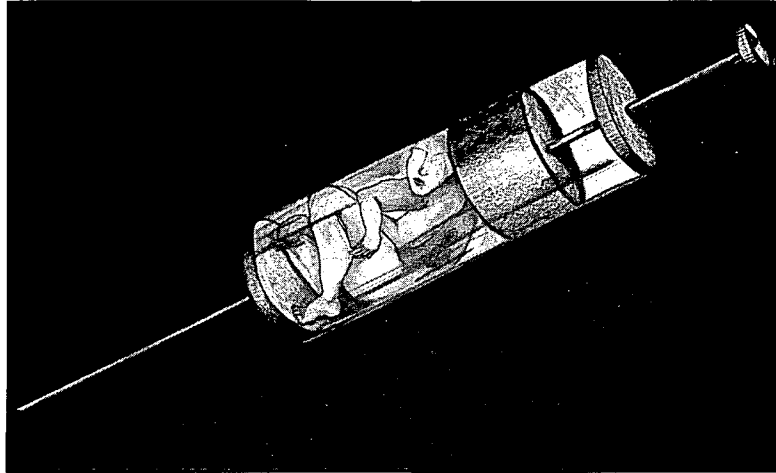


Fighting Drugs, Taking Liberties

The Effects of the Drug War

by Philip Jenkins



Anna Mycek-Wodecki

In the early 1980's, the Reagan Justice Department announced a far-reaching "war" to free the United States from illicit drug use. There was skepticism at the time that government actions could cause such a fundamental change in entrenched public attitudes and behaviors, and there were different views about the means by which such a war could be fought. Should it be aimed primarily against producers or consumers, major dealers or street-level entrepreneurs? These doubts notwithstanding, there were few initially who dared to oppose the notion of a war as such, few overt "pacifists" who felt that in drug policy as in international affairs, there is no such thing as a good war or a bad peace.

A decade later, we can begin to assess the consequences of the drug war, and victory seems as far off as ever. Some slowing of the cocaine supply is indicated by increased seizures by law enforcement, a rise in street prices, and a decline in emergency room admissions. On the other hand, surveys suggest that regular hard drug use continues to grow; while the official focus on cocaine may actually have benefited the other illicit entrepreneurs who supply less publicized substances, above all heroin, methamphetamine, and the "designer" drugs. It is these sectors of the black economy that now seem poised for a renewed conquest of the market.

Even if the war had resulted in absolute and unconditional victory, its far-reaching consequences would still be deeply disturbing for observers of all political stripes. A liberal critique is certainly possible here. Personal liberties have eroded at a rate unparalleled since the McCarthy era, with a corollary growth in the powers of police and law enforcement agencies. But con-

servatives should be equally alarmed. Many who might welcome a reassertion of traditional authority and moral standards should be appalled by the unconstitutional means by which this goal is being achieved, the undermining of familiar legal principles, and the dramatic expansion of federal power in law enforcement. Some of the nation's most conservative judges have declared themselves horrified at the savage and disproportionate punishments they have been required to impose on narcotics offenders by mandatory sentencing laws.

Beyond the purely legal arena, the war on "substance abuse" has employed notions of reeducation and therapeutic power that should be anathema to libertarians, conservative or otherwise. Substance abuse issues have permitted the subversion of older notions of personal liberty in areas as far afield as religious self-expression and reproductive freedom. That the brunt of the drug war is borne by the poor and minorities is bad enough; but it is by no means the only reason to call for an immediate armistice. The drug war subverts law, threatens civic order, and tramples justice.

The primary beneficiaries of the drug war have been police agencies and prosecutors, especially at the federal level. They have benefited in resources and manpower: federal spending on all forms of drug interdiction and enforcement reached ten billion dollars by 1990, a fivefold increase over 1984. Police have also acquired an impressive arsenal of new legislative devices. Historically, these developments are by no means surprising. The history of policing in the United States is filled with crises over moral enforcement, which frequently reflect more or less disguised social or ethnic conflicts. Temperance, Sabbath-breaking, blue laws, juvenile delinquency—all played a crucial part in the difficult task of persuading a truculent republic that professional police were necessary and were not incompatible

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with a democratic society. In the words of sociologist Howard Becker, "The final outcome of a moral crusade is a police force."

