

THE DISCRIMINATION INHERENT IN AMERICA'S DRUG WAR: HIDDEN RACISM REVEALED BY EXAMINING THE HYSTERIA OVER CRACK

INTRODUCTION

A significant, but decreasing, percentage of Americans believe the War on Drugs is justified, believing that the benefits outweigh the costs.¹ If you are one of these people, consider the following:

- The United States spends approximately \$1 billion a year to drug test approximately twenty million workers.² Companies are finding out that fatigue and illness are more common reasons for failure at work than drug use.³ Furthermore, companies that drug test have lower levels of productivity than those that do not.⁴
- The United Nations estimates that the international illicit drug business generates as much as \$400 billion in trade per year, which is about 8% of all international trade.⁵ The United Nations further estimates that illicit drug profits are so inflated that 75% of all drug shipments would have to be intercepted before profitability would be reduced by any significant amount.⁶ Current efforts intercept between 28% and 40% of cocaine shipments.⁷

1. ACLU Freedom Network, *New Poll Shows Surprisingly Forgiving Attitude Toward Crime and Punishment: Most Americans Don't Want to Throw Away the Key*, at <http://archive.aclu.org/features/f071901a.html> (last visited Nov. 19, 2002).

2. Common Sense for Drug Policy, *Drug War Facts: Drug Testing & Employment*, at <http://www.drugwarfacts.org/drugtest.htm> (last updated Feb. 1, 2002) (citing Edward M. Shepard & Thomas J. Clifton, *Drug Testing and Labor Productivity: Estimates Applying a Production Function Model*, Institute of Industrial Relations, Research Paper No.18, Le Moyne University, Syracuse, N.Y. 1 (1998)).

3. *Id.* (citing Joan O'C. Hamilton, *Top of the News: A Video Game that Tells If Employees Are Fit to Work*, BUSINESS WEEK, June 3, 1991).

4. *Id.* (citing Shepard & Clifton, *supra* note 2).

5. Common Sense for Drug Policy, *Drug War Facts: Economics*, at <http://www.drugwarfacts.org/economi.htm> (last updated May 17, 2002) (citing UNITED NATIONS OFFICE FOR DRUG CONTROL AND CRIME PREVENTION, ECONOMIC AND SOCIAL CONSEQUENCES OF DRUG ABUSE AND ILLICIT TRAFFICKING 3 (1998)).

6. *Id.* (citing UNITED NATIONS OFFICE FOR DRUG CONTROL AND CRIME PREVENTION, GLOBAL ILLICIT DRUG TRENDS 1999, at 51 (1999)).

7. *Id.*

- Unregulated cocaine production dumps an estimated 200,000 tons of chemical wastes in Columbia every year, with an ever-increasing price for future cleanup.⁸ United States spraying programs have not decreased coca production, but have led to further encroachment on the rainforest (an estimated 1.75 million additional acres have been cleared so far by displaced peasants in Columbia).⁹ Furthermore, the mixture used for spraying has handling instructions that fall within the EPA's highest toxicity rating.¹⁰ If used in the United States, workers would not be allowed in the sprayed area for twelve hours, but in Columbia, the herbicide falls on families and their homes.¹¹
- It costs approximately \$8.6 billion per year to keep drug law violators behind bars.¹² 81% of drug violation arrests are solely for possession.¹³
- In 1982, the United States spent approximately \$36 billion for the criminal justice system.¹⁴ By 1999, that number had increased to \$147 billion.¹⁵
- In 1999, the federal government allotted \$17.7 billion to explicitly fight the drug war, up from \$1.65 billion in 1982.¹⁶ During that same period, drug use has either increased or remained constant.¹⁷

8. Common Sense for Drug Policy, *Drug War Facts: Environment*, at <http://www.drugwarfacts.org/environm.htm> (last updated Nov. 29, 2000) (citing AMERICAN UNIV., TRADE AND ENVIRONMENT DATABASE (TED), TED CASE STUDIES: COLUMBIA COCA TRADE (1997)).

9. *Id.* ¶¶ 4-8.

10. Christopher Marquis, *U.S. Law Imperils Columbia Coca Spraying*, N.Y. TIMES, July 11, 2002, at A10.

11. *Id.*

12. Common Sense for Drug Policy, *Drug War Facts: Economics*, at <http://www.drugwarfacts.org/economi.htm> (last updated May 17, 2002) (citing BUREAU OF JUSTICE STATISTICS, PROFILE OF JAIL INMATES 1999 at 1, (Apr. 1996); BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1996, at 10-11 (1997); CRIMINAL JUSTICE INST., THE CORRECTIONS YEARBOOK 1997 (1997)).

13. Common Sense for Drug Policy, *Drug War Facts: Crime*, at <http://www.drugwarfacts.org/crime.htm> (last updated Oct. 12, 2002) (citing CRIME IN AMERICA: FBI UNIFORM CRIME REPORTS 2000, at 216 (2001)).

14. Common Sense for Drug Policy, *Drug War Facts: Economics*, at <http://www.drugwarfacts.org/economi.htm> (last updated May 17, 2002) (citing BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 1999 (Feb. 2002)).

15. *Id.*

16. Common Sense for Drug Policy, *Drug War Facts: Adolescents*, at <http://www.drugwarfacts.org/adolesce.htm> (last updated May 23, 2002) (citing OFFICE OF NAT'L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY: BUDGET SUMMARY 212-14 (1992); OFFICE OF NAT'L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY: 2000 ANNUAL BUDGET 97 (2000)). *Cf.* Duncan Campbell, *Bush Links War on Drugs to War on Terrorism*, THE GUARDIAN (LONDON), Aug. 8, 2002, at Guardian Foreign Pages 15 (estimating the United States spent \$40 billion fighting drugs in 2001).

17. U.S. DEP'T. OF HEALTH & HUMAN SERV., SUMMARY OF 2000 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE, available at <http://www.samhsa.gov/oas/NHSDA/2kNHSDA/2kNHSDA.htm> (last updated Feb. 14, 2002).

- From 1950 to 1980, the share of state and local government budgets spent on higher education doubled, while the share spent on corrections remained level.¹⁸ From 1980 to 2000, the share spent on education decreased 21%, while the share spent on corrections increased 104%.¹⁹

Is the money spent fighting the drug war a good use of federal spending? Do you still believe the War on Drugs is justified under a cost-benefit analysis? Perhaps you argue that a cost-benefit analysis needs to consider more than just monetary measurements. If so, here are some more facts you might not have considered:

- In 1986, a Pell Grant covered 98% of college tuition costs.²⁰ By 1998, a Pell Grant only covered 57%.²¹ Since 1998, approximately 75,000 students have been denied any financial aid (grants or loans) simply because they have a drug conviction somewhere in their past.²² No other conviction, including murder and rape, automatically results in the loss of aid.²³
- Public Housing officials now have the authority to evict whole families if anyone in the household, including guests, “engages in drug . . . activity, including alleged activity that occurs away from public housing premises.”²⁴ Such evictions can only add to the growing homeless problem in America.²⁵
- In the name of protecting citizens, the Court continues to weaken and reduce each citizen’s constitutional rights.²⁶ The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

18. JUSTICE POLICY INST., *CELLBLOCKS OR CLASSROOMS? THE FUNDING OF HIGHER EDUCATION AND CORRECTIONS AND ITS IMPACT ON AFRICAN AMERICAN MEN*, at http://www.justicepolicy.org/coc1/fact_national.htm (last visited Nov. 4, 2002).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*; Letter from Coalition for Higher Educ. Act Reform, to the House Education and the Workforce Committee Regarding the Delay or Denial of Federal Financial Aid on the Basis of Any Drug Offense (May 3, 2002), at <http://www.aclu.org/news/NewsPrint.cfm?ID=10314&c=80>; The John W. Perry Fund, *Scholarships for Students Denied Federal Financial Aid Because of Drug Convictions*, at <http://raiseyourvoice.com/perryfund/> (last visited Nov. 4, 2002).

23. News Release, Representative Barney Frank, Coalition Files Bill to Repeal Ban on Federal Financial Aid to Students with Drug Convictions, at http://www.house.gov/frank/student_aid01.htm (on file with author).

24. Letter from the ACLU, to the House Financial Services Housing and Community Opportunity Subcommittee (June 17, 2002), at <http://archive.aclu.org/congress/1061702a.html>; see also *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002).

25. See Jennifer Egan, *To Be Young and Homeless*, N.Y. TIMES MAG., Mar. 24, 2002.

26. Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593, 2612 (1994) (reviewing STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1993)).

searches and seizures,”²⁷ but suspicionless drug testing is now allowed in schools,²⁸ and discretionary drug stops now occur when the only probable cause is that a stop is made in a high crime area.²⁹

- The Fifth Amendment guarantees that “no person shall be . . . deprived of life, liberty or property, without due process of law”³⁰ Under the War on Drugs, civil asset forfeiture law has been strengthened to aid enforcement, and now private property can be seized and sold by the government without a conviction or even an arrest.³¹ Instead of requiring the government to prove even a tenuous connection to drugs, the citizen has to prove his or her innocence within ten days.³² During a ten-month national survey in 1991, approximately 80% of citizens that had property forfeited were never charged with a crime.³³
- Sixth Amendment rights have also been whittled down to fight the War on Drugs. Those accused of selling drugs have no right to confront their accuser, presumably to protect informants, even though the Sixth Amendment clearly states that “the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation [and] to be confronted with the witnesses against him.”³⁴
- Traditionally, the Eighth Amendment’s ban on “cruel and unusual punishments” has been used to require that any punishment is proportional to the crime committed.³⁵ Mandatory minimums have taken away judicial discretion in sentencing and mock the idea of proportional punishment.³⁶ In 1997, a low-level crack dealer on a

27. U.S. CONST. amend. IV.

28. *Bd. of Educ. v. Earls*, 122 S. Ct. 2559 (2002); *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

29. See Graham Boyd & Jack Hitt, *This Is Your Bill of Rights on Drugs*, HARPER’S MAG., Dec. 1999, available at <http://www.mapinc.org/drugnews/v99/n1252/a01.html> (describing government infringement on civil rights in the name of fighting the drug war); Nadya Labi, *Stop! And Say Cheese*, TIME, Sept. 23, 2002, at 53 (discussing the police tactic of “jump-out squads”—police units that stop individuals in high crime areas, place them hands-up-against-the-wall, frisk them, take their picture (“for anything you might do in the future”), then let them go).

