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COCAINE PROHIBITION: DRUG-INDUCED MADNESS IN THE WESTERN HEMISPHERE

ARTHUR L. BERNEY*

Colombia and the United States share the unhappy distinction of being two of the most violent democracies in the world, because of a common, reciprocal condition: drug addiction. This addiction is the addiction to a failed policy: prohibition. The adherence to this policy is more than irrational; it is mad.

It is the thesis of this paper that unless one or more of the major drug consuming and producing nations “kicks the habit” of drug prohibition, the addiction to this failed policy will cleave the societies affected and lead to repressive measures inimical to democratic governance.

With apologies for mixing war and illness metaphors, the basis for this dark prognosis will be explored first by reviewing the already terrible consequences of the long-running “war on drugs,” concentrating mainly on the United States, the leader in this war, and second by identifying the powerful obstacles to abandoning this war policy. In keeping with this pessimistic assessment, the final section will consider the only course left: some radical strategies.

I. INTRODUCTION

According to recent polls and political wisdom, crime has once again become the leading cause of concern to Americans.¹ Part of the

* Professor of Law, Boston College Law School. The author wishes to acknowledge the invaluable research of his assistants, Elizabeth Madden and Jeff Goss. He also thanks Dean Avi Soifer, as well as former students, Vickie Feeman and Scott Pitman for their contributions to a paper presented at the First Congress on Caribbean Legal Studies: Globalization, Law, and the Contemporary Caribbean, University of Puerto Rico School of Law, April 20–22, 1994. Parts of that presentation found their way into this Article.

¹ Despite all the emphasis on health care in 1993–94, a 1994 poll showed that crime is cited by voters as the most important problem facing the country. Robin Toner, *Health Impasse Souring Voters, New Poll Finds*, N.Y. TIMES, Sept. 13, 1994, at A1, A18; see also Steven Holmes, *A Business Gathering Focuses on Crime*, N.Y. TIMES, Oct. 8, 1994, at A30; Richard Berke, *Crime is Becoming Nation's Top Fear*, N.Y. TIMES, Jan. 23, 1994, at A1. Although there is strong public concern about crime, recent statistics generally show a downward trend in criminal activities. From 1991 to 1992, the crime rate decreased 2.9% for number of offenses, and 4.0% for the overall crime rate per 100,000 inhabitants. FBI, U.S. DEP'T. OF JUSTICE, UNIFORM CRIME REPORTS, CRIME IN THE UNITED

explanation for this heightened concern may be the perception that our society is becoming increasingly violent. This perception is powerfully reinforced by two sources: the media² and political leaders.³ Violence, particularly random violence of the kind that occurs regularly in large cities, generates fear and insecurity. Politicians understand the almost certain power of fear as a means of manipulating the *polis*. Indeed, to varying degrees every president in living memory has played the crime/fear card. In recent years, the "trump card" in this play has been *drugs*.

There is no reliable evidence that drug use, *per se*, leads to violence.⁴ The direct causal connections between illicit drug trafficking and violence, however, are clear and undeniable. There is violence at the street level between rival drug dealers in deadly competition for

STATES 1992 5 (1993) [hereinafter CRIME IN THE UNITED STATES 1992]; see also Clifford Krauss, *Urban Crime Rates Falling this Year*, N.Y. TIMES, Nov. 8, 1994, at A14.

Although the emphasis throughout this discussion will be on the United States, there is every reason to believe that the public perception regarding crime and violence is similar in Latin America. See generally KEVIN JACK RILEY, *THE IMPLICATIONS OF COLOMBIAN DRUG INDUSTRY AND DEATH SQUAD POLITICAL VIOLENCE FOR U.S. COUNTERNARCOTICS POLICY* (1993) (discussing the Colombian public's primary concern with terrorism and political violence).

² Depictions of violence attract and mesmerize the viewing public. See John T. Schuler & Arthur McBride, *Notes from the Front: A Dissident Law-Enforcement Perspective on Drug Prohibition*, 18 HOFSTRA L. REV. 893, 913 (1990). A recent study found that more than 50% of local television broadcasting in the Chicago area was devoted to violence. Mark Fitzgerald, *Newspapers & Violence Coverage*, ED. & PUB. MAG., June 18, 1994, at 14.

³ Violence portrayed by the media has reached levels that have attracted a political response. A number of proposals for containing and regulating depictions of violence in the broadcast media have been discussed by political leaders. See Raymond L. Fischer, *Is it Possible to Regulate Television Violence?*, 123 USA TODAY MAG., July, 1994, at 72; see also Laurie Jones, *AMA: Give Parents Tools to Judge TV, Video Violence*, 37 AM. MED. NEWS, July 25, 1994, at 8; Richard C. Reuben, *Pulling the Plug on TV Violence*, 14 CAL. LAW., Jan. 1994, at 39 (interview discussion with Professors Cass Sunstein and Kathleen Sullivan). The fear of violence was also used to muster support for the \$30 billion crime bill in July 1994. See Bill Walsh, *Clinton: Law Might Have Saved Boy*, TIMES-PICAYUNE, July 17, 1994, at B1.

⁴ James Ostrowski, *The Moral and Practical Case for Legalization*, 18 HOFSTRA L. REV. 607, 651 (1990). Cocaine, unlike other addictive drugs, does have a potential for provoking irrational and violent behavior. Gregory A. Loken & James Kennedy, *Legal Cocaine and Kids: The Very Bitterness of Shame*, 18 HOFSTRA L. REV. 567, 586 (1990). The fact that persons arrested for other crimes also test positive for drug use in a large number of cases does not establish any causal linkage. The absence of such a link, however, does not suggest that use of cocaine has no serious, deleterious consequences. For a discussion of cocaine and its effects, see COCAINE: A CLINICIAN'S HANDBOOK (Arnold M. Washton & Mark S. Gold eds., 1987) [hereinafter CLINICIAN'S HANDBOOK]. But see Loken & Kennedy, *supra*, at 568 (citing Gawin & Ellinwood, *Cocaine and Other Stimulants: Actions, Abuse, and Treatment*, 318 NEW ENG. J. MED. 1173 (1988), providing an analysis of the historical view that cocaine is relatively safe). One unpublished study found that of 414 randomly selected homicides in New York City, 218 were considered "drug-related." Thirty-one of the latter homicides were classified as "psychopharmacological" and of those, crack was a factor in only five. Schuler & McBride, *supra* note 2, at 901 n.40 (citations omitted).

territory and market—at both the wholesale and retail level. This violence, though directed at operatives in the illicit drug trade, randomly yet regularly impacts persons who have no connection with the drug trade other than geography. Bystander-victims, too often children in harm's way,⁵ are only the more obvious victims. Whole neighborhoods, including most low-income housing projects in every major city, are traumatized by the violence of drug operatives.⁶

In addition, violence is committed by and against the police in the course of enforcing and resisting drug prohibition laws, at both the local and national levels.⁷ Perhaps epitomizing the violence associated with the illicit drug trade are the open and shocking attacks by members of drug cartels against organized government itself.⁸

Of course, violence begets violence. Wherever blame-fixing or an unrewarding search for cause and effect may lead, there can be little doubt that the nations of the world are caught in a vicious, escalating cycle of violence and counter-violence in connection with the effort to

⁵ According to New York City Mayor Rudolph Giuliani, "an unprecedented 500 New York City children were shot" in 1993. See Kath F. Rocklen, *End War on Drugs: Too Many Casualties*, NAT'L L.J., July 25, 1994, at A19. Forty percent of homicides were estimated to be attributable to drug-related incidents. *Id.* at A20.

⁶ See, e.g., Lisa Chedekel, *Two Neighborhoods Fight Back Against Wave of Shootings, North Street Complex's Residents Ask for a Fence to Block Dealers' Routes*, HARTFORD COURANT, May 12, 1994, at D3; see also *infra* note 111 and accompanying text (regarding the evictions of tenants in public housing for household drug dealing).

⁷ The Los Angeles riots in the spring of 1992 were set off by the acquittal of four white police officers accused of the videotaped beating of Rodney King, an African-American man. The officers asserted that King was under the influence of the drug PCP, or phencyclidine, and that this contributed to the difficulty of subduing him. See Andrew Okun, *As Defense Case Opens Officer Says King was Laughing*, REUTERS N.A.M. WIRE, Mar. 16, 1993, available in LEXIS, News Library, REUTERS File.

In Boston, a police raid on the wrong apartment resulted in the death of a minister who was so frightened by the raid that he had a heart attack. See Brian McGrory & Toni Locy, *Minister Dies After Botched Drug Raid: Suffered Heart Attack in Apartment*, BOSTON GLOBE, Mar. 26, 1994, at B1.

Police officers are also injured in drug raids. See, e.g., *Officers' Injuries Cripple Investigation into Drug-Raid Disaster*, ST. LOUIS POST-DISPATCH, Nov. 6, 1993, at 1B; *2 Cops Hurt in Raid on Joliet Drug Ring*, CHI. TRIB., June 17, 1987, at C2.

⁸ In 1989, presidential candidate Luis Carlos Galan in Colombia was assassinated. See Maureen Dowd, *U.S. Giving Bogota \$65 Million in Aid to Fight Drug War*, N.Y. TIMES, Aug. 26, 1989, at A1; Eugene Robinson, *Colombian Candidate Murdered; President Sets Moves Against Drug Lords, Reinstates Extradition*, WASH. POST, Aug. 20, 1989, at A1; see also James Brooke, *War Report from Colombia: Fight Will Be Long*, N.Y. TIMES, Sept. 18, 1989, at A12 (discussing traffickers' threats to kill ten judges for every Colombian extradited to the United States, and the killing of approximately a dozen Colombian Supreme Court judges by the traffickers); *Colombian Judge Quits Amid Threats*, WASH. POST, Jan. 22, 1987, at A25; Tyler Bridges, *Colombian Judges Face Threats, Assassination; Violence by Drug Traffickers Leads to Release of Suspects, Leaving Police Dismayed*, WASH. POST, Nov. 22, 1986, at A24.

suppress the use of illicit drugs. The pernicious effect of this cycle of violence cannot and will not be broken until either government or the drug dealers relent. For various reasons, the hope that the drug dealers will relent is unrealistic.⁹ Our hope and trust must, perforce, be placed in government.

Indeed, the primary obligation of government is to serve the general welfare. If over a substantial period of time the policy of prohibition is unleashing violence and exacerbating insecurity, without demonstrating any appreciable reduction in the deleterious effects of drug use among the class of users,¹⁰ it is hard to deny that the general welfare is not being served. A policy with no provable benefits and substantial human costs, by definition, is not in the public interest. A second, related reason for an affirmative response from government pertains to economic costs. The costs of the prohibition regime established by the United States during the better part of this century are enormous.¹¹ The final reason that governments, particularly democratic governments, must end or curtail existing drug policies, is that these policies pose deep and growing threats to democratic values.¹²

This paper takes up the foregoing matters in the context mainly of the trade and use of one drug: cocaine.¹³ This focus is based on the fact that cocaine is produced in our hemisphere and thus concerns

⁹ The demand for psychotropic drugs has existed throughout human history. Steve Jonas, *Solving the Drug Problem: A Public Health Approach to the Reduction of the Use and Abuse of Both Legal and Illegal Recreational Drugs*, 18 *HOFSTRA L. REV.* 751, 756 (1990). Although this demand may fluctuate over time and vary from society to society, it apparently never disappears completely. So long as the demand persists, and there is great profit to be made by satisfying that demand, there will always be those who will undertake to supply that demand. Humans regularly engage in far riskier activity, for far less promise of profit, than that associated with the supply of psychotropic drugs. *See id.* at 756-57.

¹⁰ *See* Peter H. Smith, *The Political Economy of Drugs: Conceptual Issues and Policy Options*, in *DRUG POLICY IN THE AMERICAS* 4-5 (Peter H. Smith ed., 1992) [hereinafter *DRUG POLICY IN THE AMERICAS*]. A 1993 survey on household drug abuse reported no change in the number of current illicit drug users between 1992 and 1993—11.4 and 11.7 million respectively. 1993 *NAT'L HOUSEHOLD SURVEY ON DRUG ABUSE*, U.S. DEP'T OF HEALTH AND HUMAN SVCS. 7 (1994). Drug use, however, has declined since 1985, when there were 22.3 million users. *Id.* The survey also shows that in 1993, the prevalence of illicit drug use for individuals twelve years and older was at the highest percentage since 1979, a rate of 37.2% versus 33.3%. *See id.* at Appendix 5, Table 2, Prevalence of Any Illicit Drug Use 1979-1993.

¹¹ *See infra* notes 61-81 and accompanying text for a discussion of economic costs.

¹² *See infra* notes 82-148 and accompanying text for a discussion of the threat to democracy.

¹³ In general, unless otherwise indicated by text or context, the generic term "drug" is used in this paper to refer to cocaine and its derivatives. Cocaine has been described as the following: Cocaine is a crystalline alkaloid obtained from coca leaves that tends to induce sensations of stimulation and euphoria; in white powdery form known as cocaine hydrochloride . . . it can be ingested through inhalation ("snorting" through the nose or "freebasing" through a pipe or tube) or, dissolved in water, through intra-

United States relations within the Americas, relations that are often characterized as being of prime importance. The second reason for focusing on cocaine is that it appears to be the "hard drug" that most concerns our law enforcement agencies and the public at this moment.¹⁴

The first section of this paper will discuss the three aforementioned reasons for urging governments to relinquish their efforts to control drug use through prohibition: *human costs, economic costs, and the threat to democracy.*

This section is drawn largely from existing literature and is intended to serve as an informational backdrop.¹⁵ Although the points made in this first section are organized and expressed as an implicit argument against the continuance of drug prohibition, there is no effort to offer a brief for legalization or decriminalization,¹⁶ because the chance that the United States (the international leader of the

venous injection; combined with baking soda and water and heated—creating a form of cocaine known as "crack"—it can be ingested by either smoking or freebasing. Smith, *supra* note 10, at 2. Cocaine is derived from coca leaf grown almost exclusively in the Andean region of South America. A combination of soil conditions, climate, and agricultural practice limit its production essentially to Bolivia, Colombia, Peru, and Ecuador. *See id.* at 8–9; *see also* Elane Alvarez, *Coca Production in Peru*, in *DRUG POLICY IN THE AMERICAS*, *supra* note 10, at 72; Flavio Machicado, *Coca Production in Bolivia*, in *DRUG POLICY IN THE AMERICAS*, *supra* note 10, at 88. In 1990, Latin America produced 310,170 metric tons of coca leaf, a 6.5% increase over the figure for 1987, with most of the production coming from Peru, which produced 196,900 metric tons, followed by Bolivia, Colombia, and Ecuador. Smith, *supra* note 10, at 8 (citing U.S. DEP'T OF STATE, BUREAU OF INT'L NARCOTICS MATTERS 1991 FIGURES FOR LATIN AMERICAN PRODUCTION OF COCA LEAF AND MARIJUANA 1987 AND 1990). Until recently most of the processing took place in Colombia, converting the leaf into coca base in preparation for shipment to its markets. In response to a crackdown on the drug cartels in Colombia, some of the production operations have been moved to Peru and Bolivia. *See id.* at 10–13. Thus, whenever operations are interrupted, new avenues are opened. *See* Don Podesta, *Argentina Becomes Conduit for Drug Traffic*, *WASH. POST*, Nov. 2, 1993, at 16.

¹⁴ Former Drug Czar William Bennett said that much of the current drug problem can be explained in one word: "crack." OFFICE OF THE NATIONAL DRUG POLICY, NATIONAL DRUG CONTROL STRATEGY 3 (1989). For an official definition of the term "drug", see the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 321(g)(1) (Supp. V 1993); "narcotic drug" is defined in the Controlled Substances Act, 21 U.S.C. § 802(17) (1988). Three statutes have been relevant at the federal level for criminal enforcement of drug prohibition: The Harrison Narcotic Act, 26 U.S.C. § 4701 (1964) (repealed 1970); Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 et seq. (1988), 42 U.S.C. § 257 et seq. (1988); Racketeering Influenced and Corrupt Organizations (RICO), 18 U.S.C. §§ 1961–1968 (Supp. IV 1993).

¹⁵ The vast amount of literature on the subject of drug policy has in itself become virtually a "cottage industry." *See, e.g.*, THEODORE R. VALLANCE, *PROHIBITION'S SECOND FAILURE* 12–13 (1993); THOMAS SZASZ, *OUR RIGHT TO DRUGS* 185–89 (1993); FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 204–11 (1992).

¹⁶ Arguments for legalization may be found in various scholarly works. *See* SZASZ, *supra* note 15, at 104–07 (citing LESTER GRINSPOON, *MARIJUANA RECONSIDERED* (2nd ed. 1977)); *see also*

existing prohibition approach) will change that approach in the foreseeable future is remote.¹⁷

The second section of the paper will seek to demonstrate the basis for the pessimistic conclusion that the United States will not change its prohibition policy any time in the near future. In this section evidence of the United States government's obdurate commitment to the prohibition policy and the considerable obstacles to any change in that policy will be explored.

Although the paper joins those critics who have argued for decriminalization or legalization, the concluding section will not rehearse those arguments. Instead, the final section urges those who are adversely affected by the prohibition policy to pursue avenues that will bring pressure on the United States to amend its prohibition stance. This argument is most particularly addressed to the governments of Latin American countries and to the populations who are the main victims of the present policy.

II. HUMAN COSTS, ECONOMIC COSTS, AND THE THREAT TO DEMOCRACY

Few would question the harm directly associated with heavy drug use.¹⁸ The critical question, however, is whether prohibition reduces such use, and if so, how much. If drug abuse is largely attributable to personal inclinations or "weaknesses" that entrap so-called addictive personalities, or even if use is a function of social/economic despair, then prohibition, or for that matter decriminalization, may not significantly affect the level of use. There is no way to determine, short of social experiment,¹⁹ what the long-term impact of decriminalization would be on the incidence of use. Does prohibition deter a significant percentage of potential users who would ultimately become addicts, "experimenters," or, at the most, casual users?²⁰ "Turning crack into a

ARNOLD S. TREBACH, *THE HEROIN SOLUTION* (1982); RICHARD MILLER, *THE CASE FOR LEGALIZING DRUGS* (1991).

¹⁷ Some critics suggest that the United States will never overcome the harmful societal effects of drug use until it shifts to a treatment-based effort or to a policy of legalization, decriminalization, or "medicalization"; therefore, there is little to gain by adding still one more argument for a strategy of legalization. See generally Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501 (1990).

¹⁸ Mark A.R. Kleiman & Aaron J. Saiger, *Drug Legalization: The Importance of Asking the Right Question*, 18 HOFSTRA L. REV. 527, 538 n.68 (1990).

¹⁹ See *id.* at 544 n.98 (citing to one authority who suggests an experimentation period of drug legalization).

²⁰ See Joseph L. Galiber, *A Bill to Repeal Criminal Drug Laws: Replacing Prohibition with Regulation*, 18 HOFSTRA L. REV. 831, 849 (1990).

regulated and legal commodity would separate economically motivated lawlessness from the demand for an inexpensive high,"²¹ but it is unclear what the impact of such regulation would be upon "consumption and . . . the death, damage, and crime caused by the drug itself."²²

Inasmuch as this question is unanswerable, the only response may be another question: can the present harm associated with cocaine use get much worse?²³ Two critics of decriminalization, Mark Kleiman and Aaron Saiger, argue that the answer to this question is "yes"—the harm could become far worse.²⁴

In essence, their argument rests on the nature of crack cocaine. These critics consider crack to be an inherently extremely harmful drug, with especially seductive and addictive qualities.²⁵ Therefore, their argument proposes, the risk that the use of crack would become rapidly and irreversibly widespread, once legalized, outweighs any harms that may be linked exclusively to prohibition.²⁶ This argument, based on a dire prediction that cannot be proven or disproven, can best be refuted by invoking the lessons of history.

The history of an earlier cocaine epidemic in this country is instructive. According to a leading historian of drug use patterns in the United States, "the highest rate of addiction . . . occurred in the 1890s."²⁷ History reveals that in the absence of regulation, after a pattern of addiction has run its course, cocaine use will fall to socially tolerable limits.²⁸

The legal climate at the turn of the century, it should be recalled, strongly favored free market (*laissez-faire*) principles,²⁹ backed by an

²¹ Kleiman & Saiger, *supra* note 18, at 562–63.

²² *Id.* at 563. The authors concede that "[t]he illegal crack-distribution industry would shrink, much to the relief of neighborhoods now held captive by street drug markets. . . . Removing the financial incentives the crack business offers youth would help restore families and schools." *Id.*

²³ *But see* JOHN KAPLAN, *THE HARDEST DRUG: HEROIN AND PUBLIC POLICY* (1983) (discussing the implications of legalization, and noting that new addicts might be created under such a program).

²⁴ *See* Kleiman & Saiger, *supra* note 18, at 564–65. This argument deserves special recognition because unlike many others "[i]t assigns neither peculiar moral status to liberty nor peculiar moral onus to intoxication." *Id.* at 538. In other words, it eschews polemics.

²⁵ *See supra* note 4 and accompanying text.

²⁶ Kleiman & Saiger, *supra* note 18, at 561–65; *see also* *Legalization of Illicit Drugs: Impact and Feasibility, A Review of Recent Hearings, A Report of the Select Comm. on Narcotics Abuse and Control*, 101st Cong., 1st Sess. (1989).

²⁷ David F. Musto, *Patterns in U.S. Drug Abuse and Response*, in *DRUG POLICY IN THE AMERICAS*, *supra* note 10, at 29, 31.

²⁸ *Id.* The equivalent to the 1890 rate would be 1.1 million addicts. *Id.* However, three quarters of a century after passage of The Harrison Act, regular cocaine users now number approximately 5.8 million. VALLANCE, *supra* note 15, at 15.

