

GLOBALIZATION OF THE U.S. BLACK MARKET: PROHIBITION, THE WAR ON DRUGS, AND THE CASE OF MEXICO

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Prohibition of alcohol from 1919 to 1933 is a paradigmatic case of sumptuary legislation gone awry. Instead of removing alcohol from the market, Prohibition increased alcohol's potency and decreased its quality, resulting in a spike in drunkenness and accidental deaths while black market corruption and violence abounded. The same criticisms are often leveled at the War on Drugs. However, this Note explores the most important difference between the two, namely, that in spite of their symmetrical failures, Prohibition was met with a decisive backlash and repeal while the War on Drugs retains popular support despite having created incomparably greater violence. This is dramatically illustrated by the war in Mexico, which is currently the most violent conflict in the world. The causes and implications of this divergence in public choice are explored below.

INTRODUCTION: A TALE OF TWO MASS MURDERS

On Valentine's Day, 1929, seven members and hangers-on of the Bugs Moran gang arrived at a garage in the Lincoln Park neighborhood of Chicago, supposedly to receive a shipment of hijacked whiskey at a discount.¹ It was a set-up. Members of the rival Capone gang, some dressed as police officers, led the seven underground, lined them up against a brick wall, and machine-gunned them to death.² The uniformed killers led the plain-clothed killers outside at gunpoint to mislead bystanders into believing the shooting was under official control.³

The hit had targeted Bugs Moran, Al Capone's chief rival for control of the illegal alcohol market, but Moran was either late or saw the "police" car in time and eluded assassination.⁴ However, Moran's evasion was not the primary failure of the attempted hit. The murders were at that time the most heinous offenses associated with the high-profile world of larger-than-life bootleggers and the crime syndicates they controlled, and the media backlash was severe. The murders

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¹ Mark H. Haller, *Bootlegging: The Business and Politics of Violence*, in 1 VIOLENCE IN AMERICA: THE HISTORY OF CRIME 153–54 (Ted Robert Gurr ed., 1989).

² *Id.*

³ *Id.*

⁴ *Id.*

were, in Capone's words, "lousy public relations."⁵ "MURDER COPS HUNTED IN MASSACRE" shouted the headline of the *Daily Mirror*, which devoted its entire front page to the story, including a large, gruesome photo of the crime scene and mug shots of each victim.⁶ "The viciousness of the killing and the powerlessness of police were both part of the abiding image of Prohibition."⁷ Public opinion had reached an inflection point, and it was not long before Prohibition was abandoned.⁸

On September 2, 2009, hitmen working for the Sinaloa Cartel, a powerful Mexican drug-trafficking organization, broke into an addiction rehabilitation center in a northern sector of Juárez, Mexico, within view of the U.S. border, pushed eighteen people up against a wall, and machine-gunned them to death.⁹ The mass-murder was not directed at a rival cartel, but at a few recovering addicts regarded by the Sinaloa Cartel as potential informants.¹⁰

Juárez and El Paso, Texas, are essentially one city split by the Rio Grande, an international border; the metropolis is home to more than two million people, making it the world's most populous binational area.¹¹ Despite the depravity of the killings and the fact that Juárez is geographically contiguous with the United States, CNN declined to cover the event in lieu of such topics as President Obama's speech to schoolchildren, a football coach charged with homicide, Michael Jackson's funeral, the weather phenomenon El Niño, environmental terrorism, the sale of human body parts, Twitter, and the kidnapping of Jaycee Dugard.¹²

⁵ ANDREW SINCLAIR, *PROHIBITION* 229 (1962).

⁶ A photo of the newspaper headline can still be seen at Bloody Chicago, True Tales of Chicago Murder and Mayhem, <http://www.bloodychicago.com/valentine.html> (last visited June 9, 2010).

⁷ Haller, *supra* note 1, at 154.

⁸ For a general history of the repeal of Prohibition, see SINCLAIR, *supra* note 5, at 369–92.

⁹ Ken Ellingwood, *Mexico Under Siege*, L.A. TIMES, Sept. 4, 2009, at A.24, available at <http://www.latimes.com/news/nationworld/world/la-fg-mexico-rehab-attack4-2009sep04,0,5425770.story>.

¹⁰ *Arrests over Mexico Clinic Deaths*, BBC (Sept. 25, 2009), <http://news.bbc.co.uk/2/hi/americas/8276017.stm>.

¹¹ Tim Padgett & Cathy Booth Thomas, *Two Countries, One City*, TIME, June 11, 2001, at 64, available at <http://www.time.com/time/magazine/article/0,9171,1000104,00.html>.

¹² See generally *CNN Transcripts for September 2, 2009*, CNN, <http://transcripts.cnn.com/TRANSCRIPTS/2009.09.02.html> (last visited Aug. 17, 2010) (listing topics of CNN news coverage for September 2, 2009).

The editorial decision was partly understandable, as the killings were nothing new¹³: From January 2008 to the date of the killings described above, more than 1800 people had been murdered in Juárez, the most violent place in the world.¹⁴ It is in no sense metaphorical to describe the city as a war zone, as rival cartels have for years been engaged in open battle with one another, the federal army, the local police (ambiguously allied), and American agents, in a multifaceted, overlapping, and perpetually mutating conflict.¹⁵

It is more likely that the lack of attention to the bloodshed in Juárez was due to the understandable human tendency to care less about what happens to people in other countries. But the war in Mexico does not properly belong to Mexico. It is caused by exactly the same phenomenon that caused the Saint Valentine's Day Massacre: competition between outlaw organizations that supply the American black market for recreational drugs.¹⁶

The United States consumes more drugs and alcohol than any other country in the world.¹⁷ The U.S. legal strategy for reducing recreational drug consumption has long emphasized outright criminalization of possession and police interdiction of supply. "Prohibition," the ban on the drug alcohol from 1919 to 1933, is a dramatic example of such a policy.¹⁸ The "War on Drugs,"¹⁹ the current campaign against a

¹³ Another massacre, also at a Juárez rehabilitation clinic, took place just a few weeks later. *Mexico: 10 Killed at Juarez Drug Clinic*, N.Y. TIMES, Sept. 17, 2009, at A15, available at <http://www.nytimes.com/2009/09/17/world/americas/17briefs-Juarez.html>.

¹⁴ Ed Vulliamy, *Life and Brutal Death in the World Murder Capital*, OBSERVER (U.K.), Oct. 4, 2009, at 36, available at <http://www.guardian.co.uk/world/2009/oct/04/mexico-drugs-death-squads-juarez>; *Juarez, Mexico, Killings Reach New High*, CNN INT'L (Sept. 16, 2009), <http://edition.cnn.com/2009/WORLD/americas/09/15/mexico.juarez.killings/>.

¹⁵ For an introductory history of the DEA's involvement in Mexico, see María Celia Toro, *The Internationalization of Police: The DEA in Mexico*, 86 J. AM. HISTORY 623 (1999).

¹⁶ Mexico is the top supplier of drugs to the United States, and Mexican cartels are by far the most prominent organized drug trafficking presence in the United States. COLLEEN W. COOK, CONG. RES. SERV., MEXICO'S DRUG CARTELS 4 (2007); NAT'L DRUG INTELLIGENCE CTR., U.S. DEP'T. OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT 2009 iii (2008) [hereinafter NAT'L DRUG THREAT ASSESSMENT 2009]. Mexican cartels also produce drugs within the United States, especially on federal lands in California. COOK, *supra*, at 5. Mexico is not a major drug consumer, and Mexicans use drugs at about one-sixth the rate of Americans, although due to the increasing prevalence of drugs moving through Mexico, rates of addiction there are rising, especially in places like Juárez. U.N. OFFICE ON DRUGS & CRIME [UNODC], WORLD DRUG REPORT 2009, at 235–64, U.N. Sales No. E.09.XI.12 (2009) [hereinafter U.N. WORLD DRUG REPORT 2009] (providing statistics on overall consumption in Mexico), available at <http://www.unodc.org/unodc/en/data-and-analysis/WDR-2009.html>; Sylvia Longmire, *Mexico's Rising Drug Use and Addiction—Who Is To Blame?*, MEXIDATA.INFO (Oct. 12, 2009), <http://mexidata.info/id2430.html>.

¹⁷ U.N. WORLD DRUG REPORT 2009, *supra* note 16, at 235–64 (providing statistics on prevalence of U.S. consumption of certain classes of drugs).

¹⁸ U.S. CONST. amend. XVIII, repealed by U.S. CONST. amend. XXI.

number of drugs, but especially cocaine, heroin, marijuana, and methamphetamine,²⁰ is another. The similarities between the two are many, and the subject of much literature.²¹ Most notably, both failed or are failing to eliminate consumption of the targeted drug(s) while generating secondary costs that outweigh the problems caused by the drugs themselves, and both failed or are failing for the same reason: the futility of trying to eliminate, by fiat, flourishing markets for highly demanded goods.²²

This much has been well argued by many authors,²³ but this Note explores the most salient *difference* between the two regimes, namely that Prohibition was met with a decisive backlash and repeal,²⁴ while the War on Drugs manages to retain popular support,²⁵ even though it has created violence on a scale beyond anything seen during Prohibition.²⁶ This Note argues that the divergence in public choice is

¹⁹ The term “war on drugs” was first used by Richard Nixon in 1969 and later popularized by Ronald Reagan and his vice president. STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA’S LONGEST WAR* xvi (1993). The phrase is often derided as hyperbolic, and some officials are at pains to distance rhetoric from the martial paradigm. See, e.g., Gary Fields, *White House Czar Calls for End to ‘War on Drugs,’* WALL ST. J., May 14, 2009, at A3, available at <http://online.wsj.com/article/SB124225891527617397.html> (describing new White House Office of National Drug Control Policy head’s desire to “banish the idea” of “war on drugs” to underscore shift from criminal justice focus toward focus on public health, including treatment). But because current antidrug policies have indeed caused a real, not metaphorical, war, with many thousands of violent deaths in actual combat, this Note wholeheartedly adopts the term to refer to the ongoing use of state violence to stop the supply of drugs.

²⁰ See 21 U.S.C. § 812(b)(1)(A)–(C), (c) sched. I (2006) (defining Schedule I drugs, which include cocaine, heroin, and marijuana).

²¹ The 1990s saw the best legal writing on the War on Drugs, see, e.g., *infra* note 23, but the issue slipped from prominence after September 11, 2001. Despite this inattention, little has changed since the 1990s: Escalation of the war has been virtually continuous for nearly three decades. Bruce L. Benson, *Escalating the War on Drugs: Causes and Unintended Consequences*, 20 STAN. L. & POL’Y REV. 293, 293 (2009).

²² See generally Jeffrey A. Miron & Jeffrey Zwiebel, *The Economic Case Against Drug Prohibition*, 9 J. ECON. PERSP. 175, 176–86 (1995) (discussing limited effect of prohibition of drugs on consumer demand and ancillary costs associated with such prohibition).

²³ E.g., Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483, 486–95 (1997); Miron & Zwiebel, *supra* note 22; James Ostrowski, *The Moral and Practical Case for Drug Legalization*, 18 HOFSTRA L. REV. 607, 611–14, 644–46, 677–78 (1990); Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501, 510–18 (1990); Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 239–40 (2000).

²⁴ SINCLAIR, *supra* note 5, at 309–49.

²⁵ While a majority of Americans believe the War on Drugs has been a “failure” and particularly support decriminalization of marijuana, more than ninety percent support retaining bans on cocaine, heroin, methamphetamine, and ecstasy. ANGUS REID PUBLIC OPINION, MAJORITY OF AMERICANS SUPPORT LEGALIZING MARIJUANA 1, 5 (2009), http://www.visioncritical.com/wp-content/uploads/2009/12/2009.12.09_Drugs_US.pdf.

