

## CHAPTER 11



### *Policies Regulating Illegal Drugs*

As compared to other Western countries, the United States places a great deal of emphasis on criminal justice responses to drug use. With the most recent War on Drugs that began in the mid-1980s, the criminal justice system emphasis became even more pronounced: arrests for drug offenses increased, the sentences for drug offenses were lengthened significantly, and the number of people incarcerated for the commission of drug crimes similarly increased. These policies were apparently implemented with the goal of preventing drug use and drug-related harm, but after 30 years and billions of dollars in criminal justice system expenditures, it is clear that these policies have failed to achieve these goals.

In this chapter, we critically examine these policies, focusing on their effectiveness (or more appropriately, the lack thereof), their economic and social costs, and several unintended consequences that have resulted from them. We begin by addressing trends in arrests and incarcerations for drug offenses and discuss social class and racial inequality in the application of drug laws. We proceed to a discussion of mandatory minimum sentencing policies, which have had a disproportionately negative impact on the poor and members of minority groups. We also discuss ancillary policies such as the denial of welfare and student aid to individuals who are convicted of drug offenses; these policies have similarly had a negative impact on the poor and members of minority groups. The next section of the chapter addresses asset forfeiture and drug tax laws, the RAVE Act, and legislation from the 2000s dealing with methamphetamine, with a focus on the unintended consequences of these policies. We then discuss restrictions on hemp production and medical marijuana legislation, with an emphasis on how the U.S. federal government has actively intervened in states that have passed medical marijuana legislation. The chapter concludes with a discussion of recent changes in drug laws at the state level and interesting developments surrounding marijuana legalization initiatives.

## TRENDS IN ARRESTS AND INCARCERATION

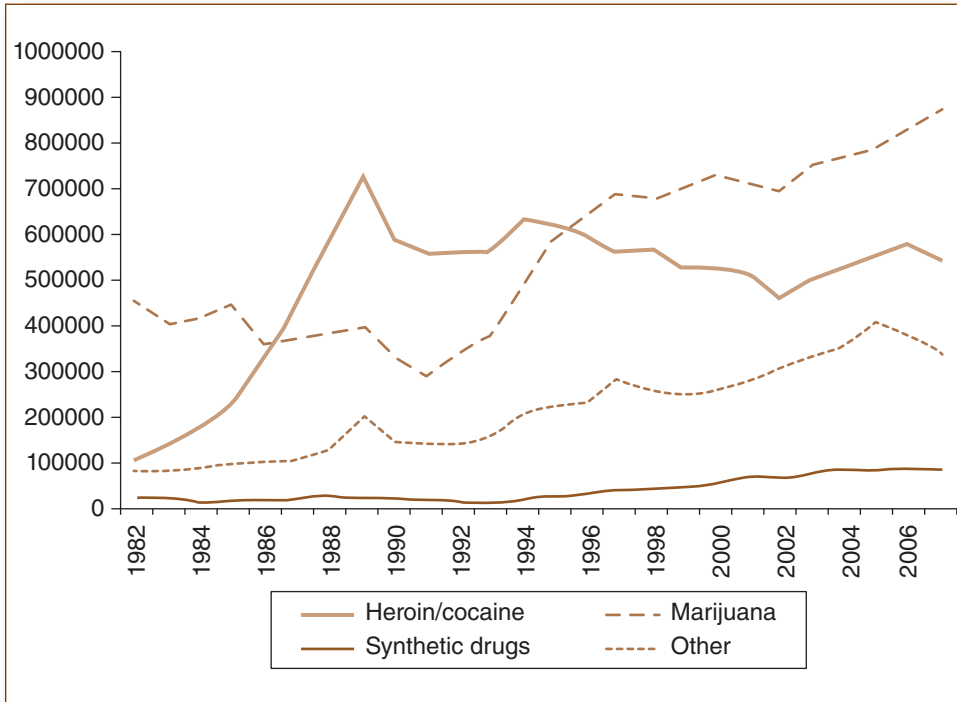
With the passage of the Harrison Narcotics Control Act in 1914, the United States launched a policy of arresting and incarcerating increasingly large numbers of users of and traffickers in illicit drugs (Brecher, 1972; Musto, 1999; Zimring & Hawkins, 1992). Historically, this legislation has disproportionately impacted members of minority groups and the poor. Contemporary policies toward illegal drugs in the United States are consistent with principles established early in the 20th century, with a particular focus on a law enforcement approach to the drug problem and stringent penalties attached to violations of drug laws. As Table 11.1 shows, in 2010, there were 1,638,846 arrests for “drug abuse violations” (note that the term *drug abuse violations* is a misnomer, in that an arrest for a drug offense by no means necessarily constitutes drug abuse) comprising more than 12% of the total arrests in that year, and constituting about the same number of arrests as for murder, rape, robbery, burglary, and theft combined (Bureau of Justice Statistics, 2011). And despite the rhetoric on the part of government and law enforcement officials that the War on Drugs is focused on those who traffic in these substances, arrests for possession of drugs were about four times greater than those for trafficking. Despite the additional rhetoric that the War on Drugs is focused on “hard drugs,” in 2010, 853,838 individuals were arrested for marijuana offenses, constituting 52% of all drug arrests in that year (Bureau of Justice Statistics, 2011). Between 2000 and 2010, nearly eight million people in the United States were arrested on marijuana charges (Smith, 2011).

**Table 11.1** Arrests in the United States—2010

Offense Category	Number of Arrests
Total	13,120,847
Drug abuse violations	1,638,846
Driving under the influence	1,412,223
Simple assaults	1,292,449
Larceny-theft	1,271,410
Disorderly conduct	615,172
Drunkenness	560,718
Liquor laws	512,790

SOURCE: Federal Bureau of Investigation, 2011.

NOTE: Arrests totals are based on all reporting law enforcement agencies and estimates for unreported areas.

**Figure 11.1** Drug Arrests by Type, 1982–2007

SOURCE: <http://bjs.ojp.usdoj.gov/content/DCF/enforce.cfm>

Additionally, and as illustrated in Figure 11.1, arrests for marijuana offenses generally increased over the 1982 to 2007 period, despite the fact that self-report surveys and other measures of drug use indicate that use of marijuana remained relatively constant over this period. Since the 1980s, arrests for cocaine and heroin have declined significantly, suggesting that it is possible that the increased focus on marijuana has come at the expense of enforcing laws against hard drugs such as cocaine, heroin, and methamphetamine.

Given the tremendous number of arrests for drug offenses and the severe penalties that result from convictions for such offenses, the drug war has also contributed to unprecedented levels of imprisonment in the United States (Austin & Irwin, 2012). At the end of 2009, there were 2,284,913 individuals incarcerated in the United States, translating to an incarceration rate of 743 per 100,000 population. As of April 2010, approximately 108,000 of the total 211,455 individuals incarcerated in federal prisons were there for drug-related crimes, and about 20% of inmates in state prisons had been convicted of drug-related crimes. As of the mid-2000s, the United States had 100,000 more people

incarcerated for drug offenses than the European Union had for all offenses combined, despite the fact that the European Union had 100 million more inhabitants (Wood et al., 2003).

While these data thus indicate that millions of Americans have been incarcerated for violations of drug legislation in the last few decades and that hundreds of thousands have served lengthy prison sentences for such offenses, one of the defining characteristics of U.S. drug laws is that they are applied unequally.

Forty-four-year-old Michael Carpenter spent a total of 3 hours helping to unload hashish from a truck and was sentenced to 12 years in prison (Steinberg, 1994). If offenders such as Carpenter, convicted under federal drug laws, had instead been convicted of robbing a bank, or even rape or murder, their average sentences would be significantly lower than what they receive for what are often very minor drug offenses.

It is also not well known that possession of a single marijuana cigarette can result in deportation. The federal government maintains that, for deportation purposes, two convictions for drug possession are the equivalent of drug trafficking, an "aggravated felony," that requires expulsion and prohibits immigration courts from granting exceptions based on individual life circumstances. In *Carachuri-Rosendo v. Holder*, a long-time legal resident of Texas was deported to Mexico based on convictions for the possession of marijuana and a tablet of Xanax. (Bernstein, 2010, although this decision was eventually overturned by the Supreme Court)

Much of this chapter addresses racial/ethnic disparities in the application of drug laws, but it is also worth considering how an individual's social status can influence how he or she is treated when in violation of drug laws. Given that crime and incarceration statistics do not include information on the social class of offenders, it is worth considering a number of individual cases. Individuals found guilty of cultivating more than 50 marijuana plants are frequently prosecuted at the federal level, where the penalties are significantly more severe than for state-level prosecutions. In 1992, the nephew of Missouri Governor and future Attorney General John Ashcroft received the relatively lenient penalty of probation following a felony conviction for growing 60 marijuana plants with intent to distribute. Ashcroft's nephew tested positive for drugs during his first test after being placed on probation, but unlike many others in similar situations, was not sentenced to prison as a result of the positive test. Although direct evidence implicating then-governor Ashcroft's involvement in the case was not uncovered, Alex Ashcroft's connection to the governor was apparently widely known (Forbes, 2001).

In 1982, the son of President Reagan's Chief of Staff (James Baker) was arrested for selling one quarter of an ounce of marijuana to an undercover agent in Texas. Under Texas law, he could have faced a prison term of between 2 and 20 years; however, he was charged with a misdemeanor and fined \$2,000 (Schlosser, 2003).

In 1990, Congressman Dan Burton introduced legislation requiring the death penalty for traffickers in illegal drugs. Four years later, his son was arrested for transporting approximately 8 pounds of marijuana from Texas to Indiana. While awaiting trial on charges stemming from this incident, he was arrested again for growing 30 marijuana plants in an apartment in Indianapolis. Federal charges were not filed in either of these cases, and Burton's son received a term of community service, probation, and house arrest (Schlosser, 2003).

When the son of Richard Riley (former governor of South Carolina who later became President Clinton's Secretary of Education) was charged with conspiracy to sell cocaine and marijuana, he faced 10 years to life imprisonment and a possible \$4 million fine. Instead, he was sentenced to 6 months of house arrest.

Inequality in the application of drug laws was perhaps most clearly manifested in the case of Noelle Bush, the daughter of Florida governor Jeb Bush and niece of President George W. Bush. In July 2002, Noelle Bush, who had previously been convicted of prescription drug fraud after attempting to obtain Xanax from a drive-through pharmacy, stole prescription pills from a medicine cabinet at the drug treatment center she was attending. As a result of the offense, Judge Reginald Whitehead sentenced her to 3 days in jail (Canedy, 2002). Some 3 months after this incident, she was found in possession of 0.2 grams of crack cocaine and once again appeared before Judge Whitehead. The judge informed Noelle Bush that he was disappointed with her and sentenced her to 10 days in jail but also allowed her to remain in the drug treatment program ("Gov. Bush's Daughter," 2002).

In response to his daughter being convicted of a drug offense for the third time, Jeb Bush was quoted as saying, "This is a very serious problem. . . . Unfortunately, substance abuse is an issue confronting many families across the nation. We ask the public and media to respect our family's privacy during this difficult time so that we can help our daughter" (as quoted in Nadelmann, 2002a). While Bush's compassionate stance is admirable, it is worth noting that his daughter could have received up to 5 years in prison and a \$5,000 fine for this offense. It is also worth contrasting this case with that of hundreds of thousands of others in the United States who are less wealthy and less politically connected who, if convicted for drug offenses, are denied welfare benefits for life. Further, as Williams (2002) notes (and as will be discussed further below),

In a case recently before the Supreme Court, an elderly woman whose retarded granddaughter smoked a joint three blocks from her

house was evicted from public housing based on her “relation” to drug use or sale. If such rules were applied across the socio-economic spectrum, we’d have to ask Jeb Bush to give up the governor’s mansion. It is, after all, public housing.

To take Williams’ argument one step further, it is worth repeating that George W. Bush is Noelle Bush’s uncle and that the White House is also public housing.

The daughter of former Chairman of the House of Representatives Ways and Means Committee, Dan Rostenkowski, was charged with possession of 29 grams of cocaine with intent to deliver in June of 1990. Although she was facing up to 15 years in prison, she pled guilty to a lesser charge and received a sentence of 3 years probation, 20 hours of public service, a fine of \$2,800, and forfeited the car in which the cocaine was found. Three years later, she was found in possession of 1 gram of cocaine, a violation for which she could have been sentenced to 3 years in prison. However, the charge was dismissed by a judge (Bovard, 1999).

Cindy McCain, wife of former presidential candidate and current Senator John McCain, admitted stealing Percocet and Vicodin (Schedule II drugs) and faced monetary fines and up to 1 year in prison. However, she was allowed to enter a pretrial diversion program and did not face formal prosecution (Bovard, 1999).

Susan Gallo, daughter of former Representative Dean Gallo, was charged with five counts of cocaine possession, five counts of intent to distribute, five counts of distribution, and five counts of conspiracy to distribute cocaine. Facing 5 to 10 years in prison for each charge, she pled guilty to one count of distribution and one count of conspiracy to distribute and was sentenced to 5 years probation (Bovard, 1999).

Talk show host Rush Limbaugh, who in October 1995 stated, “Drug use, some might say, is destroying the country . . . and so if people are violating the law by doing drugs . . . they ought to be convicted and they ought to be sent up” (as quoted in Verhovek, 2006), agreed to enter into drug treatment some 3 years after being charged for receiving approximately 2,000 painkillers prescribed by four doctors in 6 months. Limbaugh’s charge, referred to as “doctor shopping,” was a felony offense that could have resulted in a sentence of 5 years imprisonment. (Skoloff, 2006)

In presenting the examples above, we are not suggesting that only individuals with political ties and/or financial resources receive lenient treatment when they violate drug laws. However, such examples do cause us to question whether these laws are applied equitably. As is discussed in detail below, among the most glaring and consistent disparities in the application of drug laws is their disproportional impact on members of racial and ethnic minority groups.

## RACIAL AND ETHNIC INEQUALITY IN THE APPLICATION OF DRUG LAWS

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Drug policy has from the beginning been driven, in part, by a deep-seated nativist fear about the moral, political, social, and economic implications of an ever larger, polyglot, urban mass of people whose skin color or ethnic heritage differs from that of the dominant group. (Ryan, 1998, p. 228)

Despite the fact that George W. Bush's drug czar John Walters asserted that racial disparities in the criminal justice system are an "urban myth" (as quoted in Drug Policy Alliance, 2003r), an examination of illegal drug policies and their application leaves little doubt that both historically and in the contemporary period, they have had a disproportionately negative impact on members of minority groups in the United States. In fact, some have referred to the War on Drugs as the "New Jim Crow" (Alexander, 2010; Boyd, 2001).

Racial disparities in the application of drug laws have also been at least partially responsible for the widespread disenfranchisement of African Americans (Fellner & Mauer, 1998; see also Uggen & Manza, 2002). As of 2010, 12 states had disenfranchisement statutes disqualifying those convicted of drug felonies from voting even after completing their sentences—four states disqualify felons from voting for the rest of their lives (Sentencing Project, 2010). Estimates suggest that as many as 1.4 million African American males (13% of the total population of African American males) are disenfranchised. Alexander (2010) notes that no other country in the world disenfranchises people who are released from prison in a manner even remotely resembling the United States.