²⁹ This was the heyday of "Lochnerism." *See* *Lochner v. New York*, 198 U.S. 45 (1905).

interpretation of federalism³⁰ that severely limited central regulation of state "police power" measures. Thus, during this period there was minimal regulation of drug use, at either the state or federal level.³¹ In 1906, the most Congress could achieve in a regulatory vein was to require drug content labeling of "patent medicines."³² Nonetheless, by this time, drug use had already declined by one-third to one-half of its peak usage.³³ What is noteworthy is that this decline occurred in the absence of government intervention.³⁴

A second and related argument, supporting the assertion that lifting the ban on cocaine may lead to more harm than good, is based on evidence that the repeal of alcohol prohibition led to an increase in alcohol consumption, and an increase in the baneful health consequences of alcoholism.³⁵ While that may be the case, it is significant that there have been no serious proposals calling for the re-introduction of alcohol prohibition.

Lastly, Kleiman and Saiger note that crack differs from powdered cocaine, and from depressants like heroin and alcohol. "Crack did not become popular because it was illegal. It is popular because the de-

³⁰ See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down, on grounds of federalism, federal legislation that sought to inhibit child labor).

³¹ Musto, *supra* note 27, at 31. The Supreme Court's early "contortionist" struggles concerning federal drug regulation make fascinating reading. See, e.g., *United States v. Jin Fuey Moy*, 241 U.S. 394 (1916); *Webb v. United States*, 249 U.S. 96 (1919); *United States v. Doremus*, 249 U.S. 86 (1919); *Linder v. United States*, 268 U.S. 5 (1925).

³² Musto, *supra* note 27, at 32.

³³ *Id.*

³⁴ See *id.* The experience with the legalization of marijuana, admittedly a less addictive substance, indicates that use may actually decline following legalization. ARNOLD S. TREBACH, *THE GREAT DRUG WAR: RADICAL PROPOSALS THAT COULD MAKE AMERICA SAFE AGAIN* 103 (1987). The decriminalization of marijuana in Oregon, California, and Maine in the 1970s resulted in no significant percentage of new users or an increase in the frequency of use. STEVEN WISOTSKY, *BREAKING THE IMPASSE ON THE WAR ON DRUGS* 215 (1986); see also Schmoke, *supra* note 17, at 519; Galiber, *supra* note 20, at 850 n.93 (citation omitted) (noting that states which have decriminalized or substantially reduced penalties for marijuana use have recorded only a minimal effect on consumption).

Additionally, the Dutch program of "moderated decriminalization" generally led to a stabilization of drug use. There is no reason to believe that Holland would have moved back toward criminalization in recent years, but for mounting pressures from the European Community to recriminalize drug use. Henk Jan van Vliet, *The Uneasy Decriminalization: A Perspective on Dutch Drug Policy*, 18 *HOFSTRA L. REV.* 717, 717-18 (1990).

³⁵ See Kleiman & Saiger, *supra* note 18, at 542 n.93 (citations omitted); see also Mark H. Moore, *Actually Prohibition Was a Success*, *N.Y. TIMES*, Oct. 16, 1989, at A21. But see SEAN DENNIS CASHMAN, *PROHIBITION: THE LIE OF THE LAND* (1988) (noting the rise in alcohol consumption during the prohibition era). It must be noted, however, that alcohol prohibition was accompanied by a rise in the homicide and assault-by-firearm rates, and that repeal was followed by a steady decline in these rates. See David Boaz, *A Drug-Free America—Or A Free America?*, 24 *U.C. DAVIS L. REV.* 617, 618 n.8 (1991).

mand for the cheap, intense high that it provides is great, especially, perhaps, in poor, urban areas."³⁶ Whether these differences will categorically increase harm still remains in the realm of conjecture. But the reminiscent nature of this argument should cause skepticism. Again, history shows that opium derivative consumption grew greatly when it first became available, in the United States, in injectable and smokeable forms.³⁷ But the use of these forms of opium eventually declined in the face of social opprobrium, long before prohibition was enacted.³⁸

Admitting that the harm arising from drug use, in and of itself, is terrible, and admitting that it is not possible to predict whether this harm will increase and spread as a result of legalization or decriminalization, and even admitting that harm arising from use cannot be definitively isolated from the harm flowing from prohibition itself, does not relieve us from the effort to identify those harms that reasonably can be laid at the prohibition doorstep.

A. *The Human and Social Harms*

Referencing and cataloging the harms attributable to the criminalization of drug use is *de rigeur* for any study or work that addresses the reform of drug laws. Before bringing forth the cold statistics and lists, however, it is worth pausing a moment to note that one of the most insidious harms caused by the drug-war mentality has been the objectification and demonization of an entire class of fellow human beings.³⁹ With the possible exception of babies born addicted,⁴⁰ everyone involved in the business of illicit drugs is made the object of contempt and vilification.⁴¹ If this objectification were not in itself bad enough, this stereotyping merges and seems indistinguishable from

³⁶ Kleiman & Saiger, *supra* note 18, at 563; see also Jefferson Morley, *What Crack is Like: It's Great, Unfortunately*, NEW REPUBLIC, Oct. 2, 1989, at 12-13.

³⁷ See Musto, *supra* note 27, at 30.

³⁸ See Boaz, *supra* note 35, at 618 n.10 (noting that drug use has ebbed and risen without correlation to the level of enforcement).

³⁹ See SZASZ, *supra* note 15, at 117. "Under the pretext of protecting people . . . from dangerous drugs, America's young black males are stigmatized en masse as drug addicts and drug criminals." *Id.*

⁴⁰ See *infra* note 55.

⁴¹ Professor Dwight Greene, in his foreword to the 1989 Symposium on Drug Decriminalization at Hofstra University noted, "[d]rug users and sellers are the loved ones of parents, spouses, children, families and friends. They are not disconnected objects of someone else's policies. They are people who are part of other people." Dwight L. Greene, *Foreword, Drug Decriminalization: A Chorus in Need of Masterrap's Voice*, 18 HOFSTRA L. REV. 457, 489 (1990).

the more ancient and invidious forms of stereotyping: race, alienage, and class.⁴²

The images put forth by the media⁴³ form and feed the public perception that the drug scourge in the United States can be blamed on inner-city African Americans, Latinos, and Asians who do the work of the drug cartels of South America and Asia. Even if this image is in some sense accurate, rarely do the media or members of the general public try to go behind the superficial meaning of the image. For example, if, as statistics show, most consumers of cocaine in the United States are white,⁴⁴ it is notable that journalists rarely question or explain the odd fact that most of the "drug busts," police raids, and arrests take place in the minority neighborhoods of U.S. cities.⁴⁵

Even if there were no cause for concern about the dangers of racial divisiveness that the drug war exacerbates, the policies and practices of that war are having real and devastating effects on inner-city minority communities. We might dismiss as demagogic ranting the words of the Black Muslim minister Louis Farrakhan, suggesting that "under the guise of the drug war [the government] is planning a war against black youths."⁴⁶ But when scholarly observers reach a similar

⁴² See SZASZ, *supra* note 15, at 117. "Clearly, one of the unintended consequences of drug prohibition—far more dangerous to American society than drugs—has been that it has fueled the fires of racial division and antagonism." *Id.* Carl T. Rowan, a well-known black columnist notes that the racial stereotypes fostered by the war on drugs have "crippled the minds of white Americans." SZASZ, *supra* note 15, at 116 n.11 (citing Carl T. Rowan, *Wake Up White America: Stereotypes Fogging War on Drugs*, SYRACUSE HERALD-J., Dec. 28, 1989).

⁴³ The popular press abounds with stories which, while appearing neutral, nourish the public's racist stereotypes of people engaged in the illegal drug trade. See, e.g., Seth Faison, *Arrests in New York Are Said to Cripple A Huge Drug Gang*, N.Y. TIMES, Sept. 9, 1994, at A1 (noting that the "gang-leader" arrested in this raid had entered the United States illegally, and was known in the Dominican Republic as "the Mayor," due to his "big spending ways"); see also Peter Maas, *Danger from the East & The Menace of China White*, BOSTON GLOBE, Sept. 18, 1994, Parade Supp. at 4 (discussing secret Chinese criminal societies based in Hong Kong called 'triads' which resemble Mafia crime families).

⁴⁴ Former drug czar William Bennett notes that "[t]he typical cocaine user is white, male, a high school graduate, employed full time, and living in a small metropolitan area or suburb." John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 610 (1991) (citation omitted).

According to a National Institute on Drug Abuse (NIDA) survey, 37.7% of whites report having ever used drugs, while 33.6% of African Americans report such usage. NAT'L INSTITUTE ON DRUG ABUSE, U.S. DEP'T HEALTH & HUMAN SERV., NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: POPULATION ESTIMATES 1992 20-21 (1993) [hereinafter NATIONAL HOUSEHOLD SURVEY 1992]. Not only is the percentage of users who are African-American lower, but when this figure is adjusted for the proportion of the U.S. population that is African-American, it becomes clear that many fewer African Americans use drugs—59,750,000 whites versus 7,941,000 African Americans. *Id.*

⁴⁵ See Michael Z. Letwin, *Report from the Front Line: The Bennett Plan, Street-Level Drug Enforcement in New York City and the Legalization Debate*, 18 HOFSTRA L. REV. 795, 799 (1990).

⁴⁶ SZASZ, *supra* note 15, at 118 (citing L. Wright & D. Glick, *Farrakhan Mission: Fighting the*

conclusion—that “the war on drugs could more aptly be called a war on the minority populations”⁴⁷—we must take notice.⁴⁸

Discrimination and racial prejudice are egregious wrongs, and alone would serve as sufficient ground for seeking other means of dealing with the nation’s drug problem.⁴⁹ Were there ways, however, of administering the prohibition laws without even the appearance of discrimination, the more ostensible harms committed in the name of the war on drugs would endure. These too should be catalogued, even as in doing so we distance ourselves from the human stories and tragedies that fill this catalogue. Since this “bill of complaints” has been drawn up so often,⁵⁰ it should suffice here to use the shorthand device of a listing, stopping to expand on a few observations in the accompanying notes. Among other harms, the war on drugs has resulted in:

Drug War—His Way, NEWSWEEK, Mar. 19, 1990 at 25); see also Cecil Williams, *Crack is Genocide, 1990s Style*, N.Y. TIMES, Feb. 15, 1990, at A31.

⁴⁷ powell & Hershenov, *supra* note 44, at 559.

⁴⁸ Statistics demonstrate the disparate effect that the war on drugs has had on minorities in the United States, as the following examples suggest:

(1) Before the age of twenty-five, a black man is today more likely to die in the streets than a United States soldier was to perish in Vietnam or in the Persian Gulf War.” (emphasis deleted). (2) Fully eighty to ninety percent of drug arrests nationwide involve African-American males, despite the fact . . . ‘that blacks make up only 12 percent of the nation’s drug users.’ (citation omitted). (3) Fully eighty-two percent of a population of 55,000 inmates in New York’s state prisons are black or Latino. . . . [M]inorities now comprise ninety-five percent of New York City’s jail population of approximately 20,000. (4) ‘In Florida, state researchers predict that by 1994, nearly half of the black men in the 18–34 age group will be locked up or under court supervision.’ (citation omitted). (5) [A]lthough substance abuse [is] equally prevalent among white and black women, a black woman who uses drugs or alcohol during pregnancy is almost ten times more likely to be reported to the state authorities than a white woman.

Id. at 609–12.

⁴⁹ It clearly is the case that, at the very least, the war on drugs has had a disparate effect on the minority community and it may be time to demand that law enforcement officials, at whatever level the war against drugs is being waged, be made to account for and justify their unequal administration of the law. See *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886). In *Yick Wo*, the Supreme Court said:

though the law itself be fair on its face, . . . yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, the denial of equal justice is still within the prohibition of the Constitution.

Id. Cf. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (noting that a zoning decision which bears more heavily on one race than another may provide an important starting point in determining whether race discrimination occurred); *Batson v. Kentucky*, 479 U.S. 79 (1986) (holding that prosecutor’s exercise of peremptory challenges to dismiss jurors on racial grounds constitutes a prima facie showing of purposeful racial discrimination).

⁵⁰ See, e.g., VALLANCE, *supra* note 15, at 35–41; Ostrowski, *supra* note 4, at 647–55; Letwin, *supra* note 45, at 819–27; Schuler & McBride, *supra* note 2, at 901–09; Schmoke, *supra* note 17, at 512–18; powell & Hershenov, *supra* note 44, at 600–07.

- (1) Increased violence;⁵¹
- (2) Increase in property crimes;⁵²
- (3) Exploitation of and harm to women;⁵³
- (4) Spread of AIDS and venereal disease;⁵⁴

⁵¹ One estimate drawn in 1990 placed the drug related deaths associated with the prohibition regime at almost eight thousand. Ostrowski, *supra* note 4, at 655. Besides the killings directly related to black market activity, the territorial wars among rival gangs, the drive-by shootings, the shoot-outs with police, and murders of informants and witnesses, there are the less obvious "killings." These include the spread of AIDS through the sharing of infected needles, the unwillingness or inability to seek medical assistance for fear of abuse detection, and the use of adulterated drugs, such as heroin, which are subject to no quality control. See Joseph Treaster & Lynette Holloway, *Potent New Blend of Heroin Ends 8 Very Different Lives*, N.Y. TIMES, Sept. 4, 1994, at A1. But see Joseph Treaster, *Officials Lower Death Total Attributed to Powerful Heroin*, N.Y. TIMES, Sept. 2, 1993, at B3 (discussing the exaggeration of deaths attributed to heroin). For a well-documented breakdown of the crimes directly related to drug prohibition, see Schuler & McBride, *supra* note 2, at 901-09.

⁵² It is estimated that at least 40% of all property crime in the United States is committed by drug users in order to maintain their expensive habits. This amounts to about 8 million crimes per year and \$6 billion in stolen property. Ostrowski, *supra* note 4, at 647-48.

⁵³ See Letwin, *supra* note 45, at 812 & n.106 (referring to the "sex for crack phenomenon" and citing Joseph W. Queen, *Drugs Stimulate Spread of Prostitution*, NEWSDAY, Sept. 19, 1988, at 9). The strong anecdotal evidence of young women being forced into prostitution to help support the drug habits of male associates has inspired an "enslavement theory of addiction." See generally JAMES A. INCIARDI, *THE WAR ON DRUGS: HEROIN, COCAINE, CRIME, AND PUBLIC POLICY* 145-73 (1986). Women are disproportionately the victims of violence and abuse in this, and probably every society. "NIDA studies showed that 70% of addicted women had been raped or molested prior to addiction. Another study showed that among street prostitutes, as many as 70% had been sexually abused as children and repeatedly raped as adults." Rod Mullen & Naya Arbiter, *Against the Odds: Therapeutic Community Approaches to Underclass Drug Abuse*, in *DRUG POLICY IN THE AMERICAS*, *supra* note 10, at 187.

⁵⁴ Letwin, *supra* note 45, at 812. Reportedly "the barter by women of sex for crack in the inner-city has replaced dirty needles as the main reason for the increase in AIDS among drug users. . . . [It] has also led to the first syphilis epidemic in decades." *Id.* NIDA collected data in 1987 which indicated that in states that prohibited the sale of clean needles, 31% of drug users had the AIDS virus, while in states that allowed the non-prescription sale of hyperdermic needles, only 5% were infected. Ostrowski, *supra* note 4, at 637 nn.139-43 (citations omitted). "The NIDA study demonstrates that just one piece of prohibitionist legislation—the ban on over-the-counter needle sales—seems to be responsible for most drug related AIDS cases." *Id.* at 638. See also Nicholas D. Kristoff, *Hong Kong Program: Addicts Without AIDS*, N.Y. TIMES, June 17, 1987, at A1; VALLANCE, *supra* note 15, Appendix C at 149-51; Ethan A. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences and Alternatives*, 245 SCIENCE 939 (1989); SZASZ, *supra* note 15, at 55 (asserting that 50% of fresh AIDS cases in the United States are attributable to contaminated needles); Schmoke, *supra* note 17, at 517 (describing the refusal to adopt needle exchange programs as "a graphic example of our blind pursuit of an irrational policy"). For a recent confirmation of the efficacy of needle-exchange programs, see Felicia Lee, *Data Shows Needle Exchange Curbs H.I.V. Among Addicts*, N.Y. TIMES, Nov. 26, 1994, at A1.

There are many other health related problems associated with drug use, including the spread of venereal disease, and a rising incidence of drug-resistant tuberculosis. See Elisabeth Rosenthal, *The Return of TB: A Special Report; Tuberculosis Germ Resurging As Risk to Public Health*, N.Y. TIMES, July 15, 1990, at A1; see also Andrew A. Skolnick, "Collateral Casualties" Climb in Drug War, 271 J. AMER. MED. ASS'N 1636 (1994) (pointing out that, in addition to the high incidence of

- (5) Exploitation of and harm to children;⁵⁵
- (6) Undermining family integrity and authority;⁵⁶

communicable diseases among drug users, crowded prison conditions provide a breeding ground for the spread of the diseases within the prison population, and to the community after release). This also raises serious legal questions as to whether imprisonment that poses such heightened risk violates the cruel and unusual punishment clause or opens up the state to liability. Courts have held that overcrowding, when combined with unsanitary conditions, violates the Eighth Amendment's prohibition against cruel and unusual punishment. *See, e.g., Tillery v. Owens*, 907 F.2d 418, 427-28 (3d Cir. 1990); *Ramos v. Lamm*, 639 F.2d 559, 566 (10th Cir. 1980).

Some of the health problems, deaths, and illnesses caused by drug impurity, adulteration and uncertain potency, are clearly linked to the prohibition policy. *See Ostrowski, supra* note 4, at 652, 693 nn.406-18 (pertaining to cocaine specifically). *But see* The Federal Food and Cosmetic Act, 21 U.S.C. § 331(a) (1988) (prohibiting the movement in "interstate commerce of any . . . drug . . . that is adulterated or misbranded"). Other health problems, by contrast, cannot be so clearly linked, but there is no doubt that prohibition interferes with efforts to treat the health-related aspects of drug use. For a thorough discussion of health implications, see *powell & Hershenov, supra* note 44, at 559 n.6, 600-07; *Jonas, supra* note 9, at 751-59.

⁵⁵ *See* Joe Sexton, *Police, Youths and Toy Guns: 1 Hurt, 1 Dead*, N.Y. TIMES, Sept. 29, 1994, A1. This headline poignantly describes the shootings by police officers of two boys, aged 13 and 16, in separate incidents. In both cases the children were "armed" with replicas of weapons, and the officers mistakenly feared for their lives.

The reason that police officers might reasonably fear armed children is that many children have been recruited into the drug trade, just as they were during the first bootlegging era. *See E. L. DOCTOROW, BILLY BATHGATE* (1989). This recruitment makes perfect business sense: children are subject to less severe criminal penalties than those that apply to adult criminals, children work cheaply, and children are generally obedient. Being drawn into very dangerous activity is only the most obvious form of harm these children suffer. The more pervasive harm is that these children are being robbed of their childhood. *See e.g., Schmoke, supra* note 17, at 515-16; *Letwin, supra* note 45, at 813-16; *Kleiman & Saiger, supra* note 18, at 527 n.5.

The most telling response that opponents make against drug legalization is to raise the question of babies born drug-dependent. *See e.g., J. Q. Wilson, Against the Legalization of Drugs*, COMMENTARY, Feb. 1990, at 21. One proponent of legalization admits that this "[i]s the only probability that gives me any doubts about the case for legalization." David R. Henderson, *A Humane Economist's Case for Drug Legalization*, 24 U.C. DAVIS L. REV. 655, 674 (1991). The mothers of these infants are often children themselves. For the most part, they are not drug pushers or couriers. With this class of users, we are really dealing with two sets of minor-victims. In *Robinson v. California*, 370 U.S. 660 (1962), the Court held that a law which criminalizes the illness of drug addiction violates the cruel and unusual punishment clause. To criminally punish an addictive mother for transmitting her condition to her fetus seems within the rationale of *Robinson*. Jailing mothers does nothing for the addicted infants and only alienates the mother further from society. *See powell & Hershenov, supra* note 44, at 595-98, 612-13. Fear of prosecution discourages women from seeking prenatal care that might reduce fetal risk. Andrew A. Skolnick, *'Collateral Casualties' Climb in Drug War*, 271 J. AMER. MED. ASS'N 1636 (1994) (citation omitted).

⁵⁶ ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 74 (1992). The majority of children in the inner-city "ghettos" are brought up in single parent homes. In 1960, 11.5% of female heads of households were never married, and by 1990 this figure had risen to 55.1%. Considering the devastating effect that the drug wars have had on black men, this figure is not altogether remarkable. When these statistics are coupled with the high percentage of single mothers on welfare, in some states higher than 68%, the difficulties of providing a secure and sound upbringing are often insurmountable. *Id.* at 91. The absence of a strong male role model, especially for young boys lured into drug activity at early ages, weighs heavily against

- (7) Housing dispossession;⁵⁷
- (8) Drain on limited budgets;⁵⁸
- (9) Disruption of education;⁵⁹ and
- (10) Undermining community.⁶⁰

the life chances of these children. How much authority can a woman exert over an adolescent boy who offers more to the family upkeep than the mother does herself?

⁵⁷ See *infra* note 111; see also Elizabeth Neuffer, *Civil Rights at Issue in Fight Against Drugs; Seizures, Evictions Debated*, BOSTON GLOBE, May 1, 1989, at B1; *Evicting the Drug Dealers; Kemp's Tough Action Raises Constitutional Questions*, TIME, May 1, 1989, at 41. Tenants of public housing have challenged the constitutionality of the seizure of public housing. See *Richmond Tenants Org. v. Jack Kemp*, 753 F. Supp. 607 (1990). In *Richmond Tenants*, the district court enjoined the government from evicting tenants suspected of drug activity, except in "extraordinary situations;" these tenants' leaseholds had been seized by the government without prior notice and an opportunity to be heard. *Id.* at 608.

⁵⁸ Ellen Benoit, *Drugs: The Case for Legalization*, FIN. WORLD, Oct. 3, 1989, at 32. "Legalizing drugs does not mean condoning their abuse . . . [it] would mean taking billions from valiant but wasted interdiction and law enforcement efforts and spending it instead on education and rehabilitation." *Id.*; see also Letwin, *supra* note 45, at 827 (specifying taxes and diversion of expenditures from other sources in New York City). Additionally, studies suggest that allocating part of the funding for the "war on drugs" to mental health treatment would be productive. See generally Darrell A. Regier et al., *Comorbidity of Mental Disorders with Alcohol and Other Drug Abuse*, 264 J. AM. MED. ASS'N 2511 (1990). It has been estimated that "treating cocaine abuse is seven times more cost-effective than other drug-fighting strategies." William Douglas, *Best Weapon in Drug War is Treatment*, NEWSDAY, June 14, 1994, at A15 (discussing recent Rand Corp. study).