²⁶ Compare *infra* Part II (discussing extent of violence in Mexico related to War on Drugs and highlighting cartels’ sophisticated weaponry and “unparalleled savagery”), with

substantially explained by drug production taking place outside the United States, a fact that lowers the visibility of corruption and murder to those who support the War on Drugs.²⁷ Simply because drugs are produced abroad, much of the human misery immanent in black markets of every kind²⁸ has been offloaded onto people in third world countries. By contrast, black market alcohol was mostly produced in the United States, where Prohibition's bad effects were concentrated. The visibility of local costs led to relatively quick repeal of the 18th Amendment.²⁹

This Note argues that the location of drug production abroad is substantially explicable by: first, historical and political happenstance bearing on illegal investment decisions; next, fundamental differences in the material properties of drugs and alcohol that make it cheaper to move drugs over long distances than alcohol; and finally, worldwide market liberalization and rapid improvements in transportation and communications networks (broadly referred to as globalization³⁰) that make long-distance smuggling cheaper.³¹

The focus is on Mexico among all the countries in the third world that suffer from illegal drug production³² for two reasons. First, Mexico supplies the majority of drugs consumed in the United States.³³ Second, at present the situation in Mexico is the bloodiest conflict in the world—worse than Iraq and Afghanistan combined, and deteriorating as of 2010.³⁴

Haller, *supra* note 1, at 146–63 (discussing violence during Prohibition and stating that “powerful political and economic factors . . . tended to repress violence within bootlegging”).

²⁷ See *infra* Part III (explaining reasons why illegal drugs consumed within United States are mostly produced in other countries, in contrast with production of alcohol during Prohibition, which primarily took place domestically).

²⁸ See Chris Paul & Al Wilhite, *Illegal Markets and the Social Costs of Rent-Seeking*, 79 PUB. CHOICE 105 (1994) (explaining economic mechanisms by which prohibitions give rise to negative externalities).

²⁹ See *infra* Part III.A (citing preexisting capital; ease of production at home; and high warehouse, transportation, and distribution costs as explanations for domestic production of alcohol during Prohibition).

³⁰ Peter Andreas, *Free Market Reform and Drug Market Prohibition: US Policies at Cross-Purposes in Latin America*, 16 THIRD WORLD Q. 75, 78 (1995).

³¹ See *infra* Part III.B.3 (characterizing reduction in costs of international trade as facilitating illegal activity).

³² See *infra* text accompanying note 190 (listing countries in which globalized criminal networks concentrate drug production).

³³ NAT'L DRUG THREAT ASSESSMENT 2009, *supra* note 16, at iii.

³⁴ Mexico ‘More Violent than Afghanistan’, MORNING STAR (UK), Jan. 3, 2010, available at <http://www.morningstaronline.co.uk/index.php/news/content/view/full/85083>; Arthur Brice, *Deadliest Year in Mexico's War on Drugs*, CNN INT'L, Jan. 1, 2010, available at <http://edition.cnn.com/2009/WORLD/americas/12/31/mexico.violence/>; see also Global Security, *The World at War*, <http://www.globalsecurity.org/military/world/war/index.html>

This Note has two goals: One is analytical and one is normative. The analytical goal is to explain, at least in part, why Prohibition was abandoned yet the War on Drugs was not, concluding that costexternalization is substantially responsible. However, such analysis is subservient to the primary normative goal of urging attention to the war in Mexico in hopes of increasing U.S. demand for “drug peace,” if only out of comity for our southern neighbor, which after all is not some far-off banana republic but a developed industrial power, the world’s twelfth-largest economy, a major democracy, and a staunch ally.³⁵

Part I compares the primarily domestic costs of Prohibition to the *domestic* costs of the War on Drugs. Then, to complete the picture, Part II looks beyond U.S. borders to the War on Drugs catastrophe currently unfolding in Mexico. Part III analyzes how and why production of drugs was outsourced to other countries, and how conflicts such as the war in Mexico might influence U.S. drug policy.

I

PUBLIC CHOICE AND BLACK MARKET ECONOMICS

This Part first discusses the primary putative benefit of prohibitions: reduction of consumption. Then, turning to the cost side of the ledger, it explains the notorious tendency of prohibitions to generate secondary social costs above and beyond the administrative or bur-sarial costs ancillary to enforcement itself. These costs are caused by the same mechanisms, as illustrated by the numerous parallels between the War on Drugs and Prohibition, also touched on in this Part.³⁶

(listing ongoing global conflicts). Compare José de Córdoba, *Gunmen Storm Hotel in Mexican Business Capital*, WALL ST. J. ONLINE (Apr. 22, 2010), <http://online.wsj.com/article/SB10001424052748703404004575199020751733164.html> (putting Mexican deaths at 22,000), with Iraq Body Count, *Civilian Deaths from Violence in 2009*, Dec. 31, 2009, <http://www.iraqbodycount.org/analysis/numbers/2009/> (counting 4644 civilian casualties), and U.N. ASSISTANCE MISSION IN AFG., AFGHANISTAN ANNUAL REPORT ON PROTECTION OF CIVILIANS IN ARMED CONFLICT 2009 (Jan. 2010), <http://unama.unmissions.org/Portals/UNAMA/human%20rights/Protection%20of%20Civilian%202009%20report%20English.pdf> (counting 2412 civilian casualties). In the future, more concrete data on casualties during this period should be available.

³⁵ Central Intelligence Agency, *The World Factbook: Mexico*, <https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html> (last updated Sept. 1, 2010).

³⁶ Many authors have compared the two. See, e.g., Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 975–81 (1970); Nora V. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 WHITTIER L. REV. 613, 613–14 (1994); Steven 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, 772 (1990); John C. Lawn, *The Issue of*

A. Benefits of Prohibitions Generally

Reducing consumption of drugs and alcohol is a social goal with widespread support.³⁷ How effective are prohibitions at achieving this goal? In general, they probably reduce consumption by a small to moderate margin.³⁸ This is the primary benefit of a drug prohibition regime.

That said, some groups benefit in special ways. In particular, politicians who reflexively adopt a hardline attitude toward drugs reap easy political capital by excoriating any opponent willing to consider less restrictive alternatives.³⁹ Other beneficiaries include criminals, who gain a monopoly on the banned substances;⁴⁰ municipal, state, and federal police and bureaucrats, who gain employment;⁴¹ doctors, pharmacists, and pharmaceutical companies, who profit from the removal from the legal market of goods easily substitutable for their

Legalizing Illicit Drugs, 18 HOFSTRA L. REV. 703, 703–04 (1990); Miron & Zwiebel, *supra* note 22, at 179–80, 185; Ostrowski, *supra* note 23, at 647; Schmoke, *supra* note 23, at 511.

³⁷ See OFFICE OF NAT'L DRUG CONTROL POLICY, THE PRESIDENT'S NATIONAL DRUG CONTROL STRATEGY 2009, at 1, available at <http://www.whitehousedrugpolicy.gov/publications/policy/ndcs09/index.html> (discussing goal of reducing consumption).

³⁸ See *infra* notes 46–53 and accompanying text.

³⁹ As Lewis Lapham explains:

To politicians in search of sound opinions and sustained applause, the war on drugs presents itself as a gift from heaven The war against drugs provides them with something to say that offends nobody, requires them to do nothing difficult, and allows them to postpone, perhaps indefinitely, the more urgent and specific questions about the state of the nation's schools, housing, employment opportunities for young black men—i.e., the conditions to which drug addiction speaks as a tragic symptom, not a cause. . . . 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.

Lewis H. Lapham, *A Political Opiate: The War on Drugs Is a Folly and a Menace*, HARPER'S (N.Y.), Dec. 1989, at 43–45; see also Symposium Proceedings: Roundtable Discussion and Questions from the Audience, 11 NOVA L. REV. 939, 957–58 (1987) (“[The War on Drugs’s] primary purpose is to elect politicians. . . . When confronted with social policy, we must always ask: ‘Cui bono?’”) (comments of Thomas Szasz, Professor of Psychiatry at the State University of New York); Whitebread, *supra* note 23, at 256–57 (discussing boon to politicians).

⁴⁰ HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 279 (1986).

⁴¹ *Introduction: Illicit Drugs and Government Control*, in DEALING WITH DRUGS: CONSEQUENCES OF GOVERNMENT CONTROL 7 (Ronald Hamowy ed., 1987) (explaining economic dependence of law enforcement agents on restrictive drug legislation); Bruce L. Benson & David W. Rasmussen, *Police Bureaucracies, Their Incentives, and the War on Drugs*, 83 PUB. CHOICE 21, 23 (1995) (discussing police seizures). For fiscal year 2010 the budget of the Drug Enforcement Administration will be \$2.3 billion. The DEA employs more than 9000 employees, with over 600 stationed in 62 different foreign countries. DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUSTICE, FY 2010 PERFORMANCE BUDGET 5 (2009), <http://www.usdoj.gov/jmd/2010justification/pdf/fy10-dea.pdf>.

own;⁴² and private prison companies and correctional officers' unions,⁴³ whose services are highly demanded in a country with the highest rate of incarceration in the world, mainly on account of the illegality of drugs.⁴⁴

These so-called benefits are economic rents that accrue to individuals at the expense of the nation.⁴⁵ As a legal policy, criminalization is conceived in the first instance as a mechanism to reduce the consumption of drugs. To the extent that a prohibition does not reduce consumption, it fails on its own terms.

There is now tentative consensus among historians that Prohibition probably decreased alcohol consumption by a small to moderate margin that diminished over time.⁴⁶ But, by any measurement, demand for currently illicit drugs has greatly increased since each was banned.⁴⁷ So the debate must be confined to those who contend, on the one hand, that the War on Drugs has been totally ineffec-

⁴² Private pharmaceutical companies make many designer opiates, narcotics, and amphetamines, usually giving them brand names like "Xanax," "OxyContin," "Percocet," "Vicodin," "Ritalin," "Adderal," and "Cylert," the better to market them to consumers. For a discussion of the risks of abuse and addiction associated with these legal drugs, see Wilson M. Compton & Nora D. Volkow, *Abuse of Prescription Drugs and the Risk of Addiction*, 83 DRUG & ALCOHOL DEPENDENCE S4 (2006). An illegal market exists for such drugs, but rarely involves violence since production remains in the hands of legal businesses. See NAT'L DRUG THREAT ASSESSMENT 2009, *supra* note 16, at v (noting various sources for acquiring prescription drugs).

⁴³ See, e.g., Ben Carrasco & Joan Petersilia, *Assessing the CCPOA's Political Influence and Its Impact on Efforts To Reform the California Corrections System* (Stanford Criminal Justice Ctr. Working Paper, Jan. 27, 2006), available at http://www.law.stanford.edu/program/centers/scjc/workingpapers/BCarasco-wp4_06.pdf (discussing lobbying by corrections officers' union in California for increased drug penalties).

⁴⁴ ROY WALMSLEY, *WORLD PRISON POPULATION LIST 1* (7th ed. 2006), <http://www.kcl.ac.uk/depsta/law/research/icps/downloads/world-prison-pop-seventh.pdf>. There are 491 inmates for every 100,000 U.S. residents. PAGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BJS BULL. NO. NCJ 215092, PRISONERS IN 2005, at 1 (2006), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p05.pdf>. As of 2008, 52% of all federal prisoners were jailed for drugs. NAT'L DRUG THREAT ASSESSMENT 2009, *supra* note 16, at iii; see also Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 852-57 (1992) (discussing pervasive features of federal drug case sentencing such as mandatory minimums, and flexibility in adjusting sentences upward without corresponding flexibility in downward adjustment).

⁴⁵ Technically, economic rents are payments for a good in excess of the opportunity cost of producing that good. Assume for the purposes of this discussion that the legal jeopardy incurred by bootlegging criminals is not a cost of production.

⁴⁶ ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES* 160-61 (2001).

⁴⁷ Demleitner, *supra* note 36, at 636; see also ROBERT M. JULIEN, *A PRIMER OF DRUG ACTION* 95 (5th ed. 1988) (discussing long term cocaine trends); Bonnie & Whitebread, *supra* note 36, at 1096-98 (discussing "revolution" in marijuana use in 1960s and growth of use by middle class); Luna, *supra* note 23, at 486-95 (surveying pre-War on Drugs use).

tive, or, on the other hand, that it has been effective in preventing some amount of hypothetical consumption at the margin.