30. U.S. CONST. amend. V.

31. See BRENDA GRANTLAND & FOREFEITURE ENDANGERS AMERICAN RIGHTS (F.E.A.R.) FOUND., PROCEDURAL FOREFEITURE LAWS NEED TO BE AMENDED TO RESTORE DUE PROCESS AND PROTECT THE PROPERTY RIGHTS OF INNOCENT PEOPLE: F.E.A.R.’S PROPOSAL FOR REFORM (1992, updated 1998) at <http://www.fear.org> (last visited Nov. 13, 2002).

32. *Id.*

33. *Id.*

34. U.S. CONST. amend. VI; Boyd & Hitt, *supra* note 29.

35. U.S. CONST. amend. VIII; see ACLU, *Prison Population & Harsh Sentencing*, at <http://archive.aclu.org/issues/drugpolicy/prisonoverpopulation.html> (last visited Nov. 19, 2002) (discussing various unfair aspects of sentencing).

36. Prior to the Sentencing Reform Act of 1984, judges were allowed to tailor the punishment to the crime through indeterminate sentencing. U.S. SENTENCING COMM’N, 2000 FEDERAL SENTENCING GUIDELINE MANUAL pt. A (Nov. 2000), available at <http://www.usc.gov/2000guid/1pta.htm> (last visited Nov. 4, 2002). Then Congress created a 100 to 1 ratio for the amount of powder cocaine it took to

first offense charge would have served ten years and six months, while a weapons charge would have earned seven years and seven months and rape would have earned a mere six years and five months.³⁷

- The right to vote is considered essential in America as a fundamental principle of democracy, but in forty-six states, a citizen loses that right while in prison; in thirty-two states, a citizen loses that right while on parole; in twenty-nine states, a citizen loses that right on probation; and in fourteen states, citizens remain disenfranchised after fully serving their sentences.³⁸ “Most state disenfranchisement laws provide that conviction of any felony or crime that is punishable with imprisonment is a basis for losing the right to vote.”³⁹ Note that simple possession of five grams of crack is considered a felony, while simple possession of any amount of powder cocaine (which is pharmacologically the same drug as crack) is a misdemeanor.⁴⁰

Are you still certain that the War on Drugs is a good policy? Perhaps you try to rationalize away the above facts with the conviction that those who use drugs deserve the penalties society imposes. You should be aware that the costs of the War on Drugs affect every citizen, regardless of their personal use or nonuse of illicit drugs.⁴¹ Further, you should ask yourself

impose an equal prison sentence for a violation involving crack cocaine. 21 U.S.C.A. § 841 (2000). The statute provides that the possession of fifty or more grams of crack cocaine is punishable by a term of imprisonment of ten years, while it takes five *kilograms* of cocaine powder to invoke the same prison sentence. *Id.*

37. Common Sense for Drug Policy, *Drug War Facts: Crack*, at <http://www.drugwarfacts.org/crack.htm> (last updated Oct. 12, 2000) (citing U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 150 (Feb. 1995); BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1996, at 476, tbl. 5.58 (1997)).

38. HUMAN RIGHTS WATCH AND THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (1998), at <http://www.hrw.org/reports98/vote/index.html> (last visited Nov. 25, 2002).

39. *Id.*

40. 21 U.S.C. § 844; *United States v. Sharp*, 12 F.3d 605 (6th Cir. 1993).

41. In addition to all the information presented in this introduction, the reader should keep in mind the damages to the rule of law. The rule of law is the principle that grants individuals the permission to “engage in any activity which is not specifically prohibited by law” and demands that the government only “undertake activities that are specifically authorized by law.” John McMillan, *An Overview of the Australian Legal System*, reprinted in SURVEY OF AUSTRALIAN LAW 10 (2001) (on file with author). The rule of law is a basic constitutional principle in a democracy, a fundamental theoretical basis for the legitimacy of American law and society, but its viability depends on the justness of the law. See FRANCIS ALLEN, *THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW* (1996). The War on Drugs erodes this principle every time legal safeguards are loosened to promote its enforcement. *Id.* at 39-47. Under the rule of law, government “must be able to point to a clear or explicit legal foundation for any action that interferes with the liberty or property of a person,” McMillan, *supra*, at 10, but in a time of War, government often acts before setting a legal foundation. See ALLEN, *supra*, at 36-38 (discussing the effects of war psychology on the rule of law). If the War continues long enough, the once special circumstances become the norm, and the government claims authority that it is not granted by the law. Barnett, *supra* note 26, at 2612.

why drug users have been singled out for such severe penalties and if they truly deserve that fate.⁴² On your way to an answer, consider the following:

- Alcohol is associated with more violent crime than any illegal drug, including crack, cocaine, and heroin.⁴³
- Alcohol and tobacco each account for more deaths each year than all use of illegal and prescription drugs combined.⁴⁴
- Addictive properties of illicit drugs have been grossly exaggerated, as have the severity of withdrawal symptoms.⁴⁵ Relatively few drug users have problems comparable to those of severe alcoholics, and a large percentage of users have no problems at all.⁴⁶
- The most cited harms of drug use—violent crime, public disorder, government corruption, and disease—are all due more to drug

The war on drugs has contributed importantly to the environment in which the rule of law functions today. . . . One category of costs largely neglected in modern political discourse is that resulting in debilitation of the legality ideal and weakening of the habits of legality. The costs are substantial, and their consequences extend to areas of American social and political life far removed from drug-law enforcement. . . . A fundamental end of a legal system in a liberal society is to contribute to conditions consistent with the development of a sturdy sense of autonomy and personhood in its members, individuals capable of directing their own lives and destinies and of making their contributions to civil well-being. These basic objectives are imperiled by rampant criminality and by the arbitrary responses of countervailing force by public officers

ALLEN, *supra*, at 5, 39.

Allen states an important problem with the drug war that many do not want to confront: the problems of the drug war extend far beyond the lives of drug users and law enforcement. The drug war is slowly destroying the delicate balance between individual freedom and societal well-being. He further elaborates that in times of increased or pervasive fear of crime, such as the climate of fear promoted by the drug war, “concerns about abuses of governmental authority . . . tend to be engulfed in the deeper fears of criminal victimization. At such times the traditions of legality are not wholly or suddenly abandoned, but the social and political environment is one increasingly unfavorable to the habits of legality.” *Id.* at 27. When people have been convinced of a prevalent demonic threat such as crack, they are more willing to sacrifice their freedoms and the habits of legality to protect themselves and their children. *Id.* Unfortunately, such sacrifices are more damaging to the ideal of American society than crack could ever be.

42. See DOUGLAS N. HUSAK, *DRUGS AND RIGHTS* 16-18 (1992) (stating drugs and drug users are “the ideal scapegoat”).

43. Common Sense for Drug Policy, *Drug War Facts: Crime*, at <http://www.drugwarfacts.org/crime.htm> (last updated Oct. 12, 2002) (citing JOSEPH CALIFANO, *THE NAT’L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., BEHIND BARS: SUBSTANCE ABUSE AND AMERICA’S PRISON POPULATION* (1998); LAWRENCE A. GREENFIELD, U.S. DEP’T OF JUSTICE, *ALCOHOL AND CRIME: AN ANALYSIS OF NATIONAL DATA ON THE PREVALENCE OF ALCOHOL INVOLVEMENT IN CRIME* 20-21 (Apr. 1998)).

44. Common Sense for Drug Policy, *Drug War Facts: Annual Causes of Death in the United States*, at <http://www.drugwarfacts.org/causes.htm> (last updated Sept. 8, 2001). Note also that drunk driving accounted for 22,000 deaths in the late 1980s and early 1990s, but most drunk driving offenses are treated as misdemeanors. HUMAN RIGHTS WATCH AND THE SENTENCING PROJECT, EXECUTIVE SUMMARY: DOES THE PUNISHMENT FIT THE CRIME? DRUG USERS AND DRUNK DRIVERS, QUESTIONS OF RACE AND CLASS (1993), at <http://www.sentencingproject.org/policy/9040smy.pdf> (last visited Nov. 25, 2002).

45. STUART WALTON, *OUT OF IT: A CULTURAL HISTORY OF INTOXICATION*, at xxii (2001).

46. *Id.*

prohibition than drug use.⁴⁷ Note that the two periods in America with the highest homicide rates are Prohibition (9.7 per 100,000 people) and the modern War on Drugs (10 per 100,000 people).⁴⁸

- While incarceration costs continue to spiral out of control, relatively little is invested in substance abuse treatment.⁴⁹ However, every additional dollar spent on such treatment saves taxpayers \$7.46 in societal costs.⁵⁰ Even so, alcohol and tobacco use each cost the state more in health care costs than all illicit drug use combined.⁵¹

Do you still feel the War on Drugs is justified? Under traditional cost-benefit analysis, a legitimate argument can still be made that it is justified because the alleged benefits—healthy citizens free of external controls productively working in a near crime-free society—are weighty ideals, and so the argument becomes not so much a cost-benefit balancing act, but either a debate over whether such benefits will inure to a drug-free society or how efficiently the War on Drugs is bringing society closer to this ideal. However, cost-benefit analysis is not the only approach, and indeed, in this context it is an inadequate approach and the debate it engenders is misinformed because of the following:

- Black Americans constitute approximately 12% of the United States' population and approximately 13% of its drug users, but account for 33% of all drug-related arrests, 62% of drug-related convictions, and 70% of drug-related incarcerations.⁵²

47. "In 1988 in New York City, 85% of crack-related crimes were caused by the [black] market culture" Common Sense for Drug Policy, *Drug War Facts: Crime*, at <http://www.drugwarfacts.org/crime.htm> (last updated Oct. 12, 2002) (citing P.J. Goldstein et al., *Crack and Homicide in New York City: A Case Study in the Epidemiology of Violence*, in *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* 113-30 (1997)); see also Boyd & Hitt, *supra* note 29 (comparing the effects of the War on Drugs with Prohibition and British occupation of the American colonies).