Finally, even if the funding currently spent on the drug war is not relinquished by enforcement agencies, much of it could be applied to combat the many crimes "that are going uninvestigated, unprosecuted and unpunished because of the enormous effort being put into the war on drugs." Schmoke, *supra* note 17, at 514.

⁵⁹ See Sam Enriquez, *L.A. Schools Report Sharp Rise in Guns and Assaults*, L.A. TIMES, Aug. 11, 1990, at B1; see also William Douglas, *Drugs Dragging Students Down in City Schools, Fast High, Fast Bucks Lure Kids to Crack*, NEWSDAY, May 16, 1988, at 4. Compared to the deferred benefits of an education, life in the drug trade, with its immediate rewards and even thrills, is hard for children to resist. See Powell & Hershenov, *supra* note 44, at 599-600.

⁶⁰ Though much has changed since the publication of the classic study of the condition of blacks in America, *An American Dilemma: The Negro Problem and Modern Democracy*, more has remained the same, and some conditions have worsened, particularly for the inner-city black community. See GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

When the predominant "success models" in neighborhoods are drug dealers and pimps, "the credibility of teachers, police, and legitimate business people may be undermined in the eyes of the young, and the morale of conforming segments of the population may suffer." ZIMRING & HAWKINS, *supra* note 15, at 147-50; see also VALLANCE, *supra* note 15, at 36. The fear and anger that pervades the inner-city neighborhoods ravaged by drug activity is well known. Periodically, rage that is barely beneath the surface is turned against the police. See William Booth, *Officer's Retrial Starts in Florida; Motorcyclist's Shooting Sparked Miami Riots*, WASH. POST, May 18, 1993, at A3; Mike Clary, *Police in Miami Brace for Violence, Race Relations: Two Latino Officers Shoot and Wound a Black Man, The Incident Threatens to Spark a New Round of Rioting*, L.A. TIMES, June 29, 1991, at A16. More often the rage is turned inward, as the Los Angeles riots following the acquittal of the officers who beat Rodney King exemplified. See *supra* note 7 and accompanying text.

One question that policy makers in the United States rarely ask is whether the extension of the war to the supply-side, beyond our borders and deep into the heart of other countries, is a

B. *The Economic Costs of Prohibition*

When the end of the "cold war" was declared, there was a good deal of discussion concerning the peace dividend. A similar "domestic peace dividend" might be expected should the drug war also end.⁶¹ The nature and extent of the economic costs of prohibition are such that the elimination or even the reduction of those costs would enormously benefit all segments of society, with the exception of those presently involved in the drug enterprise.

The most direct cost of prohibition is the expenditure by every level of government, in both the consuming and producing nations, to stem the flow of illicit drugs. The budget request for federal drug enforcement purposes was \$13 billion in fiscal year 1995.⁶² Beyond that, "[t]rying to 'cost out' the national drug problem is a formidable task. . . . But . . . it is absolutely necessary to make the effort."⁶³ That effort, largely based on a five year study at the University of California,⁶⁴ yielded the following estimates of costs: \$11.063 billion for public expenditures;⁶⁵ \$1.381 billion for legal defense;⁶⁶ \$.759 billion for property damage;⁶⁷ \$19.252 billion for indirect costs;⁶⁸ and \$.006 billion for social welfare administration.⁶⁹ This adds up to a staggering \$32.461 billion dollar cost attributable to the war on drugs.⁷⁰

legitimate exercise of national power. The elimination of coca leaf production probably cannot be achieved without destroying indigenous cultures. See William O. Walker, *International Collaboration in Historical Perspective*, in *DRUG POLICY IN THE AMERICAS*, *supra* note 10, at 278; see also *infra* note 212 and accompanying text.

⁶¹ Of course, even a gradual cessation of the drug war almost certainly would be accompanied by short-term dislocations.

⁶² See William Ruzzamenti, *Column on U.S. Drug Policies Inflates Agency Budget*, ARIZ. REPUBLIC, Dec. 13, 1993, at B4 (Chief of Public Affairs Section of DEA, responding to Alexander Cockburn's column concerning the nation's drug policies, noting accuracy of \$13 billion federal drug budget).

⁶³ VALLANCE, *supra* note 15, at 28-29.

⁶⁴ *Id.* at 29.

⁶⁵ This consists mainly of the criminal justice system, police protection, and local, state, and federal corrections systems. *Id.* at 31, Table 2.2.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* Indirect costs include losses suffered by victims of crime, non-productivity of incarcerated violators, and the loss of productive contribution of lives spent in criminal activity. *Id.* Although this last category is the most controversial, it should be noted that many of the young people engaged in the drug trade may be among the most ambitious and inventive of their generation. See generally TERRY M. WILLIAMS, *THE COCAINE KIDS: THE INSIDE STORY OF A TEENAGE DRUG RING* (1989).

⁶⁹ VALLANCE, *supra* note 15, at 31. This relatively small figure, compared to the amount expended on drug law enforcement, speaks volumes about the lopsidedness of the federal government's approach to the drug problem.

⁷⁰ See *id.* Another \$10.624 billion was assigned to so-called "core costs" of drug use, which

These figures probably do not include expenses borne by other departments of the government which have been enlisted in the drug interdiction drive, expenses "involving the Coast Guard, the Department of Defense, the Immigration and Naturalization Service, and the Customs Services."⁷¹ Nor do these figures include the costs undertaken by cooperating governments, particularly in Latin America, or the foreign aid that has been expended to induce that cooperation.⁷² One commentator has said:

Wars are expensive, even if they exist only in myriad scattered episodes of drug busts, arrests, prosecutions, incarcerations, parole supervisions, publicity and rhetoric, rather than on traditional battlefields. This one including treatment, prevention and research, seems to be costing *at least \$60 billion each year* but is surely more than this, given the age of some of our cost figures.⁷³

Given public costs of this magnitude, it is easy, in a discussion of costs, to lose sight of the economic distortion inherent in an artificially created black market. Prohibition, imposed upon a robust trade in a commodity, deprives the economy of a substantial source of revenue. This source of taxation extends far beyond the drug trafficker to include many peripheral activities that are conducted through untaxed cash transactions.⁷⁴ What conceivable justification could there be for functionally exempting the enormous drug business from taxation?⁷⁵

Ironically, the perverse economic effect of prohibition is to push the price of drugs twenty times,⁷⁶ or more,⁷⁷ above what they might

are related less clearly to prohibition, including treatment, support, AIDS, and the cost of drug-users arising from illness (morbidity) and premature death (mortality). *Id.* at 30, Table 2.1.

⁷¹ *Id.* at 32.

⁷² *Id.* at 32, 34; *see also infra* note 134, addressing funds expended on coca eradication programs in the Andes.

⁷³ VALLANCE, *supra* note 15, at 34 (emphasis added).

⁷⁴ *See infra* notes 218–26 and accompanying text.

⁷⁵ Extrapolating from one generally accepted figure of \$80 billion in annual illegal drug sales, one economist estimated that the government would collect \$8 billion per year. This figure was based on the following assumptions: that prices would fall to one-tenth of the current price as a result of legalization, that the assessment of a 100% excise tax would be reasonable and would not provoke black market sales, and that the number of users would remain the same after legalization. *See Henderson, supra* note 55, at 664.

⁷⁶ *See Wilson, supra* note 55, at 22 (noting that had heroin been legalized, its price would have been about five percent of its current street price).

⁷⁷ An interesting comparison may be drawn between two Colombian exports: coffee and cocaine. The price of a pound of coffee on the retail market in late 1990 was about \$2.40 per pound. At the time, the spot price was 89.5 cents per pound. The mark-up retail price was

command in a "normal" market. This enormous price rise, of course, is intended to drive the average user out of the market. This has not happened. Instead there has been a massive transfer of wealth from consumers, who are hard-pressed to afford it, to a few unscrupulous wealthy operators,⁷⁸ with devastating consequences. The ripple effect of these consequences, particularly crime committed to support the users' always expensive drug habits, has spread the adverse economic effects to other segments of society.⁷⁹

We tend to associate the drug war with conservative politicians; it is recognized that the administrations of Ronald Reagan and George Bush pressed the war harder than previous ones. There are signs, however, that economic reality may be leading some conservative thinkers to part company from the mainstream conservative political response to the drug question.⁸⁰ Conceivably, arguments emphasizing economic costs and exploring the implications of trade and monetary policy might force a re-evaluation of prohibition, where arguments founded

therefore less than three times the spot price. In 1986, the price of a kilogram of cocaine was \$3,000. By the time this kilogram moved through the series of mark-ups in its dangerous distribution chain, it retailed on the street for \$113,400—a multiple of 37.8 times the spot price. Interestingly, even this multiple is understated because the \$3,000 spot market price of cocaine ready for export in Colombia already includes the heavy costs imposed by the Colombian authorities—either in the form of bribes or costs imposed as efforts to intercept the trade. Henderson, *supra* note 55, at 658 n.15.

⁷⁸ Organized crime is generally acknowledged to control the drug business, ranging from the infamous cartels of Colombia to the Mafia families and rising gangs throughout the cities of the United States. See, e.g., *American Agenda: Chicago Gang Muscles Into Politics, I* (ABC World News Tonight, Sept. 28, 1994); *American Agenda: Chicago Gang Moves Into Politics, II* (ABC World News Tonight, Sept. 29, 1994). An interesting insight into the takeover of the drug business by organized crime is noted by Henderson, *supra* note 55, at 661–62:

Before 1973, organized crime was not involved in the illegal drug business in New York. In 1973, . . . governor Nelson Rockefeller pushed through a draconian drug law with mandatory prison sentences. . . . When the penalties for selling drugs were much lighter, more civilized dealers could survive in the market. . . . [O]rganized crime eventually came to dominate the drug trade because it was the only entity able to absorb the high costs of criminalization.

Id.

⁷⁹ For example, besides the obvious case of someone burglarized or robbed by an addict in need of a fix, consider the heavy penalties, reaching into the millions of dollars, that are levied by the Customs Service against shipping companies for shipment of illicit drugs discovered in containers aboard their container ships. See William E. Sheeline, *Drugs in the Hold*, *FORTUNE*, Feb. 13, 1989, at 12–16.

⁸⁰ See, e.g., William F. Buckley, *N.Y. Bar Questions Drug Prohibition*, *DALLAS MORNING NEWS*, Oct. 1, 1994, at 29A (discussing failure of drug prosecution to deter use, noting lack of evidence that legalization would result in increase of consumption or violence); Milton Friedman, *A War We're Losing*, *WALL ST. J.*, Mar. 7, 1991, at A14 (discussing high human cost of war on drugs); *U.S. Judge Calls Drug War Failure, Urges Legalization*, *L.A. TIMES*, Dec. 13, 1989, at A5; Milton Friedman, *An Open Letter to Bill Bennett*, *WALL ST. J.*, Sept. 7, 1989, at A14.

in human concerns⁸¹ or warnings concerning assaults on civil liberty and democratic values have fallen on deaf ears.

C. *Undermining Democracy, Civil Liberties, and Human Rights—At Home and Abroad*

In 1989 Milton Friedman wrote an open letter to William Bennett, the then "drug czar,"⁸² in which he said:

Every friend of freedom . . . must be revolted . . . by the prospect of turning the United States into an armed camp, by the vision of jails filled with casual drug users and of an army of enforcers empowered to invade the liberty of citizens on slight evidence, a country in which shooting down unidentified planes "on suspicion"⁸³ . . . is not the kind of United States that either you or I want to hand on to future generations.⁸⁴

One commentator, making reference to the same words, considered Mr. Friedman's jeremiad particularly apt.⁸⁵ After all, "[t]hroughout the history of the United States, the government has used the exigencies of war as an excuse to constrict the constitutional liberties of American citizens." Driven by the "war propaganda" in the "metaphorical war" against drugs, the American people have been willing to "countenance all manner of civil liberties abuses."⁸⁶ Opinion polls have found that 52% of Americans believe "police should be able to search homes of suspected drug dealers without a warrant."⁸⁷ Indeed, former New York City Mayor Ed Koch proposed "strip-search[ing] everyone entering the United States from Latin America or Asia,"⁸⁸ and former

⁸¹ See *supra* notes 51–60 and accompanying text.

⁸² The official use of this appellation is in itself chilling. Why would a free society aspire to the tyrannical rule that the term "czar" connotes? See Greene, *supra* note 41, at 459 n.5.

⁸³ The reference is to the vote by the Senate, reversed the following day, in favor of a proposal to shoot down unidentified airplanes entering the United States as a means of curtailing drug trafficking. See Eric Weiner, *In the War on Drugs, Planes are a Big Enemy*, N.Y. TIMES, Oct. 8, 1989, at D4. See also Michael K. Frisby, *Panel Agrees to Spend \$450 Million for Military in War on Drugs*, BOSTON GLOBE, Oct. 26, 1989, at 59; William G. Broad, *Charting Drug Trade From the Skies*, N.Y. TIMES, Oct. 14, 1989, at A6.

⁸⁴ Friedman, *Open Letter to Bill Bennett*, *supra* note 80, at A14.

⁸⁵ Boaz, *supra* note 35, at 627.

⁸⁶ *Id.* at 626.

⁸⁷ *Id.* at 626 n.58 (citing Morin, *Many in Poll Say Bush Plan is Not Stringent Enough*, WASH. POST, Sept. 8, 1989, at A18).

⁸⁸ *Id.* at 627.

Los Angeles Police Chief Daryl Gates suggested we "shoot all drug users."⁸⁹

Rhetoric aside, the evidence supports the charge that government anti-drug policies—at home and abroad⁹⁰—grievously abridge civil liberties and human rights. Beyond mere documentation, to which we become easily inured, a sampling of the erosion of rights and liberties may better demonstrate the scope and pervasiveness of the violations entailed.

Possibly the earliest civil liberties "casualty" in the drug wars has been the Fourth Amendment.⁹¹ In *Ker v. California*,⁹² for example, the Supreme Court held that a warrantless, unannounced entry into a private dwelling place and the seizure of marijuana met probable cause

⁸⁹ *Id.* (citing Stripling, *Altered Tastes—Drug-Use Habits Are Changing, but the Future's Cloaked in Smoke*, SEATTLE TIMES, Feb. 19, 1991 at K1).

⁹⁰ Professor Peter Smith, Director of the Center for Iberian and Latin American Studies at the University of California, San Diego, describes the effect of the "U.S.-sponsored drug wars" in Latin America in this fashion:

[The] wars have altered society and politics in important and far-reaching ways. First, they have subjected the countries and peoples of Latin America to staggering levels of violence and intimidation. The human toll of anti-drug campaigns has been extremely high—not only in Colombia but also in Peru and Mexico. . . . Ominously, too, the . . . campaigns have produced large-scale violations of human rights.

Smith, *supra* note 10, at 14 (citing AMERICAS WATCH, HUMAN RIGHTS IN MEXICO: A POLICY OF IMPUNITY (1990); AMERICAS WATCH COMMITTEE, THE "DRUG WAR" IN COLOMBIA: THE NEGLECTED TRAGEDY OF POLITICAL VIOLENCE (1990)).

⁹¹ The Fourth Amendment of the United States Constitution sets forth:

The right of the people to be secure in their persons, houses, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person and things to be seized.

U.S. CONST. amend. IV. For evidence of this erosion of the Fourth Amendment, see SPECIAL COMM. ON CRIM. JUSTICE IN A FREE SOCIETY, AMER. BAR ASS'N, CRIMINAL JUSTICE IN CRISIS, A REPORT TO THE AMERICAN PEOPLE AND THE AMERICAN BAR ON CRIMINAL JUSTICE IN THE UNITED STATES, SOME MYTHS, SOME REALITIES, AND SOME QUESTIONS FOR THE FUTURE 46 (1988) [hereinafter ABA REPORT] (finding "evidence that certain disregard for the Fourth Amendment, specifically in drug cases, may be an unavoidable by-product of a drug problem so pervasive that the police feel they sometimes must violate constitutional restraints in order to regain control of the streets"); VALLANCE, *supra* note 15, at 70 (noting that, in its examination of four drug cases during the 1990 term, the Supreme Court "showed a narrowing view of Fourth Amendment protections and a tendency to defer [to] law enforcement interests").

⁹² 374 U.S. 23 (1963). This case is inconsistent with the general rule that the warrantless entry of private premises is presumptively unreasonable since it implicates the "interest in preserving the privacy and sanctity of the home." *Payton v. New York*, 445 U.S. 573, 588–89 (1980); *cf. Welsh v. Wisconsin*, 466 U.S. 740, 753–54 (1984) (holding that the police could not enter a home without a warrant to arrest a person whom the police had observed moments earlier driving as if intoxicated). Although *Ker* can be distinguished from *Welsh*, one wonders whether the cases reflect a different reaction to alleged drug and alcohol abuse.

and reasonableness standards.⁹³ In *United States v. Ross*,⁹⁴ the Court departed from an earlier position that searches of closed containers and packages found in an automobile could not proceed without a warrant.⁹⁵ *Ross* essentially placed the authority to determine probable cause in the hands of the police rather than in those of a magistrate.⁹⁶

"Procedural protections" of those accused of crimes have never enjoyed popular understanding or acceptance. In light of the anti-drug propaganda campaigns, the public support of procedural rights in this context has reached its nadir. It has been asserted that "the war on drugs [has] produced a political-legal context in which drug enforcement constitutes an exception" to the fair and just application of the law.⁹⁷ At some level, this attitude toward criminal procedural protections is understandable because most citizens, non-users of illicit drugs, cannot identify with those who assert that the police have wrongly searched or seized them or their property. However, popular viewpoints do not excuse the tendency of the courts to lower the constitutional bulwarks. Perhaps more significantly, these viewpoints fail to explain the willingness of courts to countenance intrusions of privacy that most citizens would emphatically disavow. For example, the United States Supreme Court has found that customs agents who "reasonably suspect that [a] traveler is smuggling contraband in her alimentary canal" may subject the traveler to a prolonged and humiliating detention, which includes a rectal exam.⁹⁸ The exposure to such violations is exacerbated by the fact that customs agents are empowered to act

⁹³ 374 U.S. at 36-37.

⁹⁴ 456 U.S. 798 (1982).

⁹⁵ 456 U.S. at 824-25; *see also* *Robbins v. California*, 453 U.S. 420, 428 (1981). *But see* *New York v. Belton*, 453 U.S. 454 (1981) (upholding search of passenger compartment of automobile, including closed containers, when police made lawful custodial arrest of occupants of automobile). The exception to the warrantless search of an automobile itself has "drug" origins, arising in a case during the alcohol Prohibition era. *See Carroll v. United States*, 267 U.S. 132 146-48 (1925).

⁹⁶ 456 U.S. at 809. Two other exceptions to ordinary search and seizure protections were spawned in drug seizure circumstances. *See New Jersey v. T.L.O.*, 469 U.S. 325, 326 (1985) (search of student belongings); *California v. Ciraolo*, 476 U.S. 207, 207 (1986) (aerial surveillance of suspected marijuana cultivation).

⁹⁷ Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 *HASTINGS L.J.* 889, 925-26 (1987).

⁹⁸ *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985); *cf. People v. Luna*, 535 N.E.2d 1305 (N.Y. 1989) (upholding pat down of nervous, agitated individual arriving alone on flight originating from distant country believed to be major source of illegal narcotics). *Montoya de Hernandez* might be compared to the very different response the Supreme Court evinced more than forty years ago in *Rochin v. California*. *See* 342 U.S. 165, 172 (1952) (holding unanimously that pumping the stomach of a suspect accused of swallowing drugs violated the due process clause, because such methods "shock the conscience").

on suspicions based upon "drug courier profiles."⁹⁹ Such profiles are notoriously overbroad¹⁰⁰ and too often are drawn in terms of racial and ethnic characteristics.¹⁰¹

In a related, arbitrary intrusion on privacy interests, the government has imposed or encouraged broad-based workplace drug testing. In 1986, President Reagan issued an executive order creating a "drug-free Federal workplace."¹⁰² The first case to reach the Supreme Court, *Skinner v. Railway Labor Executives Association*, involved the Federal Railroad Administration's implementation of urine and breath test regulations, and was limited to employees involved in accidents, incidents, or breaches of safety rules.¹⁰³ The Court held that safety considerations presented a "special need" that made the program reasonable and therefore, on balance, the usual Fourth Amendment requirements of a warrant, probable cause, and individualized suspicion could be ignored.¹⁰⁴ The two dissenting Justices identified hysteria over drugs as the basis for this unprincipled departure from constitutional text.¹⁰⁵

If the identification of persons who had records indicating safety concerns justified this decision, there was no such limiting consideration in the companion drug-testing case decided with *Skinner*.¹⁰⁶ Justices Scalia and Kennedy, in their dissent in *National Treasury Employees Union v. Von Raab*, took the Court to task for accepting the Custom

⁹⁹ See *United States v. Sokolow*, 490 U.S. 1, 10 (1989).

¹⁰⁰ In his dissent in *Sokolow*, Justice Marshall warned: "[r]eflexive reliance on a profile . . . runs a far greater risk than does ordinary, case-by-case police work of subjecting innocent individuals to unwarranted police harassment and detention." *Id.* at 13.

¹⁰¹ See *United States v. Montilla*, 733 F. Supp. 579, 580 (W.D.N.Y. 1990) (noting that eighty warrantless stops and searches, based upon drug profiles, yield three to four arrests per month); see also Lisa Belkin, *Airport Drug Efforts Snaring Innocents Who Fit 'Profiles'* N.Y. TIMES, Mar. 20, 1990, at A1; Powell & Hershenov, *supra* note 44, at 613.

¹⁰² Executive Order No. 12,564, 51 Fed. Reg. 32,889 (1986), reprinted in 1986 U.S.C.C.A.N. at B50.

¹⁰³ 489 U.S. 602 (1989).

¹⁰⁴ See *id.* at 619, 634.

¹⁰⁵ See *id.* at 654-55.