There are good reasons to believe demand for drugs is inelastic⁴⁸ with respect to the “tax” of illegality.⁴⁹ Certainly it is casual users, not addicts, who are the first to be deterred.⁵⁰

Predictions as to the effect of decriminalization vary widely. For example, while ninety-nine percent of nonusers say they would never try cocaine, even if legal, John Lawn, former Administrator of the DEA, argues that legalizing the drug would result in one third of all Americans becoming not only users but also addicts.⁵¹

There is no way to be certain about the consumption effect of decriminalization, but Judge Posner’s take on the question is characteristically persuasive:

[W]e must not forget the distinction between the cost of a good and its dollar price. . . . As a result of the war on drugs, it takes some effort to find a seller, there is a risk of arrest and prosecution, and there is a risk of an accidental overdose resulting from lack of quality control These costs would be eliminated if drugs were legal. It might seem that with drugs worth more to consumers, their price would rise. [But price would be constrained by competition], and the additional benefits of the drugs—that is, the benefits generated by eliminating the costs resulting from criminalization—would therefore be realized as consumer surplus. With the good more valuable to consumers but the price no higher, consumption would increase.⁵²

Taking the inverse of that logic, it is reasonable to conclude that the War on Drugs has decreased consumption by an unknown but almost certainly small margin. So the principal benefit of prohibitions, whether of alcohol or other drugs, is a slight or moderate reduction in consumption.

⁴⁸ To say that drug demand is “inelastic” means that a large increase in the price for a good will cause a small decrease in demand for it. See Paul & Wilhite, *supra* note 28, at 106 fig. 1, 107–08 (illustrating relationship between price of and demand for good declared illegal).

⁴⁹ See, e.g., Miron & Zwiebel, *supra* note 22, at 176–77 (citing penalties directed at suppliers rather than consumers, attenuation of motivation to abide by weakly enforced laws, and glamorization as factors decreasing elasticity).

⁵⁰ *Id.* at 184.

⁵¹ Lawn apparently bases this claim on the fact that an acquaintance of his once told him so but does not name the acquaintance or cite supporting evidence. Lawn, *supra* note 36, at 710–11.

⁵² RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 244–45 (7th ed. 2007).

If it were as simple as that, if banning drugs were like banning, say, lead paint⁵³—that is, if taxpayers paid no more than the dollar price of administering the newly prohibited substance's removal from the market and the disutility, if any, of its absence—drug prohibitions might be reasonable or even good laws. But that is not how it works in practice.

B. *Black Market Economics*

When the sale of a popular recreational drug is banned, wealth and power flowing from productive capital are amplified and transferred from the arena of competition between legitimate firms to the monopoly control of entrepreneurs whose competitive advantage is a willingness to break the law.⁵⁴ The government then invests in thwarting the criminals, who counterinvest in resistance and subterfuge.⁵⁵ Meanwhile, large numbers of transactions take place without recourse to private property rights or the civil courts, leaving violence as the only mechanism for adjudicating contractual disputes and enforcing industry norms.⁵⁶ Violence is used to take over and hold supply routes and distribution territory, with each gangster knowing that to succeed he must be more brutal than the gangster whom he has just supplanted.⁵⁷ Over time, violence and expenditures ratchet upward,⁵⁸ making it increasingly more expensive to bring the good to market, exacerbating the cycle. Meanwhile, consumers whose demand for drugs is inelastic⁵⁹ (in some cases due to addiction) resort to theft to pay for artificially priced drugs they can no longer afford.⁶⁰ The only constant in this uncontrollable spiral is a steady supply.⁶¹ The only change to consumers is increased price and reduced quality. Instead of champagne or powder cocaine, they get moonshine or

⁵³ See Randall Lutter & Elizabeth Mader, *Litigating Lead-Based Paint Hazards*, in *REGULATION THROUGH LITIGATION* 106, 106–07 (W. Kip Viscusi ed., 2002) (describing ban and subsequent tort litigation).

⁵⁴ Paul & Wilhite, *supra* note 28, at 113.

⁵⁵ *Id.* at 107; John T. Schuler & Arthur McBride, *Notes from the Front: A Dissident Law-Enforcement Perspective on Drug Prohibition*, 18 *HOFSTRA L. REV.* 893, 900 (1990); Demleitner, *supra* note 36, at 614.

⁵⁶ Miron & Zwiebel, *supra* note 22, at 177–78; Paul & Wilhite, *supra* note 28, at 108–09.

⁵⁷ *Id.* at 177 (“Prohibition is likely to lower marginal costs and raise marginal benefits to violence in an industry . . .”).

⁵⁸ See Ostrowski, *supra* note 23, at 645 (“[T]he black market thrives on the war on drugs and benefits from its intensification.”).

⁵⁹ See *supra* note 48 and accompanying text (defining term “inelastic”).

⁶⁰ Paul & Wilhite, *supra* note 28, at 112.

⁶¹ See Miron & Zwiebel, *supra* note 22, at 186 (“[A]ny increase in price [from interdiction] will yield diminishing returns in reducing consumption if market demand is convex, a condition that seems likely for drugs.”).

crack, the latter substances being cheaper to produce clandestinely, more compact for transportation, and providing greater per-unit intoxication to consumers wishing to minimize their transactions with criminal suppliers.⁶² Were bread outlawed, the same phenomenon would likely ensure its provision (probably in disgusting little nuggets) because the state is not willing or able to match what consumers are prepared to spend, a virtual guarantee of futility at the outset.⁶³

C. *The Cost of Alcohol Prohibition*

Prohibition is generally regarded to have been a disastrous experience because it was much more costly than expected.⁶⁴ The murder rate rose sharply following the passage of the Eighteenth Amendment, remained high for fourteen years, and then, after repeal and passage of the Twenty-First Amendment, declined for eleven straight years.⁶⁵ Once regulated alcohol was removed from the market, death and severe illnesses from adulterated homemade liquor became epidemic.⁶⁶ Meanwhile, judicial criminal dockets were overwhelmed,⁶⁷ and, given the difficulty of securing convictions against participants in voluntary transactions, prosecutors resorted to disproportionate punishments against bootleggers, up to life in prison in some cases.⁶⁸ In fact, the origins of the American mass prison system trace to the Prohibition era, when the number of federal prisons had to be doubled.⁶⁹ Yet illegal alcohol production and consumption was a “respectable crime.”⁷⁰ Like the presence of women in saloons,⁷¹ it became socially acceptable, for the first time, to be seen intoxicated in

⁶² See Demleitner, *supra* note 36, at 624 (discussing Prohibition-era practice of replacing beer with more potent and hazardous concentrates due to ease of transport and marketability).

⁶³ The U.S. government’s out-of-pocket expense on the War on Drugs is about \$14 billion for 2009; Mexican and Colombian cartels alone gross at least \$18 billion annually, and some estimates suggest as much as \$39 billion annually, from U.S. drug sales. NAT’L DRUG THREAT ASSESSMENT 2009, *supra* note 16, at iii.

⁶⁴ See generally WICKERSHAM COMM’N, ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES, H.R. DOC. NO. 71-722, at 44–60 (1931) [hereinafter WICKERSHAM REPORT] (discussing unintended consequences of Prohibition).

⁶⁵ James Ostrowski, Cato Institute, *Thinking About Drug Legalization*, Cato Policy Analysis no. 121, 1 (1989), <http://www.cato.org/pubs/pas/pa121.pdf>.

⁶⁶ From 1925 to 1929, forty people in every million were dying from adulterated liquor per year. SINCLAIR, *supra* note 5, at 201.

⁶⁷ WICKERSHAM REPORT, *supra* note 64, at 55–56; SINCLAIR, *supra* note 5, at 211.

⁶⁸ WICKERSHAM REPORT, *supra* note 64, at 57 (discussing increased inequalities in sentences following passage of Increased Penalties Act of 1929); SINCLAIR, *supra* note 5, at 193.

⁶⁹ SINCLAIR, *supra* note 5, at 212–13.

⁷⁰ *Id.* at 220–21; WICKERSHAM REPORT, *supra* note 64, at 21, 48–51 (discussing public opinion in opposition to strict enforcement of National Prohibition Act).

public.⁷² Most infamously, corruption among law enforcement became rampant, due in part to the large number of officials at every level of the executive branch, including the White House,⁷³ who themselves were “ready to drink anything that burns, at the same time giving thanks to God.”⁷⁴ These unintended effects bent public opinion against Prohibition and produced a reexamination of policy at a national level.⁷⁵

D. *The War on Drugs’ Domestic Costs*

Like Prohibition, the War on Drugs is expensive, even when the measurement is confined to U.S. borders. “The War on Drugs [costs the government] more . . . than the Commerce, Interior, and State Departments put together.”⁷⁶ To American taxpayers, the cost of the War on Drugs, including the opportunity cost of drug peace, is estimated to be more than eighty billion dollars annually.⁷⁷ How does enforcing bans on a few rudimentary chemicals come to be so expensive?

First, the War on Drugs causes violence. Violent conflict arises from competition between gangs that buy drugs wholesale and distribute them to consumers.⁷⁸ At least three factors lead to such conflict. First, drug gangs cannot rely on private property rights, resort to the civil court system, or call on the police to protect them.⁷⁹ Second, evading apprehension for one crime is complementary with evading

⁷¹ SINCLAIR, *supra* note 5, at 233–34 (“As Heywood Broun complained, however bad the old saloons were, at least the male drinker did not have to fight his way through crowds of schoolgirls at the bar.”).

⁷² *Id.* (“Perhaps one of the greatest crimes of prohibition against the middle classes was to make public drunkenness a virtue, signifying manliness, rather than a vice, signifying stupidity.”).

⁷³ *See id.* at 252–68 (discussing drinking habits of Presidents Harding and Coolidge).

⁷⁴ *Id.* at 269 (quoting H.L. Mencken).

⁷⁵ The WICKERSHAM REPORT, *supra* note 64, was the finished product of this national soul-searching. For a summary of the shift in press treatment of Prohibition, from supportive to negative, see SINCLAIR, *supra* note 5, at 309–15.

⁷⁶ DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* xii (Little, Brown & Co. 1996).

⁷⁷ Ostrowski, *supra* note 23, at 656–57; *see also* OFFICE OF NAT’L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY BUDGETS 2002–2009, *available at* http://www.whitehousedrugpolicy.gov/publications/policy/09budget/tbl_3.pdf (indicating federal government requested antidrug outlays of over \$14 billion in 2009). Please note that this quoted dollar figure is not intended for pecuniary accuracy but to convey the general magnitude of the costs under discussion.

⁷⁸ *See generally* Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang’s Finances*, 115 Q. J. ECON. 755 (2000) (providing primary source insight into repeated drug gang wars in undisclosed city center).

⁷⁹ Paul & Wilhite, *supra* note 28, at 108.

apprehension for another.⁸⁰ Third, the cost of legal punishment (to the convict) diminishes marginally as the number of convictions at one sentencing increases. As a result of these three factors, the drug trade becomes saturated with systemic violence as gangs secure a greater share of the lucrative market for priced-up drugs by murdering rivals, police, informants, states' witnesses, prosecutors, problematic customers, and passersby caught in the crossfire.⁸¹ Throughout the twentieth century, a strong correlation existed between the stringency of prohibitions and the U.S. murder rate.⁸²

In addition to causing violence, the War on Drugs increases property crime. Although drug use is associated with criminality in the popular imagination, and indeed drug use is correlated with commission of petty offenses,⁸³ it is the high price of drugs and not their intoxicating effects that is to blame. Unlike alcohol, no currently illegal drug has any significant pharmacologically criminogenic properties.⁸⁴ But committing crimes of whatever kind has a diminishing marginal cost in terms of risk of detection and gravity of punishment,⁸⁵ so when the drug user incurs the initial fixed cost of renouncing the status of law-abiding-citizen in order to consume

⁸⁰ Miron & Zwiebel, *supra* note 22, at 178–79. The same phenomenon partly explains the dominance of anticompetitive organizations (cartels) over illegal markets.

⁸¹ Ostrowski, *supra* note 23, at 641–43, 650, 655.

