
Drug War and Peace

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INTRODUCTION

The drug war has been called America’s longest war,¹ and appropriately so, given that its antecedents trace back a century or more.² The present symposium is only the most recent in a long line of academic events on drugs and prohibition.³ In fact, this is not even the first such collection of articles in the *UC Davis Law Review*, which hosted a symposium on the legalization of drugs a quarter-century

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¹ See e.g., STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA’S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1993) (documenting the war on drugs and the failure of national drug policy).

² See *infra* notes 85–91 and accompanying text.

³ See, e.g., Symposium, *Drug Laws: Policy and Reform*, 20 *STAN. L. & POL’Y REV.* 221 (2009); Symposium, *Drug War Madness: Policies, Borders & Corruption*, 13 *CHAP. L. REV.* 509 (2010); Symposium, *Drugs, Addiction, Therapy, and Crime*, 2009 *UTAH L. REV.* 1 (2009); Symposium, *New Voices on the War on Drugs*, 47 *VILL. L. REV.* 747 (2002); Symposium, *Penal Jurisprudence in Punishment and Treatment*, 63 *ALB. L. REV.* 679 (2000); Symposium, *The Latest Developments in the War on Drugs*, 15 *CORNELL J.L. & PUB. POL’Y* 507 (2006); Symposium, *U.S. Drug Laws: The New Jim Crow?*, 10 *TEMP. POL. & C.R.L. REV.* 303 (2001).

ago.⁴ The current issue is more focused, however, by taking on a particular drug: marijuana. Although marijuana has been cultivated and used since time immemorial,⁵ the contributions to this symposium are quite timely considering the natural experiment currently afoot across America. Medical marijuana is now legal in half the nation, more or less, while the drug has been decriminalized in several jurisdictions and the sale of recreational marijuana is allowed in Colorado, Washington, Oregon, Alaska, and, most recently, California, Massachusetts, and Nevada.⁶

The contributions to this symposium are mind expanding — not necessarily in the sense advocated by the late Dr. Timothy Leary⁷ — but instead in the more clearheaded form of thoughtful legal analysis. The panels carefully dissected constitutional issues of federalism, the taxation and regulation of marijuana, and the impact of legalization on criminal justice. In preparation for the event, I questioned whether there was anything I might add to this symposium, given my lack of expertise on the specifics of state efforts to legalize marijuana, as well as my belief that, when it comes to drug prohibition, there is nothing new under the sun.⁸ But one night, after consuming some legal intoxicants (a few beers), I wondered what would happen if you took seriously the very notion of a drug *war*. After all, the movement to legalize marijuana may be, in a very real sense, the beginning of the end of prohibition and a harbinger of drug *peace*.

With your indulgence, then, I would like to engage in a kind of thought experiment: What would happen if we viewed the war on drugs as an actual war subject to the international law of war? My goal is not to persuade anyone that prohibition is, in fact, an armed conflict under the law of war, but instead to provoke readers and force them to think about the nature and consequences of the nation's drug policies. Part I begins with a discussion of some problems that arise from the government denominating drug prohibition as a war. The bulk of this piece then considers two issues: Part II examines whether prohibition

⁴ See *Symposium on Legalization of Drugs*, 24 UC DAVIS L. REV. 555 (1991).

⁵ See MARTIN BOOTH, *CANNABIS: A HISTORY* 19-23 (2003) (describing cannabis usage and cultivation across multiple cultures dating back thousands of years).

⁶ See COLO. CONST. art. XVIII, § 16; Ballot Measure 64 (Cal. 2016); Ballot Question 4 (Mass. 2016); Ballot Question 2 (Nev. 2016); Ballot Measure 2 (Alaska 2014); Ballot Measure 91 (Or. 2014); Initiative 502 (Wash. 2012).

⁷ See Laura Mansnerus, *Timothy Leary, Pied Piper of Psychedelic 60's, Dies at 75*, N.Y. TIMES (June 1, 1996), <http://www.nytimes.com/learning/general/onthisday/bday/1022.html> (discussing Timothy Leary's life and his advocacy of drug use).

⁸ *Ecclesiastes* 1:9 (NIV).

is just under the law of war, and Part III considers whether the drug war has been fought justly under the law of war. Along the way, Parts II and III provide some examples of U.S. drug policies that seem to be in tension with the law of war. Although the American drug war is not a bona fide armed conflict, Part IV concludes that the lessons from applying the law of war would support a sober second look at prohibition and a reason to strive for drug peace.

I. DRUG PROHIBITION AS WAR

To my surprise, I am aware of no significant piece of scholarship that has sought to view the American war on drugs as an actual war subject to the law of war and the just war tradition on which this law is based.⁹ Certainly, there are reasons for this silence. Just war theory and the law of war are concerned with violent conflicts involving military force, such as the conventional land warfare of artillery barrages, tank battles, and bombing raids. By contrast, the war on drugs is a state-sponsored metaphor, typically associated with criminalization and harsh punishment for the production, transportation, sale, purchase, possession, and use of particular intoxicating or psychoactive substances. Needless to say, the war on drugs is not a “war” in the classic sense, and even a non-literal application of the law of war to prohibition can require a series of caveats.¹⁰ As this part suggests, however, drug prohibition has some of the problematic trappings of actual shooting wars. The consequences from a century of prohibition seem sufficiently serious to warrant the mental exercise of applying the law of war and the just war tradition to the American drug war.

The historical origins of the drug war date back at least a century,¹¹ although the term “war on drugs”¹² was apparently coined by President Richard Nixon after he fingered drug abuse as “public enemy number one” in the United States.¹³ Law enforcement efforts have focused on common recreational drugs such as marijuana and

⁹ *But see, e.g.*, Symposium, *On Ending the War on Drugs*, 31 VAL. U. L. REV. xvii (1997) (discussing briefly how the just war tradition might apply to the war on drugs).

¹⁰ *See infra* notes 422–28 and accompanying text.

¹¹ *See infra* notes 85–91 and accompanying text.

¹² President Richard Nixon, Statement About Drug Abuse Law Enforcement (Sept. 22, 1972).

¹³ President Richard Nixon, Remarks About an Intensified Program for Drug Abuse Prevention and Control (June 17, 1971).

cocaine, but prohibition extends to a variety of other drugs as well.¹⁴ Other substances are not considered targets of the war on drugs and instead fall outside the criminal law (e.g., caffeine) or are subject to regulation rather than prohibition (e.g., alcohol and tobacco). Moreover, certain government policies may not implicate the criminal justice system at all, such as eradication schemes using defoliant or drug testing schemes for employees and students.¹⁵

¹⁴ As a matter of pharmacological classification, opium, morphine, and heroin are correctly termed “narcotics” (or “opioids”), for instance, while cocaine is a “stimulant” and LSD is a “hallucinogen.” Nonetheless, drug legislation, government officials, and the general public frequently use the term “narcotic” to describe any illicit drug. The current federal scheme is premised on the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, a lengthy omnibus statute premised on Congress’ jurisdiction over interstate commerce rather than the power to tax and spend. It consolidated all previous federal drug provisions into a single scheme and, among other things, established the modern five-category approach (referred to as “schedules”) predicated on each drug’s alleged medical value and potential for abuse. While heroin, LSD, and even marijuana were placed in the strictest schedule with no accepted medical use, for instance, cocaine, opium, and amphetamine were placed in a somewhat more relaxed category. The law also set steep punishments for drug crime. When the federal scheme was adopted, many states had already enacted or would eventually adopt drug laws comparable to the federal approach. Some jurisdictions took even more drastic steps, including New York State’s notoriously harsh “Rockefeller Drug Laws,” which provided mandatory prison terms and even life sentences for drug crime. See generally Spiros A. Tsimbinos, *Is It Time to Change the Rockefeller Drug Laws?*, 13 ST. JOHN’S J. LEGAL COMMENT. 613 (1999) (providing an overview on the Rockefeller Drug Laws in New York and the impact of such laws on the state’s prison population).

For simplicity’s sake, this article at times lumps together a wide range of criminalized substances in referring to “drugs.” Although the generalization appears as misguided as scheduling marijuana and heroin together, the move seems defensible for present purposes since, for instance, SWAT raids may be indistinguishable by the specific drug sought by law enforcement. See *infra* notes 255–81, 323 and accompanying text. Nonetheless, drugs vary widely in short-term effects (e.g. intoxication) and longer-term consequences (i.e. addiction). See, e.g., David J. Nutt, Leslie A. King & Lawrence D. Phillips, *Drug Harms in the UK: A Multicriteria Decision Analysis*, 376 LANCET 1558 (2010) (analyzing range of drug-related harms). Ultimately, however, these differences do not justify the drug war in general nor even the continued criminalization of certain substances. We have yet to reach the point where some drug is so completely and inevitably destructive of human agency and so tightly correlated with harm to others as to warrant that drug’s treatment as a chemical weapon or deadly virus. Even if this were the case with a particular substance, that would hardly vindicate prohibition of other drugs, including the focus of the present symposium, marijuana.

¹⁵ See Erik Luna, “What Is Legal Is Not Necessarily Ethical”: *The Limits of Law and Drug Testing Programs*, 4 AM. J. BIOETHICS 41, 41 (2004); *infra* notes 370–82 and accompanying text (discussing the government’s use of chemicals to eradicate illegal drugs).

Oftentimes metaphors are merely embellishments to speech, a method of emphasizing a particular argument. Metaphors can be generative, in the sense of producing new insights into a complex problem.¹⁶ But they are also a means of positioning ourselves, where metaphors of war “orient us by highlighting and hiding features of the principal subject . . . by the commonplaces associated with war.”¹⁷ The drug war metaphor has served as a rallying cry for law enforcement or new legislation, and a way to emphasize the alleged seriousness of the underlying threat posed by banned substances. “We have an enemy. We talk about a war,” said one federal lawmaker about drug prohibition. “I love to use that term, because it sounds tough; it makes good talk, good speeches.”¹⁸ The war on drugs is thus a powerful trope — what Jonathan Simon and his colleagues have termed “a metaphor with teeth”¹⁹ — which describes the government’s collective response to contraband while also reaffirming the righteousness of drug laws and their enforcement.²⁰

So what are the consequences of denominating drug prohibition as a “war”? To begin with, the characterization influences the constitutional scheme of government, both as to individual liberties and to the separation of powers. Government powers inevitably expand in wartime under the heading of national emergency. This authority may recede once peace is achieved, but the government steps away from its wartime footing far larger than before and often with a greater arsenal at its disposal. If otherwise unconstitutional powers receive the judiciary’s imprimatur, they may lie “about like a loaded

¹⁶ See Donald A. Schöen, *Generative Metaphor: A Perspective on Problem-Setting in Social Policy*, in METAPHOR AND THOUGHT 254-55 (Andrew Ortony ed., 1979).

¹⁷ James F. Childress, *The War Metaphor in Public Policy: Some Moral Reflections*, in THE LEADER’S IMPERATIVE: ETHICS, INTEGRITY, AND RESPONSIBILITY 181, 185 (J.C. Ficarro ed., 2001).

¹⁸ 132 CONG. REC. S13,741-801 (Sept. 26, 1986) (statement of Sen. DeConcini).

¹⁹ Hannah Laqueur, Stephen Rushin & Jonathan Simon, *Wrongful Conviction, Policing, and the “War on Crime and Drugs,”* in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK AND MOVING FORWARD 1, 1 (Allison D. Redlich et al. eds., 2014).

²⁰ See, e.g., RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES 139 (2013) (noting that the drug war was cast “as a biblical struggle between good and evil,” which turned “the country’s drug cops into holy soldiers”); Susan P. Stuart, *War as Metaphor and the Rule of Law in Crisis: The Lessons We Should Have Learned from the War on Drugs*, 36 S. ILL. U. L.J. 1, 5 (2011) (noting that “the government implicitly framed the War as a struggle between good and evil for the soul of a nation and explicitly framed the War to play on the people’s fears”); see also SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 20 (1996) (“To endorse a war . . . Americans must define their role in a conflict as being on God’s side against Satan—for morality, against evil.”).

weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”²¹ Experience has also shown that when government actors speak in belligerent terms and individual rights are beset by claims of necessity, the courts sometimes seem to lack the wherewithal or confidence to intercede.²²

In addition, the initiation of warfare affects the mindset of the public. War inspires strong emotions, particularly fear and hatred, which can disengage rational thought processes in favor of visceral responses, often punitive in nature.²³ Fear and hatred may be generated in both literal and figurative wars, and can influence all types of social and political action, including the creation and enforcement of criminal law. By and large, the American populace capitulated to several “Red Scares” from World War I through the Cold War-era; today, the people seemed to have acquiesced to truly awesome government powers exercised in the new millennium’s war on terror; and, throughout the past century, we have witnessed vacillating moral panics about illegal drugs.²⁴

By generating fear and hatred, as well as nobler sentiments like honor and self-sacrifice, war has an uncanny ability to mobilize society, to foster unity of belief and action under a martial heading, and to ensure compliance with government edicts. “[W]ar is essentially the health of the State,” observed Randolph Bourne, an early twentieth-century essayist and social critic.²⁵ War “automatically

²¹ *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

²² See, e.g., William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 *ISR. Y.B. HUM. RTS.* 1, 4 (1988) (“A jurisprudence that is capable of sustaining the supremacy of civil liberties over exaggerated claims of national security only in times of peace is, of course, useless at the moment civil liberties are most in danger.”); see also *Skinner v. Ry. Labor Exs.’ Ass’n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting) (“The World War II relocation-camp cases and the Red scare and McCarthy-era internal subversion cases are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.”).

²³ See, e.g., Symposium, *Interdisciplinary Perspectives on Fear and Risk Perception in Times of Democratic Crisis*, 69 *MO. L. REV.* 897 (2004) (discussing the various cognitive bias that can affect rational thinking).

²⁴ See generally Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 *MASS. L. REV.* 72 (2002) (discussing impact of various crises on American civil liberties); see also *United States v. Solivan*, 937 F.2d 1146, 1154 (6th Cir. 1991) (noting “the pervasive fear of drugs and the attendant dangers of drugs and drug addiction,” and that “[t]he almost daily attention given by the media and politicians to the drug trade and gang violence, for example, have heightened the nation’s awareness of, and hardened its attitudes towards, the drug problem”).

²⁵ Randolph S. Bourne, *The State, in WAR AND THE INTELLECTUALS* 69 (Carl Resek ed., 1964).

sets in motion throughout society those irresistible forces for uniformity, for passionate cooperation with the Government in coercing into obedience the minority groups and individuals which lack the larger herd sense.”²⁶ In wartime, government can establish and enforce draconian penalties that may intimidate minorities and convince critics as to the righteousness of the cause, to the point of inducing the belief that the people themselves wanted war.²⁷ A symbiotic relationship is struck in wartime, where the citizen becomes part of the war machinery and loses himself in the appeal of nationalism.

The rekindling of past victories and the invocation of deceased patriots permits the government to make great demands of the citizenry, “who must periodically show themselves worthy of the gifts bestowed upon them by the wartime sacrifices of others.”²⁸ Along these lines, consider the impassioned plea made by the “Great Communicator,” Ronald Reagan, in eulogizing fallen drug agents:

America’s liberty was purchased with the blood of heroes. Our release from the bondage of illegal drug use is being won at the same dear price. The battle is ultimately over what America is and what America will be. At our founding, we were promised the pursuit of happiness, not the myth of endless ecstasy from a vial of white poison. We won our personal freedom so that we could serve God and man, so that we could freely produce and create and build a nation of strong families, rich farms, and great cities. We struggled for liberty in order to cherish it and defend it and transmit it undiminished to our children and theirs.²⁹

When the nation is engaged in a permanent war, as prohibition has become, there may be no end to the sacrifices that may be demanded of the citizenry. In these circumstances, a metaphorical war against a dreaded enemy has convinced the American public to accept various

²⁶ *Id.* at 71.

²⁷ *See id.*; *see also infra* notes 212–13 and accompanying text (discussing support of drug war by Rep. Charles Rangel).

²⁸ David Hoogland Noon, *Operation Enduring Analogy: World War II, the War on Terror, and the Uses of Historical Memory*, 7 *RHETORIC & PUB. AFF.* 339, 342 (2004).

²⁹ President Ronald Reagan, Remarks at a White House Ceremony Honoring Law Enforcement Officers Slain in the War on Drugs (Apr. 19, 1988). As a personal aside, it gives me no pleasure to use President Reagan’s words and actions as epitomizing the problems of prohibition. On many things, he was absolutely right — the case for limited government and free enterprise, for instance, and the evil of Soviet communism — but on the drug war, unfortunately, President Reagan was wrong.

deprivations of liberty, to countenance increased government expenditures to underwrite the drug war, even to anoint someone as a “Drug Czar,” a position surely unimaginable to the nation’s Founders and their stalwarts.³⁰ Historically, the public has supported even radical approaches to drug prohibition, leading political opportunists to propose otherwise unthinkable policies, including killing drug dealers, money launderers, and even occasional drug users.³¹ “We’re in a war,” said the former police chief of Los Angeles, and, accordingly, casual drug use “is treason.”³²

War can be “an enticing elixir” that “gives us resolve” and “allows us to be noble.”³³ But the fear that precedes and accompanies war also makes a citizenry politically manipulable and more inclined to accept superficial arguments in support of harsh, far-reaching measures, even to the point of people embracing their own repression based on guarantees of safety and stability. As mentioned, war has a tendency to inhibit critical thinking skills, sometimes by oversimplifying the world’s complexities and remaking them into a dualistic right versus wrong.³⁴ The public may be less likely to demand the truth³⁵ in wartime, satisfied instead with a degree of *truthiness*, where “truth” is premised not on facts but instead gut intuitions, preferring what one would like to be true rather than what is true.³⁶ Americans wanted to believe the government’s stated reasons for going to war in Vietnam and its intentions in Southeast Asia.³⁷ People also wanted to believe

³⁰ David Boaz, *A Drug-Free America — or a Free America?*, 24 UC DAVIS L. REV. 617, 627 (1991).

³¹ *Id.* But see James Downie, *Is ‘Tough on Crime’ No Longer Enough for Voters?*, WASH. POST. (Aug. 31, 2016), https://www.washingtonpost.com/blogs/post-partisan/wp/2016/08/31/is-tough-on-crime-no-longer-enough-for-voters/?utm_term=.205364f0e60a.

³² Ronald J. Ostrow, *Casual Drug Users Should Be Shot, Gates Says*, L.A. TIMES (Sept. 6, 1990), http://articles.latimes.com/1990-09-06/news/mn-983_1_casual-drug-users (quoting LAPD Chief Darryl Gates).

³³ CHRIS HEDGES, *WAR IS A FORCE THAT GIVES US MEANING* 3 (2002).

³⁴ See, e.g., *id.* at 10 (“War makes the world understandable, a black and white tableau of them and us. It suspends thought, especially self-critical thought.”).

³⁵ Here, I am referring to the conventional definition of *truth* as the agreement of the mind with external reality, which can be verified (or at least corroborated). See Yasmin Naqvi, *The Right to the Truth in International Law: Fact or Fiction?*, 88 INT’L REV. RED CROSS 245, 250 (2006).

³⁶ See SOPHIA A. MCCLENNEN, *AMERICA ACCORDING TO COLBERT: SATIRE AS PUBLIC PEDAGOGY* 117 (2011) (defining *truthiness* as “truth that comes from the gut, not books,” or the “quality of preferring concepts or facts one wishes to be true, rather than concepts or facts known to be true”).

³⁷ See, e.g., *Pentagon Papers*, NAT’L ARCHIVES, <http://www.archives.gov/research/pentagon-papers/> (last visited Oct. 27, 2016) (discrediting the government’s publicly

that Saddam Hussein possessed weapons of mass destruction and had ties to terrorists as rationales for invading Iraq.³⁸ Similarly, many want to believe the government's claims in fighting the war on drugs.

The impact of warfare on truth-telling reverberates throughout the ages, as it is often said that truth is the first casualty of war.³⁹ In his classic critique of lies propagated during World War I, British politician and activist Arthur Ponsonby wrote that the "ignorant and innocent masses in each country are unaware at the time that they are being misled, and when it is all over only here and there are the falsehoods discovered and exposed."⁴⁰ Truth's distortion or its outright rejection can be an effective instrument of warfare, intended to deceive the enemy, to gain the support of nonaligned parties, and even to hoodwink a nation's own citizenry. Those who doubt the truth of government information are then deemed traitors. So it has been with the war on drugs. For instance, a drug czar in the Reagan Administration, Carlton Turner, sought to rid federal drug agencies of researchers and officials who advocated drug treatment, and one of his officials urged libraries to eliminate several dozen prior government publications that were inconsistent with the new tough-on-drugs narrative.⁴¹ Turner, who advocated the death penalty for drug offenders, even claimed that the use of marijuana can make you gay.⁴²

Indeed, people may be prepared to delude themselves to rationalize their own wartime actions.⁴³ War has a tendency to deaden our moral

stated reasons for the Vietnam War); see also DANIEL ELLSBERG, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* 414 (2002) (source of Pentagon Papers noting that "few in the public wanted to believe what I was saying about the prospects for continued war and further escalation" because the public relied on the Nixon Administration's stated purpose for the war).

³⁸ See, e.g., SELECT COMM. ON INTELLIGENCE, *POSTWAR FINDINGS ABOUT IRAQ'S WMD PROGRAMS AND LINKS TO TERRORISM AND HOW THEY COMPARE WITH PREWAR ASSESSMENTS*, S. REP. NO. 109-331, at 145 (2006) (noting how the government wanted to believe that Saddam Hussein had WMDs).

³⁹ See, e.g., MICHAEL C. THOMSETT & JEAN FREESTONE THOMSETT, *WAR AND CONFLICT QUOTATIONS: A WORLDWIDE DICTIONARY OF PRONOUNCEMENTS FROM MILITARY LEADERS, POLITICIANS, PHILOSOPHERS, WRITERS AND OTHERS* 115 (1997).

⁴⁰ ARTHUR PONSONBY, *FALSEHOOD IN WAR-TIME: CONTAINING AN ASSORTMENT OF LIES CIRCULATED THROUGHOUT THE NATIONS DURING THE GREAT WAR* 13 (1942). For a critique arguing that Ponsonby's book was "not an inquiry into propaganda" but rather was "propaganda, of the most passionate sort," see ADRIAN GREGORY, *THE LAST GREAT WAR: BRITISH SOCIETY AND THE FIRST WORLD WAR* 43 (2008).

⁴¹ See BALKO, *supra* note 20, at 141-43.

⁴² See ARNOLD S. TREBACH, *THE GREAT DRUG WAR* 78 (2005). Turner subsequently denied saying that marijuana "caused" people to become gay, but rather that drug use caused them to lose "inhibitions against everything." *Id.*

⁴³ In Ponsonby's words, "there is a sort of national wink, everyone goes forward,

sensibilities and inure us to the horrors of war.⁴⁴ Some years after the Civil War, General William Tecumseh Sherman sought to disabuse military cadets of any sentimental pretense about their future profession: “I’ve seen cities and homes in ashes. I’ve seen thousands of men lying on the ground, their dead faces looking up at the skies. I tell you, war is Hell!”⁴⁵ Sherman’s famous statement conveyed the essential element of war as violence, with death and destruction as its direct incidents. He should know, given the scorched-earth practices of his army during its “march to the sea.”⁴⁶ Sherman’s military campaign was perhaps justifiable as a necessary means to maintain the Union and ensure the demise of slavery in America while also minimizing further bloodshed.⁴⁷ But it also helped set a precedent for the concept of “total war” and the controversial ideas that no necessary limit exists in the pursuit of victory and that those acting for a just cause necessarily conduct warfare in a different fashion from those whose rationale for war is unjust.⁴⁸

In an important way, however, Sherman’s war-is-hell dictum, which has become a leitmotif of modern writing on armed conflict, may underestimate the moral implications. War is far worse than hell in the theological sense, as Michael Walzer has pointed out:

For in hell, presumably, only those people suffer who deserve to suffer, who have chosen activities for which punishment is the appropriate divine response, knowing that this is so. But the greater number by far of those who suffer in war have made no comparable choice.⁴⁹

and the individual, in his turn, takes up lying as a patriotic duty.” PONSONBY, *supra* note 40, at 16.

⁴⁴ See, e.g., HEDGES, *supra* note 33, at 9 (“Once we sign on for war’s crusade, once we see ourselves on the side of the angels, once we embrace a theological or ideological belief system that defines itself as the embodiment of goodness and light, it is only a matter of how we will carry out murder.”).

⁴⁵ ANTHONY KING, *THE COMBAT SOLDIER: INFANTRY TACTICS AND COHESION IN THE TWENTIETH AND TWENTY-FIRST CENTURIES I* (2013) (quoting Sherman).

⁴⁶ See generally DAVID J. EICHER, *LONGEST NIGHT: A MILITARY HISTORY OF THE CIVIL WAR 760-69* (2001) (giving a detailed description of General Sherman’s “march to the sea”).

⁴⁷ Historians seem to agree that Sherman’s march facilitated the end of the Civil War, “destroy[ing] much of the South’s potential and psychology to wage war.” *Id.* at 768.

⁴⁸ See CHARLES ROYSTER, *THE DESTRUCTIVE WAR: WILLIAM TECUMSEH SHERMAN, STONEWALL JACKSON, AND THE AMERICANS 358-59* (1991).

⁴⁹ MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 30* (5th ed. 2015) [hereinafter *JUST AND UNJUST WARS*].

Military history thus serves as a rolling chronicle of people killed, injured, or otherwise mistreated during the course of belligerence.

This unromanticized view is necessary to understand not only the fundamental character of military combat, but also the reason for granting a space for legal and moral principles. Although going to war may at times be justified, the death and destruction that accompanies it requires that a war, in fact, be justified. Any decent moral theory places upon individuals and society a *prima facie* duty not to kill others, which, in turn, places a heavy burden upon those who support going to war and loads a moral weight upon those who conduct warfare.⁵⁰ Developed over the centuries by Christian theologians, European jurists, and military scholars, the just war tradition and the law of war seek to diminish the human suffering that inevitably attends armed conflict.⁵¹

Metaphorical wars, such as the drug war, can take on the semblance of actual belligerence but without any pretense of the modern legal restraints applicable in wartime. Of course, the United States cannot make war on drugs any more than it can make war on a tube of Preparation H. Wars are waged against people, and drug warfare has had very real costs for people's lives, liberty, and property. And yet the use of the war metaphor in drug prohibition has obscured the moral reality of war, and in so doing, it has ignored the lessons of the just war tradition and the law of war. As ethicist James Childress has noted,

Among other lapses, we forget important moral limits in real war — both limited objectives and limited means. In short, we forget the just-war tradition, with its moral conditions for resorting to and waging war. We are tempted by seedy realism, with its doctrine that might makes right, or we are tempted by an equally dangerous mentality of crusade or holy war, with its doctrine that right makes might of any kind acceptable.⁵²

Each time the metaphor of war is used, we should ask ourselves whether the metaphor provides insights or instead obscures reality and skews our judgments. As Childress argues, “distortion occurs in

⁵⁰ See *id.* at 182.

⁵¹ See Michael Howard, *Constraints on Warfare*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 1, 2 (Michael Howard et al. eds., 1994); see generally R.A. McCormick, *Morality of War*, in 14 *THE NEW CATHOLIC ENCYCLOPEDIA* 803 (1967) (discussing the origins of just war theory); John Langan, *The Elements of St. Augustine's Just War Theory*, 12 *J. RELIGIOUS ETHICS* 19 (1984) (providing a contemporary assessment of the principle elements of just war theory).

⁵² Childress, *supra* note 17, at 181.

part because of the failure to hold the war metaphor accountable to the just-war tradition, with its limiting conditions for waging and conducting war.”⁵³ At a minimum, then, the application of the just war tradition and the law of war may serve as a sort of intellectual check on any inclination to enhance prohibition. Although marijuana has been legalized in several states and more may soon follow, there is some movement in the opposite direction with regard to other drugs.⁵⁴ Moreover, a critical application of the law of war to prohibition could provide good reason to end the drug war and to search for peaceful solutions.