¹⁰⁶ See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); see also *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989); *Hartness v. Bush*, 919 F.2d 170 (D.C. Cir. 1990). *Harmon* and *Hartness* both involved drug-testing in the context of national security clearances. National security claims historically constitute the most potent basis for overriding constitutional norms. See e.g., *United States v. Korematsu*, 323 U.S. 214 (1944); *United States v. Nixon*, 418 U.S. 683, 706, 710-11 (1974) (upholding a subpoena of confidential presidential records "[a]bsent a claim of need to protect military, diplomatic, or sensitive national security secrets. . ."). When national security interests are joined with the need to fight drug use, there can be little doubt about the fate of constitutional arguments. Indeed, in *Hartness*, the D.C. Circuit Court of Appeals held that random drug testing in the context of national security clearances were *per se* reasonable. See 919 F.2d at 173-74; see generally STEPHEN DYCUS, ARTHUR L. BERNEY ET AL, NATIONAL SECURITY LAW, 523-25 (1990).

Service's program solely on the basis of speculation, without any showing of harm or the likelihood of harm.¹⁰⁷

In addition to assaults on privacy interests, the drug war has advanced into the hitherto sacrosanct domain of property rights.¹⁰⁸ In one study concerning the impact of the drug war on minority communities,¹⁰⁹ the authors devote six pages to property forfeiture laws passed by Congress and various state legislatures in the last decade.¹¹⁰

In an exercise of "judicial discretion," Judge Jack Weinstein of the District Court of New York summed up the violence done to family structure by the forfeiture rules as follows:

For the poor, the shortage of livable, low-priced housing is especially acute. Tenants—and especially their minor children—who are evicted are likely to become homeless, with whatever stability their lives afforded seriously jeopardized. . . . [T]he owner of the defendant leasehold is entitled to retain her home. Her children, grandchildren and great-grandchildren, who look to her for shelter as the family's matriarch, may not be dispossessed because one of them has sold drugs from their apartment.¹¹¹

Beyond this summary of civil liberty infractions involving the Fourth and Fifth Amendment¹¹² (or their manifestations under the Fourteenth

¹⁰⁷ See 489 U.S. at 681. The dissenters were disturbed by the failure of the government to base its rules on any findings. This failure may reflect the fact that scientific studies have not demonstrated any causal connection between low levels of drug use and job performance. See, e.g., powell & Hershenov, *supra* note 44, at 585 n.113 (citing Craig Zwerling, James Ryan & John Endel Orav, *The Efficacy of Preemployment Drug Screening for Marijuana and Cocaine in Predicting Employment Outcome*, 264 J. AM. MED. ASS'N 2639 (1990) and Eric D. Wish, *Preemployment Drug Screening*, 264 J. AM. MED. ASS'N 2672 (1990)).

One of the inconsistencies in the government's promotion of employee drug screening programs is that while the government claims that drug use reduces productivity and is debilitating, it admits that these consequences can not be detected without scientific screening.

¹⁰⁸ See PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 106 (1992) ("of [John Locke's] three basic rights of individuals—'life, liberty, and estate'—the last was most fundamental").

¹⁰⁹ powell & Hershenov, *supra* note 44, at 588–95.

¹¹⁰ *Id.* at 589 n.128 (citing the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 881(a)(7) (1988) as amended). The study makes the following remarkable findings, supported by statutory and judicial references: (1) statutory provisions call for seizure of property only from those accused of a drug crime; (2) seizures take place before there has been a judicial determination of guilt or innocence; and (3) civil forfeiture can be effected even when no criminal charges are ever lodged or when they are later dropped. See *id.* at 588–89 (citations omitted).

¹¹¹ See *id.* at 594 n.147 (citing *United States v. Leashold Interest in 121 Norstrand Ave.*, No. 90 Civ. 1607 (E.D.N.Y. Mar. 26, 1991), a decision concerning an eviction from public housing).

¹¹² In addition to infractions previously noted, the drug testing laws and laws imposing a tax

Amendment), lies another field of indirect, subtle, and systemic injuries to democratic processes and protected rights. Among these are: the numerous instances of unequal application of the law;¹¹³ disparate sentencing under inflexible penalty guidelines;¹¹⁴ growing police bru-

on illegal drugs raise Fifth Amendment, self-incrimination issues. *Cf. Schmerber v. California*, 384 U.S. 757 (1966).

¹¹³ See *powell & Hershenov, supra* note 44. A particularly absurd example of the inequalities of our drug laws is *Chapman v. United States*, in which defendants convicted of selling ten sheets of blotter paper laced with LSD were given the mandatory sentence of five years for selling more than a gram of a mixture containing LSD, despite the fact that a major wholesaler caught with thousands of doses of pure LSD, weighing less than a gram absent the blotter paper, would not be subject to the mandatory minimum. 500 U.S. 453, 461-64 (1991). The Court concluded that this result was not irrational. *Id.*

In *Employment Division v. Smith*, two Native Americans were dismissed from their jobs at a drug rehabilitation center for having smoked peyote in a tribal religious ritual. 494 U.S. 872, 874 (1990). The state denied them unemployment compensation on the ground that using peyote was work-related misconduct and thus the dismissal was justified. *Id.* The Supreme Court sustained the state denial. *Id.* at 890. Justice Blackmun, dissenting on the First Amendment issue, noted in passing that during the Prohibition era the ritual use of wine was exempted. *Id.* at 913 n.6.

¹¹⁴ The Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1837, Title 2, Oct. 12, 1984, was amended in 1986 to provide minimum penalties for possession with intent to distribute powder or crack cocaine. Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207, Title I, § 1005, codified at 21 U.S.C. § 801 (1988 & Supp. V. 1993). The amendment provides that the possession of one hundred times the amount of powdered cocaine carries the same penalty as the possession of crack cocaine. See 21 U.S.C. § 841(b) (1988 & Supp. V. 1993).

This statute, as applied, disproportionately affects African-American cocaine users. African Americans tend to use crack more often, while powdered cocaine is used mainly by whites. See NATIONAL HOUSEHOLD SURVEY 1992, *supra* note 44, at 32-33, 38-39 (showing that 11.8% of whites report using cocaine compared to 8.6% of blacks, while 1.2% of whites report having used crack compared with 2.5% of blacks); see also *Minnesota v. Russell*, 477 N.W.2d 886, 887 n.1 (Minn. 1991) (en banc) (noting that in 1988, 96.6% of all persons charged with possession of crack cocaine in Minnesota were African-American, while 79.6% of all persons charged with possession of powder cocaine were white); *United States v. Simmons*, 964 F.2d 763, 767 (8th Cir. 1992) (noting that 97% of those prosecuted for crack offenses in the Western District of Missouri between 1988 and 1989 were African-American).

This disparate sentencing of crack users versus powder cocaine users, in turn, has had a disparate impact on those in poorer black communities. Marcia G. Shein, *Racial Disparity in "Crack" Cocaine Sentencing*, 8 CRIM. JUST. 28, 29 (1993). As a consequence, the percentage of blacks in local jails nationwide charged with drug offenses rose from 34.6% to 48.3% between 1983 and 1989. CAROLINE W. HARLOW, U.S. DEP'T OF JUSTICE, DRUGS AND JAIL INMATES, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 2 (1989).

In *United States v. Galloway*, the United States Court of Appeals for the Fifth Circuit upheld the sentencing provision of 21 U.S.C. § 841(b)(1)(A)(iii) (crack cocaine) despite noting that all of the nineteen defendants were African-American. 951 F.2d 64, 65 n.1 (5th Cir. 1992). The court reasoned that the sentencing guidelines did not violate African-American defendants' rights to due process or equal protection as the preparation of crack cocaine made it more potent and this justified the disparate sentencing. *Id.* at 65. *But see Russell*, 477 N.W.2d at 888-89 (striking down similar state sentencing statute, as it violated the equal protection provisions of the Minnesota constitution).

tality¹¹⁵ and corruption;¹¹⁶ overcrowding in and the appalling conditions of jails;¹¹⁷ and the overwhelming of the criminal justice system.¹¹⁸

The cumulative effect of these ravages upon the delicate reticulation of civil liberties, painstakingly stitched over the centuries into the fabric of a free society,¹¹⁹ may be nothing short of devastating. One author's prediction of a coming "new conservatism, along 'Latin American

¹¹⁵ See Letwin, *supra* note 45, at 819–21; Powell & Hershenov, *supra* note 44, at 614.

¹¹⁶ See ABA REPORT, *supra* note 91, at 47 (stating "[b]ribery, even complicity, in [drug] trafficking by law enforcement officials or lawyers and judges is inevitable") This prediction has been confirmed recently in revelations of the extensive drug-related police corruption reported in New York City. See, e.g., Clifford Krauss, *14 More Officers Arrested at a Shaken 30th Precinct*, N.Y. TIMES, Sept. 29, 1994, at A1; Malcolm Gladwell, *In Drug War, Crime Sometimes Wears a Badge: New York's Latest Police Scandal Reflects Growing Temptations Facing Officers*, WASH. POST, May 19, 1994, at A1; William K. Rashbaum, *11 More 'Dirty 30' Cops Lose Badges*, NEWSDAY, May 5, 1994, at A30; see also Ostrowski, *supra* note 4, at 663–64 ("Drug corruption charges have been leveled against FBI agents, policemen, prison guards, U.S. Custom inspectors, even prosecutors"); Daniel Egler, *Ex-Pontiac Official Indicted on New Prison Drug Charges*, CHI. TRIB., July 29, 1988, at 3.

Bribery, payoffs, thefts of confiscated property, and suborning witnesses are time-worn forms of corruption. Another less recognized source of corruption is the pressure on police to produce. For example, a former police chief points out that "pressure to produce 'good cases' [has] resulted in flaking [planting evidence], dropsy [affixing possession of dropped drugs indiscriminately], perjury, entrapment and framing, by cops anxious to please demanding superiors." Letwin, *supra* note 45, at 822 (citation omitted); see also *id.* at 816–27 (offering in-depth, unflattering description of the administration of New York City's criminal justice system).

¹¹⁷ In 1991, 14,564 of 34,648 of the new court commitments to federal prisons were for drug offenses. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK, 1993 633 (1994). In 1993, 59.5% of federal prisoners were committed for a drug offense. *Id.* at 630. This statistic is particularly disturbing considering the overcrowding of prisons, already at crisis levels. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES 1991 11, Table 2.8 (1993) (specifying that in 1991, 136 jurisdictions were under court order to reduce population). See generally Schuler & McBride, *supra* note 2, at 917 & nn.87–89 (discussing the interrelation of drug use convictions and prison overcrowding). Despite the overcrowding of prisons, the Supreme Court has not found double-celling unconstitutional. See *Rhodes v. Chapman*, 452 U.S. 337, 344–52 (1991) ("double ceiling"—housing two individuals in one-person cell—does not violate the Eighth Amendment prohibition against cruel and unusual punishment); see also *supra* note 54 and accompanying text, describing the spread of disease within prisons.

According to recent reports, the prison overcrowding prediction has proven correct. The prison population surpassed one million inmates in the summer of 1994, equivalent to nearly 1,500 new prisoners a week. E.g., Steven A. Holmes, *Ranks of Inmates Reach One Million in a 2-Decade Rise*, N.Y. TIMES, Oct. 28, 1994, at A1.

¹¹⁸ See Katherine Bishop, *Mandatory Sentences in Drug Cases: Is the Law Defeating Its Purpose?*, N.Y. TIMES, June 8, 1990, at B16 (discussing judges' concern that surge in drug cases is overwhelming federal courts).

¹¹⁹ See, e.g., *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("[if] the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of justice the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face"); see also *Irvin v. Dowd*, 366 U.S. 717, 729 (1960) (Frankfurter, J., concurring) ("not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community").

lines' employing repressive, police-state tactics,"¹²⁰ cannot be lightly dismissed. As evidence, consider the following proposals offered by some of our leaders and opinion makers: establishing large internment camps for drug offenders; using federal troops to break the back of Washington, D.C.'s lucrative drug racket; using troops along United States borders for interdiction; and defoliating source countries.¹²¹ Some of these ideas can be dismissed as outrageous, but the proposed use of military force, since it has already been tried to a limited degree, cannot be ignored in any final assessment of the threat to civil liberties posed by prohibition policy.¹²²

One of the most common menaces to democratic rule is that posed by military usurpation of power. No Latin American democrat needs to be reminded of this truism. The United States has fortunately remained almost totally immune to this anti-democratic virus. Our founders, however, were acutely aware of the threat, and many clauses of the United States Constitution address the containment of the military.¹²³ As long ago as 1878, when concerns about the utilization of the army to enforce civil order were heightened in the aftermath of the Civil War,¹²⁴ the dangers of using the military to enforce the criminal law were recognized by Congress with the passage of the Posse Comitatus Act.¹²⁵ This act remained intact for more than one hundred years.¹²⁶ However, anti-drug paranoia in the early 1980s led Congress

¹²⁰ Jason DeParle, *Daring Research or 'Social Science Pornography'*, N.Y. TIMES MAG., Oct. 9, 1994, at 48, 50 (profiling Charles Murray, co-author of THE BELL CURVE).

¹²¹ See Schuler & McBride, *supra* note 2, at 896-97 & n.19 (describing the increased number of police, prosecutors, and judges, and longer sentences for drug offenders).

¹²² See, e.g., Bruce H. Bagley, *Myths of Militarization: Entlisting Armed Forces in the War on Drugs*, in DRUG POLICY IN THE AMERICAS, *supra* note 10, at 140-41; Guy Gugliotta, *The Colombia Cartels and How to Stop Them*, in DRUG POLICY IN THE AMERICAS, *supra* note 10, at 121-22.

¹²³ For example, the Second Amendment pertains to the right of the people to keep and bear arms and has generally been interpreted as an effort to retain power in a "well regulated militia" made up of the people of the various states, as a counter-weight to a federal standing army. U.S. CONST. amend. II. The Third Amendment prohibits the quartering of troops during peace in the homes of the people without consent. U.S. CONST. amend. III; see also U.S. CONST., art. I, §8, cl.12 (limiting appropriations for a standing army to a period no longer than two years); cl. 15 (vesting in Congress the power to call forth the militia to execute the laws of the nation). In the rare event that the military has been called upon to restore civil order, its use has been subjected to severe limits and criticism. See *Gilligan v. Morgan*, 413 U.S. 1 (1973).

¹²⁴ See *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (setting forth the limits on military criminal jurisdiction).

¹²⁵ 18 U.S.C. § 1385 (1988) (prohibiting the use of the Army or Air Force to execute the laws, except under circumstances expressly authorized by the Constitution or Congress).

¹²⁶ Until the passage of drug-related legislation, the exceptions to this Act all pertained to the use of federal armed forces to help put down rebellions, insurrections, or to enforce federal law in the face of open resistance. See, e.g., 10 U.S.C. §§ 331-35 (1988). The President has used troops in some questionable circumstances, but always under a colorable claim of maintaining

to amend the Act, so as to allow the involvement of the military in civilian law enforcement of criminal law.¹²⁷ This has led to the use of the National Guard in Puerto Rico to “police” housing projects against drug activities, and to similar calls for military involvement by the mayor of Washington D.C.¹²⁸

Of course, if the military poses a threat to civilian control and republican governance in the United States, the threat is remote as compared to that posed by heightened military intervention in Latin America, with its long history of military coups and seizures of government. Nevertheless, in pursuit of its drug policies, the United States has made common cause with the military in various countries in the Andean and Caribbean regions, and has even deployed forces in largely futile efforts to interdict the drug trade,¹²⁹ thereby placing both civilians and democratic governments at immediate risk.¹³⁰

A good example of this is a series of military support operations in the Caribbean in the early 1980s, which led to dubious claims of success in interdicting drugs,¹³¹ while also leading the United States to attempt a more serious military intervention in Bolivia in 1986. This action, known as “Operation Blast Furnace,” revealed the futility of such efforts.¹³² It also demonstrated the potential for disastrous political consequences of similar actions. Although the plan successfully disrupted cocaine processing operations for a short time, it had no discernible impact on either the price or the availability of cocaine in the United States. It did, however, cause havoc in Bolivia:

order. See, e.g., *Bissonette v. Haig*, 776 F.2d 1384, *aff'd* 800 F.2d 812 (8th Cir. 1986) (en banc), *aff'd* 485 U.S. 264 (1988). For a general discussion, see DYCUS, BERNEY ET AL, *supra* note 106, at 427–30.

¹²⁷ 10 U.S.C. §§ 371–80 (1988 & Supp. V 1993) (authorizing the Secretary of Defense to provide equipment and personnel to assist civilian agencies in the enforcement of drug, immigration and tariff laws). The statute expressly forbids “direct participation” by members of the armed forces “in a search and seizure, an arrest, or other similar activity unless . . . otherwise authorized by law.” *Id.* at § 375. For a case charging a violation of the law and seeking damages, see *Drug Policy Foundation v. Bennett*, No. C-90–2278 FMS (N.D. Cal. 1991) (unpublished opinion on file with the *Boston College Third World Law Journal*). See also Bagley, *supra* note 122, at 130–33. In 1989, Congress further expanded the involvement of the Department of Defense. *Id.* at 137.

¹²⁸ See Larry Rohter, *National Guard Joins Puerto Rico Police on Beat as Crime Rises*, N.Y. TIMES, July 28, 1993, at A10; see also Art Buchwald, *Guarding the Home Front*, WASH. POST, Oct. 29, 1993, at F1.

¹²⁹ See Gugliotta, *supra* note 122, at 120–22.

¹³⁰ See Walker, *supra* note 60, at 272–73 (describing the contentious U.S. efforts to intercept drug production and traffic in Mexico); see also *infra* note 177.

¹³¹ Bagley, *supra* note 122, at 135.

¹³² *Id.*

Mass protests against U.S. troop presence in Bolivia occurred in the rural zones . . . and in urban centers throughout the country. President Paz Estensorro was vilified by his domestic critics . . . and barely escaped impeachment proceedings. . . . [H]is administration was virtually paralyzed by intense political opposition [and] harsh nationalist criticism long after U.S. forces had left. In light of the severe political fallout, . . . Operation Blast Furnace was unquestionably a diplomatic failure.¹³³

Comparatively speaking, however, the Bolivian experience is a cautionary tale. In both Peru and Colombia, U.S. pressure¹³⁴ to deal with the cocaine business as a national security threat exacerbated internal political problems, and trapped the people of these nations between violent militaristic forces, revolutionary groups, drug cartels, and the armed forces of the government.¹³⁵ In Peru, the government was faced with an alliance between campesinos (peasants) and the Sendero Luminoso,¹³⁶ which led it to reject, as part of the problem, Washington's call for broadening the role of the Peruvian armed forces in the anti-drug campaign.¹³⁷ The government concluded that without "resources to offer real alternatives to coca-dependent farmers" the rural poor would be driven into the ranks of the rebels.¹³⁸ President

¹³³ *Id.* at 136. The author of this report concludes that high-profile U.S. military involvement in drug interdiction in Latin America is controversial, unsustainable, and politically counterproductive. *Id.*

¹³⁴ See, e.g., Clifford Krauss, *Colombian Leader is Hailed by Bush*, N.Y. TIMES, Feb. 27, 1991, at A8 (describing the \$20 million in economic aid in the Andean Trade Preference Act to improve trade and cooperation in law enforcement with Colombia); James Brooke, *Peru, Its U.S. Aid Imperiled, Plots a New Drug Strategy*, N.Y. TIMES, Jan. 14, 1991, at A2 (reporting that Peru's aid was imperiled as its coca bush cultivation had increased 25% in the last three years despite millions of dollars in American aid); Brooke, *supra* note 8, at A12 (detailing President Bush's ordering of \$65 million in aid to Colombia after the assassination of a presidential candidate by drug traffickers, as well as his "Andean Strategy" to provide \$90 million in military and economic aid for Colombia, \$97.5 million for Bolivia, and \$73.4 million for Peru to help combat drug traffickers); Dowd, *supra* note 8, at 1.

¹³⁵ See Walker, *supra* note 60, at 275.

¹³⁶ The Sendero Luminoso (Shining Path) is a radical leftist revolutionary movement in Peru. For a brief history of the Sendero Luminoso and its alliance with the peasant class, see Jeffrey D. Thielma, Note, *Peru's Failure to Make the Military Subservient to Civilian Law: The Absence of Prosecution After the 1988 Cayara Massacre*, 12 B.C. THIRD WORLD L.J. 433, 444-46 (1992).

¹³⁷ See Bagley, *supra* note 122, at 140-41. Paradoxically, another danger that the use of military force poses for democracy is that it is often popular. See James Brooke, *Use of Army to Fight Crime in Rio Makes Many Feel Safer in Streets*, N.Y. TIMES, Nov. 26, 1994, at A1.

¹³⁸ Bagley, *supra* note 122, at 140-41; see also Mathea Falco, *Policies and Prospects for Demand Reduction*, in DRUG POLICY IN THE AMERICAS, *supra* note 10, at 219-20. Another cost of the militarization of the anti-drug undertaking—corruption—was posited as the reason for the

Alberto Fujimori believed that to follow the course pressed by the United States would undermine the legitimacy of his government and the stability of Peru's fragile democratic regime.¹³⁹

Although democratic governance has been maintained in Colombia, it has been marked by severe repressive measures and violence,¹⁴⁰ including the bombing of the Colombian Supreme Court and the murders of Justice Department officials and journalists.¹⁴¹ This led to a series of "battles" between the government and the drug cartels, characterized at various stages by murderous police and army raids, random bombings by gang members, kidnappings, and a general period of terrorism.¹⁴² A key factor in this decade-long internal war in Colombia was the dispute over extradition of cartel leaders, action the United States insisted upon as a cornerstone of its drug war policies.¹⁴³ At one point, the Colombian president decided by executive fiat to extradite drug suspects,¹⁴⁴ a decision that led to a series of on-and-off negotiations with the Medellin cartel, further undermining the credibility of the Colombian government. Assuming that these U.S.-driven initiatives have successfully damaged the Medellin cartel,¹⁴⁵ the costs to Colombia have been unbearably high.¹⁴⁶ As Professor Peter Smith stated:

suspension of Drug Enforcement Agency's collaboration with the Peruvian police. Military officials were allegedly discovered selling information about raids to drug traffickers. Walker, *supra* note 60, at 266. For an extended and interesting discussion of corruption as a concomitant of prohibition, see MARK THORNTON, *THE ECONOMICS OF PROHIBITION* 111-38 (1991).