It is estimated that approximately 14% of all users of illegal drugs in the United States are African American (SAMHSA, 2011a). However, in 2010, they represented 34% of all drug arrestees (FBI, 2011). More generally, from the mid-1990s to the early 2000s, African Americans comprised 38% of all drug arrests, 59% of prosecutions for drug offenses, and 75% of those incarcerated for such offenses (Harkavy, 2005). It is important to stress that the higher arrest rates for blacks are not the result of higher rates of illegal drug use by blacks; as noted above and as was discussed in more detail in Chapter 5, African Americans use illegal drugs in approximately the same proportion as whites. Instead, these higher arrest rates for African Americans are at least partially the result of law enforcement's emphasis on inner-city areas where illegal drug use and trafficking are more likely to take place in the open, and where African Americans are disproportionately concentrated.

More recent data on incarceration for drug offenses underscore the continued racial disparities in the application of drug laws. In 2010, African Americans

comprised 49% of all those incarcerated for drug offenses but only 13% of the population (a rate of 429/100,000 population that is 11 times greater than the rate at which whites are incarcerated for drug offenses (Guerino et al., 2011). Counties with high proportions of African Americans imprison people for drug offenses more frequently, and blacks are disproportionately incarcerated for drug offenses in 97% of the 198 largest counties in the United States (Beatty et al., 2007) and are at least twice as likely as whites to be imprisoned on drug charges in every state (Human Rights Watch, 2010). This disproportionality also applies to African American youth, who are less likely to use drugs than Caucasians (see Chapter 5) and represent only 17% of the population but comprised 48% of those sentenced to detention facilities for drug offenses in 2001 (Snyder, 2003).

Some would argue that these racial disparities in the application of drug laws are the result of a focus on harder drugs such as crack. However, racial disparities also apply to soft drugs such as marijuana. Although more recent data are not available, while blacks and Hispanics represented approximately 20% of the users of marijuana, they comprised 58% of marijuana offenders sentenced under federal drug legislation in 1995 (Zimmer & Morgan, 1997).

Examination of incarceration statistics for selected states from the mid-1990s and early 2000s (the height of the War on Drugs) provides further evidence of racial inequality in the application of drug laws. As of January 1, 2002, there were 19,164 drug offenders incarcerated in New York State. And while blacks and Hispanics constituted 31% of the state's population, they comprised 94% of felony drug offenders sentenced to prison. In New York State, black males are incarcerated for the commission of drug offenses at approximately 11 times the rate of white males ("New York Drug Laws," 2002).

In California, as of December 31, 2002, 33,548 males were incarcerated for drug offenses. Latinos comprised 32.2% of males in the 18 to 59 age group in that state but represented 36.1% of all drug offenders in state prisons. The overrepresentation of blacks imprisoned in California is even more striking. While black males accounted for 6.2% of males ages 18 to 59 in the state, they comprised 31.8% of all male drug offenders in state prisons. Black women accounted for 6.6% of the female population in California but constituted 29.6% of female drug offenders in California state prisons in 2002 (Drug Policy Alliance, 2003e).

In Maryland, as of 2002, 9 out of every 10 people incarcerated for drug crimes were black, despite the fact that African Americans comprised only 28% of the state's population (Whitlock, 2003). From 1986 to 1999 in Maryland, the increase in the number of African Americans sentenced to prison for drug crimes—from 652 to 4,633—was approximately 18 times the increase for whites (from 309 to 534; Whitlock, 2003).

In Georgia, the rates for illicit drug use were estimated to be approximately 20% higher for blacks compared to whites. However, blacks were incarcerated for drug possession at a rate that was 500% greater than that of whites (Fellner, 1996). In the same state, there is a provision in the laws allowing for life imprisonment for conviction on a second drug offense. As of 1995, district attorneys in Georgia had



used this clause against only 1% of whites who had a second drug conviction, compared to more than 16% of blacks. At least partially as a result of the provision of this state law and the exercise of prosecutorial discretion, in 1995, 98.4% of those serving life sentences for drug offenses in Georgia were African American (Cole, 1999). Similarly, in Connecticut, while half of those arrested on drug charges were white, 9 out of 10 people in jails or prisons for the commission of drug offenses as of the year 2001 were black or Hispanic (Butterfield, 2001b).

Although Mauer (2009) notes that as of the mid-2000s racial disparities in incarceration for drug offenses were declining, he concludes “While these trends are welcome as a possible indication of a change in policy and practice, they need to be tempered by an assessment of the overall scale of incarceration and punishment” (p. 19). Mauer also speculated that because so many African Americans have already been incarcerated, there are fewer on the street to be arrested (Fears, 2009).

Studies at the local level from the same (1990s–mid-2000s) period also reveal striking differences in the application of drug laws. In the city of Baltimore, Maryland, in 1980, 18 white juveniles and 86 black juveniles were arrested for selling drugs. In 1990, however, the number of white juveniles arrested on drug trafficking charges had decreased to 13, while the number of black juveniles arrested on the same charge had increased to 1,304 (Cole, 1999). In Columbus, Ohio, black males comprised 11% of the population but accounted for 90% of drug arrests. And in Jacksonville, Florida, black males constituted 12% of the population but represented 87% of drug arrests (Cole, 1999).

In the late 1980s, a strategy employed by the Los Angeles Police Department to apprehend drug users and traffickers known as Operation Hammer resulted in the arrest of more than 1,000 people on one weekend alone in October of 1989, all of whom were either black or Hispanic (Walker, Spohn, & DeLone, 1996). A 1993 study by the California State Assembly’s Commission on the Status of African American males reported that 92% of the black males arrested by the police on drug charges were subsequently released for lack of evidence or inadmissible evidence (American Civil Liberties Union, 2000b).

In analysis of data from Seattle, Washington, for the years 1999 through 2001, Katherine Beckett found that of those arrested for selling heroin, cocaine, methamphetamine, and ecstasy, 63% were black, 19% were white, and 14% were Hispanic (Beckett et al., 2005). However, data derived from observations of drug markets in Seattle revealed that the majority of actual drug dealers were white. Beckett concluded that black heroin dealers were 22 times more likely to be arrested than white heroin dealers, while black methamphetamine traffickers were 31 times more likely to be arrested than white methamphetamine traffickers (Beckett et al., 2005).

The city of Portland, Oregon, also provides an instructive example of racial inequality in the application of drug laws. In 1992, the city passed a civil law designating a portion of the downtown area as a drug-free zone; this legislation allowed police to banish suspected drug criminals from the area for a 90-day period. Under the provisions of this law, police officers were not required to present evidence before judges in order to issue exclusion orders, and an investigation of these cases

found that police routinely excluded individuals where there was insufficient evidence to prosecute them (Franzen, 2001). The investigation also found that, of the 3,700 exclusions issued by the Portland police in 1999, blacks, who constituted approximately 8% of the city's population, represented 45% of the exclusion orders issued by law enforcement. When the constitutionality of these zones was questioned, they were eliminated in 2007 (Hottle, 2011) but were re-created in 2011 and relabeled drug impact areas (DIAs). The law was changed such that judges, as opposed to police, would determine who would be excluded from the DIAs. And although racial disparity apparently decreased under the new law, a report on the first 6 months of the operation of this law by the Multnomah County District Attorney's Office found that 37% of those excluded from the zones were African American (Therault, 2012).

Another example of racial disparities in the application of drug laws comes from the Texas panhandle town of Tulia, where 46 people, 39 of them black (representing 10% of the town's black population) were arrested and eventually prosecuted on drug trafficking charges in 1999. The local newspaper, the *Tulia Sentinel*, celebrated the arrests, announcing "We do not like these scumbags in our town. [They are] a cancer in our community, it's time to give them a major dose of chemotherapy behind bars." A later headline in the same newspaper in reference to the case stated, "Tulia's Streets Cleared of Garbage" (as cited in Mangold, 2003). All of these individuals were arrested on the uncorroborated, unsubstantiated testimony of Deputy Tom Coleman, who was given the Texas Lawman of the Year award for his efforts in these arrests. However, Coleman had a history of "throwing evidence into the garbage, scrawling important investigative information on his arms and legs, changing testimony from trial to trial, making false statements while under oath, and referring to black people as 'niggers'" (Herbert, 2002).

Subsequent investigations into the Tulia arrests revealed that several of the individuals who Coleman claimed had been dealing cocaine were not in the place he indicated at the time the alleged transactions took place. In addition, when the bags of cocaine Coleman used as evidence were tested for their cocaine content, they ranged from a high of 11.8% cocaine to a low of 2.9%. Most cocaine sold on the street has a purity of 85% to 90% (Mangold, 2003). Eventually, 12 of the defendants in this case, 11 of them African American, were released after spending 4 years in prison (and were given \$12,000 in compensation). Despite the fact that these individuals were not involved in drug use and trafficking, the judge admonished them to "make better choices" (as quoted in Hockstader, 2003). Coleman eventually received 10 months probation after being found guilty of perjury for his testimony in the case (Blakeslee, 2005). Contrasting Coleman's sentence to the ones received by the Tulia defendants, Blakeslee commented, "I think some would question whether or not 10 months probation is an adequate sentence after some of the people he accused did four years in prison before they were exonerated" (as quoted in Shemkus, 2005). Sullum (2006), noting the similarity between the events in Tulia and a scandal involving 24 Mexican immigrants in Dallas who were convicted on drug charges after police informants planted bags of ground up billiard chalk on them, noted,

Tulia demands our attention not because the events were so unusual but because they dramatically illustrate the injustices routinely inflicted by the War on Drugs, which results in 1.7 million arrests a year and keeps half a million Americans behind bars for failing to comply with an arbitrary set of pharmacological preferences.

And while the racism associated with the Tulia arrests is relatively well known and has been covered in several media sources, there are many other instances of such injustice. For example, a Drug Enforcement Administration operation in the northern district of Ohio that targeted alleged African American drug dealers disparagingly referred to these individuals as “niggers with rims” (English, 2009).

From the outset, the drug war could have been waged primarily in overwhelmingly white suburbs or on college campuses. SWAT teams could have rappelled from helicopters in gated suburban communities and raided the homes of high school lacrosse players known for hosting coke and ecstasy parties after their games. The police could have seized televisions, furniture, and cash from fraternity houses based on an anonymous tip that a few joints or a stash of cash could be found hidden in someone’s dresser drawer. . . . All of this could have happened as a matter of routine in white communities, but it did not. (Alexander, 2010, p. 121)

Thus, both state and local statistics indicate that drug laws have been applied disproportionately against members of minority groups, in particular, African Americans. In the following sections, we examine specific policies that have contributed to these racial disproportions.

### *“Crack Babies”*

In partial response to the alleged crack cocaine “epidemic” in the late 1980s, a number of states instituted the practice of prosecuting women for using drugs while pregnant, under offense categories including criminal child abuse, neglect, manslaughter, and delivering substances to a minor. While in some cases these laws were applied to mothers who used methamphetamine (Talvi, 2003a), the overwhelming majority of women charged were black, poor, and users of crack cocaine.

The Common Sense for Drug Policy advertisement shown here addresses some of the consequences of the “crack baby” legislation, which involves prosecuting expectant or young mothers with infants who use drugs for the supposed effects of drug use on the child. Although these policies have ostensibly been enacted with the goal of protecting unborn and newborn children, there is no scientific evidence of their effectiveness, and it appears as though they may actually be counterproductive in a number of ways.

One of the first of these cases occurred in 1989 in South Carolina, when Jennifer Johnson, a poor African American woman who allegedly used crack cocaine, was

## Is It Sound Policy To Jail Expectant Mothers For Substance Abuse And Take Away Their Babies?



“Many professional health care and child welfare organizations have banded together against criminalization on the basis that it is antithetical to the best interests of both the mother and the child”

“ . . . criminalization has no proven effect on improving infant health or deterring substance abuse by pregnant women.”

“In fact, criminalization may deter the pregnant woman from seeking out necessary prenatal care for fear of losing their children or being arrested.”

“A drug-exposed infant should be removed from the custody of his/her parent(s) only if the parent(s) are unable to protect and care for the infant and other support services are not sufficient to manage this risk, or the parent(s) have refused such services.”

**If removal is good policy, shouldn't we also place infants in foster care if the mother smokes, imbibes or is obese? We could build orphanages as well as prisons!**

### **Common Sense for Drug Policy**

[www.CommonSenseDrugPolicy.org](http://www.CommonSenseDrugPolicy.org) — [www.DrugWar-acts.org](http://www.DrugWar-acts.org)

[www.ManagingChronicPain.org](http://www.ManagingChronicPain.org) — [www.MedicalMJ.org](http://www.MedicalMJ.org)

[www.TreatingDrugAddiction.org](http://www.TreatingDrugAddiction.org)

[info@cspd.org](mailto:info@cspd.org)

*'Substance Use During Pregnancy: Time for Policy to Catch Up with Research.*  
by Barry M Lester, PhD, Lynne Andrezzi, And Lindsey Appiah, Harm Reduction  
Journal, published April 20, 2004, on the web at  
<http://www.harmreductionjournal.com/content/1/1/5>

convicted of delivery of a controlled substance to a minor; she received a 15-year sentence (14 years of which was probation; Logan, 1999). In another South Carolina case in 2001, a woman who was 8 months pregnant and delivered a stillborn baby was sentenced to 12 years in prison for killing the baby by smoking crack cocaine (Firestone, 2001), despite the fact that there is absolutely no scientific evidence linking cocaine use to stillbirth (Talvi, 2003a).

More generally, at least 24 states laid criminal charges against women for using illicit drugs while pregnant, and at one point, at least 13 states required that public hospitals drug test women suspected of abusing drugs and to report those who tested positive to social service agencies and/or the police (Logan, 1999). As of 2003, at least 100 women in South Carolina and 275 nationally had faced criminal charges as a result of using drugs while pregnant (Talvi, 2003a).

Although, as discussed in Chapter 5, the use of illegal drugs crosses all income levels and racial/ethnic groups, women from minority and lower-class groups were disproportionately targeted by these policies. In a 1989 study conducted in Florida, 380 women in public clinics and 335 in private care were drug tested; the rate of positive drug tests was 15.4% for white women and 14.1% for black women. Despite the lower rates of positive drug tests for black women, they were approximately 10 times more likely to be reported to authorities for substance use (Siegel, 1997). Similarly, an analysis of data from one hospital in South Carolina found that of 30 pregnant women who were arrested for drug use, 29 were African American. The one white woman who was arrested was married to a black man, a fact that had been noted on her medical record (American Civil Liberties Union, 2000a). And the fact that most drug testing of women is conducted at public hospitals that generally service low-income communities results in women of color being disproportionately likely to be the subject of such testing and to subsequently be reported to social service agencies and/or arrested.