⁸² Miron & Zwiebel, *supra* note 22, at 178 (discussing fluctuations of murder rate in response to increases in law enforcement from 1910 to 1988). For 1980–2005 raw data on the murder rate, see U.S. CENSUS BUREAU, LAW ENFORCEMENT, COURTS, & PRISONS: CRIMES AND CRIME RATES, tbl. 301, <http://www.census.gov/compendia/statab/2010/tables/10s0301.pdf>. Note that the U.S. murder rate has fallen recently, though it is unclear why. For a discussion, see Editorial, *America the Safer; A Golden Age of Crime Reduction?*, WASH. POST, Jan. 2, 2010, at A.12, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/01/AR2010010101829.html>.

⁸³ OFFICE OF NAT'L DRUG CONTROL POLICY, DRUG-RELATED CRIME (Mar. 2000), <http://www.whitehousedrugpolicy.gov/publications/pdf/ncj181056.pdf>.

⁸⁴ According to a recent article:

[M]ost illegal recreational drugs have no pharmacological properties that produce violence or other criminal behavior. Heroin and marijuana diminish rather than increase aggressive behavior. Cocaine—or cocaine withdrawal—occasionally triggers violence but usually does not. Very little crime is generated by the mere use of these drugs, especially in comparison to alcohol, which is causally related to thousands of homicides and hundreds of thousands of assaults annually.

Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571, 575 (1995); see also James J. Collins & Pamela M. Messerschmidt, *Epidemiology of Alcohol-Related Violence*, 17 ALCOHOL HEALTH & RES. WORLD 93 (1993) (reviewing research on alcohol consumption as contributor to interpersonal violence).

⁸⁵ See *supra* notes 76–82 and accompanying text (describing economic and social costs of competitive violence between gangs vying to secure greater share of lucrative drug market).

drugs, petty property crimes among drug users increase.⁸⁶ Using police force to ratchet up the price of goods, demand for which is inelastic,⁸⁷ is even more directly implicated in the prevalence of economic-compulsive crime. It is estimated that users seeking to finance purchases of drugs, some of which are 50 to 100 times more expensive than the predicted free market equilibrium price, commit around forty percent of all property crime in the United States.⁸⁸

Antidrug agencies, directing important channels of information, blame the crime and murder discussed above on drug use itself,⁸⁹ feeding public demand for more punitive counteraction against both supply and possession. In the United States, drug distribution has come to be punishable by sentences commensurate with those usually reserved for homicide or rape,⁹⁰ despite the lack of intrinsic moral culpability in the act of a voluntary transaction. So many Americans have been imprisoned for drug crimes that the country now has the world's highest incarceration rate in both absolute and per capita terms.⁹¹

⁸⁶ Cf. Miron & Zwiebel, *supra* note 22, at 177–78 (observing that prohibition decreases marginal costs of violence for drug suppliers).

⁸⁷ See *supra* note 48 and accompanying text (discussing inelasticity).

⁸⁸ Ostrowski, *supra* note 23, at 647.

⁸⁹ The federal government has gone so far as to make causal claims between drug use and Islamic terrorism. Frank Arhens, *New Pitch in Anti-Drug Ads: Anti-Terrorism*, WASH. POST, Feb. 4, 2002, at A.03, available at <http://www.encyclopedia.com/doc/1P2-323043.html>.

⁹⁰ The penalties for trafficking range up to life in prison and an unlimited fine. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2009) (indicating base offense level for drugs may be as high as Level 43, carrying a minimum sentence of life imprisonment), *with id.* § 2A1.2 (indicating base offense level for second degree murder is 38, carrying a minimum sentence of nineteen years), *and id.* § 2A3.1 (indicating base offense level for criminal sex abuse is 38 or 30, carrying a minimum sentence of eight years). Depending on the specifics of the crime and the perpetrator's criminal history, a Level 38 offense carries a minimum of nineteen years and seven months incarceration and a maximum sentence of life imprisonment. See *generally id.* § 5A (providing sentencing table and instructing courts to consider specifics of crime and perpetrator's criminal history when imposing sentence). Penalties are further augmented by an array of collateral consequences that attach to a drug conviction. Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE & JUST. 253, 253 (2002) ("The collateral sanctions begin with depriving [convicted felons] of the basic rights of membership in society: denying them the right to serve on juries or vote if they are citizens, and expelling them from the United States if they are non-citizens."). Likewise, Prohibition-era moralists favored fantastic punishments for those unwilling to be coerced into virtue; William Jennings Bryan favored exile for American tourists seen drinking overseas. SINCLAIR, *supra* note 5, at 336.

⁹¹ ROY WALMSLEY, INT'L CENTRE FOR PRISON STUD., WORLD PRISON POPULATION LIST 1, 3 (8th ed. 2009), available at http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wpp1-8th_41.pdf (noting that as of December 2008, U.S. prison population totaled over 2,000,000 and United States had prison population rate of 756 per 100,000 of national population).

In addition to causing violence and property crime, the War on Drugs increases official corruption. Bribery and graft are the result of a surfeit of drug profits,⁹² the lack of real moral revulsion directed against the use of drugs (compared to crimes that immediately cause tangible harm to others⁹³), and police fatigue with the Sisyphean struggle.⁹⁴ Over the last half century the War on Drugs has led to serious and widespread corruption, especially in the police departments of high-crime cities⁹⁵ and in the federal agencies tasked with controlling the southern border.⁹⁶

In addition to increasing violence, crime, and corruption, the War on Drugs has also led to a steady erosion of civil liberties. It is hard to enforce laws forbidding voluntary, victimless transactions without attenuating long-cherished rights of privacy and property.⁹⁷ Because in the aftermath of a drug deal there is no complainant and no one to compensate, the government must resort to “urine testing, roadblocks, routine strip searches, school locker searches without probable cause, abuses of the good faith exception to the exclusionary rule, preventative detention, and nonjudicial forfeiture” to ferret out that which

⁹² Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593, 2596–97 (1994) (book review) (arguing that there are few systemic protections to prevent drug-related bribes, especially given the lucrative black market created by prohibiting drugs); cf. WICKERSHAM REPORT, *supra* note 64, at 6–7, 12–17, 25, 31, 37, 43–47 (discussing widespread corruption during Prohibition).

⁹³ Increases in antidrug enforcement are often justified with rhetoric about the *harm* drugs cause to third parties (neither buyers nor sellers), using sociological and other studies purporting to show a correlation between drug use and specified measures of harm. Legalization proponents also speak of “harm reduction” in the same sense. Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 112–13 (1999). But this sort of “harm” no longer has the same meaning as John Stuart Mill originally used the word to delineate the ethical limits of the criminal sanction. *Id.* at 113–14.

⁹⁴ Schuler & McBride, *supra* note 55, at 924–25.

⁹⁵ U.S. GEN. ACCOUNTING OFFICE, LAW ENFORCEMENT: INFORMATION ON DRUG-RELATED POLICE CORRUPTION 7–8 (1998), available at www.ethicsinstitute.com/pdf/Drug%20Corruption%20Report.pdf (“[S]everal studies and investigations of drug-related police corruption found on-duty officers engaged in serious criminal activities, such as (1) conducting unconstitutional searches and seizures; (2) stealing money and/or drugs from drug dealers; (3) selling stolen drugs; (4) protecting drug operations; (5) providing false testimony; and (6) submitting false crime reports.”).

⁹⁶ See, e.g., Randal C. Archibold, *Hired by Customs, but Working for the Cartels*, N.Y. TIMES, Dec. 18, 2009, at A1, available at http://www.nytimes.com/2009/12/18/us/18corrupt.html?_r=1 (reporting increasing trend of Customs and Border Protection agents and officers charged with drug-related corruption).

⁹⁷ Cf. WICKERSHAM REPORT, *supra* note 64, at 33, 46 (discussing this phenomenon during Prohibition). See generally Stephen Wisotsky, Cato Institute, *A Society of Suspects: The War on Drugs & Civil Liberties*, Cato Policy Analysis no. 180 (1992), www.cato.org/pubs/pas/pa180.pdf (“[T]he War on Drugs is necessarily a war on the rights of all of us.”).

has been deemed wrongdoing.⁹⁸ Illiberal laws require illiberal procedure.⁹⁹

Because the U.S. War on Drugs pits large costs against moderate benefits,¹⁰⁰ the criminalization of drugs has long been a controversial legal policy, but not as controversial as it should be: Despite the similarities between Prohibition and the War on Drugs, pressure to end the latter is clearly lower than pressure to end the former was at the height of Prohibition. This must be in substantial part because most of the violence caused by the War on Drugs is realized outside the United States.

II

THE WAR IN MEXICO¹⁰¹

As discussed, the War on Drugs causes violence in the United States.¹⁰² Yet that violence, mostly inner-city shootings, is trivial compared to the mayhem caused in illegal-drug-producing countries, like Mexico, the primary supplier of U.S. demand.¹⁰³ Were these effects manifested in the United States, even if confined to marginalized and impoverished communities, the War on Drugs would probably go the same way as Prohibition—written off as a social experiment that proved too costly.

Mexico is currently embroiled in a major national conflict with a 2009 body count that surpassed the body count in Iraq and Afghanistan combined.¹⁰⁴ Steadily enriched by the constant flow of money from American drug sales, the cartels have infiltrated every layer of society in Mexico.

⁹⁸ Ostrowski, *supra* note 23, at 664.

⁹⁹ For an in-depth exploration of the War on Drugs's truncation of civil liberties, see Luna, *supra* note 23, at 546–50. For a discussion of the legality of subjecting a suspect to a “rectal exam even though there was no probable cause to believe she was carrying drugs,” see, for example, Ostrowski, *supra* note 23, at 664–66.

¹⁰⁰ The above sketch of domestic War on Drugs costs is necessarily incomplete. For a more thorough account of War on Drugs costs, see *supra* note 23 (listing anti-War on Drugs articles).

¹⁰¹ Two brief warnings should preface this Part. First, the following discussion is of the war in Mexico, a conflict that is ongoing in 2010 and characterized by shocking violence. Sensitive readers, especially those already convinced that the War on Drugs is too costly, might consider skipping this Part's graphic descriptions. In addition, because the war is ongoing, perilous to journalists, and underreported, this Part relies heavily on newspaper reports, often from smaller, regional newspapers, for its factual basis.

¹⁰² See *supra* notes 76–82 and accompanying text (discussing domestic War on Drugs violence).

¹⁰³ See Cook, *supra* note 16, at 4 (noting that Mexico is main foreign supplier of marijuana and cocaine to United States and major supplier of methamphetamine to United States).

¹⁰⁴ See *supra* note 34 (comparing body counts in these countries).

Al Capone's thugs were farmboys and immigrants with sawed-off shotguns and tommyguns.¹⁰⁵ Retail gangs in American cities wield pistols, knives, and fists. The armed wings of Mexico's cartels, by contrast, are manned by disciplined soldiers well equipped with increasingly sophisticated arsenals now reported to go beyond mere assault rifles, machine guns, and grenades, to include such military materiel as anti-aircraft guns and semisubmersible submarines.¹⁰⁶ Cartel operatives coordinate their operations from sophisticated command centers using cell phones, two-way radios, scanner devices, Voice Over Internet Protocol, broadband satellite instant messaging, and encrypted text messages.¹⁰⁷ Street battles between them and the federal army are sustained infantry engagements that can last hours and leave dozens dead.¹⁰⁸

Los Zetas,¹⁰⁹ a private army that rose to prominence as the enforcement branch of the Gulf Cartel,¹¹⁰ originated out of the *Grupo Aeromóvil de Fuerzas Especiales*,¹¹¹ the special forces branch of the Mexican army. Its defection to entrepreneurial endeavors was a stark testament to the ability of the drug trade to compete with the Mexican state.¹¹²

¹⁰⁵ Haller, *supra* note 1, at 148–49, 153 (noting that leading bootleggers during Prohibition were young, unknown men).