This is especially true of federal law enforcement, which is largely the creation of successive crusades and moral panics over the last century. In 1900, the Secret Service was virtually the only national enforcement agency, and the "Bureau of Investigation" created in 1908 remained a cipher for many years. Even a society that had reluctantly accepted the idea of policing still felt that national agencies would inevitably lead to a form of police state. Matters were changed decisively by a series of morality campaigns, and the bureaucracies they engendered. In 1910, the Mann Act was directed against a chimerical wave of white slavery, which was to be countered by the activities of federal laws and officials. This would also be the pattern of antidrug legislation in 1914 (the Harrison Act) and the 1919 attempt to prohibit alcoholic drink (the Volstead Act). In the 1930's, the FBI had its powers expanded by federal laws because of an imagined wave of kidnapping; and the minuscule Federal Bureau of Narcotics began its war against the alleged horrors of marijuana. Spy and subversion panics in subsequent decades permitted the creation of political police forces at many levels of American government — federal, state, and city.

More recently, the alleged menace of organized crime and drug trafficking permitted the enormous expansion of the federal agencies, armed with the draconian powers laid out in the Organized Crime Control Act of 1970. This last was a classic piece of "moral panic" legislation, an ill-conceived package of measures that few dared oppose for fear of appearing to support rather than control "organized crime"—a nebulous concept that is nowhere defined in the law itself. While it predated the actual drug war, it is only in recent years that the act has been fully employed. Most devastating have been the extreme criminal penalties and civil sanctions levied against any organization deemed to be a "Racketeer Influenced Corrupt Organization" (RICO). The law has been ruthlessly abused by federal prosecutors, who have employed RICO against a wide and somewhat bizarre array of political targets on right and left, from Vietnam War protesters to Croat nationalists, Nazi militants, Weathermen, Teamsters' locals, and anti-abortion protesters. There is in addition a private "RICO bar," attorneys who soon noted the law's utility in civil litigation and began suits against such "racketeers" as Morgan Stanley and Shearson Lehman. Not even the Liberty Lobby in its wildest nightmares ever conceived that federal legislation might provide so many weapons for use against private business.

RICO is only one of a battery of laws employed by federal prosecutors against drug trafficking, and there are in addition a number of state RICO or "drug kingpin" measures, all ultimately based on the 1970 law. Throughout the 1980's, such measures passed with astonishing ease, as few legislators were prepared to be named as opposing "tough" antidrug laws. Debate, such as it was, often focused on attempts to increase already stringent penalties.

Most of these laws shared common underlying principles and assumptions, which combine to make the world of "narco-justice" distinctly alien from Anglo-American legal traditions. Most significant, the defendant is effectively presumed guilty until proven innocent. RICO permits the seizure of assets prior to conviction, which places overwhelming pressure on a suspect to come to terms with the prosecutor with-

out going through the inconvenience of a trial. Asset seizure also reduces the suspect's ability to secure adequate legal counsel. In any case, this right is constantly weakened by the government's new powers to demand information about the sources of money paid as legal fees. At every stage, traditional lawyer-client privilege has been undermined, a blow against a fundamental underpinning of the defendant's rights. As former Attorney General Edwin Meese repeatedly stated, society must adopt an attitude of "zero tolerance" for drug offenders (this policy must be distinguished from the standards prevailing in matters of political corruption, where even an actual conviction seldom dents a career).