While authorities have arrested and prosecuted drug-using pregnant women with the admirable goal of deterring drug use in this population and thereby protecting newborn children, as is the case with several other strategies, this approach is lacking in scientific foundation and may, in fact, be counterproductive. Studies have indicated that there is no specific “crack baby syndrome” that is equivalent to fetal alcohol syndrome. One meta-analysis of studies on the crack baby syndrome found that “there was no consistent negative association between prenatal cocaine exposure and physical growth, developmental test scores, or receptive or expressive language” (Frank et al., 2001). Early reports of the impact of crack cocaine on fetal and childhood development failed to take into account the fact that women who use crack are also more likely to smoke cigarettes, drink alcohol, use other drugs, be malnourished, and live in poverty (Logan, 1999). Each of these factors has been demonstrated to negatively affect fetal and early childhood development even in the absence of cocaine use (Davenport-Hines, 2001; Emmett, 1998; Frank et al., 2001). It is also important to note that policies targeting pregnant women may be counterproductive because the threat of drug testing and possible arrest may deter women from seeking prenatal care. As L. Siegel (1997) concludes with respect to these policies, “mothers who use crack were convenient scapegoats for conservative administrations to blame in order to divert the public’s attention from declining social and economic conditions affecting increasing numbers of Americans” (p. 257).

### “C.R.A.C.K.”

Although it is not officially sanctioned by the federal or state-level governments, another program that has targeted drug-using women is C.R.A.C.K. (Children Requiring a Caring Kommunity [*sic*]; subsequently renamed “Project Prevention”). This program, initiated by Barbara Harris of Orange County, California, has chapters in several states in the United States and pays drug users (including “alcoholics”) \$200 to submit to birth control or to be permanently sterilized. The program received a \$10,000 donation from popular radio talk show host Laura Schlesinger and had received more than \$2 million in donations as of 2003 (Roe, 2003). Under this program, prospective clients call a toll-free number and supply their name and address: C.R.A.C.K. then mails them forms to take to their parole officer or drug treatment provider, who documents their history of substance use. The clients then take the completed forms to a clinic, where health care providers verify that they have received an intrauterine contraceptive device, the birth control drug Depo-Provera, a tubal ligation for females, or a vasectomy for males. The use of birth control pills does not qualify for the \$200 payment because, according to founder Barbara Harris, “we don’t trust them to take a pill every day” (as quoted in Roe, 2003). In addition, the C.R.A.C.K. literature states, “Don’t let a pregnancy get in the way of your habit” (as cited in Cox, 2006).

Critics of the C.R.A.C.K. program have noted that clients may simply use the \$200 payment to purchase drugs, thereby further contributing to their addiction. However, Harris is apparently not overly concerned how the clients spend the money: “If they choose to use the money to buy drugs, that’s their business” (as quoted in Yeoman, 2001). Critics have further charged that this program is reminiscent of earlier eugenics programs in the United States because it targets poor and minority women (see also Paltrow, 2006). Although Harris has rejected this claim, it is notable that data on the racial/ethnic characteristics of those who have participated in the program indicate a substantial overrepresentation of Hispanics and blacks. Of the 4,097 clients who had participated in this program as of May 2012, 53% were white, 24% African American, 12% Hispanic, and 10% were of other ethnic backgrounds (see <http://www.projectprevention.org>).

## MANDATORY MINIMUM SENTENCES

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Judges are confronted with the following scenario. A young African American appears for sentencing on a conviction for selling two-tenths of a gram of crack cocaine within 1,000 feet of a school bus stop. The defendant trades his service as a middleman in the deal for a small quantity of cocaine for his own use. Although he made no significant economic gain by facilitating the sale, his standard-range sentence for this first-time drug offense is 45 to 51 months. Contrast that case with that of a Caucasian robber who takes property by threat of force. Even though the defendant already has an identical prior offense, he would face a sentence of only 12 months and a day to 14 months. (Murphy, 2003)

Mandatory minimum sentences have been part of criminal laws in the United States since 1790 (Schulhofer, 1993) but have had arguably their greatest impact in the last three decades. Interestingly, in the 1970 Comprehensive Drug Abuse and Control Act, Congress concluded that mandatory minimum sentences had not served their intended purpose of deterring drug offenders, and virtually all mandatory minimum sentences were repealed at that time. However, prompted at least partially by the “crack cocaine epidemic” discussed in Chapter 1, the federal and several state governments enacted mandatory minimum penalties for drug offenses in the 1980s (some states, such as New York, with its Rockefeller drug laws, enacted such statutes in the 1970s). As of 2012, there were 171 mandatory minimum sentencing statutes at the federal and state levels, about 80% of which were for drug law violations (Tabichnick, 2012).

In 1987, the Minnesota legislature passed a law designating different threshold amounts and different penalty structures for crack and powder cocaine, such that possession of 3 grams of the former would result in a mandatory minimum sentence of 48 months in prison, while possession of 10 grams of powder cocaine would result in a 12-month sentence (Blumstein, 1993). In *State v. Russell* (1991), the Minnesota Supreme Court declared that this differential treatment of powder and crack cocaine was in violation of the state’s constitution. The ruling held that the distinction between the two substances was racially discriminatory in its impact: In 1988, 100% of those sentenced for crack cocaine violations in Minnesota were black, while 66% of those sentenced under the powder cocaine statute were white (Blumstein, 1993). The court ruled that because of the disparate impact of this law on African Americans, there had to be a compelling rationale for the differential treatment (Minnesota Sentencing Guidelines Commission, 2004).

At the federal level, the 1986 Anti-Drug Abuse Act reinstated mandatory minimum penalties for drug offenses, with the most important change being a distinction between crack and powder cocaine. Under this legislation, a first-time offender convicted of possession of 5.01 grams of crack cocaine was subject to a mandatory minimum penalty of 5 years of imprisonment. If the offender possessed only 5.0 grams of crack cocaine or less, he or she would be subject to a maximum sentence of 1 year imprisonment (Wilkins, Newton, & Steer, 1993). For powder cocaine, however, the 5-year mandatory minimum sentence did not apply until an individual possessed more than 500 grams of the substance. In passing this legislation, Congress conveniently ignored the fact that crack and powder cocaine are essentially the same drugs pharmacologically and have the same effects and consequences (Hatsukami & Fischman, 1996). Congress also failed to offer any rationale for the selection of the 100 to 1 ratio in amounts of powder cocaine versus crack cocaine that would trigger the mandatory minimum penalties (Sklansky, 1995). As Schlosser (2003) argued, the process of selecting the quantities of drugs to trigger the mandatory minimum sentences was like “pulling numbers out of thin air.”

Before addressing some of the more general problems with this and other mandatory minimum sentencing policies, it is important to note that African Americans were far more likely to be arrested and prosecuted under federal crack cocaine statutes than were whites. A study conducted by the United States Sentencing

Commission in 1992 found that in 16 states, including populous ones such as Connecticut, New Jersey, and Illinois, not a *single* white person had been prosecuted under federal crack laws (Gelacak, 1997). Another Sentencing Commission study found that in 1994, blacks accounted for more than 90% of federal prosecutions for crack offenses and whites for less than 1%. The Sentencing Commission also found that in the central district of California, the federal trial court that includes Los Angeles, the first charge against a white defendant under federal crack cocaine laws came in 1995, some 9 years after the crack/powder cocaine distinction was created. In 1993, 88.3% of those sentenced under federal crack statutes were black and 95.4% were nonwhite (Gelacak, 1997).

These racial disparities in prosecutions and sentencing must be placed in the context of data on racial differences in the use of drugs in general, and crack cocaine in particular. Although it is certainly true that hardcore drug use and its consequences may be more severe in inner-city areas where minorities are more likely to be concentrated, overall drug use figures for 1990 reported by the National Institute on Drug Abuse (NIDA) show that whites comprised 77% of the estimated 1.3 million users of illegal drugs, while blacks comprised 15%. Despite the apparent ubiquity of America's drug problem, economically disadvantaged racial minority groups provide the bulk of the raw material for the drug war (Gaines & Kraska, 1997). A defense attorney quoted in Sklansky (1995) noted, "Maybe I'm cynical, but I think that if you saw a lot of young white males getting 5- and 10-year minimums for dealing powder cocaine, you'd have a lot more reaction" (p. 1308).

The U.S. Sentencing Commission itself recognized the racial disparities in sentencing that resulted from the crack/powder cocaine distinction, and while not willing to concede that the law was racially discriminatory in its intent, the Commission noted,

If the impact of the law is discriminatory, the problem is no less regardless of the intent. The problem is particularly acute because the disparate impact arises from a penalty structure for two different forms of the same substance. It is a little like punishing vehicular homicide while under the influence of alcohol more severely if the defendant had become intoxicated by ingesting cheap wine rather than scotch or whiskey. (Gelacak, 1997, p. 2)

In 1995, the Sentencing Commission unanimously recommended to Congress that the 100-to-1 quantity ratio between powder and crack cocaine be reduced to 1 to 1. However, these recommendations were rejected by Congress and President Clinton (Gelacak, 1997). In 1997, the Sentencing Commission changed its recommendation, suggesting that the quantity to trigger a mandatory sentence for powder cocaine should be between 125 and 175 grams, and for crack, between 25 and 75 grams (Musto, 1999). As will be discussed in more detail below, the ratios were finally altered with the passage of the 2010 Fair Sentencing Act.

In addition to its disproportionately negative impact on African Americans, this law creating a distinction between crack and powder cocaine resulted in a number of other apparently unintended but rather perverse outcomes as a result of the establishment of



“cliffs” (Heaney, 1991). Musto (1999) notes that in 1991, 59% of federal crack cases qualified for a mandatory minimum sentence (due to the 5.01-gram cutoff); however, if the powder cocaine cutoff of 500 grams had been applied to these cases, only 3% would have qualified. In the same year, only 27% of powder cocaine cases qualified for the mandatory minimum sentence, but this would have increased to 76% if the 5-gram crack standard had applied. As a result of these distinctions, an individual who sells a 1-pound (454-gram) lot of powder cocaine, from which he could supply 64 others with enough cocaine to produce a 7-gram unit of crack, would not be subject to the mandatory minimum penalties under federal legislation. However, somewhat perversely, each of the 64 individuals he supplied with cocaine to produce crack would be subject to the mandatory minimum penalty. To put it in monetary terms, under this legislation, an individual convicted of trafficking 400 grams of powder cocaine, which had an approximate street value of \$40,000 in 1998, would end up serving a shorter sentence than a user he supplied with crack, valued at \$500 (Mauer, 1999).

These “cliffs” can also result in questionable and counterproductive law enforcement practices. Due to the fact that the length of a drug offender’s sentence is at least partially dependent on the quantity of drugs he participated in purchasing or selling, it appears as though some law enforcement officials attempt to convince suspects to purchase or sell drugs in quantities large enough to trigger the mandatory minimum penalties (Heaney, 1991). In other cases, police officers have postponed the arrest of suspects until they have bought or sold cumulative amounts of drugs sufficient to result in the application of the mandatory minimum sentence. Heaney (1991) notes that one of the counterproductive outcomes related to such practices is that the entire purpose of apprehending drug traffickers is defeated because such individuals will actually be on the streets selling drugs for longer periods of time. Even aside from this issue, it is notable how the very practices law enforcement officers engage in with respect to apprehending drug traffickers—instigating the very crimes for which they later arrest individuals—are not consistent with other law enforcement practices. As Sullum (2006) comments, “police do not commit murder to prevent murder; they do not steal to prevent theft; but they do buy drugs to prevent people from buying drugs, a situation that puts them above the law and encourages corner cutting.”

In the case of *United States v. Brigham*, a relatively low-level drug dealer received a sentence of 120 months incarceration while the leader of the organization received only 84 months because he had provided “substantial assistance” to the prosecutor. Commenting on the absurdity of this outcome, the sentencing judge noted, “Mandatory minimum penalties, combined with the power to grant exemptions, create a prospect of inverted sentencing. The more serious the defendant’s crimes, the lower the sentence, because the greater his wrongs, the more information and assistance he has to offer to a prosecutor” (as quoted in Schulhofer, 1993, p. 212). In a more recent case from Pensacola, Florida, a 87-year-old African American woman was sentenced to 19 months in prison for selling a \$20 rock of crack cocaine to an undercover police officer. She died (in jail) a few months later. (“Never Too Old,” 2010)

An additional problem with mandatory minimum sentencing laws for drugs more generally is that they transfer discretion in the criminal justice system from judges to police, probation officers, and, especially, prosecutors (Heaney, 1991). As a result, there is the possibility of even more sentencing disparity due to the fact that the application of guidelines depends on low-visibility prosecutorial decisions, which are typically not reviewable (Schulhofer, 1993), as compared to judicial decisions, which can be appealed.

A provision within the federal mandatory minimum sentencing guidelines for drug offenses allows defendants who provide “substantial assistance” (information on other drug transactions and dealers) to prosecutors to receive “downward departures” (reductions) in their sentences. But as Schulhofer (1993) suggests, this provision frequently results in the unintended consequence of more minor participants in drug trafficking operations receiving more severe sentences than those who are more central to such operations because the latter usually have more information to provide. The United States Sentencing Commission itself has noted that “the value of a mandatory minimum sentence lies not in its imposition, but in its value as a bargaining chip to be given away in return for the resource-saving plea from the defendant to a more leniently sanctioned charge” (as quoted in Alexander, 2010, p. 87).

Recall that the apparent goal of these laws is to deter drug traffickers and thereby reduce the supply of illegal drugs. If, as a result of the application of these laws, low-level drug traffickers end up being punished more severely than the leaders of drug trafficking organizations, has this goal been accomplished?

Apparently, these substantial assistance provisions have also had a negative impact on African Americans. Schulhofer (1993) found that of defendants eligible to receive a mandatory minimum sentence under federal drug laws, 25% of whites, compared with 18% of blacks, received a shorter sentence as a result of providing substantial assistance to the prosecutor. Overall, Schulhofer (1993) found that almost half of whites were sentenced below the mandatory level, while less than one-third of blacks experienced similar leniency.

As we have already documented, given the numerous problems with these mandatory minimum sentencing laws, an increasing number of judges have expressed their displeasure at being forced to invoke them. In addition to the comments of Judge Murphy at the start of this section and the concerns of the sentencing judge in the *United States v Brigham* case, Donald Lay, the former Chief Judge of the Court of Appeals for the 8th Circuit in St. Paul, Minnesota, argued,

They have set such atrocious and unfair statutory minimum sentences that the result is there is often no relationship between the sentence received and the crime involved. The hysteria over the control of drugs has led us to the point where I think we've broken down many civil rights. (as quoted in Wilkinson, 1993)

California Superior Court Judge James Gray expressed similar sentiments in commenting that mandatory minimum sentencing policies are at least partially responsible for the fact that “our system has arrested, imprisoned, and eliminated from the [drug] market the stupid, unorganized, and less violent drug traffickers and

smugglers, thus leaving behind the phenomenally lucrative market open to offenders who are smarter, better organized, and more violent” (Gray, 2001, p. 31). More generally, a survey of federal judges released by the Federal Judicial Center in 1994 found that 59% of circuit court judges and 69% of district court judges were strongly or moderately opposed to the retention of mandatory minimum sentencing laws (as cited in Pratt, 1999).

