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## Formalism, Realism, and the War on Drugs

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## Formalism, Realism, and the War on Drugs\*

David D. Colet†

Upon graduation, one of my law school classmates became an Assistant United States Attorney (AUSA) in a major city in the Northeast, where he found himself prosecuting federal drug cases. Like Supreme Court Justice Clarence Thomas reportedly reacted upon seeing a man taken into custody, my friend had a “there but for the grace of God go I” reaction.<sup>1</sup> My friend is an ambitious, smart white man who grew up in the Midwest, and worked hard to get where he is today. In his eyes, but for their race and class, the young men he was prosecuting were strikingly similar to himself. They were the entrepreneurs of their community—the ones with ambition, drive, and a willingness to work hard. But the way to get ahead in their community was not to do well on exams, join the debate team, and go to an exclusive Ivy League college, but rather to deal drugs, earn lots of money, and buy a fancy car. My friend felt that had he grown up where these defendants grew up, he too might well have been involved in the drug trade, and might well have found himself on the other side of the courtroom.

Like most wars, the war on drugs has had a devastatingly disparate impact on minorities and the poor. Even though illegal drug use appears to be an equal opportunity offense, blacks and the poor are disproportionately arrested,

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1. *The Thomas Hearings: Excerpts from the Senate’s Hearings on the Thomas Nomination*, N.Y. TIMES, Sept. 13, 1991, at A18 (quoting Clarence Thomas). Thomas stated that when he looks out the window from his courthouse office and sees criminal defendants being bused into court, “I say to myself almost every day, but for the grace of God there go I.” *Id.*

convicted, and incarcerated for drug offenses. This essay argues that the war on drugs is sustainable only *because* of that disparity, and that society's response to drugs would be very different if we were willing to take full account of, and responsibility for, that disparity. We can only afford to be as tough on drugs as we are because those who are sent away for years of their lives for relatively minor roles in the drug trade are overwhelmingly minorities.

One of the ways our legal system has avoided confronting this ugly reality is through a commitment to legal formalism. Legal formalism allows us to ignore the social determinants that my AUSA friend saw every day as he prosecuted federal drug cases. As my colleague Professor Michael Seidman has suggested, legal formalism, which has been effectively critiqued and displaced by legal realism in many other areas of law, continues to exercise considerable influence over the way we think about criminal law.<sup>2</sup> This formalist approach, in my view, has strongly affected the way we approach the drug problem. One consequence is that we continue to pursue an increasingly futile war on drugs and refuse to see the issue in its broader, realist dimension. A little realism on the subject of drugs, I suggest, would go a long way.

There is much to be said for formalism in the criminal law. Formalism, with its commitment to fair procedures, clear rules, and restricted discretion, is a necessary part of any fair system of criminal law. The sanctions involved in the criminal system are too severe to permit them to be allocated in an open-ended discretionary or regulatory manner. The criminal law's commitment to formalism is thus not a fault, but a strength. Discretionary regulatory schemes too often invite subjective judgments susceptible to abuse, prejudice, and favoritism. Formalist rules, by contrast, are built on the promise of treating likes alike. Precisely for this reason, however, we ought to reconsider whether the criminal approach makes sense when there is substantial evidence that the commitment to equality has been seriously compromised. Our dual commitments to equality and to the reduction of the human damage that drug abuse inflicts suggest that we should reduce our reliance on the criminal justice system. Alternative approaches, such as treatment and rehabilitation, promise to be both more effective and more fair.

### I. REALISM AND THE CRIMINAL LAW

In an important and perceptive article, Professor Michael Seidman argues that the criminal law has in significant respects remained immune from the legal realist revolution in American law.<sup>3</sup> The criminal law rests on core assumptions that fit the formalist worldview much more comfortably than the

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2. See generally Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 97 (1996).

3. *Id.* at 97-98 (stating criminal law remains formalist in a legal environment dominated by realism).

realist worldview. One cornerstone of the criminal justice system, for example, is free will and individual responsibility. It is legitimate for the state to lock up human beings only because they are said to be blameworthy, or responsible for their bad acts. To be blameworthy, one must act with free will. If one's actions are not the product of free will, one cannot be held responsible for them, and punishment is inappropriate. The criminal law's focus on individual responsibility, Seidman argues, reflects a formalist conception that has long been considered outmoded in other areas of law, where legal realist insights have revealed the shortcomings of the formalist approach.

Consider, for example, *Lochner v. New York*,<sup>4</sup> a familiar example of legal formalism and its faults. In *Lochner*, the Supreme Court sustained a substantive due process challenge to a law that set maximum hours for bakers, reasoning that the law infringed upon the liberty of contract. The Court concluded that the law was an attempt to regulate labor relations between bakery owners and employees, and that it impermissibly interfered with the parties' right to contract. In the Court's view, the "liberty" protected by the due process clause rendered suspect any regulation of labor relations, and in particular any attempt to redistribute economic bargaining power. This view in turn was predicated on the formalist assumption that the right to contract was a pre-political natural right, from which any departure through "regulation" required a compelling justification.