48. Common Sense for Drug Policy, *Drug War Facts: Crime*, at <http://www.drugwarfacts.org/crime.htm> (last updated Oct. 12, 2002) (citing U.S. Census Data and F.B.I. Uniform Crime Reports).

49. See Common Sense for Drug Policy, *Drug War Facts: Treatment*, at <http://www.drugwarfacts.org/treatmen.htm> (last updated July 26, 2002), for a discussion of treatment spending.

50. Common Sense for Drug Policy, *Drug War Facts: Economics*, at <http://www.drugwarfacts.org/economi.htm> (last updated May 17, 2002) (citing C.P. RYDELL & S.S. EVERINGHAM, OFFICE OF NAT'L DRUG CONTROL POLICY & U.S. ARMY, CONTROLLING COCAINE (1994)).

51. *Id.* (citing U.S. DEP'T HEALTH AND HUMAN SERV., THE ECONOMIC COSTS OF ALCOHOL AND DRUG ABUSE IN THE UNITED STATES (1998)).

52. ACLU Freedom Network, *Repeal Ban on Federal Financial Aid to Students with Drug Convictions!*, at <http://archive.aclu.org/action/hea107.html> (last verified Sept. 27, 2002); INEKE HAEN MARSHALL, MINORITIES, MIGRANTS, AND CRIME: DIVERSITY AND SIMILARITY ACROSS EUROPE AND THE UNITED STATES 6 (1997). Capitalization will be used throughout this Comment to mark the socially constructed nature of racial categories. See *infra* Part II for a discussion of race.

- In 1980, there were approximately three times the number of Black American men in college as there were in prison or jail.⁵³ At the end of 2000, there were actually fewer Black American men in college than there were in prison or jail.⁵⁴
- In 1986, a Black American was six times as likely as a White American to go to jail for a drug related offense.⁵⁵ By 1996, Black Americans were twenty-two times as likely.⁵⁶
- 13% of all Black American men have lost their right to vote.⁵⁷ In more than ten states, 20% of the Black American men in each state are ineligible to vote, and in Florida and Alabama the percentage reaches 33%.⁵⁸
- By 1999, Black American women were imprisoned at a rate eight times that of White American women, and were ten times as likely to be reported to child welfare agencies for prenatal drug use (even though the same proportion of Black and White American women use drugs while pregnant).⁵⁹
- By 2000, Black American children were nine times as likely as White American children to have at least one parent in prison.⁶⁰
- The number of incarcerated Black American men in 2002 was equal to the number of Black American slaves in 1820.⁶¹ If the rate of imprisonment does not change, in fifteen years the number incarcerated will equal the number of slaves on the eve of the American Civil War.⁶² The slavery comparison is particularly appropriate because of the free labor provided by the subjugation of others.⁶³

These numbers suggest that something is wrong. The proportions of arrested drug offenders should mirror the proportions of drug users, but the

53. JUSTICE POLICY INST., *CELLBLOCKS OR CLASSROOMS? THE FUNDING OF HIGHER EDUCATION AND CORRECTIONS AND ITS IMPACT ON AFRICAN AMERICAN MEN*, at <http://www.justicepolicy.org/coc1/main.htm> (last visited Nov. 4, 2002).

54. *Id.*

55. *Id.*

56. *Id.*

57. Graham Boyd, *New Voices on the War on Drugs: Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839, 845 (2002).

58. *Id.*

59. Common Sense for Drug Policy, *Drug War Facts: Impact of the Drug War on Families*, at <http://www.drugwarfacts.org/families.htm> (last updated May 17, 2002).

60. *Id.*

61. Boyd, *supra* note 57, at 846.

62. *Id.*

63. See Angela Y. Davis, *Masked Racism: Reflections on the Prison Industrial Complex* (Sept. 3, 2002), at <http://www.alternet.org/story.html?StoryID=14009> (discussing the profit motive behind America's prison system and how the system further entrenches racism in America).

reality is that Black America⁶⁴ is the victim of the War on Drugs.⁶⁵ This Comment will examine a microcosm of Black America and the War on Drugs (cocaine in all its illicit forms), using the tools of critical race theory, in search of an explanation for the Drug War's racial inequity and a solution. Part I introduces the tools and definitions of critical race theory necessary to uncover inherent racism. Part II briefly discusses the history of cocaine in America, with a focus on the initial stages of illegality. Part III examines how politicians have exploited the prejudice against Black America for their own gain and how the media has furthered that prejudice. Part IV discusses the crack baby myth. In Part V, this Comment concludes that the War on Drugs is indefensible and presents a different strategy for the drug problem.

I. CRITICAL RACE THEORY AND THE DEFINITION OF RACE

Critical theory is meant to be a form of knowledge that can enlighten us about the roots of social and political oppression, and help us collectively transform our relations in ways that might overcome the damaging and destructive legacies we have inherited from the past. Indeed, it might be argued that critical theory is about the way human emancipation and social progress might be achieved.⁶⁶

Critical race theorists start with the belief that race is a social construct, "deeply embedded in language, perceptions, and perhaps even 'reason' itself."⁶⁷ Our traditional rational approach has always been to define, learn, and interact by categorization, always thinking in terms of categorical opposites. These categories are only rough maps for our comprehension, artificial separations that allow us to break the world into understandable pieces. Left unchecked, a category will lose its status as a malleable tool and become an indisputable truth, leading us to mistake the map for the territory. We have defined ourselves, as a society and as individuals, in terms of race for so long that we have forgotten race only has meaning in our own eyes. Imagine yourself on a crowded street corner, watching all types of people go by. How many types of Black people can you imagine? How many White people? How many Others? Is there any one feature that has to be present, besides a subjective determination that the flesh colored skin is

64. Black America particularly stands out in the abuses of the Drug War, but other Non-White groups suffer from the same types of problems. The author has chosen to focus on Black America for ease of dialogue. See *infra* Part I for a discussion of race.

65. See text accompanying *supra* notes 52-63 for the applicable statistics.

66. STEPHEN T. LEONARD, *CRITICAL THEORY IN POLITICAL PRACTICE* 251 (1990).

67. Angela P. Harris, *Foreward: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 743 (1994) [hereinafter A. Harris]. In a sense, critical race theorists are advocating a change from traditional rational logic to fuzzy logic, which recognizes the flaws of purely categorical thinking. See BART KOSKO, *FUZZY THINKING: THE NEW SCIENCE OF FUZZY LOGIC* (1994), for a non-technical discussion of fuzzy mathematics.

more Black, or White, than the other? Critical race theorists adamantly answer no. Race is neither based on a biological component⁶⁸ nor on some inherent moral or character trait.⁶⁹ Race is based on nothing outside of our own sociohistorical worldview: “race is an indeterminate social construct that is continually reinvented and manipulated to maintain domination and enhance White privilege.”⁷⁰

Western culture used the concept of race to justify slavery, thereby color-coding the dominant-subservient categorization: dominant became White, and Black became oppressed.⁷¹ These labels of completely opposite colors signify an extreme difference between the two groups because a “real” easily distinguishable difference is needed by the dominant group in order to solidify its position of power. Race labels became real distinctions with time and use, internalized as a basic way of defining other people. Every system has its basic truths, the underlying unprovable accepted axioms that all other experience/knowledge is built from, directly or indirectly.⁷² This is true of social systems as well, including political and legal systems. The United States was founded during a time that racial distinctions were axiomatic and the underlying assumption has affected the country ever since.

Perhaps earlier generations could persuade themselves and accept the idea that some significant legitimate distinction existed between Whites and Blacks, but there is no longer an excuse to believe in the logic of separating people on the basis of skin color. The color of one’s skin is no better reason to separate out people than is the thickness of one’s eyebrows, yet race continues to divide America.⁷³ Thus, in the postmodern tradition of critical legal studies, critical race theorists deny the legitimacy of the idea of race, but in the face of social inequities, acknowledge that race has been, and continues to be, a basic truth (“an inescapable part”) of modern Western society.⁷⁴ Critical race theory also “inherits from traditional civil rights scholarship a

68. “Even though we are anatomically different from each other, there is no subspecies in our group. In fact, there are far more genetic differences within a [recognized racial] population of humans than between [the recognized races].” Linda Villarosa, *Interview, A Conversation With: Joseph Graves; Beyond Black and White in Biology and Medicine*, N.Y. TIMES, Jan. 1, 2002. Dr. Graves attacks the last vestige of admitted socially acceptable racism—medicine—by debunking the pharmacogenetic theory that genetic differences in the socially constructed races exist. *Id.* He explains that “the genes for drug activity and response don’t seem to be localized in the socially defined races” and that the genes responsible for “racial” diseases (sickle cell anemia) appear because of the reason for mutation—presence of malaria—not due to some socially constructed racial boundary. *Id.* Instead of furthering the notion of a genetic basis for socially constructed race, he wants medical research to acknowledge the medical uselessness of race and examine actual medical variables (such as stress, diet, and family history). *Id.* *Contra* Nicholas Wade, *Race Is Seen as Real Guide to Track Roots of Disease*, N.Y. TIMES, July 30, 2002 (explaining the traditional opposing viewpoint).

69. DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* § 1.4 (4th ed. 2000) (discussing and dismissing the race as essence theory).

70. *Id.* at 9.

71. *Id.* at § 1.5.

72. See DOUGLAS R. HOFSTADTER, *GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID* (1994) (discussing Gödel’s Incompleteness Theorem and its application to any system).