More objective evidence that a high proportion of judges are dissatisfied with these mandatory minimum penalty structures is provided through an examination of data on departures from the guidelines. Although not specific to drug offenses, in 2001, close to 36% of federal defendants received downward departures (reductions) in their sentences, while fewer than 1% received upward departures (Bowman, 2003). Looking at drug offenses only, a General Accounting Office report focusing on federal drug-related offenses for the 1999 to 2001 period found that more than half of the sentences fell below the mandatory minimum (U.S. General Accounting Office [GAO], 2003). However, the federal government has not reacted favorably to the apparently increasing number of judges who grant downward departures. In July 2003, Attorney General John Ashcroft required all United States Attorneys’ offices to report to the Justice Department all instances in which federal judges imposed sentences below the range specified in the federal guidelines against the wishes of the prosecutor (Bowman, 2003).

### “SCHOOL ZONE” POLICIES

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The federal Anti-Drug Abuse Act of 1988 also provided enhanced mandatory penalties for individuals convicted of dealing drugs within 1,000 feet of playgrounds, youth centers, swimming pools, and video arcades (Gray, 2001). On the surface, these laws also have the laudable goal of preventing the distribution of illegal drugs to young people. At one point, more than 30 states had similar laws; for example, individuals in the state of Alabama who were convicted of selling illegal drugs within a 3-mile radius of *any* educational institution, including colleges and universities, were subject to an additional 5 years of imprisonment.

In Massachusetts, legislation provided for a 2-year mandatory minimum sentence for selling drugs within 1,000 feet of a primary, secondary, or vocational school. An analysis of the application of this law in the city of New Bedford, Massachusetts, found that fully 84% of all drug trafficking cases within the city limits occurred within school zones. However, a detailed review of case files revealed that only 1 of 443 transactions involved the actual sale of drugs to children, and more than 70% of the cases occurred when school was not in session. The authors of this study concluded that the outcome of the legislation was not better protection for children, but instead, a general escalation of the severity of penalties for drug offenses (Brownsberger & Aromaa, 2003). More generally, in the state of Massachusetts, while 43% of those arrested for drug offenses are white, 80% of those sentenced under drug-free-zone statutes were members of racial and ethnic minority groups (Greene, Pranis, & Ziedenberg, 2006).

A similar study focusing on the application of school zone laws in New Jersey found that African Americans and Hispanics, who comprised 27% of the state's population, constituted 96% of all inmates in the state whose most serious offense was a school-zone violation (New Jersey Commission to Review Criminal Sentencing, 2005). Of 90 reported school-zone cases studied in detail by the Commission, not a single one involved selling drugs to minors, and only two of the cases actually occurred on school property. The Commission concluded,

Essentially what the current law does is add about three years of mandatory prison time to sentences of individuals whose offenses occur in urban areas. Basically New Jersey has two different punishments for the same crime, with the severity of punishment being based on geography and race.

In light of these findings, the Commission recommended altering the definition of school zones from 1,000 to 200 feet and increasing the criminal penalty in the 200-foot zone from a third- to a second-degree offense, thereby targeting the “few people who sell drugs at or near schools” (“Drugs and Racial,” 2006). In 2010, New Jersey eliminated mandatory minimum sentencing for individuals convicted of selling drugs in school zones.

## **PUBLIC HOUSING EVICTIONS**

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Under the 1998 Anti-Drug Abuse Act, public housing agencies were required to evict tenants if the tenant, a member of his or her own family, or guests were involved in drug-related crimes—these laws potentially affect the more than three million residents of federally funded housing in the United States. The precursors of the federal legislation were law enforcement campaigns in individual cities whereby police would lock all exits to public housing buildings and conduct unannounced, warrantless drug searches of tenants and their guests. In 1989 in Washington, D.C., alone, 209 individuals were evicted from public housing as a result of such police activities (Zeese, 1989).

While these provisions were apparently enacted with the goal of helping communities to reduce drug use and trafficking and the problems associated with the drug trade, it is once again instructive to examine how they have been applied. Here, we refer to four cases from the city of Oakland, which were eventually heard by the United States Supreme Court. In the first case, a 79-year-old disabled male was evicted from public housing because authorities discovered that his full-time caretaker had hidden pipes for smoking crack in his apartment. In a second case, a 63-year-old woman was given an eviction notice when her mentally disabled daughter was arrested three blocks from their residence on charges of possessing cocaine. In two other cases, elderly women were ordered out of their homes when their grandchildren were found smoking marijuana in the parking lot of their public housing complex (Lithwick, 2002). It is important to stress that in none of these cases was the person evicted found personally using or possessing an illegal drug, nor did he or she have knowledge about the accusations.

These four individuals initiated a civil lawsuit, arguing that the evictions were unconstitutional because they had no knowledge of the drug use of their relatives or acquaintances. After a lower court and the 9th U.S. Circuit Court of Appeals in California supported the tenants' claim that the evictions were unconstitutional, the Oakland Public Housing Authority and the federal government appealed the decision to the U.S. Supreme Court (Lithwick, 2002). In an 8-0 decision in 2002, the U.S. Supreme Court upheld the evictions and the law. In the Court's decision, Chief Justice William Rehnquist wrote, "There is an obvious reason why Congress would have permitted local public-housing authorities to conduct no-fault evictions. Regardless of knowledge, a tenant who cannot control drug crime by a household member . . . is a threat to other residents" (as quoted in Richey, 2002). As a San Francisco lawyer remarked, "Our argument has always been that if you read the statute literally, you can evict a grandmother who lives in Oakland if their granddaughter is smoking pot in New York" (as quoted in Nieves, 2002). It is necessary to question whether punishing individuals for the drug uses of their relatives and/or acquaintances serves the objective of reducing drug use and trafficking activities in public housing projects, and like several other drug policies, these laws clearly have a disproportionately negative impact on minorities and the poor. In addition, such policies exacerbate the negative impact of drug convictions on women (Radosh, 2008).

## DENIAL OF WELFARE

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Under a provision of the 1996 Federal Welfare Reform Act that was apparently debated in Congress for approximately 2 minutes, any individual convicted of a felony drug offense can be denied federal welfare benefits, including food stamps and temporary aid to needy families, for life (Schwartz, 2002). As of 2002, more than 92,000 women had been denied access to welfare as a result of felony drug convictions (Kirkorian, 2002). There is little doubt that the individuals most affected by this particular policy are, once again, the poor and members of minority groups because they are obviously the ones most likely to be welfare recipients. It is by no means clear how the denial of welfare would be a deterrent for those who traffic in illegal drugs, and drug users who are convicted of felony drug offenses and denied welfare may find it more difficult to stop using drugs. Perhaps amazingly, although certainly consistent with much of drug policy in the United States, individuals can commit murder, rape, and other serious crimes without being denied access to federal welfare assistance.

It is somewhat encouraging to note that several states have recognized the potential problems associated with this policy and used their option of not enforcing this provision of the Welfare Reform Act. As of March 2003, 21 states still denied welfare to those convicted of felony drug offenses, while 11 states and the District of Columbia did not enforce the provision. An additional 18 states had modified this provision, either by allowing individuals to receive welfare benefits on the condition of participating in drug treatment, denying benefits only to individuals convicted of

drug trafficking offenses, or reducing the restrictions from a lifetime ban on receiving benefits to shorter time periods (Drug Policy Alliance, 2003a). However, the fact that these laws are still in place at the federal level and that close to half the states continue to impose and enforce them is cause for concern.

## DENIAL OF STUDENT AID

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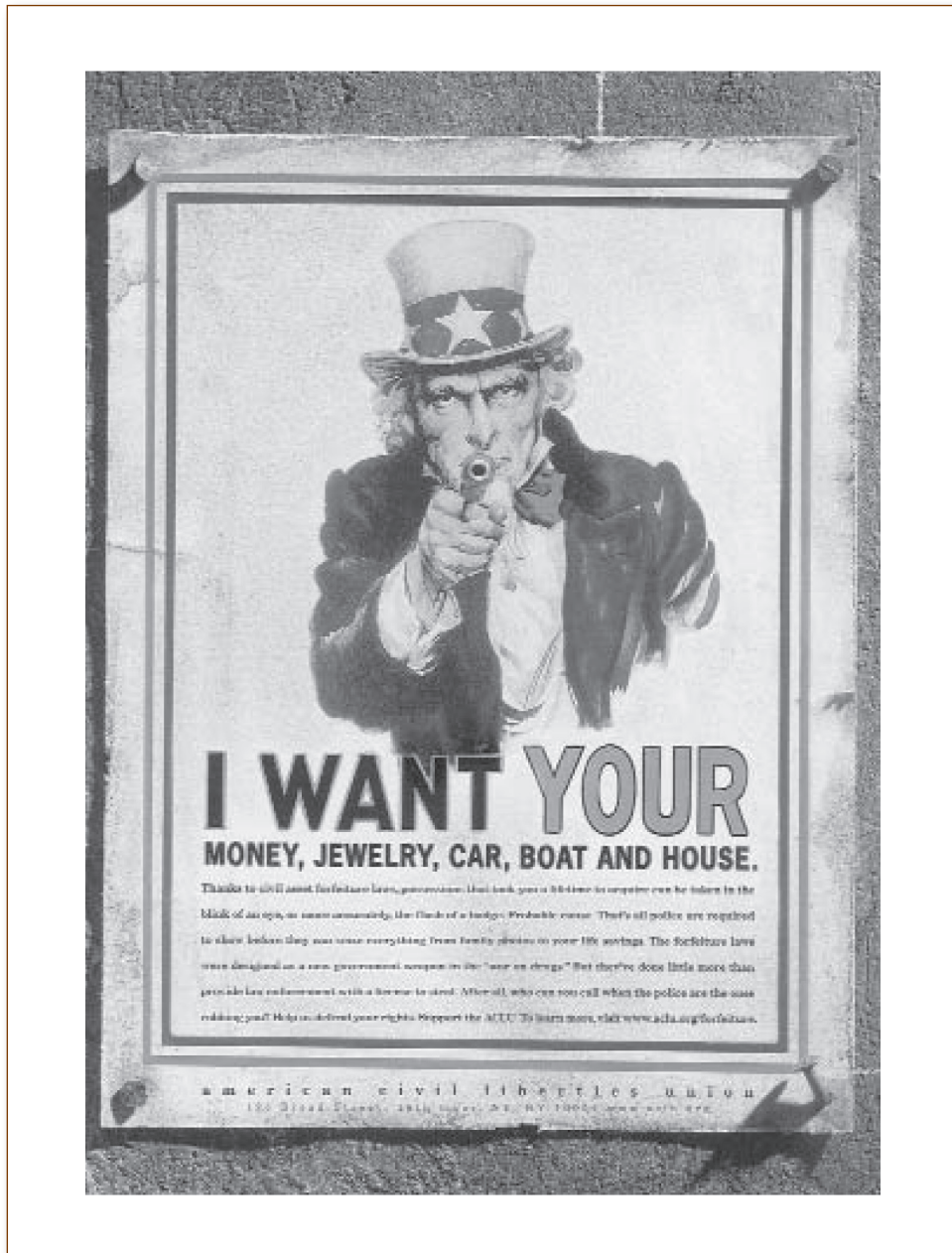
Under provisions of the Higher Education Act, passed in 1998, individuals applying for federal financial aid are required to answer a question regarding their prior drug convictions. If applicants indicate they have a conviction for a drug offense, or if they refuse to answer the question, they are sent a follow-up questionnaire that asks them to provide more information about the type and number of drug convictions they have, as well as when the convictions occurred (Students for Sensible Drug Policy, 2006). Individuals convicted of drug offenses, including possession of marijuana, or who refuse to answer the question can be denied student aid. For a first drug offense, individuals are ineligible for financial assistance for a period of 1 year, while a second conviction results in a 2-year period of ineligibility. Subsequent convictions can result in permanent denial of student aid. Similar to the welfare restrictions discussed above, this is another provision that is unique to drug offenses: No other class of offenders, including those convicted of rape or murder, is disqualified from receiving student aid.

Students for Sensible Drug Policy (2006) determined that since the drug conviction question was added to federal student aid applications during the 2001 to 2002 school year, 189,065 individuals (approximately 1 in every 400 applicants) had their requests for aid denied because of their answers to the question, and it is notable that a study by the Government Accountability Office found no evidence that this provision helped to deter drug use (U.S. Government Accountability Office, 2005b). Noting that this law, similar to other drug legislation, has a disproportionately negative impact on the poor and members of minority groups, who are more likely to have drug convictions while at the same time requiring student aid to participate in higher education, Davenport-Hines (2001) referred to it as a “blunder of crashing stupidity” (p. 358). The denial of student aid to those with drug convictions “reinforce[s] the discriminatory effect of U.S. drug policy on African Americans. Its cruel and irrational punishment typifies the U.S. drug enforcement mentality. By perpetuating the disadvantages of the ghetto, it perpetuates the conditions that foster addiction.” A *New York Times* editorial similarly noted,

By narrowing access to affordable education, the federal government further diminishes the prospects of young people who are already at risk of becoming lifetime burdens to society. . . . It doesn't take a genius to see that barring young offenders from college leads to more crime, not less. Student aid was never intended for use as a law enforcement weapon. Any attempt to employ it that way will inevitably yield perverse and unfair results. (“Cutting College Aid,” 2005)

In response to these policies, some postsecondary institutions, including Yale University, Hampshire College in Massachusetts, and Swarthmore College in Pennsylvania, reimburse students who have been denied federal aid as a result of drug convictions (Rubin, 2003).

## ASSET FORFEITURE



The law enforcement agenda that targets assets rather than crime, the 80% of seizures that are unaccompanied by any criminal investigation, the plea bargains that favor drug kingpins and penalize the “mules” without assets to trade, the reverse stings that target drug buyers rather than sellers, the overkill in agencies involved in even minor arrests, the massive shift in resources towards federal jurisdiction over local law enforcement—is largely the unplanned byproduct of this economic incentive structure. (Blumenson & Nilsen, 1998)

Another disturbing development in recent U.S. drug policies is related to provisions allowing for the forfeiture of assets of individuals allegedly involved in drug transactions. Such laws have a long history in the United States: Following the ratification of the Constitution, Congress enacted forfeiture statutes in order to assist in the collection of customs duties and taxes (Shaw, 1998). The more direct precursor to current asset forfeiture laws as they are applied in drug cases was their use in violations of alcohol prohibition laws in the 1920s; several cases in that era involved forfeiture of automobiles that were used to transport liquor. The civil forfeiture of assets related to illegal drug transactions began with the Comprehensive Drug Abuse and Control Act of 1970 and was extended in 1978. In that year, Congress passed legislation that allowed for the forfeiture of

all monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by a person in exchange for a controlled substance in violation of this [subchapter], all proceeds traceable to an exchange, and all monies, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter. (Jensen & Gerber, 1996, p. 43)

The apparent goal of this legislation was to “take the profit out of crime, paralyze drug operations, eradicate the criminal infiltration of legitimate businesses and labor organizations, and end criminal tactics in business and trade unions” (cited in Shaw, 1998). In addition to federal legislation allowing for asset forfeiture, by 1990, 49 states and the District of Columbia had enacted similar laws. From 1989 to 2010, an estimated \$26 billion in assets of “drug traffickers” were seized by U.S. attorneys (Maguire, 2010).