The realist critique of *Lochner* maintains that there is no such thing as a pre-political freedom of contract.<sup>5</sup> Contractual relationships reflect disparities in bargaining power that are themselves constructed, affected, and maintained by the law of contracts. These disparities in bargaining power substantially reduce the reality of free choice for many in contractual negotiations. According to this view, the Court's mistake in *Lochner* was to accept the market status quo and the common law as a neutral "state of nature" baseline. Realists contended that the status quo and the common law were neither natural nor neutral, but were determined by legal rules and social choices that privileged some while disadvantaging others. Bakers, the realists argued, simply did not have the same freedom to contract as owners. From this perspective, contractual relations are already constructed by legal regulation, and thus it is legitimate to structure regulations for the common good, particularly for the purpose of leveling the playing field and reducing labor exploitation.

The Supreme Court has long since repudiated *Lochner*. As Professor Bernard Siegan has put it, *Lochner*" is one of the most condemned cases in

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4. 198 U.S. 45 (1905).

5. See generally Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCIENCE Q. 470 (1923) (arguing bargaining power is function of legal rules and not part of pre-existing natural order).

United States history and has been used to symbolize judicial dereliction and abuse.”<sup>6</sup> There are multiple reasons for the demise of the *Lochner* regime, one of which was undoubtedly the rise of legal realism and its critique of legal formalism. It is no longer acceptable to argue that the law cannot have redistributive consequences because there is no such thing as law without distributive consequences. This follows logically from the realization that the status quo is constructed by law. Today, unlike in the days of *Lochner*, government regulation of markets is seen as inevitable. We hang on Federal Reserve Chairman Alan Greenspan’s interest rate announcements, but we do not question the government’s role in setting that rate. Whereas formalists assumed autonomous individuals exercising free will in a state of nature, realists hold a more deterministic view of world, seeing the law as a set of incentives to regulate social relationships, to prevent problems, and to advance social welfare. In Professor Seidman’s terms, realists see the law as *regulatory* rather than *natural*.<sup>7</sup>

This realist revolution has largely bypassed the criminal law, which has remained formalist at its core. The criminal law’s focus on individual responsibility and blameworthiness assumes that the status quo is neutral, and that individuals’ choices are the product of free will and not socially determined.

There are good reasons for the criminal law’s formalist assumptions. For one thing, as Seidman acknowledges, the assumption of free will reflects how most of us experience the world.<sup>8</sup> Even those who believe in a strong form of material or social determinism tend to act as if they exercise *some* sort of free will in their daily lives; indeed, acting in the world would probably be impossible without such an assumption. Further, concepts of individual responsibility and free will have a valuable impact on social behavior. These concepts instill each of us with a sense of responsibility for our own fate. Indeed, to act freely is central to our conception of human dignity.

At the same time, formalist commitments are important because they reduce reliance on discretion. The criminal sanction is the most severe that a democratic society can impose on its citizens. The severity of the sanction demands that it be applied with scrupulous neutrality. Thus, while race-conscious affirmative action in the distribution of job opportunities or college admissions is widely practiced (and debated), race-conscious decision making in the criminal setting is widely viewed as unacceptable, even if undertaken to

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6. BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 23 (1980).

7. Seidman, *supra* note 2, at 102 (arguing regulatory approach flows from realist approach). Seidman further asserts that a rejection of the concept of natural rights has allowed the law to attempt to redistribute resources and to strive to reach optimal social outcomes. *Id.*

8. Seidman, *supra* note 2, at 162 (acknowledging even those who espouse theory of social determinism live as though making free choices).

benefit minorities. The heightened significance of equality in the criminal justice system supports the criminal law's commitment to formalist rules.

Despite its surface commitment to formalist rules, however, the administration of the criminal law is also shot through with discretion. Police officers exercise discretion in determining where to patrol, whom to question and stop, whether to arrest, and what charges to propose. Prosecutorial discretion is also notoriously wide-ranging, as prosecutors wield authority to drop or add charges to an indictment, and to decide whether to negotiate plea agreements. Juries, which reach their decisions in the black box of the jury room, exercise largely invisible and unreviewable discretion. Judges wield discretion in their pretrial orders, evidentiary rulings, jury instructions, and sentencing decisions. Moreover, the criminal justice system depends upon these discretionary interstices, and would likely be unworkable without them.<sup>9</sup>

The law insists, however, that all of these discretionary decisions be made in a formally colorblind fashion. If police, prosecutors, juries or judges rely on race to guide their discretion, whether to aid or to harm a minority group, their decisions are by definition illegitimate and unconstitutional. Thus, while the criminal law depends upon the exercise of discretion, it insists that such discretion be exercised in keeping with the criminal law's formal commitment to equality.

At the same time, we recognize that in the real world, all persons do not have the same ability to act autonomously. "Free will" is a relative concept, and social circumstances significantly affect and determine behavior. The choices facing a young black man in the ghetto of Camden, New Jersey are starkly different from the choices that my AUSA friend faced growing up in a Midwest suburb. Yet we steadfastly refuse to consider that reality in the criminal justice system. The Federal Sentencing Guidelines, for example, expressly forbid any consideration of race or socioeconomic status in sentencing.<sup>10</sup> As a constitutional matter, deciding whether to prosecute on the basis of race or socioeconomic status is clearly impermissible.<sup>11</sup> In criminal law, formal colorblindness is the rule, and probably should be.