73. See text accompanying *supra* notes 52-63 for the applicable statistics.

74. A. Harris, *supra* note 67, at 743, 746-50.

commitment to a vision of liberation from racism⁷⁵ through right reason," a modernist appeal to the possibility of a true nonbiased system.⁷⁶ Different critical race theorists have recommended different ways to liberate American society from its racist roots, but they all agree on the social construction and the remaining pervasiveness of race.⁷⁷

Harris argues for critical race theory to be used as a "jurisprudence of reconstruction."⁷⁸ Instead of ceding defeat because racism is inescapable, or trying to do the impossible and liberate Black America without addressing the hidden racial structures, she suggests that critical race theorists "live in the tension" between the two ideas, "continually rebuild[ing] modernism in light of postmodernist critique."⁷⁹ Thus, the way to improve the legal system is to continue to first illuminate any insidious racism through critical race theory, examining the social and historical aspects of the legal system for sites race has informed the law. The next step is to remove race from those sites by cleansing out the idea of race, refashioning the legal system so that race is no longer implicit in any term, law, or method. All the while, awareness that the process can never be completed must be maintained because the refashioned legal system will have its own flaws due to its own hidden social constructions. "[W]hat has been presented in our social-political and our intellectual traditions as knowledge, truth, objectivity, and reason are actually merely the effects of a particular form of social power."⁸⁰ Postmodernist aspects of critical race theory proclaim the legal system irrevocably biased, while the modernist aspects continue to try to articulate a non-biased system. Reconstruction jurisprudence is more than deconstruction, more than a nod to the Reconstructions of the past. It is a method by which racist systems can be transformed into truly just systems.

Critical race theory is not, however, an advocate of colorblind jurisprudence.⁸¹ Correcting errors caused by hidden racism necessitates that the

75. See generally JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 5-49 (2000), for a discussion of the definition of racism.

76. A. Harris, *supra* note 67, at 743.

77. See generally CHARLES W. MILLS, THE RACIAL CONTRACT (1997) (describing the nature and pervasiveness of race).

78. A. Harris, *supra* note 67, at 743.

79. *Id.* at 744.

80. *Id.* at 748.

81. Color-blind jurisprudence is the name given to the Court's current civil rights jurisprudence that reviews all racial classification under strict scrutiny, an approach that "denies the political import and social significance of race and [the] long history of subordination and exploitation." BELL, *supra* note 69, at 135-36. Critical race theorists have also attacked color-blind jurisprudence for confusing equal protection with equal treatment. Cheryl I. Harris, *The Constitution of Equal Citizenship for a Good Society: Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753 (2001). She accuses the Court of returning to the majority's analysis in *Plessy v. Ferguson*, 163 U.S. 537 (1896), because the Court has lifted the "color-blind" language from Harlan's dissent without accepting Harlan's remaining points about the inherently subordinating nature of racial exclusions. *Id.* at 1767. "Equal treatment then cannot be the sum total of equal protection because the application of that principle requires that the circumstances of the groups be similar. Race, however, embodies asymmetry—of resources, power, access, and social status." *Id.*; see generally BELL, *supra* note 69, at 131-54 (discussing the development, consequences, and arguments for and against color-blind jurisprudence); Robert L. Hayman Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditional-*

racism is openly acknowledged and addressed. The idea of race is woven into the fabric of our society, and racism will not go away by pretending it is suddenly gone nor by believing it is an obvious stain “born of ignorance and curable by education, or . . . a grave moral defect of ‘bad’ people.”⁸² Instead, “racism is a defect in the collective unconscious” and so must be consciously addressed before it can be corrected.⁸³

Because race has informed the legal discourse for so long in terms of a Superior White and an Inferior Black, it is illogical to think that any American legal idea, significantly formed by precedent, would be innocent of race. Legal methods, laws, and terms were all formed by an inherently racist legal discourse, and so must be examined for obvious and hidden racism. However, the Court has decided that racism can only be obvious and intentional, and its analysis of the law proceeds accordingly.⁸⁴ Further, the Court has been unwilling to fashion or uphold remedies that openly acknowledge both the social construction of race and the resulting social inequity.⁸⁵ Critical race theorists largely believe the Court is perpetuating racial subordination by refusing to address the idea of hidden racism and hiding behind the slogan of color-blind justice.⁸⁶

Delgado points to moments such as these, when the Court is irresponsible to the needs of Black America, as indicative that an approach that includes more than just legality will be required to end the idea of race.⁸⁷ Delgado begins with the premise that White America will only allow gains for Black America if it is in White America’s benefit (interest convergence),⁸⁸ and then discusses what Black America should do when its interests are not those of White America, which could entail civil unrest in the footsteps of revolutionaries such as Gandhi and King.⁸⁹ According to Delgado, the rule of law does not truly exist, for it is used to reinforce White America’s control over the legal system.⁹⁰ Any conflict between the rule of law and White America’s interest has been solved by granting White Amer-

ism, 30 HARV. C.R.-C.L. L. REV. 57 (1995) (discussing the idea that traditions such as colorblindness have no coherent existence).

82. A. Harris, *supra* note 67, at 770-71.

83. *Id.*

84. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987), reprinted in PEREA, *supra* note 75, at 37-41.

85. See *Johnson v. Bd. of Regents*, 263 F.3d 1234 (11th Cir. 2001) (determining that the University of Georgia’s admission policy, which was an attempt to help diversify the university population so that it might better reflect the State’s population, was unlawful because the State did not meet the burdens imposed by strict scrutiny); see also BRYAN K. FAIR, NOTES OF A RACIAL CASTE BABY 120-75 (1997) (critiquing the Court’s colorblind approach and arguing for an approach that will eliminate, rather than perpetuate, racial caste in America).

86. Neil Gotanda, *A Critique of “Our Constitution is Color-blind,”* 44 STAN. L. REV. 1 (1991), reprinted in PEREA, *supra* note 75, at 61-63.

87. Richard Delgado, *Rodrigo’s Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994).

88. *Id.* at 383; BELL, *supra* note 69, at 63-68.

89. Delgado, *supra* note 87, at 390-91 (discussing legal instrumentalism).

90. *Id.* at 391-96; see also Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249, 305 (1993) (arguing that the rule of law exists but must be “stripped of the vestiges of Enlightenment conceit”).

ica a legal exception, while a conflict with Black America leads only to discussion about the necessity of upholding the rule of law (in a sense, to uphold the status quo—the very thing that needs changing).⁹¹ In Delgado's view, "[O]ne of the main uses of normative [legal] discourse is to keep people . . . from criticizing the rule of law."⁹² Therefore, critical race theorists should treat law "as the social institution [that] it is: good for some things, less so for others" (legal instrumentalism).⁹³ Justice should not depend on the patience of the oppressed; legal instrumentalism is a valid approach for the disempowered.⁹⁴

Racism hides throughout the system, but aspects of racism can be eliminated by those who not only see how the categories of race are used, but also have the power and the will to purge the system of racism. It is every person's duty to examine the social systems within which he or she operates. For the members of the professional American legal system who believe our system is worth saving, it is our duty to make the American system one that everyone believes is worth saving—a truly just, nonbiased, system. Those who serve the law have a duty to hunt out and dispel any hidden racism in the legal system, for our professional service is an implicitly strong approval of the system itself.

The disproportionality that Black America has suffered and the high costs America has willingly endured under the War on Drugs indicates a problem and hints of irrationality.⁹⁵ To address this problem, critical race theory demands the examination of the sociohistorical context of both race and the intersection of race and the War on Drugs. Before a solution can be designed, the problem must be understood, and problems today cannot be understood without understanding the racial undertones. This Comment will analyze the War on Drugs (as it pertains to cocaine) using the framework of critical race theory, in an attempt to uncover any hidden racism. To do so, it is necessary to examine the social and political history of the Drug War.

II. HISTORICAL ORIGINS OF AMERICA'S DRUG WAR: THE BATTLE AGAINST COCAINE

The early 1900s was "one of the most tumultuous [periods] in American history . . . riddled with class, racial, cultural, and political conflict."⁹⁶ During this time of vexing complications and problems, drugs and an associated Other population (such as cocaine and the newly freed slaves) provided an easy scapegoat as White America sought comforting reasons behind the

91. Delgado, *supra* note 87, at 391-98 (pointing to the realms of free speech, tax, criminal enforcement, and corporate law for examples).

92. *Id.* at 394.

93. *Id.* at 395.

94. *Id.* at 394-96.

95. *See supra* Introduction.

96. Craig Reinerman & Harry G. Levine, *Crack in Context: Politics and Media in the Making of a Drug Scare*, 16 CONTEMP. DRUG PROBS. 535, 556 (1989).

country's societal woes.⁹⁷ Before such connections were made around the turn of the century, drugs had been widely accepted and used throughout the American population.⁹⁸

Cocaine was legal and widely used throughout the 1800s; it was commonly used as a "general tonic, for sinusitis and hay fever, and as a cure for the opium, morphine, and alcohol habits."⁹⁹ The Hay Fever Association touted cocaine as its official remedy, and cocaine was a favorite ingredient in many patent medicines.¹⁰⁰ Cocaine, however, was not without its legitimate critics. Several doctors recognized the problems that such widespread use might have on an unsuspecting population, for patent medicines (over-the-counter tonics) originally did not have to disclose their ingredients.¹⁰¹ In response, Congress approved the Pure Food and Drug Act in 1906, which "required the listing of narcotics . . . on the labels of patent medicines shipped in interstate commerce."¹⁰² This was the first attempt by the federal government to regulate cocaine, but note that cocaine was still legal and available to the public. This would soon change.

Patent medicines led to further calls for reform by the medical profession, but not for purely altruistic reasons. "[P]ractitioners of nineteenth-century medicine had little power to cure disease. The main thing the physician could do was to make the patient feel better, and [narcotics] were pre-eminent for these functions and were apparently used with great frequency."¹⁰³ Opponents of legislation restricting the sales of narcotic preparations rightly accused the physicians of simply wanting to corner the market.¹⁰⁴

Lay reformers similarly had underlying motives beneath any humane "conviction that drug-takers need to be saved from themselves . . . before they do themselves irredeemable damage."¹⁰⁵ One explanation offered for the shift in public opinion concerning cocaine from common acceptance to rampant fear, was the connection made between certain drugs and minority populations.¹⁰⁶ By the turn of the nineteenth century, cocaine was associated

97. See *id.* at 555.

98. See DAVID F. MUSTO, M.D., *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 7 (expanded ed. 1987); see also RUFUS KING, *THE DRUG HANG UP: AMERICA'S FIFTY-YEAR FOLLY 17-20* (1972) (discussing early American feelings towards opium, cocaine, and alcohol); WALTON, *supra* note 45, at 105-10 (discussing the early popularity of cocaine).