It is important to note that under criminal law in the United States, an individual is generally presumed to be innocent until proven guilty. However, under these civil asset forfeiture provisions, the burden of proof falls on the individual to demonstrate that his or her property is not connected to any involvement in illegal drug activity. Another unique feature of these laws is that the property itself is presumed guilty—known in legal terms as *in rem* jurisdiction—and its owner must either prove its innocence by a preponderance of evidence or lose it altogether (Shaw, 1998).

Examples of the questionable use of these asset forfeiture laws are legion. In April 1988, the Coast Guard boarded and seized a yacht, valued at \$2.5 million, because 10 marijuana seeds and two stems were found on board. In the same year, another yacht was impounded for a week because cocaine dust rolled up in a dollar bill was found on board. In a third case, an oceanographic research ship valued at \$80 million was seized when the Coast Guard found one-tenth of an ounce of marijuana in a



crewman's shaving kit (Wisotsky, 1992). In another case, a man flying to Las Vegas was stopped by Customs officials due to suspicions arising from his purchase of a one-way ticket. When drug-sniffing dogs detected drugs on the money he had in his possession, \$9,600 was seized from him (Gray, 2001). In yet another case, government lawyers actually tried to have the gold caps from the teeth of two accused drug dealers removed as part of asset forfeiture ("Gold Diggers," 2006).

There have also been numerous cases of individuals having their homes and/or property seized as a result of the drug-related activities of their children or individuals staying in their homes (Gray, 2001) and cases involving drug-dealing husbands and uninvolved wives. In the latter cases, the courts have generally ruled that a wife who may have had some knowledge of her husband's involvement in drug trafficking but did not act reasonably to stop it will lose her interest in their home under the forfeiture statutes (Shaw, 1998). There have also been instances in which individuals who are only marginally—if at all—connected to the drug trade have been victimized by these laws. For example, a man who operated an airline charter service flew a client he had not previously known from Arkansas to California. It turned out that the passenger was a convicted drug trafficker, and when a search of his luggage resulted in the discovery of \$2.8 million in his suitcase, the passenger and the aircraft operator were arrested. The operator also had his \$500,000 airplane seized, based on the suspicion that it was connected to a drug transaction (Fitzgerald, 2000).

In a case that further underlines social class inequities in the application of drug laws, Leslie C. Ohta, a federal prosecutor in Connecticut, seized the house of a couple who were in their 80s when their 22-year-old son was arrested for selling marijuana. Subsequent to this, Ohta's 18-year-old son was arrested for selling LSD from Ohta's vehicle. It was also believed that he had previously sold marijuana from her home. Ohta did not have her vehicle or home seized, although she was eventually transferred out of the United States Attorney's forfeiture unit. (Schlosser, 2003)

In 1984, Congress altered these laws under the Department of Justice Assets Forfeiture Fund, which allowed most of the proceeds from asset forfeiture cases to be retained by local law enforcement agencies. This provision led to widespread misuse of forfeiture laws and considerable corruption; Jensen and Gerber (1996) have referred to these laws as resulting in "policing for profit—due to their dependence on raising revenue, [criminal justice system officials] become the beneficiaries of the illegal drug trade" (p. 430). Similarly, the president of the National Association of Criminal Defense Attorneys argued, "civil forfeiture is essentially government thievery" (as quoted in Shaw, 1998).

A number of examples suggest that the above characterizations of asset forfeiture laws are accurate. In St. Francis County, Arkansas, the sheriff was privately selling cars he had seized to himself and others at prices at or well below their appraised values (Fitzgerald, 2000). In New Jersey, a prosecutor known as the "forfeiture king" assisted a colleague in his purchase of land seized in a marijuana case at a

fraction of its actual value (Schlosser, 1997). In California, state and federal agents raided a ranch based on the belief that it contained a marijuana-growing operation. In the course of the raid, the owner of the ranch was killed by a deputy sheriff; however, no marijuana was found and a subsequent investigation revealed that law enforcement officials had been at least partially motivated by a desire to seize the \$5 million ranch. In fact, they had obtained an appraisal of the property a few weeks before they conducted the raid (Schlosser, 1997).

In Spokane, Washington, seizures resulting from the discovery of a marijuana-growing operation resulted in a \$400,000 bounty for the local police department, including a 1997 BMW 740i sedan, which was subsequently being driven to work by one of the police officers. A Seattle attorney commented, "It's routine for my clients to see their vehicles being driven by police officers. They are like malicious children without supervision. These forfeiture laws give them the toys to play with" (as quoted in Clouse, 2003). In another city, after receiving \$1.5 million in forfeiture funds, the police department spent \$1,235 on the chief's Christmas party, \$208 on an aquarium, \$2,100 on a buffet for police officers who worked on Labor Day, \$720 on amusement park tickets, and \$32,375 on banquets (Shaw, 1998).

The apparent goal of civil forfeiture laws is to deprive major drug traffickers of the property and assets utilized to further their criminal activity. But at least partially as a result of the fact that criminal justice system agencies are allowed to keep significant proportions of the assets seized, they may be led to pursue cases that are not necessarily the most serious ones. Thus, a senior Customs official stated that if police had "a guy with a ton of marijuana and no assets versus a guy with two joints and a Lear jet, I guarantee you they will bust the guy with the Lear jet" (as quoted in Shaw, 1998). And as James Gray (2001) notes, individuals who believe they have been subject to an inappropriate forfeiture action are required to appeal to their local district attorney. However, given that the legislation provides that the district attorney retains 13.5 cents out of every dollar forfeited, it is unlikely that he or she will be motivated to overturn the forfeiture.

An additional problematic aspect of asset forfeiture laws is related to the use of informants, who can receive up to 25% of the amount forfeited in these cases (Gray, 2001). In 1991, at least 24 informants made between \$100,000 and \$250,000, and at least eight made more than \$250,000—one individual received \$780,000 (Shaw, 1998). The identity of informants remains unknown in forfeiture proceedings, and consequently, there is no way for the owner of the property being seized to address the truthfulness of the information provided. As Shaw (1998) notes, "paying informants such large sums of money, with little to no requirements for who can be an informant, simply corrupts the world of civil forfeiture more than it otherwise is."

Civil asset forfeiture laws were further revised in 2000, with one of the most important changes being that the government must now prove, by a preponderance of evidence, that the property allegedly connected to drug-related offenses should be forfeited. Alexander (2010) further notes that merely shifting the burden of proof to the government under the revised law did not serve to remove the profit motive in drug law enforcement.

Asset forfeiture laws were enacted with the apparent purpose of deterring trafficking in illegal drugs and hampering the efforts of drug traffickers to continue their operations. There is little evidence to suggest that asset forfeiture laws have achieved these goals, and, similar to other drug policies, these laws have resulted in a number of negative outcomes, particularly with respect to corruption in law enforcement and an erosion in civil rights. It is also important to recall that, as mentioned in the quote introducing this section, in approximately 80% of the asset forfeiture cases, no individual is charged with an actual crime.

## ECSTASY AND THE RAVE ACT

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As mentioned in Chapter 1, one of the media- and government-constructed drug “epidemics” of the late 1990s and early 2000s was related to ecstasy (MDMA). In the early 1980s, ecstasy was actually a legal substance in the United States, but in 1984, sale and possession of the substance was made illegal. And despite a judicial recommendation that MDMA be placed in Schedule III of the Controlled Substances Act, the Drug Enforcement Administration insisted that it be placed in Schedule I (Davenport-Hines, 2001).

In order to stem the ecstasy epidemic that was allegedly occurring in the United States in the late 1990s and early 2000s, the RAVE (Reducing America’s Vulnerability to Ecstasy) Act was introduced in 2002 and eventually passed into law in 2003. This legislation was essentially a revision of the federal crack house law that had been passed in 1986, which made it illegal to maintain a building for the purposes of drug consumption. Under the RAVE Act, 20 years imprisonment, up to \$250,000 in civil penalties, and \$500,000 in criminal fines could be applied to anyone who

managed or controlled any place, whether temporarily or permanently, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance. (Kopel & Reynolds, 2002)

It is important to note that under this legislation, the government is not required to demonstrate that the owners of the property were actually involved in selling drugs (Cloud, 2001).

Prior to the passage of this formal federal legislation, owners of a company in New Orleans that promoted musical events where ecstasy was consumed were charged with violating the federal crack house law, fined \$100,000, and placed on probation for 5 years. Law enforcement officials justified the arrest of the company’s owners by claiming that staff had encouraged consumption of ecstasy by selling items such as glow sticks and pacifiers, which they alleged were drug related because glow sticks can stimulate the dilated pupils that can result from ecstasy use, while pacifiers can relieve the teeth grinding associated with use of the drug (Cloud,

2001). As part of the agreement in this case, the company was also required to ban glow sticks, vapor rub, pacifiers, dust masks, and other legal items and to eliminate air-conditioned “chill-out” rooms from future events (Drug Policy Alliance, 2003d).

The apparent goal of the RAVE Act was to make promoters of musical and other events where ecstasy consumption allegedly occurs liable for the consumption of their patrons. But as Sullum (2003b) argues, it appears highly unlikely that this law will deter individuals from using ecstasy, especially since the penalties are imposed against event organizers and club owners, as opposed to users of the drug. And similar to much of the legislation we have discussed in this chapter, the RAVE Act could also be counterproductive and result in more harm due to the fact that it could serve to push raves underground and discourage some of the safety measures that have been implemented by club owners. For instance, in order to address one of the serious short-term risks associated with ecstasy use—that users “overheat”—many of those involved in organizing raves and other events at which ecstasy consumption occurs have provided bottles of water and access to chill-out rooms. However, under the provisions of the RAVE Act, providing water and chill-out rooms could be used as evidence that owners knew those attending their events would be using drugs (Sullum, 2003b). The legislation could also deter organizers from allowing DANCE-SAFE, an organization that offers testing of ecstasy tablets to ensure that they do not include additional dangerous additives, to attend events where ecstasy may be consumed (Drug Policy Alliance, 2003g).

Critics of the RAVE Act have noted that, applied literally, the provisions of the act could be used to prosecute homeowners whose teenagers are found smoking marijuana on their property (Kopel & Reynolds, 2002) or concert promoters who book reggae artists and sell marijuana-themed t-shirts (Boucher, 2002). And, in consideration of the fact that marijuana and opium are grown on federally owned land in the United States, Bill Piper, Associate Director of National Affairs for the Drug Policy Alliance noted,

It’s a good thing for the federal government that it’s not subject to the same laws as the rest of us are. If it was, it would have to indict itself under the RAVE Act, which punishes innocent property owners who fail to stop drug offenses on their property. (“Chronic Hypocrisy” n.d.)

In addition to the RAVE Act, the federal government passed legislation in 2001 that increased the penalties for importing or selling ecstasy to the point that they were more severe than those associated with trafficking in powder cocaine. Under this legislation, the penalty for selling 200 grams (approximately 800 pills) of ecstasy was increased from 15 months to 5 years imprisonment, while the penalty for sale of 8,000 pills was increased from 41 to 120 months (Slevin, 2001). Individual states have proposed, and in some cases passed, even more stringent legislation to deal with ecstasy. For example, legislation passed in Illinois in 2001 provided for mandatory minimum penalties of 6 to 20 years for those selling more than 15 grams of ecstasy (Zeleny & Biesk, 2001). These increased penalties for trafficking in ecstasy could also prove to be counterproductive as a result of the fact

that they could lead to the manufacture of counterfeit substances being sold as ecstasy. It is important to note that, as discussed in Chapter 1, most of the problems attributed to ecstasy are not, in fact, related to the drug itself, but rather to the effects of adulterants and counterfeit substances sold to users. The Federation of American Scientists criticized the increased penalties provided for ecstasy in the 2001 legislation, noting that they had “no justification, either pharmacologically or in policy terms” (Lindesmith Center, 2001a).

## METHAMPHETAMINE LEGISLATION

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In Chapter 1, we discussed the United States’ alleged “methamphetamine epidemic” in some detail. As a result of this alleged epidemic, several states enacted legislation to control use of methamphetamine, with most of these laws focusing on restricting access to products containing pseudoephedrine, which is used in manufacturing the drug and is contained in widely used cold and allergy medicines. Following the murder of a state trooper in 2003, Oklahoma became the first state to enact such a law, confining sales of pseudoephedrine products to licensed pharmacies and requiring consumers to sign a logbook when purchasing such products (Suo, 2005c). As of early 2006, 39 other states had passed similar laws (Webley, 2006), with the state of Oregon, under a law passed in 2005, going as far as to require a doctor’s prescription for individuals purchasing cold- and allergy-relief medicines (Cain, 2005).

As is the case with other drug legislation, however, the laws restricting access to pseudoephedrine products have led to a number of unintended consequences. For example, 7 months after the state of Iowa passed legislation restricting pseudoephedrine sales, seizures of methamphetamine laboratories in the state declined from 120 per month to 20 per month. While this law apparently achieved its purpose in restricting the manufacture of methamphetamine within the state of Iowa, it was accompanied by a “new flood of crystal methamphetamine coming from Mexico” (Zernike, 2006). The imported Mexican methamphetamine has higher levels of purity and as such is more highly addictive than domestically produced methamphetamine, thus leading to a higher probability of users overdosing. In addition, because the imported methamphetamine is more costly (\$800 for 1 ounce) than locally produced methamphetamine (\$50 per ounce), some police officers in Iowa indicated that thefts were increasing as people who once cooked the drug at home had to purchase it instead (Zernike, 2006). An additional indicator of the ineffectiveness of this legislation is revealed in data on the reason children are under state protection in Iowa. In southeastern Iowa, 4 months after the law took effect, 49% of children under state protection were taken as a result of their parents using methamphetamine—the same percentage as 2 years earlier (Zernike, 2006).

A similar situation occurred in Oklahoma. Following the passage of its law restricting sales of pseudoephedrine products, lab seizures in the state decreased from 90 per month in 2003 to 9 in the month of June 2005 (Suo, 2005a). However, this led to an influx of methamphetamine from “superlabs” in Mexico that was estimated to have 75% purity; seizures of smokeable Mexican methamphetamine in

Oklahoma increased from 384 cases in the 15 months before the law was passed to 1,875 since (Kurt, 2005). Tom Cunningham, the Task Force Coordinator for the Oklahoma District Attorney's Council, commented, "We took away their production. That didn't do anything for their addiction" (as quoted in Suo, 2005a). Similar comments were made by David Nahmias, U.S. Attorney for the Northern District of Georgia, whose state was also experiencing problems with methamphetamine and had passed legislation restricting the sale of pseudoephedrine products:

We had problems with the mom and pop labs, but 50 mom and pop labs aren't half of one of these shipments we're seeing here. Mexican cartels will replace meth supplied with local labs with double the volume, double the purity, double the quality. (as quoted in Suo, 2005b)

As of 2012, it was estimated that Mexican methamphetamine (which is as much as 90% pure) accounted for as much as 80% of the substance sold in the United States. The amount of methamphetamine seized on the Southwest border of the United States increased from approximately 4,000 pounds in 2007 to more than 16,000 pounds in 2011. (Salter, 2012)

While it thus appears that laws restricting the sale of pseudoephedrine products are simply displacing the methamphetamine problem, and possibly even exacerbating it, perhaps even more problematic is a law passed in the state of Tennessee in March of 2005. This law, modeled on sex offender notification laws, requires individuals convicted of methamphetamine-related crimes to register with law enforcement officials ("Tennessee Starts," 2006). Individuals in Tennessee can search an online database for the name, alias, birthdate, and location of methamphetamine offenders, with the name of the offender remaining in the database for 8 years (Childress, 2006a). On the surface, such laws seem to violate the civil rights of individuals. Even more problematic, and as has happened in some jurisdictions with sex offender notification laws, it is possible that individuals will access the information from the database to personally harass or inflict harm on individuals they believe to be methamphetamine users.

