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978-1-107-01390-2 - The Drug Wars in America, 1940–1973

Kathleen J. Frydl

Excerpt

[More information](#)

## Introduction

In 2010, California voters considered – and rejected – a ballot proposition to legalize the cultivation and consumption of marijuana. Most voters wrestled with this decision while bearing in mind other illicit drugs, wondering whether legalizing marijuana would affect the moral and legal case for outlawing substances considered more potent and destructive. Could a pragmatic concession on one drug set an unwelcome precedent for the entire scheme of prohibition of illicit drugs?

Yet it is illicit drug prohibition itself that is the historical aberration, a labored and in many ways radical construction of some of the most formative decades in modern American history. Most assume that it is the result of President Richard Nixon’s declaration of a “war on drugs”; in fact, his announcement only gave a name to changes that had taken place during the preceding two decades. Between World War II and 1973, the United States transitioned from a regulatory illicit drug regime to a prohibitive and punitive one. This book tells the story of that shift.

It does so differently than has been done before. Where others have focused on patterns of illicit drug consumption and trafficking and characterized the state-sponsored drug war as in some way a reaction to these, this book will treat the government’s approach to handling illicit drugs as a subject worthy of its own story, one that is not adequately explained by dramatic increases in drug use or the sophisticated methods of drug smugglers. Instead I argue that in order to understand the construction of and ongoing commitment to the U.S. government’s militant drug war, especially in light of its abject failure, we must examine the project’s origins in decisions over how to manage state power in the context of global ascendancy abroad, and the difficult challenges to government

Cambridge University Press

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Excerpt

[More information](#)

posed by increasing affluence and accountability at home. It is a neglected but important fact that government officials adopted punishment and rejected illicit drug regulation as part of a calculus of power that initially had little to do with drugs, and that the government remains invested in the drug war despite its daily disappointments because the set of institutions and instruments that comprise it perform other tasks, and are valued for other reasons.

This emphasis on the state alters some well-established notions of how we currently understand the drug war. The first is chronology: in the main, students of the drug war focus their attention on illicit drug enforcement after Nixon's declaration of "war" in 1971, but, as we will see, the tactics deployed in that period have their roots in the postwar era. Even many scholars of the drug war assume that mandatory minimum prison sentences for drug possession and a focus on asset forfeiture (or seizing the money or material of drug smugglers for use by the state) came to the federal government in the 1980s; instead, both were important components of the government's strategy beginning in the 1950s. When we fail to provide an accurate chronology of the drug war, we also fail to appreciate the contemporaneous historical events that influenced its adoption and shaped its form and function. By restoring the drug war to its appropriate context, we add a new dimension to our understanding of it, and we also better understand the formation of and problems inherent in state power during a critical period of American history.

Second, when we concentrate on the state, we see continuities in and dialog between subjects normally presented as separate. For example, accounts of the drug war that do examine the pre-1971 period, what some call the "classical era," usually focus on one drug exclusively; histories of marijuana, for instance, are numerous, and several of them noteworthy.<sup>1</sup> Likewise, histories of licit addictive synthetics, first developed and distributed during the so-called classical era, also select one drug (or class of drug) for review, seldom drawing a connection between synthetics and the evolving priorities and nature of narcotics regulation.<sup>2</sup> Yet this

<sup>1</sup> See Richard J. Bonnie and Charles H. Whitehead, *The Marijuana Conviction: A History of Marijuana Prohibition in the United States* (New York: Lindesmith Center, 1999); for a more popular survey, see Larry "Ratso" Sloman, *Reefer Madness: A History of Marijuana* (New York: St. Martin's Griffin, 1979); on heroin, see Eric C. Schneider, *Smack: Heroin and the American City* (Philadelphia: University of Pennsylvania Press, 2008).