Reality, however, rarely conforms to the rule. Consider the following facts. A 2000 study of 2800 homicide cases randomly selected from thirty-three urban counties found that the race and sex of the *victim* had a substantial effect on homicide sentences, even after controlling for other variables, such as

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9. See David Cole, *What's Criminology Got to Do With It?*, 48 STAN. L. REV. 1605, 1617 (1996) (recognizing discretionary determinations integral to administration of criminal law).

10. U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.10, 5K2.12 (2001) (stating race, sex, national origin and economic status irrelevant to determination of sentence).

11. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding selective prosecution based on race or national origin unconstitutional).

criminal history, type of offense, and details of the crime.<sup>12</sup> These disparities held true even for vehicular homicides, in which victims are almost always random and blameless. All other variables being equal, a drunk driver who kills a woman will receive a sentence more than 50% longer than one who kills a man, and a driver who kills a black victim will receive a sentence 50% shorter than one who kills a white victim. The system seems to “value” the lives of white female victims more highly than any others.

These findings are consistent with Professor David Baldus’s famous study of the Georgia death penalty.<sup>13</sup> Baldus conducted a detailed statistical analysis of more than 2,000 murder cases in Georgia in the 1970s. He found that after controlling for thirty-nine nonracial variables that might explain apparent racial disparities, those charged with killing white victims were 4.3 times more likely to receive the death penalty than those who killed black victims.<sup>14</sup> Thus, the race of one’s victim was a significant determinant in whether a murderer in Georgia received a sentence of life imprisonment or of death. Other studies of the death penalty have found similar race-of-victim disparities. In 1990, the General Accounting Office reviewed twenty-eight studies concerning race and the death penalty, and discovered that 82% of them found the race of the victim to be a significant factor in whether a defendant received the death penalty.<sup>15</sup>

A 1998 study by George Bridges and Sara Steen found that juvenile caseworkers were much more likely to attribute delinquent behavior to innate characteristics when committed by black youth than when committed by white youth.<sup>16</sup> The caseworkers were more likely to explain white youth’s behavior as a result of their social environment, and more likely to label minority youth as “bad kids.” These attributions in turn affect predictions of future dangerousness and sentencing of juvenile offenders, contributing to harsher treatment for black youth. These findings suggest that while colorblindness may be the formal rule of the criminal justice system, the reality is that race matters.<sup>17</sup> As the following section illustrates, nowhere is this more true than in

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12. EDWARD L. GLAESER & BRUCE SACERDOTE, *THE DETERMINANTS OF PUNISHMENT: DETERRENCE, INCAPACITATION AND VENGEANCE I*, 13-14 (Nat’l Bureau of Econ. Research, Working Paper No. 7676, 2000).

13. DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 314-16 (1990).

14. *Id.* at 315 (explaining study used cross-tabular analysis requiring large sample size); *see also* *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987) (stating Baldus study of over 2,000 murder cases indicates disparity based on race of victim). The *McCleskey* Court found that the Baldus study did not establish an equal protection violation, because it did not establish that McCleskey’s particular death penalty was imposed because of race. *Id.* at 292 n.7.

15. U.S. GEN. ACCOUNTING OFFICE, *DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES* 5-6 (1990) (stating synthesis of studies indicate racial disparities in capital sentencing).

16. *See generally* George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554 (1998).

17. *See generally* DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); *see also generally* MARC MAUER, *RACE TO INCARCERATE* (1999) (tracing racial



the war on drugs.

## II. REALISM AND THE WAR ON DRUGS

The best evidence suggests that the use of illegal drugs is evenly distributed by race. The leading indicator of drug use is an annual anonymous household survey conducted by the United States Public Health Service. This self-report study indicates that drug use is roughly proportionate across the racial spectrum. In 2000, 6.4% of whites and of blacks, and 5.3% of Hispanics reported using illicit drugs.<sup>18</sup>

Similar self-reporting data on drug distribution does not exist. Some suggest that minorities dominate the drug distribution trade, pointing anecdotally to inner-city drug markets run by minorities and frequented by white suburban buyers. On the other hand, a 1997 Justice Department study found that most users report getting their drugs from dealers of the same race, so the demographics of distribution likely reflect the demographics of drug use.<sup>19</sup>

Racial profiling studies also support the proposition that drug use is an equal opportunity offense. These studies, mandated by many jurisdictions across the country in recent years, track the racial patterns of stops and searches on the nation's roads and sidewalks and at the borders. Profiling stops and searches are primarily designed to find contraband, mostly drugs. Studies consistently show that police officers disproportionately stop and search African-Americans and Hispanics.<sup>20</sup> The consistency of this finding across multiple jurisdictions and officers suggests that profiling is not the work of a few rogue racist police officers, but the result of a broadly shared assumption that blacks and Hispanics are more likely to be carrying drugs or other contraband than whites.