In considering legislation addressing the methamphetamine problem, it is also notable how, in comparison to the crack cocaine problem in the mid-1980s, the federal government has been relatively inactive. Recall that in the context of the alleged crack epidemic in the 1980s, the federal government moved quickly to establish mandatory sentencing for crack cocaine, creating a 100-to-1 sentencing disparity for crack versus powder cocaine. However, until the summer of 2005, the Drug Enforcement Administration essentially denied that methamphetamine constituted a serious national problem (Suo, 2005d), and the federal government was especially reluctant to consider national legislation that would impose restrictions on the sales of pseudoephedrine products. Considerable pressure exerted by legislators from states that were most affected by methamphetamine eventually led the federal

government to pass the Combat Methamphetamine Act in 2006. This law imposed controls over cold remedies containing pseudoephedrine, providing that consumers in every state would be limited to purchasing 3.6 grams of pseudoephedrine per day and 9 grams per month (the equivalent of approximately 300 pills). In addition, by October 2006, all retailers were required to keep cold medicines behind the counter and to record the name and address of all customers who purchased the products (Suo & Barnett, 2006). While this legislation may result in a reduction in the local production of methamphetamine, similar to other federal drug policies, the law is particularly inadequate for addressing the demand for methamphetamine. Notably, out of a total of \$12.4 billion drug control budget for 2006, the federal legislation included only \$16.2 million in new money for the treatment of methamphetamine users (Friedman, 2005).

## MARIJUANA LAWS

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### *Hemp*

Although the potential benefits associated with hemp are extensive, and although it has been reintroduced as a cash crop in a number of countries, including Great Britain, Germany, Australia, and Canada, the United States federal government continues to ban hemp and to mislead the public about this product. As Green (2004) notes, the fiber volume supplied by trees that take up to 30 years to grow can be harvested from hemp plants only 3 to 4 months after the seeds are planted, and on one-half the amount of land. Hemp crops are also environmentally friendly, in that they do not require herbicides and require little or no pesticide, and unlike most other crops, hemp actually enriches instead of depletes soil. Hemp is useful as a textile and a building material and in food products.

In July 2003, the United States 9th Circuit Court of Appeals ruled that it was legal for consumers to purchase granola, energy bars, salad dressings, and other food products that contain the seeds or oil from hemp. The market for hemp products in the United States at that time was estimated to be more than \$10 million per year (Kelly, 2003).

Although 28 states have considered legislation to liberalize their laws towards industrial hemp (Kolosov 2009), production of the substance has apparently not taken place in those states due to the federal government's opposition. Similar to other federal stances with respect to drugs, this ban on hemp has been produced through the dissemination of sometimes misleading and other times blatantly false information. For example, Ada Hutchinson, former head of the Drug Enforcement Administration, asserted "many Americans do not know that hemp and marijuana are both parts of the same plant and cannot be produced without producing marijuana" (as quoted in Green, 2004). As Green (2004) points out, however, the reason

most people do not know this is because it is simply not true; hemp and marijuana are completely different plants. The Drug Enforcement Administration further justifies its prohibition of hemp through claims that hemp crops provide camouflage for illegal marijuana growers. This contention is similarly nonsensical, given that hemp and marijuana plants are distinguishable from one another and marijuana growers would be reluctant to follow such a strategy because cross-pollination of the plants would ultimately reduce the THC content of marijuana (Green, 2004).

### *Medical Marijuana*

As discussed in Chapter 4, marijuana has been used for medicinal purposes for at least 300 years, and more than 100 articles on the therapeutic uses of the substance were published in professional journals between 1840 and 1900. Cannabis was listed in the *U.S. Pharmacopeia* as a recognized medicine from 1850 until 1942, and it could be purchased in local pharmacies in Texas until 1919 and in Louisiana until 1924 (Davenport-Hines, 2001). And while there is by no means scientific consensus on the medical utility of marijuana, despite the claims of former drug czar John Walters and other government officials, a number of prominent organizations and individuals support use of the substance for medical purposes. Reports by the National Institutes of Health and the Institute of Medicine claimed that cannabis and its constituents may have some clinical utility (National Institutes of Health [NIH], 1997). Similarly, in a publication from the National Academy Press, it was noted that “accumulated data indicate a therapeutic potential for cannabinoid drugs, particularly for symptoms such as pain relief, control of nausea, and vomiting, and appetite stimulation” (Joy, Watson, & Benson, 1999, p. 3). This report also pointed out that with the exception of the harms associated with smoking, the adverse effects of marijuana “are within the range of effects tolerated for other medications” (p. 4). Other organizations in favor of allowing the use of medical marijuana include the American Public Health Association, the Federation of American Scientists, the Physicians’ Association for AIDS Care, the Lymphoma Association of America, and the National Association of Prosecutors and Criminal Defense Attorneys (Zimmer & Morgan, 1997). The *New England Journal of Medicine* and the *Journal of the American Medical Association* have also taken stances in favor of medical marijuana.

Georgia Congressman Bob Barr wrote an editorial in 1999 that was syndicated in a number of newspapers across the United States. Referring to scientific studies proving that marijuana had beneficial medicinal properties, Barr (1999) wrote, “What kind of message does this send to our kids? It tells our children that government scientists have concluded that marijuana might be good for them. In other words, it puts mind-altering drugs on the same level as vitamins or healthy breakfast cereal.”



In 1988, Francis L. Young, the Chief Administrative Law Judge of the Drug Enforcement Administration, recommended that marijuana be removed from Schedule I of the Controlled Substances Act so that it could be used for medical purposes. Young asserted that cannabis fulfilled the legal requirement of currently accepted medical use in treatment and noted that it was “one of the safest therapeutically active substances known to man” (as quoted in Grinspoon & Bakalar, 1995, p. 1875). However, the DEA ignored this recommendation, and since then, DEA agents and other government officials have actively engaged in a campaign of pursuing medical marijuana users and providers in states where medical marijuana legislation has been passed.

Although it is not widely known, there was also a federal government program that supplied marijuana to certain individuals. The “compassionate care” program began in 1976 when Robert Randall, who suffered from glaucoma, convinced a court that marijuana was a medical necessity to improve his condition. Fourteen other patients were subsequently enrolled in this program, but enrollment was closed in 1992, and as of 2003, only seven patients remained (Craig, 2003). These individuals received 300 marijuana cigarettes from the government each month, and heavy security requirements meant that keeping them supplied with the substance costs some \$285,000 per year. (“Where There’s Smoke,” 1999)

As of January 2013, 18 states and the District of Columbia had passed medical marijuana legislation, and at least seven other states were considering it (Cohen 2013). Although there is wide variation across states in the specifics of these laws, the most common type protects doctors, pharmacies, and patients involved in federally approved research on the medicinal value of marijuana from prosecution. In most states where marijuana is legal for medicinal purposes, laws protect doctors who prescribe marijuana or discuss its medicinal value with patients, while some states have removed marijuana from Schedule I to a lower schedule in recognition of its medicinal value (Drug Policy Alliance, 2003i). While it would appear on the surface that these state laws allow for the provision of medical marijuana, they are in conflict with federal legislation, which continues to list marijuana as a Schedule I drug, and with Article IV of the Constitution, which holds that the federal law shall be the “law of the land” and hence prevail over state laws.

In states where medical marijuana legislation has passed, businesses catering to consumers have proliferated. For example, as of 2010, Colorado (where a constitutional amendment legalizing medical marijuana passed in 2000; Segal, 2010) had 113,000 residents registered as medical marijuana patients, and an estimated 1,218 marijuana farms and 808 dispensaries (Simon, 2010); the city of Denver alone had at least 250 dispensaries (Reuteman, 2010). In California, an estimated 400,000 individuals had medical marijuana cards—in that state, sales of medical marijuana topped \$1.3 billion in 2010 (Harkinson, 2011). Although perhaps overstated, one reporter noted that “in parts of California, licensed medical marijuana dispensaries

have become as common as In-N-Out burger stands” (Hendrix, 2009), another commented that [in the state of California] “storefront purveyors (of medical marijuana) are nearly as easy to find as a taco stand” (Welch, 2009).

In response to medical marijuana initiatives passed in Arizona and California in the 1980s, President Clinton’s drug czar, Barry McCaffrey, threatened to arrest any doctor who merely *mentioned* to a patient that marijuana might help him or her (Boyd & Hitt, 2002), and at one point referred to medical marijuana as “Cheech and Chong medicine” (as quoted in Forbes, 2000). McCaffrey and other government officials have justified their stance against medical marijuana by, among other things, arguing that there is no need for it because the same beneficial effects can be achieved through the use of Marinol (synthetic THC). However, as Zimmer and Morgan (1997) note, smoking marijuana is more effective than consuming Marinol because smoking delivers THC to the bloodstream more quickly than swallowing Marinol. A further and related disadvantage of Marinol is that because it is swallowed, it must be processed through the body, and a significant portion of the THC is transformed into other chemicals. Smoked marijuana, on the other hand, delivers most of the THC that is inhaled. There is also some evidence to suggest that the psychoactive effects of Marinol are more severe than for smoked marijuana (Zimmer & Morgan, 1997). Conant (1997) further asserts that an indirect indicator of the superiority of marijuana over Marinol is that even though many health insurance plans in the United States will pay for Marinol, a significant percentage of patients spend their own money to purchase marijuana, even at risk of criminal prosecution. And despite the federal government’s contention that Marinol is more effective than smoked marijuana, it is notable that the Drug Enforcement Administration and the National Institute on Drug Abuse have actively prevented attempts by scientists to conduct research in order to compare the effectiveness of the two substances. Dr. Donald Abrams, a researcher at the University of California, San Francisco, received approval from the Food and Drug Administration for a comparative study of marijuana and Marinol in 1993, but the DEA and NIDA refused to provide him with access to the marijuana he required to conduct the study (Pollan, 1997).

President George W. Bush’s drug czar John Walters was even more stringent in his opposition to medical marijuana laws, at one point referring to medical marijuana as “medicinal crack” (as quoted in Drug Policy Alliance, 2003b). In what some have argued was a violation of the 1939 Hatch Act, which prevents federal government officials from using their authority to affect the outcome of an election, Walters campaigned against a marijuana decriminalization ballot initiative in the state of Nevada in 2000, publicly claiming, among other things, that passage of the law would make Nevada a “vacation spot for drug traffickers” (as quoted in Janofsky, 2002). The proposed Nevada legislation was eventually defeated by a vote of 61% to 39%, and critics also noted that Walters had not reported his activities in campaigning against it to the state of Nevada, as required by the state’s campaign laws (Drug Policy Alliance, 2002b). Walters also campaigned against a medical marijuana law in Maryland, urging the state’s governor to “see through the con” and not sign

the bill and arguing that the notion that marijuana was a “proven efficacious medicine” made no more sense than “an argument for medicinal crack” (as quoted in Montgomery & Whitlock, 2003). Maryland Governor Robert Ehrlich eventually approved the state’s medical marijuana legislation, marking the first time a Republican governor had done so (Drug Policy Alliance, 2003b).

Proposed legislation to allow marijuana for medical purposes was also blocked in Washington, D.C. In September 2002, a federal appeals court overturned, without providing any rationale, a previous court ruling that had cleared the way for a medical marijuana initiative to be considered by voters in an election in D.C. (Santana, 2002). Interestingly, this was the second time that the measure had been blocked in D.C.—in 1998, voters approved a medical marijuana initiative by a vote of 69% to 31%, but Congress prevented the law from going into effect.

In addition to efforts to block medical marijuana legislation, the federal government has initiated a number of campaigns against medical marijuana users and providers, particularly in California. One such case involved Ed Rosenthal, a medical marijuana advocate and provider who was convicted of trafficking in the substance in California. In this case, Judge Charles Breyer prohibited the jury from hearing Rosenthal’s medical marijuana defense. When jurors discovered this after the trial, several of them wrote to Judge Breyer, expressing concern that they had convicted Rosenthal without having access to all the evidence in the case and recommending that the judge not sentence him to prison (“Federal Persecution,” 2003). In commenting on the Rosenthal case, a *New York Times* editorial referred to the federal government’s pursuit of medical marijuana as “mean-spirited and unconstitutional. . . . Medical marijuana can be a legitimate treatment for cancer patients who are nauseated by chemotherapy, AIDS patients who have lost their appetites, and other seriously ill people” (“Medical Marijuana,” 2002). Judge Breyer eventually heeded the jury members’ wishes and sentenced Rosenthal to only one day in prison. However, federal authorities vowed to continue the fight against marijuana. A spokesman for the Office of National Drug Control Policy commented,

It would be unfortunate if anyone misread this ruling to mean that the federal government is not going to enforce our laws against drug trafficking. Marijuana is a dangerous drug. . . . It would be even more unfortunate if the ruling misled sick people who are truly suffering and steered them away from the best medicine and practices. (as quoted in R. Sanchez, 2003)

While medical marijuana laws remain in a state of flux, a decision by an appellate court in San Francisco in 2003 held that while doctors could be prosecuted for assisting their patients in acquiring illegal drugs, they could not be prosecuted for merely giving patients medical advice indicating that marijuana might be useful in dealing with their particular medical conditions. The chief judge in this case ruled that the federal policy was inconsistent with both free speech protections under the First Amendment to the Constitution and states’ traditional authority over the

practice of medicine (Egelko, 2003). However, this court decision did not really result in further clarity for doctors, since it stated,

If, in making recommendations, the physician intends for the patient to use it as a means for obtaining marijuana, as a prescription is used as a means for a patient to obtain a controlled substance, then the physician would be guilty of aiding and abetting the violation of the federal law. (as quoted in Tuller, 2003)

In another case eventually decided by the U.S. Supreme Court, in response to Drug Enforcement Administration officials' destruction of their medical marijuana plants, two patients and two marijuana providers from the state of California sued the federal government. They argued that applying the Controlled Substances Act to a situation in which marijuana was being grown locally, not in violation of state law, and for no remuneration exceeded Congress's authority under the commerce clause (Eddy, 2006). In 2003, the Ninth Circuit Court of Appeals in San Francisco held that states were free to adopt medical marijuana laws as long as the substance was not sold, transported across state lines, or used for nonmedicinal purposes. However, the federal government appealed this decision, and in June 2005, the Supreme Court, in a six-to-three decision, ruled that Congress's power to regulate commerce extended to local activities that are "part of an economic class of activities that have a substantial effect on interstate commerce" (*Gonzales v. Raich* cited in Eddy, 2006). While the Supreme Court's decision in this case does not overturn state medical marijuana laws, it does allow the Drug Enforcement Administration to continue to enforce the Controlled Substances Act against medical marijuana patients and those who supply them with the drug.

