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The War on Drugs and Its Constitutional Implications (Program)

Institute of Bill of Rights Law at the William & Mary Law School

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Saturday
February 17, 1990

Marshall-Wythe School of Law
Williamsburg, Virginia

THE WAR ON DRUGS AND ITS CONSTITUTIONAL IMPLICATIONS

The Student Division of the Institute of Bill of Rights Law welcomes you to our First Annual symposium. This year's symposium aims to focus debate on the controversies surrounding the war on drugs. Legislative attempts to control the spread of drug use have increased concern about individual constitutional rights. Areas of consideration include drug testing in state funded institutions, civil and criminal sanctions against pregnant drug users, and the current controversial debate over the legalization of drugs. Admission is free and open to the public.

The symposium will begin at 10:00 a.m. in room 119 with an address on drug testing by Robert W. Kelly, General Counsel for the Executive Office of the President, Office of Administration. Mr. Kelly is responsible for the implementation of the Executive Office of the President (EOP) Drug-Free Workplace plan. Audience questions and discussion will follow. At noon, there will be a break for lunch (on your own).

The afternoon session, room 119, from 1:30 until 3:00 p.m., will be a student Problem-Solving Panel, moderated by Rodney A. Smolla, James G. Cutler Professor of Constitutional Law and Director, Institute of Bill of Rights Law. Students Camilia Belcher, John V. Edwards, Joan Quigley, Mukta Srivastav, and David Ziemer will be the panel members. These discussions will be in an "open" format to encourage audience participation.

DRUG TESTING IN THE WORKPLACE

Some Facts:

- ❑ Roughly 20% of all employers use some form of drug testing or screening procedures with their employees.
- ❑ Drug abuse in the workplace exacts a high social cost by impairing the health and efficiency of workers.
- ❑ Virtually all drug testing is done through urinalysis testing, which involves some government intrusion into the privacy and autonomy of individual workers.
- ❑ In 1989, the Supreme Court decided VonRaab and Skinner, which upheld the constitutionality of mandatory drug tests for public sector workers in (1) sensitive positions or (2) who give employers probable cause.

Some Issues:

- ❑ Should drug testing be imposed on all workers, or based upon individual suspicion?
- ❑ Should the same standards apply to public and private sector workers?
- ❑ Should certain job categories have required drug testing?
- ❑ How should testing procedures be monitored for accuracy?
- ❑ Once an employee tests positive, what remedies and sanctions are available?
- ❑ Can test results be made public or disclosed to other workers?

RIGHTS OF THE UNBORN

Some Facts:

- ❑ Recent trends indicate that courts are more willing to recognize unborn fetuses as human beings and to hold others responsible for harms committed to the unborn child.
- ❑ Surveys indicate that 1 in 10 babies in the U.S. is born with some evidence of cocaine in its body as a result of drug abuse by its mother.
- ❑ Harms to the babies as a result of cocaine ingestion by their mothers include permanent brain damage, retarded growth, seizures, and abnormalities in internal organs.

Some Issues:

- ❑ Should a mother be made to face criminal charges for the ingestion of drugs during pregnancy which subsequently affect her child?
- ❑ Can a judge place a pregnant woman who is a known drug user, convicted of a separate crime, in custody to protect her unborn child from any further drug abuse?
- ❑ Should we adopt similar rules for mothers who injure their unborn children through alcohol or tobacco use?
- ❑ Do such rules violate the Constitutional right to privacy? or Equal Protection?

THE GROWING DEBATE OVER THE LEGALIZATION OF DRUGS

SOME PROS:

- ❑ Eliminate the Black Market Because drugs are illegal, high prices are charged. High profits attract criminal elements to sale and distribution.
- ❑ Ease Pressure on Criminal Justice System The high volume of drug related cases has created a backlog in the courts and overcrowding in the prisons.
- ❑ Save Money Federal government wouldn't have to spend billions of dollars on interdiction, enforcement, border patrols, investigation, prosecution, and confinement.
- ❑ Raise Money The sale of drugs, like sale of alcohol and tobacco, would be regulated by the state and subject to sales tax.
- ❑ Quality Control Regulation by State would lead to cleaner, safer drugs; could prevent spread of AIDS through dirty needles.
- ❑ Respect for Individual Rights Current law enforcement measures, including surveillance, entrapment, random testing and searches interfere with basic civil liberties and privacy rights.

SOME CONS:

- ❑ Moral To legalize drugs would be moral surrender, a cop-out in the administrations all-out war on drugs.
- ❑ Decreased Efficiency and Health in the Workplace and in the Home Impaired workers or homemakers will have an extremely detrimental effect on society.
- ❑ Stigma The stigma of illegality will prevent many from trying drugs who otherwise might try drugs out of curiosity or social pressure.
- ❑ Products Liability Suits Decriminalizing drug use would open the door to products liability suits against manufacturers.

PANELISTS AND POSITIONS

The Economics of Legalizing Cocaine: Mukta Srivastav

Mukta will present an economic analysis of the "war on drugs" which shows that the government's policy has itself lead to many of the problems we associate with cocaine use: the cartels, crime, and even the increased number of addicts. She will then give an economic perspective of what should (might) happen if the government were to legalize cocaine use.