99. MUSTO, *supra* note 98, at 7.

100. *Id.*

101. *Id.* at 10, 58.

102. *Id.* at 22.

103. Barnett, *supra* note 26, at 2605.

104. MUSTO, *supra* note 98, at 58-59; see also JAMES B. BAKALAR & LESTER GRINSPOON, *DRUG CONTROL IN A FREE SOCIETY* 73-78 (1984) (discussing the emerging dominance of the medical profession).

105. WALTON, *supra* note 45, at 161.

106. MUSTO, *supra* note 98, at 282 n.15 (listing numerous newspapers, medical journals, magazines, and books from the late 1800s to the early 1900s that made such a connection). According to Musto, "The association of cocaine with the southern Negro became a cliché a decade or more before the Harrison Act." *Id.*; see also Kathleen Auerhahn, *The Split Labor Market and the Origins of Antidrug Legislation in the United States*, 24 *LAW & SOC. INQUIRY* 411, 426 (1999) (stating that "[t]he notion of cocaine

with southern Black America and was especially feared for its stimulating properties.¹⁰⁷ Prominent White southerners were claiming that “Negro cocaine fiends” were terrorizing the South, although there was absolutely no hard data supporting such claims.¹⁰⁸ White America commonly believed that cocaine promoted Black attacks on White society, but it is now believed that “anticipation of black rebellion inspired [W]hite alarm,” and Whites were attempting to thwart such rebellions through use of the law.¹⁰⁹ The White South feared that cocaine would cause the freed Black to forget “his place” within segregated society.¹¹⁰ “The fear of the cocainized [B]lack coincided with the peak of lynchings, legal segregation, and voting laws all designed to remove political and social power from him.”¹¹¹ Not surprisingly, these fears would be used as a successful argument against the southern stance on states rights to get southern support for federal drug legislation.¹¹² Myths about the “superhuman strength, cunning and efficiency” of the Negro on cocaine flourished in the South.¹¹³ Such myths included ideas such as cocaine induced Black men to rape White women, cocaine improved Black marksmanship, and cocaine made Blacks impervious to .32 caliber bullets (“caus[ing] southern police departments to switch to .38 caliber revolvers”).¹¹⁴

Split labor market offers another explanation for the early twentieth century cocaine scare and corresponding prohibitions. Split labor market is simply a way to describe the condition that results from having two or more groups of workers able to perform the same work, with one group willing to work for lower wages due to a lack of resources, whether economic, political, or otherwise.¹¹⁵ When such a condition exists in a capitalist society, the higher paid labor group's existence is threatened and can respond in several ways, though “[l]aw is one of the most effective means of social control available to a group that believes itself to be under threat.”¹¹⁶ Reconstruction exacerbated the price differentials and opportunities between the Black and White labor groups.¹¹⁷ Black labor was often preferred during this period, for Blacks were “easily exploited by employers” and had “lower rates of unionization and unrest.”¹¹⁸ At the same time, the popular press seized

use as primarily a Negro phenomenon” was “widespread”).

107. See MUSTO, *supra* note 98, at 282-83 n.15.

108. *Id.* at 283 n.15.

109. *Id.* at 7.

110. *Id.* at 6.

111. *Id.* at 7.

112. MUSTO, *supra* note 97, at 282 n.15.

113. *Id.* at 7; ROSS COOMBER, *THE CONTROL OF DRUGS AND DRUG USERS: REASON OR REACTION?* 14 (1998).

114. MUSTO, *supra* note 98, at 7; Reinerman & Levine, *supra* note 96, at 558.

115. Auerhahn, *supra* note 106, at 411-13. See generally Edna Bonacich, *A Theory of Ethnic Antagonism: The Split Labor Market*, 37 AM. SOC. REV. 547 (1972), for an introduction to the theory of split labor markets.

116. Auerhahn, *supra* note 106, at 414.

117. *Id.* at 424-27.

118. *Id.* at 425.

upon the idea that cocaine use (presumably not of the accepted tonic type) was a typical and pervasive Negro habit, though it seems the press was simply forming a caricature to give an acceptable basis to racial fear because there was not an actual disproportional use of cocaine by Blacks.¹¹⁹ Therefore, “criminalization of cocaine was favored . . . as merely another means of social control in the face of black threat.”¹²⁰ Correspondingly, “fear of wage undercutting and the advancing economic position of free blacks in the postbellum period resulted in the campaign against cocaine that ultimately [led to] . . . the Harrison Act.”¹²¹

“The public’s fear of addicts and minority-group drug users [supplied a] powerful motive force for legislation” but the physician and pharmacy groups originally wanted to retain their prescriptive control over narcotics.¹²² Thus, in 1914, a compromise was reached and the Harrison Act was passed.¹²³ Initially, the United States Supreme Court interpreted it as merely a revenue statute (the Harrison Act required physicians and pharmacists—the only ones allowed to prescribe or sell cocaine—to register, keep records, and pay a special tax) and rejected the government’s argument for police power.¹²⁴ However, by 1918, “narcotic use was officially described as leading to antisocial acts and individual degeneracy” as well as a “threat to the national war effort.”¹²⁵ Accordingly, the Supreme Court changed its stance and accepted the government’s interpretation of the statute.¹²⁶

The years to come would bring increasing public intolerance followed by stronger amendments to the Harrison Act and new statutes to bolster federal police powers in the realm of drug prohibition,¹²⁷ leading to the culmination of intolerance and police power in the 1956 Narcotics Control Act, which among many other severe penalties, authorized the death penalty for anyone caught selling heroin to a minor.¹²⁸ Public sentiment and the law softened somewhat in the following years.¹²⁹ However, the 1980s brought the advent of the crack scare, and corresponding “tough on crime” legislation. Black America was again associated with cocaine/crack, and laws were passed that were again aimed at that nexus, generally erasing mercy

119. See *supra* note 106 and accompanying text.

120. Auerhahn, *supra* note 106, at 426.

121. *Id.* at 417.

122. MUSTO, *supra* note 98, at 14.

123. *Id.* at 60-61.

124. *United States v. Jin Fuey Moy*, 241 U.S. 394 (1916). See MUSTO, *supra* note 98, at 129-32, for a discussion of the case and its ramifications.

125. MUSTO, *supra* note 98, at 133-34.

126. *Webb v. United States*, 249 U.S. 96 (1919). See BAKALAR & GRINSPOON, *supra* note 104, at 93, and Barnett, *supra* note 26, at 2608, for a discussion of the case and its ramifications.

127. See MUSTO, *supra* note 98, at 183-229, for a discussion of America’s growing intolerance and the expansion of federal power in the drug war during the 1920s and 1930s. See *id.* at 230-31 for a synopsis of post-World War II drug policy prior to the enactment of the 1956 Narcotics Control Act.

128. KING, *supra* note 98, at 142-50; MUSTO, *supra* note 98, at 252.

129. MUSTO, *supra* note 98, at 251-77.

and logic from the criminal justice system when crack—and therefore Black America—was involved.¹³⁰

III. POLITICS AND THE MEDIA IN THE CRACK SCARE AND THE PRESENT IMAGE OF THE DRUG WAR

The modern Drug War, in terms of public acceptance and federal funding, became immensely popular once crack hit the streets. Crack was a cheap drug, one that White America could easily distance itself from and associate with Black America. Because crack was a new drug, myths about its dangerousness (similar to the earlier myths about dangerous Negro cocaine fiends) were easily spread and easily believed by a society unwilling to recognize its own structural flaws. Critical race theory demands that we not only examine our past, but also the current social institutions and practices when we attempt to understand the extent of racism in an aspect of society. Media representations of the War on Drugs, fed by opportunistic politicians, show that the original racial problems of the Drug War are still inherent in it today.

Although use of powder cocaine skyrocketed in the 1970s, mainly among affluent Whites, and freebasing cocaine (a dangerous way to smoke powder cocaine which gives the same effects as smoking crack) was also recognized as a problem in the 1970s, the media did not portray these occurrences as a national problem of prime importance.¹³¹ It was not until President Reagan and the introduction of crack in a few urban ghettos in the mid-1980s that the media pounced upon the drug issue, “bombard[ing] the public with frightening images of crack cocaine as a unique ‘demon’ drug that is different from any other drug . . . highly potent, instantly addictive, and conducive to systemic violence and moral decadence.”¹³² While crack does cost significantly less than powder cocaine, thereby making it more widely accessible, and crack does allow for a faster, higher absorption (like freebasing) than snorted powder cocaine, pharmacologically the two drugs are identical.¹³³ However, it is crack that has been demonized, and not coincidentally, crack is associated with the urban minority population.¹³⁴

The public relations campaign of the war on drugs has been extremely beneficial for many politicians, but especially so for former Presidents

130. In 1984, Congress passed the Sentencing Reform Act, which demanded implementation of mandatory minimum sentencing over sentencing through judicial discretion. The Anti-Drug Abuse Acts of 1986 and 1988 established a 100 to 1 ratio for the amount of powder cocaine to crack cocaine for imposition of equal prison sentences. 21 U.S.C. § 841 (2000). The Acts provide that the possession of fifty or more grams of crack cocaine is punishable by a term of imprisonment of ten years, while it takes five kilograms of cocaine powder to invoke the same prison sentence. *Id.*

131. Reinerman & Levine, *supra* note 96, at 540.

132. John J. Lieb & Claire Sterk-Elifson, *Crack in the Cradle: Social Policy and Reproductive Rights Among Crack-Using Females*, 22 CONTEMP. DRUG PROBS. 687, 687-88 (1995); see Reinerman & Levine, *supra* note 96, at 540-43.