In addition to arresting and prosecuting medical marijuana providers and physicians who recommend marijuana to their patients, the federal government has used crack house statutes to charge individuals who operate medical marijuana clinics and has enacted legislation penalizing states that pass medical marijuana legislation by denying them funds from the Office of National Drug Control Policy (Durbin, 2003b).

The federal government's aggressive pursuit of doctors and medical marijuana providers has led a number of smaller jurisdictions, particularly in California, to pass local ordinances to protect providers. In July 2002, for example, voters in San Francisco approved a local bylaw that would require officials to examine the possibility of the city itself growing and distributing medical marijuana (Drug Policy Alliance, 2002c). Also in California, in response to a DEA raid on a medical marijuana distribution cooperative in Santa Cruz, the city council allowed members of the cooperative to hand out marijuana publicly to its patients at city hall (Ritter, 2002). Later, the same city deputized two members of the "Wo/men's Alliance for Medical Marijuana," thereby providing them with the legal authority to cultivate, distribute, and possess medical marijuana because as deputies, they were, in effect, enforcing drug laws (Watercutter, 2002).

*The Recent War on Medical Marijuana*

As Norm Stamper (former Seattle police chief) commented, "It wasn't hard to put together a report showing how the Obama administration continues to wage the failed 'war on drugs' even while pretending to end it. Although President Obama has talked about respecting states' rights to enact medical marijuana laws, his DEA [Drug Enforcement Administration] has raided state-legal medical marijuana providers at a higher rate than the Bush administration. Similarly, this president has continued a Bush-era budget ratio that heavily favors spending on punishment over providing resources for treatment, even though he has said drug addiction should be handled as a health issue." (as quoted in Friedersdorf, 2011)

As a presidential candidate, and after taking office, President Obama indicated that his administration would take a hands-off approach to medical marijuana (Egelko, 2011; Yardley, 2011). This stance was reflected in a 2009 statement by federal Justice Department officials that indicated that, as a general rule, prosecutors should not focus their resources on "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana" (as cited in Baker, 2011). However, in an interesting switch in focus, a 2011 Justice Department memo stated, "we maintain the authority to enforce [federal law] vigorously against individuals and organizations that participate in unlawful manufacturing and distribution activity involving marijuana, even if such activities are permitted under state law" (as cited in Baker, 2011). In addition, the 2011 National Drug Control Strategy claimed that marijuana was "addictive and unsafe," and devoted five pages to attacking marijuana legalization and medical marijuana. As Gutwillig and Piper (2011) note,

The administration's disconnect from science is shocking. A federally commissioned study by the Institute of Medicine more than a decade ago determined that nausea, appetite loss, pain and anxiety can all be mitigated by marijuana. The esteemed medical journal *Lancet Neurology* reports that marijuana's active components "inhibit pain in virtually every experimental pain paradigm." The National Cancer Institute, part of the U.S. Department of Health and Human Services, notes that marijuana may help with nausea, loss of appetite, and insomnia.

Under the Obama administration, there have been at least 200 raids and 70 indictments against medical marijuana providers in six states (Martin, 2012e). While perhaps overstated, Rob Kampia (Director of the Marijuana Policy Project) referred to Obama as "the worst president in history when it comes to medical marijuana" (2012, p. 55). Although some of these raids focused on dispensaries that were located close to schools, one legislator from Washington State (which had recently allowed for the sale of liquor in grocery stores) questioned why marijuana dispensaries were more dangerous to young people than grocers (Martin, 2012e).

Rob Kampia (Director of the Marijuana Policy Project) asserts that the targeting of medical marijuana providers and consumers is the result of pressures on Drug Enforcement Administration officers to “bust as many people as possible while not getting shot in the process.” He notes that it is easier to target a medical marijuana business (many of which advertise in newspapers) than it is to investigate a group selling cocaine, [so] “the DEA guys started targeting people who dispense medical marijuana.” (2012, p. 56)

As Ethan Nadelmann, Director of the Drug Policy Alliance, pointed out in a *New York Times* editorial (Nadelmann, 2011), in addition to the hundreds of raids of medical marijuana dispensaries that have been conducted by the Drug Enforcement Administration, pressures are also being exerted on medical marijuana businesses by other federal government agencies (see also Eckholm, 2011). Nadelmann notes, for example, that the Treasury Department has forced banks to close the accounts of medical marijuana businesses that are in fact operating legally under state laws, that the Internal Revenue Service has required dispensary owners to pay punitive taxes that are not imposed on other businesses, and that the Bureau of Alcohol, Tobacco, and Firearms ruled that medical marijuana patients cannot legally purchase firearms. Importantly, Nadelmann argues that these federal crackdowns will not be successful in stopping the trade in marijuana but will instead serve to push it back underground, with potentially higher levels of violence and other social harms resulting.

In light of the scientific evidence demonstrating the medical uses of marijuana and support for medical marijuana laws by several prominent organizations, the federal government’s actions with respect to the substance seem terribly misguided. The government’s stance on marijuana in general, and medical marijuana in particular, also seems inconsistent with public sentiment toward the substance. A *CBS News* poll conducted in the fall of 2011 found that 77% of Americans thought medical marijuana should be allowed (Backus, 2011). However, some federal government officials apparently view the passage of medical marijuana legislation and the relaxation of penalties for cannabis use as a potential threat to the larger War on Drugs and have deemed it necessary to exercise their hegemony with respect to drug legislation.

### *Marijuana Legalization Measures*

Despite the federal government’s stance toward marijuana, in recent years, some states have included marijuana legalization measures on voters’ ballots. Rivas (2010) argues that three factors seem to be driving the momentum behind these measures: (1) baby boomers who consumed marijuana in their youth do not share previous generations’ fear of the substance; (2) economic crises have reduced the budgets of law enforcement (and state governments more generally), forcing states to seek alternative revenue sources; and (3) the level of drug-related violence in Mexico (see also Chapter 12) “shows what happens when a rhetorical war turns all too real” (Rivas, 2010).

In the fall of 2010, a marijuana legalization measure, Proposition 19 (the “Regulate, Control, and Tax Cannabis Act”) was included on the ballot in the state of California

(McKinley, 2010). Likely in reaction to some polls indicating the measure had a reasonably good chance of passing, in an interesting pre-emptive move, Governor Arnold Schwarzenegger signed a law just prior to the vote that made the penalty for marijuana possession in the state of California equivalent to a traffic ticket: a \$100 fine and no provision for jail time. This strategy was important, since one of the main arguments of proponents of Proposition 19 was that the state's marijuana laws cost too much to enforce and prosecute (Lagos, 2010). In opposition to this law, there were typical (misguided) pronouncements by law enforcement officials, such as the police chief in Pleasant Hill, California, who claimed, "If the price drops, more people are going to buy it. Low-income people are going to buy marijuana instead of buying food, which happens with substance abusers." He added that passage of Proposition 19 would make the state of California "a laughingstock" (as quoted in Wohlsen, 2010). Interestingly, one of the largest contributors to the campaign against marijuana legalization in California was the state's beer and beverage distributors—"having branded their products with nearly every major American ritual, Big Alcohol does not want marijuana to get a piece of that large pie of money spent to distract ourselves from ourselves" (Egan, 2010). Although Proposition 19 was ultimately defeated by a margin of 56.5% opposed versus 43.5% in favor, younger voters were much more likely to support it, and 65% of voters in San Francisco approved the measure ("Prop. 19," 2010).

In the summer of 2012, Chicago Mayor Rahm Emanuel (former Chief of Staff for President Obama) proposed an ordinance that would allow police officers in that city to issue tickets with fines ranging from \$100 to \$500 for individuals caught in possession of 15 grams or less of marijuana. Chicago Police Superintendent Garry McCarthy, whose officers made more than 18,000 arrests for marijuana possession in 2011, supported the proposal because, he argued, it would free up police time: "I am pleased that Mayor Emanuel has taken this step to address this important issue. . . . Passing this ordinance will be a major victory in promoting safe neighborhoods and reducing crime." (as quoted in Mack, 2012)

Three states—Colorado, Oregon, and Washington—had marijuana legalization measures on the fall 2012 ballot. Colorado's measure, known as Amendment 64, would permit retail stores to sell marijuana and would tax and regulate marijuana in a fashion similar to alcohol. Among the backers of the Colorado legislation was Bruce Madison, former associate medical director at the University of Colorado School of Medicine, who commented,

As physicians, we have a professional obligation to do no harm. But the truth is that the Colorado marijuana laws do just that, by wasting millions of dollars in a failed war on marijuana, by ruining thousands of lives by unnecessary arrest and incarceration, and by causing the deaths of hundreds of people killed in black market criminal activities. (as quoted in Horowitz, 2012)

The state of Washington had considered the legalization of marijuana as early as 1971, when a bill was introduced to the legislature but ultimately did not pass. Prior

to the inclusion of the marijuana legalization measure on the 2012 ballot, Washington Governor Christine Gregoire (as well as Rhode Island Governor Lincoln Chafee) had petitioned the Drug Enforcement Administration to reclassify marijuana as a Schedule II drug, thereby recognizing its therapeutic value (Martin, 2011). Washington's measure I-502 would make it legal for individuals 21 years of age and older to possess up to 1 ounce of marijuana (or up to 1 pound of marijuana-containing baked goods). It was estimated that if the measure passed, the state of Washington would receive approximately \$500 million in taxes and licensing fees per year (Carson, 2012) and that there would be about 328 state marijuana stores serving more than 350,000 customers (Martin, 2012b).

Among the supporters of the Washington legislation were several prominent politicians in the state, former federal prosecutor John McKay, Seattle City Attorney Pete Holmes, Seattle's mayor and city council (Garber & Miletich, 2011; Martin, 2012a), international travel guide Rick Steves, the National Association for the Advancement of Colored People, the Children's Alliance (a statewide advocacy group for children's interests), the American Civil Liberties Union of Western Washington, and the national Drug Policy Alliance, which contributed at least \$715,000 to the pro-Initiative 502 campaign (Carson, 2012). In addition, the pro-I-502 campaign received \$1.5 million in contributions from Progressive Insurance founder Peter Lewis (Martin, 2012c). King County Sheriff Steve Strachan, a former D.A.R.E. officer, also supported the legalization campaign, noting, "with alcohol being highly regulated, we're able to have a more reasonable discussion about it" (as quoted in Westneat, 2012). However, Sheriff Strachan was apparently rare among his law enforcement counterparts, as among those groups and individuals opposed to the legislation were included the Washington Association of Sheriffs and Police Chiefs. The two candidates for Washington governor (former state Attorney General), Republican Rob McKenna and Democrat Jay Inslee, were also opposed to the measure (O'Neill, 2012).

Interestingly (and as had happened with the 2010 marijuana legalization measure in California), many medical marijuana providers and activists in the state of Washington were opposed to the legislation, partly because of their contention that the legislation did "not go far enough" because it did not allow for legal home growing of marijuana except by medical marijuana patients (Hefter, 2012). This group was also concerned about a clause in the proposed legislation that addressed driving under the influence of marijuana. Under the proposed policy, impairment was assumed at 5 nanograms of THC per milliliter of blood (Johnson, 2011), which, the medical marijuana providers suggested, would result in significant numbers of medical marijuana patients being charged with driving under the influence.

The 2012 Washington State voters' pamphlet listed arguments for and against Initiative 502 (Clark County, 2012). Among the arguments in support of the legislation were included the fact that the initiative would provide "billions in new revenue" for the state and that "almost all marijuana law enforcement is handled by state and local police—it's time for Washingtonians to decide Washington's laws, not the federal government." Among the arguments opposed, it was noted that legalizing marijuana "will greatly increase its availability and lead to more use, abuse, and addiction among adults and youth. . . . Marijuana recently surpassed alcohol as the number one reason



youth enter substance abuse treatment.” As noted in Chapter 1 and elsewhere in this book, there is little scientific evidence to indicate that the increased availability of marijuana will necessarily lead to long-term increases in use. And, as noted in Chapter 8, the increasing proportion of youth entering treatment for marijuana use is largely the result of criminal and juvenile justice system referrals of youth arrested for using marijuana.

Although the marijuana legalization measure in the state of Oregon did not pass, legalization measures passed in both Colorado (with approximately 55% of voters in favor; “Amendment 64,” 2013) and Washington State (with approximately 56% of voters in favor (“Marijuana Legalization,” 2012). In an interview with Barbara Walters of *ABC News*, President Obama indicated that recreational marijuana users in Colorado and Washington would not be targeted by federal law enforcement officials: “We’ve got bigger fish to fry . . . It would not make sense for us to see a top priority as going after recreational users in states that have determined it’s [marijuana] legal” (as quoted in Dwyer, 2012). However, if the federal government’s actions with respect to medical marijuana are any indication, it is unlikely that the federal agencies will not react. It has been speculated that the federal government might file an injunction to block the bill’s passage and/or block federal grant money to the state of Washington (O’Neill, 2012). In fact, when asked a question regarding how the federal government would respond if I-502 passed, in an interview on *60 Minutes*, the deputy U.S. attorney general commented, “We’re going to take a look at whether or not there are dangers to the community from the sale of marijuana and we’re going to go after those dangers” (as quoted in Hopperstad, 2012).

### SIGNS OF CHANGE? RECENT CHANGES IN STATE DRUG LAWS AND DEVELOPMENTS AT THE FEDERAL LEVEL

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I don’t favor decriminalization, I favor legalization, not just of pot, but of all drugs, including heroin, cocaine, methamphetamine, psychotropics, mushrooms, and LSD. . . . It’s not a stretch to conclude that our draconian approach to drug use is the most injurious policy since slavery. (Stamper, 2005b)

A study by the National Center on Addiction and Substance Abuse (2009) estimated that in 2005, federal, state, and local governments spent at least \$467.7 billion (combined) as a result of substance abuse and addiction, representing 10.7% of their \$4.4 trillion budgets. The study also estimated that of every dollar federal and state governments spent on substance abuse and addiction in 2005, only 1.9 cents was spent on prevention and treatment, 1.4 cents on taxation and regulation, 0.7 cents on interdiction, and 0.4 cents on research. The remaining funds were spent on “shoveling up the wreckage”—with health care costs totaling \$207.2 billion and \$47 billion on criminal justice system expenditures. The report noted that “the federal government spends more than 30 times as much to cope with the health consequences of addiction as it spends on prevention, treatment, and research.”