¹⁰⁶ *Mexican Drugs War: Woman Arrested with Anti-Aircraft Machine Gun*, TELEGRAPH (U.K.), Apr. 15, 2009, available at <http://www.telegraph.co.uk/news/worldnews/central-americaandthecaribbean/mexico/5158184/Mexican-drugs-war-woman-arrested-with-anti-aircraft-machine-gun.html> (discussing Mexican drug cartels' acquisition of "military-grade arms such as grenades and machine guns"); Mary A. O'Grady, *Mexico's Hopeless Drug War*, WALL ST. J., Sept. 14, 2009, at A13, available at <http://online.wsj.com/article/SB10001424052970203440104574405350025715082.html> (noting drug cartels' innovative use of semisubmersibles to move drugs by sea).

¹⁰⁷ NAT'L DRUG THREAT ASSESSMENT 2009, *supra* note 16, at 45.

¹⁰⁸ See, e.g., Elisabeth Malkin, *Mexico Deals a Blow to Cartel but Warns of Continued Drug-Related Violence*, N.Y. TIMES, Dec. 17, 2009, at A6, available at <http://www.nytimes.com/> (enter "Mexico Deals a Blow to Cartel" in "Search" field; then follow "Mexico Deals a Blow to Cartel but Warns of Continued Drug . . ." hyperlink) (describing battle between 400 Mexican special forces sailors and drug lord Arturo Beltrán Leyva).

¹⁰⁹ COOK, *supra* note 16, at 10–11; Ed Vulliamy, *The Zetas: Brutal Kings of Their Own Mexican Narco-state*, OBSERVER (U.K.), Nov. 15, 2009, at 36, available at <http://www.guardian.co.uk/world/2009/nov/15/zetas-drugs-mexico-us-gangs> (reporting that U.S. intelligence estimates 4000 Zeta soldiers were recruited from Mexican Army special forces unit); *Mexico's Ferocious Zetas Cartel Reigns Through Fear*, NPR, Oct. 2, 2009, available at <http://www.npr.org/templates/transcript/transcript.php?storyId=113388071> (interview) (reporting that Zetas have become independent cartel).

¹¹⁰ The Gulf Cartel is a major cartel with presence in at least thirteen Mexican states. COOK, *supra* note 16, at 1, 10.

¹¹¹ Reports indicate that the Zetas were created by thirty lieutenants and sublieutenants who defected from the Mexican military's Special Air Mobile Force Group in the late 1990s. COOK, *supra* note 16, at 10.

¹¹² One Mexican lawmaker has called Los Zetas a "parallel government." Steve Fainaru & William Booth, *Mexico's Drug Cartels Siphon Liquid Gold*, WASH. POST, Dec. 13, 2009,

In addition to adopting western discipline and training, cartel soldiers have adopted the most effective tactics of Islamist terrorists and other irregular paramilitaries at war with governments and have committed rampant atrocities of virtually unparalleled savagery.¹¹³ Those speaking out publicly against cartel bosses, including speakers who are public officials, reporters, lawyers, and even clergymen, are murdered in short order.¹¹⁴ Only the rich and hard-to-reach are lucky

at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/12/AR2009121202888.html> (noting that Zetas control “vast stretches” of Mexico’s oil pipelines and earn millions of dollars siphoning oil from such pipelines).

¹¹³ Beheading and dismemberment are routine. COOK, *supra* note 16, at 14; *Severed Head Left in Front of Mexican Drug Lord’s Crypt*, THE CANADIAN PRESS, Jan. 18, 2010. Executions are filmed and circulated on the Internet. COOK, *supra* note 16, at 14. Severed heads are collected in iceboxes with threatening messages. *Four Found Decapitated in Northwestern Mexico*, EFE NEWS SERVICE (Madrid), Aug. 24, 2009. “Colombian neckties,” where the tongue is yanked down out of a slit throat and “necklacing,” placing a burning tire around a bound person’s neck to incinerate the head, are investments in reputations for brutality. Charles Bowden, *The Sicario: A Juárez Hit Man Speaks*, HARPER’S (N.Y.), May 2009, at 44, 47. Victims are buried in mass graves, dissolved in vats of acid, or boiled in lye. See Marc Lacey, *Drug Suspect Accused of Boiling Bodies*, N.Y. TIMES, Jan. 13, 2010, at A12, available at <http://query.nytimes.com/gst/fullpage.html?res=9C07E3D71138F930A25752C0A9669D8B63&scp=1&sq=Drug%20Suspect%20Accused%20of%20Boiling%20Bodies&st=cse> (discussing lye-boiling of bodies); David Luhnnow & Nicholas Casey, *Mexican Police Nab Notorious Drug Lord*, WALL ST. J., Jan. 13, 2010, at A14, available at http://online.wsj.com/article/SB126331893997626407.html?mod=WSJ_hpp_MIDDLTopStories (discussing dissolving of bodies in acid); Sofia Miselem, *Hitmen, Corpse Dissolvers, Best Paid in Mexico*, MAIL & GUARDIAN ONLINE, Mar. 1, 2009, <http://www.mg.co.za/article/2009-03-01-hitmen-corpse-dissolvers-best-paid-in-mexico> (discussing dissolving of bodies in acid); Karl Penhaul, *Mexico’s Mass Graves Yield Bodies of Gang Victims*, CNN (Apr. 17, 2009), <http://www.cnn.com/2009/WORLD/americas/04/17/mexico.juarez/> (discussing mass graves). Tortured and decapitated bodies hang from bridges. See generally, e.g., *Murder Victims Found Hanging from Mexico Overpass*, ASSOCIATED PRESS, Dec. 31, 2009, available at http://www.huffingtonpost.com/2009/12/30/drug-war-murder-victims-f_n_407429.html. Even children who get in the way are kidnapped, executed, and dumped in mass graves. Bowden, *supra*, at 51. In Juárez, a body was found hanging from a fence with a pig’s face over the dead man’s. *In Mexico, Beheaded Man Hung from Overpass*, ASSOCIATED PRESS, Nov. 6, 2008, available at <http://www.foxnews.com/story/0,2933,448508,00.html>. Another drug-related group killed a man, cut off his face, and stitched it to a soccer ball. Soraya Roberts, *Mexico Man’s Face Skinned and Stitched onto a Soccer Ball in Sinaloa in Threat to Juarez Drug Cartel*, N.Y. DAILY NEWS (Jan. 9, 2010), http://www.nydailynews.com/news/world/2010/01/09/2010-01-09_mexico_mans_face_skinned_and_stitched_onto_a_soccer_ball_in_threat_to_juarez_dru.html. In January 2010, naval special forces killed a prominent drug lord in an epic gun battle. After the local press hailed one slain marine a hero, hitmen executed his grieving family. David Luhnnow & Jose de Cordoba, *Hit Men Kill Mexican Hero’s Family*, WALL ST. J., Dec. 23, 2009, at A1, available at <http://online.wsj.com/article/SB126149866534701603.html>.

¹¹⁴ See, e.g., Mariano Castillo, *Killing Shows Mexico Clergy No Longer Cloaked from Cartel’s Aim*, CNN (June 17, 2009), <http://edition.cnn.com/2009/WORLD/americas/06/16/mexico.clergy.violence/index.html> (reporting at least seven clergymen killed); Ken Ellingwood, *Prominent Defense Lawyer for Cartels Stabbed to Death*, L.A. TIMES, Aug. 30, 2009, at A24, available at <http://articles.latimes.com/2009/aug/30/world/fg-mexico-lawyer30>;

enough to be killed by a sniper or a team of vehicle-borne gunmen: Cartel enemies taken alive are slowly tortured to death in safehouses built for that very purpose.¹¹⁵

As of 2010, large swaths of the country are under cartel control.¹¹⁶ As much as thirty percent of Mexico's arable land is under drug crop cultivation.¹¹⁷ Every political party takes drug money,¹¹⁸ the Federal Investigative Agency has been corrupted,¹¹⁹ and one-fifth of the Attorney General's office is under investigation.¹²⁰ Vigilantism is rampant.¹²¹ The Central Intelligence Agency (CIA) and Department of Defense are preparing for the possibility of the failure of the Mexican state.¹²² The cartels are believed to be actively trying to kill the head of state,¹²³ and some business leaders have even called for the U.N. to occupy the country.¹²⁴

In short, Mexico is a country pushed to the brink of a particularly awful kind of failure, the cause of which is its status as the leading producer and transporter of drugs bound for the U.S. black market.¹²⁵

Imagine instead, however implausibly, that the United States produced all of the drugs it consumes. To be sure, eradication efforts

Tim Padgett & Dolly Mascarenas, *Mexico's Witness-Protection Program: What Protection?*, TIME (Dec. 8, 2009), <http://www.time.com/time/world/article/0,8599,1945983,00.html> (reporting that informants are easily located and murdered); Tracy Wilkinson, *Crime Beat Reporters Face Deadly Perils*, L.A. TIMES, Dec. 29, 2009, at A17, available at <http://www.latimes.com/news/nation-and-world/la-fg-mexico-reporters29-2009dec29,0,6825114.story>; *Lawmaker Killed by Gunmen*, N.Y. TIMES, Aug. 21, 2009, at A12, available at http://www.nytimes.com/2009/08/21/world/americas/21briefs-Mexicorbrf.html?_r=1&partner=TOPIXNEWS&ei=5099.

¹¹⁵ See Bowden, *supra* note 113, at 50 (recounting in gruesome detail procedures used by cartel hitmen).

¹¹⁶ See COOK, *supra* note 16, at 3 (mapping areas of influence).

¹¹⁷ Alma Guillermoprieto, *Days of the Dead: The New Narcocultura*, NEW YORKER, Nov. 10, 2008, at 44.

¹¹⁸ *Id.*

¹¹⁹ COOK, *supra* note 16, at 12.

¹²⁰ *Id.*

¹²¹ See, e.g., Dudley Althaus, *Mexico's Bloody Crime Wave Spawning Signs of Vigilantes*, HOUSTON CHRON., Nov. 17, 2009, at A1, available at <http://www.chron.com/dispatch/story.mpl/world/6723952.html>; Tracy Wilkinson & Ken Ellingwood, *Mexico's Public Is Missing in Action*, L.A. TIMES, Dec. 30, 2009, at A1, available at <http://www.latimes.com/news/nation-and-world/la-fg-mexico-society30-2009dec30,0,6128325.story> (reporting that Mexican mayor admitted to hiring vigilantes to keep his city safe).

¹²² *CIA and Pentagon Wonder: Could Mexico Implode?*, NPR (Feb. 27, 2009), <http://www.npr.org/templates/transcript/transcript.php?storyId=101215537> (interview).

¹²³ *Mexico: Drug Smugglers Arrested in Scheme To Kill President*, N.Y. TIMES, Aug. 11, 2009, at A8, available at <http://www.nytimes.com/2009/08/11/world/americas/11briefs-Mexico.html>.

¹²⁴ Tom Leonard, *Mexicans Call for UN Peacekeepers To End Violence on America's Border*, DAILY TELEGRAPH (London), Nov. 13, 2009, at 21.

¹²⁵ NAT'L DRUG THREAT ASSESSMENT 2009, *supra* note 16, at 45 ("Mexican [drug cartels] are the greatest drug trafficking threat to the United States.").

would be more efficient, because the United States is wealthier and more developed. But the resulting scarcity would drive the price of drugs higher, making them an even more lucrative product. The higher price commanded by drugs would induce more determined, better-financed criminals to enter the illegal market. This would increase production, again spurring an increase in corresponding antinarcotics efforts, making drugs even more costly. Those increased costs would in turn be passed on to drug consumers, again raising the price of drugs, again exacerbating the cycle, until an equilibrium were reached at which the price of drugs would be much higher than at the outset but the total quantity supplied would have changed little or not at all.¹²⁶ All the while counternarcotics efforts would be increasing, and domestic criminal syndicates would be gaining money, power, and reputational capital. Eventually, with the two upward trajectories pitted against one another, the conflict would approach an outright war.¹²⁷

In response to such a pointless conflagration, the country would likely seek an alternative means to regulate drugs other than a criminal ban. That is precisely what happened at the end of Prohibition.¹²⁸ After being scandalized by Prohibition-era violence, emblematic of which was the Saint Valentine's Day massacre, and given the absence of any corresponding decline in drunkenness,¹²⁹ voters decided to regulate alcohol consumption with tools other than the criminal law.¹³⁰ Nowadays, by contrast, the violence inherent in the War on Drugs is out of sight and out of mind of the average voter.