The actual results of the searches refute this assumption. If it were true that blacks and Hispanics were more likely to be carrying drugs or contraband, one would expect the police to find more contraband on the blacks and Hispanics they stop and search than on the whites they stop and search. Yet reported "hit rates"—the proportion of searches that actually reveal contraband—are as high or higher for whites as for minorities. In Maryland, 73% of drivers the police stopped and searched on I-95 were black, yet equal percentages of whites and blacks searched had contraband.<sup>21</sup> In New Jersey, where police have admitted

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politics and disparities in exponential rise in incarceration in United States from 1970s to present).

18. Substance Abuse and Mental Health Services Administration, *Summary of Findings From the 2000 National Household Survey on Drug Abuse* (2001), at <http://www.samhsa.gov/oas/NHSDA/2kNHSDA/chapter2.htm> (last visited June 22, 2002).

19. K. JACK RILEY, *CRACK, POWDER COCAINE, AND HEROIN: DRUG PURCHASE AND USE PATTERNS IN SIX U.S. CITIES I* (National Institute of Justice, 1997).

20. See DAVID HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* 49-72 (2002) (collecting studies of racial profiling).

21. David Cole & John Lamberth, *The Fallacy of Racial Profiling*, N.Y. TIMES, May 13, 2001, at D13

to racial profiling, 10.5% of whites and 13.5% of blacks were found carrying contraband.<sup>22</sup> Based on data from January 1998 to March 1999, the New York Attorney General reported that while New York City police were 6 times more likely to stop and frisk blacks than whites, and four times more likely to stop and frisk Latinos than whites, their hit rates were 12.6% for whites, 10.5% for blacks, and 11.3% for Latinos.<sup>23</sup> And while 43% of those searched by United States Customs in Fiscal Year 1998 were minorities, only 6.7% of whites, 6.3% of blacks, and 2.8% of Latinos had contraband.<sup>24</sup> These findings suggest that, contrary to the assumption that drives racial profiling, whites are just as likely as blacks to be carrying drugs or other contraband.

The racial profiling studies also make clear that the war on drugs has largely been a war on minorities. It is, after all, drug enforcement that motivates most racial profiling. The Drug Enforcement Agency's Operation Pipeline, which trained state police in drug enforcement on the highways, specifically trained officers in racial profiling.<sup>25</sup> People carrying drugs do not look very different from people carrying school supplies or groceries, and thus police often resort to racial stereotypes in selecting whom to approach and stop, and specifically rely on the stereotype that minorities are more likely to be carrying drugs than are whites.

The disproportionate targeting of minorities does not stop on the nation's highways, but extends to general drug arrest and incarceration rates. For example, while blacks represent only 14-15% of drug users, in 1995 they were 35% of those arrested for drug possession, 55% of those convicted for drug possession, and 74% of those sentenced to prison for drug possession.<sup>26</sup> Although African-Americans committed drug crimes in rough proportion to their representation in the population at large, they were sentenced at a rate 5 to 6 times their representation in the population. Local statistics tell much the same story. In Columbus, Ohio, although black males compose less than 11%

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(reporting hit rates on I-95 in Maryland refute assumption that minorities more likely to have drugs); John Lamberth & American Civil Liberties Union, *Report of John Lamberth, Ph.D.*, at <http://www.aclu.org/court/lamberth.html> (last visited June 22, 2002); Paul Valentine, *ACLU Files Suit Against Md. Police: Group Says Blacks Targeted Along I-95*, WASH. POST, Jun. 5, 1998, at B1 (analyzing Maryland State Police stop and search records for first nine months of 1995).

22. PETER VERNIERO & PAUL ZUBEK, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 28 (1999), available at [http://www.state.nj.us/lps/intm\\_419.pdf](http://www.state.nj.us/lps/intm_419.pdf) (last visited June 22, 2002).

23. Office of N.Y. State Attorney General Eliot Spitzer, "*Stop and Frisk*" Report, ch. 5, part I (2000) at [http://www.oag.state.ny.us/press/reports/stop\\_frisk/ch5\\_part1.html](http://www.oag.state.ny.us/press/reports/stop_frisk/ch5_part1.html) (last visited June 22, 2002) (reporting statistical patterns regarding race in New York law enforcement).

24. U.S. CUSTOMS SERVICE, PERSONAL SEARCHES OF AIR PASSENGERS RESULTS: POSITIVE AND NEGATIVE, FISCAL YEAR 1998 6-8 (2000).

25. Harris, *supra* note 20, at 48-52 (detailing charges of use of racial factors in Operation Pipeline).

26. MARC MAUER & TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 12 (1995).

of the population, they constitute about 90% of drug arrests.<sup>27</sup> In Minneapolis, Minnesota, black males are arrested for drugs at a rate twenty times that of white males.<sup>28</sup>

The Supreme Court has permitted—and to some extent invited—these disparities.<sup>29</sup> Drug law enforcement is extremely difficult to accomplish without circumventing Fourth Amendment guarantees of freedom from unreasonable searches and seizures. This is largely because drug couriers are difficult to identify and drug offenses are often victimless. Several doctrines permit the police to evade the probable cause requirement in ways that facilitate the search for drugs. For example, the Court permits “pretext stops,” in which the police use the pretext of a traffic violation to stop and search for drugs.<sup>30</sup> In practice, this rule permits police to stop virtually anyone on the roads and facilitates the use of racial profiling in choosing whom to stop because nearly everyone who drives a car will likely violate some traffic regulation.