The law of war may even apply by analogy,⁵⁵ the U.S. Defense Department’s *Law of War Manual* points out, such as using “law of war rules with a humanitarian purpose in situations outside of the context of armed conflict.”⁵⁶ Because the law of war embodies “standards . . . that must be adhered to in all circumstances,” its application ensures that the standards in non-belligerent settings “equal or exceed those required” in armed conflict.⁵⁷ After all, much of the law of war reflects “elementary considerations of humanity, even more exacting in peace than in war.”⁵⁸ In the present context, we should expect that drug prohibition abide by law of war principles, not because the war on drugs is an actual war, but because the principles oftentimes set a floor below which civilization must not descend. As will be seen in the following sections, the just war tradition and the law of war also provide a thoughtful, methodical structure for analyzing information and arguments about the war on drugs.

⁵³ See *id.* at 195.

⁵⁴ See, e.g., Sentencing Reform Act, H.R. 3713 § 2(a)(3) (2016) (bill proposing mandatory minimum sentence for the opioid fentanyl); Lauren Silverman, *Kratom Gets Reprieve from DEA’s Schedule I Drug List*, CNN (Oct. 17, 2016), <http://www.cnn.com/2016/10/17/health/kratom-dea-schedule-i-comments/> (discussing debate about adding another drug as a Schedule I substance under federal law); see also Mike McPhate, *California Today: What Jeff Sessions Could Mean for Legal Marijuana*, N.Y. TIMES (Nov. 22, 2016), <http://nyti.ms/2f2qlxJ> (speculating about potential crackdown on legal marijuana in the next administration).

⁵⁵ OFFICE OF GEN. COUNSEL, U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 92-93 (2015) [hereinafter LOW MANUAL].

⁵⁶ *Id.* at 93.

⁵⁷ *Id.* at 71-72.

⁵⁸ *Corfu Channel (U.K. v. Alb.)*, Merits, 1949 I.C.J. 4, 22. (Apr. 9); see also LOW MANUAL, *supra* note 55, at 72.

II. JUS AD BELLUM

Traditionally, just war theory distinguishes between rules that govern the justice in going to war (*jus ad bellum*) and rules that govern justice in conducting war (*jus in bello*). As summarized by Michael Walzer, the leading contemporary theorist of just war, “*Jus ad bellum* requires us to make judgments about aggression and self-defense; *jus in bello* about the observance or violation of the customary and positive rules of engagement.”⁵⁹ To a large extent, just war theory is expressed in today’s international law of war, understood as the body of customary international law⁶⁰ and international agreements such as the Geneva Conventions.⁶¹ The modern, mostly treaty-based law of war — often referred to today as the law of armed conflict or international humanitarian law — may be complimented by domestic provisions concerning a nation’s war powers under its own constitution and statutes.⁶²

⁵⁹ WALZER, JUST AND UNJUST WARS, *supra* note 49, at 21; *see also* WILLIAM V. O’BRIEN, THE CONDUCT OF JUST AND LIMITED WAR 9 (1981).

⁶⁰ “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102(2) (AM. LAW INST. 1987).

⁶¹ *See, e.g.*, LOW MANUAL, *supra* note 55, at 26 (discussing how just war theory has been incorporated into the law of war). There are four separate instruments that constitute the 1949 Geneva Conventions. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. The terms “Common Article 2” and “Common Article 3” refer to the second and third article of each of the Geneva Conventions. Two supplemental instruments were added in 1977. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

⁶² An important caveat should be mentioned here: Although this article uses synonymously the terms “war,” “armed conflict,” and “hostilities” (as well as words like “combat” and “belligerence”), meaningful distinctions can be drawn among them. In particular, the Geneva Conventions represent a twentieth-century trend toward *armed conflict* as the operative term. Common Article 2 of the Geneva Conventions states that its provisions “shall apply to all cases of declared war or of *any other armed conflict*” (emphasis added), while Common Article 3 applies “[i]n the case of armed conflict not of an international character.” *See, e.g.*, GC I, *supra* note 61, arts. 2–3. By

This section will consider some common principles of *jus ad bellum*,⁶³ while the next section will take up some basic considerations of *jus in bello*. Throughout, one should keep in mind that just war theory cannot be distilled to a checklist to be mechanically applied, such that, “should you get more than a given number, then war it is.”⁶⁴ Instead, it is a general framework for public reasoning and reflection on how to differentiate justifiable wars and warfare from those that are unjustifiable. As the law governing recourse to war, *jus ad bellum* focuses on the circumstances under which a state may legally and morally resort to the use of force.⁶⁵ This section compares drug prohibition to three subgroups of *jus ad bellum*: legitimate authority and last resort, just cause and right intention, and macro-proportionality and probability of success.

Legitimate Authority and Last Resort. To begin with, *jus ad bellum* requires that war be declared by a *legitimate authority* — typically conceived as a duly constituted, competent sovereign — and that the use of force may be pursued only as a *last resort*, that is, after exhausting all viable, nonviolent alternatives.⁶⁶ Of course, the United States represents a legitimate authority for purposes of declaring war. As a matter of legal formalities, however, the sanctioned process was not followed in declaring a war on drugs. Nor is it evident that the drug war was pursued only after all reasonable, non-belligerent alternatives had been exhausted.

contrast, the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973), uses the word *hostilities* instead of armed conflict. Apparently, *hostilities* was thought to be broader in scope, going beyond actual fighting to include “a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict.” H.R. Rep. No. 93-287, at 6 (1973).

⁶³ See O'BRIEN, *supra* note 59, at 16 (“The decision to invoke the exceptional rights of war must be based on the following criteria: there must be competent authority to order the war for a public purpose; there must be a just cause (it may be self-defense or the protection of rights by offensive war) and the means must be proportionate to the just cause and all peaceful alternatives must have been exhausted; and there must be right intention on the part of the just belligerent.”).

⁶⁴ Jean Bethke Elshtain, *Jean Bethke Elshtain Responds*, DISSENT, (2006), <https://www.dissentmagazine.org/article/jean-bethke-elshtain-responds>.

⁶⁵ See, e.g., U.S. ARMY JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., LAW OF ARMED CONFLICT DESKBOOK 10 (5th ed. 2015) [hereinafter LOAC DESKBOOK] (discussing *jus ad bellum* and how it governs conflict management).

⁶⁶ See, e.g., LOW MANUAL, *supra* note 55, at 40-42 (noting the requirements for declaring war); LOAC DESKBOOK, *supra* note 65, at 12-13 (“A State may resort to war only if it has exhausted all plausible, peaceful alternatives to resolving the conflict in question.”).

On the international level, the Charter of the United Nations was intended to “save succeeding generations from the scourge of war” and to provide for “effective collective measures for the prevention and removal of threats to the peace.”⁶⁷ The Charter gives the U.N. Security Council authority to determine the existence of any threat to or breach of the peace or an act of aggression, for which it may call on member states to employ measures that range from diplomatic and economic sanctions, to the establishment of ad hoc criminal tribunals, to the use of military force against the aggressor.⁶⁸ The Security Council is supposed to determine that non-military measures “would be inadequate or have proved to be inadequate” before authorizing the use of force “as may be necessary to maintain or restore international peace and security.”⁶⁹ No such determinations have ever been made with regard to the drug war.⁷⁰ The U.N. Charter system does recognize “the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.”⁷¹ But it is not at all clear that the war on drugs represents an act of self-defense rather than aggression.⁷²

On the domestic level, the declarations of a war on drugs by several U.S. Presidents raise issues about the constitutional powers of the respective branches of government. The President is the chief organ of foreign affairs,⁷³ and, of particular importance here, he is “Commander in Chief” of the armed forces.⁷⁴ But Congress maintains the explicit

⁶⁷ U.N. Charter preamble; *see also id.* art. 1.

⁶⁸ *See id.* arts. 39–50.

⁶⁹ *Id.* art. 42.

⁷⁰ Obviously, the drug war’s early twentieth-century initiation could not be bound by the U.N. Charter system, which was formulated in the aftermath of World War II. Of greater importance, it can be debated whether the U.N. Charter even applies to internal conflicts. *See id.* art. 2(7) (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state[.]”). *But see, e.g.,* Mohamed S. Helal, *Am I My Brother’s Keeper? The Reality, Tragedy, and Failure of Collective Security*, 6 HARV. NAT’L SEC. J. 383, 445 (2015) (noting increased U.N. involvement in internal conflicts); Paul Szasz, *Role of the United Nations in Internal Conflicts*, 13 GA. J. INT’L & COMP. L. 345 (1983) (arguing in favor of U.N. power to intervene in internal conflicts).

⁷¹ U.N. Charter art. 51.

⁷² *See infra* notes 105–45 and accompanying text. *But see infra* notes 425–39 and accompanying text (noting that the American drug war is neither an international nor non-international armed conflict under the law of war).

⁷³ *See* U.S. CONST. art. II, §§ 2–3 (authorizing the President to recognize foreign officials and to enter treaties contingent upon the assent of two-thirds of the Senate).

⁷⁴ *Id.* art. II, § 2.

constitutional authority to “declare war,”⁷⁵ as well as related powers to provide and make rules for the military.⁷⁶ To be sure, some prominent jurists have claimed that legislation would be invalid to the extent it “interferes with the command of the forces and the conduct of campaigns.”⁷⁷ Moreover, some war-related endeavors have been ratified afterward by lawmakers.⁷⁸ Nonetheless, the constitutional text and context suggest a relatively narrow conception of the commander-in-chief powers, which allow the President “to repel and not to commence war,” as only the legislature could “actually transfer the nation from a state of peace to a state of hostility.”⁷⁹ Here, the U.S. Congress has never formally declared a war against drugs; nor has any President asserted that he was relying upon his constitutional war powers in fighting the war on drugs.⁸⁰

Perhaps more fundamentally, it is not obvious that the federal government has the constitutional authority to wage a war on drugs even if the President and Congress sought to do so. As a matter of first principles, the U.S. Constitution was premised on the idea that the

⁷⁵ *Id.* art. I, § 8, cl. 11.

⁷⁶ In particular, Congress has the power to: “raise and support Armies”; “provide and maintain a Navy”; “make Rules for the Government and Regulation of the land and naval forces”; “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”; and “provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.” *Id.* art. I, § 8, cl. 12–16. Congress is also authorized to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,” and to “grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” *Id.* art. I, § 8, cl. 10–11. In addition, the Constitution states that the federal government “shall protect each of [the states] against Invasion,” and, when called upon, “domestic violence.” *Id.* art. IV, § 4.

⁷⁷ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 88 (1866) (Chase, C.J., concurring).

⁷⁸ See, e.g., *The Prize Cases*, 67 U.S. (2 Black) 635, 671 (1862) (pointing out that naval blockade was later ratified by Congress).

⁷⁹ Hamilton et al., *The Letters of Pacificus*, in *THE FEDERALIST, ON THE NEW CONSTITUTION* 419 (Hallowell et al. eds., 1837) (1788); 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 318 (Max Farrand ed., Yale Univ. 1966) (1911) (comment of Roger Sherman); see *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28–29 (1801) (stating that legislation must guide the Supreme Court’s inquiry since “[t]he whole powers of war [were], by the constitution of the United States, vested in congress”); see also *Holtzman v. Schlesinger*, 414 U.S. 1304, 1311–12 (1973) (Marshall, J., in chambers) (quoting *Talbot* and stating that “nothing in the 172 years since those words were written alters that fundamental constitutional postulate” that “the President may not wage war without some form of congressional approval”).

⁸⁰ Nor, for that matter, have the requirements of the War Powers Resolution been met with regards to the war on drugs. See *War Powers Resolution*, 50 U.S.C. §§ 1541–48 (2012).

people were the source of government authority, that the powers of the federal government were limited and specifically enumerated in the constitutional text, and that all powers not delegated to the federal government were reserved to the people or their local governments.⁸¹ Prominent members of the founding generation rejected the notion that any government should have the power tell the people what they can or cannot put in their bodies.⁸² Until the twentieth century, it was inconceivable that the federal government had the authority to prohibit drugs, as evidenced by the enactment of a constitutional amendment to bring about a national alcohol ban in 1920.⁸³ In the intervening years, however, such constraints have been wiped away by fiat and the drug war is now fought by mere statute alone.

Regardless of government authority, the drug war was not pursued only as a last resort. Drug prohibition is a relatively new idea, as Stanton Peele observed:

[F]or most of human history, even under conditions of ready access to the most potent of drugs, people and societies have regulated their drug use without requiring massive education, legal and interdiction campaigns. The exceptions to successful self-regulation have come for the most part . . . as a result of cultural denigration brought on by outside military and social domination.⁸⁴

Although the 1914 Harrison Narcotics Tax Act would come to represent the first shot fired by the federal government in the war on drugs, the face of the statute only sought to regulate the marketing of opium and other drugs, to place the dispensing function in the hands of medical professionals, and to provide revenue for the federal

⁸¹ See U.S. CONST. art. I, § 8 (enumerating federal powers); *id.* amends. IX, X; THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

⁸² See, e.g., Thomas Jefferson, *Notes on Virginia*, in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 187, 275 (Adrienne Koch & William Peden eds., 1944) (“Was the government to prescribe to us our medicine and diet, our bodies would be in such keeping as our souls are now.”). Since the founding, the U.S. Supreme Court has stated on a number of occasions that the federal government does not have a general police power of the type that would allow it to enact criminal laws generally. See, e.g., *United States v. Lopez*, 514 U.S. 549, 561 n.3, 566 (1995); *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 443 (1827); *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 426, 428 (1821).

⁸³ Roger Pilon, *The Illegitimate War on Drugs*, in AFTER PROHIBITION: AN ADULT APPROACH TO DRUG POLICIES IN THE 21ST CENTURY 23, 27 (Timothy Lynch ed., 2000).

⁸⁴ Stanton Peele, *A Moral Vision of Addiction*, in VISIONS OF ADDICTION: MAJOR CONTEMPORARY PERSPECTIVES ON ADDICTION AND ALCOHOLISM 201, 227 (Stanton Peele ed., 1988) (internal citations omitted).

government.⁸⁵ Toward these ends, the law demanded documentation of drugs from their arrival in the United States through their distribution to patients, while physicians and other permissible drug dispensers were required to be licensed with the government and pay a small tax.⁸⁶ “It is unlikely that a single legislator realized in 1914 that the law Congress was passing would later be deemed a prohibition law.”⁸⁷ And yet, that is exactly what happened.

The entity initially entrusted with enforcement of the Harrison Act, the Bureau of Internal Revenue, promulgated regulations that converted the legislation from an orderly marketing and taxation scheme into a de facto ban backed by criminal sanctions. In particular, federal law enforcement claimed that the Act barred prescriptions to drug users solely to maintain their addiction.⁸⁸ This switch was “a classic example of an uninformed Congress and an uninformed public being manipulated by a bureaucracy for its own ends.”⁸⁹ A somewhat similar transformation occurred in 1937 with the passage of the Marijuana Tax Act, which was, at least nominally, a revenue and registration statute that required physicians and other permissible distributors to obtain licenses and pay small fees.⁹⁰ The effect of the

⁸⁵ See EDWARD M. BRECHER, *LICIT AND ILLICIT DRUGS* 49 (1972); ARNOLD S. TREBACH, *THE HEROIN SOLUTION* 119 (1982); Martin I. Wilbert, *Sale and Use of Cocaine and Narcotics*, 29 PUB. HEALTH REP. 3180, 3181 (1914) (stating that the Harrison Act was “not in any way designed to be a regulatory measure but is intended primarily as a revenue measure”).

⁸⁶ See DUKE & GROSS, *supra* note 1, at 85; TREBACH, *supra* note 85, at 46.

⁸⁷ BRECHER, *supra* note 85, at 49.

⁸⁸ The lower courts rejected this tortured statutory interpretation on a number of grounds, as did the U.S. Supreme Court in 1916. See *United States v. Jin Fuey Moy*, 241 U.S. 394, 399-402 (1916); see also DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 122-30 (1999). Only a few years later, however, the Supreme Court reversed course in a pair of 1919 cases that upheld the constitutionality of the Harrison Act and sustained criminal prosecutions for prescribing and dispensing drugs to an addict. *United States v. Doremus*, 249 U.S. 86, 95 (1919); *Webb v. United States*, 249 U.S. 96, 99-100 (1919). The judicial flip-flop was inexplicable in terms of legal doctrine but perfectly explainable as a matter of historical events, including the rise of World War I jingoism and the first “red scare” of the Bolshevik Revolution, which associated drugs with perversion and rebellion while addiction was considered unpatriotic. See MUSTO, *supra* at 132-34; see also Ethan A. Nadelmann & David T. Courtwright, *Should We Legalize Drugs? History Answers*, AM. HERITAGE, Feb.-Mar. 1993, at 41, 46. Most important of all, the Temperance Movement had finally achieved a nationwide ban on alcohol with the passage of the Eighteenth Amendment to the U.S. Constitution and the necessary enabling legislation known as the Volstead Act.

⁸⁹ TREBACH, *supra* note 85, at 119 (quoting author Richard Ashley).

⁹⁰ See *Marihuana Tax Act of 1937*, Pub. L. No. 75-238, 50 Stat. 551.

law was a total prohibition of marijuana, however, with the Federal Bureau of Narcotics treating distribution of marijuana as a federal crime carrying the possibility of substantial punishment.⁹¹

Fast-forward three decades to the Nixon Administration. Before the war on drugs took on a distinctly militaristic attitude, President Nixon's first drug policy reflected a belief that drug use and abuse were medical issues, with more than half of the drug control budget earmarked for treatment. As documented by journalist Michael Massing, the focus on treatment — in particular, the funding of methadone programs for heroin addiction — produced tangible results in the form of reductions in drug-related crime and overdose deaths.⁹² But the emphasis on treatment was short lived, as political pressure prompted the Nixon Administration to support severe criminal penalties for drug dealing and to establish the Drug Enforcement Administration “to lead the war against illicit drug traffic.”⁹³ So although a non-belligerent approach appeared to be making headway in dealing with America's drug problem, “the political needs of the Nixon Administration kept intruding,” and cracking down on street-level drug dealing, for instance, was “good politics.”⁹⁴

Just Cause and Right Intention. Arguably the most important tenet of the just war tradition — given that its primary purpose is to restrict the occasions for armed conflict — is that war must be launched for a *just cause*, predominantly self-defense.⁹⁵ The just cause principle is complemented by the requirement of *right intention*, which requires that warfare must be for the purpose of a just cause and not based on an ulterior motive such as material gain.⁹⁶ For present purposes, let's assume that that a government's concern about drug addiction and drug-related crime might serve as a just cause. These rationales will be

⁹¹ See LESTER GRINSPOON, MARIHUANA RECONSIDERED 20-21 (1971); see also *United States v. Sanchez*, 340 U.S. 42, 44-45 (1950) (upholding law despite its prohibitive effect).

⁹² See MICHAEL MASSING, *THE FIX* 129 (2000).

⁹³ Reorganization Plan No. 2 of 1973, 38 Fed. Reg. 15,932 (Mar. 28, 1973), as reprinted in 5 U.S.C. app. 1 (1976), and in 87 Stat. 1091 (1978) (establishing a Drug Enforcement Administration).

⁹⁴ MASSING, *supra* note 92, at 123.

⁹⁵ See LOW MANUAL, *supra* note 55, at 40; LOAC DESKBOOK, *supra* note 65, at 13. One of the fathers of international law, sixteenth-century just-war theorist Francisco de Vitoria, proclaimed that “[t]here is a single and only just cause for commencing a war, namely, a wrong received.” Franciscus de Victoria, *De Indis et de Ivre Belli*, in *RELECTIONES* 170 (Ernest Nys ed., John Pawley Bate trans., 1917).

⁹⁶ See LOW MANUAL, *supra* note 55, at 40; LOAC DESKBOOK, *supra* note 65, at 13.

considered below in the discussion of the *jus ad bellum* requirement of macro-proportionality.⁹⁷

Another ostensible reason for the American drug war is to fulfill its obligations under various international conventions.⁹⁸ Interestingly, however, it is not necessarily true that any treaty obligation demands the level of belligerence seen in the war on drugs.⁹⁹ As a matter of domestic law, moreover, it remains unresolved whether the federal government's authority to make treaties goes beyond the limited powers enumerated elsewhere in the Constitution.¹⁰⁰ Such an interpretation could "effectively afford the Government a police power whenever it implements a treaty . . . contrary to the Framers' careful decision to divide power between the States and the National Government as a means of preserving liberty."¹⁰¹

What can be agreed upon, however, is that war is not justified by animosities of race, ethnicity, religion, or national origin, for instance. Much of the modern law of war was motivated by the horrors of World War II, especially the Nazi genocide against European Jews, but also the Axis power's barbarity against people of other nationalities, ethnicities, and religions. These atrocities, particularly the Holocaust, provided the reason for the Genocide Convention and other international agreements.¹⁰² The WWII pogroms and other mass offenses also animated the war crimes tribunal convened in Nuremberg, which, in turn, provided the intellectual basis for several ad hoc international tribunals and the permanent International

⁹⁷ See *infra* notes 184–203 and accompanying text.

⁹⁸ See, e.g., Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 164, 28 I.L.M. 497 (entered into force Nov. 11, 1990); Convention on Psychotropic Substances, 1971, Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 (entered into force Aug. 16, 1976); Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 151 (entered into force Dec. 13, 1964), amended by Protocol of 1972 Amending the Single Convention on Narcotic Drugs, Mar. 25, 1972, 26 U.S.T. 1439, 976 U.N.T.S. 3 (entered into force Aug. 8, 1975).

⁹⁹ See Melissa T. Aoyagi, *Beyond Punitive Prohibition: Liberalizing the Dialogue on International Drug Policy*, 37 N.Y.U.J. INT'L L. & POL. 555, 580 (2005).

¹⁰⁰ Cf. U.S. CONST. art. I, § 8, cl. 18 (reserving for Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

¹⁰¹ *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014); see also *id.* at 2098-102 (Scalia, J., concurring); *id.* at 2102-111 (Thomas, J., concurring).

¹⁰² See generally Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) (entered into force for U.S. Feb. 23, 1989).

Criminal Court to deal with atrocities, including those committed along lines of race, ethnicity, and religion.¹⁰³ The non-discrimination principle in international humanitarian law is so strong, in fact, that an additional protocol to the Geneva Conventions provides that armed struggles in which people are fighting against racist regimes may constitute an international armed conflict with the resulting maximal protections under the law of war.¹⁰⁴

With this background, it can be safely said that animus based on race, ethnicity, religion, etc., does not constitute a just cause for war.¹⁰⁵ History shows, however, that ethnocentric views and hegemony have played a major role in rationalizing the prohibition of intoxicating substances,¹⁰⁶ with public opinion and government

¹⁰³ See SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 47-60 (2002).

¹⁰⁴ See AP I, *supra* note 61, at 7. In loosening the conditions to deal with armed conflict between a state and non-state actors — variously described as irregulars, guerillas, insurgents, and freedom fighters — Additional Protocol I allows individuals to retain their combatant status so long as they carry their arms openly, immediately preceding and during a military attack. See *id.* at 23. However, the United States has refused to adopt this protocol. See Ronald Reagan, Letter of Transmittal, S. Treaty Doc. No. 100-2 (Jan. 29, 1987), reprinted in 81 AM. J. INT'L L. 910, 911 (1987); see also Abraham D. Sofaer, *The Rationale for the United States Decision*, 82 AM. J. INT'L L. 784, 785 (1988).

¹⁰⁵ Of course, the early twentieth-century initiation of the drug war predated the anti-discrimination principle's modern codification in international law. Putting aside the issue of chronology, one might argue that this article suffers from "presentism" by reading contemporary understandings of morality into the past. See, e.g., DAVID HACKETT FISCHER, *HISTORIANS' FALLACIES* 135-40 (1970) (describing the fallacy of presentism). As an historical matter, it is factually correct to say that the roots of prohibition are permeated by racist beliefs, and yet some might consider it anachronistic to criticize prior generations who accepted and acted upon the then-prevailing views of drug use and abuse. That said, however, historians' sensitivity to whiggishness does not temper the analysis of non-historians who reject the absolution bestowed by moral relativism across time and cultures. And, regardless, the judgments made here are not solely about a war in the distant past but instead about an ongoing conflict, the maintenance of which must be evaluated in the present. The fact that prohibition was previously launched and waged pursuant to racial prejudice remains a good reason to question the continuance of hostilities today.

¹⁰⁶ As detailed in sociologist Joseph Gusfield's classic study, *Symbolic Crusade*, the anti-alcohol Temperance Movement was not merely a conflict between teetotalers and imbibers, but a cultural battle as well. JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT 176-77* (2d ed. 1986). "[T]he rural, orthodox Protestant, agricultural, [and] native American" were pitted against "the immigrant, the Catholic, the industrial worker, and the secularized upper class," *id.* at 177, with the social status of the former degraded by the normalization of the drinking and saloon life of the latter. See *id.* Eventually, Temperance leaders achieved public dominance through a national alcohol ban backed by criminal sanction. See *id.*

responses to drug use and abuse often hinging upon who is thought to be using and abusing drugs.¹⁰⁷ Racial prejudices and fears motivated early legislation against opiates, cocaine, and marijuana. Among the first drug laws were those aimed at Chinese railroad workers and laborers who were easy scapegoats for local crime and other social ills.¹⁰⁸ The laws sought to prevent the spread of opium smoking to the white population and protect it against the debauchery that allegedly took place in opium dens,¹⁰⁹ including lurid accusations of opium-driven sexual aggression against white women.¹¹⁰ “[M]any hoped that the Chinese, deprived of access to their drug in the United States, might simply go back to China.”¹¹¹

Likewise, African-Americans were viewed as particularly susceptible to drug use and abuse, rendering them unmindful of social boundaries between blacks and whites.¹¹² Of particular concern was the effect of cocaine, a drug that allegedly made African-Americans prone to crime sprees, including the ultimate offense in the Deep South, the rape of

at 176-77.

¹⁰⁷ See DAVID T. COURTWRIGHT, *DARK PARADISE: OPIATE ADDICTION IN AMERICA BEFORE 1940*, at 3 (1982).

¹⁰⁸ See BRECHER, *supra* note 85, at 42-43. Some of the legislation was explicit in its discrimination, by, for instance, prohibiting opium importation by Chinese immigrants, *see, e.g.*, Act of February 23, 1887, ch. 210, 24 Stat. 409; or by making it a crime for “any white person” to maintain or frequent an opium den. Ronald Hamowy, *Introduction*, in *DEALING WITH DRUGS: CONSEQUENCES OF GOVERNMENTAL CONTROL* 13 (Ronald Hamowy ed., 1987).

¹⁰⁹ See BRECHER, *supra* note 85, at 42-43; COURTWRIGHT, *supra* note 107, at 65-78 (1982); Hamowy, *supra* note 108, at 13; JOHN KAPLAN, *THE HARDEST DRUG: HEROIN AND PUBLIC POLICY* 61-62 (1983).

¹¹⁰ Among other things, officials in San Francisco claimed to have “found white women and Chinamen side by side under the effects of this drug — a humiliating sight to anyone with anything left of manhood.” DUKE & GROSS, *supra* note 1, at 83; *see also* BRECHER, *supra* note 85, at 74.

¹¹¹ KAPLAN, *supra* note 109, at 61. Along these lines, a report by the state pharmacy board to the governor of California expressed satisfaction with the criminalization of opium trade and possession: “[A] marked decrease has been noted in the number of Asiatic immigrants . . . because of their inability to secure the opium necessary to satisfy their cravings. Hence we are in this manner instrumental in ridding the community of this class of undesirable citizens.” HAMILTON WRIGHT, *REPORT ON THE INTERNATIONAL OPIUM COMMISSION AND ON THE OPIUM PROBLEM AS SEEN WITHIN THE UNITED STATES AND ITS POSSESSIONS*, S. DOC. NO. 61-377, at 57 (1910).

¹¹² *See, e.g.*, H. WAYNE MORGAN, *DRUGS IN AMERICA: A SOCIAL HISTORY, 1800-1980*, at 92 (1981) (“The negroes, the lower and immoral classes, are naturally most readily influenced, and therefore among them we have the greater number [of users], for they give little thought to the seriousness of the habit forming.” (quoting a 1903 report by the American Pharmaceutical Association)); MUSTO, *supra* note 88, at 6.

white women.¹¹³ One of the more incredible myths was that African-Americans on cocaine were impervious to .32 caliber bullets, which evidently prompted Southern police departments to switch to .38 caliber firearms.¹¹⁴ A similar phenomenon arose in the 1920s, as Mexican immigrants, who came to the United States to work in agriculture and manufacturing, became associated with marijuana and were vilified as a source of crime and violence.¹¹⁵ As was claimed about African-Americans on cocaine, Mexican immigrants using marijuana supposedly became endowed with phenomenal strength to commit acts of violence.¹¹⁶

The idea of “reefer madness” among Mexicans, of “cocaine-crazed” African-American, and of the “yellow peril” of opium and Chinese immigrants, all conformed to popular prejudices and supported efforts to suppress and segregate racial and ethnic minorities.¹¹⁷ Race-based

¹¹³ According to testimony before the House of Representatives in 1910:

The colored people seem to have a weakness for [cocaine]. . . . They 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. It produces a kind of temporary insanity. They would just as leave rape a woman as anything else and a great many of the southern rape cases have been traced to cocaine.