But how did the violence come to be outsourced in the first place? The next Part takes up that important question.

III LIBERALIZATION OF THE INTERNATIONAL BLACK MARKET

In the absence of some barrier, production of a commodity will take place where it is cheapest. During Prohibition, it was cheapest to produce alcohol in the United States because significant productive capital already existed, and alcohol was easy to make at home and

¹²⁶ See Paul & Wilhite, *supra* note 28, at 106–10 (discussing this sort of phenomena in general terms).

¹²⁷ See *supra* Part I.B (discussing black market economics).

¹²⁸ See MACCOUN & REUTER, *supra* note 46, at 161–63 (describing circumstances of repeal).

¹²⁹ *Id.* at 160–61.

¹³⁰ Sinclair's conclusion is that repeal actually went *too far* and more federal alcohol regulation should have been retained. See SINCLAIR, *supra* note 5, at 386–99, 414–16.

expensive to warehouse and transport. Although a significant amount of marijuana is produced in the United States,¹³¹ most illegal drugs are produced abroad.¹³²

It is cheapest to produce drugs for the American market abroad for a number of reasons. First, drug bans went into effect before substantial demand existed, strangling domestic capital investment in the cradle. Second, some drug precursors are highly adapted to exotic ecosystems. Finally, globalization has made transportation and smuggling more affordable by reducing the price of precursor commodities;¹³³ improving transportation and communications networks; increasing the overall volume of world trade; streamlining customs procedures; and facilitating the ease of money laundering.

A. Domestic Production of Illegal Alcohol During Prohibition

Although “Rum Row,”¹³⁴ the line of ships freighted with foreign liquor sitting in constant vigil just outside U.S. territorial waters from 1920 until 1933, is an enduring image of Prohibition, and the notion of a “bootlegger” conjures up images of surreptitious nighttime jaunts over the long, unguarded Canadian border by horseback or rowboat, the fact is that during Prohibition imports comprised much less of the illicit alcohol supply than domestic distilling,¹³⁵ for several reasons.

1. Preexisting Capital

When alcohol was prohibited, a large system of capital capable of meeting U.S. demand was already in place. Not surprisingly, the legal decree of 1919 did not cause all of this land, machinery, labor, and managerial expertise magically to vanish. However, this network of capital required certain modifications before the capital could be used in illegal production.

For example, to mitigate losses caused by Prohibition, owners of beer factories reconfigured them to produce nonalcoholic “near

¹³¹ See generally NAT’L DRUG INTELLIGENCE CTR., U.S. DEP’T OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT 2007 10–13 (2006), available at <http://www.justice.gov/ndic/pubs21/21137/21137p.pdf> (giving marijuana production figures).

¹³² See generally U.N. WORLD DRUG REPORT 2009, *supra* note 16, at 187–217 (providing data on volume of drugs produced by country).

¹³³ For the purposes of this Note, I define the term “precursor commodity” as a commodity that is consumed in the production of a consumer good.

¹³⁴ See Haller, *supra* note 1, at 149–52 (describing operation of “Rum Row”).

¹³⁵ WICKERSHAM REPORT, *supra* note 64, at 29. It is interesting to note, however, that during Prohibition, Mexico also produced illegal liquor which it exported north to the United States. Gabriela Recio traces the roots of the contemporary drug trade near the U.S.-Mexico border to this period. Gabriela Recio, *Drugs and Alcohol: US Prohibition and the Origins of the Drug Trade in Mexico, 1910–1930*, 34 J. LATIN AMER. STUD. 21 (2002).

beer.”¹³⁶ But fully alcoholic beer, the primary input of near beer, was routinely siphoned off and sold on the black market,¹³⁷ and the nonalcoholic final product was often shipped together with the just-removed alcohol to retailers who simply recombined the two liquids.¹³⁸ Meanwhile, the output of industrial alcohol factories skyrocketed, as much industrial alcohol could be consumed directly, and even denatured alcohol could be transformed into beverage alcohol by amateur chemists.¹³⁹ In this and similar ways, factories built before Prohibition continued producing beverage alcohol during the ban, but at lower output and higher costs—primarily the cost of subterfuge.

2. *Production of Alcohol at Home*

If consumption decreased only slightly during Prohibition, what filled the gap left by reduced industrial output? Mostly, it was filled by Americans making alcohol themselves.¹⁴⁰ Mankind has been making alcohol for tens of thousands of years, and few things are simpler to make.¹⁴¹ Even as wineries and breweries were being shuttered, production of beer and wine inputs, such as corn mash and grapes, was increasing exponentially as consumers assumed control over the final stages of production.¹⁴²

3. *Warehousing, Transportation and Distribution Costs*

Alcoholic beverages are relatively bulky products.¹⁴³ During Prohibition, large inventories destined for urban retail had to be cobbled together from divergent sources, a process which necessitated major investment in truck transport and warehousing. Truck transport and warehouse storage provided easy targets for criminals, which meant the business was beset with internecine holdups.¹⁴⁴ Recall that

¹³⁶ See WICKERSHAM REPORT, *supra* note 64, at 30–32 (describing production of “cereal beverage of less than one-half of one per cent of alcohol”).

¹³⁷ *Id.* at 31.

¹³⁸ *Id.*

¹³⁹ *Id.* at 27.

¹⁴⁰ While the scale of independent domestic production is impossible to estimate with precision, the number of stills seized rose from approximately 32,000 in 1920 to almost 261,000 in 1928. *Id.* at 123 (statement of William S. Kenyon, Member, Wickersham Comm’n).

¹⁴¹ WICKERSHAM REPORT, *supra* note 64, at 33 (“Few things are more easily made than alcohol.”).

¹⁴² *Id.* at 32–34, 35–36 (describing practices of home brewing, wine-making, and distilling, and noting increased production of malt syrup, wort, corn sugar, and grapes).

¹⁴³ Demleitner, *supra* note 36, at 635.

¹⁴⁴ See WICKERSHAM REPORT, *supra* note 64, at 38–39 (noting prevalence of “hi-jacking and banditry”).

Bugs Moran's crew, killed in the Saint Valentine's Day massacre, were lured into the parking garage by the promise of a shipment hijacked from other bootleggers.¹⁴⁵ Routine hijackings of this sort made transportation more expensive.¹⁴⁶

Not only was alcohol slow to transport and expensive to warehouse, it was typically sold from fixed locations: the so-called speakeasies.¹⁴⁷ Because alcohol is a social drug, and because before Prohibition it had been chiefly dispensed from saloons, consumers habitually gravitated to vendors occupying a physical store, the location of which could be passed on to discerning acquaintances.¹⁴⁸ But disclosing the location of these saloons entailed great risk, as the investment sunk in a given speakeasy could easily be lost, since a favorite technique of gangster competition was tipping off the police to rival operations.¹⁴⁹

Cut off from the civil courts, outlaw businessmen responded to these high costs of distribution, warehousing, and retail sales by creating vertically integrated fiefdoms, and the primary methods of achieving such geographic monopolies were violence¹⁵⁰ and corruption.¹⁵¹ The riskiness of truck transport created a large demand for armed convoy escorts, a mode of employment naturally suited to off-duty police officers, who could supplement their income without getting their hands dirty.¹⁵² The best way to guard a warehouse was to hire a squad of cops. Conversely, the best way to capture market share was to pay the police to shut down a rival's operations.¹⁵³ And few customers were as loyal to the local speakeasy as an off-duty officer, who earned free drinks by the implicit, double-edged promise that he would both refrain from reporting the lawbreaking and keep away rival thugs.¹⁵⁴

¹⁴⁵ See *supra* notes 1–8 and accompanying text (discussing Saint Valentine's Day Massacre).

¹⁴⁶ See Haller, *supra* note 1, at 149–52 (describing practice of hijacking and its associated costs and dangers during Prohibition).

¹⁴⁷ WICKERSHAM REPORT, *supra* note 64, at 37.

¹⁴⁸ *Id.*

¹⁴⁹ Haller, *supra* note 1, at 153.

¹⁵⁰ *Id.* at 152–54 (describing widespread violence of Prohibition criminals); Paul & Wilhite, *supra* note 28, at 106–09 (same).

¹⁵¹ See MACCOUN & REUTER, *supra* note 46, at 164 (noting severity of corruption during Prohibition).

¹⁵² Haller, *supra* note 1, at 152–54 (describing police involvement with illegal groups).

¹⁵³ See SINCLAIR, *supra* note 5, at 232–33 (describing bribery costs of operating speakeasies).

¹⁵⁴ See *id.* (detailing several ways in which police officers collected protection money from speakeasy owners).

4. *Visibility of Prohibition Crime*

The net effect of Prohibition, then, was not to eliminate alcohol-producing capital, but merely to rearrange it and freight manufacture with a *de facto* tax. The resulting black market for alcohol, unlike the current market for illegal drugs, was characterized by widespread and substantial domestic production, visible and risky transport, expensive and vulnerable warehousing, and fixed retail locations—all of which necessitated geographic monopolies secured by violence and police corruption.¹⁵⁵ This rearranged industrial base became the locus of criminality, around which all the inevitable consequences of black markets concentrated.¹⁵⁶

The relative openness of such criminality had a demoralizing effect on the country, leading first to systematic examination of policy, such as the Wickersham Commission,¹⁵⁷ then to the rise of influential and organized anti-Prohibition groups, and finally to the national mobilization required for repeal of the Eighteenth Amendment.¹⁵⁸

Today there is no such mobilization against the War on Drugs, despite its violence on a scale that makes Depression-era violence seem almost quaint.¹⁵⁹ The lack of mobilization can be attributed to the fact that illegal drugs are mostly produced outside the United States, lowering the visibility of corruption and violence to voters who support the War on Drugs.

B. *International Production of Illegal Drugs*

At present, due to the lack of American drug-producing capital predating the War on Drugs, the botanical particularities of drug precursors, and the rapid global expansion of neoliberal economic policies that make drug trafficking over long distances cheaper, illicit drugs are mostly produced outside the United States.¹⁶⁰

¹⁵⁵ Haller, *supra* note 1, at 152–53.

¹⁵⁶ See Demleitner, *supra* note 36, at 636–39 (discussing involvement of organized crime in illicit markets).

¹⁵⁷ See *supra* note 75 and accompanying text.

¹⁵⁸ *Id.*

¹⁵⁹ See *supra* Part II (describing widespread violence perpetrated by drug cartels in Mexico, and noting that American voters decriminalized alcohol in response to less extreme violence associated with Prohibition).

¹⁶⁰ See generally U.N. Gen. Assembly, Special Session on the World Drug Problem, *Key Statistics: Illicit Drug Production, Trafficking, and Consumption* (June 8–10, 1998), <http://www.un.org/ga/20special/presskit/pubinfo/info2.htm> [hereinafter U.N. Statistics].

1. Lack of Preexisting Demand or Capital

To begin with, when marijuana, cocaine, and heroin were made illegal there was little demand for any of them,¹⁶¹ so there was not much productive capital to eliminate. Unlike the Eighteenth Amendment and the Volstead Act, the bans on these drugs were not in response to a perceived problem of widespread use among the general population; rather, they were directed most particularly at blacks and immigrants.¹⁶²

Myths about cocaine use by blacks¹⁶³—particularly that it rendered them assaultive, insubordinate to white authority, and, in the intimations of early antidrug propaganda, a threat to white female chastity¹⁶⁴—played a large role in the demedicalization and subsequent criminalization of the drug,¹⁶⁵ though in fact the drug has no chemical properties tending to make the user violent.¹⁶⁶ Chinese immigrants in the American West coped with lives of abject toil by smoking opium rather than by getting drunk off whiskey like other laborers;¹⁶⁷ naturally, nativist narratives played up the threat posed by the drug.¹⁶⁸ The congressmen who outlawed marijuana literally did

¹⁶¹ Demleitner, *supra* note 36, at 636 (noting only “recent popularity of drugs and their small-scale consumption” at time of Prohibition); *see also* Luna, *supra* note 23, at 486–95 (surveying pre–War on Drugs use).