The Court’s “consent search” doctrine also invites profiling. This doctrine allows the police to search in the absence of any individualized suspicion as long as they obtain “voluntary consent.” The Court has refused to require the police when seeking consent to inform citizens that they have the right to say no and that exercising that right cannot be used against them.<sup>31</sup> The Court has also declined to provide any protection against the use of “consent searches” in the inherently coercive setting of a traffic stop.<sup>32</sup> Consent searches have become a particularly attractive tool for conducting searches for drugs without probable cause because few people refuse consent when an officer asks for it during a traffic stop. Significantly, profiling data suggest that racial disparities in searches are much more acute than in stops themselves.<sup>33</sup>

These doctrines are themselves partly attributable to the war on drugs. Difficulty in identifying drug crimes, combined with the mandate to enforce

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27. JEROME G. MILLER, *SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* 82 (1996).

28. *Id.*

29. *Infra* notes 30-32 and accompanying text (discussing cases in which Supreme Court expands rights of officers to search despite conflicts with Fourth Amendment rights).

30. *Whren v. United States*, 517 U.S. 806, 811-12 (1996) (holding that pretextual motivation of police officer irrelevant to Fourth Amendment inquiry).

31. *Schneckloth v. Bustamonte*, 412 U.S. 218, 231-32 (1973) (finding no requirement that police advise subject of search of right to refuse). The Court reasoned that requiring warnings would discourage consent and thereby burden police investigations. *Id.*

32. *Ohio v. Robinette*, 519 U.S. 33, 36-37 (1996) (refusing to require police to inform detainee he can leave before conducting consent search in automobile stop).

33. *See generally Report of John Lamberth, supra* note 21 (black, Hispanic, or other racial minorities made up 80.3% of the 823 motorists searched in Maryland study); *Verniero & Zoubek, supra* note 22, at 27 (black or Hispanic motorists made up 77.2% of 1,193 searches in New Jersey study); *see also* U.S. Customs Service, *supra* note 24 at 6-8 (reporting that blacks and Hispanics searched disproportionately more often than whites).

drug laws, has put substantial pressure on constitutional doctrine. Consequently, the Court has developed several doctrinal “loopholes” at the expense of constitutional rights by allowing the police to conduct searches for drugs without probable cause that a person is carrying drugs.<sup>34</sup> But by freeing officers to act without objective indicia of individualized suspicion, such doctrines effectively invite racially stereotyped profiling.<sup>35</sup>

Racial disparities in the administration of the drug laws are reflected in growing racial disparities in incarceration. The war on drugs has been a critical factor in the explosion in incarceration rates in America over the past twenty-five years, and racial targeting has meant that minorities have made up most of the increase in the incarcerated population. From 1925 to 1975, the incarceration rate in the United States was virtually flat, at about 100 incarcerated persons per 100,000 residents.<sup>36</sup> The rate was so steady for so long that criminologists developed theories for why incarceration rates would always remain constant.<sup>37</sup> Those theories are no longer seriously entertained, however, because since 1975 the United States has experienced a nearly 400% increase in the incarceration rate.<sup>38</sup> We now lead the world in per capita incarceration, and boast an incarceration rate 5 times higher than that of the next highest Western European nation.<sup>39</sup> From 1980 to 1993, drug offenders made up three-quarters of the increase in the federal prison population.<sup>40</sup> Drug offenders were 25% of the federal prison population in 1980, but 59% in 1996.<sup>41</sup> In the state prisons, drug offenders were 6% of the prison population in 1980, but 21% in 1996.<sup>42</sup> Today, there are nearly half a million prisoners

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34. See generally David A. Harris, *Terry and the Fourth Amendment: Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN'S L. REV. 975 (1998); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994); Gregory H. Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio*, 34 HOW. L.J. 567 (1991); see also *supra* notes 30-32 and accompanying text (discussing several cases in which Supreme Court relaxes Fourth Amendment requirements).

35. See DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 27-55 (1999).

36. Mauer, RACE TO INCARCERATE, *supra* note 17, at 17, fig. 2-1 (showing per capita incarceration rate ranging from 80 to 140 persons per 100,000 residents every year from 1925 to 1975).

37. See generally Alfred Blumstein & Jacqueline Cohen, *A Theory of the Stability of Punishment*, 64 J. CRIM. L. & CRIMINOLOGY 198 (1973).

38. *Sourcebook of Criminal Justice Statistics*, table 6.26 (Ann L. Pastore & Kathleen Maguire, eds., 2000), at <http://www.albany.edu/sourcebook/1995/pdf/t626.pdf> (last visited June 22, 2002).