Bruce Alexander (1990) has argued that one of the primary reasons drug policies have been ineffective, and in many cases counterproductive, is that they are typically determined by national law. He asserts that one possible path to more rational and

progressive drug regulations is for them to be “as local as possible” (p. 293). The medical marijuana policies of individual states and localities discussed above are examples of this principle, and recent developments in several states suggest that many of them are rethinking their severe policies toward drugs. While part of the impetus for these changes has been related to a growing realization that drug treatment can be effective (see Chapter 8), a number of states have moved to relax their policies as a result of the costs associated with incarcerating large numbers of drug offenders.

In 2002, the state of Washington passed legislation that reduced by 6 months the 21- to 27-month minimum sentence for first-time convictions for trafficking in heroin and cocaine and also eliminated the “triple-scoring” sentences for nonviolent drug offenders (Thomas, 2002). This law was projected to save Washington State \$45 million per year, with the money saved as a result of reductions in the length of sentences being devoted to funding drug courts in the state.

Also in Washington State, a 2003 ballot initiative in the city of Seattle required police to make marijuana possession their lowest enforcement priority. Given his opposition to laws that could potentially reduce the severity of penalties imposed on drug offenders, drug czar John Walters referred to this initiative as a “con” and a “silly and irresponsible game.” But there were also indications that at least some law enforcement officials in Washington State were re-evaluating their approach to drugs. Then Seattle Police Chief (current drug czar in the Obama administration) Gil Kerlikowske, in reaction to an announcement that drug czar John Walters would travel to that city to discuss drug issues, noted that while he would be willing to talk to Walters,

The one thing that is pretty clear here is that there’s a strong recognition that the drug issues and the drug problem are not just a law enforcement or criminal justice problem. . . . Just arresting the same people, putting handcuffs on the same people, makes no sense. (as quoted in Pope, 2003)

In March 2003, legislation in Michigan came into effect that repealed that state’s mandatory minimum sentences for drug offenses and resulted in the release of several first-time nonviolent drug offenders from prison. This law reformed Michigan’s 1978 legislation that required judges to impose lengthy mandatory minimum penalties that were based on the quantity of drugs in given cases. With this particular change, judges in Michigan could use sentencing guidelines to impose sentences based on a range of factors in each case instead of relying strictly on the weight of the drug (Drug Policy Alliance, 2003h).

In 1973, the state of New York enacted legislation (known as the Rockefeller drug laws) that created mandatory minimum sentences of 15 years to life for possession of 4 ounces of drugs (equivalent to the penalty for second-degree murder). Similar to the federal drug legislation discussed above, these laws were disproportionately applied to African Americans (and, to a lesser extent, Hispanics) and led to high levels of incarceration in the state of New York. After considerable criticism of these laws in the late 1990s and 2000s, in 2009, New York Governor David Paterson stated, “I can’t think of a criminal justice strategy that has been more unsuccessful than the Rockefeller drug laws” (as quoted in Liu, 2009) and revised

the laws. Under the revisions, mandatory minimum sentences for drug laws violations were removed, allowing judges to sentence offenders to shorter prison sentences and also to order substance abusers to enter addiction treatment programs in lieu of prison (Davis, 2012). Importantly, the changes to the legislation were retroactive, allowing more than 1,000 offenders in prison to apply to be resentenced (Canfield, 2009). It was estimated that repeal of the Rockefeller drug laws would save the state of New York approximately \$250 million per year (Hastings, 2009).

The state of California, which passed Proposition 215 (the Compassionate Use Act) allowing for the use of medical marijuana in 1996, also passed Proposition 36 (the Substance Abuse and Crime Prevention Act) in 2000. This legislation allowed individuals convicted of their first and second nonviolent drug possession offenses the option of participating in drug treatment in lieu of incarceration. It also allowed offenders on probation or parole for certain offenses to receive treatment instead of incarceration after violations of drug-related conditions of their probation or parole (Uelmen et al., 2002). Individuals convicted of drug trafficking or other felony offenses were not eligible for the program. Although there have been some negative consequences associated with this legislation that were discussed in Chapter 8, in its first year of operation, Proposition 36 was estimated to have saved the state of California \$275 million (Haake, 2003).

While these and other drug policy developments at the state level are encouraging, it is clear that the federal government feels such policies represent a threat to its hegemony in the drug policy arena. One example of this is the situation in Arizona. In 1996, voters in that state approved Proposition 200 (by a margin of two to one), which had as its basic premise “drug abuse is a public health problem.” The initiative called for the release from prison of all nonviolent drug offenders who had been convicted of drug possession and recommended drug treatment, education, and community service, as opposed to incarceration, for minor drug offenders. The proposition also allowed doctors to prescribe not just marijuana but any Schedule I drug to a patient if medical research supported the effectiveness of using the drug and if a second doctor concurred with the decision. However, the Clinton administration criticized this proposition, with Drug Czar Barry McCaffrey referring to it as “part of a national strategy to legalize drugs” (Schlosser, 1997) and threatened to revoke the licenses of physicians who prescribed marijuana. A Drug Enforcement Administration press release in response to this legislation noted that it was “in conflict with public safety and the physical well-being of innocent citizens” (cited in U.S. Department of Justice, 1996).

An Arizona Supreme Court report on the effectiveness of Proposition 200 estimated that it had saved the state \$2.6 billion in 1 year and that 77.5% of those who had been placed on probation for drug possession offenses under the provisions of the Act tested negative for drug use, thus indicating that the law had resulted in several benefits (Arizona Supreme Court, 1999). However, perhaps in response to the above-mentioned pressure from the federal government, the Arizona legislature overturned several of the more progressive aspects of this legislation in 1997.

Other states that have recently softened their drug laws include South Carolina, where in 2010, a law that eliminated mandatory minimum sentencing for some drug offenses and reduced sentences for some repeat drug offenders was passed (The Leadership Conference, 2010).

It is important to note that not all states are moving in the direction of more progressive drug policies. In 2012, Governor Rick Scott of Florida vetoed legislation that would have diverted some nonviolent drug offenders into treatment (“Rick Scott Vetoes,” 2012). And, as was discussed in Chapter 7, Florida is among the states that have aggressively promoted drug-testing of public assistance recipients and state employees.

Finally, at the level of the federal government, there was the passage of the Fair Sentencing Act in 2010, which narrowed the gap between crack and powder cocaine sentencing from 100 to 1 to 18 to 1 (Douglas, 2010). Presaging the passage of this legislation, former Republican Congressman J. C. Watts and former Congressman and former head of the Drug Enforcement Administration Asa Hutchinson wrote an editorial in the *Washington Post* calling for the Attorney General (who had earlier implied that changing the federal crack cocaine law would flood the streets of the United States with violent felons) to change the law:

The truth is that for years our legal system has enforced an unfair approach to sentencing federal crack offenders. . . . It makes no sense that somebody arrested for a crack cocaine offense should receive a substantially longer prison term than somebody who is convicted of a powder cocaine offense. (Watts & Hutchinson, 2008)

In defending the eventual change in this legislation and acknowledging the damage the previous legislation had done, Attorney General Eric Holder essentially concurred with Watts and Hutchinson and commented, “There is simply no logical reason why their [crack cocaine users/traffickers] sentences should be more severe than those of other cocaine offenders” (as quoted in Serrano, Savage, & Williams, 2011). Under this change, an estimated 12,000 federal prisoners would be eligible for sentence reductions, with an average reduction of approximately 3 years (Schwartz, 2011). While this change should certainly be viewed as a positive development, a federal appeals court judge in Chicago, noting that the disparity between crack and powder had not been completely eliminated, commented that the act was misnamed, suggesting that it instead should have been called “the not quite as fair as it could be sentencing act” (as quoted in Liptak, 2011). And, as Alexander (2010) comments, “merely reducing sentence length, by itself, does not disturb the basic architecture of the new Jim Crow” (p. 14).

A 1997 ONDCP publication asserted “the foremost objective of the Office of National Drug Control Policy is to create a national drug control strategy based on science rather than ideology (p. 1)—a similar sentiment was echoed in the 2012 National Drug Control Policy statement, which notes that the administration’s strategy to reduce drug use and its consequences would be based on a “collaborative, balanced, and science-based approach” (ONDCP, 2012, p. 1). In light of the policies and activities of the federal government reviewed above, this assertion needs to be called into question.

Nevil Franklin, a former Baltimore narcotics police officer and Executive Director of Law Enforcement against prohibition, commented, “President Obama needs to think about where he would be right now had he been caught with drugs as a young black man. It’s probably not in the Oval Office, so why does he insist on ramping up a drug war that needlessly churns other young black men through the criminal justice system?” (as quoted in Saunders, 2011)

And despite some optimism that drug policies would change under the Obama administration, this has not been the case. As Alexander (2010) notes, Obama chose Joe Biden, “one of the senate’s most strident drug warriors,” as his vice president (p. 238). Obama also chose Rahm Emanuel, a “major proponent of the drug war and slashing of welfare rolls during the Clinton administration,” as his chief of staff. More generally, Alexander (2010) notes that President Obama’s budget for law enforcement was actually worse than that of the Bush administration in terms of the ratio of funds devoted to drug prevention and treatment as opposed to law enforcement.

## CONCLUSION

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While many Western countries address drug use and dependence primarily as public health issues (see Chapter 12), the United States has a long history of dealing with drug problems through the criminal justice system. Criminal justice responses to drug use tend to do little or nothing to reduce drug use in the general population while simultaneously creating a number of social and economic problems. The most problematic consequences of these policies is that they substantially increase prison populations and justice system expenditures and that they disproportionately impact members of minority groups and the lower social classes.

Drug offenses are among the most severely penalized crimes in the United States. Individuals arrested for drug offenses are among the most likely to be sent to prison for long periods of time, with drug crimes generally being punished more severely than the violent crimes of assault, robbery, and rape. The tremendous number of arrests for drug offenses and the severe penalties that result from a drug conviction have contributed to unprecedented levels of imprisonment in the United States.

As noted, there are substantial disparities in the application of drug laws across social class and race. As discussed in Chapter 5, the use of illegal drugs crosses all income levels and racial/ethnic groups, and African Americans and Hispanics use illegal drugs less frequently or in approximately the same proportion as whites. Despite this, members of minority groups and the lower class have been disproportionately targeted and affected by drug enforcement policies. Members of minority groups are more likely to be poor, and the poor are least able to afford a private attorney, making them less successful at defending themselves from drug charges. Additionally, higher drug arrest rates for African Americans result from the concentration of law enforcement in inner-city areas where illegal drug use and trafficking are more likely to take place in the open and where African Americans are disproportionately concentrated.

Racial- and class-based disparities in the application of drug laws result from a number of specific policies. These include “crack baby” legislation, public housing eviction policies, denying welfare benefits to people convicted of drug offenses, and mandatory minimum sentences for drug offenses, among others. While these policies may have been enacted with the goal of reducing drug use, they have contributed to massive growth in the United States’ prison population and have disproportionately affected the poor and racial minorities.

Another disturbing development in recent U.S. drug policies is asset seizure laws that allow for the confiscation of assets of individuals allegedly involved in drug transactions.

The apparent goal of civil forfeiture laws is to deprive drug traffickers of the proceeds and assets that have been produced by their criminal activity and may be used to further it, but there is no evidence to suggest that these laws have reduced drug trafficking and use. Because criminal justice agencies are allowed to keep significant proportions of the assets seized, drug enforcement officials may pursue cases that involve the most lucrative seizures even if those cases do not involve the most serious offenses. These laws also encourage corruption in law enforcement and represent a violation of the civil rights protections guaranteed under the Constitution to individuals charged with crimes.

Both the RAVE Act and legislation intended to control domestic methamphetamine production represent policies implemented hastily in order to “do something” about perceived drug epidemics. In the case of the RAVE Act, policy makers created legislation penalizing rave organizers and club owners for maintaining an environment where ecstasy use is believed to be more likely to occur. As users can consume ecstasy in virtually any setting, the RAVE Act is unlikely to significantly reduce use of the drug, but it may contribute to drug-related harm. This policy discourages safety measures (e.g., chill-out rooms) implemented by club owners because these measures could be used as evidence that club owners are aware that ecstasy use is occurring in their establishment.

Similarly, in an attempt to prevent the production of methamphetamine in light of a socially constructed methamphetamine “epidemic,” legislation in the mid-2000s restricted public access to products containing pseudoephedrine. Those laws were partially successful in limiting the domestic manufacture of methamphetamine, but they did not reduce availability of the substance, never mind demand for the drug. The reduction in domestic methamphetamine production resulting from this legislation opened the market for international smugglers, and imported methamphetamine, largely from Mexico, quickly met the demand. Mexican methamphetamine generally has higher levels of purity and thus increases the risk of overdose; in addition, Mexican-produced methamphetamine may be more addictive than domestically manufactured methamphetamine.

A great deal of controversy surrounds the regulation of marijuana in the United States. With respect to the medical use of this product, organizations such as the American Public Health Association, the Federation of American Scientists, and the National Association of Prosecutors and Criminal Defense Attorneys favor policy allowing the use of medical marijuana, but critics of such policies argue that they are just a “disguised step” toward drug legalization. While the federal government resolutely opposes any policy that relaxes the penalties for marijuana, several states have adopted decriminalization policies, treating marijuana possession as an infraction punishable by a fine rather than incarceration.

More generally, an increasing number of legislators at the state level are rethinking the rationality of severe policies toward illegal drugs. In part, this shift in thinking comes from a realization that drug treatment can be effective (see Chapter 8) and that treatment may provide a cost-effective alternative to the exceptionally expensive practice of incarcerating large numbers of nonviolent drug offenders. While these developments at the state level are encouraging, it is clear that the United States federal government feels that such policies represent a threat to federal hegemony in the drug policy arena.

**REVIEW QUESTIONS**

1. In terms of total numbers, how do drug arrests compare to arrests for violent crime in the United States?
2. What percentage of the drug-using population is African American? What percentage of those arrested, prosecuted, and incarcerated for drug offenses are African American? How do we explain these discrepancies?
3. What has research concluded regarding the scientific validity of the crack baby syndrome?
4. What is the “100 to 1” rule for crack and powder cocaine sentencing? Why can this law be seen as discriminatory against poor and minority groups?
5. Why do drug laws related to public housing, welfare, and student loans have a disproportional impact on the poor and members of minority groups?
6. Laws regulating access to pseudoephedrine have been enacted to limit the production of methamphetamine. What unintended consequences are associated with these laws?
7. Which medical and legal organizations have issued statements in support of medical marijuana? Given the support of these organizations, what explains the opposition of federal government officials and agencies to the passage of medical marijuana legislation?

**INTERNET EXERCISES**

1. The Bureau of Justice Statistics provides data on the number of people incarcerated in the United States. Access the most recent report on correctional populations in the United States (<http://www.ojp.usdoj.gov>). Of those incarcerated in the United States, how many people and what proportion of all prisoners are serving time for drug offenses? How many people and what percentage of all prisoners are incarcerated for committing violent crimes? Be sure to examine both state and federal prison populations.
2. Access the website of the National Organization for the Reform of Marijuana Laws (<http://www.norml.org>) and compare the marijuana policies of your state (with respect to the penalties for possession and sales of marijuana and whether there is a medical marijuana policy) with those of at least one other state. How do you explain the similarities and differences in the policies?