133. MUSTO, *supra* note 98, at 274.

134. Reinerman & Levine, *supra* note 96, at 539.

Ronald Reagan and George H.W. Bush. The extreme conservative policy espoused by Reagan explained away:

most social problems . . . [as] simply the consequences of individual moral choices. Programs and research that had for many years been directed at the social and structural sources of social problems were systematically defunded in the federal budget and delegitimated in discourse. . . . People *in* trouble were reconceptualized as people who *make* trouble; social control replaced social welfare¹³⁵

Correspondingly, and not surprisingly, “urban ills . . . increased markedly under [the] Reagan administration” and the “new” drug problem represented by crack was “an all-purpose scapegoat with which they could blame an array of [social] problems on the deviance of the individuals who suffered them” while upholding family values and ignoring their own policies’ part in America’s social problems.¹³⁶ Additionally, by focusing on crack as the cause of America’s social ills, “Reagan and [G.H.W.] Bush appeared tough on crime and concerned about domestic issues” as they covertly “blamed social ills on minorities without communicating a sense of racism to white constituents.”¹³⁷ Their rhetoric was so successful that Democrats and Republicans alike jumped on the bandwagon so as not to appear soft on crime.¹³⁸

The dependence of American news media on their Washington sources led the press to an unquestioning acceptance of most presidential public relation campaigns, at least at the definitional stage (news coverage did criticize the lack of success in the drug war, but not the underlying definitional principles of who to blame), causing news coverage to unfairly focus on urban minorities as the enemy in the war on drugs.¹³⁹ Additionally, following the lead of presidential rhetoric, “[m]ainstream journalists interpreted these depressed inner-city conditions as arising from increased drug use rather than as a product of the reduction of economic programs and other structural forces that left these populations without resources.”¹⁴⁰ The reality is that drug use did not increase during the 1980s.¹⁴¹

In a systematic study of drug war coverage in *The New York Times*, *USA Today*, *The Washington Post*, *Time*, and *Newsweek* from the late ‘80s

135. *Id.* at 560-61.

136. *Id.* at 561-62.

137. WILLIAM N. ELWOOD, RHETORIC IN THE WAR ON DRUGS: TRIUMPHS AND TRAGEDIES OF PUBLIC RELATIONS 11 (1994). *Cf. supra* notes 109-11, 119-20 and accompanying text (describing a similar previous occurrence).

138. Reinerman & Levine, *supra* note 96, at 563-66.

139. ELWOOD, *supra* note 137, at 42, 45, 56, 62.

140. Katherine Irwin, *Ideology, Pregnancy and Drugs: Differences Between Crack-Cocaine, Heroin, and Methamphetamine Users*, 22 CONTEMP. DRUG PROBS. 613, 632 (1995); *see generally* MEG GREENFIELD, WASHINGTON (2001) (discussing the relationship between Washington and the press).

141. Katherine Beckett, *Fetal Rights and “Crack Moms”: Pregnant Women in the War on Drugs*, 22 CONTEMP. DRUG PROBS. 587, 599 (1995).

and early '90s, "drug war enemies appear to be anyone but white American men," and are most consistently portrayed as Black Americans.¹⁴² Nearly one thousand stories covering crack were run in 1986, the peak of the crack scare.¹⁴³ The stories had an overwhelmingly racist tinge, focusing on "the crack whores, the welfare queens, and the crack baby"—characters all given a Black face.¹⁴⁴

Politicians and the media warned that an entire generation—consistently portrayed as a frightening "biological underclass" of mainly black urban youth—would be born addicted and diseased. Much of that alarmist reporting, however, was based on shoddy or incorrect scientific research; later research which showed that the risk was not nearly so great as was feared was not widely reported.¹⁴⁵

In a study of network television news in 1990 and 1991, all stories concerning illegal drugs were analyzed.¹⁴⁶ The study found a consistent "us against them" frame was used in the news stories, with "us" being White Suburban America and "them" being Black Americans and the few exceptional corrupted Whites.¹⁴⁷ Although statistics dispute the media's conclusion, reputable anchors such as Tom Brokaw continually insisted that crack was "flooding America," fanning the flames of White America's fears and prejudices.¹⁴⁸ Because television is a dominant source of news for much of America and research suggests that the news shapes "people's perceptions of and prescriptions for social problems," the visual images of Black America as the enemy, repeated throughout the television media, are socially deconstructive, keeping America in its historical pattern of using "drug wars as a means of social control over racial minorities."¹⁴⁹

"[T]elevision's overpowering images of Black deviance"¹⁵⁰ were reinforced in the public service announcements run by the Partnership for a Drug Free America (PDFA).¹⁵¹ Out of 45 video, 25 print, and 17 radio public service announcements (PSAs),¹⁵² in all but two examples, it was

142. ELWOOD, *supra* note 137, at 46-56.

143. Bryony J. Gagan, *Ferguson v. City of Charleston, South Carolina: "Fetal Abuse," Drug Testing, and the Fourth Amendment*, 53 STAN. L. REV. 491, 496 (2000).

144. *Id.*

145. *Id.*

146. David Jernigan & Lori Dorfman, *Visualizing America's Drug Problems: An Ethnographic Content Analysis of Illegal Drug Stories on the Nightly News*, 23 CONTEMP. DRUG PROBS. 169, 174 (1996).

147. *Id.* at 188.

148. Reinerman & Levine, *supra* note 96, at 548 (quoting NBC Nightly News 5-23-86).

149. Jernigan & Dorfman, *supra* note 146, at 192-93; *see also* STEVEN R. BELLENKO, CRACK AND THE EVOLUTION OF ANTI-DRUG POLICY 30 (1993) (discussing the effects the media has on the public's perceptions of problems).

150. KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSION 3 (1998).

151. ELWOOD, *supra* note 137, at 81-102.

152. This number represented about 35% of all PSAs that PDFA had produced by 1994, and is repre-

“women, children, and racial minorities . . . [that] constitute[d] ‘the drug problem’ that white men in power should resolve.”¹⁵³ Apparently attempting to work through an appeal to White fear, Whites were shown as “innocent victims of . . . [the] pervasive Others” (generally Black Americans).¹⁵⁴ One particular ad that turned a Black American dealer into a snake to make its point has been interpreted as extending “the racist tenet that all African-Americans are sinful, inferior beings by dint of their skin color” though it is admitted that most of the public service announcements do not use such morally questionable, racial imagery.¹⁵⁵ However, the PSAs consistently perpetuated “the drug war campaign’s idea that drugs are an urban problem for the [W]hite establishment and that [B]lack pushers and users . . . warrant whatever punishment they receive.”¹⁵⁶ Thus, the Partnership’s misguided attempt to improve American society by decreasing drug use in all likelihood only further polarized America, White against Black, Black against White.

Politicians use sensational stories to gain support for their agendas; the media uses visual images to capture their audience and raise ratings. Both of these tactics are understandable. However, the repercussions are severe in the context of the drug war. One in three Black men between the ages of 20 and 29 years is under correctional supervision or control and approximately 14% of Black men have lost their right to vote due to felony convictions.¹⁵⁷ These results have not been widely condemned, but easily accepted by a majority of Americans. National opinion surveys show that “Americans rely on the mass media for information about the scope of the drug abuse problem.”¹⁵⁸ Because the media portrays the drug problem as a Black problem, the racial disparities in the prison system are viewed, if at all, as reflecting reality, rather than reflecting discrimination.

IV. A MODERN DAY DRUG MYTH USED TO JUSTIFY HARSH RACIAL INEQUITIES: THE CRACK BABY

As the effects of political manipulation and media (mis)representations are more widely understood, the racial inequities of the Drug War become less acceptable. However, the myths about crack remain, hidden with the inherent racism of the War on Drugs. Perhaps no crack myth is more insidious or more detrimental to Black America than the one about crack babies. The crack baby myth allows White America to claim the Drug War is nec-

sentative of all PSAs at that time because these were the PSAs most widely distributed. *Id.* at 83.

153. *Id.* at 84.

154. *Id.* at 87.

155. *Id.* at 89.

156. ELWOOD, *supra* note 137, at 90.

157. Boyd, *supra* note 57, at 846-47; JUSTICE POLICY INST., CELLBLOCKS OR CLASSROOMS? THE FUNDING OF HIGHER EDUCATION AND CORRECTIONS AND ITS IMPACT ON AFRICAN AMERICAN MEN, at <http://www.justicepolicy.org/coc1/main.htm> (last visited Nov. 4, 2002).

158. Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1020 (1999).

essary, despite its problems, because of the significant harm to innocent children. However, the myth is based on political maneuvering and media hype, not fact, and has been used to further entrench racism in America. These myths must be exposed before the racism can be addressed.

*A. The Context of the Crack Baby Phenomenon
and the Discriminatory Effects on African American Mothers*

In the 1980s, the media bombarded the public with powerful images of helpless, undernourished “crack babies,” describing these infants as physically, emotionally, and cognitively damaged, emphasizing that the damage was both permanent and extreme.¹⁵⁹ The media frenzy led to public outcry and legal attacks. Mothers using crack were punished in a number of ways, including removal of their children, incarceration for the duration of their pregnancy, and criminal prosecution.¹⁶⁰ However, the research that supported the original outcry has been denounced as flawed in its methodology and simply false in its conclusions.¹⁶¹ Subsequent blind studies conducted with scientific rigor have been unable to duplicate any finding of fetal cocaine withdrawal syndrome or increased risk for sudden infant death syndrome; nor have such studies found any evidence that cocaine exposed infants lag developmentally behind similarly situated non-exposed children.¹⁶² However, subsequent studies have shown that children labeled as “crack babies” are significantly harder to place in adoptive homes.¹⁶³ Further, the label of “crack baby” tends to lower teacher and parent expectations, leading to lower success rates in school and in life.¹⁶⁴

The original studies documenting the crack baby phenomenon failed to separate crack use from other factors that are proven to lead to low birth weights, such as lack of prenatal care and poor nutrition.¹⁶⁵ Additionally, the studies did not separate crack use from the use of other drugs, such as alcohol and tobacco.¹⁶⁶ Authorities now believe it is the social context of crack use—mainly by poverty stricken women, many in an abusive relationship—rather than the prenatal drug exposure that led to the highly publicized medical and developmental damage outcomes.¹⁶⁷ Historical data supports this idea.¹⁶⁸ In the 1970s, significant numbers of well-nourished, stable White women used cocaine (which is pharmacologically indistinguishable

159. Beckett, *supra* note 141, at 600.

160. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1431 (1991).

161. The Lindesmith Center—Drug Policy Alliance, *Research Brief: Cocaine & Pregnancy*, at <http://www.lindesmith.org/library/research/cocaineandpr/index.cfm> (last visited Nov. 4, 2002).