39. SENTENCING PROJECT, U.S. SURPASSES RUSSIA AS WORLD LEADER IN RATE OF INCARCERATION, at <http://www.sentencingproject.org/brief/pub1044.pdf> (last visited June 22, 2002); see also MAUER, RACE TO INCARCERATE, *supra* note 17, at 21-23 tbl. 2-1, fig. 2-3 (comparing incarceration rates of United States and other nations).

40. Dept. of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 1994*, at 10, table 13 (1995).

41. *Id.*

42. HUMAN RIGHTS WATCH, PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS 14 (2000).

incarcerated for drug offenses.<sup>43</sup> This figure does not include the thousands of inmates whose offenses are drug-related, meaning that they committed a crime to raise money to pay the prices of drugs kept artificially high by the war on drugs. Nor does it take into account those driven to violence and crime by exposure to the criminal business of drug dealing and distribution, which would not exist but for the war on drugs.

Racial minorities have borne the brunt of this incarceration boom. From 1970 to 1996, the proportion of blacks in prison increased by 25%, while the proportion of blacks arrested for violent crimes *dropped* by 20%.<sup>44</sup> From 1986 to 1991, the number of white drug offenders in state prisons increased by 110%, but the number of black offenders incarcerated grew by 465%.<sup>45</sup> Among juveniles during the same time period, drug arrests of minorities increased by 78%, while drug arrests of whites *decreased* by 34%.<sup>46</sup> Today, black males are admitted to state prison for drug offenses at thirteen times the rate for white males.<sup>47</sup> In many states, the disparities are even worse. In Maryland and Illinois, for example, blacks comprised 90% of those admitted to prison for drug offenses in 1996.<sup>48</sup>

Like the formalist “liberty of contract” protected in *Lochner*, the formalist criminal justice response to drugs is subject to a realist critique: its formal neutrality masks political choices that are anything but neutral. I do not suggest that we should excuse harmful behavior because of social circumstances, and I acknowledge that the drug trade has plagued many residents of inner-city minority communities. But the disparities identified above in the administration of drug law enforcement ought to prompt a reconsideration of the application of the necessarily formal criminal justice model. As noted above, I do not believe that the criminal justice model can easily accommodate the realist critique—in the end, formal equality is indispensable in the administration of criminal justice. But if that is the case, the stark disparities described above ought to cause us to question whether the criminal justice model, with its attendant formalism, is an appropriate response to the drug problem. A more realist regulatory approach may be appropriate—one less concerned with meting out sanctions in a formally neutral manner, and more concerned with maximizing social welfare and public health by adopting

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43. PHILLIP BEATTY, ET AL., POOR PRESCRIPTION: THE COSTS OF IMPRISONING DRUG OFFENDERS IN THE UNITED STATES (Just. Pol’y Inst. 2000), at <http://www.cjcj.org/drug/pp.html> (last visited June 22, 2002) (detailing number of drug-related incarcerations).

44. Michael Tonry, *Crime and Punishment in America*, in THE HANDBOOK OF CRIME AND PUNISHMENT 1, 18 (Michael Tonry ed., 1998) (comparing admissions to federal and state prisons by race).

45. MARC MAUER, THE SENTENCING PROJECT, INTENDED AND UNINTENDED CONSEQUENCES: STATE RACIAL DISPARITIES IN IMPRISONMENT 10 (March 1997).

46. AMERICAN BAR ASSOCIATION, THE STATE OF CRIMINAL JUSTICE 11 (Feb. 1993).

47. Punishment and Prejudice, *supra* note 42, at 2.

48. Punishment and Prejudice, *supra* note 42, at 17.

measures that respond to the drug problem in less rigid, and quite possibly more effective, ways.

### III. AN ALTERNATIVE APPROACH TO DRUG REGULATION

By all accounts, the war on drugs has been a failure. Although nearly half a million people are locked up for drug crimes, drugs are cheaper, purer, and more easily available than ever before.<sup>49</sup> It costs about \$20,000 a year to incarcerate someone,<sup>50</sup> and studies consistently find that treatment and prevention are far more cost-effective responses to drug abuse. In 1997, the Rand Corporation reported that treatment is seven times more cost-effective than incarceration in reducing drug consumption.<sup>51</sup> We spend billions of dollars each year in an increasingly futile effort to interdict drug imports.<sup>52</sup> Further, the criminalization of drugs makes the drug trade more profitable, creating the incentive and opportunity for substantial organized criminal activity.<sup>53</sup> As one commentator wrote presciently in 1920, when the first laws criminalizing drugs were adopted: "We had not realized that the moment restrictive legislation made these drugs difficult to secure legitimately, the drugs would also be made profitable to illicit traffickers."<sup>54</sup> We have created the conditions for criminals to make billions of dollars. Juan Garcia Abrego, for example, a Mexican drug gang leader, is said to be worth \$15 billion.<sup>55</sup>

The most difficult cost of the war on drugs to measure is also the most important—the cost to the legitimacy of the criminal justice system. Legitimacy is the linchpin of a legal order. If people believe in the fairness and legitimacy of a legal regime, they will obey the law without the need for substantial enforcement; if they lose faith in the system, law enforcement will need to resort to harsher and harsher measures. Two features of the war on drugs in particular corrode legitimacy. The first is the reality and perception that the system is unfair to minorities, subjecting them to much harsher

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49. MICHAEL MASSING, *THE FIX* 9 (1998) (declaring war on drugs has not alleviated problem).