¹³⁹ Bagley, *supra* note 122, at 140-41. This assessment was partially borne out soon afterward, when President Fujimori declared a state of emergency and suspended the constitution and the parliament of Peru. *Peru's Leader Dissolves Congress*, N.Y. TIMES, Apr. 6, 1992, at A8.

¹⁴⁰ See Francisco E. Thoumi, *The Economic Impact of Narcotics in Colombia*, in *DRUG POLICY IN THE AMERICAS*, *supra* note 10, at 58. It is unclear whether all costs of the violence are intrinsic to the drug enterprise or whether they are attributable to the illegality of the activity. Most analysts believe the latter is true. If the government is involved in the escalation of violence, then this last point is hard to refute. *Id.*

¹⁴¹ RILEY, *supra* note 1, *passim*; see also Gugliotta, *supra* note 122, at 113, 115.

¹⁴² See Gugliotta, *supra* note 122, at 112-16, 122-28.

¹⁴³ The Medellin cartel actually dubbed itself the "Extraditables." See *id.* at 113.

¹⁴⁴ See *id.* at 124. This questionable legal move was ultimately upheld by the Colombian Supreme Court. *Id.*

¹⁴⁵ For several reasons the gains are short-lived or illusory. Every setback the Medellin cartel has suffered has been accompanied by a reciprocal gain by Cali, the other large Colombian cartel. *Id.* at 126. Moreover, there are so many independent traffickers that it is doubtful that if the cartels were eliminated it would make a difference in the drug flow. See *id.* at 112.

¹⁴⁶ The series of crackdowns following presumed cartel assassinations of Colombian officials and other direct attacks on the government were, in the words of one journalist who has studied the situation, "a waste of time. Not only did it not produce results, but it allowed the traffickers to flout the justice system and call into question the government's ability to govern." Gugliotta, *supra* note 122, at 123-24.

[P]rosecution of the drug wars [as presently conceived], places increasing autonomy and authority in the hands of Latin American armed forces. To put it bluntly, drug wars encourage militarization. This can pose a substantial threat to still-fragile democracies . . . and alter the political course of the region as a whole.¹⁴⁷

Perhaps the most telling indictment of U.S. policy was delivered by Iban de Rementería of the *Comision Andina de Juristas*: "Argentina and Brazil can see their future in Bolivia. Bolivia sees its own [future] in Peru, Peru in Colombia and Colombia in Lebanon."¹⁴⁸

III. GOVERNMENT WILL NOT CHANGE PROHIBITION POLICY

This section of the paper suggests and considers what the real obstacles to change in United States or Latin American drug policies may be.¹⁴⁹ Among these obstacles are strong congeries of cultural grounds, including religious, moral, psychological, and social attitudes. To a significant extent, these obstacles relate to matters of racism and class bias that prevail in the United States, as well as in most other countries.¹⁵⁰ Regardless of whether these cultural and prejudicial grounds are primary, or derivative of some other basis for maintaining the status quo, presumably determined and courageous leadership¹⁵¹ could overcome them. That cannot be said as confidently, perhaps, with respect to the dominant reason for maintaining the status quo: the economic interests of many powerful and allied entities.

In the second part of this discussion of the obstacles to change, two forms of inconsistent responses are reviewed in order to further demonstrate that drug prohibition policy is not rationally based. These two forms of behavior—(1) the half-hearted enforcement of money laundering activity, and (2) the treatment of legal drugs—reinforce the

¹⁴⁷ Smith, *supra* note 10, at 15.

¹⁴⁸ *Id.* at 13 (quoting member of the Andean Commission of Jurists).

¹⁴⁹ In the larger picture, this discussion would include the other coca-producing regions, Mexico and other marijuana-producing countries in this hemisphere, and the opium-producing regions of Asia and the Near East. However, since the focus is cocaine, the discussion is limited essentially to the United States, by far the greatest market for cocaine, and the producing countries of South America. Because the United States has made its drug policy a central element in its foreign policy as it concerns Latin America, the focus in this section will be mainly on the obstacles to change in the United States.

¹⁵⁰ See *supra* notes 39–48 and accompanying text. A particularly vicious form of class-related violence has emerged in Colombia. *Vigilantes in Colombia Kill Hundreds in a 'Social Cleansing'*, N.Y. TIMES, Oct. 31, 1994, at A8.

¹⁵¹ See *infra* notes 258–60 and accompanying text. Dedicated leadership led to the abolition

conclusion that economic constraints drive the current policy and inhibit its reform. These constraints reflect the interests of two important indigenous industries: the financial industry and the legal drug industry.

A. *Obstacles to Change of Prohibition Policy*

Why would the United States, with the intermittent cooperation of Latin American governments, pursue for so long a drug policy that is fraught with dangers to democracy at home and abroad, and at the same time appears to worsen the living conditions of those segments of society which are the most powerless and destitute? The answer to that question is not to be found wholly in rational drug policy explanation. Instead, it derives from an understanding of political and cultural underpinnings of the drug prohibition policy. One need not subscribe to a conspiracy theory to recognize that policy makers are capable of exploiting fears and prejudices to sustain themselves in power, and to avoid the real problems that may confront the nation. This is particularly so when the problems, like poverty and chronic underemployment, seem intractable. Thus, the first basis for the assertion that the United States drug policy will not change is that it is *contrary to the political interests* of our elected officials.¹⁵²

1. The Politics of Prohibition

In the simplest terms, only the bravest or most foolhardy politicians, whatever their private opinions, would endorse a shift in drug policy in the face of public opinion polls that consistently identify crime and its association with drug trafficking at or near the top of the public's fears.¹⁵³ Even the most impacted populations, inner-city minority neighborhoods, favor stricter enforcement of drug laws.¹⁵⁴ When former Surgeon General Joycelyn Elders suggested in 1993 that it might be appropriate to commission a study of our current prohibition policy, the political reaction from the White House and Republican

of an even more imbedded social evil in the past. Racial slavery was abolished in the 19th century, with many of the Latin American states taking the lead. Argentina abolished slavery in 1813, Colombia in 1821, and Mexico in 1829, all without recourse to war. Laws against racial and kindred forms of discrimination have evolved steadily, if erratically, throughout the nations of the western hemisphere.

¹⁵² See Matthew O. Howard, *Modern "War on Drugs" is Supported by Elemental Untruths*, SEATTLE TIMES, May 2, 1990, at A9 (Lewis Lapham, Editor of Harper's magazine, states, "the war on drugs thus becomes the perfect war for people who would rather not fight a war").

¹⁵³ See *supra* note 1 and accompanying text.

¹⁵⁴ SZASZ, *supra* note 15, at 117 (claiming blacks "enthusiastically [support] the War on Drugs") (citation omitted); see also Letwin, *supra* note 45, at 828 n.169.

lawmakers was furious.¹⁵⁵ Within twenty-four hours the Clinton Administration disavowed any such idea.¹⁵⁶

Even as President Clinton struggled to wrest the "tough on crime" mantle from the Republican Party with the Crime Bill of 1994,¹⁵⁷ members of the Republican opposition attacked the "prevention" provisions¹⁵⁸ in the Bill as "coddling criminals" or little more than "pork."¹⁵⁹ President Clinton must have spoken tongue-in-cheek when he said at the signing ceremonies, "[n]ever again should Washington put politics and party above law and order."¹⁶⁰

The phrase "law and order" has increasingly taken on dark overtones in the American political lexicon. When mainstream politicians in the United States approach the dangerous fault line of race¹⁶¹ for political gain, they court catastrophe. If our leaders are willing to exploit the idea that drug use, and the violence and crime with which it is associated, is a matter of racial proclivity, then more is at stake than mere intransigence on drug policies. What is at stake is the very future of our pluralist society.

It would be comforting to believe that the exploitation of the crime/race connection is a recent and passing aberration.¹⁶² However, the fact that political interest in maintaining the connection between drugs and race has been a central theme of drug prohibition from the outset is particularly worrisome.¹⁶³ Opium prohibition arose first in the Western states, in the wake of an influx of cheap Chinese labor "imported" in the middle of the last century.¹⁶⁴ The initiation of marijuana

¹⁵⁵ Stephen Labaton, *Surgeon General Suggests Study of Legalizing Drugs*, N.Y. TIMES, Dec. 8, 1993, at A23.

¹⁵⁶ *Id.*

¹⁵⁷ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 103 H.R. 3355 (Sept. 13, 1994).

¹⁵⁸ These include special "drug courts" to steer nonviolent drug users into rehabilitation programs, as well as programs to reduce gang membership. David Johnston & Steven A. Holmes, *Experts Doubt Effectiveness of Crime Bill*, N.Y. TIMES, Sept. 14, 1994, at A16.

¹⁵⁹ *Id.*; see also Stephen Green, *Capitol Hill Ill Feelings Won't Help Health Bill*, SAN DIEGO UNION-TRIB., Aug. 28, 1994, at A33; John Aloysius Farrell, *GOP Senators Plan Assault on Crime Bill*, BOSTON GLOBE, Aug. 23, 1994, at 1.

¹⁶⁰ Johnston & Holmes, *supra* note 158, at A16.

¹⁶¹ The famous Willie Horton advertisement used in the George Bush-Michael Dukakis presidential race may be the most overt use of this tactic in modern presidential campaigns.

¹⁶² Although the Horton ad was never fully repudiated, the excesses at the 1992 Republican National Convention may have contributed to the defeat of President Bush. For example, a speech delivered by Pat Buchanan stated: "There is a religious war going on. . . . We must take back our cities, and take back our culture, and take back our country." David Nyhan, *Pat Talks a Great War*, BOSTON GLOBE, Aug. 19, 1992, at 15.

¹⁶³ H. WAYNE MORGAN, *DRUGS IN AMERICA: A SOCIAL HISTORY 1800-1980* 93-94 (1981).

¹⁶⁴ THORNTON, *supra* note 138, at 60.

prohibition in the depths of the Depression was almost directly linked to a wave of cheap labor from Mexico.¹⁶⁵ Alcohol prohibition was also linked to xenophobia. For example, the Progressive Era, which led to some very important reforms, is also associated with Prohibition. That movement, according to one scholar:

was based largely on the fears of middle- [sic] and upper-class citizens in a rapidly changing society. . . . The lower-class and immigrant populations were growing and congregating in the rapidly expanding urban areas. . . . Progressive policies . . . were largely the result of a conservatism and an attempt to fix society, enforce middle-class morality, and protect the old stock American way of life.¹⁶⁶

In truth, the use of psychotropic substances is, and always has been, widely indulged in by most of our population.¹⁶⁷ The salient point, however, is that the dominant culture—white middle-class people—has always identified the use of “bad” substances with the “other,” whomever the other might be at different phases of our history. One scholar of the subject summed up this component of race and class as follows:

Despite proclamations about being an open society and exhortations to believe that the American dream can be eventually realized by anyone willing to work hard, we have always had an underclass of the unemployed, underemployed, and undereducated for whom entry to the middle class is an exceedingly low probability. That this large underclass exists and that negative attitudes about it are held by the middle and upper classes are partly responsible for the ferocity with which the drug war is waged. It is not difficult for many who make up the middle and upper classes to think of people who are poor or afflicted by economic and racial stereotypes as somehow qualitatively different and resigned to bearing the burdens of well-intended anti-drug laws that turn out to have repressive consequences for these people—who happen neither to vote in large numbers nor to lobby their legislators.¹⁶⁸

¹⁶⁵ *Id.* at 53–54, 66; *see also* Schmoke, *supra* note 17, at 507.

¹⁶⁶ THORNTON, *supra* note 138, at 53.

¹⁶⁷ *See* VALLANCE, *supra* note 15, at 8–10, 13–14; *see also infra* notes 227–55 and accompanying text, for a discussion of the treatment of licit drugs.

¹⁶⁸ VALLANCE, *supra* note 15, at 10 (citing JOHN HELMER, *DRUGS AND MINORITY OPPRESSION* (1975)). Vallance credits Helmer with the insights drawn and concludes that “Helmer does not

The prediction then, that our leaders are politically constrained to maintain the current prohibition posture, is closely related to the second basis for a prediction of stasis: the *cultural/moral* ground.

2. The Cultural Roots of Prohibition

More than a few commentators locate the underpinnings of the drug prohibition policy in a long strand of puritanism in American culture and history.¹⁶⁹ To this day, there is a strong strain of moralism in anti-drug attitudes, and our leaders constantly mine this vein by referring to the evil and immoral nature of drug dependence and use.¹⁷⁰ So long as a large proportion of the population believes that drug use is sinful, a form of debauchery, detrimental to the work ethic, wasteful, and generally deleterious, there will be built-in resistance to any reform of the prohibition laws.¹⁷¹ Dr. Thomas Szasz, in an iconoclastic and polemical attack on drug prohibition, describes this cultural strain of American moralism most colorfully. In a nation as diverse as ours, he asks: "What makes a person an American?" He answers that, lacking other grounds,

[W]e habitually fall back on the most primitive yet most enduring basis for group cohesion, namely, scapegoating. Hence the American passion for moral crusades, which, thanks to the modern medicalization of morals, now appear as crusades against disease. . . .

To understand America's protracted struggle against drugs, we must situate the current anti-drug hysteria in the context of this nation's historical penchant for waging moral crusades. Since Colonial times, the New World was perceived—by settlers and foreign observers alike—as a New Promised Land,

attribute this condition to conscious conspiracy, but sees it as the natural, if unplanned, outcome of the maintenance of power by the powerful." *Id.* at 11.

¹⁶⁹ See Musto, *supra* note 27, at 33; see also GORE VIDAL, *HOMAGE TO DANIEL SHAYS: COLLECTED ESSAYS 1952-1972* (1972). Of course we have no monopoly in the depth of moral offense that self-indulgent behavior provokes. As one writer noted, the Egyptians banned coffee in the sixteenth century, China penalized opium sellers by strangulation, and the Sultan of the Ottoman Empire executed tobacco smokers, as did the Czar of Russia in the seventeenth century. Boaz, *supra* note 35, at 617. The former U.S. drug czar, William Bennett, accepted the idea of beheading drug dealers as morally supportable. See *Editorial, Crackmire, Drug Czar William Bennett Advocates Beheading Dealers*, *NEW REPUBLIC*, Sept. 11, 1989, at 7 (quoting portions from *The Larry King Show* (CNN television broadcast, June 15, 1989)); see also VALLANCE, *supra* note 15, at 71.

¹⁷⁰ VALLANCE, *supra* note 15, at 18.

¹⁷¹ See SZASZ, *supra* note 15, at 31-34.

a place where man, corrupted in the Old World, was reborn, uncorrupted.¹⁷²

Finally, Dr. Szasz closes his discussion by noting that “[f]ormerly, the conviction that America’s manifest destiny was the moral reformation of the world was couched in clerical terms, as a fight against sin (drinking as ‘intemperance’); now, it is couched in clinical terms, as a fight against disease (drug use as ‘chemical dependency’).”¹⁷³

While emphasizing this disease metaphor, Dr. Szasz also acknowledges the continuing power of religious imagery, quoting former drug czar William Bennett: “It [drug abuse] is a product of the Great Deceiver . . . we need to bring to these people in need the God who heals.”¹⁷⁴ With the rapid approach of the millennium and the rise of evangelism, fundamentalism, and the so-called “religious right,” it would be unwise to underestimate the force of the opposition these groups exert in favor of a fervent commitment to our drug war policy.¹⁷⁵

The moralistic and puritanical chord does not play as important a part in the social context of the Latin American support for prohibition.¹⁷⁶ However, there are cultural and social forces operating in the Latin American countries that pose obstacles to any retreat from the policy of prohibition. Given the horrors and outrages that “narco-traffickers” have visited on their own countries and people, there is the understandable desire for vindication, particularly among those who have suffered directly. That vindication, however, may never be achieved by clinging to a failed policy. The last obstacle the countries of the Caribbean region and beyond must overcome is their subservience and dependence upon the hegemony of the United States.¹⁷⁷ Given the economic and political power of the United States, that may be easier said than done.

¹⁷² *Id.* at 32–33.

¹⁷³ *Id.* at 34.

¹⁷⁴ *Id.* at 32.

¹⁷⁵ If there is any lingering doubt that such groups as the Christian Coalition, led by Pat Robertson, have a national political agenda, the list of presidential candidates addressing the 1994 Coalition conference should dispel that doubt. See Richard L. Berke, *From the Right, Some Words of Restraint*, N.Y. TIMES, Sept. 17, 1994, at A9.

¹⁷⁶ *But see In re A. Sochandamandou*, File No. C-221/94, Constitutional Court of Justice, Republic of Colombia (May 5, 1994), *infra* note 192.

¹⁷⁷ See David R. Mares, *The Logic of Inter-American Cooperation on Drugs*, in DRUG POLICY IN THE AMERICAS, *supra* note 10, at 335–36 (describing the skewed inter-American drug policy as a game involving the U.S. as “bully”); see also Walker, *supra* note 60, at 272–73 (discussing the highly coercive U.S.-directed “Operation Intercept” in Mexico). See generally Maria Celia Toro, *Unilateralism and Bilateralism*, in DRUG POLICY IN THE AMERICAS, *supra* note 10, at 314–28 (describing the relationship of the United States and Mexico regarding drug enforcement, noting issues of national pride and sovereignty).

3. The Institutional Support of Prohibition

If Sir Isaac Newton had been a political scientist rather than a physicist, he still may have discovered his first law of motion: bodies at rest tend to stay at rest and bodies in motion tend to stay in motion. The third reason that there is likely to be no reform of the drug prohibition regime is *bureaucratic inertia*.

One of the greatest difficulties in assessing and understanding current drug policies is the great disparity and uncertainty of data relating to drug use and costs. Without standardized measurements, comparisons are difficult or impossible. Added to this is the fact that as an illicit, underground activity, even the raw data are both hard to come by and inherently unreliable.¹⁷⁸ Additionally, there is no reliable baseline. During the long history of non-regulation of drugs, use fluctuated quite dramatically from period to period.¹⁷⁹ Thus, there is no method to separate the underlying currents in drug use from the consequences of enforcement.¹⁸⁰ This means that both the claims of officials committed to the existing policy, as well as the claims of those who advocate decriminalization, can be supported by conflicting empirical studies.

The National Institute on Drug Abuse (NIDA), for instance, reported a decline in the number of current illegal drug users from 23 million in 1985 to 12.9 million in 1992, and a dramatic decline in current cocaine users during the same period, from 2.9% of the over-twelve population to 0.8%, a decline of approximately 660,000 users.¹⁸¹ However, another study, perhaps more reliably based on hospital emergency admissions and criminal statistics, put the number of cocaine users during that same time period at more than three times as high—2.2 million users.¹⁸² There is also no explanation for the discrepancy

¹⁷⁸ By comparison, data on tobacco and alcohol consumption are relatively easy to compile accurately because their sales are taxed.

¹⁷⁹ See Musto, *supra* note 27, at 29–44.

¹⁸⁰ For example, drug use increased substantially during the “rebellious” 1970s. Did this rise occur because of governmental permissiveness, or because of the anguish that divided the nation—initially along generational lines—over the Vietnam war, or was it the result of the returning, embittered veterans, who had turned to drugs as a means of escaping the horrors of a bloody, losing war?

¹⁸¹ Smith, *supra* note 10, at 3–4 (citing NAT’L INSTITUTE ON DRUG ABUSE, U.S. DEP’T HEALTH & HUMAN SERVS., NAT’L HOUSEHOLD SURVEY ON DRUG ABUSE: POPULATION ESTIMATES 1985 (1987); NAT’L INSTITUTE ON DRUG ABUSE, U.S. DEP’T OF HEALTH & HUMAN SERVS., NAT’L HOUSEHOLD SURVEY ON DRUG ABUSE: POPULATION ESTIMATES 1990 (1991)). Professor Smith sheds serious doubt on the NIDA statistics. He notes that they are voluntarily derived from households and high school graduates, surveys that are likely to miss the homeless, the down-trodden, and prison populations. See *id.* at 4.

¹⁸² Smith, *supra* note 10, at 5 n.7 (citing STAFF REPORT, COMMITTEE ON THE JUDICIARY,

between the NIDA's use figures and data showing that cocaine available for export to the United States during this same period remained almost unchanged.¹⁸³ Whatever the data, the United States government and public continue to perceive the drug problem in crisis terms and continue to expend enormous resources in combating drug use without obvious success. Given the substantial expenditures by the United States on its "drug war" policy, it is not surprising that drug enforcement officials continually claim that we are winning the war, and that we therefore must stay the course or renew our efforts.¹⁸⁴

This is not to question the strong conviction in the virtue of, and commitment to, the vigorous pursuit of the drug war by the "foot soldiers," the law enforcement officials constantly engaged in the war on drugs. Many risk and some lose their lives in this battle, and they are rarely honored except in moments of loss.¹⁸⁵ It is only natural that

UNITED STATES SENATE, *HARD-CORE COCAINE ADDICTS: MEASURING—AND FIGHTING—THE EPIDEMIC* (1990).

¹⁸³ See Smith, *supra* note 10, at 14, Table 1–5 (citing *Worldwide Cocaine Production Quantities Available for Export to United States, 1986–1990*, unpublished figures by U.S. Office of Management and Budget, 1990). None of these efforts to ascertain use patterns and trends account for questions of drug potency or shifts in use techniques, such as the rise in "crack" consumption. Economist Milton Friedman has asserted that the development of crack is an economic consequence of prohibition. His argument is that the high cost of powdered cocaine, driven up by the government effort to eliminate it, led to the development of a product that was more affordable. Friedman, *An Open Letter to Bill Bennett*, *supra* note 80, at A16. *But see* Mark A.R. Kleiman, *Bennett Fears 'Public Policy Disaster,' It's Already Here*, WALL ST. J., Sept. 29, 1989, at A15 (positing that crack was not invented as a cheap substitute for poorer users but instead by rich users looking for a more intense drug experience).

¹⁸⁴ "I can say with confidence that we are moving toward victory. . . . Things seem to be getting better: Press on, and they will get better still." Smith, *supra* note 10, at 3 (quoting remarks of the former director of the Office of the National Drug Control Policy, Bob Martinez).