162. *Id.*

163. *Id.*

164. *Id.*

165. Beckett, *supra* note 141, at 600.

166. *Id.*

167. *Id.* at 600-01.

168. *Id.*

from crack) and had babies.¹⁶⁹ These cocaine babies did not suffer from abnormal physical, emotional, or cognitive damages, and there is no scientific reason to believe any different result for crack babies.¹⁷⁰

One reason proposed to explain why crack babies became a national issue while the earlier powder babies did not is the element of poverty involved.¹⁷¹ By labeling these low birth weight babies as “crack babies,” their problems became the fault of irresponsible Black mothers, rather than the fault of the American social structure.¹⁷² “[I]f we had called them poverty babies, the responsibility to fix that might have been ours.”¹⁷³ The “crack baby” label helps American society rationalize their choice of punishment of these women and assuage their feelings of guilt from leaving these women in hopeless situations.

The racism behind the crack baby myth cannot be ignored. Crack is no more detrimental to the fetus than other illicit drugs, and probably less detrimental than alcohol.¹⁷⁴ But while the prevalence of substance abuse of all types crosses racial and socioeconomic lines, “inner-city Black communities have the highest [visible] concentrations of crack addicts.”¹⁷⁵ Not surprisingly, crack use is demonized. Instead of consistently punishing all women who prenatally expose their children to drugs, society has chosen to focus on punishing women who are suspected of using crack, which in effect has limited such punishment to poor African American women.¹⁷⁶ “[S]electing crack abuse as the primary fetal harm to be punished has a discriminatory impact that cannot be medically justified.”¹⁷⁷

Throughout the 1990s, significant numbers of hospitals across the nation began implementing screening practices to determine if the pregnant woman under their care had used drugs.¹⁷⁸ However, the hospitals that tested for prenatal drug abuse were generally public hospitals serving minority communities, presumably because “[p]rivate physicians who serve more affluent women . . . have a financial stake both in retaining their patients’ business and securing referrals from them and because they are so-

169. Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703, 719 (2000).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 720. Note that in the years between 1977 and 1984, “maternal and child health block grants were reduced by one-third.” Paltrow, *supra* note 158, at 1027.

174. ACLU, Supreme Court Preview: 2000 Term, *Ferguson v. City of Charleston* (No. 99-936), Background: Social and Legal Contexts, at http://archive.aclu.org/court/ferguson_00.html [hereinafter ACLU Preview] (citing American Medical Association amicus brief in *Ferguson*, 15, 16; Public Health Association et al., amicus brief in *Ferguson*, 29). Ideally, all pregnant women would consume a nutritional diet, free from any drug, legal or illegal. Crack is not good for a pregnancy, but it is no worse than other drug habits that have escaped public outcry. *Id.*

175. Roberts, *supra* note 160, at 1434. This statement is not to suggest that only Blacks, or even that predominantly Blacks, use crack, but to point to the visible nature of the crack trade in inner city Black communities.

176. ACLU Preview, *supra* note 174.

177. Roberts, *supra* note 160, at 1434.

178. Beckett, *supra* note 141, at 601.

cially more like their patients.”¹⁷⁹ The reason was not a disparity in drug use: “15.4 percent of white women and 14.1 percent of African American women used drugs during pregnancy.”¹⁸⁰ The administration of drug tests further compounded the discrimination against poor Black women, for hospitals use one of two methods to determine if a drug test is necessary.¹⁸¹ Hospitals either employ triggers to determine if a test is necessary—a common trigger being simply the failure to obtain prenatal care (common in poor Black communities)—or they rely on the suspicion of the health care professionals, which “allows doctors . . . to perform tests based on their stereotyped assumptions about drug addicts.”¹⁸² Such policies result in Black American mothers being disproportionately identified with prenatal drug use.

Even if a pregnant White woman were to be tested, she would be ten times less likely to be reported to public health officials for prenatal drug use than a Black woman.¹⁸³ This allows White women to avoid the legal punishments that Black mothers have had to suffer. In 1995, eleven states had “gestational abuse statutes,” which authorized the criminal prosecution of drug-using pregnant women.¹⁸⁴ Even in states without such statutes, pregnant drug-users were prosecuted under creative readings of criminal statutes prohibiting child abuse, child neglect, and delivering controlled substances to minors, just to name a few.¹⁸⁵ While most of these prosecutions eventually failed, the prosecutions continue nationwide, and the threat has deterred women from seeking prenatal care.¹⁸⁶ Perhaps more damaging to the Black families involved, civil actions triggered by reporting have been increasingly instigated against Black American women who used drugs during their pregnancy and the anchors have been “largely supported by the family courts.”¹⁸⁷ These actions generally result in either temporary or permanent removal of children from their mother’s custody.¹⁸⁸

Some believe that such drastic measures are the only way to help the innocent children (and potential children) unfairly burdened by their mother’s drug use. However, the American Medical Association (AMA) finds such policies “irrational” and “counterproductive.”¹⁸⁹ Because the medical literature today posits that prenatal drug abuse can be mitigated with good prenatal care and nutrition and that illicit prenatal drug exposure

179. Roberts, *supra* note 160, at 1433.

180. ACLU Preview, *supra* note 174 (citing a 1990 New England Journal of Medicine study).

181. Roberts, *supra* note 160, at 1433.

182. *Id.*

183. *Id.* at 1433-34; Gagan, *supra* note 143, at 499.

184. Lieb & Sterk-Elifson, *supra* note 132, at 691.

185. Beckett, *supra* note 141, at 603.

186. Lieb & Sterk-Elifson, *supra* note 132, at 699-700.

187. Beckett, *supra* note 141, at 604; see generally Tracey L. Mears, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, reprinted in JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 1047-1053 (2000) (discussing the negative ramifications of the Drug War in poorly organized communities, such as Urban America).

188. *Id.*; Boyd, *supra* note 57, at 847.

189. Lieb & Sterk-Elifson, *supra* note 132, at 693.

alone is not the evil it was once portrayed to be, the true way to help these children is to help their mothers through “nonpunitive health and prenatal care, job training, . . . and child care.”¹⁹⁰ Contrary to media-inspired public opinion, crack does not destroy maternal instincts, but rather merely ostracizes and condemns these women who often suffer guilt and “increased . . . fears for fetal well-being.”¹⁹¹ Unfortunately, “drug treatment for pregnant women is largely unavailable” and “most treatment centers are unable to provide child care and other comprehensive services.”¹⁹² So once a drug addict finds herself with child, she may also find herself outside of any treatment programs.¹⁹³

While an individual’s support of removing children and/or prosecuting drug-using mothers is understandable though misguided given the media’s slant on the crack problem, the state’s justification of concern for these Black children is less believable. “The history of overwhelming state neglect of Black children casts further doubt on [the state’s] professed concern for the welfare of the fetus.”¹⁹⁴ If the state was truly concerned about the welfare of Black children, an attempt could be made to reduce the infant mortality rate of Black children, which in 1987 was more than twice that of White children and largely due to inadequate prenatal care.¹⁹⁵ While taking custody of the pregnant addict or her child is arguably designed out of concern (though the reality of foster care and the limited attempt to keep parent and child together through deficient social programs speaks otherwise), prosecution of a woman for exposing a fetus to drugs is an attempt to “criminalize[] the mother as a consequence of her decision to bear a child,” and as this policy mainly affects Black mothers, it is part of a larger “devaluation of Black motherhood”—an ideology that began with slavery and remains with us today.¹⁹⁶

B. Case Study: A Collaborative Prosecution Policy

Near the peak of the crack scare, the Medical University of South Carolina (MUSC, a public hospital) and Charleston law enforcement instituted the Interagency Policy on Cocaine Abuse in Pregnancy, in which pregnant women at the hospital were subjected to warrantless searches if they met any of the trigger criteria, which included minimal prenatal care.¹⁹⁷ “Women who tested positive or whose infants tested positive after birth were immediately arrested and charged Most women arrested under the

190. Beckett, *supra* note 141, at 606.

191. Irwin, *supra* note 140, at 616.

192. Lieb & Sterk-Elifson, *supra* note 132, at 693.

193. Roberts, *supra* note 160, at 1448.

194. *Id.* at 1446.

195. *Id.*

196. *Id.* at 1432, 1437; see generally SHEILA RADFORD-HILL, FURTHER TO FLY: BLACK WOMEN AND THE POLITICS OF EMPOWERMENT (2000) (discussing the special problems that Black women suffer).

197. Roberts, *supra* note 160, at 1433.

program were hauled off to jail in handcuffs and leg shackles within hours of giving birth.”¹⁹⁸ Some were actually taken from the delivery room, still bleeding, in shackles.¹⁹⁹ Out of the thirty women arrested under this program, twenty-nine were Black, and the remaining White woman had a Black boyfriend, as noted on her medical chart.²⁰⁰ In contrast, “MUSC’s own records indicate that among its pregnant patients equal percentages of white and African American women consumed illegal drugs.”²⁰¹

The policy was finally challenged in *Ferguson v. City of Charleston*²⁰² by ten of the women who were arrested. However, the case was not argued in the main as a discrimination case under the Equal Protection Clause, likely due to the Court’s high bar for such claims.²⁰³ Instead, the case was argued as a violation of the Fourth Amendment. “Disagreeing with the District Court, the majority of the [Fourth Circuit] held that the searches were reasonable as a matter of law under [the] line of cases recognizing that ‘special needs’ may, in certain exceptional circumstances, justify a search policy designed to serve non-law-enforcement ends.”²⁰⁴

The Supreme Court noted that while the city argued a beneficial ultimate purpose of protecting the health of the mother and child, the “purpose actually served by the MUSC searches ‘is ultimately indistinguishable from the general interest in crime control.’”²⁰⁵ The finding of such an entanglement was critical, for it took the case out of the special needs doctrine, and allowed the Court to hold that nonconsensual, warrantless searches by the hospital to obtain evidence of criminal conduct for law enforcement purposes would be unreasonable.²⁰⁶ However, the Supreme Court stopped short of declaring Charleston’s policy unconstitutional and remanded the case for a determination of whether or not the searches were consensual.²⁰⁷ Apparently, if the searches were consensual, a legal possibility given the standard medical consent forms, the policy could be constitutional regardless of the evident discriminatory effects. While the Court introduced the hurdle of consent for those medical professionals wishing to test and then collaboratively prosecute pregnant women for drug use, it did not address the racial

198. *Id.* at 498. Note that the program did eventually allow women one chance to get treatment before they were arrested, but as treatment for these women was not provided, the result remained the same. Paltrow, *supra* note 158, at 1025.