¹⁶² “Although distinct in locale and incentives, racist drug propaganda shared two common traits. First, each narcotic was invidiously associated with a particular race. African-Americans were ‘cocaine-crazed Negroes,’ Asians were ‘opium-addled Coolies,’ and, in the 1930’s [sic], Hispanics were ‘reefer-mad Mexicans.’” Luna, *supra* note 23, at 493.

¹⁶³ “[Blacks on cocaine] have an exaggerated ego. They imagine they can lift this building, if they want to, or can do anything they want to. They have no regard for right or wrong.” *Importation and Use of Opium: Hearings on H.R. 25240, H.R. 25241, H.R. 25242, and H.R. 28971 Before the H. Comm. on Ways and Means*, 61st Cong. 12 (1911) (statement of Dr. Christopher Koch). Among many delusional beliefs that early Prohibitionists had about blacks and cocaine use was that it would render them impervious to .32 caliber bullets. This reportedly caused a switch to the .38 caliber service pistol in the American South. DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTICS CONTROL* 6–7 (expanded ed., Oxford Univ. Press 1987) (1937).

¹⁶⁴ Stephen R. Kandall & Wendy Chavkin, *Illicit Drugs in America: History, Impact on Women and Infants, and Treatment Strategies for Women*, 43 *HASTINGS L.J.* 615, 619 (1992).

¹⁶⁵ Before 1914, cocaine was widely used to treat depression, hayfever, sinus problems, and headaches. *Id.* at 619.

¹⁶⁶ *See* Duke, *supra* note 84, at 575 (“[M]ost illegal recreational drugs have no pharmacological properties that produce violence or other criminal behavior. . . . Cocaine—or cocaine withdrawal—occasionally triggers violence but usually does not.”).

¹⁶⁷ *See, e.g.*, DAVID T. COURTWRIGHT, *DARK PARADISE: OPIATE ADDICTION IN AMERICA BEFORE 1940* 63–64, 67–68 (1982) (describing Chinese opium smokers in United States).

¹⁶⁸ *See, e.g.*, John Kaplan, *A Primer on Heroin*, 27 *STAN. L. REV.* 801, 804 (1975) (noting view that “opium provided the Chinese with their energy and ability to tolerate hardship”).

not know what it was: No medical testimony was presented.¹⁶⁹ Because cannabis was used almost exclusively by Mexican immigrants in the southwest,¹⁷⁰ criminalization appeared a valuable social tool for controlling a burgeoning population, as it gave law enforcement a facially nonarbitrary reason to stop, detain, search, arrest, and imprison Mexican laborers, virtually at will.¹⁷¹

But the illegality of these drugs did not stop them from becoming popular among the middle classes. Indeed, to 1960s counterculturists, that very illegality was part of the attraction, illustrating another counterproductive tendency of prohibition.¹⁷² By the 1970s, demand for opium, cannabis, and cocaine was substantial.¹⁷³

When alcohol was banned, the *de facto* tax of illegality was insufficient to drive production abroad wherever sunken investment outweighed the cost of subterfuge.¹⁷⁴ But entrants to the rapidly expanding drug market in the second half of the twentieth century faced a different cost structure. For them, investment in productive capacity anywhere in the United States necessarily entailed a high risk of detection, seizure, fines, and imprisonment. At the outset, then, not only did suppliers face the usual pressure to locate production where conventional inputs—e.g., land and labor—were cheapest, they also had an incentive to invest in countries that had not banned the sub-

¹⁶⁹ Ostrowski, *supra* note 23, at 614 (“[W]hen marijuana was first banned . . . , no medical testimony was presented to Congress.”). But the Montana legislature learned of the dangers of marijuana from Dr. Fred Fulsher of Mineral County: “‘When some beet field peon takes a few rares of this stuff . . . [h]e thinks he has just been elected president of Mexico so he starts out to execute all his political enemies.’” Bonnie & Whitebread, *supra* note 36, at 1014 (quoting THE MONTANA STANDARD, Jan. 27, 1929, at 3, col. 2).

¹⁷⁰ Bonnie & Whitebread, *supra* note 36, at 1012, 1012–16 (“[U]se of marijuana west of the Mississippi was limited primarily to the Mexican segment of the population.”).

¹⁷¹ See generally *id.* at Part II.A.1 (describing nature of original marijuana statutes in American West). This technique of controlling apparently dangerous populations by a proxy substance has a long pedigree, dating back to nineteenth-century England where gin, the liquor associated with the working class, was made illegal, while whiskey, an upper-class beverage, was not. Noam Chomsky, *Drug Control as Social Policy*, in PRISON NATION: THE WAREHOUSING OF AMERICA’S POOR 57 (Tara Herivel & Paul Wright, eds., 2003).

¹⁷² See EDWARD M. BRECHER ET AL., LICIT AND ILLICIT DRUGS: THE CONSUMERS UNION REPORT ON NARCOTICS, STIMULANTS, DEPRESSANTS, INHALANTS, HALLUCINOGENS, AND MARIJUANA—INCLUDING CAFFEINE, NICOTINE, AND ALCOHOL 368 (1972) (discussing how publicity campaigns against LSD and glue sniffing had effect of popularizing both).

¹⁷³ See OFFICE OF NAT’L DRUG CONTROL POLICY, DRUG USE TRENDS 1–2 (2002), <http://www.whitehousedrugpolicy.gov/publications/factsht/druguse/drugusetrends.pdf> (listing percentage of persons reporting illicit drug use from 1979 to 2001).

¹⁷⁴ See *supra* Part III.A (discussing reasons for domestic, rather than foreign, production of alcohol during Prohibition).

stance to be produced, or where law enforcement was lax or the central state weak.

2. *Botany and Terrain*

Some of the plants from which drugs are made are highly particular to certain regions. Varietals of the coca plant containing the cocaine alkaloid are essentially confined to Bolivia, Colombia, and Peru.¹⁷⁵ Cocaine, once in demand, was bound to be produced there—and other drugs as well—due to economies of scope.¹⁷⁶

Sometimes a climate amenable to indigenous narcotic botanicals combines with a forbidding terrain and social factors of the kind already discussed (a weak state, lax enforcement, cheap labor) to give a country a near monopoly over a specific drug crop. The Andean-Amazonian region, for example, has a near monopoly on coca,¹⁷⁷ not only because of its traditional use there¹⁷⁸ and the coca plant's poor survival elsewhere, but also because of the protection provided by high mountain ranges, dense jungles, and low population density. In the United States, California and federal police fight a losing battle to eradicate cannabis plots in a handful of national forests.¹⁷⁹ Consider, then, the impossibility for Latin American security forces, who have their own policing priorities, of eradicating millions of acres of plants hidden high in the Andes or deep in the Amazon rain forest amongst recalcitrant *campesinos* to whom the opportunity cost of growing such crops approaches zero, the alternative being sustenance farming.¹⁸⁰ To take another example, poppy grows well throughout much of Europe, South America, and Asia, yet Afghanistan produces approximately 94 percent of the global heroin supply.¹⁸¹ Afghanistan's arid climate and long history of poppy cultivation explain less of its dominance than

¹⁷⁵ DOMINIC STREATFEILD, *COCAINE: AN UNAUTHORIZED BIOGRAPHY* 2–3 (2001) (describing growth patterns of cocaine-rich varieties of coca plants).

¹⁷⁶ “Economies of scope” is a technical way of saying that if a person is already making product *X* it may be cheaper for him or her than for other people to make products *Y*, *Z*, etc. For a precise definition, see John C. Panzar & Robert D. Willig, *Economies of Scope*, 71 *AM. ECON. R.* 268 (1981).

¹⁷⁷ STREATFEILD, *supra* note 175, at 2–3.

¹⁷⁸ *Id.* at 2 (“[Coca] has been harvested by local tribes for thousands of years.”).

¹⁷⁹ See, e.g., Solomon Moore, *California: Marijuana Growers Linked to Wildfires*, N.Y. TIMES, Aug. 18, 2009, at A12, available at http://www.nytimes.com/2009/08/18/us/18brfs-MARIJUANAGRO_BRF.html (noting that Mexican drug cartels are known to plant marijuana crops in protected forests).

¹⁸⁰ Andreas, *supra* note 30, at 78 (“The incentives [for farmers] are not difficult to comprehend: the coca plant grows on poor soil and yields up to four or five crops each year, requires little infrastructure and start-up costs, and offers a higher return than available alternatives.”).

¹⁸¹ NAT'L DRUG THREAT ASSESSMENT 2009, *supra* note 16, at 30 (citing 2006 potential worldwide heroin production figures). Note, however, that this figure is global: Seventy-six

the country's lawlessness, tribal balkanization, lack of available economic alternatives for laborers, and a rugged terrain that is arguably impossible to police.¹⁸²

3. *Globalization*

The comparative advantage enjoyed by overseas drug producers outlined above is lessened, however, by the necessity of international transportation. Drugs produced in Latin America, or elsewhere, have to be shipped to the United States in order to be sold. But because of the rapid growth of international transportation and communications networks in the twentieth and twenty-first centuries, globalization, and the implementation of international free trade accords like the WTO, GATT, and NAFTA, these exportation costs are declining rapidly.

International liberalization—opening markets and freeing the movement of goods and services—is at odds with efforts to control the international drug trade.¹⁸³ First, expansion of neoliberal free trade policies tends to reduce the price of precursor commodities, such as land, labor, and chemicals, used to make saleable narcotics and makes legally controlled chemical precursors more difficult to restrict.¹⁸⁴ A global reduction in the price commanded by more mundane agricultural commodities also makes drug crops more attractive to peasant farmers.¹⁸⁵ Second, international economic liberalization lowers the price of transportation, improves international infrastructure, and enhances distribution networks, all of which make transportation of drugs across long distances more affordable.¹⁸⁶ Third, by increasing the overall volume in world trade, globalization gives smugglers more hiding places for drugs.¹⁸⁷ Fourth, streamlined customs procedures lower the probability of seizures.¹⁸⁸ Finally, financial deregulation, the

percent of heroin seized by police in the United States comes from South America. *Id.* at 32.

¹⁸² See generally Central Intelligence Agency, *The World Factbook: Afghanistan*, <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html> (discussing features of Afghanistan).

¹⁸³ Kal Raustiala, *Law, Liberalization & International Narcotics Trafficking*, 32 N.Y.U. J. INT'L L. & POL. 89, 91 (1999) (“[T]he very thrust of international liberalization—to open markets and free the movement of goods and services—runs counter to the struggle to control the international drug trade.”).

¹⁸⁴ *Id.* at 116–17.

¹⁸⁵ Andreas, *supra* note 30, at 84.

¹⁸⁶ Raustiala, *supra* note 183, at 117–18.

¹⁸⁷ *Id.* at 118–20.

¹⁸⁸ *Id.* at 119–21.

proliferation of offshore banking, and increasingly rapid capital flows across borders make money laundering easier.¹⁸⁹

For all these reasons, globalized criminal networks concentrate drug production in about a dozen countries—including Mexico, Colombia, Bolivia, Peru, Afghanistan, Pakistan, Kazakhstan, Myanmar, Thailand, Morocco, Jamaica, and Laos¹⁹⁰—countries that are generally large, fertile, mountainous or jungly, and underdeveloped, with a weak or war-hobbled central state.¹⁹¹ These countries supply the developed world with drugs.¹⁹² Currently, Mexico has a lock on the U.S. drug market, but, in the past, Colombia has held that position (making use of maritime rather than overland importation channels¹⁹³), and in the future it could be any one of them. As global trade grows more laissez-faire, competition increases: In an industry that operates outside law, this translates directly to more violence.¹⁹⁴

Three decades of campaigning by the United States and the security forces of client regimes have done little to dislodge this arrangement,¹⁹⁵ and there is little reason to expect change soon. In the plain words of a senior lieutenant to Mexico's most notorious drug lord:

One day I will decide to turn myself in to the government so they can shoot me. . . . They will shoot me and euphoria will break out. But at the end of days we'll all know that nothing changed For all the bosses jailed, dead or extradited their replacements are already there.¹⁹⁶

¹⁸⁹ *Id.* at 122–23; *cf.* Andreas, *supra* note 30, at 83 (discussing Bolivian use of “short-term certificates of deposit” and foreign exchange auctions in order to swell national currency reserves, reduce debt, and curb inflation—all effects of compliance with neoliberal reform).