Importation and Use of Opium: Hearings Before the Committee on Ways and Means of the House of Representatives, 61st Cong. 72 (1911) (statement of Dr. Christopher Koch).

¹¹⁴ MUSTO, *supra* note 88, at 7; *see also* Edward Huntington Williams, *Negro Cocaine “Fiends” Are a New Southern Menace*, N.Y. TIMES, Feb. 8, 1914, at SM12 (“Bullets fired into vital parts, that would drop a sane man in his tracks, fail to check the ‘fiend’ — fail to stop his rush or weaken his attack.”).

¹¹⁵ *See* MUSTO, *supra* note 88, at 219.

¹¹⁶ One Texas law enforcement official asserted:

I have had almost daily experience with the users of [marijuana] for the reason that when they are addicted to the use they become very violent, especially when they become angry and will attack an officer even if a gun is drawn on him. They seem to have no fear. I have also noted that under the influence of this weed they have enormous strength and it will take several men to handle one man while, under ordinary circumstances, one man could handle him with ease.

JAMES SWARTZ, *SUBSTANCE ABUSE IN AMERICA: A DOCUMENTARY AND REFERENCE GUIDE* 18 (2012); *see also* RICHARD J. BONNIE & CHARLES H. WHITEBREAD, II, *THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES* 43 (1974).

¹¹⁷ *See* MORGAN, *supra* note 112, at 93 (“The Near Easterner had symbolized apprehensions about the adverse personal and social effects of cannabis use. Stereotypes of the Chinese had summarized fears about the social dangers of opium smoking. In decades to come the Mexican and marihuana, and the black or Puerto Rican and heroin would figure in the debate. This imagery revealed apprehensions

decision-making in drug prohibition has continued in more recent times, although typically concealed under the cover of an acceptable rationale such as fighting crime. Apparently, race was part of a cynical political calculus in President Nixon's launching of the war on drugs. Journalist Dan Baum reported that John Ehrlichman, one of Nixon's top aids, once said that the Nixon Administration had "two enemies: the antiwar left and black people."¹¹⁸

We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.¹¹⁹

No such smoking gun has surfaced with regard to the notorious disparity in punishment (and enforcement) between crack cocaine and powder cocaine, where the former was predominantly used by blacks and the latter used by whites. Until recent years, federal law imposed a "100-to-1" ratio for cocaine trafficking — a dealer had to possess 100 times the amount of powder cocaine to generate the same punishment for crack cocaine — while only crack cocaine would trigger a mandatory minimum sentence for drug possession.¹²⁰ In the lead-up to the law's passage, media coverage "featured black 'crack whores,' 'crack babies,' and 'gangbangers,' reinforcing already prevalent racial stereotypes of black women as irresponsible, selfish 'welfare queens,' and black men as 'predators' — part of an inferior and criminal subculture."¹²¹ The public dialogue avoided overtly racist language

about these ethnic groups and a desire to control their behavior or isolate them.").

¹¹⁸ Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER'S MAG., Apr. 2016, at 22.

¹¹⁹ *Id.* But see Hilary Hanson, *Nixon Aides Suggest Colleague Was Kidding About Drug War Being Designed to Target Black People*, HUFFINGTON POST (Mar. 25, 2016, 5:32 PM), http://www.huffingtonpost.com/entry/richard-nixon-drug-war-john-ehrllichman_us_56f58be6e4b0a3721819ec61.

¹²⁰ See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. In 2010, the crack-powder ratio was reduced to 18-to-1 and the 5-year mandatory minimum sentence for crack cocaine possession was eliminated. See Fair Sentencing Law of 2010, Pub. L. No. 111-220, 124 Stat 2372.

¹²¹ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 51 (2010).

and instead employed “coded” messages in support of drug warfare.¹²² So despite the absence of explicit proof, it has been argued that racism was “patently evident in the crack cocaine statutes.”¹²³

To the extent that it has been rationalized by prejudice, the war on drugs lacked a just cause in its initiation and pursuit. Putting aside ethnocentrism, as well as other potential just cause problems,¹²⁴ the drug war still has some difficulties with the right intention requirement of *jus ad bellum*. The commencement of drug prohibition may have been driven as much by “ulterior political motives of disingenuous individuals” as by principled belief in prohibition.¹²⁵ For instance, it has been argued that the criminalization of marijuana was motivated, at least in part, by a desire to increase the sagging budget of federal drug enforcers,¹²⁶ who were aided in this pursuit by industrialists with a financial interest in banning hemp.¹²⁷ Whether apocryphal or not, such stories would be consistent with the self-interests at work today in maintaining the drug war: police departments dependent on federal drug war grants to finance their budgets and police unions that want to maintain their constituents’ livelihood; prison administrators and unions that have a large stake in keeping prisons open and people locked up; alcohol and beer companies that want to maintain their monopoly on legal recreational intoxicants; and pharmaceutical manufacturers that may view cheap legal marijuana as a threatening alternative to their pricey pills.¹²⁸ The right intention principle also forces one to confront apparent

¹²² See, e.g., *id.* at 52-54; Richard Dvorak, *Cracking the Code: “De-coding” Racial Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611 (2000).

¹²³ U.S. v. Clary, 846 F. Supp. 768, 779 (E.D. Mo. 1994), *rev’d* 34 F.3d 709 (8th Cir. 1994); see David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1291-93 (1995). *But see* Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994).

¹²⁴ See *infra* notes 184-203 and accompanying text (discussing addiction and drug-crime nexus).

¹²⁵ See COURTWRIGHT, *supra* note 107, at 4; see, e.g., *id.* at 28-30 (discussing Dr. Hamilton Wright); MUSTO, *supra* note 88, at 31-33.

¹²⁶ See, e.g., BOOTH, *supra* note 5, at 149-50 (discussing motives of Harry Anslinger).

¹²⁷ See *id.* at 152-53. “There is much of the conspiracy theory about [this] premise,” Martin Booth acknowledges, “but it is not at all outlandish.” *Id.* at 152.

¹²⁸ See Peter J. Boettke et al., *Keep Off the Grass: The Economics of Prohibition and U.S. Drug Policy*, 91 OR. L. REV. 1069, 1090-91 (2013); Christopher Ingraham, *A Maker of Deadly Painkillers Is Bankrolling the Opposition to Legal Marijuana in Arizona*, WASH. POST (Sept. 9, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/09/09/a-maker-of-deadly-painkillers-is-bankrolling-the-opposition-to-legal-marijuana-in-arizona>.

hypocrisies in the prohibition of vice, as evidenced by, among other things: various Presidents' histories with drugs and alcohol,¹²⁹ one drug czar's penchant for high-stakes gambling,¹³⁰ and DEA agents hosting sex parties with prostitutes hired by foreign drug cartels.¹³¹

The problem of drug war duplicity and mixed motives has even bled into actual shooting wars. During the Vietnam War-era, the CIA apparently supported entities in Southeast Asia involved in opium smuggling. "It was ironic that the CIA should be given the responsibility of narcotics intelligence," a congressional oversight committee wrote, "particularly since they were supporting the prime movers" and, "in fact, facilitating the movement of opiates to the U.S."¹³² Double-dealing in the drug war would occur again during the 1980s, this time in Central America with cocaine smuggling to support the military efforts of the Contras, an anti-communist rebel force in Nicaragua.¹³³ According to a Senate report, American government links included "payments to drug traffickers by the U.S. State Department of funds authorized by the Congress for humanitarian assistance to the Contras, in some cases after the traffickers had been indicted by federal law enforcement agencies on drug charges, in others while traffickers were under active investigation by these same agencies."¹³⁴ In a subsequent review, the CIA Inspector General found

¹²⁹ See, e.g., Raf Sanchez, *A Brief History of Presidential Drug Taking*, TELEGRAPH (Oct. 13, 2014), <http://www.telegraph.co.uk/news/worldnews/barackobama/11191599/A-brief-history-of-presidential-drug-taking.html>.

¹³⁰ See, e.g., David von Drehle, *Bennett Reportedly High-Stakes Gambler - Former Education Secretary Lost \$8 Million in Past Decade, Magazines Find*, WASH. POST, May 3, 2003, at A04.

¹³¹ See, e.g., Sari Horwitz & Carol D. Leonnig, *Report: DEA Agents Had 'Sex Parties' with Prostitutes Hired by Drug Cartels*, WASH. POST, Mar. 26, 2015, https://www.washingtonpost.com/world/national-security/report-dea-agents-had-sex-parties-with-prostitutes-hired-by-drug-cartels/2015/03/26/ad2d53e-d3bd-11e4-8fce-3941fc548f1c_story.html.

¹³² Jack Anderson & Les Whitten, *House Papers Allege CIA Drug Role*, WASH. POST, Oct. 3, 1977, at B13 (quoting secret House report); see also *Frontline: Guns, Drugs, and the CIA*, (PBS television broadcast May 17, 1988), <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/archive/gunsdrugsCIA.html>.

¹³³ See, e.g., ALFRED W. MCCOY, *THE POLITICS OF HEROIN: CIA COMPLICITY IN THE GLOBAL DRUG TRADE* 478-79 (1991); PETER DALE SCOTT & JONATHAN MARSHALL, *COCAINE POLITICS: DRUGS, ARMIES, AND THE CIA IN CENTRAL AMERICA* 24-26 (1991).

¹³⁴ S. SUBCOMM. ON TERRORISM, NARCOTICS AND INT'L OPERATIONS OF THE COMM. ON FOREIGN RELATIONS, 100TH CONG., *REP. ON DRUGS, LAW ENF'T AND FOREIGN POLICY* 36 (Comm. Print 1989), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB113/north06.pdf>; see also *Frontline: Guns, Drugs, and the CIA*, *supra* note 132; Craig Deleval, *Cocaine, Conspiracy Theories & the C.I.A. in Central America*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/special/cia.html> (last visited Sept. 22, 2016).

no evidence of a massive government conspiracy to bring drugs into the United States, but he did acknowledge that the CIA had maintained relationships with Contra supporters who were known to be engaged in drug trafficking.¹³⁵ Senator John Kerry summed up the problem during a 1988 congressional hearing: “[W]e were complicitous as a country in narcotics traffic at the same time as we are spending countless dollars in this country to try to get rid of this problem.”¹³⁶

The following year, the principle of right intention would be put to an even greater test when the United States invaded Panama to oust that nation’s brutal military dictator, Manuel Noriega. Over 24,000 troops were sent to the Central American nation, in part, “to combat drug trafficking.”¹³⁷ Noriega had been on the U.S. government’s payrolls for years and was used by, ironically enough, the DEA, even though he was long known to have been involved in the drug trade.¹³⁸ Apparently, Noriega had helped U.S. national security officials in the purchase and delivery of weapons to the Contras — thereby circumventing congressional restrictions on providing such aid¹³⁹ — employing various machinations that included cocaine trafficking from Panama into the United States.¹⁴⁰ Noriega was even indicted in Florida for drug trafficking and money laundering, embarrassing

¹³⁵ See OFFICE OF INSPECTOR GEN., CENT. INTELLIGENCE AGENCY, REPORT OF INVESTIGATION CONCERNING ALLEGATIONS OF CONNECTIONS BETWEEN CIA AND THE CONTRAS IN COCAINE TRAFFICKING TO THE U.S. (96-0143-IG), VOL. II: THE CONTRA STORY (1998), <https://www.cia.gov/library/reports/general-reports-1/cocaine/contrastory/contents.html>; Walter Pincus, *Inspector: CIA Kept Ties with Alleged Traffickers*, WASH. POST, Mar. 17, 1998; see also *The Contras, Cocaine, and U.S. Covert Operations: Nat’l Sec. Archive Elec. Briefing Book No. 2*, GEO. WASH. UNIV., <http://nsarchive.gwu.edu/NSAEBB/NSAEBB2/index.html#1> (last visited Sept. 22, 2016).

¹³⁶ S. COMM. ON FOREIGN RELATIONS, 100TH CONG., DRUGS, LAW ENFORCEMENT AND FOREIGN POLICY 145 (Comm. Print 1988) (quoting Kerry); *Frontline: Guns, Drugs, and the CIA*, *supra* note 132 (quoting Kerry).

¹³⁷ Address to the Nation Announcing United States Military Action in Panama, 2 PUB. PAPERS 1722 (Dec. 20, 1989). The other rationales were “to safeguard the lives of Americans, to defend democracy in Panama, . . . and to protect the integrity of the Panama Canal treaty.” *Id.*

¹³⁸ See, e.g., Eytan Gilboa, *The Panama Invasion Revisited: Lessons for the Use of Force in the Post Cold War Era*, 110 POL. SCI. Q. 539, 541-43 (1995).

¹³⁹ See Act of Oct. 12, 1984, § 8066, Pub. L. No. 98-473, 98 Stat. 1837 (continuing appropriations for fiscal year 1985); Further Continuing Appropriations Act, 1983, § 793, Pub. L. No. 97-377, 96 Stat. 1830 (1982).

¹⁴⁰ See, e.g., ALEXANDER COCKBURN & JEFFREY ST. CLAIR, *WHITEOUT: THE CIA, DRUGS AND THE PRESS* 287-90 (1998); FREDERICK KEMPE, *DIVORCING THE DICTATOR* 158 (1990); MCCOY, *supra* note 133, at 478-80; SCOTT & MARSHALL, *supra* note 133, at 66-67.

American officials and the DEA in particular, “which considered Noriega to be one of its best assets in its war on drugs.”¹⁴¹

Still, the United States did not act until a series of political criticisms had been leveled against George H.W. Bush — connecting the then-presidential candidate to his “old friend” Noriega, for instance, and subsequently denouncing the Bush Administration’s failure to support a coup attempt against the Panamanian dictator.¹⁴² The war on drugs provided a strong rhetorical argument for invading Panama. Noriega’s involvement in drug trafficking “is aggression as surely as Adolf Hitler’s invasion of Poland 50 years ago was aggression,” said acting Secretary of State Lawrence Eagleburger.¹⁴³ Nonetheless, most analysts agree that “it was highly unlikely that the Bush administration invaded Panama to combat drug trafficking”¹⁴⁴ and thus doubtful that the right intention requirement was met on that basis. Perhaps recognizing that the invasion rested on shaky grounds under international law, the name of the military action was changed to “Operation Just Cause.” As General Colin Powell would later quip, “[e]ven our severest critic would have to utter ‘Just Cause’ while denouncing us.”¹⁴⁵

Macro-Proportionality and Probability of Success. Two final *jus ad bellum* considerations focus on seemingly empirical assessments of the likely outcomes of war. The principle of *macro-proportionality* demands that the aggregate benefits of waging war (e.g., repelling an attack and restoring security) must outweigh the aggregate harms resulting from war (e.g., deaths of innocents).¹⁴⁶ Similarly, a *probability of success* requirement rejects futile causes, viewing war as permissible only if there is a reasonable likelihood of achieving victory.¹⁴⁷

¹⁴¹ Ronald E. Ratcliff, *Panama — The Enduring Crisis 1986–1989*, in CASE STUDIES IN POLICY MAKING AND PROCESS 77, 80 (Kevin L. Little ed., 2004); see also Gilboa, *supra* note 138, at 547.

¹⁴² See, e.g., Jane Kellet Cramer, “Just Cause” or Just Politics? U.S. Panama Invasion and Standardizing Qualitative Tests for Diversionary War, 32 ARMED FORCES & SOC’Y 178, 193-94 (2006).

¹⁴³ John M. Goshko, *OAS Apparently Fails to Resolve Split over Measures to Remove Noriega*, WASH. POST, Aug. 24, 1989 (quoting Eagleburger).

¹⁴⁴ Cramer, *supra* note 142, at 192; see also Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT’L L. 281, 283-84 (1991) (discussing reasons for invasion of Panama).

¹⁴⁵ COLIN POWELL, MY AMERICAN JOURNEY 426 (1995).

¹⁴⁶ See, e.g., LOW MANUAL, *supra* note 55, at 40-41; LOAC DESKBOOK, *supra* note 65, at 13.

¹⁴⁷ See, e.g., LOAC DESKBOOK, *supra* note 65, at 13.

An evaluation of macro-proportionality in the war on drugs might begin with a basic question: Why do individuals use drugs? Throughout human history, individuals have consumed drugs with mind-altering effects,¹⁴⁸ and, in fact, many other animals also indulge in intoxicating substances.¹⁴⁹ The pursuit may be innate or it may be acquired,¹⁵⁰ but regardless, it is extremely powerful. One leading expert has argued that the pursuit of intoxication is a sort of “fourth drive”¹⁵¹ — along with hunger, thirst, and sex — and thus “no more abnormal than the pursuit of love, social attachments, thrills, power, or any number of other acquired motives.”¹⁵² Through the use of drugs, individuals have sought pain relief, escape from drudgery, understanding of self and others, interpersonal bonding, social acceptance, transcendent revelations, altered consciousness, and all kinds of emotions. Indeed, as David Boaz noted in the *UC Davis Law Review*’s 1991 symposium, people use drugs “[p]erhaps because — and this is what really irks the prohibitionists — we enjoy drugs’ mind-altering effects.”¹⁵³

Not only are there benefits from drug use, there is also a strong argument that the very idea of prohibition violates an individual right. Consider, for instance, the implications of classical liberalism or, as it more commonly referred to today, libertarianism. Under this theory — which, among other things, underpinned the framing of the U.S. Constitution¹⁵⁴ — government has no authority to prohibit what an individual does to himself¹⁵⁵ and his possessions,¹⁵⁶ nor could it ban

¹⁴⁸ See, e.g., ANTONIO ESCOHOTADO, *A BRIEF HISTORY OF DRUGS: FROM THE STONE AGE TO THE STONED AGE* (1996); RICHARD RUDGLEY, *THE ALCHEMY OF CULTURE: INTOXICANTS IN SOCIETY* (1993) (examining intoxication across time and culture); RONALD K. SIEGEL, *INTOXICATION: LIFE IN PURSUIT OF ARTIFICIAL PARADISE* (2005) (examining the origins, history, and evolution of intoxication); STUART WALTON, *OUT OF IT: A CULTURAL HISTORY OF INTOXICATION* (2002).

¹⁴⁹ See SIEGEL, *supra* note 148, at 9, 14-15, 32-35.

¹⁵⁰ Compare *id.* at 208 (arguing that motivation to use drugs is acquired), with ANDREW WEIL, *THE NATURAL MIND: A REVOLUTIONARY APPROACH TO THE DRUG PROBLEM* 16 (1972) (arguing the desire to alter consciousness periodically is innate).

¹⁵¹ See SIEGEL, *supra* note 148, at 10, 206-26.

¹⁵² *Id.* at 208-09.

¹⁵³ Boaz, *supra* note 30, at 617; see generally JACOB SULLUM, *SAYING YES: IN DEFENSE OF DRUG USE* (2003).

¹⁵⁴ See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

¹⁵⁵ Under libertarian theory, individuals exercise full “self-ownership,” which means that a person has the right to use his body and mind as he sees fit. For non-consequentialist libertarians, self-ownership is advocated not for its instrumental benefits but instead as a deontological principle. See, e.g., RANDY E. BARNETT, *THE*

him from engaging in voluntary transactions with other adults,¹⁵⁷ so long as the individual does not violate the rights of others.¹⁵⁸ As such, drug possession, use, and trade — as self-regarding acts and free-market exchanges among adults — would be beyond official power. A number of prominent scholars agree that drug use is protected by a moral right, regardless of whether they approach the topic from a classical or modern conception of liberalism.¹⁵⁹

Glimpses of this argument have even been seen in a few court cases involving marijuana. Some opinions contained language that suggests

STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 14 (1998); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 30-33 (1974). For consequentialist libertarians, self-ownership is considered essential for human flourishing, maximizing both personal happiness and socioeconomic productivity in a comprehensive utility function. See, e.g., RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 59 (1995); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 4 (1962); CHARLES MURRAY, WHAT IT MEANS TO BE A LIBERTARIAN 18 (1997).

¹⁵⁶ Libertarian self-ownership entails what are usually described as property rights, the power to determine the disposition of goods and services resulting from one's physical and intellectual labor. When these are mixed with justly acquired resources, the resulting products are also owned by the individual, who in turn may use these goods or voluntarily transfer them to others. The basis for each transaction is the same: allowing "capitalist acts between consenting adults." NOZICK, *supra* note 155, at 163; see also Murray N. Rothbard, *The Future of Capitalism*, in MODERN POLITICAL ECONOMY 419 (James H. Weaver ed., 1973).

¹⁵⁷ See NOZICK, *supra* note 155, at 163 ("capitalist acts between consenting adults"); see also Rothbard, *supra* note 156, at 419.

¹⁵⁸ DAVID BOAZ, THE LIBERTARIAN MIND 96-98 (2015) (discussing the nonaggression principle); see also JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 14 (John Gray ed., 1991) (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.").

¹⁵⁹ Along these lines, Milton Friedman challenged the Nixon Administration for announcing and pursuing a war on drugs:

On ethical grounds, do we have the right to use the machinery of government to prevent an individual from becoming an alcoholic or a drug addict? For children, almost everyone would answer at least a qualified yes. But for responsible adults, I, for one, would answer no. Reason with the potential addict, yes. Tell him the consequences, yes. Pray for and with him, yes. But I believe that we have no right to use force, directly or indirectly, to prevent a fellow man . . . from drinking alcohol or taking drugs.

Milton Friedman, *Prohibition and Drugs*, NEWSWEEK, May 1, 1972, at 104; see also DOUGLAS N. HUSAK, DRUGS AND RIGHTS 2-4 (1992); THOMAS SZASZ, OUR RIGHT TO DRUGS: THE CASE FOR A FREE MARKET 1-2 (1992) (arguing that personal possession of drugs is a property right); Michael Huemer, *America's Unjust Drug War*, in THE NEW PROHIBITION 133 (Bill Masters ed., 2004); Robert W. Sweet & Edward A. Harris, *Just and Unjust Wars: The War on the War on Drugs — Some Moral and Constitutional Dimensions of the War on Drugs*, 87 NW. U. L. REV. 1302, 1339-41 (1993) (reviewing SZASZ, OUR RIGHT TO DRUGS).

the war on drugs, or at least marijuana prohibition, cannot meet the requirements of macro-proportionality and perhaps cannot constitute a just cause in the first place.¹⁶⁰ Preventing people from exercising

¹⁶⁰ In 1972, for instance, the Michigan Supreme Court reversed a conviction for illegal possession of marijuana. *People v. Sinclair*, 194 N.W.2d 878 (Mich. 1972). Although the court was splintered in the rationale for the decision, one concurring judge found that the state's marijuana ban represented

an impermissible intrusion on the fundamental rights to liberty and the pursuit of happiness, and is an unwarranted interference with the right to possess and use private property. As I understand our constitutional concept of government, an individual is free to do whatever he pleases, so long as he does not interfere with the rights of his neighbor or of society, and no government—State or Federal—has been ceded the authority to interfere with that freedom. . . . “Big Brother” cannot, in the name of public health, dictate to anyone what he can eat or drink or smoke in the privacy of his own home.

Id. at 896 (Kavanagh, J., concurring); see also *State v. Kantner*, 493 P.2d 306, 313 (Haw. 1972) (Levinson, J., dissenting). Three years later, the Alaska Supreme Court held that marijuana prohibition violated a right to privacy in so far as it criminalized an adult's possession of marijuana for personal use at home. See *Ravin v. State*, 537 P.2d 494 (Alaska 1975). Reviewing prior cases, the court opined that

the authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large as it relates to matters of public health or safety, or to provide for the general welfare. We believe this tenet to be basic to a free society. The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals.

Id. at 509. Most recently, a chamber of the Mexico Supreme Court found that that nation's ban on marijuana production and consumption violated an individual's right to “free development of personality.” See *Amparo en Revisión, Pleno de la Suprema Corte de Justicia [SCJN]*, Décimo Época, Abril de 2015, J.A.-844/2013 237/2014, Página 1 (Mex.) [hereinafter *Amparo en Revisión*]. This right represented “a radical rejection” of state paternalism in favor of the view that each person is the “best judge of his own interests.” *Id.* at 31 (quoting LUIS MARIA DíEZ-PICAZO, *SISTEMA DE DERECHOS FUNDAMENTALES* 69 (2d ed. 2005)).

The choice of a recreational or leisure activity is a decision that undoubtedly belongs to the sphere of personal autonomy That choice may include, as in this case, the intake or consumption of substances that produce experiences that in some way “affect” the thoughts, emotions and/or feelings of the person. In this line, the decision to smoke marijuana can have different purposes, including “the relief from tension, the heightening of perceptions, and the desire for personal and spiritual insights.” Thus, being “mental experiences,” they are among the most personal and intimate that anyone can feel, so that the decision of an adult to “affect” his personality in this way for recreational or entertainment purposes is *prima facie* protected under the right to free development of personality.

their rights is not a justification for going to war or among the “benefits” that counts in proportionality analysis, but it could be a cost of war in any *jus ad bellum* calculations. To be sure, the judicial decisions were limited in scope to relatively low-level marijuana violations.¹⁶¹ And like those scholars who have argued for a moral right to drugs, the courts recognized that the right at issue could be outweighed by significant concerns for public safety, such as the danger posed by driving under the influence of drugs.¹⁶² More generally, the complexities of the moral issues involved are ones upon which people can disagree in good will.

As a matter of macro-proportionality, however, a purely instrumental weighing of the aggregate costs and benefits undermines any argument for the war on drugs. In the words of Nobel Prize-winning economist Milton Friedman, “[p]rohibition is an attempted cure that makes matters worse — for both the addict and the rest of us.”¹⁶³ The drug war is often driven by a type of fundamental attribution error, where people assume that particular harms are caused by the drugs when, in fact, the harms result from prohibition. In other words, the drug war and not the drugs themselves generate many of the costs that concern individuals and society. Although cost-benefit analysis is well rehearsed in the drug war literature, the arguments are summarized here to spur discussion of macro-proportionality.

Because certain drugs are in heavy demand among the general public but cannot be obtained legally, prohibition creates a black market for these substances.¹⁶⁴ As compared to the potential price in a legal market, the cost of drugs under prohibition is higher as producers and sellers demand increased profits due to the risks associated with criminalization.¹⁶⁵ Those risks include the prospect of

Id. at 40 (quoting *Kantner*, 493 P.2d at 315) (Levinson, J., dissenting).

¹⁶¹ See *Ravin*, 537 P.2d at 512-13; *Sinclair*, 194 N.W.2d at 879; *Amparo en Revisión*, *supra* note 160, at 2.

¹⁶² See *Ravin*, 537 P.2d at 504, 510; *Amparo en Revisión*, *supra* note 160, at 64-65.

¹⁶³ Friedman, *supra* note 159, at 140.

¹⁶⁴ See, e.g., *Black Market*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining “black market” as “[a]n illegal market for goods that are controlled or prohibited by the government, such as the underground market for prescription drugs.”); see also *Shadow Economy*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining a “shadow economy” as “unregistered economic activities that contribute to a country's gross national product,” such as the “illegal production of goods and services, including gambling, prostitution, and drug-dealing, as well as barter transactions and unreported incomes”).