¹⁸⁵ See *DEA Agents Killed in Crash Mourned As Anti-Drug Martyrs*, L.A. TIMES, Sept. 4, 1994, at A17 ("Five U.S. narcotics enforcement special agents who perished in a plane crash in the Andes Mountains last week were honored Saturday as martyrs to the struggle for a safer America and world."). One may question whether "scouting for clandestine airfields in the cocaine suppression operation" has made any real difference in terms of the amount of cocaine production and shipment. *Id.*

During the height of the Bush Administration's highly publicized offensive against drugs, highlighted by cocaine seizures at record levels in 1989, the impact on cost and supply was negligible. In one case alone more than twenty-one tons of cocaine said to be worth up to \$20 billion on the street was confiscated. Scott Ladd, *N.Y. Drug War a Bust, So Far, Street Prices Same, Experts Say*, NEWSDAY, Oct. 15, 1989, at 4. In fiscal year 1988, fifty-seven tons of cocaine were seized, but a chief in the narcotics division noted that the fact that the "availability of drugs doesn't appear to be dwindling" was "staggering." *Id.*

In the above 1989 NEWSDAY account, the wholesale price of a kilo of cocaine was quoted at between \$18,000 and \$20,000. *Id.* In a 1994 New York Times article, the price of a kilo of cocaine was quoted at \$20,000. Joseph B. Treaster, *79 Seized in New York and Italy Echoing Pizza Connection Case*, N.Y. TIMES, Sept. 16, 1994, at A1 (describing the arrests of a major New York drug ring). The fact that the price had not fluctuated for five years calls for some explanation regarding the

people engaged in this undertaking, particularly in the “front lines,” need and seek vindication in their skirmishes, in order to believe that their efforts are not futile.¹⁸⁶ Bureaucratic inertia aside, it is not easy to turn one’s back on such sacrifices. Still, it is questionable whether the same respect is due the policymakers and high officials who, at no risk to themselves beyond a potential loss of power and status,¹⁸⁷ refuse even to review the dubiousness of existing drug policies. With regard to the “generals” in this war,¹⁸⁸ there is reason to suspect that an operative force is the tendency within bureaucracies to stick with the status quo, and the will to expand vested power and influence.¹⁸⁹

efficacy of the U.S. government’s strategy of disrupting cocaine supply, unless one believes the law of supply and demand was suspended during the period. It also might cause one to wonder whether cocaine use had dropped in the intervening years.

¹⁸⁶ At a hemispheric conference in which this author presented a paper on drug policy in the Caribbean Region, an anguished and angry delegate from El Salvador objected strongly to any suggestion of decriminalization and reconciliation. He said that we must not allow the lives lost in this struggle to have been in vain. Others have echoed his sentiments:

The mere discussion of decriminalization may be very painful for the families of police officers slain during narcotics enforcement . . . America’s overdue reconciliation with those who performed military service in Vietnam may provide us with a guide: our admiration and respect for those who fought in their nation’s service stands apart from our judgment of the wisdom of that war. If we are to decriminalize, there should be . . . no failure to recognize the sacrifices made—the lives lost—in a fight against profiteering. Decriminalization can be the final, winning salvo in the battle against illegal drug trafficking.

Schuler & McBride, *supra* note 2, at 934.

¹⁸⁷ A rather negative review of Mr. Lee Brown, the current director of the Office of National Drug Control Policy (the current “drug czar”), dwells on the excessive expenditures of that office on the “trappings of power” and security measures. Byron York, *Clinton’s Phony Drug War, Do-Nothing Drug Czar, Lee Brown, Has Cabinet Status, But No Ideas, No Goals, and No Money—Which is Just the Way the President Wants It*, AM. SPECTATOR, Feb. 1994, at 40.

¹⁸⁸

The war on drugs thus becomes the perfect war for people who would rather not fight a war, a war in which the politicians who stand so fearlessly on the side of the good, the true, and the beautiful need do nothing else but strike noble poses as protectors of the people and defenders of the public trust.

Howard, *supra* note 152, at A9 (quoting Lewis Lapham).

¹⁸⁹ Under the Reagan and Bush Administrations, the budgets of federal agencies involved in prosecuting the war on drugs were dramatically expanded. Agencies such as Customs, the Coast Guard, the DEA, the FBI, the IRS, and the CIA, as well as state and local agencies involved in drug law enforcement, all feed at the drug war trough. These expenditures have increased exponentially in the last twenty years. See *DEALING WITH DRUGS: CONSEQUENCES OF GOVERNMENT CONTROL* 7 (Ronald Hamowy ed., 1987):

There are large numbers of people, principally employees of law enforcement agencies, who have a vested interest [in increased prohibition expenditures]. Any serious reform of the nations’ drug laws is bound to meet powerful resistance . . . from groups within the . . . bureaucracy . . . who have capitalized on our current policy and who have a great deal to gain from its maintenance.

Id.

A good example of the bureaucratic instinct to sustain itself can be drawn from an historical parallel: passage of the marijuana prohibition law in 1937.¹⁹⁰ Marijuana prohibition was enacted long before marijuana emerged as a recreational substance. Some analysts argued that the Federal Narcotics Bureau, led by the former Prohibition commissioner Harry Anslinger, pushed the adoption of the new prohibition as a means of sustaining its own bureaucratic survival and growth in the face of budget cuts during the Great Depression.¹⁹¹ It would be uncharacteristic and surprising if today's far more extensive and powerful bureaucratic drug control establishment did not behave similarly during the current budgetary stringency.

As important and powerful as the three previously discussed obstacles to change may be, each could be overcome by a leadership willing to consider alternatives and to experiment with reform. Principles of equality, individualism, tolerance, and compassion, all of which flow steadily through the currents of American idealism, can be tapped by a willing leadership.¹⁹² It is not as clear whether strong leadership

¹⁹⁰ Marihuana Tax Act of 1937, Aug. 2, 1937, ch. 553, 50 Stat. 551; as amended Feb. 10, 1939, ch. 2, 53 Stat. 1 §§ 2590-2604 and Aug. 16, 1954, ch. 736, 68A Stat. 1, codified at 26 U.S.C. § 4741 et seq. (1964).

¹⁹¹ THORNTON, *supra* note 138, at 66-67.

¹⁹² In this century, the United States Supreme Court has led the shift in national policy regarding the legacies of slavery and racial discrimination. Perhaps the judiciary will lead the way in a reform of drug law policy; we might look to Latin America for a recent example of such jurisprudence.

In a recent decision of the Supreme Court of Colombia, a closely divided Court declared that those provisions of Colombian law that punished persons for possession of addictive drugs in amounts described in the law as "doses for personal use" (which in the case of cocaine was set at one gram or less), or required the commitment of addicts to psychiatric clinics, were unconstitutional. The Court rested its decision on constitutional norms that "respected human dignity," recognized the "priority of the inalienable rights of an individual, such as autonomy as an immediate expression of freedom," and the "right to equality." The decision sounded strongly in terms of the right to privacy and autonomy and the right to control one's body. *Cf.* *Stanley v. Georgia*, 394 U.S. 557 (1969) (upholding the right of individuals to view proscribed obscene material in the privacy of the home). The Court reviewed a provision which called for commitment of addicts to clinics as punishment for their illnesses, and identified the provision as a confinement for an open-ended period of time that could exceed the allowed criminal sanctions. The Court therefore held that it violated both rights of equality and personal freedom. *Cf.* *Robinson v. California*, 370 U.S. 660 (1962).

The Court stressed that its decision did not affect the provisions of existing drug laws, insofar as they deal with the transportation, storage, production, elaboration, or selling of narcotics, and thereby did not contravene the obligation of the state to abide by international treaties respecting the regulation of drugs. *See infra* note 283 and accompanying text. Finally, the Court indicated that the state may reasonably regulate matters of place, age, and activities in which drug consumption would be considered socially offensive. One other unusual feature was that the Attorney General joined the petitioner arguing that the provisions under review were unconstitutional. The Department of Justice defended the statute. *See In re A. Sochandamandou*, File No. C-221/94,

could overcome the great weight of the *economic foundations* of the prohibition regime.

4. The Economic Superstructure of Prohibition

The institutional intransigence of the government may be minor as compared to the stake that private and quasi-private interests have in the status quo. First, as with any significant government expenditures, there is the usual multiplier effect on the rest of the economy. Jobs and economic activity are created, as police forces, court systems, and numbers of government agents and prison personnel expand, and private sector responses also occur. Opportunities present themselves for weapons manufacturers to supply the police and "narcs" with increasingly sophisticated tools. Construction companies build new prisons and court facilities,¹⁹³ and building material producers supply the construction workers. Lawyers defend the increased numbers of suspects and detainees and advise those not yet caught. The list goes on and on. Further, because current policy remains unable to stop drug trafficking, bankers, accountants, and real estate brokers all benefit in this lucrative trade,¹⁹⁴ as it generates billions in cash profits that require laundering. Each financial transaction, in turn, has its own multiplier effect. These public and private benefits of current drug policy represent major obstacles to any change in the status quo.¹⁹⁵ Powerful interests in the private sector thus seek to maintain the jobs and profits that

Constitutional Court of Justice, Republic of Colombia (May 5, 1994) (opinion and English translation on file with the *Boston College Third World Law Journal*. The author wishes to express his gratitude for the translation to Boston College Law School students Anabel Crescenzi and Rafael Garcia).

The immediate response to the decision from both the governments of Colombia and the United States was critical. See Joseph B. Treaster, *Use of Drugs is Legalized by Colombia*, N.Y. TIMES, May 7, 1993, at A3. For commentary about the decision, see C. Torres, *Legalize It?*, NATION, June 20, 1994, at 857.

¹⁹³ See Steven A. Holmes, *The Boom in Jails is Locking Up Lots of Loot*, N.Y. TIMES, Nov. 6, 1994, at E3 (discussing prison building "boom").

¹⁹⁴ See *infra* note 269.

¹⁹⁵ Professor Thornton emphasizes prohibition in his analysis of "rent seeking." He describes this as the search for privilege and personal gain through the political process. He distinguishes it from corruption in that rent seeking is legal. In its most obvious form, rent seeking entails lobbying by private interests. THORNTON, *supra* note 138, at 6. Again, the best insight about this ongoing process is drawn from the past. Thornton describes how various interest groups fought for and against the original alcohol and drug prohibition proposals both openly and secretly, including such expected players as whiskey and beer producers, patent medicine manufacturers, and pharmaceutical companies. He also notes less obvious players, such as soft drink manufacturers, the medical and the pharmacy professions, and even such remote rent seekers as manufacturers of artificial fibers interested in removing the competition from hemp, a byproduct of the marijuana plant. *Id.* at 47-69.

the current drug policy engenders. Bankers, construction company executives, lawyers, weapons manufacturers, and most importantly, the legal drug industry¹⁹⁶ have traditionally been among the most powerful voices in both the public and private debate on the side of maintaining and even enhancing current drug control policies.¹⁹⁷ Given the range of economic benefits that accrue to so many sectors of the economy, change in policy seems virtually unthinkable.

Many of the same obstacles that block reform of drug policies in the United States are in full force in Latin America and sustain a situation that is possibly even more fraught with egregious distortions of public policy. The harm of the dominant drug policy and its impact on the fabric of society and democratic rule in Latin America has reached intolerable proportions in terms of misery, violence, and corruption.¹⁹⁸ Indeed, the war on drugs in the producing countries is often transformed into real war.¹⁹⁹ The extent of the devastation itself may ultimately allow or induce the Latin American governments and citizens to overcome obstacles to changing the prevailing policy of prohibition, long before the United States reaches that step.²⁰⁰ Nevertheless, the obstacles to such reform taking place first in Latin America remain formidable.

Foremost among these obstacles is the simple fact that the drug trade is perceived as economically critical to the producing and processing countries of the region. Although the data varies widely, one measure of the importance of the drug trade to Colombia is reflected in the estimate that narco-traffickers²⁰¹ may command 30% of the total

¹⁹⁶ The interests of the first and last players in this partial list of countervailing interests are discussed in the next subsection of this paper.

¹⁹⁷ This summary of obvious beneficiaries does not include the drug cartels, the traffickers, the transshippers, the "enforcers," and the street operators, those up and down the extensive and massive illicit drug chain enterprise, and the myriad of incidental beneficiaries of all this economic activity. Whether publicly acknowledged or not, the drug trade "employs" many young people who otherwise have no comparable means of making a living. It would not be surprising if a sizeable investment were made by the drug operators regularly on behalf of opponents of change. After all, no one stands to lose more than the drug operators from a move toward legalization. *But see infra* notes 286 and 291.

¹⁹⁸ For a discussion of these same points—assaults on democratic principles and civil liberties—See *supra* Part II and notes 131–48.

¹⁹⁹ Smith has identified seven simultaneous drug wars going on in Latin America: (1) U.S. vs. suppliers; (2) Latin American governments vs. narco-terrorists; (3) Latin American governments vs. guerrillas; (4) Latin American governments vs. narco-traffickers; (5) Narco-traffickers vs. narco-traffickers; (6) Narco-traffickers vs. guerrillas; and (7) Narco-traffickers vs. political left. Smith, *supra* note 10, at 12.

²⁰⁰ See e.g., *In re A. Sochandamandu*, *supra* note 192.

²⁰¹ This is a misnomer. Cocaine is not a narcotic; it is a stimulant. See *supra* note 13.

wealth of Colombians, within and outside the country.²⁰² The contribution of cocaine to the Colombian economy is about double that of the largest legal export, coffee.²⁰³ In addition, the gross private fixed investment in Colombia between 1976 and 1986 averaged \$2.8 billion per year, a figure that was about the same as or somewhat less than narco-traffic annual profits.²⁰⁴ In Peru, a classic example of an export economy, the most profitable export crop from the 1970s through the 1980s was coca leaf.²⁰⁵ Extrapolating from coca leaf production data, one researcher speculated that the export of coca base and paste²⁰⁶ equaled between 14.3% and 35.4% of Peru's total legal exports in 1988.²⁰⁷ The total employment effect of coca-related activity ranged between 2.7% and 4.5% of the total work force and 6.8%–11.5% of Peru's agricultural employment.²⁰⁸ In Bolivia the story is the same, or even more pronounced. Coca production in Bolivia was estimated to be 6.38% of the gross national product (GNP) in 1988.²⁰⁹ It can confidently be stated, then, that "[f]or poverty-stricken and crisis-ridden economies, [the drug trade] windfalls can only seem to be a blessing. Local governments can hardly be expected to implement [U.S.-proposed crop] eradication with enthusiasm."²¹⁰

In addition to the economic power and importance of the drug trade to Latin American nations, the policy of prohibition has allowed drug operators to gain political and military power. They have used this power to terrorize those who have the audacity to challenge them. The use of raw political power through terrorism and violence in Colombia has been extensively documented.²¹¹ In Peru and Bolivia, the drug lords made common cause with campesinos²¹² and gained politi-

²⁰² Thoumi, *supra* note 140, at 68.

²⁰³ RILEY, *supra* note 1, at 15.

²⁰⁴ *Id.* at 68.

²⁰⁵ Alvarez, *supra* note 13, at 72.

²⁰⁶ Paste and base are chemically distilled forms of the psychoactive substance found in coca leaves. For a lively and accessible description of the movement from coca fields, through the processing, shipping, and cutting-functions, see INCIARDI, *supra* note 53, at 72–78.

²⁰⁷ Alvarez, *supra* note 13, at 79.

²⁰⁸ *Id.*

²⁰⁹ Machicado, *supra* note 13, at 90.

²¹⁰ Smith, *supra* note 10, at 9.

²¹¹ See *supra* note 8.

²¹² The campesinos are another class of victims in this international cocaine trade. Coca may be the only cash crop that provides them with the means to subsist. However, the prices the peasants receive for their crops are not even remotely related to the price cocaine commands in the market place. One estimate was that coca leaves were sold at the jungle refineries for \$8–12 per kilo, in some cases after being carried over hundreds of miles of footpaths. The price for

cal power and allies by resisting the crop eradication programs promoted by the United States.²¹³ Thus, in all three major producing and processing countries, the perverse political effects of the prohibition policy are hard to ignore.²¹⁴

B. *Inconsistencies Reveal Powerful Interests Supporting Prohibition Policy*

Given all the reasons in favor of reform, are the foregoing obstacles to change enough to explain the intransigence? Perhaps, but it is likely that there are less obvious forces working to maintain the status quo as well. *Cui Bono* (Who stands to gain)?²¹⁵ There are three prime candidates: the drug dealers, the financial institutions that profit from the illicit trade, and the competitors in the field of psychoactive substances. Although the first group has substantial clout in the producing countries, through means that involve intimidation, terror, corruption, and investment,²¹⁶ there are no grounds for believing that the traffickers are a voice in the muted debate that may exist in the United States. The same cannot be said for the other two prime candidates, since their voice in policy circles is familiar and strong.

If the monetary figures that are referred to at the outset of the next sub-section are accurate, financial institutions have a great incentive to sustain the cash-flow generated by the drug traffic. This suggests that at least a brief examination of money laundering enforcement is in order.

For two reasons, it is also important to consider the treatment of industries that produce the substances that compete with illicit drugs.²¹⁷ First, this examination exposes inconsistencies in government policy, and second, it demonstrates who has the most to lose if non-patentable,

street cocaine at the time this estimate was given was approximately \$65,000 per kilo. INCIARDI, *supra* note 53, at 73, 78. However, estimates vary so widely that none is reliable. See PAUL EDDY ET AL., *THE COCAINE WARS* 48-49 (1988) (reporting the estimate of a Drug Enforcement Agent in 1979, that \$625 of coca leaves was worth \$560,000 dollars on the street); see also *War on Marijuana Draws Complaints in California*, N.Y. TIMES, Sept. 19, 1994, at B9. By analogy, California growers are not that different from Andean farmers when it comes to protecting their livelihood.

²¹³ See Smith, *supra* note 10, at 26; José Guillermo Justiniano, *The Power of Coca Producers, in DRUG POLICY IN THE AMERICAS*, *supra* note 10, at 101-04. For additional discussion of the political strategy of cartels, see *supra* notes 134-39 and accompanying text.

²¹⁴ See generally RILEY, *supra* note 1.

²¹⁵ For a rather cynical answer to this question see Ostrowski, *supra* note 4, at 639 n.147 (citing comments of Dr. Thomas Szasz published at *Symposium Proceedings: Roundtable Discussion*, 11 NOVA L. REV. 957-58 (1987)).

²¹⁶ See *supra* notes 8, 212-14 and accompanying text.

²¹⁷ These industries include tobacco, alcohol, numerous prescription drugs that are dispensed by physicians and mental health professionals, and dozens more over-the-counter drugs.

illicit mood altering drugs and pain alleviators were ever allowed to compete in the open market.

1. Ineffective Money Laundering Enforcement

As noted, economic interests are the dominant reason for maintaining the status quo in drug policy. By almost any measure, the profits generated by the illicit drug trade are enormous. The annual retail market for drugs in the United States is estimated at \$120 billion and the annual profits are believed to exceed \$25 billion. This is more than the combined net earnings of the nation's eight largest corporations.²¹⁸ Extraordinary wealth such as this is bound to create prosperous and powerful entities with a direct stake in maintaining the status quo.

Without effective money laundering techniques, drug traffickers would be drowning in illicit \$20 bills. Every movement of cash—every transfer, purchase, or investment—would risk discovery and subsequent forfeiture.²¹⁹ Money laundering protects purchases, investments, and cash reserves by severing their connection to drug trafficking. It enables “drug kingpins” to sustain their lavish lifestyles, to invest in other holdings and businesses,²²⁰ to finance their next drug shipment, and to pay off their powerful allies.²²¹

A successful attack on money laundering could diminish the incentive for drug trafficking while curtailing existing traffickers' ability to operate. Despite the possible effectiveness of a drug policy focused on money laundering, the United States government has failed to pursue such activities with any vigor. Money laundering was not even a crime until the mid-1980s.²²² Since then, the laws have focused on interfering with relatively small cash transactions rather than addressing the root of the problem—the ease with which large amounts of cash may move undetected through electronic transfer. Likewise, al-

²¹⁸ Allan Dodds Frank, *See No Evil*, FORBES, Oct. 6, 1986, at 38.

²¹⁹ See 18 U.S.C. § 981 (1988 & Supp. V 1993). In 1989, the U.S. Justice Department for the first time used civil forfeiture laws to order American banks to return money they were holding in overseas branches. Paula Dwyer & Pete Engardio, *Getting Banks to Just Say 'No'*, Bus. W., Apr. 17, 1989, at 16 (discussing how launderers use unsuspecting banks and how banks are strongly cooperating). If the government really wanted to throw a wrench into the street trade, where the lion's share of the drug income is generated, it would eliminate paper currency altogether. This idea of moving almost totally to a credit or debit card payments system would also reduce street thefts and the killing of shopkeepers and taxi drivers for their cash on hand. Drug traffickers would need forklifts to move their proceeds in the form of coins.

²²⁰ See Thoumi, *supra* note 140, at 65–66 (discussing investments of “narco-capitalists”).

²²¹ One report has revealed that New York City street dealers pay as much as 40% of gross sales in bribes to police officers in order to avoid arrest. VALLANCE, *supra* note 15, at 37.

²²² See 18 U.S.C. §§ 1956–1957 (1988 & Supp. V. 1993).

though the late 1980s witnessed several indictments for money laundering, the U.S. Justice Department appears to have dragged its heels during the investigations.²²³ Although it is difficult to prove, there are strong indications that some of the profits of money laundering find their way into the pockets of Washington power brokers.²²⁴

Contrasting the established interests that would be burdened by any serious government interference with money laundering, with the interests affected by the far more expensive, dangerous, and futile 'drug bust' efforts, makes it all too clear why the U.S. government prefers to pursue the latter. Whereas attacks on money laundering would hinder the economic interests of many powerful, established groups, the effects of interdiction fall haphazardly on the criminal functionaries lower down in the elaborate drug enterprise.