199. Gagan, *supra* note 143, at 492.

200. ACLU Preview, *supra* note 174; Paltrow, *supra* note 158, at 1025. *Contra* Gagan, *supra* note 143, at 498 (stating that forty-two women were arrested, and forty-one of them were Black).

201. ACLU Preview, *supra* note 174.

202. 532 U.S. 67 (2001).

203. Roberts, *supra* note 160, at 1451-52. The suit alleged that the testing violated the Fourth Amendment, Title VI of the Civil Rights Act of 1964, and the constitutional right to privacy. However, the Fourth Circuit and the Supreme Court addressed only the Fourth Amendment issues. Gagan, *supra* note 143, at 506. See *supra* Part I for a discussion of the problems of colorblind jurisprudence.

204. *Ferguson*, 532 U.S. at 74.

205. *Id.* at 81.

206. *Id.* at 86.

207. *Id.* The jury in the district court case held that the plaintiffs had consented to the searches. *Id.* at 74.

inequities of the policy. "By both design and implementation, the policy led inevitably to the identification and punishment of drug use by pregnant, low-income women of color, leaving other pregnant users free of the threat of warrantless, suspicionless, nonconsensual drug testing."²⁰⁸

Policies such as Charleston's need to be recognized and attacked for what they are—merely another form of racial profiling. If racial inequity is to be cured in this country, the Court cannot continue to equate color-blind jurisprudence with fairness. Ignoring race today merely entrenches race further and deeper in our society. Race is just a social construction, but it is a social construction that still governs much of present-day American life. As long as it is meaningful to speak in terms of Black America and White America, race must be acknowledged and addressed.

V. CONCLUSION: IT IS TIME TO DECLARE THE END OF THE WAR ON DRUGS

Today's society is consciously trying to free itself from racism, yet is still bound by the unseen racial structure of society. This tension reveals itself whenever inequities are meaningfully described in terms of race, such as the modern day consequences of the War on Drugs. The professional legal society has a special duty to uncover racism within the law (as do all professions in their respective fields), because membership voices a belief and approval of the American legal system as a democratic and non-biased system. A social system can never be completely non-biased, but reconstruction jurisprudence asks us to continually try for that ideal.

Bias in our system is everywhere; this Comment has examined some of the bias presented by the War on Drugs, regarding cocaine. Cocaine has been widely used and accepted by White America at times in our history as useful medicine or innocent recreation,²⁰⁹ but it morphs into a mythical demonic force once it is associated with Black America. Due to White America's fear and desire for social control, those with power respond with the full force of racist law, and Black America is once again subjugated. While there are health concerns associated with cocaine (though less than those associated with alcohol or tobacco), White America undercuts its own messages of public health by relying on prohibition rather than treatment.²¹⁰ Society ignores its own racism in this context, believing both the media-inspired Black Face of the Drug War and the political rhetoric that drugs cause all of our social problems (actual or otherwise). In our own times, this is well illustrated by the unfounded hysteria over crack babies.

Our system is inundated with the idea of race, and present social inequality is a direct result. While theoretically all Americans are equal, the

208. ACLU Preview, *supra* note 174.

209. PAUL GOOTENBERG, COCAINE: GLOBAL HISTORIES 2-5 (1999).

210. See BAKALAR & GRINSPOON, *supra* note 104, for a complete discussion of the inadequacies of a paternalistic public health model.

truth today is that White America has more social support and power than Black America. To advocate for colorblindness while race is still an issue, still a respected statistical measure, and still an underlying structure, is to perpetuate the racism. The Drug War is not a colorblind war. It is a war begun in fear and with the desire of the dominant majority to retain social control. It remains a war of fear and control, a war inundated with racism. While this Comment has focused on crack and Black America, the other major fronts of the Drug War have similar racial foundations, such as opium and Yellow America²¹¹ and marijuana and Brown America.²¹² The War on Drugs is an inherently racist war. Something must be done.

Whenever racism is acknowledged in a particular structure, it can be dealt with in two basic ways: removing the racism or removing the structure. Because the Drug War is not only racist, but also incredibly costly and completely ineffective,²¹³ this is a structure that should be removed. There is not a non-racist justification for continuing the current Prohibition.²¹⁴ This country, through enactment of the Twenty-First Amendment, decided that regulation is preferable to prohibition for alcohol.²¹⁵ The current drug prohibition is as poorly thought out and equally as damaging as the previous alcohol prohibition; the only distinction between the two is the common familiarity of alcohol versus the apparent exotic nature of illicit drugs.²¹⁶ There is simply no logical public health, safety, or welfare reasoning that justifies the War on Drugs.²¹⁷ Without illegality, there is no black market and no black market crime.²¹⁸ Studies have shown that generally drug users treat the drugs they use in much the same manner and with much the same type and level of problems as drinkers with alcohol.²¹⁹ The great majority do what they do without any significant negative consequences (ignoring the criminal consequences of possession momentarily).²²⁰ A small minority of both users and drinkers develop significant problems, but that is no reason to legislate abstinence for all of society, especially considering the

211. COOMBER, *supra* note 113, at 13-14.

212. *Id.* at 23-24; MUSTO, *supra* note 98, at 223.

213. See *supra* Introduction; see also Common Sense for Drug Policy, *Drug War Facts: Adolescents*, at <http://www.drugwarfacts.org/adolesce.htm> (last modified May 23, 2002) (citing Donald R. Lynam et al., *Project DARE: No Effects at 10-Year Follow Up*, 67 J. OF CONSULTING AND CLINICAL PSYCHOLOGY 590-93 (1999) (“[T]here appear to be no reliable short-term, long-term, early adolescent, or young adult positive outcomes associated with receiving the DARE intervention.”)).

214. See HUSAK, *supra* note 42, for arguments against prohibition as a means to protect users from themselves or to protect society from drug related harm; WALTON, *supra* note 45, for discussion of intoxication as an integral part of human culture; and BAKALAR & GRINSPOON, *supra* note 104, for discussion of the philosophical problems of the drug war.

215. See BAKALAR & GRINSPOON, *supra* note 104, at 80-88; COOMBER, *supra* note 113, at 18-21; and WALTON, *supra* note 45, at 151-59, for a discussion of the problems of alcohol prohibition.

216. BAKALAR & GRINSPOON, *supra* note 104, at 87-88.

217. See *supra* note 210. See also <http://www.drcnet.org/links> for a set of internet links to numerous groups disproving various rationales for the current drug war.

218. See BELENKO, *supra* note 149, at 71-113 (presenting research about crack-related crime and concluding that the drug had little, if any, effect that was not related to its illegal status).

219. See *supra* notes 45-46.

220. *Id.*

heavy price of enforcement.²²¹ Health and welfare money is better spent—in amount and result—under a regulatory system rather than under prohibition.

Furthermore, it would be impossible to remove the racism from the War on Drugs. Particular drugs are illegal because of their connection to a subjugated race and other drugs are legal because of their connection to the dominant race. Without race, there are no illicit drugs—just regulated foods, medicines, and intoxicants (a less negative substitute for the word “drugs”²²²). The racism in the Drug War is comparable to the materials used to build a house: Without the materials (racism), there can be no house (Drug War).

Purging racism from our society is as continual a process as the creation of race, and indeed purging must continue as long as there is a meaningful social construction of race. One obvious target is the War on Drugs. The War on Drugs began in racism, is enflamed by racism, and perpetuates racism in America. It has no logical non-racist reason for existence. It continues to be used to subjugate Non-White America. It has not and likely will never solve a perceived drug problem. Drugs are not the problem, as White America has shown with its relationship to alcohol, tobacco, refined sugar, and caffeine.²²³ The problems are the underlying inequities caused by racist structures. These inequities will not significantly change until the racism is acknowledged and addressed—but not ignored. We must continue to help each other and our society find our hidden, ignored racisms so that our society can be—and is—worth saving by all.

Declaring the War on Drugs to be over would be a good start. In its place, we should implement a system combining elements of both alcohol regulation and prescription medication control. Formerly illicit drugs should be available with appropriate regulation, and the Food and Drug Administration (FDA) should have the power to determine what type of regulation is applicable. Because of the likely tendencies for racism to linger on, FDA regulations of this type should be susceptible to intermediate scrutiny by the courts and citizens should have standing to bring reasonable citizen suits. As an additional check on racism, each upheld regulation should be allowed to be challenged every five years, though under a lesser standard of review. Furthermore, the funds and personnel being wasted on the Drug War should be diverted to implement social programs to improve the lives of the American underclass. However, these resources cannot be dispelled in a colorblind fashion. The American underclass is largely a problem of race, and so race must consciously inform the solution. A dispersion of resources informed by present actual needs, recognizing that those needs are the legacy of racism, will restore America in a way that a colorblind equal dispersion, which would help all levels of need to maintain the appearance of

221. See discussion in Introduction, *supra*.

222. See HUSAK, *supra* note 42, at 19-27 (discussing the connotations and problems of defining the word “drugs”).

223. See WALTON, *supra* note 45, at 85-95, 129-39 (discussing caffeine, tobacco, and alcohol).

equality, never could. It is time for America to admit her hidden racial problems and begin to consciously acknowledge and address them. America is founded on beautiful principles tarnished by race.²²⁴ It is time to make American principles shine.

Kathleen R. Sandy

224. For instance, the Preamble to the Constitution states:

We the people of the United States, in order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. Pmbi.

Regardless of the prejudices of the Founders, their ideas of a truly democratic nation, replete with liberty and justice for all, is a remarkably obvious but not yet inherent principle. The idea of an all-inclusive "we the people" is an idea worth striving towards, and for the time being, should be done with the help of critical race theory.