50. BEATTY, *supra* note 43, at n.20.

51. JONATHAN P. CAULKINS, ET AL., *MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY?* xvii-xviii (1997) (comparing effects of incarceration and treatment in preventing drug use).

52. Massing, *supra* note 49, at 9; *see also*, MIKE GRAY, *DRUG CRAZY: HOW WE GOT INTO THE MESS AND HOW WE CAN GET OUT* 145-52 (1998) (recognizing futility of drug interdiction). Gray notes that the nation's annual supply of heroin could be imported in a single cargo container, that Los Angeles harbor alone unloads 130,000 containers a month, and that Customs checks only about 400 of them. *Id.*

53. GRAY, *supra* note 52, at 18-21; *see also generally* MARK THORNTON, *THE ECONOMICS OF PROHIBITION* (1991).

54. GRAY, *supra* note 52, at 53 (quoting Charles Terry, former city health officer of Jacksonville, Florida).

55. *See* GRAY, *supra* note 52, at 50.

treatment than whites.<sup>56</sup> The second threat to legitimacy stems from the corruption that the war on drugs itself breeds because of the sheer amount of money involved. The corrupting power of the war on drugs is widespread in Colombia and Mexico, but it is also evident in U.S. drug and border enforcement.<sup>57</sup>

For these reasons, many involved in enforcing the war on drugs have acknowledged that we cannot “incarcerate ourselves out of” the drug problem.<sup>58</sup> Yet our insistence on hewing to a criminal model as our principal response to the drug problem makes the regulatory approach of prevention, education, and treatment a neglected second cousin. Former President Bill Clinton’s drug czar, General Barry McCaffrey, repeatedly said that we cannot wage a “war” on drugs, and that we must emphasize treatment and prevention.<sup>59</sup> The Clinton administration, however, consistently devoted two-thirds of its drug budget to criminal law enforcement and only one-third to treatment, pursuing the same rough distribution that Presidents George Bush and Ronald Reagan did before him.<sup>60</sup> As a result, there are more people incarcerated for drug offenses than ever before, and treatment is less available. In 1991, 25% of state prisoners and 16% of federal prisoners received drug treatment; in 1997, with many more drug-related prisoners behind bars, only 10% of state prisoners and 9% of federal prisoners received drug treatment.<sup>61</sup>

The racial disparities described above play a critical role in the persistence of a formalist criminal model for responding to the drug problem. Imagine what the politics of drugs and crime would look like if the figures were reversed, and white males were 13 times more likely to be incarcerated for drugs than blacks. Indeed, we need not leave it to our imagination. In the late 1960s and early 1970s, when white high school and college kids began

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56. See COLE, NO EQUAL JUSTICE, *supra* note 17, at 169-78 (detailing costs to legitimacy attributable to racial double standards in the criminal justice system).

57. GRAY, *supra* note 52, at 119-33 (discussing violence and corruption in Columbia and Mexico as result of war on drugs); see also James Sterngold, *3 of 4 Officers Convicted in Police Corruption Case*, N.Y. TIMES, Nov. 16, 2000, at A20 (reporting on convictions arising from Rampart scandal in which a Los Angeles Police Department Division allegedly stole drugs, fabricated evidence, and lied in court); Lou Cannon, *One Bad Cop*, N.Y. TIMES MAG., Oct. 1, 2000, at 32 (describing Rampart scandal).

58. Mireya Navarro, *Experimental Courts Are Using New Strategies to Blunt the Lure of Drugs*, N.Y. TIMES, Oct. 17, 1996, at A25. Barry McCaffrey, head of the National Drug Control Policy Office, stated “What we’re convinced doesn’t work is to just arrest people, lock them up and throw them back on the street the way you got them.” *Id.*; see also Timothy Egan, *War on Crack Retreats, Still Taking Prisoners*, N.Y. TIMES, Feb 28., 1999, at A1 (quoting McCaffrey as stating “We have a failed social policy and it has to be re-evaluated . . . . Otherwise, we’re going to bankrupt ourselves. Because we can’t incarcerate our way out of this problem.”) McCaffrey estimated that we could save \$5 billion per year were we to substitute treatment for incarceration for more than a quarter million Americans now in prison. *Id.*

59. *Supra* note 58 and accompanying text (discussing McCaffrey’s view of war on drugs).