The principle of pretrial asset seizure has been applied at all levels of wealth, from stockbroking firms allegedly involved with Ivan Boesky or Michael Milken, down to public housing tenants who face eviction on suspicion (not conviction) of drug dealing. Naturally, common sense would indicate that such cases pose a danger of injustice. Due process and the necessity of proof have customarily been regarded as bulwarks against an overmighty executive or the malicious prosecutions of greedy neighbors. Is it really that difficult to contemplate a landlord or neighbor so anxious to remove a tenant that he is prepared to make false charges of narcotics activity? On the other hand, Justice Department spokesmen reject such objections with a simple and powerful doctrine. The Constitution does indeed provide the defendant with rights, such as the presumption of innocence and the right to secure counsel of one's choice; but the threat posed by drugs and organized crime is so severe that rights must be suspended in such cases. Constitutional protections do not therefore extend the controversial or politically charged criminal cases. We are at war, which means that drugs are special; drugs are different.

Drugs are so different, in fact, that private citizens and corporations must obey the whims and edicts of officialdom, even when they have not troubled to invoke a law like RICO. This was nicely illustrated by a 1985 incident when U.S. Attorney Rudolph Giuliani was investigating an alleged money-laundering conspiracy involving the Italian Mafia, the "Pizza Connection." The conspirators were said to have transferred money through the firm of E.F. Hutton, which duly notified its clients that they had received subpoenas in this matter. Federal authorities were outraged that the firm had contacted its clients "contrary to the specific request of the United States government." Normally, private concerns are assumed to have obligations to their clients, which can be overridden only by legal warrants and injunctions. In this case, the word of the prosecutor is assumed to be law, and disobedience verges on *lèse majesté*. There is an old maxim that "the will of the prince has the force of law"; but it has not hitherto been popular in this country.

So drugs are different: they provide a bogeyman that persuades courts and legislators to accept draconian "wartime" incursions into personal liberty, justified by the necessity to combat the alleged moral danger. Again, this is not a new phenomenon. If we consider the leading Supreme Court decisions in the area of personal rights and liberties over the last century, we find that cases commonly arise from moral crusades over issues like drink, drugs, and pornography. The *Olmstead* wiretapping case of 1928 concerned bootleggers; most of the landmark search and seizure cases of the last quarter of a century ultimately stem from drug arrests and so on. A crusade thus creates conflicts that reshape the law and the Constitution just as irrevocably as it reorients policing. Emergency "wartime"

measures are enacted, and then justified by courts, only to create a precedent for future restrictions on liberty or constitutional rights. Drugs are by no means the only such area, as issues like drunk driving and child abuse have both been used in such a way; but drugs offer perhaps the clearest recent illustrations.

Private gun ownership has been one target of the crusaders. It was the bootlegging era that called forth the first sweeping state and federal laws against the possession of particular types of weapons, such as machine guns and sawed-off shotguns. More recently, antigun forces have latched onto the drug war as a vehicle to destroy the Second Amendment. We have heard that semiautomatic rifles or even pistols are "the weapon of choice of the drug dealers," "narcoterrorist assassination weapons," so naturally they must be prohibited. Absent this reform, there must be lengthy waiting periods in which police can check the backgrounds of prospective purchasers. It is difficult to imagine even the antigun lobby believing that this will make the slightest impact on "drug violence," if only because dealers and urban youth gangs seldom obtain their weapons by legal means. However, the net effect is that cynical use of antidrug rhetoric has succeeded in restricting an explicit constitutional right.

The First Amendment has also been under assault. In 1990, the Supreme Court denied the right of Indian groups to make use of peyote in their religious rituals (*Oregon Employment Division v. Smith*), an important decision that the mainstream press scarcely accorded the attention it merited. Now, it would be difficult to argue that the Republic stands or falls on whether one small cult can employ what it believes to be a sacrament. However, this is yet another example of the drug issue being used to create a very large bridgehead in civil liberties. Every court will hold in theory that religion cannot be regulated, or even taxed—but where drugs are involved, normal principles go by the wayside: drugs are different. The precedent is thus created for the regulation of other behaviors that may be unpopular in particular regions or social groups. The ratchet turns one notch, where it remains until ready to be advanced in the next panic; the process seldom goes in reverse.