¹⁶⁵ David R. Henderson, *A Humane Economist's Case for Drug Legalization*, 24

being arrested, prosecuted, and incarcerated for drug cultivation and production, drug trafficking and sales, and drug possession. Drug war-inflated prices further harm those who use drugs by forcing them to spend an inordinate amount of their resources on illegal substances and, as a result, they have less to spend on the “basics of life.”¹⁶⁶

The toll for the drug user is not only the high price of drugs, however, but also the costs from having to associate with criminals to obtain the drug. The sheer amount of money involved in the drug trade also fosters government corruption, from beat cops to lawmakers, who yield to the ever-present temptation of seemingly never-ending drug money.¹⁶⁷ Prohibition thus increases the crime rate — by definition with regard to many (though not all) forms of drug possession, use, and sales, but also with regard to crimes associated with the drug war — thereby ensuring that crime is part of “business as usual” in the drug trade.¹⁶⁸ Analysis of prohibition regimes — both with regard to alcohol and drugs and by comparison to other nations — demonstrates that vigorous enforcement coincides with increases in violence, as “market participants substitute guns for lawyers in the resolution of disputes.”¹⁶⁹ Moreover, some addicts may engage in theft-based crimes to pay for their habit, and death or injury may ensue when force is used to take others’ money or fence-able property.¹⁷⁰

Other harms stem from the absence of quality controls and market signals applicable to legal products.¹⁷¹ Potentially lethal impurities result from the necessarily clandestine production of the drugs, which,

UC DAVIS L. REV. 655, 657-58, 658 n.15 (1991); see, e.g., Jeffrey A. Miron, *The Effect of Drug Prohibition on Drug Prices: Evidence from the Markets for Cocaine and Heroin*, 85 REV. ECON. & STAT. 522, 529 (2003) (estimating “that the black market price of cocaine is two to four times the price that would obtain in a legal market, and of heroin 6 to 19 times”).

¹⁶⁶ Henderson, *supra* note 165, at 664.

¹⁶⁷ See U.S. GEN. ACCOUNTING OFFICE, LAW ENFORCEMENT: INFORMATION ON DRUG-RELATED POLICE CORRUPTION 8 (1998) (“[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.”).

¹⁶⁸ Henderson, *supra* note 165, at 660-62; see also Dan Werb et al., *Effect of Drug Law Enforcement on Drug Market Violence: A Systematic Review*, 22 INT’L J. DRUG POL’Y 87, 91 (2011); see also JEFFREY A. MIRON, DRUG WAR CRIMES 43-55 (2004).

¹⁶⁹ MIRON, *supra* note 168, at 43-55.

¹⁷⁰ See, e.g., *id.* at 12-13; Henderson, *supra* note 165, at 664.

¹⁷¹ Henderson, *supra* note 165, at 664-65.

in turn, is due to their very illegality.¹⁷² The history of alcohol prohibition demonstrated many of these consequences.¹⁷³ The national ban precluded government health and safety standards or even a modest level of production transparency for the ultimate consumers, some of whom died or were injured because they were unable to discern between safe “moonshine” and poisonous “rotgut.” A recent example from the war on drugs involved the poisoning of scores of individuals from ingesting opioids cut with an animal tranquilizer used for livestock and elephants.¹⁷⁴ Additional harms arise from the criminalization of drug paraphernalia and, for instance, bans on needle-exchange programs, which otherwise would limit the spread of disease from intravenous drug use.¹⁷⁵

The drug war’s harm to the non-imbibing public also tends to come from the illegality of drugs and not an inherent quality of the substances.¹⁷⁶ It is safe to assume that drug abusers who could obtain their fix in a legal market at a lower post-prohibition price would be involved in fewer crimes against persons and property. Consider also those who are injured or killed in the crossfire of armed traffickers or other violence associated with drug gangs. Obviously, prohibition carries a heavy price tag for taxpayers — over \$67.1 billion in federal, state, and local expenditures in 2008¹⁷⁷ — with the funds diverted away from other public and private projects. Moreover, prohibition almost invariably requires the invasion of privacy and loss of freedom for drug users and teetotalers alike in order to get at a shadow economy that involves willing buyers and sellers.¹⁷⁸ By contrast, legalizing drugs would remove black-market profits and reduce the amount of crime while increasing the quality of law enforcement. “Can you conceive of any other measure that would accomplish so

¹⁷² See MIRON, *supra* note 168, at 15-16.

¹⁷³ See Jeffrey A. Miron & Jeffrey Zwiebel, *Alcohol Consumption During Prohibition*, 81 AM. ECON. REV. 242, 245-46 (1991).

¹⁷⁴ See Jack Healy, *Cincinnati Is Awash with a Drug That Kills in Minuscule Doses*, N.Y. TIMES, Sept. 6, 2016, at A10; see also James Ostrowski, *The Moral and Practical Case for Drug Legalization*, 18 HOFSTRA L. REV. 607, 654 (1990).

¹⁷⁵ See, e.g., MIRON, *supra* note 168, at 16-17; Henderson, *supra* note 165, at 665.

¹⁷⁶ See, e.g., William F. Buckley, *The War on Drugs Is Lost, Address Before the New York Bar Association* (1995), in NAT’L REV., Feb. 12, 1996, at 35 (discussing the costs to non-users); Henderson, *supra* note 165, at 666-69.

¹⁷⁷ See JEFFREY A. MIRON & KATHERINE WALDOCK, *THE BUDGETARY IMPACT OF ENDING DRUG PROHIBITION* 5-7 (2010).

¹⁷⁸ See *infra* notes 214-17 and accompanying text.

much to promote law and order?," Milton Friedman rhetorically asked.¹⁷⁹

The upshot should be a decrease in drug-related deaths¹⁸⁰ — and a reduction in drug-related crime more generally. Law enforcement will not have to stalk the streets and invade people's privacy in pursuit of victimless drug crimes, nor will officers be seduced by the lucrative bribes of drug traffickers. Just think what the police could do with their newly freed-up schedules, such as hunting killers, rapists, pedophiles, swindlers, polluters, terrorists, and so on.¹⁸¹ Consider also the billions of dollars spent chasing drugs and those involved with drugs, seeking to seize both and punish the latter, not to mention the billions of dollars that might be generated in tax revenue. According to one study, drug legalization would not only reduce government expenditures (as mentioned, by about \$41.3 billion in 2010 dollars), but it would also generate billions of dollars in tax revenue (approximately \$46.7 billion in 2010 dollars).¹⁸²

How might these resources be deployed? Perhaps the savings could be used to expand woefully underfunded drug treatment programs, which have been shown to be many times more cost-effective, in terms of alleviating addiction, than the bludgeon of arrest, prosecution, and incarceration.¹⁸³ Maybe the funds could be invested into better schools and more opportunities of the type that can divert those susceptible to drug abuse into pro-social activities consistent with stable, clean living. Or the money could be given back to the taxpayer, who might then invest their peacetime rebate into private enterprise, which could hire new employees and contract for more goods and services that not only would boost the economy but also could provide jobs to the un(der)employed who might otherwise seek solace in intoxication.

¹⁷⁹ Friedman, *supra* note 159, at 140.

¹⁸⁰ See Jeffrey A. Miron, *Violence and the U.S. Prohibitions of Drugs and Alcohol*, 1 AM. L. & ECON. REV. 78, 79 (1999) (suggesting a twenty-five to seventy-five percent drop in the U.S. homicide rate).

¹⁸¹ See, e.g., MARK A.R. KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS 151-153 (1992); MIRON, *supra* note 168, at 12; Bruce L. Benson, David W. Rasmussen & Iljoong Kim, *Deterrence and Public Policy: Trade-Offs in the Allocation of Police Resources*, 18 INT'L REV. L. & ECON. 77, 93-94 (1998).

¹⁸² MIRON & WALDOCK, *supra* note 177, at 12.

¹⁸³ See See, e.g., JUSTICE POLICY INST., SUBSTANCE ABUSE TREATMENT AND PUBLIC SAFETY 13-15 (2008); STEVE AOS ET AL., THE COMPARATIVE COSTS AND BENEFITS OF PROGRAMS TO REDUCE CRIME (2001); DOUG MCVAY ET AL., TREATMENT OR INCARCERATION?: NATIONAL AND STATE FINDINGS ON THE EFFICACY AND COST SAVINGS OF DRUG TREATMENT VERSUS IMPRISONMENT (2004); Gary Zarkin et al., *Benefits and Costs of Substance Abuse Treatment Programs for State Prison Inmates: Results from a Lifetime Simulation Model*, 21 HEALTH ECON. 633 (2012).

This is not to say that ending the drug war would be cost-free. It has been argued that legalization will increase consumption and turn some casual users into addicts, for instance, and greater drug use might lead to an increase in certain crimes. As for the former, most medical professionals and scientific researchers now believe that addiction is “produced by the interaction of the drugs themselves with genetic, environmental, psychosocial, behavioral, and other factors, which causes long-lived alterations in the biochemical and functional properties of selected groups of neurons in the brain.”¹⁸⁴ Drug addiction is manifested by, most notably, drug craving, drug seeking, and drug use.¹⁸⁵ There should be no doubt, moreover, that the lifestyle and behavior of some drug addicts can be shocking.¹⁸⁶ But, again, the fundamental attribution error of drug warfare often leads the analysis astray. The question is not whether an addict’s behavior is reprehensible, but whether it is the product of the drug or instead the drug war. Oftentimes, prohibition is the cause in the sense that the conduct would not occur in the absence of the drug war. Even if this is not true in a particular case, a weaker claim is certainly correct: the drug war failed to prevent the relevant behavior. The only question, then, is whether prohibition prevents a sufficient number of similar cases from occurring so as to justify the drug war’s heavy price tag.

In addressing this issue, one must keep in mind that about half of all Americans will use illegal drugs sometime during their lives.¹⁸⁷ Most use drugs only a few times while others discontinue at some later point.¹⁸⁸ Regardless, the vast majority of those who use drugs do so without destructive consequences for themselves or for others, and instead live productive, otherwise crime-free lives.¹⁸⁹ Only a fraction of

¹⁸⁴ INST. OF MED., *DISPELLING THE MYTHS ABOUT ADDICTION: STRATEGIES TO INCREASE UNDERSTANDING AND STRENGTHEN RESEARCH* 37 (1997). *But see, e.g.*, JOHN BOOTH DAVIES, *THE MYTH OF ADDICTION* (2d ed. 1997); JEFFREY A. SCHALER, *ADDICTION IS A CHOICE* (2001).

¹⁸⁵ Alan I. Leshner, *Understanding Drug Addiction: Insights from the Research*, in *PRINCIPLES OF ADDICTION MEDICINE* 47, 48 (Allan W. Graham, et al. eds., 3d ed. 2003). In this article, I use the terms “addiction” and “drug abuse” interchangeably, but these terms have slightly different meanings and/or adherents among experts. *See, e.g.*, MARGARET P. BATTIN ET AL., *DRUGS AND JUSTICE: SEEKING A CONSISTENT, COHERENT, COMPREHENSIVE VIEW* ch. 6 (2008).

¹⁸⁶ *See, e.g.*, Rachel Premack, “Worst Thing That Has Come Before This Court”: *Mother Financed Addiction by Letting Drug Dealer Rape Her Child*, *WASH. POST*, July 20, 2016.

¹⁸⁷ *See infra* note 305 and accompanying text.

¹⁸⁸ *See, e.g.*, MIRON, *supra* note 168, at 65-68.

¹⁸⁹ *See, e.g.*, ROBERT MACCOUN & PETER REUTER, *DRUG WAR HERESIES: LEARNING FROM OTHER VICIES, TIMES, AND PLACES* 61 (2001); MIRON, *supra* note 168, at 14.

individuals who ingest drugs will become problem users,¹⁹⁰ with significant differences in addictiveness among the substances of abuse.¹⁹¹ Moreover, those who do become addicted may present thorny questions of comorbidity. Individuals suffering from certain mental illnesses — including schizophrenia, bipolar disorder, depression, and post-traumatic stress disorder — are far more likely to be addicted to drugs than those without such disorders. This, in turn, raises questions of causation, since mental illness may well lead to drug use, perhaps as a form of self-medication to deal with the underlying illness.¹⁹² In other words, addiction may not be the issue, or at least not the whole problem.

Environmental factors often play a critical role as well — and, of importance here, these factors can change or be changed. For instance, studies of American soldiers whose drug use had been remarkable and chronic while serving in the Vietnam War found that, in most cases, drug consumption entirely subsided when they returned home.¹⁹³ The soldiers' drug use and abuse could be attributed to having been wrenched from their homes and dropped into a war in a foreign land. Although addiction is widely assumed to be a chronic, relapsing disease, research has shown “that addiction typically remits, that it is the shortest-lasting psychiatric disorder, that it is the disorder most influenced by socially mediated consequences, and that addicts can

¹⁹⁰ See, e.g., GLOBAL COMM'N ON DRUG POLICY, *WAR ON DRUGS: REPORT OF THE GLOBAL COMMISSION ON DRUG POLICY* 13 (2011); MIRON, *supra* note 168, at 65-68; THE NSDUH REPORT, *SUBSTANCE USE AND DEPENDENCE FOLLOWING INITIATION OF ALCOHOL OR ILLICIT DRUG USE* (2008); Megan S. O'Brien & James C. Anthony, *Extra-Medical Stimulant Dependence Among Recent Initiates*, 104 *DRUG & ALCOHOL DEPENDENCE* 147 (2009).

¹⁹¹ See, e.g., Phillip J. Hiltz, *Is Nicotine Addictive? It Depends on Whose Criteria You Use*, *N.Y. TIMES*, Aug. 2, 1994, at C3; Nutt et al., *supra* note 14, at 1563.

¹⁹² See, e.g., Sylvia J. Dennison, *Substance Use Disorders in Individuals with Co-Occurring Psychiatric Disorders*, in *SUBSTANCE ABUSE: A COMPREHENSIVE TEXTBOOK* 904 (Joyce H. Lowinson et al. eds., 4th ed. 2005) [hereinafter Lowinson et al.]; Stephen Ross, *The Mentally Ill Substance Abuser*, in *TEXTBOOK OF SUBSTANCE ABUSE TREATMENT* 537 (Marc Galanter & Herbert D. Kleber eds., 4th ed. 2008) [hereinafter Galanter & Kleber]. See generally *THE ASAM PRINCIPLES OF ADDICTION MEDICINE* § 11 (Richard K. Ries et al. eds., 5th ed. 2014) (“Co-Occurring Addictive and Psychiatric Disorders”).

¹⁹³ See Lee N. Robins et al., *Vietnam Veterans Three Years After Vietnam: How Our Study Changed Our View of Heroin*, in *Drugs: Should We Legalize, Decriminalize, or Deregulate?*, 19 *AM. J. ON ADDICTIONS* 203, 206 (2010); Lee N. Robins et al., *Narcotic Use in Southeast Asia and Afterward: An Interview Study of 898 Vietnam Returnees*, 32 *ARCHIVES GEN. PSYCHIATRY* 955, 958-59 (1975); Lee Robins et al., *How Permanent Was Vietnam Drug Addiction?*, 64 *AM. J. PUB. HEALTH* 38, 39 (1974); see also Dan Waldorf & Patrick Biernacki, *Natural Recovery from Heroin Addiction: A Review of the Incidence Literature*, 9 *J. DRUG ISSUES* 281, 281-82 (1979).

curtail drug use when it is immediately beneficial to do so.”¹⁹⁴ Modern science has also shown that drug addiction is treatable when appropriate resources are available.¹⁹⁵ All of this challenges the prohibitionist image of drugs inevitably conscripting the otherwise problem-free user who has no chance of escape. To put it in the language of the law of war, addiction is not equivalent to “an invading army.”¹⁹⁶

Most interesting of all, however, is the lack of evidence demonstrating that drugs cause violent crime. Drugs are not criminogenic in a pharmacological sense — that is, violent or anti-social behavior is not a property of consumption — and a causal link between drugs and violence has yet to be proven.¹⁹⁷ This is not for lack of effort on the part of researchers. At best, studies have shown a correlation between drug use and crime, using a methodology that, in Jeffrey Miron’s words, “would also demonstrate that consumption of fast food or wearing blue jeans causes criminal behavior.”¹⁹⁸ To date, studies of marijuana legalization in the United States have shown no exacerbation of crimes rates.¹⁹⁹ As for drug use, it is not even clear that drug warfare brings about a worthwhile reduction in consumption. Using various proxies for imbibing, it appears that alcohol prohibition had only a modest impact on consumption.²⁰⁰ After the national ban was lifted, alcohol consumption returned to pre-prohibition rates.²⁰¹

¹⁹⁴ Gene M. Heyman, *Is Addiction a Chronic, Relapsing Disease?*, in *DRUG ADDICTION AND DRUG POLICY: THE STRUGGLE TO CONTROL DEPENDENCE* 81, 109 (Philip B. Heymann & William N. Brownsberger eds., 2001).

¹⁹⁵ See, e.g., Andrea G. Barthwell & Lawrence S. Brown, Jr., *The Treatment of Drug Addiction: An Overview*, in *PRINCIPLES OF ADDICTION MEDICINE*, *supra* note 185, at 389. See generally *THE ASAM PRINCIPLES OF ADDICTION MEDICINE*, *supra* note 192, §§ 6–9; Lowinson et al., *supra* note 192, § 6; Galanter & Kleber, *supra* note 192, Parts 4–5.

¹⁹⁶ MASSING, *supra* note 92, at 126 (quoting Governor Nelson Rockefeller).

¹⁹⁷ See Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 273 (2015); Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of a Task Force Examining the Drugs-Violence Interrelationship*, 63 ALB. L. REV. 749, 755-58 (2000); Jeffrey Fagan, *Interactions Among Drugs, Alcohol, and Violence: Dilemmas and Frameworks for Public Health Policy*, 12 HEALTH AFF. 65, 67-71 (1993).

¹⁹⁸ MIRON, *supra* note 168, at 14.

¹⁹⁹ See Robert G. Morris et al., *The Effect of Medical Marijuana Laws on Crime: Evidence from State Panel Data, 1990–2006*, 9 PLOS ONE 1, 6 (2014); see also COLO. DEP’T OF PUB. SAFETY, *MARIJUANA LEGALIZATION IN COLORADO: EARLY FINDINGS* (2016).

²⁰⁰ See Angela K. Dills et al., *The Effect of Alcohol Prohibition on Alcohol Consumption: Evidence from Drunkenness Arrests*, 86 ECON. LETTERS 279, 280 (2005); Angela K. Dills & Jeffrey A. Miron, *Alcohol Prohibition and Cirrhosis*, 62 AM. L. & ECON. REV. 285, 286-87 (2004).

²⁰¹ Rex Greene, *Towards a Policy of Mercy: Addiction in the 1990s*, 3 STAN. L. & POL’Y REV. 227, 230-31 (1991).

Likewise, there is no evidence that legalization or decriminalization of marijuana has resulted in massive increases in marijuana use.²⁰² If anything, criminalization may have a substitution effect, as consumers move from one substance to another, perhaps more dangerous drug.²⁰³

The foregoing suggests not only that the aggregate harms of prohibition outweigh the aggregate benefits, but also the war on drugs is unlikely to succeed, at least to the extent that success means a drug-free America and in the absence of a fundamental change in the American constitutional structure.²⁰⁴ Alcohol prohibition demonstrated as much nearly a century ago. The iron law of supply and demand ensures that we will never be able to staunch the flow of illegal drugs.²⁰⁵ Opium poppy and coca leaves can be grown and harvested in numerous places around the globe, while the slang name “weed” is entirely appropriate for marijuana, given that the cannabis plant is adaptive, fast growing, and appears naturally throughout the world’s temperate and tropical zones. Institutional factors matter as well. Law enforcement tends to be a reactionary body one step behind the entrepreneurial drug cartels,²⁰⁶ which have often responded in a

²⁰² See, e.g., JEFFREY A. MIRON, THE EFFECT OF MARIJUANA DECRIMINALIZATION ON THE BUDGETS OF MASSACHUSETTS GOVERNMENTS, WITH A DISCUSSION OF DECRIMINALIZATION’S EFFECT ON MARIJUANA USE 6-7 (2008), http://scholar.harvard.edu/files/miron/files/deccrim_update_2007-1.pdf; STEVEN WISOTSKY, BREAKING THE IMPASSE ON THE WAR ON DRUGS 215 (1986); 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, 785 (1990); Ethan A. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, 5 NOTRE DAME J.L. ETHICS & PUB. POL’Y 783, 803 (1991); Richard Dennis, *The Economics of Legalizing Drugs*, ATLANTIC MONTHLY, Nov. 1990, at 126, 130.

²⁰³ See MARK THORNTON, THE ECONOMICS OF PROHIBITION 100-05 (1991); Michael Conlin, *The Effect of Alcohol Prohibition on Illicit-Drug-Related Crimes*, 48 J.L. & ECON. 215 (2005); see also D. Mark Anderson et al., *Medical Marijuana Laws, Traffic Fatalities, and Alcohol Consumption*, 56 J.L. & ECON. 333, 359 (2013) (“We find that the legalization of medical marijuana is associated with reduced alcohol consumption, especially among young adults.”).

²⁰⁴ See Buckley, *supra* note 176, at 35 (concluding “that the so-called war against drugs was not working, that it would not work absent a change in the structure of the civil rights to which we are accustomed and to which we cling as a valuable part of our patrimony”).

²⁰⁵ See, e.g., Friedman, *supra* note 159, at 140 (“So long as large sums of money are involved — and they are bound to be if drugs are illegal — it is literally hopeless to expect to end the traffic or even to reduce seriously its scope.”).

²⁰⁶ See, e.g., James Ostrowski, *Thinking About Drug Legalization*, CATO POL’Y ANALYSIS (May 25, 1989), <https://www.cato.org/pubs/pas/pa121.html> (“The public has the false impression that drug enforcers are highly innovative, continually devising new schemes to catch drug dealers. Actually, the reverse is true. The dealers, like successful businessmen, are usually one step ahead of the ‘competition.’”).

whack-a-mole fashion to any government endeavors. Whack drug production in one country, up pops drug production in another country.²⁰⁷ Add to that a sort of *Breaking Bad* effect: When someone can cook their own synthetic drugs with a basic chemistry set, a few relatively obtainable precursors, a little bit of scientific know-how, and some elbow grease, an entire drug control scheme blows up (as does the occasional meth lab).²⁰⁸

Some old drug warriors argued that escalating the war would do the trick, oftentimes in a manner “eerily reminiscent of the Vietnam War,”²⁰⁹ when government officials repeatedly claimed that, despite horrible losses on the field, victory over the enemy was soon to be had. One of the more optimistic statements was made by President Reagan, who found a way to put a positive spin on mounting evidence of the drug war’s failure:

[The] persistent demand for illegal drugs is met by sometimes seemingly limitless supply. But a surge in drug-related crimes, deaths by overdose, births of drug-addicted and drug-impaired babies, and even the destabilization of national governments by traffickers should not be viewed as harbingers of defeat in our war on drugs. These events should instead strengthen our resolve to stop this insidious evil once and for all. . . . But believe me, with each jolt into reality, we strengthen our offenses and move closer to a drug free America. Remember, the shock of recognition is not a sign of defeat; it’s the beginning of victory.²¹⁰

Such sentiments have been repeated over the years.²¹¹ “Many of us believe . . . that the war has not yet begun,” said Rep. Charles Rangel,

²⁰⁷ See, e.g., Ethan A. Nadelmann, *The Case for Legalization*, 92 PUB. INT. 3, 9 (1988).

²⁰⁸ See, e.g., Mike Power, *Drugs Unlimited: How I Created My Very Own Legal High*, GUARDIAN (Oct. 31, 2013, 9:10 EDT), <https://www.theguardian.com/science/2013/oct/31/drugs-legal-high>.

²⁰⁹ John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 UC DAVIS L. REV. 557, 557 (1991).

²¹⁰ President Ronald Reagan, Remarks to Media Executives at a White House Briefing on Drug Abuse (Mar. 7, 1988).

²¹¹ See, e.g., William J. Bennett, *Don’t Surrender: The Drug War Worked Once. It Can Again*, WALL STREET J., May 15, 2001 (“We must re-engage this fight. What we were doing in the 1980s and early 1990s — vigorous law enforcement and interdiction coupled with effective prevention and treatment — worked. It can work again.”); Bill McCollum, *Waving the White Flag in Drug War?*, WASH. TIMES, Mar. 10, 1998, at A17 (“The drug crisis is a top — if not the top — national security threat facing our nation today [and the Clinton] administration’s clear unwillingness to wage an all-out drug

who was once described as a “front-line general in the War on Drugs”²¹² for pushing tough drug laws that sent to prison entire generations of young men from his own Harlem community. A quarter-century later, Rangel apparently recognizes that the policies he supported caused irreparable harm to his constituents and the nation as a whole.²¹³

Truth be told, the government *has* engaged in warlike efforts — they have just failed to work. Over the past few decades, the United States has witnessed massive increases in drug war-related spending, contraband seizures, arrests, prosecutions, court cases, sentences, and imprisonment.²¹⁴ In support of these efforts, the judiciary has become “a loyal foot soldier”²¹⁵ in the war on drugs and acquiesced to “constitutionally forbidden shortcuts,”²¹⁶ where those accused of drug offenses seem to receive lesser protection than others. The result is a type of “drug exception” to the Constitution, which, when taken to an extreme, works like a wartime suspension of habeas corpus by effectively cutting out the courts in the interpretation of constitutional provisions affected by prohibition. Apropos of this, drug czar William Bennett seemed to advocate suspending the writ of habeas corpus for

war cannot go unchallenged.”); *The Larry King Show* (CNN television broadcast Feb. 7, 2001) (Attorney General John Ashcroft stating: “I want to escalate the war on drugs. I want to renew it. I want to refresh it, relaunch it if you will.”).

²¹² Charles Rangel, *Our National Drug Policy*, 1 STAN. L. & POL’Y REV. 43, 52 (1989); Lynn Norment, *Charles Rangel: The Front-Line General in the War on Drugs*, EBONY, Mar. 1989, at 128; see also *What Must Be Done*, EBONY, Aug. 1989, at 156 (quoting Rangel as saying: “We haven’t even fired the first shot in the war on drugs . . . you cannot say we’re ‘losing’ the war because we have not even fought it yet.”).

²¹³ See, e.g., Jacob Sullum, *How Charlie Rangel’s Outrage Shifted from Drugs to Drug Penalties*, REASON.COM (May 31, 2012) <http://reason.com/blog/2012/05/31/how-charlie-rangels-outrage-shifted-from>.

²¹⁴ See, e.g., Boettke et al., *supra* note 128, at 1071; Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 754-55 (2002); Office of Nat’l Drug Control Policy, *National Drug Control Budget: FY 2017 Funding Highlights*, WHITE HOUSE (Feb. 2016), https://www.whitehouse.gov/sites/default/files/ondcp/press-releases/fy_2017_budget_highlights.pdf.

²¹⁵ *California v. Acevedo*, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting).

²¹⁶ *Harmelin v. Michigan*, 501 U.S. 957, 1024 (1991) (White, J., dissenting) (quoting *Turner v. United States*, 396 U.S. 398, 427 (1970) (Black, J., dissenting)); see, e.g., Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993); Luna, *Drug Exceptionalism*, *supra* note 214, at 755-77; David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237 (1994); Steven Wisotsky, *Crackdown: The Emerging “Drug Exception” to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

drug offenders. “It’s a funny war when the ‘enemy’ is entitled to due process of law and a fair trial.”²¹⁷

The war-like efforts and contortions have had little effect on the availability and use of drugs or the incidence of violence and property crimes, but they have made drug cartels very rich.²¹⁸ In summing up the argument against the drug war, David Boaz noted that even high-ranking government officials had acknowledged that they were unaware of any study showing that the costs of prohibition were outweighed by its benefits. “There is a good reason for the lack of such a study,” Boaz argued. “Prohibition is futile.”²¹⁹ So although the drug war will never achieve its objective, the United States will certainly continue to pay a very heavy price in blood, treasure, and legitimacy.

III. JUS IN BELLO

The second set of rules in the just war tradition and the law of war concern the conduct of war once it has begun. The considerations of *jus in bello* seek to ensure that a war’s prosecution is both legal and moral, consistent with the notion that the parties in an armed conflict are not unlimited in their methods of warfare.²²⁰ Michael Walzer neatly distinguished *jus ad bellum* from *jus in bello*. The former involves a judgment “adjectival in character: we say that a particular war is just or unjust,” while the latter “is adverbial: we say that the war is being fought justly or unjustly.”²²¹ So while the previous section considered whether the war on drugs is just or unjust, this part will examine whether the drug war is being fought justly or unjustly.

Indeed, it is important to emphasize that the “justness” of a party’s recourse to war does not affect the “justness” of its conduct during war. In other words, *jus ad bellum* and *jus in bello* generally operate

²¹⁷ *The Top Drug Warrior Talks Tough*, FORTUNE, Mar. 12, 1990.