Mukta Srivastav is a second year student who graduated from Stanford University in 1988 with an A.B. in Economics and communication. She is a member of the William and Mary Law Review.

Decriminalization and a Model Legalization Statute: Joan Quigley

Joan will outline the arguments for and against decriminalization of drugs and will propose a model legalization statute. Joan will argue that the "war on drugs" cannot be won from the supply side. Rather, drug use is a demand problem which should be addressed by the health care system, not the criminal justice system. The model statute attempts to strike a balance between competing policy considerations of prevention, efficiency, fairness, and respect for individual rights.

Joan Quigley is a second year student who graduated from Princeton in 1986 with a degree in history. Prior to law school, Joan worked as a speech writer on Kathleen Kennedy Townsend's Congressional campaign in Baltimore, Maryland and as a medical writer on a women's health newsletter in Washington, D.C.

Drug Testing In the Workplace: David Zeimer

David will present an analysis of drug testing in the workplace in light of two 1989 Supreme Court decisions: Skinner v. Railway Labor Executives' Association and National Treasury Employees Union v. Von Raab. David will examine the Court's treatment of drug testing in relation to the Fourth Amendment jurisprudence regarding other types of searches. He will also critique the present state of the law and speculate on the future of drug testing as a result of the Skinner and National Treasury decisions.

David Zeimer is a second year student who graduated from the University of Wisconsin with a B.A. in English.

Criminal Liability for Pregnant Women Who Use Drugs:

John V. Edwards

The rationale for holding a mother criminally liable for ingesting drugs or alcohol during pregnancy derives from tort, property, and criminal law. New questions have arisen, and have not been answered, as a result of the decisions in Roe and Webster. John will discuss this historic rationale and the challenges to this rationale posed by the recent abortion decisions.

John V. Edwards is a first year student who graduated from the Midwest with a masters in Public Administration and a B.S. in Political Science. John has worked in a variety of different positions including Legal Assistant, Campaign Organizer, Lobbyist and Management Analyst Consultant.

The Drug War of the Nineteenth Century—Chinese Opium Wars: Camilia Belcher

In recognition of the fact that man has been fighting the "war on drugs" throughout history, Camilia will present an overview of the Chinese Opium Wars.

Camilia Belcher is a first year student who graduated from Morehead State University, summa cum laude. Prior to law school, Ms. Belcher was a historical researcher specializing in American colonial history. She is a columnist for the Advocate, the law school newspaper. She is a relative of Admiral Sir Edward Belcher, who was knighted for his distinguished service in the opium wars.

THE INSTITUTE OF BILL OF RIGHTS LAW

The Institute of Bill of Rights Law was established at the College of William and Mary in 1982 by a private bequest to support scholarly research on the Bill of Rights. The Institute functions as a public forum for airing and debating matters of legal and public policy, as a vehicle for education by providing information on constitutional topics, and as a source of creative thought on constitutional and public policy issues. It is an academic foundation with a mission of quality research and public education.

The Student Division of the Institute of Bill of Rights Law was established to foster dialogue and promote research among law students. An integral part of the institute, the student division enhances the educational opportunities of students and promotes the ideal of the lawyer as a thoughtful citizen contributing to the resolution of social and political problems.

THE BILL OF RIGHTS LAW AND POLICY JOURNAL

The Editorial Committee of the Student Division of the Institute of Bill of Rights Law is publishing a journal of Bill of Rights Law, tentatively titled "The Bill of Rights Law and Policy Journal." Our publication is devoted to student research and analysis of contemporary Bill of Rights issues. This year, in conjunction with the activities of the Symposium Committee, the theme is Constitutional issues raised by the "War on Drugs." Our journal will consist primarily of topical, student-written submissions. It is an open forum for discussion on a broad range of contemporary civil rights and civil liberties issues. All Marshall-Wythe law students as well as students from other law schools are invited to submit articles.

Articles submitted for publication should address a current debate over law or policy, with emphasis on individual protections guaranteed by the Bill of Rights. The Editorial Committee is looking for articles which are well-written, well-researched and theoretically sound. We encourage prospective contributors to explore substantive areas of the law which may not be fully addressed in law school courses. Contributors should not feel confined to areas in which the prevailing doctrine is well-defined or settled.

Submissions should be typed, double-spaced (including endnotes) on standard 8 1/2 X 11" white paper. All sources must be correctly cited in proper Bluebook form. We recommend an article length of between twenty and seventy-five pages, including endnotes. All citations and textual notes must be in endnote format. An alphabetically-arranged table of citations must be included. Authors should submit a copy of their article on a 5 1/4 inch floppy disk in Wordperfect 5.0, or the ASCII equivalent and three hard copies.

The deadline for submissions is March 15, 1990. The Editorial Committee may consider articles submitted after the deadline, as space and time allow. Please turn in all submissions to The Institute of Bill of Rights Law, Room 220, William And Mary Law School. Contact Dave Edwards (2L) or Joan Quigley (2L) if you have any questions.