The *Smith* case effectively reversed the classic decision of *Sherbet v. Verner* (1963), which held that the free exercise of religion could only be restricted if there was a compelling public interest in so doing, and even that restriction must be imposed in the least onerous fashion possible. In contrast, the new doctrine affirms that religious groups must learn to live with any "incidental" burdens arising from any "reasonable" law, a statement that has caused near panic among churches and religious scholars. *Smith* threatens to "gut" the First Amendment: it establishes the principle that religious liberty is less a right than a conditional privilege that only applies until it reaches the roadblock erected by the latest fit of public morality.

What next? One natural consequence would be for a "dry" state or county to command Catholic churches to use only unfermented grape juice in their services. Clearly, this would be an invaluable educational tool, removing the apparent sanction given by the churches to substance abuse and other antisocial behavior. At present, there are harrowing reports of teenagers and children being supplied with wine, and adult parishioners are even reported to *drive* shortly after sharing the alcoholic beverage! Can such a Mothers Against Drunk Driving law be far in the future?

And the peyote precedent suggests other necessary exceptions to outmoded constitutional liberties, other "reasonable" laws that might pose "incidental" problems. With child abuse said to be so commonplace, surely few will object to far-reaching measures to safeguard the children. Already, such laws have gravely undermined the privacy of conversations between clergy and parishioners in counseling settings, and have threatened the secrecy of the confessional. Barely a tenth of the mandatory abuse reporting laws passed during the 80's recognized clergy privilege. Furthermore, it cannot be long until truly effective legislation will call a halt to the practice of infant circumcision for ritual reasons. Catholics and Jews may object to such reforms, but this confirms once again their fundamentally un-American character. How much better protected we will be without the archaic superstitions of the First, Second, and other Amendments.

All prosecutors are ultimately political animals who know that no votes are to be lost by appearing tough on issues like drugs and child abuse. Unfortunately, the costs of this judicial Rambo-ism are ultimately paid by individuals, and by the law itself. From a great many examples in recent years, we might choose the cases of women who use drink or drugs while pregnant, only to find themselves facing prison time for some such offense as "delivering narcotics to another person" (namely, the fetus). Some Indian reservations have seriously discussed incarcerating alcoholic women at an early stage of their pregnancy, to curb the occurrence of "fetal alcohol syndrome" (FAS).

Now, it might appear that we have here a classic feminist issue, an example of women being regarded as communal broodmares on a scale paralleled only in nightmare fantasies like *The Handmaid's Tale*, while the treatment of the early fetus as a person goes far to subverting *Roe v. Wade*. In reality, feminist silence on the issue has been deafening; but perhaps that is not so surprising. Is anyone really prepared to speak up against laws that simultaneously denounce substance abuse and child abuse? At the same time, we have a cacophony of learned voices assuring us of the scale of problems like FAS and the "crack baby." Both are questionable concepts. The "crack baby" remains a largely mythical image, a consequence of the sudden discovery that (regardless of drug use) poor urban women tend to receive inferior nutrition and medical care, and accordingly deliver children who are punier and sicker. With proper care and nourishment, the babies will outgrow these early problems; and the notion that crack is causing the birth of hundreds of thousands of congenital monsters each year is hysterical nonsense. But mere facts have seldom stood in the way of a good legislative panic.

Surely, there is a positive side to the story. Yes, it is regrettable that the drug war has its innocent bystanders, its occasional victims of friendly fire, but does not the innocent citizen benefit from a stronger justice system, from a greater degree of law and order? This attractive argument is belied by the realities of big cities, where drug offenders have so swelled the jails that robbers and burglars have had to be freed in appalling numbers. Since the 1970's, federal courts have maintained a tough attitude towards prison overcrowding, to the warehouse mentality that has created such American Gulags as New York City's Rikers Island. Many courts have ordered that when the jail system reaches a particular population, inmates must be released, either by reducing bail to fire-sale proportions, or actually by having the city pay offenders' bail for them. This

scheme was barely workable before the drug war, but the influx of petty dealers and couriers has brought most urban court and jail systems to a state of collapse.