60. See generally Massing, *supra* note 49.

61. BUREAU OF JUSTICE STATISTICS, SUBSTANCE ABUSE AND TREATMENT, STATE AND FEDERAL PRISONERS, 1997 10 (1999).

smoking marijuana in large numbers, the nation's response was not to seek harsher sentences, mandatory minimums, and increased prison building. Instead, every state in the nation *reduced* the penalties associated with marijuana, with thirteen states essentially decriminalizing possession of small amounts altogether.<sup>62</sup> Like the juvenile caseworkers in Bridges and Steen's study,<sup>63</sup> the white majority appears ready to blame and criminalize when the defendant is black, but to excuse and treat when the defendant is white.

#### IV. CONCLUSION

The war on drugs is an area where we desperately need more realism and less formalism, more regulation and less criminalization. The criminal response is not working. It is taxing our resources, distorting our constitutional rights, and increasing the racial disparities that plague our criminal justice system. Many involved in the war itself agree that our current approach is not working. But the color of those we assume to be responsible for the illicit drug trade has allowed us to maintain the criminal model and to avoid confronting our own social responsibility for the problem.

There is, however, some reason for hope. Coerced treatment appears to be a politically acceptable alternative to incarceration, at least with respect to nonviolent drug offenders. Drug courts, which offer those arrested for nonviolent drug crimes a program of intensive coerced treatment with regular drug testing in lieu of a conviction and prison sentence, have multiplied in recent years. In 1994, there were only twelve nationwide; today there are over 400 drug courts, with another 200 in the planning stages.<sup>64</sup> Initial studies have found drug courts more effective and cheaper than incarceration.<sup>65</sup>

Similarly, in recent years, voters in Arizona and California have adopted referenda that require their states to provide treatment rather than incarceration for nonviolent drug offenders.<sup>66</sup> Arizona's law, adopted in 1996, requires

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62. See Cole, *supra* note 17, at 152-53.

63. See generally Bridges & Steen, *supra* note 16. Bridges and Steen found juvenile caseworkers were far more likely to attribute criminal behavior to innate characteristics for black youth, and to poor environments for white youth. *Id.* Such findings generally lead to much harsher treatment for black youth in the juvenile court system. *Id.*

64. David Cole, *Doing Time—In Rehab: Drug Courts Keep Addicts Out of Jail*, *The Nation*, Sept. 20, 1999, at 20-21 (discussing new approach to dealing with nonviolent drug offenders).

65. *Id.*; see also generally Steven Blenko, *The Challenges of Integrating Drug Treatment into the Criminal Justice Process*, 63 ALB. L. REV. 833 (2000); Steven Blenko, *Research on Drug Courts: A Critical Review*, 1 NAT'L DRUG CT. INST. REV. 22, 24 (1998) (summarizing results from drug court evaluations).

66. See Drug Medicalization, Prevention, and Control Act of 1996, ARIZ. REV. STAT. § 13-901.01-02 (2001) (requiring courts to suspend sentencing and impose probation); *California Drug Program Begins, Despite Los Angeles Skepticism*, N.Y. TIMES, July 3, 2001, at A10 (describing beginning of implementation of Proposition 36, which requires treatment instead of jail for first- and second-time non-violent drug offenders); Anna Gorman, *Judges Say New Drug Law is Working*, L.A. TIMES, Feb. 5, 2002, at B1 (reporting on implementation of California's Proposition 36).



judges in certain drug cases to suspend sentences and provide probation in conjunction with treatment. The state estimated that the program saved over \$2 million in incarceration costs in its first year of implementation.<sup>67</sup> In 2000, California voters adopted the Substance Abuse and Crime Prevention Act, which similarly diverts nonviolent drug offenders from prison to treatment programs. The California program took effect in July 2001, so it is too early to assess its effectiveness. But the fact that both programs were adopted by popular referenda suggests that there may be growing support for a public health response to drugs as an alternative to the criminal response.

In addition, revelations of widespread racial profiling, combined with the data showing that blacks and Latinos are no more likely than whites to be carrying drugs or other contraband, have brought home to the public at large one of the real costs of the war on drugs—unequal law enforcement based on race. Although the terrorist attacks of September 11th have complicated the picture, before September 11th a full 80% of the American people thought that racial profiling was wrong.<sup>68</sup> Many states, the federal government, and hundreds of cities and counties have adopted reporting requirements designed to identify and eliminate racial profiling. There has been more progress on this issue than on any other issue of inequality in criminal justice in the past twenty-five years.

These developments suggest that at least some elements of the public are beginning to pay more attention to both equality considerations and effectiveness in the war on drugs, and are beginning to call for change in the way that we have responded to drugs over the past twenty-five years. It is time to abandon the formal approach of the criminal justice system and the stale metaphor of a war on drugs. Formalism has its place in criminal justice, but the drug problem deserves a more realist, and more realistic, public health approach.

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67. Drug Treatment and Education Fund Legislative Report, FY 1997-98, at 10 (1999), available at <http://www.supreme.state.az.us/asd/dteftoday.pdf> (last visited June 22, 2002) (reporting cost savings from diverting persons from prison to probation).

68. Frank Newport, *Racial Profiling Is Seen as Widespread, Particularly Among Young Black Men*, GALLUP POLL NEWS SERVICE, Dec. 9, 1999 (on file with author) (presenting result of race-based poll to determine treatment by law enforcement).