²¹⁸ See, e.g., Patrick Radden Keefe, *The Snow Kings of Mexico*, N.Y. TIMES, June 17, 2012, at MM36; Eduardo Porter, *Numbers Tell of Failure in Drug War*, N.Y. TIMES, July 4, 2012, at B1; Tom Wainwright, *How Economists Would Wage the War on Drugs*, WALL STREET J. (Feb. 19, 2016), <http://www.wsj.com/articles/how-economists-would-wage-the-war-on-drugs-1455895053>; Oriana Zill & Lowell Bergman, *Do the Math: Why the Illegal Drug Business is Thriving*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/special/math.html> (last visited Sept. 13, 2016).

²¹⁹ Boaz, *supra* note 30, at 636.

²²⁰ See, e.g., LOAC DESKBOOK, *supra* note 65, at 10-11; LOW MANUAL, *supra* note 55, at 39; U.K. MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT 21 (2004) [hereinafter U.K. MANUAL]; see also AP I, *supra* note 61, at 35(1); Hague Convention (IV) Respecting the Laws and Customs of War on Land arts. 1–2, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague IV].

²²¹ WALZER, JUST AND UNJUST WARS, *supra* note 49, at 21.

independent of one another.²²² An otherwise unjust cause under *jus ad bellum* does not become legitimate because belligerents employ only lawful and moral methods of warfare, nor does a just cause for going to war dispense with the requirement that belligerents abide by *jus in bello* in conducting military operations.²²³ In the present context, the fact that prohibitionists may believe the drug war is just does not allow them to adopt an ends-justify-the-means form of belligerence. Likewise, the fact that drug traffickers fight unjustly (and sometimes their acts are despicable) would not excuse the government for employing similar means.

As mentioned earlier, much of the just war tradition has been codified by international treaty. In particular, four interrelated principles underpin the law of war: distinction, proportionality, military necessity, and humanity.²²⁴ This section will apply these fundamental principles of *jus in bello* to certain aspects of the war on drugs.

Military Necessity and Micro-Proportionality. The principle of military necessity permits combatants to employ only that degree and type of force necessary to achieve a legitimate military objective.²²⁵ The principle rejects the idea of total war²²⁶ and the militaristic proverb that “necessity in war overrules the manner of warfare.”²²⁷ Rather, an alleged military necessity cannot excuse acts that otherwise

²²² LOW MANUAL, *supra* note 55, at 39, 86. See, e.g., LOAC DESKBOOK, *supra* note 65, at 133. When *jus ad bellum* and *jus in bello* do interact, however, they tend to place further limits on war. For instance, the requirement that war be pursued by a legitimate authority “acknowledges that the resort to military force is a prerogative of the State,” LOW MANUAL, *supra* note 55, at 88, which, in the context of prohibition, would mean that the government’s drug warfare could not be waged by private persons (e.g., vigilantes) or others ineligible for combatant status (e.g., children), *cf.* *Confidential Informants*, 60 Minutes (CBS television broadcast Dec. 6, 2015) (describing the recruitment of young people to serve as drug informants).

²²³ See, e.g., LOW MANUAL, *supra* note 55, at 14, 78, 86-88; see also GC I, *supra* note 61, art. 1 (“The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”); INT’L COMM. OF THE RED CROSS, COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 27 (Jean S. Pictet ed., 1952) (“The words ‘in all circumstances’ mean in short that the application of the Convention does not depend on the character of the conflict. Whether a war is ‘just’ or ‘unjust’, whether it is a war of aggression or of resistance to aggression, the protection and care due to the wounded and sick are in no way affected.”).

²²⁴ See, e.g., U.K. MANUAL, *supra* note 220, at 21; see also LOW MANUAL, *supra* note 55, at 51-52 (discussing interrelation between the principles).

²²⁵ See, e.g., LOW MANUAL, *supra* note 55, at 52-53; LOAC DESKBOOK, *supra* note 65, at 134-36; U.K. MANUAL, *supra* note 220, at 21-22.

²²⁶ See *supra* note 48 and accompanying text.

²²⁷ LOW MANUAL, *supra* note 55, at 53.

violate the law of war.²²⁸ Nor should military necessity be mistaken for mere military or personal conveniences that “cloak slackness or indifference.”²²⁹ Military necessity does not allow for wanton destruction of property and infliction of death, injury, and suffering on innocent individuals.²³⁰ Legal commentators add that decisions on military necessity should be based not on generalities but instead on what is actually necessary under the prevailing circumstances.²³¹

Although military necessity accepts the occurrence of incidental harms, the principle of micro-proportionality limits the extent to which such harms can be justified by the alleged necessity.²³² In particular, instances of military force must be proportionate to the end sought, such that the military objective (e.g., destroying a military installation) outweighs the harm inflicted (e.g., civilian casualties).²³³ The principle of micro-proportionality forbids indiscriminate action and requires certain precautions by decisionmakers, who must refrain from “any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”²³⁴ As a result, attacks on otherwise legitimate targets may be precluded as disproportionate and therefore an unjustifiable escalation in warfare.²³⁵ Likewise, proportionality comes into play when

²²⁸ See, e.g., *id.* at 54; U.K. MANUAL, *supra* note 220, at 22.

²²⁹ LOW MANUAL, *supra* note 55, at 55 n.30 (quoting Gen. Dwight Eisenhower).

²³⁰ See, e.g., U.K. MANUAL, *supra* note 220, at 22.

²³¹ See, e.g., NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 79 (2009) (noting that principle of military necessity does not prohibit “that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances”); see also JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 75-76 (1985) (“If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him.”). *But see* LOW MANUAL, *supra* note 55, at 57-58 (rejecting this interpretation).

²³² See, e.g., LOW MANUAL, *supra* note 55, at 53, 61; see also *id.* at 86 (distinguishing proportionality in *jus ad bellum* [i.e., macro-proportionality] from proportionality in *jus in bello* [i.e., micro-proportionality]); LOAC DESKBOOK, *supra* note 65, at 35 nn.9–10 (making the same distinction).

²³³ See, e.g., LOW MANUAL, *supra* note 55, at 60-62; LOAC DESKBOOK, *supra* note 65, at 13; U.K. MANUAL, *supra* note 220, at 25.

²³⁴ AP I, *supra* note 61, arts. 51(5)(b), 57(2)(a)(iii), (b).

²³⁵ See, e.g., LOW MANUAL, *supra* note 55, at 60; U.K. MANUAL, *supra* note 220, at 26.

determining whether certain weaponry is prohibited because it is expected to inflict unnecessary suffering.²³⁶

These principles have come into play as militaristic responses have increased over the course of the American drug war. In 1981, the Posse Comitatus Act — which limits the use of the U.S. armed forces in domestic law enforcement²³⁷ — was amended by Congress to allow the military to help in the execution of drug laws.²³⁸ The military became “steadily more active, more innovative, and more flexible” in its drug war role.²³⁹ Among other things, the Secretary of Defense was directed to find ways that “enable U.S. military forces to support counter-narcotics efforts more actively,”²⁴⁰ and the Defense Department was explicitly tapped as the “single lead agency” for drug interdiction efforts.²⁴¹ The process only accelerated with the end of the Cold War, which created pressure to shift military resources toward new objectives.²⁴² Eventually, the Defense Department created military units whose entire mission was drug interdiction, for instance, patrolling the Caribbean Sea and the U.S.-Mexico border for drug smugglers.²⁴³

On occasion, the U.S. military’s involvement in the drug war has resulted in tragedy. In one case, a camouflaged Marine unit patrolling the border in Texas shot and killed an American teenager who was tending his family’s goats.²⁴⁴ Critics argued that the incident

²³⁶ LOW MANUAL, *supra* note 55, at 62.

²³⁷ See 18 U.S.C. § 1385 (2012) (making it a crime to “willfully use[] any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws”).

²³⁸ See Pub. L. No. 97-86, § 905, 95 Stat. 1115 (1981) (codified at 10 U.S.C. §§ 371-78 (2012)).

²³⁹ PRESIDENT’S COMM’N ON ORGANIZED CRIME, AMERICA’S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME 379-80 (1986).

²⁴⁰ PRESIDENT RONALD REAGAN, NATIONAL SECURITY DECISION DIRECTIVE NO. 221, at 3 (1986).

²⁴¹ National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 100-189, § 1202, 103 Stat. 1353, 1563 (1989) (codified as amended at 10 U.S.C. § 124(a)(1)); see also National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 1011(c), 108 Stat. 2836 (1994); *DOD Role in Drug Control*, DISAM J., Winter 1989-90, at 39.

²⁴² See, e.g., Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383, 409 (2003).

²⁴³ See, e.g., *id.* at 384-85, 413-14, 419; W. Kent Davis, *Swords into Ploughshares: The Dangerous Politicization of the Military in the Post-Cold War Era*, 33 VAL. U. L. REV. 61, 70-71 (1998); Mark P. Nevitt, *Unintended Consequences: The Posse Comitatus Act in the Modern Era*, 36 CARDOZO L. REV. 119, 144 (2014).

²⁴⁴ E.g., Ron Martz, *Role of the Military: Pushing the Law’s Limits to Fight the Drug War on the Home Front*, ATLANTA J. & CONST., Oct. 5, 1997, at G1; Robert Draper, *Soldiers of Misfortune*, TEX. MONTHLY (Aug. 1997), <http://www.texasmonthly.com/>

highlighted a critical distinction between military and law enforcement approaches to fighting the drug war, which does not always present “a life-threatening situation that would warrant military action.”²⁴⁵ Worse yet, interdiction efforts by the armed forces may have been driven by budgetary concerns, where certain parts of the military had become “hooked on drug interdiction money.”²⁴⁶ As one ranking officer acknowledged, “my commanders depend on, and plan for, this annual infusion [of federal funds.] Withdrawal from counterdrug missions will impact small unit training and could impact anticipated budget [increases].”²⁴⁷

For most Americans, however, direct involvement of the U.S. military in interdiction efforts does not represent the drug war’s greatest threat to the principles of necessity and proportionality. Rather, the real problem comes from the military equipment, training, and mindset that have been infused into domestic law enforcement of drug prohibition.²⁴⁸ Under federal law, the Defense Department can transfer military equipment and supplies to civilian police departments for their drug war efforts.²⁴⁹ Likewise, police departments have purchased military equipment with grant money provided by the Justice Department and the Department of Homeland Security.²⁵⁰ As a result, local law enforcement acquired billions of dollars in military

articles/soldiers-of-misfortune-2; Monte Paulsen, *Fatal Error: The Pentagon’s War on Drugs Takes a Toll on the Innocent*, AUSTIN CHRON., Dec. 25, 1998. Eighteen-year-old Ezequiel Hernandez Jr. — “carrying his grandfather’s old .22 rifle to fend off a pack of wild dogs that had been ravaging his herd — allegedly fired on four low-to-the-ground shaggy figures that turned out to be heavily armed and camouflaged Marines.” Draper, *supra*. The Marines returned fire and killed Hernandez.

²⁴⁵ Martz, *supra* note 244.

²⁴⁶ Paulsen, *supra* note 244.

²⁴⁷ MAJOR GEN. JOHN T. COYNE, INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES SURROUNDING THE JOINT TASK FORCE-6 (JTF-6) SHOOTING INCIDENT THAT OCCURRED ON 20 MAY 1997 NEAR THE BORDER BETWEEN THE UNITED STATES AND MEXICO (1998) (quoting Commanding General, 1st Marine Division).

²⁴⁸ See generally BALKO, *supra* note 20 (discussing the militarization of domestic law enforcement).

²⁴⁹ See 10 U.S.C. § 2576a (2012); see also DANIEL H. ELSE, CONG. RESEARCH SERV., R43701, THE “1033 PROGRAM,” DEPARTMENT OF DEFENSE SUPPORT TO LAW ENFORCEMENT 1-2 (2014); VALERIE BAILEY GRASSO, CONG. RESEARCH SERV., RS20549, DEFENSE SURPLUS EQUIPMENT DISPOSAL, INCLUDING THE LAW ENFORCEMENT 1033 PROGRAM 5 (2014).

²⁵⁰ See 42 U.S.C. § 3751 (2012) (Byrne grants); *Oversight of Federal Programs for Equipping State and Local Law Enforcement Agencies: Hearing Before the S. Comm. on Homeland Security & Governmental Affairs*, 113th Cong. 3-5 (2014); ACLU, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 16-17 (2014); BALKO, *supra* note 20, at 243; see also Matt Apuzzo & Michael S. Schmidt, *In Washington, Second Thoughts on Arming Police*, N.Y. TIMES, Aug. 24, 2014, at A1.

equipment and supplies, including battle uniforms, body armor, military-grade firearms, bayonet knives, grenade launchers, pyrotechnic devices, battering rams, night-vision goggles, surveillance equipment, armored vehicles, airplanes, helicopters, and amphibious personnel carriers.²⁵¹ The attendant danger is captured in the so-called “law of the instrument”: when you have a hammer, everything looks like a nail.²⁵² In the drug war, when police officers are provided military-grade weaponry, they may find a way to use it regardless of necessity or proportionality. As an example, a number of local law enforcement agencies have acquired .50-caliber machine guns, which, according to military veterans and even police officials in possession of these weapons, have no legitimate use in domestic law enforcement.²⁵³

Moreover, civilian drug enforcers have been trained — oftentimes by military personnel, including active-duty or retired experts in special operations — on how to develop a “warrior mentality.”²⁵⁴ One police official had this to say about the training received by his department’s Special Weapons and Tactics (SWAT) unit:

We’ve had special forces folks who have come right out of the jungles of Central and South America. . . . All branches of military service are involved in providing training to law enforcement. . . . We’ve had teams of Navy Seals and Army Rangers come here and teach us everything. We just have to use our judgment and exclude the information like: “at this point we bring in the mortars and blow the place up.”²⁵⁵

Interestingly, the official noted that he had received a message from a four-star general who expressed concern about the training the SWAT team members were receiving.²⁵⁶ In fact, even the federal agencies that

²⁵¹ See, e.g., ACLU, *supra* note 250, at 13, 24-25 (listing equipment acquired by law enforcement); BALKO, *supra* note 20, at 253-54 (discussing multi-billion dollar DHS grants); DIANE CECILIA WEBER, WARRIOR COPS: THE OMINOUS GROWTH OF PARAMILITARISM IN AMERICAN POLICE DEPARTMENTS 7 (1999), <http://www.cato.org/sites/cato.org/files/pubs/pdf/bp50.pdf>; Boettke et al., *supra* note 128, at 1087.

²⁵² See ABRAHAM KAPLAN, THE CONDUCT OF INQUIRY: METHODOLOGY FOR BEHAVIORAL SCIENCE 28-29 (1964); see also ABRAHAM H. MASLOW, THE PSYCHOLOGY OF SCIENCE 15-16 (1966).

²⁵³ See BALKO, *supra* note 20, at 302.

²⁵⁴ See, e.g., ACLU, *supra* note 250, at 22-23; BALKO, *supra* note 20, at 191; WEBER, *supra* note 251, at 9.

²⁵⁵ Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBS. 1, 12 (1997); see also ACLU, *supra* note 250, at 18.

²⁵⁶ Kraska & Kappeler, *supra* note 255, at 12.

have helped underwrite the militarization of local law enforcement have expressed reservations about using a military model to train police officers.²⁵⁷

Along with the military-style weaponry, the training engenders a “paramilitary subculture,” “constructs and reinforces the ‘dangerousness’ of police work, and ‘the ‘pleasure’ that comes from playing out ‘warrior fantasies.’”²⁵⁸ Or, in the words of one military officer who trains civilian SWAT units: “Why serve an arrest warrant to some crack dealer with a .38? With full armor, the right shit, and training, you can kick ass and have fun?”²⁵⁹ In his book, *Rise of the Warrior Cop*, journalist Radley Balko described the incidence of war-like offensives by drug enforcement, where military helicopters swoop into rural areas in pursuit of marijuana, for instance, and heavily armed agents descend upon purported grow operations, in drug raids that resemble “an assault on an enemy prison camp in Vietnam.”²⁶⁰ A belligerent mindset in drug enforcement also transforms American neighborhoods into “war zones” to be patrolled by “soldiers,” who view city streets as the “front” and U.S. citizens as the “enemy.”²⁶¹ The result is a blurring of the line between civilian law enforcement and military armed forces.

The divide between soldier and police officer is not merely semantic but instead fundamental in U.S. and international law. While the American military is directly governed by the Constitution’s war powers and the international law of war, domestic law enforcement is constrained by the Bill of Rights and international human rights law, also known as the “law of peace.” Indeed, the historic role of the police officer is to keep the peace. Law enforcement may apprehend suspected offenders, of course, but it must do so within the boundaries of constitutional criminal procedure and with respect for human rights. “It is not better that all felony suspects die than that they escape,” the U.S. Supreme Court has opined, and a “police officer may not seize an unarmed, nondangerous suspect by shooting him dead.”²⁶² Lethal force is only appropriate when “the officer has probable cause to believe that the suspect poses a threat of serious

²⁵⁷ See, e.g., ACLU, *supra* note 250, at 18 (quoting newsletter from U.S. Justice Department office).

²⁵⁸ Kraska & Kappeler, *supra* note 255, at 11.

²⁵⁹ BALKO, *supra* note 20, at 177.

²⁶⁰ See *id.* at 110 (quoting reporter riding along in raid).

²⁶¹ See WEBER, *supra* note 251, at 10; see also Kraska & Kappeler, *supra* note 255, at 9-10.

²⁶² *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

physical harm, either to the officer or to others.”²⁶³ Likewise, under international human rights law, the police are limited by strict requirements of necessity and proportionality, meaning that the use of lethal force may only be employed when less extreme measures — for instance, capture by the application of non-lethal force — are insufficient to achieve a legitimate objective, most notably, self-defense or defense of others against imminent death or serious injury.²⁶⁴

By contrast, while wartime hostilities persist, the law of war generally permits a combatant to pursue and kill other combatants without warning and regardless of whether they pose an imminent threat.²⁶⁵ A combatant may even kill naked soldiers bathing in a pond, to use Michael Walzer’s example, because “soldiers as a class are set apart from the world of peaceful activity.”²⁶⁶ As noted above, any wartime attack must meet the requirements of necessity and proportionality, thereby limiting action to military targets and sparing innocent life to the extent possible. But the principles are far less constraining under the law of war than under the law of peace.²⁶⁷ And that is the precise concern when police are armed and trained to be

²⁶³ *Id.*; see also *Scott v. Harris*, 550 U.S. 372, 385-86 (2007); *Graham v. Connor*, 490 U.S. 386, 386 (1989). See generally Erik Luna, *Law of Police Use of Force*, in *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* (Gerben Bruinsma & David Weisburd eds., 2014) (providing background on police use of force and the law governing its use).

²⁶⁴ Despite some interplay between the law of war (international humanitarian law) and the law of peace (international human rights law), the two bodies are distinct and place different constraints on state actors. “[H]uman rights treaties apply both in peacetime, and during situations of armed conflict,” but “none of these human rights instruments was designed to regulate such situations and, thus, they contain no rules governing the means and methods of warfare,” opined the Inter-American Commission on Human Rights. “In contrast, international humanitarian law generally does not apply in peacetime, and its fundamental purpose is to place restraints on the conduct of warfare in order to diminish the effects of hostilities.” *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. ¶¶ 158–59 (Apr. 13, 1998). As discussed below, this latter goal is achieved by creating categories of individuals and then providing enhanced protection for particular groups, most notably, civilians. See *infra* notes 282–87, 309–21 and accompanying text. The protections of international human rights law, however, generally apply to all individuals without distinction. The dispositive question is whether an armed conflict exists such that the *lex specialis* of international humanitarian law supersedes certain rules of human rights law.

²⁶⁵ To be sure, this rule has some exceptions under international law, such as protection of combatants who have been rendered *hors de combat* (“outside the fight”) due to physical incapacitation, for instance. See AP I, *supra* note 61, art. 41.

²⁶⁶ WALZER, *JUST AND UNJUST WARS*, *supra* note 49, at 142-44.

²⁶⁷ See *infra* note 423 and accompanying text.

militaristic in drug enforcement. “If you have a mind-set that the goal is to take out a citizen, it will happen,” one police chief conceded.²⁶⁸

The problem is perhaps best illustrated by the use of SWAT units to execute drug-related search warrants. Devised in the 1960s, SWAT teams were intended to deal with extraordinarily serious and violent confrontations beyond the ken of ordinary law enforcement, such as riots, hijackings, hostage-takings, barricaded suspects, and active shooter scenarios.²⁶⁹ Among other things, SWAT teams “learn to break into homes with battering rams and to use incendiary devices called flashbang grenades, which are designed to blind and deafen anyone nearby. Their usual aim is to ‘clear’ a building — that is, to remove any threats and distractions . . . and to subdue the occupants as quickly as possible.”²⁷⁰ Today, however, SWAT teams often employ their military equipment and extraordinarily aggressive tactics in less-than-extraordinary drug cases.

According to a 2014 report, roughly eighty percent of SWAT deployments were for the purposes of executing a search warrant — most frequently in drug investigations (62% of SWAT raids) — while less than ten percent of deployments dealt with the type of situations for which SWAT teams were created (e.g., hostage scenarios).²⁷¹ In one-third (and possibly as much as two-thirds) of all drug raids, SWAT teams found no contraband of any kind.²⁷² In cases in which the presence of weapons was cited as a justification for using SWAT, two-thirds of the time no weapons were found.²⁷³ In as much as two-thirds of drug searches, SWAT teams used battering rams or other breaching devices to force entry into someone’s home.²⁷⁴ Likewise, in

²⁶⁸ Timothy Egan, *Soldiers of the Drug War Remain on Duty*, N.Y. TIMES, Mar. 1, 1999, at A1 (quoting Albuquerque Police Chief Jerry Galvin).

²⁶⁹ See BALKO, *supra* note 20, at 59-60.

²⁷⁰ Radley Balko, *Rise of the Warrior Cop: Is it Time to Reconsider the Militarization of American Policing?*, WALL STREET J., Aug. 7, 2013; see also ACLU, *supra* note 250, at 3 (“SWAT raids are undoubtedly violent events: numerous (often 20 or more) officers armed with assault rifles and grenades approach a home, break down doors and windows (often causing property damage), and scream for the people inside to get on the floor (often pointing their guns at them).”).

²⁷¹ See ACLU, *supra* note 250, at 3-5, 31; see also BALKO, *supra* note 20, at 237; Peter Kraska, *Militarization and Policing — Its Relevance to 21st Century Police*, 1 POLICING 501, 506-07 (2007); DAVID A. KLINGER & JEFF ROJEK, MULTI-METHOD STUDY OF SPECIAL WEAPONS AND TACTICS TEAMS 7 (Aug. 2008) (unpublished report), <https://www.ncjrs.gov/pdffiles1/nij/grants/223855.pdf>.

²⁷² See ACLU, *supra* note 250, at 34.

²⁷³ See *id.* at 4, 33; see also BALKO, *supra* note 20, at 270 (describing similar findings by investigative reports in Florida).

²⁷⁴ See ACLU, *supra* note 250, at 6, 37.

a majority of drug cases SWAT teams employed no-knock warrants,²⁷⁵ which dispense with the Fourth Amendment requirements that officers announce their presence and authority before (forcibly) entering a home.²⁷⁶ The instances of forcible entry and no-knock warrants are all the more troubling since “many resulted in the SWAT team finding no drugs or small quantities of drugs.”²⁷⁷

This analysis suggests that domestic drug enforcement may use military equipment and belligerent tactics to force entry into homes — frequently unannounced and based on ordinary levels of suspicion (i.e., probable cause) — but oftentimes recovering neither weapons nor drugs, or at least nothing that would justify a militaristic assault. In other words, warlike belligerence is often injected into otherwise non-violent circumstances, at times creating a violent confrontation with startled residents. The rationales offered were often vague or unsubstantiated — the “suspect was believed to be armed,”²⁷⁸ for instance, or an officer’s “training and experience” that drugs would be found²⁷⁹ — with potentially lethal decisions made by relatively low-level officials pursuant to minimal standards and oversight.²⁸⁰ And even when drug raids are a success, in the sense that contraband is seized and no one dies, many officials would admit that military-style assaults have little impact on drug use and abuse.²⁸¹ All told, the militarization of domestic drug enforcement would seem to be both unnecessary and disproportionate.

Distinction. The principle of *distinction*, also known as *discrimination*, requires that warfare be directed toward enemy combatants and not against non-combatants (i.e., civilians). Sometimes called the “grandfather of all principles,”²⁸² distinction has been described as one of the great triumphs of international law.²⁸³ For

²⁷⁵ See *id.* at 33.

²⁷⁶ See *Wilson v. Arkansas*, 514 U.S. 927, 927 (1995) (holding that Fourth Amendment incorporates knock-and-announce principles).

²⁷⁷ ACLU, *supra* note 250, at 33; see also BALKO, *supra* note 20, at 266.

²⁷⁸ See ACLU, *supra* note 250, at 4, 32-33.

²⁷⁹ See John Sullivan, Derek Hawkins & Pietro Lombardi, *Probable Cause: Pursuing Drugs and Guns on Scant Evidence, D.C. Police Sometimes Raid Wrong Homes — Terrifying the Innocent*, WASH. POST (Mar. 5, 2016), <http://investigativereportingworkshop.org/investigations/probable-cause/story/dc-police-pursuing-drugs-and-guns-scant-evidence-s/>; see also BALKO, *supra* note 20, at 248.

²⁸⁰ See ACLU, *supra* note 250, at 28-33; BALKO, *supra* note 20, at 249.

²⁸¹ See BALKO, *supra* note 20, at 158-60.

²⁸² LOAC DESKBOOK, *supra* note 65, at 136.

²⁸³ E.g., JAMES MALONEY SPAIGHT, *WAR RIGHTS ON LAND* 37 (1911) (“The separation of armies and peaceful inhabitants into two distinct classes is perhaps the greatest

much of human history, entire populations were considered fair game during wartime and thus subject to enslavement or killing with impunity.²⁸⁴ By contrast, the modern approach recognizes that warfare should be conducted by and against the professional military forces of belligerent states, thus sparing unarmed civilians from intentional attacks. Today's treaty-based law of war codifies the principle of distinction in several instruments, ensuring that both "[t]he civilian population and individual citizens shall enjoy general protection against the dangers arising from military operations."²⁸⁵ Moreover, a belligerent is required to discriminate between legitimate military targets and protected persons and objects even if its adversary has failed to do so.²⁸⁶ So although the ordinary civilians of a hostile nation may be "enemies," they are not proper targets of a military attack.²⁸⁷

Unfortunately, however, the brunt of the drug war is often borne by the innocent, those individuals who are not involved in the drug trade and might not even consume illicit substances, but whose life, liberty, and property are negatively impacted by prohibition.²⁸⁸ Even worse than being victimized by drug war-related crime is being victimized by the government in its pursuit of drug war-related crime. As mentioned in the previous section, the innocent have been adversely affected by the use of heavily armed police teams to conduct drug raids. Not only are houses tossed and property damaged during these raids, but on occasion innocent individuals are seriously injured or even killed.²⁸⁹

triumph of International Law. Its effect in mitigating the evils of war has been incalculable.").

²⁸⁴ LASSA OPPENHEIM, 2 INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY 204 (Hersch Lauterpacht ed., 7th ed. 1952); see also General Orders No. 100: Instructions for the Government of Armies of the United States in the Field, art. 22 (1863), reprinted in NAVAL WAR COLL., INTERNATIONAL LAW DISCUSSIONS, 1903, at 115 (1904) [hereinafter Lieber Code].

²⁸⁵ AP II, *supra* note 61, art. 13(1); see also AP I, *supra* note 61, arts. 41, 48, 51, 85(3)(b); LOW MANUAL, *supra* note 55, at 62-65; LOAC DESKBOOK, *supra* note 65, at 96-117, 136; U.K. MANUAL, *supra* note 220, at 24.

²⁸⁶ See LOW MANUAL, *supra* note 55, at 65.

²⁸⁷ Compare *Johnson v. Eisentrager*, 339 U.S. 763, 772-73 (1950) ("The alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign."), with *Ex parte Quirin*, 317 U.S. 1, 30 (1942) ("By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations' . . .").

²⁸⁸ See Buckley, *supra* note 176, at 35; see also *supra* text accompanying note 176.