<sup>2</sup> Nicolas Rasmussen, *On Speed: The Many Lives of Amphetamines* (New York: New York University Press, 2008); Andrea Tone, *The Age of Anxiety: A History of America's Turbulent Affair with Tranquilizers* (New York: Basic Books, 2008); for an excellent history of different synthetics considered together, see David Herzberg, *Happy Pills in*

Cambridge University Press

978-1-107-01390-2 - The Drug Wars in America, 1940–1973

Kathleen J. Frydl

Excerpt

[More information](#)*Introduction*

3

separation of older drugs from newer synthetics validates the different approaches constructed to regulate these drugs, and it also cheats history. Heroin and morphine were used for licit medical purposes for decades; moreover, when addictive synthetics like amphetamines and barbiturates were first manufactured in the United States, lawmakers weighed whether to add them to the regulatory machinery already in place for opiates and marijuana.

The reason they chose not to did not rest on any scientific or normative assessment of these different kinds of drugs; instead, the story was one of balancing and building state power, a story that is the focus of the pages that follow. In many ways, absent the specifics on drugs, this book describes how and why the federal government went from regulating citizens' behavior through taxation to doing so using the forces of criminal punishment. This story has historical interest to students of American political history, but it also has policy implications for today's debate. Are illicit drugs better conceptualized as a trade or a crime? If the former, then a regulatory regime makes more sense than criminal enforcement. Common sense dictates that it is easier to repeal drug laws than to overturn the law of supply and demand.

Not only is it impossible to punish a market out of existence, attempting to do so brings unintended consequences and costs. Some of these undesirable effects were in evidence as soon as the federal government began ratcheting up criminal punishment for possession and sale of illicit narcotics. While not unnoticed, the inability of punishment to deter drug traffic or consumption in any meaningful way failed to attract systematic or focused attention. This oversight underscored the power of the moral crusade waged against narcotics, as other scholars have noted, and it also advanced the many ways in which the more militant and resolute "war" against various illicit drugs served other purposes and solved

*America: From Miltown to Prozac* (Baltimore: Johns Hopkins University Press, 2008). One historian of science does relate narcotics to addictive synthetics; for a discussion of the social organization and "laboratory logics" of the scientific community dedicated to studying addiction, see Nancy D. Campbell, *Discovering Addiction: The Science and Politics of Addiction Research* (Ann Arbor: University of Michigan Press, 2007); for a recently issued call for historians to take more heed of addiction science and abandon polemical views of drugs in modern America, see David Courtwright, "Addiction and the Science of History," *Addiction* 107 (3): 486–92. I join Samuel Roberts (and, I presume, others) in noting that historical methodology can be rigorous in its own right, and hence a credible conversant with addiction scientists or any researcher. See Samuel Roberts, "Addiction, History, and Historians," <http://pointsadhsblog.wordpress.com/2012/03/12/addiction-history-and-historians-samuel-roberts-response/> [accessed September 26, 2012].

Cambridge University Press

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Excerpt

[More information](#)

other problems in the exercise of state power. Significantly, this alternative state agenda was more structural than partisan: despite occasional contours of party interest, the absence of durable party dimensions to the “drug war” political consensus is but one suggestive indication that deeper and more fundamental issues of governance were at stake in forging it. What is more, the dilemmas of power at the heart of the drug war have their own particular dynamic and historical trajectory, none of which can be fully accounted for or explained by attention to interests outside of the state.<sup>3</sup> At times, and paradoxically, the validity and importance of narrating the drug war through the lens of state power is best demonstrated by the role of unintended consequences – like those brought about by decisions of government officials made for reasons unrelated to drugs – in the evolution of drug prohibition and punishment. Yet, at the very same time, it is also the case that the government often acted with no uniform purpose, sometimes with no obvious purpose at all, and almost never with a motivation belonging only to itself. So, although the drug war can be considered from the perspective of the state – or more accurately, as a collection of decisions about how to manage state power – it is not a story that can be recited in one voice, let alone a voice that harbors only one motivation or acts with only one purpose in mind.