In a city like Chicago or Los Angeles, it is all but impossible to impose pretrial detention for anything except the most egregious act of violence, and often not then. There have been notorious cases of burglars arrested up to eleven times within two months, without spending more than a day in custody for each offense. Car thieves are rarely even detained, so that this activity has effectively ceased to be a criminal offense in most large cities. In Atlanta, there are now in excess of 25,000 outstanding fugitive warrants, and next to no chance that any large number of these individuals will ever be taken. And without bail, why should they turn up for trial? Philadelphia has 35,000 outstanding warrants, and *thirty* officials trying to round them up. The effects of this situation on police morale can only be imagined, to say nothing of the impact on courtroom personnel, probation, parole officers, and, of course, on the civilian victims who fondly imagined that the police arrested criminals with a view to taking them off the streets. Poor naive idealists!

None of which should imply that America's judges are softhearted libertarians who turn dangerous criminals loose to rape and kill. While pretrial detention has collapsed, American prisons continue to fill to many times their capacity, and all accounts agree that drug offenders are the largest single element of the problem. Any state will provide an example. The California system could barely cope with the 25,000 inmates it had in 1980; yet it had 81,000 by 1989, and faces 100,000 in the imminent future. New Jersey went from 10,000 in 1984 to 15,000 in 1989, with narcotics sentences accounting for virtually all the increase. Taking federal and state prisons together, there were 210,000 inmates in 1974, 454,000 by 1984, and over 800,000 by 1991. This final jump is staggering, as it coincided with a general demographic decline in teenagers and young adults who provide so large a proportion of the criminal population. By any rational standard, both crime rates and prison populations should have been plunging since mid-decade.

Including jails, America's incarceration rate now stands at almost six hundred per hundred thousand, and the rate of growth shows no signs of slowing. To put this in international perspective, the American rate a decade ago was exceeded only by that of a few choice utopias, including the former Soviet Union, Albania, and South Africa. Today, by contrast, this is one enviable area of international competitiveness where the United States has no close rivals left, and comparable European nations have rates perhaps a tenth as large. In terms of the cost of incarceration to state and federal budgets, suffice it to say that it would be cheaper to keep the offender in liberty, while the government pays him a decent middle-class salary as an incentive to stay out of trouble, and subsidizes the occasional Caribbean vacation or skiing trip. Nor does this equation take account of factors like lost productivity, or welfare payments to the offenders' families. There must be cheaper ways to purchase anarchy.

Space forbids a comprehensive catalog of the havoc wrought by the drug war, and the Manichaeian attitudes it has helped inculcate. However, we must include the impact on foreign policy, especially in Latin America. Excesses and illegalities can no longer be justified in terms of the communist threat, and even the specter of "international terrorism" is looking rather

pallid. Nevertheless, the drug war seems set to replace the Cold War as the all-purpose excuse for administrations of either political party. We have already seen the United States undertake an invasion of a sovereign nation for the ostensible reason of winning a military battle in the drug war. Different views are possible of the brief war in Panama—although no rational planner could have believed that this might have had any impact whatever in the cocaine supplies reaching these shores. However, this was a telling augury of the future course of U.S. policy in this area: the use of the drug war to disable opposition to intervention in Latin nations.

We have seen the Reagan administration smear the Sandinistas with charges of drug dealing in order to raise funds for the Contras, and the quite as chilling response from the left that it was those very Contras who were indeed the worst "narco-terrorists." Thus neither side challenges the essential orthodoxy that to traffic in drugs is to be in league with Satan and to earn the undying enmity of the United States. As revolutionary forces gain strength in Peru, American personnel are already being dispatched to that same country in the guise of drug interdiction forces, agents of the Drug Enforcement Administration, "advisers" to local soldiers hunting narco-traffickers. It is by no means fanciful to imagine that the familiar helicopter gunships will soon be swooping once more over ocean-like jungle wildernesses, though this time marked with the insignia of the DEA rather than the Army or Marines. The American response to this intervention to date has largely been one of thorough indifference, combined with vociferous support from some Democrats and urban liberals who would have had apoplexy at a "new Vietnam" in any other context.