²⁸⁹ See ACLU, *supra* note 250, at 5-6, 9, 17; BALKO, *supra* note 20, at 74-76, 158-59, 171-73, 248-50, 264; Boettke et al., *supra* note 128, at 1070-71; Vicki Brown, *Cops Kill*

Apparently, the incidence of wrong-door raids in New York City was sufficiently commonplace that “the NYPD circulated a memo among the city’s police officers instructing them on how to contact locksmiths and door repair services should they break into the wrong home.”²⁹⁰

The drug war is also behind outrageous cases of police misconduct. In one wrong-door raid in Atlanta, law enforcement agents relied upon dubious information from a snitch and lied to a judge in order to get a no-knock warrant; then, after the raid went terribly wrong with the lethal wounding of a 92-year-old sole resident, one officer handcuffed the elderly victim “as she lay bleeding before he planted drugs in her basement.”²⁹¹ The so-called Rampart scandal revealed systematic corruption by LAPD gang-unit members, who, among other things, framed innocent individuals of drug-related crime by planting contraband and other evidence.²⁹² By contrast, the Tulia scandal was the product of a single undercover officer, whose false testimony led to the mass arrest and drug convictions of more than three dozen innocent people.²⁹³ Scandals like these demonstrate “how our idea of justice gets corrupted when we declare war on something.”²⁹⁴

On American streets and highways, an untold number of innocent pedestrians and motorists have been detained and their persons and property searched as law enforcement agents engaged in general exploratory rummaging for drugs. At times, these stops progress into extremely invasive intrusions, physical abuses, and even false arrests.²⁹⁵ Even in the absence of bad faith, the innocent have been

Man, Raid Wrong House, WASH. POST (Oct. 6, 2000, 10:12 PM), http://www.washingtonpost.com/wp-srv/aponline/20001006/aponline221233_000.htm.

²⁹⁰ BALKO, *supra* note 20, at 265.

²⁹¹ Bill Torpy & Rhonda Cook, *Deadly Deception: Two Atlanta Cops Plead Guilty in Woman’s Death, Blame Pressure from Police Brass*, ATLANTA J. CONST., Apr. 27, 2007, at A1. See generally Ted Conover, *A Snitch’s Dilemma*, N.Y. TIMES, July 1, 2012, at MM24, <http://nyti.ms/LTNKJA>.

²⁹² See Peter J. Boyer, *Bad Cops*, NEW YORKER, May 21, 2001, at 60; Lou Cannon, *One Bad Cop*, N.Y. TIMES, Oct. 1, 2000, at MM36; Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1137-39 (2013).

²⁹³ See Covey, *supra* note 292, at 1139-41. See generally NATE BLAKESLEE, *TULIA: RACE, COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN* (2005).

²⁹⁴ *Tulia, Texas* (PBS 2009) (quoting Tulia defense attorney Jeff Blackburn), <http://www.pbs.org/independentlens/tuliatexas/film.html>.

²⁹⁵ See, e.g., Radley Balko, *Video: Illegal Traffic Stop Leads to Beating and Illegal Medical Procedures in S.C.*, WASH. POST (Apr. 8, 2016), https://www.washingtonpost.com/news/the-watch/wp/2016/04/08/video-illegal-traffic-stop-leads-to-beating-arrest-and-illegal-medical-procedures-in-south-carolina/?utm_term=.5533672e8624; Radley Balko, *Video Shows White Cops Performing Roadside Cavity Search of Black Man*, WASH.

harmful by standard drug war techniques, such as the use of reagent kits to test for illegal drugs. A recent article detailed how these field tests can generate false positives due to the presence of common, perfectly legal substances, for example, or because of an officer's mishandling (or misreading) of the kits.²⁹⁶ Given the number of defendants who plead guilty to drug possession charges based solely on field-test results, a modest error rate would generate thousands of wrongful convictions each year in the United States.²⁹⁷

Sometimes, however, government agents take the property of those they suspect of drug crimes without charging, let alone convicting, the underlying owners. Over the past few decades, federal, state, and local governments have confiscated billions of dollars in cash, cars, jewelry, real estate, and other private property — most of it identified as drug-related — through the practice of civil asset forfeiture.²⁹⁸ Dubbed “policing for profit,” civil asset forfeiture has filled the coffers of the seizing agencies while skirting the constitutional guarantees of criminal procedure intended to protect the innocent.²⁹⁹ Many of the property owners may, in fact, be guilty of drug crime, but some have done nothing more than possess a wad of cash, for instance, while traveling through a forfeiture-happy jurisdiction. At times, the government's profits have been used in ways that bear a troubling resemblance to the crime of pillage under the law of war.³⁰⁰

The foregoing examples concern law enforcement pursuing drug criminals but instead harming innocent individuals, who, one might

POST (Apr. 1, 2016), https://www.washingtonpost.com/news/the-watch/wp/2016/04/01/video-shows-white-cops-performing-roadside-cavity-search-of-black-man/?tid=ai_inl&utm_term=.e80a9b1848b1; see also *infra* notes 330–35 and accompanying text (discussing racial profiling).

²⁹⁶ See Ryan Gabrielson & Topher Sanders, *Proof Negative*, N.Y. TIMES MAG., July 10, 2016, at 34, 37.

²⁹⁷ *Id.* at 38.

²⁹⁸ See DICK M. CARPENTER II ET AL., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 5 (2015), <http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf> (“The forfeiture funds of the DOJ and Treasury Department together took in nearly \$29 billion from 2001 to 2014, and combined annual revenue grew 1,000 percent over the period.”).

²⁹⁹ See MARIAN R. WILLIAMS ET AL., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 15–20 (2010), <http://ij.org/wp-content/uploads/2015/03/assetforfeituretoemail.pdf>; Eric Blumenson & Eva Nilssen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 46–49 (1998).

³⁰⁰ See Darpana M. Sheth, *Policing for Profit: The Abuse of Forfeiture Laws*, 14 ENGAGE 24, 26 (2013); see also 10 U.S.C. § 950t(5) (2012); Rome Statute of the International Criminal Court art. 8(2)(b)(xvi), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute]; GC IV, *supra* note 61, art. 33; Hague IV, *supra* note 220, art. 28.

argue, are only “collateral damage” in the fog of war. But this response only begs the question of how to distinguish civilians from combatants in the context of drug prohibition. In a conventional war between two or more states, discriminating between combatant and civilian is hard enough and oftentimes poses questions of life or death, since war is waged against people who are the “them” in an “us-versus-them” confrontation. In the war on drugs, however, the enemy has fluctuated over time and included, *inter alia*, drug users, drug addicts, drug dealers, drug mules, drug kingpins, and so on. Depending on the day and shifting roles, individuals can at the same time be the “us” and the “them” in the war on drugs, a point that is only now fully recognized by both the perpetrators and principal victims of drug warfare. As a recent drug czar conceded, “Regardless of how you try to explain to people it’s a ‘war on drugs’ or a ‘war on a product,’ people see a war as a war on them.”³⁰¹

In the United States, the war on drugs is like a civil war,³⁰² but “unlike previous battles in this apparently endless war, current campaigns target casual users as well as drug abusers.”³⁰³ According to a 2014 survey, an estimated 27 million Americans had used an illegal drug in the past month — roughly one in ten individuals in the United States — and more than 44 million had used an illegal drug within the past year.³⁰⁴ The survey also found that 130 million Americans had used illegal drugs during their lifetimes.³⁰⁵ In other words, roughly half of the U.S. population admits to using illegal drugs sometime during their lives. In truth, however, these numbers may underestimate drug use, given that survey data hinges upon self-reporting of an illegal and oftentimes stigmatized activity.³⁰⁶ The drug

³⁰¹ Gary Fields, *White House Czar Calls for End to “War on Drugs,”* WALL STREET J. (May 14, 2009, 12:01 AM), <http://www.wsj.com/articles/SB124225891527617397> (quoting drug czar Gil Kerlikowske).

³⁰² *But see infra* notes 425–39 and accompanying text (describing how the drug war is not an actual armed conflict).

³⁰³ DOUGLAS N. HUSAK, DRUGS AND RIGHTS 2 (1992).

³⁰⁴ *See* SARRA L. HEDDEN ET AL., BEHAVIORAL HEALTH TRENDS IN THE UNITED STATES: RESULTS FROM THE 2014 NATIONAL SURVEY ON DRUG USE AND HEALTH 4-5 (2015), www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2014/NSDUH-FRR1-2014.pdf; SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2014 NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES tbl.1.19A (2015), <http://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs2014/NSDUH-DetTabs2014.pdf> [hereinafter DETAILED TABLES].

³⁰⁵ *See* DETAILED TABLES, *supra* note 304, tbl.1.1A.

³⁰⁶ *See* COMM. ON DATA AND RESEARCH FOR POLICY ON ILLEGAL DRUGS, NAT’L RESEARCH COUNCIL, INFORMING AMERICA’S POLICY ON ILLEGAL DRUGS 93 (Charles F. Manski et al. eds., 2001).

war's targeting of drug users is borne out by arrest data. Of the more than 1.5 million people who were arrested for drug law violations in 2014, nearly 1.3 million of them were arrested for possession of a controlled substance.³⁰⁷ For years, in fact, about 80% of all drug arrests in the United States have been for possession.³⁰⁸

Can the United States be at war with millions of its own citizens?³⁰⁹ Some prohibitionists apparently thought as much. Nancy Reagan once said that, “[i]f you’re a casual drug user, you are an accomplice to murder.”³¹⁰ Likewise, the former police chief of Los Angeles, Daryl Gates, testified before Congress that “the casual user ought to be taken out and shot.”³¹¹ The First Lady’s comment was erroneous as a matter of legal doctrine, while, ironically, Gates’s recommendation itself was a call for the commission of murder in peacetime or what would amount to a war crime during an armed conflict. More to the point, the underlying premise — anyone somehow involved with illegal drugs, including casual use, is a “combatant” in the war on drugs — would not be categorically true under the law of war. For instance, casual users may not be obvious “civilians” for purposes of the drug war — that is, private citizens lacking any connection to illegal drugs — but they are also not unmistakable combatants like DEA agents and armed drug traffickers.

Under the law of war, civilians are barred from participating in combat, and, in turn, they are protected from attack “unless and for such time as they take a direct part in hostilities.”³¹² The concept of direct participation in hostilities embraces those “acts of war which by

³⁰⁷ FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES, 2014: ARRESTS 2 (2015), <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/persons-arrested/persons-arrested.pdf>; Fed. Bureau of Investigation, *U.S. Dep’t of Justice, Crime in the United States, 2014: Arrests for Drug Abuse Violations Table*, FBI: UCR <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/arrest-table.xls> (last visited Oct. 31, 2016).

³⁰⁸ See HINDELANG CRIMINAL JUSTICE RESEARCH CTR., UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.4.29.2012, <http://www.albany.edu/sourcebook/pdf/t4292012.pdf>.

³⁰⁹ Not to mention hundreds of millions of people around the globe. See, e.g., UNITED NATIONS OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 2015, at 1 (2015), http://reliefweb.int/sites/reliefweb.int/files/resources/World_Drug_Report_2015.pdf (survey by the UN Office of Drugs and Crime finding that about 246 million people, or 5.2 percent of the world’s population, had used an illegal drug in the year 2013).

³¹⁰ Stephen Chapman, *Nancy Reagan and the Real Villains in the Drug War*, CHI. TRIB., Mar. 6, 1988, at C3.

³¹¹ *One-Year Drug Strategy Review: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 77 (1990) (statement of Daryl Gates).

³¹² AP I, *supra* note 61, art. 51(3); AP II, *supra* note 61, art. 13(3).

their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”³¹³ But such acts of war must be distinguished from more general contributions to the war effort, which are “often required from the population as a whole to various degrees.”³¹⁴ Narrowly construed, the loss of protection occurs only while a civilian is directly participating in hostilities.³¹⁵

So how should drug users be viewed under the law of war? An individual’s mere personal possession and consumption of drugs may be irksome to prohibitionists, but it is not an integral component of combat of the type that would render a civilian a direct participant in hostilities. Without more, simple use or possession of drugs is not “the proximate or ‘but for’ cause of death, injury, or damage to persons or objects”³¹⁶ that prohibitionists seek to protect. Nor is an individual’s use of drugs “connected to the hostilities” of the drug war, “likely to affect adversely” the operations or capacity of drug enforcement, or liable to pose “a significant threat” to drug war efforts.³¹⁷ By itself, drug use is not akin to placing mines and other explosive devices, engaging in acts of sabotage, manning an aircraft gun, acting as an artillery spotter, relaying information used to direct an armed attack, or delivering ammunition to the front lines.³¹⁸

Likewise, drug use and personal possession do not involve “making decisions on the conduct of hostilities, such as determining the use or application of combat power,” and it is hard to imagine that the vast majority of people use drugs with the specific intent “to advance the war aims of one party to the conflict to the detriment of the opposing party.”³¹⁹ Drug use is rarely an act of great intelligence, let alone drug war counterintelligence. Rather, simple drug use and possession are more like those wartime activities that are not considered to be direct

³¹³ INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 619 (Yves Sandoz et al. eds., 1987) [hereinafter ADDITIONAL PROTOCOLS]; see LOW MANUAL, *supra* note 55, at 224-25.

³¹⁴ ADDITIONAL PROTOCOLS, *supra* note 313, at 619; see also Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through Practice*, in NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY 189 (Kenneth Watkin & Andrew J. Norris eds., 2012).

³¹⁵ See ADDITIONAL PROTOCOLS, *supra* note 313, at 619. *But see* LOW MANUAL, *supra* note 55, at 230-32 (requiring that civilian permanently cease participation in hostilities).

³¹⁶ LOW MANUAL, *supra* note 55, at 226.

³¹⁷ *Id.*

³¹⁸ See, e.g., *id.* at 224-25, 227-28.

³¹⁹ *Id.* at 226-27.

participation in hostilities, such as purchasing war bonds and making similar contributions to the war efforts, for instance, or working in a munitions factory or some other plant that supplies weapons, material, and other goods useful to the armed forces but is located in rear areas away from hostile territory.³²⁰ Moreover, recreational users are not constantly involved in drug-related activities and thus differ from civilians who are engaged in “continuous combat functions.”³²¹ Under the law of war, then, if simple drug use and possession does not transform a civilian into a drug war combatant, the principle of distinction has often been irrelevant to prohibitionists.

The principle of distinction has been ignored in other ways as well. In particular, targeting in the war on drugs has generated troubling outcomes for racial and ethnic minorities, perhaps reflecting a less than benign intent. “[I]t is no secret that people of color are disproportionate victims of this type of scrutiny,” wrote Justice Sonya Sotomayor in the Supreme Court’s most recent drug war-related case.³²² The 2014 report on SWAT units found that people of color were the subject of more than half of the deployments to execute search warrants, predominantly in pursuit of drugs.³²³ The racially disparate use of force is long-standing and generalizes,³²⁴ and, indeed, most drug war tactics have been disproportionately used against minorities. The Rampart and Tulia scandals were racially tinged, as were numerous scandals in other parts of the country.³²⁵ In wartime, such practices and incidents would implicate important rules of

³²⁰ See LOW MANUAL, *supra* note 55, at 228-29; LOAC DESKBOOK, *supra* note 65, at 141; U.K. MANUAL, *supra* note 220, at 24.

³²¹ See NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 16 (2009).

³²² Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting).

³²³ See ACLU, *supra* note 250, at 5, 35-37. This disparity is unsurprising in light of, for instance, the iconography of some SWAT team members. See, e.g., BALKO, *supra* note 20, at 212-13 (describing SWAT trainee’s t-shirt, which “carried a picture of a burning city with gunship helicopters flying overhead and the caption ‘Operation Ghetto Storm’”).

³²⁴ See Strieff, 136 S. Ct. at 2070 (Sotomayor, J., dissenting) (“For generations, black and brown parents have given their children ‘the talk’ — instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger — all out of fear of how an officer with a gun will react to them.”).

³²⁵ See *supra* notes 292-93 and accompanying text; see also Covey, *supra* note 292, at 1141-42 (describing how in Hearne, Texas, “numerous cases in 2001 were dismissed following revelations that a drug task force was systematically targeting black residents”).

conduct under international law. In particular, the Geneva Conventions adopt a principle of non-discrimination in protecting prisoners of war, wounded, sick, or shipwrecked military members, and civilians, with each of the four conventions specifically forbidding “any adverse distinction” based upon, *inter alia*, race and nationality.³²⁶

Despite such prohibitions, prejudice in drug enforcement is perhaps unsurprising given the racial history of the war on drugs,³²⁷ as well as the reality that the burden of warfare is rarely equal across an entire populace. Jonathan Simon and his colleagues have argued that the war metaphor carries with it at least three potential repercussions drawn from traditional combat: (1) wartime leaders identify geographical territory as the zone of operations; (2) wars oftentimes employ race or ethnicity as a proxy for targeting the enemy; and (3) well-planned operations preemptively neutralize enemy forces.³²⁸ In the war on drugs, the targets have tended to be racial and ethnic minorities and the poor, oftentimes one and the same for drug enforcement purposes, with battle lines drawn away from the neighborhoods where the politically powerful reside. Preemptive warfare requires a different set of tactics than the reactive approach of conventional law enforcement. “Buy and busts,’ ‘jump outs,’ the use of informants, wiretaps, and even paramilitary tactics, as well as the broader expansion of pretextual stops and searches and low-level arrests, have produced an increasingly aggressive, intrusive and indiscriminate form of policing that falls disproportionately on low-income communities of color.”³²⁹

The war on drugs has been a driving force behind the phenomenon of “racial profiling” or, as it is sometimes labeled with derision, “D.W.B.” — “Driving While Black (or Brown).”³³⁰ Racial profiling can

³²⁶ See GC I, *supra* note 61, arts. 3, 12, 31; GC II, *supra* note 61, arts. 3, 12; GC III, *supra* note 61, arts. 3, 16; GC IV, *supra* note 61, arts. 3, 13, 27; see also AP I, *supra* note 61, art. 75(1); AP II, *supra* note 61, art. 2(1). Similarly, a principal international human rights law requires that a state ensure the rights of individuals within its jurisdiction without distinction of any kind such as race or religion — a protection which cannot be derogated even “[i]n time of public emergency which threatens the life of the nation . . .” International Covenant on Civil and Political Rights arts. 2(1), 4, Dec. 19, 1966, 999 U.N.T.S. 171; see also International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Dec. 21, 1965, 660 U.N.T.S. 195.

³²⁷ See *supra* notes 105–23 and accompanying text.

³²⁸ See Laqueur, Rushin & Simon, *supra* note 19, at 94.

³²⁹ *Id.* at 97.

³³⁰ See Luna, *Drug Exceptionalism*, *supra* note 214, at 765–66. Among other things, the war on drugs gave birth to the the prototype for the more general racial profile: the “drug courier profile.” Critics argued that the drug courier profile was so

be defined as the use of race or ethnicity to single out individuals for heightened police surveillance and investigation. Race or ethnicity serves as a proxy for involvement in drug crime, allegedly justified by a propensity toward such crime, resulting in the detention and search of individuals standing or walking on the streets, for instance, and driving on roads and highways. Statistical analysis suggests that racial profiling is a pervasive problem in drug enforcement.³³¹ Although few court decisions have upheld the use of race or ethnicity in drug enforcement,³³² the practice typically eludes meaningful review because a low level of suspicion³³³ of even minor infractions can provide legal pretexts to stop motorists and pedestrians in search of drugs.³³⁴ This imposes “a type of racial tax for the war against drugs

malleable and wide-ranging as to allow anyone and everyone to be stopped. *See, e.g.*, DAVID COLE, *NO EQUAL JUSTICE* 47-49 (1999). By the 1990s, however, the drug courier profile had been effectively endorsed by the courts. *See, e.g.*, *United States v. Sokolow*, 490 U.S. 1 (1989) (holding that agents had reasonable suspicion to make investigative stop of suspected drug courier).

³³¹ *See, e.g.*, *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013) (noting that more than 80% of stops conducted by the NYPD between January 2004 and June 2012 were of blacks or Hispanics); *State v. Soto*, 734 A.2d 350, 352-53 (N.J. Super. Ct. Law Div. 1996) (detailing results of statistical study of New Jersey Turnpike); IAN AYRES & JONATHAN BOROWSKY, *ACLU OF S. CAL., A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT* (2008); DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* 53-72 (2002) (discussing racial profiling studies); John Lamberth, *Driving While Black; A Statistician Proves that Prejudice Still Rules the Road*, WASH. POST, Aug. 16, 1998, at C01; Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html>. *But see, e.g.*, Heather MacDonald, *The Myth of Racial Profiling*, CITY J. (Spring 2001), http://www.city-journal.org/html/11_2_the_myth.html; Joel Rubin, *LAPD Rejects Finding of Bias*, L.A. TIMES, Jan. 14, 2009, at B4.

³³² *See, e.g.*, *United States v. Weaver*, 966 F.2d 391, 394 (8th Cir. 1992) (noting as a factor in defendant’s detention “that he was a roughly dressed young black male”); *cf. United States v. Martinez-Fuerte*, 428 U.S. 543, 564 n.17 (1976) (observing that that “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor”); *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (holding that Mexican ancestry is relevant to an officer’s decision to stop a suspected alien).

³³³ *See* Erik Luna, *Hydraulic Pressures and Slight Deviations*, 2009 CATO SUP. CT. REV. 133 (critiquing “reasonable suspicion” standard).

³³⁴ The Supreme Court essentially placed its imprimatur on pretextual traffic stops in *Whren v. United States*, 517 U.S. 806 (1996), where it declined to inquire into an officer’s motivations for conducting a vehicle stop. *Id.* at 813. “Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” *Id.* Once the car has been stopped, police can then conduct a variety of searches aimed at uncovering narcotics. *See* JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE* 183-240 (2d ed. 1997) (describing various searches that might apply in context of traffic

that whites and other groups escape,” Randall Kennedy argued. “That tax is the cost of being subjected to greater scrutiny than others.”³³⁵

But the problems of race in drug prohibition go beyond profiling, with some claiming “the war on drugs could more aptly be called a war on the minority populations.”³³⁶ Racial discrimination in the drug war may effectively (re)segregate American society,³³⁷ violating the spirit, if not the letter, of both domestic and international law. The “practices of apartheid and other inhuman or degrading practices involving outrages upon personal dignity, based on racial discrimination” are deemed a grave breach of an additional protocol to the Geneva Conventions.³³⁸ Likewise, several international instruments make apartheid a crime against humanity.³³⁹ Under the Geneva Conventions, legally enforced discrimination also constitutes an exception to the general rule that a foreign power occupying a belligerent state must recognize the criminal laws of that state.³⁴⁰ Instead, the occupying power may “abrogate any discriminatory

stops). In fact, the all-encompassing nature of today’s codes appears little different from a single statute declaring that law enforcement may pull over any car or stop any pedestrian at any time for any reason or, for that matter, no reason at all. As Justice Kennedy would later note, “[t]he practical effect of our holding in *Whren*, of course, is to allow the police to stop vehicles in almost countless circumstances.” *Maryland v. Wilson*, 519 U.S. 408, 423 (1997) (Kennedy, J., dissenting). The *Whren* Court did acknowledge that selective enforcement based on considerations such as race would be unconstitutional, but the basis for such a claim would be the Equal Protection Clause rather than the Fourth Amendment. *Whren*, 517 U.S. at 813. As it turns out, it can be quite difficult to meet the standard for proving selective prosecution under equal protection jurisprudence, which requires proof of both discriminatory effect and purpose. See *United States v. Armstrong*, 517 U.S. 456, 465 (1996). Moreover, in order to obtain information necessary to support an equal protection claim, one must first demonstrate that “similarly situated individuals of a different race” could have been detained or arrested but were not. *Id.* The catch-22 is that victims must already possess the information — evidence of similarly situated Caucasians avoiding police contact — before the state can be forced to turn over such information.

³³⁵ RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 159 (1997).

³³⁶ Powell & Hershenov, *supra* note 209, at 559; see also Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks,”* 6 J. GENDER, RACE & JUST. 381, 382 (2002).

³³⁷ See ALEXANDER, *supra* note 121, at 190-91; Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703, 723 (2000).

³³⁸ AP I, *supra* note 61, art. 85(4)(c). But see *supra* note 104 (noting U.S. rejection of Additional Protocol I).

³³⁹ See, e.g., ICC Statute, *supra* note 300, art. 7(1)(j); International Convention on the Suppression and Punishment of the Crime of Apartheid art. 1, Nov. 30, 1973, 1015 U.N.T.S. 243.

³⁴⁰ See GC IV, *supra* note 61, art. 64.

measures incompatible with humane requirements,” particularly those “provisions which adversely affect racial or religious minorities.”³⁴¹

In her book, *The New Jim Crow*, Michelle Alexander makes out an impressive case that the war on drugs has become a substitute for official segregation in the United States. The drug war, through the medium of mass incarceration, is a “stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow.”³⁴² Despite the fact that minorities are no more likely than whites to be involved in drug crime — indeed, some studies show that African-Americans use or sell drugs at a lower rate than whites — people of color have been the primary targets of drug war efforts and are disproportionately arrested, convicted, and incarcerated for drug crimes,³⁴³ due to a combination of racial biases, socio-political incentives, and vast legal discretion wielded by law enforcement.³⁴⁴ Once arrested, poor, mostly minority drug defendants may be deprived of meaningful legal counsel and pressured into pleading guilty to avoid draconian drug sentences.³⁴⁵ And once convicted, they spend extensive periods of time under control of the criminal justice system, whether in the custody of jails and prisons or under supervised release through probation and parole.³⁴⁶

Assuming they ever escape formal supervision, former drug offenders still face the “invisible punishment”³⁴⁷ of collateral consequences stemming from their convictions: the denial of housing, employment, education, and public benefits and services, for instance, and the loss of various rights, including the right to vote and to serve on juries.³⁴⁸ This virtual mark of Cain is accompanied by informal social stigma and shame for minority drug offenders, who may simply

³⁴¹ INT’L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 335 (Jean Pictet ed., 1958) [hereinafter Commentary GC IV].

³⁴² ALEXANDER, *supra* note 121, at 4.

³⁴³ See Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 266-76 (2009); Cassia Spohn, *Race, Crime, and Punishment in the Twentieth and Twenty-First Centuries*, 44 CRIME & JUST. 49, 61-68 (2015).

³⁴⁴ See ALEXANDER, *supra* note 121, at 48-83, 97-109, 123-25, 130-33.

³⁴⁵ See *id.* at 85-88.

³⁴⁶ See *id.* at 89-94.

³⁴⁷ See Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15-16 (Marc Mauer & Meda Chesney-Lind eds., 2002) (“Not all criminal sanctions are as visible as prisons: We punish people in other, less tangible ways.”).

³⁴⁸ See ALEXANDER, *supra* note 121, at 141-56.

be cast back into the ghettos from where they came.³⁴⁹ “They become members of an undercaste — an enormous population of predominantly black and brown people who, because of the drug war, are denied basic rights and privileges of American citizenship and are permanently relegated to an inferior status.”³⁵⁰ This is a powerful argument that drug warfare functions as apartheid in contravention of the principle of humanity.

Although this new Jim Crow has been achieved without explicit prejudice, on occasion racial sentiments still emerge in the drug war, sometimes harking back to the drug war’s origins and propaganda connecting drugs, race, violence, and sex.³⁵¹ According to President-elect Donald Trump, Mexicans entering the United States are “bringing drugs. They’re bringing crime. They’re rapists.”³⁵² For his part, Maine Governor Paul LePage argued that “black people come up the highway and they kill Mainers” — men “with the name D-Money, Smoothie, Shifty . . . come up here, they sell their heroin,” and “half the time they impregnate a young white girl before they leave.”³⁵³ Seeking to justify these claims, LePage connected drug enforcement to warfare: “When you go to war . . . you shoot at the enemy. You try to identify the enemy and the enemy right now, the overwhelming majority of people coming in, are people of color or people of Hispanic origin.”³⁵⁴ In this way, the law of war’s principle of distinction is warped into an excuse for prejudice.

Humanity. A final principle, *humanity*, holds that military tactics and weapons must avoid gratuitous suffering, injury, and destruction.³⁵⁵

³⁴⁹ See *id.* at 161-67.

³⁵⁰ See *id.* at 182. Alexander defines the term undercaste as “a lower caste of individuals who are permanently barred by law and custom from mainstream society.” *Id.* at 13.

³⁵¹ See *supra* notes 110, 113 and accompanying text.