¹⁹⁰ U.N. Statistics, *supra* note 160.

¹⁹¹ See Central Intelligence Agency World Factbook, <https://www.cia.gov/library/publications/the-world-factbook>.

¹⁹² U.N. Statistics, *supra* note 160.

¹⁹³ RON CHEPESIUK, *THE WAR ON DRUGS: AN INTERNATIONAL ENCYCLOPEDIA* xxvi (1999).

¹⁹⁴ Alex Y. Seitza, *The Role of Market Forces in Transnational Violence*, 60 ALB. L. REV. 635, 644–47 (1996); Paul & Wilhite, *supra* note 28, at 111–12 & fig. 3.

¹⁹⁵ Compare Bruce Michael Bagley, *The New Hundred Years War? US National Security and the War on Drugs in Latin America*, J. INTERAMERICAN STUD. & WORLD AFF. 161 (1998) (discussing failure of War on Drugs at end of Reagan administration), with Bruce L. Benson, *Escalating the War on Drugs: Causes and Unintended Consequences*, 20 STAN. L. & POL'Y REV. 293, 293 (2009) (discussing failure of War on Drugs at end of second Bush administration).

¹⁹⁶ Robert Campbell, *Mexican Cartels Cannot Be Defeated, Drug Lord Says*, REUTERS, Apr. 4, 2010, www.reuters.com/article/idUSTRE6331DZ20100404 (quoting Julio Scherer Garcia, *Proceso en la guarida de “El Mayo” Zambada*, PROCESO (Apr. 3, 2010), available at <http://proceso.com.mx/tv/modHome/detalleExclusiva/78067>).

C. *What is the Alternative?*

The externalization of War on Drugs costs described above would be a boon to the United States if the country received the benefits of a moderate reduction in drug consumption without paying the concomitant price in blood, unless it were conceded that the value of a human life does not depend on nationality.¹⁹⁷ Even though governments clearly owe the greatest duty of consideration to their own citizens, it is unreasonable, not to mention uncompassionate, in a globally interconnected and interdependent world to knowingly sacrifice tens of thousands of foreign lives for a marginal reduction in the amount of recreational drugs consumed by Americans.¹⁹⁸ Taking into account the suffering borne by noncitizens, it is necessary to search for some other method of regulating drugs: a regulatory framework the costs of which are as moderate as its benefits.

Clearly the best solution would be for Americans to simply stop using drugs altogether. But drug users' refusal to do so even in the face of stark punishment suggests this is unlikely ever to happen. Fortunately, there are many noncriminal legal tools for controlling dangerous goods. The most promising alternative regulatory framework would involve medicalization, strict regulation, and steep taxation, ideas that have all been explored elsewhere.¹⁹⁹ Indeed, steps have recently been taken towards a more workable national drug policy. Some states have moved to join California and Oregon in effectively

¹⁹⁷ The contrary view is humorously illustrated by Jon Stewart's "Body Count Conversion Rate," according to which "2,000 Massacred Congolese = 500 Drowned Bangladeshis = 45 Fire-bombed Iraqis = 12 Car-bombed Europeans = 1 Snipered American." JON STEWART, *AMERICA (THE BOOK): A CITIZEN'S GUIDE TO DEMOCRACY IN ACTION* 155 (2004); cf. Thomas Nagel, *The Problem of Global Justice*, 33 *PHIL. & PUB. AFF.* 113, 119–22 (2005) (comparing the "cosmopolitan view" of global socioeconomic justice with the "political conception").

¹⁹⁸ See PETER SINGER, *PRACTICAL ETHICS* 229 (1993) ("If it is in our power to prevent something very bad from happening, without thereby sacrificing anything of comparable moral significance, we ought to do it.").

¹⁹⁹ See Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 *STAN. L. & POL'Y REV.* 417, 450–60 (2009) (discussing problems with current drug courts and urging less coercive alternative); Gary S. Becker, Kevin M. Murphy & Michael Grossman, *The Economic Theory of Illegal Goods: The Case of Drugs* (Nat'l Bureau of Econ. Research, Working Paper No. 10976, 2004) (arguing taxation could reduce consumption more than prohibition). See generally Jonas, *supra* note 36, at 772 (discussing harm-reduction approaches, including needle-distribution programs, decriminalization, and synthetic prescriptions, to control and limit negative consequences of drug use); Ethan A. Nadelmann, *Common Sense Drug Policy*, 77 *FOREIGN AFF.* 111 (1998) (providing background on factors which have determined legal status of recreational drugs); Harold Pollack, *Moral, Prudential, and Political Arguments About Harm Reduction*, 35 *CONTEMP. DRUG PROBS.* 211 (2008) (discussing moral and political debate that may prevent adoption of beneficial social harm reduction programs, with focus on needle distribution programs).

decriminalizing marijuana use,²⁰⁰ and the Obama administration has directed the Justice Department not to override local policies of toleration.²⁰¹ But decriminalization of *supply*, not possession, is what is needed to stop black market violence and most other consequences of the illegal drug trade.²⁰² So long as selling drugs is illegal, criminals will maintain their monopoly, and the problems discussed above flow from that fact and no other.²⁰³

To save Mexico from collapsing under the weight of our demand for drugs, and to staunch our own significant losses,²⁰⁴ something other than the criminal sanction should be used to control the trade in drugs. This would end the War on Drugs and save as much as one hundred billion dollars annually.²⁰⁵ It might even accomplish the goal that criminal law has failed to accomplish time and time again: substantially reducing consumption. Given that one poll reported that 99% of Americans say they would never try hard drugs, even if legal,²⁰⁶ and given the declining rate of drug use in countries where drugs are decriminalized,²⁰⁷ there is very good reason to think, optimistically but realistically, that with deglamorization, serious education, tolerant rehabilitative care, and all the other sane policies that could affordably be implemented with only a fraction of the money

²⁰⁰ Cynthia S. Duncan, Note, *The Need for Change: An Economic Analysis of Marijuana Policy*, 41 CONN. L. REV. 1701, 1703–04 (2009).

²⁰¹ See David Johnston & Neil A. Lewis, *Ending Raids of Dispensers of Marijuana for Patients*, N.Y. TIMES, Mar. 19, 2009, at A20, available at <http://www.nytimes.com/2009/03/19/us/19holder.html?r=1> (explaining Attorney General Holder’s statement that Justice Department would not focus on medical marijuana dispensaries that comply with state law).

²⁰² Duncan, *supra* note 200, at 1728 (arguing decriminalization shares many social consequences with total legalization but does nothing to dismantle trafficking apparatuses).

²⁰³ *Id.*

²⁰⁴ See *supra* Part I.D (arguing that War on Drugs “is expensive, even when the measurement is confined to U.S. borders”).

²⁰⁵ Luna, *supra* note 23, at 524–25.

²⁰⁶ Zogby America Poll of Likely Voters 10/24/07–10/27/07, question 205, available at http://stopthedrugwar.org/files/zogby_legalization_question.pdf.

²⁰⁷ After Amsterdam decriminalized drugs, the number of drug addicts stabilized, soft-drug users declined to just two percent of the population, the crack market disappeared, and drug-related deaths declined to the lowest level in Europe. Henk Jan van Vliet, *The Uneasy Decriminalization: A Perspective on Dutch Drug Policy*, 18 HOFSTRA L. REV. 717, 728 & n.51, 729, 737 (1990). Alaska, the first state to decriminalize marijuana, enjoys one of the lowest rates of use in the country. Ostrowski, *supra* note 23, at 643–44. Portugal recently decriminalized drug possession and use; overall use is declining, especially among young people. GLENN GREENWALD, DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES 11, 14–15 (2009). An interesting implication of these experiences seems to be that decriminalization is especially effective in reducing youth consumption, perhaps due to the glamorization effect. See Miron & Zwiebel, *supra* note 22, at 176–77 (noting that, due to glamorization of drugs, “respect for the law” doesn’t reduce drug use as much as might be expected).

currently going to counterproductive interdiction, not to mention the funds that would be raised by taxes on legal sales,²⁰⁸ consumption of drugs would decrease. This is not a certainty, but it is clear that just as the repeal of the Eighteenth Amendment did not cause the surge in drinking predicted by prohibitionists,²⁰⁹ decriminalization of drugs would not result in a catastrophic spike in drug use.

What *is* certain is that were drugs legal, Mexican cartels and their ilk would be bankrupted overnight. No one would buy a single gram of roughly processed, contaminated drugs off the street any sooner than they would buy wood alcohol or moonshine over going to the liquor store. The black market would cease to exist. With one stroke, the war in Mexico would be ended. There would be nothing to fight over.

CONCLUSION: WARRANTED PESSIMISM

Unfortunately, nothing is going to change, at least not anytime soon. For cable news pundits and other public mountebanks it is too easy to shout down reason, too advantageous to exploit prejudice, and too effective to demonize political opponents with the kneejerk epithet “pro-drugs.”²¹⁰ These opportunistic moralizers are blame-worthy for the death and mayhem outside the United States that will no doubt continue for at least the next decade, and probably more.

In April 2010, the Mexican government announced an official death toll of more than 22,000, even higher than previous estimates, and all indicia point toward further escalation in the violence.²¹¹ Three things might happen at this point: (1) Mexico might fail as a state; (2) the Calderon administration might prevail over the cartels by sheer military force;²¹² or (3) the Calderon administration might abandon its efforts to stop the drug cartels, or get replaced by an administration more amenable to détente. Of the three possibilities, capitulation is

²⁰⁸ See Becker, Murphy & Grossman, *supra* note 199 (discussing optimal tax on drugs).

²⁰⁹ SINCLAIR, *supra* note 5, at 398.

²¹⁰ Sanho Tree, Fellow, Drug Policy Project, Institute for Policy Studies, The Forum at N.Y.U. School of Law: Legalizing Drugs: What Would a Regulatory Framework Look Like? (Feb. 3, 2010) (discussing politicians’ ample incentives in mass media era to hyperbolize drug issues).

²¹¹ Córdoba, *supra* note 34.

²¹² Felipe Calderón is the current president of Mexico. He came to power in a very close 2006 election and touched off a wave of violence by deploying the federal army to combat drug traffickers nationwide. See Times Topics, Felipe Calderón, http://topics.nytimes.com/top/reference/timestopics/people/c/felipe_calderon/index.html (last visited Aug. 12, 2010) (collecting articles discussing Calderón).

the most likely.²¹³ Only military victory is a positive outcome under Washington's current paradigm. But that was the outcome in Colombia, Mexico's predecessor as global kingpin. Colombia's "victory" was costly, partial, and ugly.²¹⁴ Yet nothing changed for the United States because drug production simply moved to a more convenient location, a bit to the north. Even if Mexico wins its war, the same will happen again. So it goes with the War on Drugs.

²¹³ This option is probably the most sensible from a Mexican perspective. See Ethan Nadelmann, *Addicted to Failure*, 137 FOREIGN POL'Y 94 (2003) (arguing Latin American countries should break with United States's prohibitionist drug policies).

²¹⁴ See Elizabeth F. Schwartz, *Getting Away with Murder: Social Cleansing in Colombia and the Role of the United States*, 27 U. MIAMI INTER-AM. L. REV. 381, 382-94 (1996) (discussing disturbing social consequences of U.S. military aid to Colombia); Joanne Sum-Ping, *A New Approach to Extraterritorial Application of Environmental Statutes?: Uncovering the Effects of Plan Colombia*, 31 COLUM. J. ENVTL. L. 139 (2006) (discussing environmental consequences of such aid). See generally ROBERT W. DREXLER, *COLOMBIA AND THE UNITED STATES: NARCOTICS TRAFFIC AND A FAILED FOREIGN POLICY* 159-69 (1997) (chronicling violence in Colombia).