Focusing on interdiction and enforcement efforts, as opposed to money laundering, also confines abuses of human rights in the name of the drug war to disenfranchised members of society. Increased interference with money laundering activities might upset bank secrecy laws and invade the privacy of "legitimate" depositors.²²⁵ Likewise, the administrative task of tracking drug money would place an undue burden on banks and might slow the transfer of legitimate money.²²⁶

2. Treatment of Licit Psychoactive Drugs

Comparing U.S. drug policy with respect to illicit drugs with U.S. policy towards three other forms of mass addiction—alcohol, tobacco, and prescription drugs—raises further doubts about the United States

²²³ Acting CIA director Richard Kerr testified before a Senate panel that the CIA circulated several hundred reports to government agencies between 1983 and 1985, including the Justice Department, about the Bank of Credit and Commerce International's (B.C.C.I.) illegal activities, but that the Department never pursued the leads. When B.C.C.I. was finally indicted, the Justice Department limited its inquiry, informing the law-enforcement community that the case was too sensitive to be handled in a routine manner. Congressman Charles Schumer, chairman of the House Judiciary Subcommittee on Crime and Criminal Justice, alleged that the White House was involved in monitoring the B.C.C.I. case and that it was likely someone told the prosecutors to "lay off B.C.C.I." Jonathan Beaty & S.C. Gwynne, *Scandal, Too Many Questions, But Few Answers About a Shameless Attempt to Buy Favor with the White House and the Justice Department's Reluctance to Investigate B.C.C.I.*, TIME, Nov. 11, 1991, at 42.

²²⁴ For example, the 1988 indictment of B.C.C.I. for money laundering activities raised substantial allegations of links between the bank and many prominent U.S. politicians, attorneys, and lobbyists. *Id.*

²²⁵ In recognition that the efforts to stop money laundering were time-consuming and ineffective, the U.S. Treasury Department reduced the amount of information that banks must keep on large cash transactions. Keith Bradsher, *Bank Rules on Reporting Relaxed*, N.Y. TIMES, Oct. 16, 1994, at A33.

²²⁶ It is ironic at best that body-cavity searches and physical seizures of individuals are viewed as necessary sacrifices to the war on drugs, but monitoring the wire transfer of money is considered too intrusive. *See supra* note 98.

government's motivation. In contrast to its strict prohibition stance towards marijuana, cocaine, and heroin, the United States government supports, promotes, and at times even subsidizes legal drugs.²²⁷ It is difficult to understand the radical difference in this approach because there is no corresponding difference in the addictive substances themselves. From the viewpoint of the drug user, the licit and illicit forms of addiction serve similar purposes: they help individuals relax, achieve pleasure, relieve pain or stress, or in many cases cope with what they deem to be insufferable conditions of life. In physiological terms, licit drugs do not offer a more attractive solution; they are often no less addictive than illegal drugs,²²⁸ and often pose a greater risk of physical harm to the drug user. Although the effects of most drugs are limited to the central nervous system, alcohol and cigarettes also cause substantial damage to other organs, such as the heart, liver, and lungs.²²⁹ Cigarette smoking, in particular, is considered the largest single health risk and most preventable cause of premature death in the United States. It is estimated that 15% of all deaths in the United States—approximately 350,000 per year—are related to smoking.²³⁰ Further, although abuse of prescription drugs such as amphetamines and barbiturates does not cause the tissue damage that cigarettes and alcohol cause, the health risks they create are no less severe than those created by illicit drugs. Moreover, psychotropic drugs have a toxic effect on the central nervous system and, like illicit drugs, they also create a significant risk of overdose.²³¹

²²⁷ See *infra* notes 242–45.

²²⁸ See ROBERT E. GOODIN, NO SMOKING 26–27 (1989). According to the U.S. Surgeon General, the pharmacological and behavioral processes that determine tobacco addiction are highly similar to those that determine addiction to drugs such as heroin and cocaine. Likewise, the relapse rate—the percentage of ex-addicts who are back on a drug after a given period—is almost identical for nicotine and heroin. *Id.* For comparisons of these common addictive substances, see Philip J. Hiltz, *Is Nicotine Addictive? It Depends on Whose Criteria You Use*, N.Y. TIMES, Aug. 2, 1994, at C3. One expert noted that the “quit rate” for Vietnam veterans addicted to heroin was 30% per year, whereas the rate for tobacco was 2.5% per year. Philip J. Hiltz, *Philip Morris Blocked '83 Paper Showing Tobacco is Addictive, Panel Finds*, N.Y. TIMES, Apr. 1, 1994, at A21. Further, withdrawal from alcohol and sedatives is frequently more severe and life-threatening than withdrawal from cocaine or heroin. See AWNI ARIF & JOSEPH WESTERMEYER, MANUAL OF DRUG AND ALCOHOL ABUSE 217 (1988).

²²⁹ See ARIF & WESTERMEYER, *supra* note 228, at 137, 224.

²³⁰ ELIZABETH M. WHELAN, A SMOKING GUN: HOW THE TOBACCO INDUSTRY GETS AWAY WITH MURDER 10 (1984). See also GOODIN, *supra* note 228, at 8–9. The harm goes beyond the user. Philip J. Hiltz, *Children of Smoking Mothers Show Carcinogens in Blood*, N.Y. TIMES, Sept. 21, 1994, at B8. According to a recent report, maternal cigarette smoking may pose a greater risk to a fetus than maternal cocaine use. Skolnick, *supra* note 55, at 1636. See also *supra* note 55 for a discussion of cocaine harm to fetuses.

²³¹ See ARIF & WESTERMEYER, *supra* note 228, at 217–22.

Not only do the legal forms of addiction pose a greater risk of harm to the individual, but abuse of these substances also presents a greater threat to the overall health and welfare of American society than does the abuse of illegal drugs. This increased threat is partially due to the prevalence of legal drug abuse throughout all sectors of society.²³² According to the Office of National Drug Control Policy, alcohol is the most widely abused mind-altering substance in the United States.²³³ Significantly, most of the remaining drug abuse involves legitimately produced psychotropic drugs.²³⁴ The extensive abuse of these substances, combined with the grave health risks associated with their use, impose significant costs on society. In fact, the relative cost to society of alcohol abuse is approximately twice the cost associated with all illicit drugs, and the loss of employment due to alcohol abuse is ten times as great.²³⁵ Similarly, tobacco use is believed to cost society three times as much as illegal drug abuse.²³⁶

Despite the addictive and harmful nature of alcohol, tobacco, and prescription drugs, and the substantial costs imposed on society by their abuse, these substances lie beyond the realm of the United States government's war on drugs.²³⁷ By ignoring the problems of "legal drug abuse," the U.S. government permits the manufacture, distribution, and use of alcohol, tobacco, and prescription drugs with only minimal interference. Possibly alcohol and tobacco can be distinguished from marijuana, cocaine, and opium derivatives, but how can the strict regulation of these illicit drugs be distinguished from the tardy and inconsequential regulation of psychotropic prescription drugs? As early as the 1950s, experts recognized that abuse of amphetamines and

²³² In contrast, although cocaine was initially a glamour drug of the rich and then a recreational drug of the middle classes, it has increasingly taken on widespread use among the underclasses of the inner cities, particularly in its more dangerous form of crack. LAMOND TULLIS, HANDBOOK OF RESEARCH ON THE ILLICIT DRUG TRAFFIC: SOCIOECONOMIC AND POLITICAL CONSEQUENCES 6-7 (1991). Tobacco use reflects a similar trend. Michael Specter, *Less-Educated, Poor More Likely to Smoke*, WASH. POST, Jan. 6, 1989, at A3.

²³³ ZIMRING & HAWKINS, *supra* note 15, at 24-25; JOHN PEKKANEN, THE AMERICAN CONNECTION 14 (1973).

²³⁴ A 1970 report by the National Commission on Drug Abuse indicated that one billion gallons of spirits, wine and beer were sold and 214 million prescriptions for psychotropic drugs were issued in a single year. ZIMRING & HAWKINS, *supra* note 15, at 24-25.

²³⁵ *Id.* at 40. "The drug most frequently associated with crime and violence is alcohol." Ostrowski, *supra* note 4, at 658. The same is true with respect to the correlation with accidents. *Id.*

²³⁶ Not only is \$11 billion per year spent on direct medical costs for smoking-related diseases, \$36 billion is lost through reduced productivity, and more than \$300 million worth of property is destroyed each year by fires ignited by cigarettes. WHELAN, *supra* note 230, at 13. These references do not even include recently discovered harms associated with second-hand smoke.

²³⁷ See ZIMRING & HAWKINS, *supra* note 15, at 7.

barbiturates posed a serious danger to society. In fact, because of the prevalence of abuse, these substances were believed by some to create a greater threat than narcotics.²³⁸ Nonetheless, despite substantial prodding by factions concerned with the abuse of prescription drugs, Congress refused to include these substances in the Narcotics Control Act of 1956.²³⁹ Even when in 1966, pro-control forces finally managed to pass a record-keeping law for manufacturers and distributors of psychotropic drugs, the powerful pharmaceutical lobby managed to ensure that the law was weak and ineffective. Likewise, when a federal crime bill was passed two years later, it imposed stiff penalties only on small-time peddlers and possessors. The mass producers of the drugs were given only minimal penalties for shipping drugs to illegal sources.²⁴⁰ It is difficult to avoid the conclusion that the radical difference in treatment accorded manufactured psychotropic drugs and the prohibited substances was that the former were produced largely in the United States, and the latter were natural, largely imported substances.²⁴¹

Perhaps even more disturbing than the United States government's hands-off approach to legal forms of drug addiction, is its active promotion and subsidization of the tobacco industry. To begin with, the United States government helps to ensure an adequate supply of tobacco to support mass addiction to cigarettes by guaranteeing tobacco farmers a minimum price.²⁴² The United States has also actively promoted the increase of cigarette addiction in developing countries, by helping cigarette manufacturers donate tobacco to these countries, and by providing export assistance to the tobacco industry.²⁴³ From the

²³⁸ The Narcotics Subcommittee of the House Ways and Means Committee issued a report on the seriousness of prescription drug abuse in the mid-1950s. This report suggested that the problem was more serious than narcotic traffic because it attacked a broader segment of society. See PEKKANEN, *supra* note 233, at 25–26.

²³⁹ See *id.* at 28. This decision to exclude psychotropic drugs from the Narcotics Act was not based on drug semantics—cocaine was purposefully included in the Narcotics Act of 1914 even though it is not technically a narcotic. See *id.* at 28–31. Because the manufacture and distribution of these substances was legal, and their use so important to the psychiatric profession, Congress decided that the states should take responsibility for controlling their abuse. *Id.* For ten years, the federal government remained committed to this states' rights argument, avoiding even minimal control of the manufacture and distribution of these highly addictive drugs. See *id.* at 56–59.

²⁴⁰ See *id.* at 173.

²⁴¹ See *supra* note 195 regarding “rent seeking” and the power of lobbying firms.

²⁴² In addition to internal subsidies that currently cost federal tax payers \$15 million per year, between 1966 and 1972, the U.S. government spent \$200 million on export subsidies. WHELAN, *supra* note 230, at 148; see also RUTH ROEMER, LEGISLATIVE ACTION TO COMBAT THE WORLD TOBACCO EPIDEMIC 72–73 (2nd ed. 1993) (discussing government subsidies for tobacco products in the United States and other countries).

²⁴³ During the 1960s the U.S. government spent hundreds of thousands of dollars advertising

mid-1950s until 1980, the U.S. Department of Agriculture shipped between \$17 million and \$66 million in tobacco products per year as part of the Food for Peace program.²⁴⁴ More recently, the U.S. Trade Representative has used the threat of sanctions under § 301 of the 1974 U.S. Trade Act to force Asian countries to open their markets to U.S. tobacco products.²⁴⁵

The result of the United States government's promotion of cigarette addiction has been devastating. In Japan, a twenty-year downward trend in the number of smokers was reversed within two years of the aggressive introduction of foreign cigarettes. In China, the average number of cigarettes smoked per person increased by more than 80 per year during the year following the opening of its market. In Korea, smoking is currently increasing by 4.7% per year compared with a previous 1.5% increase.²⁴⁶ During the push for new cigarette markets in the 1980s, cigarette smoking increased by 33% in Africa and by 24% in Latin America.²⁴⁷ Probably the greatest harm caused by increased cigarette consumption has occurred in developing countries, where the cost of cigarette addiction takes food from the mouths of hungry children.²⁴⁸ The cost of this increased consumption goes far beyond malnutrition. It is currently estimated that during the 1990s, one million people per year will die in developing countries from tobacco-related diseases.²⁴⁹

The only way to account for the difference in U.S. policy toward cocaine and other illicit drugs on the one hand, and treatment of

cigarettes in Japan, Thailand and Austria. The government likewise promoted increased cigarette addiction in developed countries by producing and distributing a 23-minute promotional film entitled "The World of Pleasure" for distribution to most of Western Europe and the United Arab Republic. WHELAN, *supra* note 230, at 98.

²⁴⁴ *Id.* at 167; *see also* GOODIN, *supra* note 228, at 119 (discussing the Food for Peace program in which the U.S. government compelled countries to buy tobacco in exchange for economic assistance).

²⁴⁵ ROEMER, *supra* note 242, at 74-76. In 1986, the U.S. government pressured Japan to eliminate a 28% tariff on foreign cigarettes. Later that year, the Trade Representative attacked China's closed cigarette market. The Chinese government, fearing the impact of foreign cigarettes on the health of its people, offered to import any other U.S. product. China's pleas went unheeded—the U.S. Trade Representative insisted that China drop quotas and tariffs and lift advertisement restrictions on foreign cigarettes. Likewise, in 1987, the U.S. convinced Korea to open its market under the threat of trade sanctions to its textile market, and in 1989, the Trade Representative filed an action against Thailand. *See id.*

²⁴⁶ *Id.* at 75-76.

²⁴⁷ GOODIN, *supra* note 228, at 116-17.

²⁴⁸ For example, researchers in Bangladesh estimate that the use of income for smoking rather than food results in halving the prospects for survival of 18,000 children in Bangladesh alone each year. *Id.* at 117.

²⁴⁹ ROEMER, *supra* note 242, at 151.

addictive legal substances on the other, is to note two distinctions: the difference in the economic value to the United States of the two classes of drugs, and the difference in the segments of society that depend on the various drugs. In contrast to cocaine, which is produced solely in Latin America, the production of alcohol, cigarettes, and prescription drugs is largely supported and controlled by resources and industries within the United States. These major industries play a significant role in the American economy, providing substantial revenue and jobs,²⁵⁰ as well as generating billions of tax dollars. The power and influence wielded by the alcohol, tobacco, and pharmaceutical industries and their political constituents are apparent from the United States government's promotion of these products, as well as the forceful opposition afforded any attempt to increase government interference with their manufacture, distribution, or use.²⁵¹ The contrasting treatment of increased narcotics regulation in the early 20th century highlights the role that powerful economic interests have played in creating the division between legal and illegal drug policy. No powerful pharmaceutical lobby fought against governmental regulation of these largely imported illegal substances; on the contrary, the American Medical Association (AMA) forcefully campaigned for their prohibition.²⁵² This desire to control distribution and use of narcotic substances was not motivated by the harmful effects of narcotic consumption. Rather, the AMA's actions were prompted by economic concerns—physicians feared that a rapid increase in the use of patent narcotic medications created undue competition for the medical profession.²⁵³

To sum up, proscribed substances are the drugs of choice, some would say necessity, of the lower economic classes; proscribed substances are the drugs of the middle and upper classes. A drug policy focused on cocaine and other illicit substances thus poses less political risk than does a policy attempting to deal with the nation's legal drug problem; the former policy mainly impacts disenfranchised members of society.²⁵⁴ Not only is such a policy unlikely to receive much opposi-

²⁵⁰ The tobacco industry alone accounts directly for almost 700,000 jobs. Anna Quindlen, *Public and Private; Where There's Smoke*, N.Y. TIMES, Mar. 2, 1994, at A15.

²⁵¹ See *supra* notes 239–41 and accompanying text. Attempts to regulate alcohol and tobacco were hindered by political maneuverings designed to serve the interests of the industries manufacturing and distributing these substances. See *supra* note 195. One scholar points out that federal alcohol prohibition gained a foothold only after the coalition between the distillers (hard liquor) and the brewers (beer) broke down. THORNTON, *supra* note 138, at 55.

²⁵² THORNTON, *supra* note 138, at 59.

²⁵³ *Id.*

²⁵⁴ This group largely consists of the poor and the young, particularly the politically disaffected members of these segments of the population. See *supra* note 232.

tion from the drug users and traffickers directly impacted by it, but this policy is also able to command popular support from those who view illicit drug use as socially deviant. By focusing on illegal addiction, the United States drug policy permits the majority of citizens to persist in their own "legal" forms of addiction, free from government interference, regardless of the harm they inflict on either themselves or society.²⁵⁵

Books are written, speeches given, conferences held, and from time to time influential appeals to reason are made, but if the foregoing assessment of the obstacles to reform of the prohibition policy is accurate, so too is the title to this section of the paper, "Government Will Not Change Prohibition Policy."

IV. PROPOSALS FOR CHANGES IN STRATEGY

Governments are persuaded to change policy in one of two general ways: public discourse or coercion. Typically, major change results from a combination of the two. There has been endless debate and discourse, to no avail. What has been missing thus far in the drug equation are any credible coercive counter-forces. From where and in what forms might those forces develop? If identification of those who stand to gain the most from the prohibition policy explains the forces that sustain it,²⁵⁶ then identifying those who stand to lose may help identify potential forces of resistance and coercion.

There are many losers in the drug wars. However, only three immediately suggest themselves as potentially coalescent and organized, and therefore capable of offering a serious threat of countervailing force.²⁵⁷ The first consists of the administrators of the criminal justice system—from judges, prosecutors, and public defenders, to police forces—concerned with the intolerable strain the drug war has put on the justice system. The second potential opposition force might come from the most affected inner-city populations. The third, and most promising source of resistance, are the drug-producing nations.

In the United States, there have been instances when judges have openly professed their opposition to laws they are duty-bound to en-

²⁵⁵ Moreover, the policy validates the vast majority's choice of escape from life's problems by making the abuse of legal substances appear a health problem, while defining the abuse of illicit drugs as a criminal problem.

²⁵⁶ See *supra* Part III B.

²⁵⁷ Drug users are among the big losers in the drug war and though they offer resistance and might even mount sporadic forays, there is no conceivable way to form a coalition around a group comprising mainly of pariahs.

force, but these instances are rare. The primary example of this phenomenon occurred during the rise of abolition sentiment leading up to the Civil War, when many judges either refused to enforce, or found ways to avoid, the fugitive slave laws.²⁵⁸ Last year, a few federal judges announced their unwillingness to hear drug enforcement cases.²⁵⁹ In the past, public defenders and legal aid lawyers have mounted strike actions and threats, largely based on the claim that the system has placed intolerable burdens on them by compromising their ability to meet the ethical standards of adequate representation.²⁶⁰ Although judges and lawyers have the ability through parallel, if not concerted action, to force the government to review its drug enforcement policies, the chances of this happening on a wide-enough scale to make a difference are minimal.

The second source of conceivable opposition derives from inner-city populations who have suffered the brunt of the baleful effects of the drug war. Inasmuch as this group is predominantly made up of minorities, the inherent solidarity of this group presents a credible potential for coercive force. Moreover, there have been times in the recent past when minority populations have mounted effective movements, both in the form of riots,²⁶¹ and, more appealingly, in the form of marches, demonstrations, or other concerted acts of civil disobedience.²⁶² Similarly, in parts of Latin America, when pushed too hard by government prohibition efforts, peasant collective movements have demonstrated their power to at least defend their own interests.²⁶³

²⁵⁸In *Prigg v. Pennsylvania*, 41 U.S. 536 (1842), Justice Story, writing for the majority, held that the Fugitive Slave Act of 1793 was self-enforcing and needed no aid from legislation, state or national. Justice Story's son had characterized his father's opinion as a not too subtle sabotage of the enforceability of the Act. ROBERT M. COVER, *JUSTICE ACCUSED* 241 (1975).

²⁵⁹Jack Weinstein, *A Jurist Who's Willing to Lead*, NAT'L L.J., Dec. 27, 1993 at S3 (describing Weinstein's refusal to hear drug cases because of sentencing guidelines); *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES, Sept. 30, 1990, at A22 (detailing Judge J. Lawrence Irving's decision not to hear drug cases because of harsh sentencing guidelines).

²⁶⁰A public defenders' strike has been advocated, based on their inability to effectively represent their clients. Andy Court & Kevin Bell, *Public Defenders: To The Barricades*, AM. LAW., May, 1992, at 99. See also ANDREW KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 587-88 (3d ed. 1989) (discussing whether strikes by lawyers in the Legal Aid Society of New York, in 1974, violated the Code of Professional Responsibility).

²⁶¹See *supra* notes 7 and 60; see generally James H. Johnson & Walter C. Farrell, *The Fire This Time: The Genesis of the Los Angeles Rebellion of 1992*, 71 N.C. L. REV. 1403 (1993).

²⁶²It is hard to imagine marches in favor of drug decriminalization. However, it is less difficult to foresee the formation of a coalition of families and friends of those who have been incarcerated, injured or killed in the course of the war on drugs, seeking a way to confront the government's policy. The open sale of marijuana, as a starting place, would soon present the government with the dilemma of how to prevent the overwhelming of the criminal justice system.

²⁶³See *supra* notes 212-13 and accompanying text.

There are many reasons to believe that this particular counterforce will never develop.²⁶⁴ First, and possibly most importantly, the affected minority community is internally divided over drug policy. Many leaders in the African-American community perceive drugs as a scourge, particularly devastating to their people and community.²⁶⁵ They consider the anti-prohibitionist movement anathema.²⁶⁶ Second, it is difficult to see how a movement emerging from the anguish of the inner-city communities, and possibly fueled by the pent-up rage of blacks, could find support and allies in the larger population of the sort that the civil rights movement generated through its moral claims. Third, and this is admittedly based on hardly more than a feeling for the temper of the times, there is a mean and sour mood running through the United States at this moment²⁶⁷ that might support a very repressive reaction to any concerted efforts by minorities to force a change in drug policy.