³⁵² Jannell Ross, *From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Moments*, WASH. POST (Oct. 20, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments/>. Mr. Trump then added, “some, I assume, are good people.” *Id.*

³⁵³ Scott Thistle, *Gov. LePage Stands by Racially Charged Statements About Drug Dealers Coming to Maine*, PORTLAND PRESS HERALD (Aug. 25, 2016), <http://www.pressherald.com/2016/08/25/aclu-of-maine-asks-lepage-to-produce-binder-of-recent-maine-drug-arrests/>.

³⁵⁴ Eric Duvall, *Accusations of Racism, Challenge of a Duel Surround Maine Governor*, UNITED PRESS INT’L (Aug. 27, 2016, 6:23 PM), http://www.upi.com/Top_News/US/2016/08/27/Accusations-of-racism-challenge-of-a-duel-surround-Maine-governor/3071472335542/print.

³⁵⁵ See LOW MANUAL, *supra* note 55, at 58-59; LOAC DESKBOOK, *supra* note 65, at 149-50; U.K. MANUAL, *supra* note 220, at 23; AP I, *supra* note 61, art. 35(2) (“It is

The principle prohibits wanton violence and cruelty and thereby reaffirms the humanitarian ideal that the methods of war are not unlimited.³⁵⁶ Humanity is intertwined with the principles of military necessity, proportionality, and distinction, often complementing their dictates. Once a military objective is achieved, for instance, or an enemy combatant is incapacitated, the infliction of further harm would not only be unnecessary but also inhumane.³⁵⁷ Acts of disproportionate violence are similarly inhumane by imposing needless suffering, injury, and destruction.³⁵⁸ Moreover, an attack on civilians and their property violates both distinction and humanity, since non-combatants are viewed as being inoffensive and harmless.³⁵⁹

Humanity underpins various prohibitions against weapons that are inherently indiscriminate or calculated to cause superfluous injury.³⁶⁰ The principle also demands compassionate treatment of protected persons and animates fundamental safeguards for those taken into custody.³⁶¹ Humanity “incorporates the earlier rules of chivalry,”³⁶² which date back to the Middle Ages and were critical to the development of the law of war. The concept of chivalry, often referred to today as “honor,” requires “a certain amount of fairness in offense and defense and a certain mutual respect between opposing forces.”³⁶³ The idea that all combatants are deserving of respect is considered a

prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”); Hague IV, *supra* note 220, art. 23(e).

³⁵⁶ See Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects pmbl., Oct. 10, 1980, 1342 U.N.T.S. 2249 (noting “the principle of international law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited”); AP I, *supra* note 61, art. 35(1) (“In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”); Hague IV, *supra* note 220, art. 22 (“The right of belligerents to adopt means of injuring the enemy is not unlimited.”).

³⁵⁷ See LOW MANUAL, *supra* note 55, at 51-52, 58-59; U.K. MANUAL, *supra* note 220, at 23.

³⁵⁸ See U.K. MANUAL, *supra* note 220, at 23.

³⁵⁹ See, e.g., LOW MANUAL, *supra* note 55, at 58-59; U.K. MANUAL, *supra* note 220, at 23.

³⁶⁰ See, e.g., LOW MANUAL, *supra* note 55, at 59-60; LOAC DESBOOK, *supra* note 65, at 149-50.

³⁶¹ See, e.g., LOW MANUAL, *supra* note 55, at 59-60; LOAC DESBOOK, *supra* note 65, at 149-50.

³⁶² U.K. MANUAL, *supra* note 220, at 23-24.

³⁶³ LOW MANUAL, *supra* note 55, at 66.

necessary condition for the very existence of the law of war and its effective operation.

Unfortunately, drug enforcement has not always seen fit to view their enemies through a humanitarian lens. “Drug people are the very vermin of humanity,” said the nation’s first drug czar.³⁶⁴ With such views, it is unsurprising that drug enforcement would be indifferent toward the well-being of drug users despite the expectations of humanity. For instance, the modern law of war has long barred the use of poison or poisoned weapons,³⁶⁵ with specific prohibitions against chemical weapons, for instance,³⁶⁶ and their use denominated as a war crime.³⁶⁷ These bans support a norm of customary international law against the use of herbicides as a method of warfare, not only when they are by nature a prohibited chemical weapon,³⁶⁸ but also when they would cause civilian death, injury, or damage that is disproportionate to any anticipated military advantage.³⁶⁹

At times, however, government officials have employed dangerous chemicals in the war on drugs. In the mid-1970s, a joint U.S.-Mexican eradication program sprayed marijuana crops in Mexico with paraquat,³⁷⁰ an herbicide known to be toxic if ingested.³⁷¹ Concerns eventually arose about the harmful effects of smoking marijuana laced with paraquat.³⁷² In 1978, a panic broke out about “paraquat pot,”

³⁶⁴ Paul Vitello, *M. J. Ambrose, 87, D.E.A.’s Midwife, Dies*, N.Y. TIMES, June 10, 2014, at A23 (quoting Ambrose).

³⁶⁵ See, e.g., Lieber Code, *supra* note 284, art. 70; Hague IV, *supra* note 220, art. 23(a).

³⁶⁶ See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. 1(1), Jan. 13, 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 317 [hereinafter Chemical Weapons Convention]; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571; Hague IV, Declaration II - Concerning the Prohibition of Projectiles Diffusing Asphyxiating Gases, July 29, 1899, 187 Consol. T.S. 453.

³⁶⁷ See, e.g., ICC Statute, *supra* note 300, art. 8(2)(b)(xvii)-(xviii).

³⁶⁸ See Chemical Weapons Convention, *supra* note 366, pmbl.

³⁶⁹ See, e.g., 1 INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 265-67 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); see also AP I, *supra* note 61, arts. 35, 55.

³⁷⁰ Kathy Smith Boe, *Paraquat Eradication: Legal Means for a Prudent Policy?*, 12 B.C. ENVTL. AFF. L. REV. 491, 502-03 (1985); see DUKE & GROSS, *supra* note 1, at 195; see also Nat’l Org. for Reform of Marijuana Laws (NORML) v. U.S. Dep’t of State, 508 F. Supp. 1, 2 (D.D.C. 1979); Nat’l Org. for the Reform of Marijuana Laws (NORML) v. U.S. Dep’t of State, 452 F. Supp. 1226, 1229 (D.D.C. 1978).

³⁷¹ In 1974, two children accidentally drank paraquat left in an unmarked soda bottle. One died, and the other became critically ill. See *News in Brief: The Nation*, L.A. TIMES, Mar. 31, 1974, part 1, at 2.

³⁷² See, e.g., Martha Angle & Robert Walters, *High-Priced Eradication*, COLUMBUS

with poison centers witnessing a spike in calls related to marijuana sprayed with the herbicide.³⁷³ The following year, the Secretary of Health, Education, and Welfare, Joseph Califano, warned that the use of paraquat in Mexico “may create health hazards for American consumers.”³⁷⁴ Although some health officials downplayed the seriousness of the threat,³⁷⁵ federal lawmakers sought to end the program,³⁷⁶ and eventually Congress allocated funds to address health concerns raised by paraquat-laced marijuana.³⁷⁷

In 1982, the Institute of Medicine published a report which found that about 21 percent of marijuana coming from Mexico was contaminated with paraquat.³⁷⁸ Although then-existing observations of injurious effects were “too meager for conclusions,” the evidence did “not provide any assurance about the long-term effects” and, moreover, clinical experience raised “the serious possibility that continued exposure to inhaled paraquat is likely to be harmful to the lungs . . . and death may reasonably be expected to ensue.”³⁷⁹ A subsequent study by the Centers for Disease Control confirmed that paraquat exposure was a health risk to marijuana smokers.³⁸⁰ Even the DEA would acknowledge that “heavy smokers of marijuana could be affected by paraquat-sprayed marijuana.”³⁸¹ Yet the government continued to employ paraquat in the war on drugs — and, in fact, the

TELEGRAM, May 20, 1977, at 6 (noting that warnings appeared throughout the year); *Herbicide May Peril Marijuana Smokers*, L.A. TIMES, Dec. 4, 1977, part 1, at 2.

³⁷³ Paul Jacobs, *Health Officials Doubt Paraquat Poses Threat to Pot Smokers*, L.A. TIMES, Apr. 22, 1978, part 2, at 7.

³⁷⁴ I GERALD F. UELMEN & ALEX KREIT, *DRUG ABUSE AND THE LAW SOURCEBOOK* § 3:77 (2015).

³⁷⁵ See *id.*; Jacobs, *supra* note 373.

³⁷⁶ The program in Mexico was suspended in 1979, but two years later Congress permitted herbicide eradication to resume. See Foreign Assistance Act of 1961, Pub. L. No. 97-113, § 502(a)(1), 95 Stat. 1538 (1981) (codified at 22 U.S.C. § 2291(d) (2012)).

³⁷⁷ *Id.* § 502(3) (allocating “not less than \$100,000 to develop a substance that clearly and readily warns persons who may use or consume marijuana that it has been sprayed with the herbicide paraquat or other herbicide harmful to the health of such persons”).

³⁷⁸ INST. OF MED., *MARIJUANA AND HEALTH* 186-87 (Nat’l Acad. Press 1982).

³⁷⁹ *Id.* at 187-88.

³⁸⁰ See Philip J. Landrigan et al., *Paraquat and Marijuana: Epidemiological Risk Assessment*, 73 AM. J. PUB. HEALTH 784, 787-88 (1983).

³⁸¹ Associated Press, *U.S. to Resume Using Paraquat on Marijuana*, N.Y. TIMES (July 14, 1988), <http://www.nytimes.com/1988/07/14/us/us-to-resume-using-paraquat-on-marijuana.html>.

herbicide has been used for marijuana eradication efforts within the United States.³⁸²

The flipside of prohibitions on inhumane weapons are various obligations under international law with regard to the medical treatment of the sick and wounded. The duty to care for injured combatants is a time-honored rule of the law of war, not only prohibiting willful neglect of the sick and wounded but affirmatively requiring parties to take all possible measures to provide the necessary treatment.³⁸³ Among other things, military authorities must allow civilians and relief societies to collect and care for sick and wounded combatants, without inhibiting the efforts or prosecuting those who engage in such humanitarian aid.³⁸⁴ Sick and wounded civilians are likewise “the object of particular protection and respect.”³⁸⁵ Those involved in the operation and administration of civilian hospitals must be respected and protected at all times.³⁸⁶ Under no circumstances may such facilities be the object of attack, even if, for instance, small arms and ammunition are present on the premises.³⁸⁷ Moreover, parties to a conflict must allow the unimpeded passage of medical supplies to civilians.³⁸⁸ Occupying powers have the additional duty to ensure sufficient medical supplies for the affected population, and they may not requisition such supplies from civilian stores.³⁸⁹

These rules are in tension with some drug war practices. Consider, for instance, the ongoing saga of medical marijuana. Studies have shown that the drug has a number of therapeutic benefits, such as relief from chronic neuropathic pain associated with HIV and amelioration of the debilitating symptoms associated with

³⁸² See UELMEN & KREIT, *supra* note 374, § 3:77; *see also* *Sierra Club v. Mullen*, 619 F. Supp. 1244, 1246 (D.D.C. 1985).

³⁸³ See AP I, *supra* note 61, art. 10; AP II, *supra* note 61, arts. 7-8; GC I, *supra* note 61, arts. 3, 12(2) & 15(1); GC II, *supra* note 61, arts. 3, 12 & 18; GC III, *supra* note 61, arts. 30-31; GC IV, *supra* note 61, arts. 3 & 16(1); LOW MANUAL, *supra* note 55, at 425-27; *see also* Convention for the Amelioration of the Condition of the Wounded in Armies in the Field art. 6, Aug. 22, 1864, 129 Consol. T.S. 361; Lieber Code, *supra* note 284, art. 79.

³⁸⁴ See GC II, *supra* note 61, art. 18.

³⁸⁵ GC IV, *supra* note 61, art. 16.

³⁸⁶ See *id.* art. 20.

³⁸⁷ *Id.* arts. 18-19.

³⁸⁸ See AP I, *supra* note 61, art. 70(2); AP II, *supra* note 61, art. 18(2); GC IV, *supra* note 61, art. 23; *see also* ICC Statute, *supra* note 300, art. 8(2)(b)(xxv).

³⁸⁹ AP I, *supra* note 61, art. 14; GC IV, *supra* note 61, arts. 55, 57; *see also* AP II, *supra* note 61, art. 18(2).

chemotherapy and radiation treatments.³⁹⁰ Although marijuana is hardly a cure-all, decades of prohibitionist politics have stifled research into the drug's potential medical uses, which may include therapy for a series of autoimmune (e.g., multiple sclerosis and rheumatoid arthritis), neurodegenerative (e.g., Lou Gehrig's disease and Parkinson's disease), and other neurological disorders (e.g., epilepsy, Tourette syndrome, and bipolar disorder). As of this writing, 29 states and the District of Columbia have legalized or decriminalized the medicinal use of the drug, with laws defining eligibility and allowing some means of patient access, such as home cultivation, dispensaries, or both.

Despite these developments, federal law still maintains the nearly half-century-old classification of marijuana as a drug having no legitimate medical use.³⁹¹ Moreover, drug enforcers took an aggressive approach to interpreting the U.S. government's drug war prerogative, arguing successfully in court that there were no exceptions or limitations to federal prosecutions involving medical marijuana.³⁹² Federal law enforcement conducted hundreds of raids on medical marijuana dispensaries, and sought criminal prosecution of medical marijuana providers even when they were in full compliance with local and state law.³⁹³ One particularly pathetic raid involved a collective hospice, located on a farm in Santa Cruz, California, that had "approximately 250 member-patients who suffer from HIV or AIDS, multiple sclerosis, glaucoma, epilepsy, various forms of cancer,

³⁹⁰ See *Conant v. Walters*, 309 F.3d 629, 641-43 (9th Cir. 2002) (Kozinski, J., concurring); UELMEN & KREIT, *supra* note 374, § 3:76; Peter J. Cohen, *Medical Marijuana: The Conflict Between Scientific Evidence and Political Ideology*, 2009 UTAH L. REV. 35, 72-75 (2009); Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen's Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673, 697-99 (2009); see also INST. OF MED., MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE (Janet E. Joy et al. eds., 1999); SCI. & TECH. COMM., SCIENCE AND TECHNOLOGY – 9TH REPORT, 1997-8, HL chap. 5 (UK) (Nov. 4, 1998).

³⁹¹ See 21 U.S.C. § 812(b)(1)(B), (c) (2012); see also Catherine Saint Louis, *D.E.A. Keeps Marijuana on List of Dangerous Drugs, Frustrating Advocates*, N.Y. TIMES (Aug. 11, 2016), <http://www.nytimes.com/2016/08/12/health/dea-keeps-marijuana-on-list-of-dangerous-drugs-frustrating-advocates.html>.

³⁹² See *Gonzales v. Raich*, 545 U.S. 1, 8-9 (2005) (rejecting Commerce Clause challenge); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 486 (2001) (rejecting necessity defense for medical marijuana); see also Alex Kreit, *Reflections on Medical Marijuana Prosecutions and the Duty to Seek Justice*, 89 DENV. U. L. REV. 1027, 1041-44 (2012) (noting that many state law enforcement officials opposed medical marijuana and sought to crack down on dispensaries).

³⁹³ See Kreit, *supra* note 392, at 1034-35; see, e.g., Stern & DiFonzo, *supra* note 390, at 674-75.

and other serious illnesses.”³⁹⁴ Consistent with state law and only pursuant to a physician’s recommendation, the hospice “assists seriously ill and dying patients by providing them with the opportunity to cultivate marijuana plants for their personal medicinal use and to produce marijuana medications collectively used by [hospice] members to alleviate their pain and suffering.”³⁹⁵

During the raid, between 20-30 DEA agents “forcibly entered the premises, pointed loaded firearms at the [farm owners], forced them to the ground, and handcuffed them.”³⁹⁶ One of the owners — who herself used medical marijuana to control seizures resulting from a traumatic head injury — was driven away in her nightgown. Another patient, a paraplegic woman suffering from polio, “was told to stand up to be handcuffed; when she could not do so, she was handcuffed to her bed.”³⁹⁷ The drug agents remained at the hospice for eight hours, “seizing 167 marijuana plants [and] many of the [hospice] members’ weekly allotments of medicinal marijuana.”³⁹⁸ When state and local officials condemned the raid, the DEA gave a response evincing anti-humanitarian indifference: “No one in the United States is allowed to distribute illegal drugs, period.”³⁹⁹

Such incidents are not only unseemly but also inconsistent with a belligerent’s obligations to allow the treatment and care of the sick under the principle of humanity. Early on in the Obama Administration it looked like the raids would end,⁴⁰⁰ especially after the Justice Department issued a memo calling for non-prosecution of “individuals whose actions are in clear and unambiguous compliance with existing state laws that provide for medical use of marijuana.”⁴⁰¹ But in an apparent bait-and-switch with penal consequences, federal law enforcement once again began cracking down on medical

³⁹⁴ *Cty. of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d 1192, 1195 (N.D. Cal. 2003).

³⁹⁵ *Id.* at 1195-96.

³⁹⁶ *Id.* at 1197.

³⁹⁷ RANDOLPH J. GERBER, *LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS* 132 (2004).

³⁹⁸ *Cty. of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d at 1197.

³⁹⁹ GERBER, *supra* note 397, at 132 (quoting DEA spokesman Richard Meyer).

⁴⁰⁰ See Michael Vitiello, *Legalizing Marijuana: California’s Pot of Gold?*, 2009 WIS. L. REV. 1349, 1360-61; Stephen Dinan & Ben Conery, *Bush Holdovers at DEA Continue Pot Raids - Obama Vowed to End Policy*, WASH. TIMES, Feb. 5, 2009, at A01.

⁴⁰¹ Memorandum from David Ogden, Deputy Attorney Gen. on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19. 2009), <https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.

marijuana dispensaries and prosecuting their proprietors.⁴⁰² In the language of the law of war, one might describe this as the misuse of a flag of truce.⁴⁰³

At times the conflict has run deeper, however, with the drug war impacting medical ethics. The principle of humanity requires that “medical personnel of all categories” be permitted to carry out their duties,⁴⁰⁴ and forbids punishment for performing such duties consistent with medical ethics.⁴⁰⁵ For instance, “doctors who recommend medical marijuana to patients after complying with accepted medical procedures are not acting as drug dealers; they are acting in their professional role in conformity with the standards of the state where they are licensed to practice medicine.”⁴⁰⁶ And yet, when California and Arizona enacted medical marijuana laws, federal drug enforcement issued a patent threat to the medical profession: Those who recommend the drug to their patients will face revocation of their prescription licenses, exclusion from Medicare and Medicaid programs, and criminal prosecution.⁴⁰⁷ The government suggested that it would employ surveillance and informers to identify physicians who recommend the drug,⁴⁰⁸ and, in one case, a doctor was “interrogated by DEA agents who questioned his medical education and training,”

⁴⁰² See Erik Eckholm, *Medical Marijuana Industry Is Unnerved by U.S. Crackdown*, N.Y. TIMES, Nov. 24, 2011, at A22; John Ingold, *Feds Justify Dispensary Crackdown — Walsh Cites Evidence that Youths Are Getting Medical Marijuana*, DENV. POST, Jan. 20, 2012, at B01; see also Jennifer Medina, *U.S. Attorneys in California Set Crackdown on Marijuana*, N.Y. TIMES, Oct. 8, 2011, at A10; William Yardley, *New Federal Crackdown Confounds States that Allow Medical Marijuana*, N.Y. TIMES, May 8, 2011, at A13; Chris Roberts, *Blowing Smoke: Obama Promises One Thing, Does Another on Medical Marijuana*, S.F. WKLY. (Apr. 6, 2011), <http://www.sfweekly.com/2011-04-06/news/medical-marijuana-raids-obama-eric-holder-legalization-dispensaries-chris-roberts/>; Jacob Sullum, *Read My Tea Leaves*, REASON.COM (Oct. 12, 2011) <http://reason.com/archives/2011/10/12/read-my-tea-leaves>.

⁴⁰³ See, e.g., ICC Statute, *supra* note 300, art. 8(2)(b)(vii); AP I, *supra* note 61, art. 38(1); Hague IV, *supra* note 220, art. 23(f).

⁴⁰⁴ GC IV, *supra* note 61, art. 56; see also COMMENTARY GC IV, *supra* note 341, at 314 (“Medical personnel of all categories’ should be taken to mean all people engaged in a branch of medical work: doctors, surgeons, dentists, pharmacists, midwives, medical orderlies and nurses, stretcher bearers, ambulance drivers, etc., whether such persons are or are not attached to a hospital.”).

⁴⁰⁵ See AP I, *supra* note 61, art. 16; AP II, *supra* note 61, art. 10.

⁴⁰⁶ *Conant v. Walters*, 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring).

⁴⁰⁷ Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (1997); see also *Walters*, 309 F.3d at 632-33; *Conant v. McCaffrey*, 172 F.R.D. 681, 686, 688, 690 (N.D. Cal. 1997).

⁴⁰⁸ *McCaffrey*, 172 F.R.D. at 696.

and “confronted a pharmacist regarding prescriptions he has dispensed.”⁴⁰⁹

The courts described government fears of medical marijuana as “exaggerated and without evidentiary support,” given that the state laws concerned “no more than the ability of physicians to recommend personal use of marijuana to bona fide patients suffering from a narrow range of serious, debilitating diseases.”⁴¹⁰ By contrast, the threats of criminal prosecution and other sanctions intimidated physicians, who began to self-censor their communications with patients and refused to offer guidance on the risks and benefits of medical marijuana.⁴¹¹ Physicians are “peculiarly vulnerable to intimidation” because they have nothing to gain personally from providing advice regarding a drug, but they have much to lose by doing so — not only from criminal sanctions, but also from the prospect that “they may destroy their careers and lose their livelihoods” if they are stripped of their license to prescribe medicine or are even investigated by a government body.⁴¹² This, in turn, jeopardizes medical care by precluding frank and open communication between patients and physicians, thereby undermining the trust of the former while precluding the latter from accurately diagnosing and effectively treating illnesses.⁴¹³ Sometimes the consequences may be life or death by, for instance, hastening the demise of seriously ill patients.⁴¹⁴

The drug war’s adverse impact on medical practice is even more pervasive with regard to opioid palliative care. Millions of Americans suffer from chronic pain, much of which could be treated today but is not.⁴¹⁵ When properly prescribed, the family of drugs known as

⁴⁰⁹ *Id.* at 690.

⁴¹⁰ *Id.* at 694 n.5, 698; *see also* *Walters*, 309 F.3d at 632.

⁴¹¹ *Walters*, 309 F.3d at 639 (noting that the government even conceded that a “reasonable physician would have a genuine fear of losing his or her DEA registration to dispense controlled substances if that physician were to recommend marijuana to his or her patients.”); *see, e.g., McCaffrey*, 172 F.R.D. at 690, 697.

⁴¹² *Walters*, 309 F.3d at 639-40, 640 nn.1-2 (Kozinski, J., concurring).

⁴¹³ *McCaffrey*, 172 F.R.D. at 690-91, 697; *see Walters*, 309 F.3d at 636.

⁴¹⁴ *See Walters*, 309 F.3d at 643 n.8 (Kozinski, J., concurring); *McCaffrey*, 172 F.R.D. at 697.

⁴¹⁵ *See* INST. OF MED. OF THE NAT’L ACADS., RELIEVING PAIN IN AMERICA: A BLUEPRINT FOR TRANSFORMING PREVENTION, CARE, EDUCATION, AND RESEARCH 1-2 (2011); Stern & DiFonzo, *supra* note 390, at 751; Katherine Goodman, Note, *Prosecution of Physicians as Drug Traffickers: The United States’ Failed Protection of Legitimate Opioid Prescription Under the Controlled Substances Act and South Australia’s Alternative Regulatory Approach*, 47 COLUM. J. TRANSNAT’L L. 210, 215-16 (2008).

opioids — including morphine, codeine, hydrocodone, and oxycodone — can be effective analgesics for chronic pain with a relatively low propensity for addiction or abuse.⁴¹⁶ Unfortunately, widespread misunderstandings about the nature and prevalence of narcotics addiction has led to physicians underprescribing opioids even when otherwise indicated.⁴¹⁷ This phenomenon, known as “opiophobia,”⁴¹⁸ stems in part from the drug war’s incessant drumbeat about the dangers of addiction. As a result, physicians have “been ‘conscripted’ into that war, much to the detriment of their patients with severe and persistent pain.”⁴¹⁹ And like the intimidation of physicians who recommend medical marijuana, doctors who prescribe high doses and quantities of opioids run serious risks — government investigation, loss of licenses, and even criminal prosecution — which has had a chilling effect on the provision of palliative care.⁴²⁰ The principle of humanity is of little consequence when law enforcers promise “to root out certain doctors like the Taliban” and the drug war becomes “a war on pain relief.”⁴²¹

⁴¹⁶ See Charles E. Inturrisi, *Clinical Pharmacology of Opioids for Pain*, 18 CLINICAL J. PAIN S1, S3, S9 (2002); Meredith Noble et al., *Long-Term Opioid Therapy for Chronic Noncancer Pain: A Systematic Review and Meta-Analysis of Efficacy and Safety*, 35 J. PAIN & SYMPTOM MGMT. 214, 215, 222, 225 (2008); *Opioids Safely Curb Chronic Back Pain: Study*, REUTERS Feb. 23, 2005.

⁴¹⁷ See, e.g., Ben A. Rich, *A Prescription for the Pain: The Emerging Standard of Care for Pain Management*, 26 WM. MITCHELL L. REV. 1, 43, 45 (2000); Stern & DiFonzo, *supra* note 390, at 751; Goodman, *supra* note 415, at 216-17.

⁴¹⁸ See Daniel S. Bennett & Daniel B. Carr, *Opiophobia as a Barrier to the Treatment of Pain*, 16(1) J. PAIN & PALLIATIVE CARE PHARMACOTHERAPY 105, 106 (2002); see also John P. Morgan, *American Opiophobia: Customary Underutilization of Opioid Analgesics*, 5 ADVANCES IN ALCOHOL & SUBSTANCE ABUSE 163, 170 (1985).

⁴¹⁹ Rich, *supra* note 417, at 5-6.

⁴²⁰ See Jan Hoffman, *Patients in Pain, and a Doctor Who Must Limit Drugs*, N.Y. TIMES, Mar. 17, 2016, at A1; Tina Rosenberg, *When Is a Pain Doctor a Drug Pusher?*, N.Y. TIMES MAG., June 17, 2007, at 48; see also Ronald T. Libby, *Treating Doctors as Drug Dealers: The Drug Enforcement Administration’s War on Prescription Painkillers*, 10 INDEP. REV. 513, 515-16, 518 (2006); Annemarie Daly Linares, *Opioid Pseudoaddiction: A Casualty of the War on Drugs, Racism, Sexism, and Opiophobia*, 15 QUINNIPIAC HEALTH L.J. 89, 96-97 (2012); Stern & DiFonzo, *supra* note 390, at 752; Goodman, *supra* note 415, at 217-18, 222.

⁴²¹ See Deroy Murdock, *Bad Trip: The Federal War on Drugs Expands*, NAT’L REV. (May 10, 2004, 9:16 AM), <http://www.nationalreview.com/article/210596/bad-trip-deroy-murdock>.

IV. CONCLUDING THOUGHTS

As suggested at the beginning, this article should be taken as a mental exercise subject to various caveats,⁴²² a pair of which bear mentioning here. The first concerns the nature of law-of-war principles, which tend to be pitched at a high level of generality and fraught with ambiguity, and then cushioned by a margin for disparate interpretations and factual mistakes. Among other things, the *jus in bello* principles of necessity and proportionality are somewhat elastic and concerned with categorical violations, evaluated by the standard of a reasonable military commander who, in the heat of battle, must determine military objectives and weigh the incommensurable values of military gain and civilian harm.⁴²³ Although in retrospect a given drug war policy or operation may be unnecessary and disproportionate — such as the movement toward militarizing drug enforcement or the use of military-style tactics and gear in particular cases — the relevant government officials would not be exposed to legal second-guessing with the benefit of hindsight. Then again, the question posed by this article is not the liability of drug enforcement for any past decision but rather the proper judgment about whether to continue prohibition into the future. On this issue, even reasonable mistakes matter in determining whether the drug war can be justified.