The war continues because it is invaluable for any group or individual with the *nous* to claim (however implausibly) that their particular cause or obsession is somehow connected to the drug platform. It continues because it offers careers and official positions, votes and research funding.

This is not to say that American intervention may not be necessary in Peru or Bolivia, but at least let it happen after a frank discussion of the issues and risks involved and not simply because of some scare story such as "Shining Path supplies x percent of the cocaine flooding American cities." Need it be added that a war in this region would bear a much closer resemblance to the Vietnam morass than the recent walkovers in Panama or Iraq?

How did we get a drug war? Was it indeed—as it sometimes seems—the brilliant stratagem of a hostile power, determined to cripple the American economy, subvert the Constitution, and spread violence and crime across the cities? If only the explanation were so rational. No one force or pressure group was to blame, and in fact the success of the war can only be explained in terms of the very diverse movements at work. There certainly was conservative and moralist pressure to enforce the widely flouted drug laws and to purge the culture of its easy tolerance of drug abuse. The rigors of

the drug war were part of a national penance required to make amends for the excesses of the high-flying 1960's and the Sybaritic 1970's. In some cases—especially in the Meese Justice Department—there may also have been a hidden agenda of using the drug war to enhance police and prosecutable powers limited by the Warren Supreme Court. However, the activists were also able to tap into well-established currents of temperance and morality enthusiasm in American society, the sort of movement that has found prominent expression in groups like M.A.D.D.

But conservatives represented only one arm of the “nutcracker.” As America is the land of Puritanism and Prohibition, it is also the nation where therapeutic and psychiatric ideas and solutions have taken firmest hold, and the attack on drugs and “substance abuse” must be seen in the context of the whole industry of addiction, treatment, and 12-point recovery programs. During the decade, this became a booming sector of the economy, with ever more positions for medical and nursing personnel, counselors, and of course administrators, all funded from the cornucopia of insurance payments. The more apparent problems, the more need for specialist physicians and counselors to treat the proliferating wave of syndromes and disorders—from alcoholics and drug abusers to survivors of child abuse and ritual abuse, multiple personality and obsessive-compulsive disorders, co-dependents and adult children of alcoholics. This all formed part of what an excellent recent book has entitled the “Dis-easing of America.”

Naturally, members of the rehabilitation industry had a vested interest in stating the serious dangers of the problems

they were purporting to handle, and they disseminated their views through the mass media as well as the specialist press. Inevitably, building up the problem implied the vast scale of the measures necessary to combat it, and in the context of the 1980's, that implied support for the “war” analogy. Individual therapists and researchers might be politically liberal, and advocate nonpenal medical solutions to drug abuse, but they provided the questionable statistics and the exaggerated claims used by the drug warriors to pass ever more stringent legislation.

In other words, the drug war has been so successful and enduring because it is the triumphant outcome of a broad bipartisan coalition, the alliance of disparate factions of whom all have something to gain in material or ideological terms. The war continues because it is invaluable for any group or individual with the *nous* to claim (however implausibly) that their particular cause or obsession is somehow connected to the drug platform. It continues because it offers careers and official positions, votes and research funding.

With so many vested interests, the drug war has become an addiction that seems impossible to break, despite all the evidence of the harm that is being wrought on countless individuals, and on society as a whole. As with any addiction, reform can only come when the victim recognizes that the condition is beyond his or her control, and decides to seek help. At that point, just possibly, we can begin the process that leads back, however slowly and painfully, to confronting the problems of the real world. If ever we needed a twelve-stage recovery program. . . ◊

Semblance

by Paul Ramsey

The photograph, faded slightly,
Of her hungry, timid face
Calls forth his tenderness, his
Rage having somewhat subsided.
She looks shyly from the photograph
As though expecting damage
From any who would seek out frailty
To protect, trying to protect
Their own frailty and their fierceness
Of remorse.