Finally, let us turn to the most promising source of countervailing force—developments in the producing countries, especially Colombia. For years, a cornerstone of the United States foreign policy toward the drug-producing nations of South America has been insistence upon steadfast commitment to the drug war. When interdiction and source-suppression methods were ratcheted-up during the Reagan-Bush Administrations, the consequences for Peru, Bolivia, and most of all, Colombia, were terrible.²⁶⁸ The United States conditioned economic assistance and favorable trade treatment on compliance with what amounted to an anti-drug crusade. Initially, this foreign policy comported with the interests of the ruling classes and the military of the producing nations, even as it alienated many segments of the population, especially those who depend on the cocaine trade,²⁶⁹ as well as

²⁶⁴ As Dr. Szasz rightly noted, the author does not intend to speak for anyone, either groups with which the author is classified, or most assuredly groups to which the author does not belong. See SZASZ, *supra* note 15, at 111.

²⁶⁵ See *id.* at 117. But see Letwin, *supra* note 45, at 828 n.169.

²⁶⁶ See, e.g., Charles B. Rangel, *Legalize Drugs? Not on Your Life*, N.Y. TIMES, May 17, 1988, at A25. For a discussion of the view held by Rep. Rangel, see David Tuller, *Surgeon General's Remarks Debate Changing in War on Drugs*, S.F. CHRON., Dec. 11, 1993, at A1; see also Paul Ruffins, *To Fight Crime, Some Blacks Attack Gun Control*, L.A. TIMES, Jan. 19, 1992, at M2 (discussing the recent spread of libertarian arguments about drugs and gun control); Letwin, *supra* note 45, at 828 n.169 (citing poll that showed support for legalization to be lower among African Americans and Latinos than among whites).

²⁶⁷ Perhaps the clearest evidence of this is Proposition 187, approved by the California voters in 1994. This proposition denies most public services, including public education and health care, other than emergency care, to all illegal aliens and their children. B. Drummond Ayres, Jr., *Californians Pass Measure on Aliens; Courts Bar It*, N.Y. TIMES, Nov. 10, 1994, at B7.

²⁶⁸ See *supra* notes 133, 146-47.

²⁶⁹ See *supra* note 138. The growing of coca leaves is estimated to involve 300,000 people in

many intellectuals.²⁷⁰ In the process, however, the Andean states were pushed to near anarchy as the drug cartels, revolutionary political movements, and the governments engaged in a running war.²⁷¹ Eventually, the instability generated by the "internal wars" led the political leadership throughout the region to distance itself from the excessive demands of the United States' policy.²⁷²

Possibly reacting to the signs of political disaffection in Colombia and Peru, the Bush Administration in 1990 embarked on a new initiative to promote hemispheric cooperation on drug matters. President Bush sought to dramatize this approach by attending the "summit" in Cartagena, Colombia. The Cartagena statement of principles promised a shift toward multi-lateral solutions.²⁷³ For the first time, the United States admitted that reduction of demand was as important as suppression of supply. The agreement called for areas of cooperation, including crop substitution, economic aid, licensing of chemicals used in cocaine processing, and controls on arms shipments and small aircraft sales.²⁷⁴ Within months, however, the spirit of collaboration began to dissipate. After the United States Navy seized Colombian ships without prior notice, the newly-elected President, Gaviria Trujillo, stated that his government's highest priority in the drug war was not international

PERU. 1993 WALDEN COUNTRY REPORTS: PERU, available in LEXIS, Nexis Library, World File. It is estimated that the cocaine trade employs over 200,000 people in Colombia, making the industry one of the largest employers in the country. RILEY, *supra* note 1, at 15. Cartel members cultivate public support by financing public works, housing projects, and national sports teams, and by protecting the population from guerrilla attacks. *Id.* at 28.

²⁷⁰ "Even before the Colombian [Supreme Court] decision, two thousand Latin American intellectuals signed a manifesto in which novelist Gabriel Garcia Marquez wrote, 'The drug polemic must not continue to be caught between war and permissiveness. . . .'" C. Torres, *Legalize It?*, NATION, June 20, 1994, at 857. See also Tracy Wilkinson, *Image vs. Reality in Colombia: A Soccer Star's Slaying is the Latest Blow to a Drug-Besieged Nation Struggling to Redefine Itself, The Identity Conflict Creates a Schizophrenic Society and Fuels Tensions with U.S. Over How to Fight Narcotics War*, L.A. TIMES, July 8, 1994, at A1 (noting that a "growing movement among intellectuals such as Nobel laureate Gabriel Garcia Marquez" favors legalization).

²⁷¹ See generally RILEY, *supra* note 1, *passim*.

²⁷² During the last decade, the Latin American political leadership has vacillated between tough enforcement measures (marked by support of extradition of "traficantes" to the United States, cooperation with United States' interdiction efforts and anti-terrorist campaigns), and attempts to negotiate with the drug cartels. See *id.* at 30-41 (concerning government policies with respect to political violence, drug industry murders, and death squad murders as correlated to counternarcotics policy).

²⁷³ There have been many calls for this approach in the past and there is little question that multilateral cooperation and regional or international collaboration would be a marked improvement over the hegemonic stability theory pursued for so long by the United States. See Lisa L. Martin, *Foundations for International Cooperation*, in DRUG POLICY IN THE AMERICAS, *supra* note 10, at 252-53; see also M. Cherif Bassiouni, *Critical Reflections on International and National Control of Drugs*, 18 DENV. J. INT'L L. & POL'Y 311 (1990).

²⁷⁴ See Gugliotta, *supra* note 122, at 120, 128; Bagley, *supra* note 122, at 138-39.

smuggling, but ending narco-terrorism. Accordingly, he announced that the government would not extradite traffickers if they renounced terrorism and submitted to criminal prosecution in Colombia.²⁷⁵ This refreshing sign of independence may foreshadow new initiatives.

In the last few years there have been growing signs that the governments of the Andean region are considering a more independent drug policy. A recent Colombian Supreme Court opinion decriminalizing the personal use of small amounts of drugs is one straw in the wind.²⁷⁶ The fact that the former Prosecutor of Colombia, Gustavo de Greiff, openly advocated legalizing drugs is further indication that a break with the anti-drug policy could be in the offing.²⁷⁷ President Fujimori of Peru has not called for legalization, but he bluntly declared the Peruvian-United States drug policy "a failure."²⁷⁸

Naturally, disassociation from the United States-driven drug policies by the Andean governments will not be easy. In purely economic terms the region is in conflict. On the one hand, the drug trade contributes substantially to the region's gross national product, both directly in terms of exports and indirectly in terms of employment and re-investment of drug profits.²⁷⁹ On the other hand, the United States, the most influential foreign power in Latin America in both political and economic terms,²⁸⁰ continues to threaten cut-offs of economic

²⁷⁵ Bagley, *supra* note 122, at 139.

²⁷⁶ See *supra* note 192. Subsequently, the government issued a decree limiting personal "use in public places, and forbidding consumption by minors, pregnant women and government employees." *Colombia Tries to Renew Ban on Drug Usage*, N.Y. TIMES, Nov. 2, 1994, at A6. The government recently stated that it would submit legislation to modify the Constitution and forbid drug consumption again. *Id.*

²⁷⁷ See Don Podesta & Douglas Farah, *A Captain in the Drug War Wants to Call It Off*, N.Y. TIMES, July 8, 1994, at A4. The prosecutor noted that "[l]egalization is the worst thing that could happen to drug traffickers." *Id.* The fact that remnants of the Medellin drug cartel had threatened to kill him and President-elect Ernesto Samper "in such a way that will make everyone's jaw drop," only tends to affirm his point. *Id.*

²⁷⁸ Don Podesta & Douglas Farah, *Drug Policy in Andes Called Failure; Years of Efforts Funded by U.S. Show Few Results, If Any*, WASH. POST, Mar. 27, 1993, at A1; see also *supra* notes 145-46. But see James Brooke, *Peru Combats Drug Traffic, Winning U.S. Team's Praise*, N.Y. TIMES, Jan. 23, 1995, at A2.

²⁷⁹ The leaders of Colombia contend "that no more than \$2 billion in drug money is repatriated to Colombia annually; the [Drug Enforcement Agency] puts the figure at \$7 billion. That compares with Colombia's total [GNP] last year of \$34.2 billion." Michael S. Serrill, *Is It the Last Battle? Under U.S. Pressure, President-elect Samper Gives a New Impetus to the Antidrug War*, TIME INT'L, Aug. 8, 1994, at 15.

²⁸⁰ For example, with respect to natural commodities—petroleum, coffee, coal and fruit—the principal trading partners of Colombia are: the United States, 44%; European Community, 21%; and Japan, 5%. With respect to manufactured commodities the breakdown is: the United States, 36%; European Community, 16%; Brazil, 4%; Japan, 3%. 1993 U.S. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 86 [hereinafter WORLD FACTBOOK] (figures given are from 1991).

assistance should the governments of the region stray from strict drug enforcement policies.²⁸¹ It is impossible, in view of these conflicting pressures, to ascertain whether Colombia will indeed set out upon an independent drug-policy course, or will simply revert to a more pragmatic approach. That approach, viewed objectively, entails periodic enforcement sufficient to satisfy the United States, but not strong or consistent enough to substantially interfere with the drug trade. This middle course may have made sense in the past, on the ground that it assured both continuous assistance and drug trade profits. However, the costs of this approach, even in economic terms, may have passed the point of diminishing returns.²⁸²

Nevertheless, assuming that Colombia, and other states that might join it, decided to break with the anti-drug policy, what might that entail? Radically, the producing states might exercise their sovereign rights to formally withdraw from existing international agreements,²⁸³

²⁸¹ In a statement before the House Foreign Affairs Committee on June 22, 1994, Robert Gelbard, Assistant Secretary of State for International Narcotics Matters, discussed U.S. tactics to combat international narcotics trafficking. 5 U.S. DEP'T OF STATE DISPATCH 440, 440-41, (June 27, 1994). He outlined President Clinton's "counter-narcotics directive" which instructs the Department of State to apply stringent standards in the congressionally mandated certification process—a process that can result in the denial of assistance to countries that do not cooperate fully with the United States in counter-narcotics or take adequate steps on their own. *Id.* After complimenting Colombia for its successful actions against the Medellin cartel, Mr. Gelbard also added that "[w]e have sent a strong message to Colombia's President-elect, Ernesto Samper, that the crackdown on the Cali cartel must not falter if Colombia wants to sustain close relations with the United States." *Id.* at 441. Of course, it cannot be discounted that this may only be rhetoric from the United States government. At another point in the statement Mr. Gelbard noted that "Bolivia and Peru had not met the requirements for 'full' certification primarily because their efforts to attack coca cultivation were insufficient, but they were granted vital national interest certifications." *Id.* at 443.

²⁸² The costs to Colombia attributable to drug enforcement were estimated in 1990 to exceed \$1 billion. James Brooke, *High Cost of Fighting Drugs Strains U.S., Colombian Ties*, N.Y. TIMES, June 4, 1990, at D1. This only reflects budgeting costs. The costs in lives lost, corruption, and the undermining of the institutions of society are incalculable. However measured, these costs are far greater than the combined economic U.S. aid which is \$115.7 billion for fiscal years 1980–1989. WORLD FACTBOOK, *supra* note 280, at 405. Even if the United States contributes approximately 40% of Colombia's balance of trade surplus of \$2 billion—a 1992 estimate—Colombia would still come out in the red. See WORLD FACTBOOK, *supra* note 280, at 6–7 (extrapolations based on reported figures). There is a strong argument that in economic terms, the resort to drug cultivation in developing countries has an overall negative impact. See Bassiouni, *supra* note 273, at 326 (quoting extensively from DRUG TRAFFICKING AND THE WORLD ECONOMY, U.N. DEP'T OF PUB. INFO., U.N. Doc. DPI/1040B-40076 (Jan. 1990)).

²⁸³ For example, the nations could denounce the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances under Article 30. U.N. Doc. E/Conf.82/15 reprinted in 28 I.L.M. 497, 524–25 (1989). In addition, Mexico could terminate the Mexico-United States Agreement on Cooperation in Combatting Narcotics Trafficking and Drug Dependency under Article VI. 29 I.L.M. 58, 61 (1990). For a comprehensive coverage of the

declaring the trade and export of cocaine legal.²⁸⁴ Following such a declaration,²⁸⁵ participating states would do whatever they could to normalize and facilitate their local cocaine industries.²⁸⁶

The United States almost certainly would oppose such a step with the full force of its international power and influence.²⁸⁷ Therefore, it is conceded that this may not be a realistic proposal.²⁸⁸ However, an equally radical proposal would present the United States with a dilemma. This second proposal builds on the idea that the drug cartel

international legal regime for controlling drugs since 1912, see Bassiouni, *supra* note 273, at 312 & nn.3-4.

²⁸⁴ The cultivation of "illicit drugs" is considered legitimate under existing international conventions if carried on under the control of the government. Bassiouni, *supra* note 273, at 315 & n.12.

Before a moral consensus developed regarding the slave trade, a trade that is clearly distinguishable from the drug trade in that it involved unwilling participants, international law was interpreted to allow each country to determine its own course regarding the far more pernicious slave trade. *See* *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825) (Marshall, C.J. opinion).

²⁸⁵ To give any credence to such a bold move, the states of the region would have to act immediately, or better still, in advance, to redirect their trade orientation toward the other major international trading blocs, Western Europe and Japan. Generally, the European countries have gone along internationally with the U.S. prohibition stance; however, most of these nations have pursued a more flexible regulatory approach, internally, to drug use. *See* VALLANCE, *supra* note 15, at 21-25. The Japanese have consistently taken amoral positions with respect to international trade matters, almost single-mindedly pursuing a pragmatic course.

²⁸⁶ Contrary to conventional thinking, the profits generated by a legitimate cocaine trade would remain intact, as many of the costs of running an illicit business would be eliminated. *See* Bassiouni, *supra* note 273, at 325-28. Also, since the growing conditions for coca plants are virtually unique to the Andes, the Andean nations would retain a natural monopoly position.

²⁸⁷ The Clinton Administration, whatever its own views on prohibition, would be politically savaged if it did not resolutely and strongly oppose such a development. Should President Clinton be re-elected, he could respond more flexibly in a second term, but ironically a Republican administration would be better positioned to reform U.S. drug policies, just as it was better positioned to change the China policy it had supported so vociferously before the change. The Clinton Administration has already demonstrated its limited maneuverability on drug policy reform. The Attorney General of Colombia, Gustavo De Greiff, declined an invitation to an anti-Prohibition conference sponsored by the Civil Liberties Union of Massachusetts on May 21, 1994 at Harvard Law School, citing "threats by the U.S. Department of Justice and Senator John Kerry" which convinced him that he could cause serious problems for Colombia by attending. *CLUM Conference Puts Drug Prohibition Debate on National Agenda*, 24 *THE DOCKET* 3 (Aug. 1994). In retaliation for De Greiff's policy of negotiating with drug traffickers, Washington suspended its practice of sharing evidence with Colombian judicial officials, jeopardizing some fifty drug-trafficking cases. *See* Wilkinson, *supra* note 270, at A1. De Greiff recently reached the mandatory retirement age of 65, and the Colombian Supreme Court refused to grant a waiver. *See* David Van Bienna, *Sweet, Sweet, Surrender*, *TIME*, Nov. 7, 1994, at 46, 48.

²⁸⁸ Nevertheless, there are signs that Colombia has reached its limits of tolerance for the existing conditions. "The concern for image, combined with a volatile sense of nationalism, has created a deep ambivalence about the drug war among many Colombians, who say they would like to clean up their government . . . but who resist and resent pressure from Washington to fight the traffickers more forcefully. Increasingly, Colombians speak of legalizing drugs. . . ." Wilkinson, *supra* note 270, at A1.

leaders may be ready to consider cooperating in order to begin to legitimize their activity.²⁸⁹ Just as OPEC used the mechanism of a worldwide oil embargo to instigate a restructuring of the international petroleum markets, the leaders of the drug cartels might be induced to curtail all cocaine shipments with the purpose of restructuring their enterprise. A cut-off would have dramatic impact on consumers. A possible consequence that cocaine operators might not be willing to risk is that hard-core users would switch to other substances.²⁹⁰ If the shift is toward opium derivatives, especially heroin, or to synthetics, the short term interests of the cocaine operators would be hurt.²⁹¹ In the longer term, however, as the more devastating effects of heroin use are felt, the United States might be moved to adopt a "relative evil" approach, and decriminalize marijuana use, or even seek a regulated form of cocaine use.²⁹²

V. CONCLUSION

The foregoing proposals are not made in the naive belief that they will be viewed as currently realistic or feasible. Instead, the proposals are mooted in order to suggest that the manifestation of an independent mindset among leaders of the Andean states may hasten the day when even the "giant of the North" will have to face the truth about the futility of its drug policy. Once the initiative is seized by such leaders, the United States Departments of State and Commerce could

²⁸⁹ The idea of negotiating with drug traffickers strikes some as morally reprehensible, but recent developments in Colombia, where cartel leaders attempted to negotiate a "retirement," suggest that this idea is not unthinkable there. Gugliotta, *supra* note 122, at 126-28; *see also* Van Bienna, *supra* note 287, at 46-48. It would be difficult, if not impossible, however, to sell the idea that the people that we formerly demonized now might receive a "buy-out" underwritten by the U.S. taxpayer. Nevertheless, the majority of Americans did not balk at that idea in connection with the removal of the junta in Haiti in October, 1994.

²⁹⁰ Substitutability is a complex and speculative "science." *See* Peter Reuter, *After the Borders are Sealed: Can Domestic Sources Substitute for Imported Drugs*, in *DRUG POLICY IN THE AMERICAS*, *supra* note 10, at 163-77. A total cut-off, which is what the United States government professes it wants, might actually create such havoc in the cities of the United States that it would force the government to reconsider its attitude toward drug use. Like it or not, the truth is that some of the advances in the area of civil rights laws followed serious outbreaks of rioting in the cities of this country. One of the most immediate consequences of a cocaine cut-off possibly would be widespread rioting in the inner cities.

²⁹¹ In the long run, a move toward regulated use would benefit the cocaine operators, because presently their overhead costs cut deeply into their profits. At present, "most of the profits stay in the hands of distributors, or middlemen, rather than the producers. . . . [Also,] most profits accrue outside of Latin America . . . which suggests that a large share of drug money probably remains in the United States." Smith, *supra* note 10, at 11.

²⁹² *See* VALLANCE, *supra* note 15, at 88. As to the relative harmfulness of heroin, *see generally* KAPLAN, *supra* note 23.

face some hard questions. For example, in an international forum convened to respond to the threatened repudiation of the existing convention on illicit drugs, the United States might well be confronted with the numerous instances when, in its own interest, it cynically supported the very drug trafficking it so loudly condemned.²⁹³ Or, beyond mere embarrassment, it might be forced to distinguish and defend its major drug export—tobacco.²⁹⁴ It is conceivable that, faced with the possibility of seeing tobacco and alcohol placed on the list of proscribed substances, the United States would begin to take the incremental steps²⁹⁵ that would lead itself, and the nations of the world, toward a more humane and sane drug policy.

²⁹³ The involvement of the Central Intelligence Agency (CIA) in illicit drug transactions with former President Noriega of Panama is the most notorious instance of such conduct. See Stephen Engelberg & Jeff Gerth, *The Noriega Case: Intelligence Operations; U.S. Worry: What Damage Can Noriega Do?*, N.Y. TIMES, Jan. 6, 1990, at A1; see also *Noriega's Lawyers Say He Got Rich by Spying*, N.Y. TIMES, Oct. 27, 1994, at A22. But there have been many other such instances of U.S. involvement in—and support of—drug trafficking. For example, there was the Drug Enforcement Agency's (DEA) alleged involvement with transference of funds through drug operators in connection with the so-called Iran-Contra affair. See DYCUS, BERNEY ET AL, *supra* note 106, at 339. For more recent examples, see Tim Weiner, *Suit by Drug Agent Says U.S. Subverted His Burmese Efforts*, N.Y. TIMES, Oct. 27, 1994, at A9 (claims by a DEA special agent that the State Department and the CIA subverted his anti-drug efforts in Myanmar, formerly Burma); John Kifner, *Mission to Haiti: History; Haitians Ask of U.S. Links To Attachés*, N.Y. TIMES, Oct. 6, 1994, at A8 (reports that the CIA poured money into the army hierarchy in Haiti, before the junta was ousted, despite the fact that high-ranking officers went into the drug business themselves).

One of the most egregious cases concerned the revelation that the CIA withheld intelligence regarding the murder in Mexico of a DEA agent, supposedly because it feared compromising CIA sources connected with traffickers who provided intelligence on Communist insurgencies in Central America and logistical support for U.S. covert aid to the Contras in Nicaragua. Bagley, *supra* note 122, at 134. Purportedly, it was Colonel Oliver North's decision to leak DEA photographs to the press, "revealing Sandinista complicity in cocaine trafficking", that exposed the DEA's surveillance operations in Nicaragua. *Id.* This conduct should be compared to the treatment to which the United States subjected a Mexican citizen whom it suspected was involved in the events surrounding another DEA agent's death. In that case, the United States participated in the abduction of the Mexican citizen. The Supreme Court of the United States upheld this "extralegal arrest" in the face of an extradition treaty between the United States and Mexico, and despite claims that the abduction violated international principles and analogous principles of U.S. constitutional law. *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992).

The Clinton Administration has pursued a policy of accommodation with Syria in spite of findings by Congress and the DEA that Syria is heavily involved in drug trafficking. Yedidya Atlas, *Syria Gets a Free Pass*, INSIGHT, Aug. 30, 1993, at 6.

²⁹⁴ See *supra* notes 227-49 and accompanying text.

²⁹⁵ See Jefferson Fish, *Discontinuous Change and the War on Drugs*, 54 HUMANIST 14 (Sept. 1994), for an intriguing discussion concerning the discontinuous change model for the way in which qualitative drug-policy reform will arise. The thesis is that discontinuous change is like the turning of a kaleidoscope: some event may precipitate a sudden re-ordering. It is possible that a shift in the response by the producing states, as proposed, could unexpectedly set off processes of major change. The author draws the analogy to the "sudden" collapse of the Soviet Union and the end of the "cold war." More aptly, perhaps, the analogy suggested here is the end of the state of war between sworn enemies, Israel and the Palestine Liberation Organization.