A second caveat, which was noted at the outset but deserves elaboration here,⁴²⁴ rejects the law of war's literal application to prohibition. Because the war on drugs does not involve a clash between two or more nations, it is not an international armed conflict as conceived by the 1949 Geneva Conventions.⁴²⁵ Nor does the drug war fit within an expanded definition that includes so-called “wars of national liberation.”⁴²⁶ Although prohibition has racist origins and may be viewed today as a “racist regime,” it is hard to argue that drug cartels and dealers operating within the United States “are fighting against

⁴²² See, e.g., *supra* notes 14, 62, 70, 105 (mentioning limitations).

⁴²³ If amenable to judicial review at all, the resulting decisions usually receive substantial deference under doctrines such as the so-called “Rendulic rule” — a sort of strict-liability defense that only demands that a military commander make a good faith assessment of those facts available at the point of decision. See, e.g., LOW MANUAL, *supra* note 55, at 58, 192-93 (discussing Rendulic rule); LOAC DESKBOOK, *supra* note 65, at 134-35 (same).

⁴²⁴ See, e.g., *supra* text accompanying note 10.

⁴²⁵ See, e.g., GC I, *supra* note 61, art. 2 (convention applicable to armed conflicts “between two or more of the High Contracting parties”); LOW MANUAL, *supra* note 55, at 73; see also *supra* note 70.

⁴²⁶ See ADDITIONAL PROTOCOLS, *supra* note 313, at 41.

colonial domination and alien occupation . . . in the exercise of their right of self-determination.”⁴²⁷ Somewhat less improbable would be the classification of the American war on drugs as an “armed conflict not of an international character.”⁴²⁸ A non-international armed conflict can involve non-state groups, either fighting one another or a nation, but it must meet conditions relating to the organization of the non-state group and the intensity of hostilities,⁴²⁹ such that the conflict is “in many respects similar to an international war, but take[s] place within the confines of a single country.”⁴³⁰ The organizational criterion requires that a non-state group evince some structural similarities to bona fide armed forces so as to justify its treatment as such, while the intensity criterion is intended to discern those situations constituting the type of grave public emergency that warrants a shift in legal regime from the law of peace to the law of war.⁴³¹

Generally speaking, the law of war does not apply to “banditry” or “isolated and sporadic acts of violence,”⁴³² including, in most circumstances, the brutality of criminal organizations and gangs.⁴³³ To be sure, drug war violence is horrifying and far too frequent in the United States. Yet it would likely be seen as intermittent and moderate in terms of, *inter alia*: the duration and intensity of any armed confrontations, the kind of forces involved in combat, the amount of death and injury, and the extent of physical destruction.⁴³⁴ The familiar belligerence of the American drug war — for instance, a shootout among drug gang members or between a drug dealer and law enforcement, perhaps lasting a few minutes if not seconds, and

⁴²⁷ AP I, *supra* note 61, art. 1(4). Regardless, the United States has refused to accept this definition. *See supra* note 104.

⁴²⁸ *See* GC I, *supra* note 61, art. 3; LOW MANUAL, *supra* note 55, at 73-74; *see also supra* note 70.

⁴²⁹ *See, e.g.*, INT’L LAW ASS’N, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 2 (2010) (endorsing and defining two criteria).

⁴³⁰ COMMENTARY GC IV, *supra* note 341, at 36. “In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front.” *Id.*

⁴³¹ Pierre Hauck & Sven Peterke, *Organized Crime and Gang Violence in National and International Law*, 92 INT’L REV. RED CROSS 407, 431-32 (2010); *see also* INT’L LAW ASS’N, *supra* note 429, at 2.

⁴³² AP II, *supra* note 61, art. 1(2); COMMENTARY GC IV, *supra* note 341, at 35-36; *see also* Prosecutor v. Tadić, Case No. IT-94-I-T, Opinion & Judgment, ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

⁴³³ *See, e.g.*, Hauck & Peterke, *supra* note 431, at 429-30; INT’L LAW ASS’N, *supra* note 429, at 3, 12, 29.

⁴³⁴ *See* Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 49 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

producing some injuries (or even deaths) and relatively minor property damage — is not the kind of protracted armed violence usually associated with a non-international armed conflict. Certainly, it is not comparable to the fighting in, say, a literal civil war, which stands as the archetype of armed conflict not of an international character.

As for the organizational criterion, American drug gangs and networks may maintain a leadership structure of sorts and claim certain territory vis-à-vis other groups. But they are not “under responsible command” as understood in international law and they do not exercise territorial control akin to a governing authority, circumstances which would allow them “to carry out sustained and concerted military operations and to implement” the requirements of the law of war.⁴³⁵ For the most part, drug gangs do not engage in military-style training; they lack the competence to design, coordinate, and execute military operations; they are incapable of defining an integrated military strategy and using military tactics; and they do not communicate with a single voice.⁴³⁶ Moreover, the gangs do not challenge the U.S. armed forces or carry out operations against military objectives, and, conversely, the armed forces are not directly involved in domestic drug enforcement.⁴³⁷ As for complying with the demands of international law, those involved in drug distribution rarely (if ever) conform to the basic expectations of the law of war, such as carrying arms openly and respecting the protections for civilians.⁴³⁸

All things considered, the American drug war cannot be categorized as an actual armed conflict under the law of war⁴³⁹ — but that was

⁴³⁵ AP II, *supra* note 61, art. 1(1); *see also* COMMENTARY GC IV, *supra* note 341, at 35-36.

⁴³⁶ *See Haradinaj, supra* note 434, ¶ 60 (identifying criteria that establishes whether a group is an organization capable of engaging in armed military conflict).

⁴³⁷ *But see supra* notes 237-47 and accompanying text (discussing U.S. military’s involvement in drug interdiction efforts).

⁴³⁸ *See* GC III, *supra* note 61, art. 4(A)(2); *supra* notes 234, 282-87 and accompanying text. Because “their violence is not driven by an ideology or legitimate political intentions,” drug gangs and networks “not only have no interest in confronting the government and assuming its powers and responsibility, they also have no interest in imposing disciplinary rules and mechanisms to guarantee respect for” the law of war. Hauck & Peterke, *supra* note 431, at 433.

⁴³⁹ For the most part, this article has focused on the drug war within the United States and not global drug prohibition. *But see, e.g., supra* notes 132-45 and accompanying text (discussing drug-war duplicity and mixed motives in armed conflicts abroad). The verdict that the drug war is not an actual armed conflict under the law of war does not necessarily hold outside of the United States, however.

never the goal of this article. Instead, the foregoing was intended as a mental exercise prompting readers to think deeply about U.S. drug policy, given the pervasive use of the war metaphor for prohibition and the resulting impact on public cognition and sentiment, truth-seeking and decision-making, and individual rights and government structures. As mentioned earlier, the just war tradition provides a useful analytical structure, and, more importantly, application of the doctrine may offer perspective on the nature of prohibition. With all the law of war allows — the dispatching of armed forces against another people, for instance, and the killing of combatants without

Consider, for instance, the drug-related violence raging south of the U.S.-Mexico border: Since 2006, when then-President Felipe Calderón promised to escalate drug enforcement efforts to a real war, a large corps of military personnel has been deployed to fight the drug cartels, upwards of 100,000 Mexicans have died in the bloody conflict that ensued, and thousands of people have simply disappeared at the hands of the cartels, the government, or the cartels working with the government. See CLARE RIBANDO SEELKE & KRISTIN FINKLEA, CONG. RESEARCH SERV., R41349, U.S.-MEXICAN SECURITY COOPERATION: THE MÉRIDA INITIATIVE AND BEYOND (2016); JUNE S. BEITTEL, CONG. RESEARCH SERV., R41575, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS (2015); see also INTER-AMERICAN COMM'N ON HUMAN RIGHTS, SITUATION OF HUMAN RIGHTS IN MEXICO (2015). Indeed, some commentators have argued that the Mexican drug war meets the conditions for a non-international armed conflict. See, e.g., Craig A. Bloom, *Square Pegs and Round Holes: Mexico, Drugs, and International Law*, 34 HOUS. J. INT'L L. 345 (2012) (classifying Mexican drug war as a non-international armed conflict); Carina Bergal, *The Mexican Drug War: The Case for a Non-International Armed Conflict Classification*, 34 FORDHAM INT'L L.J. 1042 (2011) (same); Nagesh Chelluri, *A New War on America's Old Frontier: Mexico's Drug Cartel Insurgency*, 210 MIL. L. REV. 51 (2011) (same); Callin Kerr, *Mexico's Drug War: Is It Really a War?*, 54 S. TEX. L. REV. 193 (2012) (same). But see Patrick Gallahue, *Mexico's "War on Drugs" — Real or Rhetorical Armed Conflict?*, 24 J. INT'L L. PEACE & ARMED CONFLICT 39 (2011) (rejecting classification of Mexican drug war as armed conflict); Andrea Nill Sánchez, Note, *Mexico's Drug "War": Drawing a Line Between Rhetoric and Reality*, 38 YALE J. INT'L L. 467 (2013) (same). Moreover, Americans have fueled war through both their insatiable demand for drugs and their government's intervention in Mexican affairs. Congress has appropriated hundreds of millions of dollars to help Mexico battle the drug cartels; U.S. officials have provided military training, equipment, and intelligence gathering for Mexican drug war efforts; and, in fact, myriad American agencies have participated in drug enforcement activities involving Mexico. See, e.g., SEELKE & FINKLEA, *supra*, at 1-2, 6-10; Ginger Thompson, *U.S. Widens Its Role in Battle Against Mexico's Drug Cartels*, N.Y. TIMES, Aug. 7, 2011, at A1; Rebecca Gordon, *The Failed War on Drugs in Mexico (and the United States)*, MOYERS & CO. (Mar. 27, 2015), <http://billmoyers.com/2015/03/27/can-say-blowback-spanish/>. Predictably, however, the escalation has failed to put a significant dent in the illegal drug trade. If anything, the upsurge in belligerence has increased the margins for drug profiteers like the Sinaloa cartel, which "reap more annual revenue than Univision." Grace Rubenstein, *The Vanishing: What Happened to the Thousands Still Missing in Mexico?*, LONGREADS (Apr. 2016), <https://blog.longreads.com/2016/04/05/the-vanishing-what-happened-to-the-thousands-still-missing-in-mexico/>.

warning and the detention of enemies without trial⁴⁴⁰ — the rules on declaring and conducting war establish the bare minimum expected of civilized societies. If, as this article has suggested, the drug war proves troublesome in its initiation and execution as measured by the law of war, then prohibition is likely to be even more problematic under the law of peace. And, if nothing else, this assessment calls for a sober second look at the drug war and due consideration of drug peace.

Completing the metaphor, the law of war may even provide insights on achieving a just resolution to the war on drugs. In addition to *jus ad bellum* and *jus in bello*, modern commentators have suggested a third doctrinal category, *jus post bellum*, concerning justice after war and “what a just peace should look like.”⁴⁴¹ Although it is “the least developed part of just war theory,”⁴⁴² *jus post bellum* may contain the most important values for achieving justice and maintaining peace.⁴⁴³ After all, the ultimate purpose of a just war must be the realization of peace,⁴⁴⁴ and experience has shown that failure to settle wars justly only tends to perpetuate conflict.⁴⁴⁵ While *jus ad bellum* and *jus in bello* require parties to have just causes to start a war and to use just means while conducting war, *jus post bellum* requires combatants to “end their wars in a fair, justified way” and thus serves to “prevent the war from spilling over into something like a crusade, which demands the utter destruction of the demonized enemy.”⁴⁴⁶ Like *jus ad bellum* and *jus in bello*, this emergent doctrine seeks to guide the decision-making and limit the conduct of morally justified actors.

⁴⁴⁰ See *supra* text accompanying notes 265–67 (discussing wartime targeting); *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (describing capture and detention of combatants as accepted incidents of war).

⁴⁴¹ LOAC DESKBOOK, *supra* note 65, at 10.

⁴⁴² MICHAEL WALZER, *ARGUING ABOUT WAR* 161 (2004) [hereinafter *ARGUING*]; see also LOAC DESKBOOK, *supra* note 65, at 10.

⁴⁴³ See generally *JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE* (Carsten Stahn & Jann K. Kleffner eds., 2008) [hereinafter *JUS POST BELLUM*] (edited collection offering in-depth analysis of *jus post bellum*).

⁴⁴⁴ See, e.g., FRANCISCO DE VITORIA, *POLITICAL WRITINGS* 283, 305, 321, 327 (Anthony Padgen & Jeremy Lawrence eds., 1991) (arguing that the aim of war is peace).

⁴⁴⁵ See Brian Orend, *Jus Post Bellum: A Just War Theory Perspective*, in *JUS POST BELLUM*, *supra* note 443, at 36–37. Among other things, a decent theory will reject “victor’s justice” and the notion that might makes right, where winners freely enjoy the spoils of war and take revenge upon the losers with impunity — a dreadful approach that ruled the practice of war throughout much of human history.

⁴⁴⁶ *Id.* at 38–39.

Admittedly, *jus post bellum* lacks an established canon⁴⁴⁷ and appears prone to even wider interpretations than the other two prongs of just war theory.⁴⁴⁸ Nonetheless, several principles may be gleaned for purposes of *jus post bellum* analysis, derived in part from other aspects of just war theory. For instance, justice may demand trial and punishment of a belligerent's leadership, as well as unlawful combatants on both sides of the hostilities, for crimes they committed during the war.⁴⁴⁹ One could imagine post-prohibition trials of kingpins and other principals of drug cartels, for instance, and the continued detention of violent drug offenders. In fact, any punitive post-war measures should distinguish between high-level and violent criminals on the one hand, and non-violent "soldiers" and "civilians" on the other.⁴⁵⁰ In the context of the drug war, drug users might be considered civilians (as discussed earlier),⁴⁵¹ while low-level, non-violent drug dealers who are presently incarcerated might be viewed as

⁴⁴⁷ See Carsten Stahn, *Jus Post Bellum: Mapping the Discipline(s)*, in *JUS POST BELLUM*, *supra* note 443, at 107.

⁴⁴⁸ For instance, commentators have questioned the ability to identify the "post" for purposes of *jus post bellum*: when exactly do wars end, how long does a post-war phase continue, and, in some cases, can it even be said that a war is truly over? See Orend, *supra* note 445, at 34. Such questions are especially difficult when applied to the war on drugs. Conventional wars may culminate in an explicit termination of conflict, such that the "post bellum" period usually begins with a cease-fire, armistice, or surrender." Louis V. Iasiello, *Jus Post Bellum: The Moral Responsibilities of Victors in War*, 57 *NAVAL WAR COL. REV.* 33, 40 (2004). The "enemy" in drug prohibition is stateless and indefinite, both in terms of time and actors, thus making the "end" of the war on drugs necessarily hard to categorize. Although these issues are difficult, fixating on the post in *jus post bellum* may be unhelpful in seeking a just resolution to the drug war. Rather, as Brian Orend suggests, the third part of just war theory can be viewed as a conflict's "termination phase" in the sense of a transition process from war to peace. Orend, *supra* note 445, at 34. "To use a crude analogy to the sunrise, who can say, around the dawn, exactly where night ends and day begins? But eventually it is irrelevant and we all come to realize a new day has dawned, a new phase has been entered, and new and fresh activities and principles are needed." *Id.*

⁴⁴⁹ See Orend, *supra* note 445, at 41, 45; Gary J. Bass, *Jus Post Bellum*, 32 *PHIL. & PUB. AFF.* 384, 404 (2004); cf. David Rodin, *War Termination and the Liability of Soldiers for Crimes of Aggression*, in *JUS POST BELLUM*, *supra* note 443, at 60 ("Contributing just causes may include such aims as deterring future aggression, punishing those responsible for the initiation of aggression, degrading enemy forces and disarming the enemy to make future acts of aggression less likely."). Likewise, the aggressor might be required to provide compensation for the costs of war. See Orend, *supra* note 445, at 41, 47; Bass, *supra*, at 408-09; Carsten Stahn, 'Jus ad Bellum,' 'Jus in Bello' . . . 'Jus post Bellum'? — *Rethinking the Conception of the Law of Armed Force*, 17 *EURO. J. INT'L L.* 921, 939-40 (2006) [hereinafter *Rethinking*].

⁴⁵⁰ See Orend, *supra* note 445, at 41; Stahn, *Rethinking*, *supra* note 449, at 940.

⁴⁵¹ See *supra* notes 301-21 and accompanying text.

prisoners of war. Under the law of war, both civilians and prisoners of war must be released from detention at the end of hostilities,⁴⁵² and an analogous process for prohibition has begun under President Obama through the use of his commutation power.⁴⁵³

Other *jus post bellum* principles involve the terms of peace, where any settlement is the work of legitimate authorities who reach terms that are publicly declared and reasonable.⁴⁵⁴ Here, *jus post bellum* is concerned with the construction of new institutions or the “rehabilitation” of those that existed under the previous regime.⁴⁵⁵ The reforms may involve, *inter alia*: “demilitarization and disarmament; police and judicial re-training; human rights education; and even deep structural transformation towards a minimally just society governed by a legitimate regime.”⁴⁵⁶ In both peace talks and institution-building, the process should be inclusive and “people-centered,” involving all interested parties in reaching a settlement and constructing new institutions.⁴⁵⁷ A drug peace conference would be public and transparent, and would include all the major stakeholders: elected and appointed officials, leaders of the law enforcement community, members of the public, and, yes, advocates for the right to possess and consume drugs and representatives from the “business” of drug cultivation, production, distribution, and sales. The topics for a conference would include those discussed in the present symposium, with the goal of turning the swords of the drug war into the plowshares of a drug peace.

Perhaps the key practical question would be where to place each drug along a scale from total prohibition to free-market drug anarchism.⁴⁵⁸ For instance, should a particular drug be merely decriminalized or instead legalized?⁴⁵⁹ If the former, how does society

⁴⁵² See LOW MANUAL, *supra* note 55, at 96 (“Certain obligations are triggered by the end of hostilities. . . . POWs and protected persons, in general, must be released and returned to the party to the conflict to which they belong.”).

⁴⁵³ See, e.g., Sari Horwitz, *Obama Commutes the Sentences of 102 More Federal Drug Offenders*, WASH. POST (Oct. 6, 2016), https://www.washingtonpost.com/world/national-security/obama-commutes-the-sentences-of-102-more-federal-drug-offenders/2016/10/06/e66578d6-8bff-11e6-bf8a-3d26847eed4_story.html.

⁴⁵⁴ See Orend, *supra* note 445, at 40.

⁴⁵⁵ See *id.* at 41-42.

⁴⁵⁶ BRIAN OREND, *THE MORALITY OF WAR* 181 (2006).

⁴⁵⁷ See Orend, *supra* note 445, at 41-42, 46, 49-50; Stahn, *Rethinking*, *supra* note 449, at 938-39, 941.

⁴⁵⁸ See, e.g., BATTIN ET AL., *supra* note 185, at 227-31.

⁴⁵⁹ See, e.g., W. AFR. COMM’N ON DRUGS, *THE GLOBAL DRUG POLICY DEBATE: EXPERIENCES FROM THE AMERICAS AND EUROPE* 14-15 (2013).

avoid a black market and the unwelcome consequences that flow from it? If the latter, what regulatory model should apply to each drug? Various options are possible, including: prescription by a physician or perhaps a pharmacist; licensed sales akin to the regime used today for alcohol and tobacco; licensed premises where drugs can be sold and consumed, such as bars for alcohol or Dutch “coffee shops” for marijuana; and unlicensed sales, as is the case with caffeinated substances and certain common pain relievers.⁴⁶⁰ The concrete details of a regulatory scheme would involve controls on production and availability, packaging and warnings, licenses and suppliers, advertising and marketing, purchasers and ultimate users, treatment and education, and so on and so forth.⁴⁶¹ Any national retreat from drug prohibition would also need to consider the existing framework of international drug control conventions and whether they allow space for a non-prohibitionist regime or instead require treaty revision.⁴⁶²

Needless to say, the foregoing implicates a series of tough issues, made all the more difficult by the *jus post bellum* desiderata of inclusive decision-making that both respects individual rights and provides for the common welfare,⁴⁶³ for instance, and demilitarizes and disarms the drug war machinery without leaving government incapable of dealing with the myriad problems that will continue to affect society in a post-prohibition world (e.g., drug abuse, underage drug use, and intoxicated risk-taking). Given that a question as complex as constructing drug peace will surely have an answer that, in H.L. Mencken’s words, is clear, simple, and wrong, this article won’t even pretend to work out the solution in the few remaining pages.

⁴⁶⁰ See TRANSFORM DRUG POLICY FOUND., *AFTER THE WAR ON DRUGS: BLUEPRINT FOR REGULATION* 20-27 (2009); see also BATTIN ET AL., *supra* note 185, at 231-47.

⁴⁶¹ See TRANSFORM DRUG POLICY FOUND., *supra* note 460, at 31-64, 99-161.

⁴⁶² See DAVE BEWLEY-TAYLOR, *TOWARDS REVISION OF THE UN DRUG CONTROL CONVENTIONS: THE LOGIC AND DILEMMAS OF LIKE-MINDED GROUPS* (Transnat’l Inst. 2012); LAW ENF’T AGAINST PROHIBITION, *PROPOSED AMENDMENT OF THE UNITED NATIONS DRUG TREATIES* (2014); TRANSFORM DRUG POLICY FOUND., *supra* note 460, at 165-191; see also *supra* notes 98-99 and accompanying text.

⁴⁶³ Among other things, Professor Orend posits that an agreement should seek to vindicate the rights of those who were wronged in a manner proportionate to the injustice that triggered the war in the first place. See Orend, *supra* note 445, at 34. “The relevant rights include human rights to life and liberty,” where a decent settlement ensures improved conditions for those affected by war. *Id.* at 40. Moreover, the victor may have obligations, as Professor Walzer has claimed, guided by values of post-war justice that would “include self-determination, popular legitimacy, civil rights, and the idea of a common good” in a reestablished state. WALZER, *ARGUING*, *supra* note 442, at 164.

Instead, I will close with an appeal to a latent component of *jus post bellum*⁴⁶⁴ that should be one of its institutional writs: telling and vindicating the truth.⁴⁶⁵ Contrary to any polemical exercise (perhaps including this article),⁴⁶⁶ the transition toward a post-drug war reconciliation should involve the establishment of a shared, factually accurate understanding of drugs and drug prohibition.

As discussed earlier, truth has been a victim of war throughout history, and the war on drugs is no exception. The truth matters greatly, nonetheless, both in peace and in wartime. Even a minimally functional society must maintain a vigorous understanding of the instrumental value of truth for individual and collective decision-making. As Harry Frankfurt rhetorically asked, “How could [society] possibly flourish, or even survive, without knowing enough about relevant facts to pursue its ambitions successfully and to cope prudently and effectively with its problems?”⁴⁶⁷ Decent conceptions of democratic rule and individual liberty seem to demand a level of respect for the truth so as to ensure that government decisions are subject to the political mechanisms of change.⁴⁶⁸ These concerns are only magnified when the decisions concern belligerent policies in times of perceived exigency.⁴⁶⁹ The importance of truth in wartime can

⁴⁶⁴ See Margaret Urban Walker, *Post-Conflict Truth Telling: Exploring Extended Territory*, in MORALITY, *JUS POST BELLUM*, AND INTERNATIONAL LAW 11, 12-13 (Larry May & Andrew T. Forcehimes eds., 2012) (“Virtually absent on the *just post bellum* side is a measure so central to transitional justice as to be, for some people, almost synonymous with it: concerted public truth telling about an era of violence and human rights abuses, as seen in the burgeoning institution of the truth commission.”).

⁴⁶⁵ See *supra* note 35 (defining “truth” for present purposes).

⁴⁶⁶ Here, a final caveat is in order: The details provided in this article are authentic, as far as I know, and the arguments are made sincerely — yet, alas, some might view the foregoing as a mere diatribe, since the facts have been marshalled and the propositions arranged as an indictment of the war on drugs. As such, it may not seem that the best case has been made for prohibitionists, whose beliefs are heartfelt and often grounded in non-trivial, facially plausible claims. Although I doubt that even the strongest points in favor of the drug war can withstand scrutiny, they can and must be considered in any fair and meaningful truth-finding endeavor.

⁴⁶⁷ HARRY FRANKFURT, ON TRUTH 16 (2006).

⁴⁶⁸ See, e.g., Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1108, 1130-31 (2000).

⁴⁶⁹ See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (“[T]he only effective restraint on executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry”); *id.* at 717 (Black, J., concurring) (stating that the flow of truthful information to the public was necessary “to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell”).

also be viewed as a matter of moral precept; indeed, it has been argued that there is a right to the truth under international law in the wake of war or internal strife.⁴⁷⁰ Regardless, truth-telling can have a series of salutary effects, such as preventing post-conflict societies from retreating into denial and helping to avoid the occurrence of similar episodes.⁴⁷¹ In the words of one prominent international jurist, “there is no peace without justice [and] there is no justice without truth, meaning the entire truth and nothing but the truth.”⁴⁷²

Perhaps it is time for a type of “truth commission,” charged with investigating and reporting on drugs, their use and abuse, and their criminalization, with the goal of setting the record straight on the drug war. Like other truth commissions, this body should be impartial and independent, composed of a variety of respected stakeholders, and provided wide latitude to review documents and conduct interviews, with the aim of generating a legitimate and meaningful public record.⁴⁷³ Even at their best, however, truth commissions are no panacea.⁴⁷⁴ As Michael Ignatieff has written, these bodies cannot heal a

⁴⁷⁰ See U.N., Econ. & Soc. Council, Comm. on Hum. Rts., *Promotion and Protection of Human Rights: Study on the Right to the Truth*, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006); PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS* 23-24 (2d ed. 2011); see also Naqvi, *supra* note 35, at 254-68. This right has been recognized with regard to gross human rights violations and serious breaches of international humanitarian law, which, for instance, imposes a state duty to provide information to the families of missing persons in armed conflicts and victims of forced disappearances. See U.N., Econ. & Soc. Council, Comm. on Hum. Rts., *supra*; HAYNER, *supra*, at 23-24; see also Naqvi, *supra* note 35, at 254-68.

⁴⁷¹ For Justice Robert Jackson, who served as the chief American prosecutor at Nuremberg, the legacy of the war crimes trials was their documentation of “Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people.” *Prosecution of Major Nazi War Criminals: Final Report to the President from Supreme Court Justice Robert H. Jackson*, 15 DEP’T ST. BULL. 771, 775 (1946). *But cf.* Michael Ignatieff, *Articles of Faith*, 5 INDEX ON CENSORSHIP 110, 117 (1996) (questioning effect of Nuremberg trials). Consider also this purported exchange at the Versailles Peace Conference in 1919: When someone suggested that generations of historians would be arguing over who was responsible for starting the Great War, French Prime Minister Georges Clemenceau responded, “They will not say that Belgium invaded Germany.” FRANKFURT, *supra* note 467, at 27 (quoting Clemenceau).

⁴⁷² *Prosecutor v. Deronjić*, Case No. IT-02-61-S, Sentencing Judgment, Dissenting Opinion of Judge Schomburg, ¶ 6 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 30, 2004).

⁴⁷³ See HAYNER, *supra* note 470, at 23-74 (describing and discussing major truth commissions).

⁴⁷⁴ Truth commissions are subject to substantial criticisms, including concerns that the truth is achieved only by sacrificing justice. Truth commissions are not judicial

society's divisions or even bring arguments to a conclusion. Instead, a truth commission "can only winnow out the solid core of facts upon which society's arguments with itself should be conducted," along the way "reduc[ing] the number of lies that can be circulated unchallenged in public discourse."⁴⁷⁵ This outcome is hardly inconsequential when responding to war crimes, atrocities, and other wide-ranging abuses⁴⁷⁶ — and I have little doubt that it could improve America's discourse about drugs. At least there would be no more "reefer madness."

bodies and thus cannot instigate prosecution of known perpetrators. Worse yet, some commissions may obtain testimony by granting amnesty to individuals who otherwise would be subject to prosecution. Moreover, human rights abusers are typically still in power when a truth commission is in operation, and many are never prosecuted despite the contents of a commission's report.

⁴⁷⁵ Ignatieff, *supra* note 471, at 113.

⁴⁷⁶ *See id.* ("In Argentina, its work has made it impossible to claim, for example, that the military did not throw half-dead victims into the sea from helicopters. In Chile, it is no longer permissible to assert in public that the Pinochet regime did not dispatch thousands of entirely innocent people.").