Nonetheless, a state-centered story of the drug war can be told, and it is one with a decidedly tragic cast to it. Ultimately, the drug war as waged by the U.S. government exposed more vulnerability than it shielded. Throughout the postwar era, more trade and greater ease of travel brought more drugs and, to a great and largely unappreciated extent, the smuggling of illicit drugs was the unwelcome but inevitable result of the country’s expanded trade and global engagement. It was, in particular, the sinews of American economic power – trading channels and the movement of people and goods – upon which drug trafficking relied. In capitalizing on these resources, traffickers benefited from what I have elsewhere referred to as the advantages of the “pest” as opposed to the “predator”: a cunning exploitation of the inevitable gaps in state power available to small-scale operators.<sup>4</sup> Thus, the very success of the American economy exposed new avenues of vulnerability. However small

<sup>3</sup> The state-centered approach here is analogous to Schneider, *Smack*, who recounts the history of heroin markets and the prosecution of them as an urban history, situating his “drug” narrative within the context of other transformations and dynamics of the city.

<sup>4</sup> Kathleen J. Frydl, “Kidnapping and U.S. State Development,” *Studies in American Political Development* 20 (Spring 2006): 18–44.

Cambridge University Press

978-1-107-01390-2 - The Drug Wars in America, 1940–1973

Kathleen J. Frydl

Excerpt

[More information](#)*Introduction*

5

or trivial these weaknesses, their flagrant persistence goaded lawmakers into imposing increasingly severe reprisals.

The United States undertook such measures and moved away from its initial drug regulations – literally a tariff and tax regime – incrementally, first by adding more punishment for violations, then transferring the oversight of the illicit drug portfolio from the Treasury Department to the Department of Justice, and finally by shifting the purposes and justifications for that portfolio from regulatory authority to criminalization. Scholars of the drug war as well as of American criminal punishment more generally have been divided in their assessment of the reasons for this change. Two of the most influential, David Garland and Michael Ignatieff, advance the modern industrial age and its attendant dislocations as the principal reason for the embrace of punishment and prisons more specifically – a tangible effort to restore order to a society unmoored or disconnected from previously binding conventions.<sup>5</sup> Legal scholar Jonathon Simon and sociologist James Whitman tailor this broader observation into distinct arguments: Whitman heralds the American preference for “harsh” punishment as a paradoxical result of the absence of aristocracy and a modern penchant for populist crusades, while Simon sketches the broad “episteme” or body of ideas shaping the modern understanding of punishment, including the critical discursive, political, and disciplinary moments that enabled a punitive paradigm to emerge as a structuring frame of governance.<sup>6</sup>

<sup>5</sup> David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2002); Michael Ignatieff, *Just Measure of Pain: The Penitentiary in the Industrial Revolution* (New York: Columbia University Press, 1978).

<sup>6</sup> James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (New York: Oxford University Press, 2003). Significantly, Whitman acknowledges the role that anti-statist political culture has played in the United States in the drive to rely more heavily on criminal codes, though he seems to take “weak” state claims at face value, agreeing with others that weak institutional capacity in the criminal justice system has made it susceptible to the influence of feverish moral campaigns: see also James A. Morone, *Hellfire Nation: The Politics of Sin in American History* (New Haven: Yale University Press, 2004); Samuel Walker, *Popular Justice: A History of American Criminal Justice* (New York: Oxford University Press, 1998); and William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge: Harvard University Press, 2011). Other scholars have taken issue with the notion of a weak American state: see William Novak, “The Myth of the ‘Weak’ American State,” *American Historical Review* 113 (2008): 752–72; Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (New York: Cambridge University Press, 2009); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (New York: Cambridge University Press, 1982). Those more apt to see an “uneven” state at work include: Gary Gerstle,

Cambridge University Press

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Kathleen J. Frydl

Excerpt

[More information](#)

Where some see the collateral damage of modernity, others see a struggle for power as the central issue of the drug war, criminal punishment, and the impressive expansion of the carceral state, a formal term to describe mass incarceration and the “prison-industrial” complex. Academics who write in this particular vein prioritize categories traditionally subject to social control: class and race – and, far less so, gender.<sup>7</sup> David Courtwright and David Musto see drug war tactics shift according to changes in the class composition of drug users, with criminal sanctions directed toward only those drugs popular among the less powerful.<sup>8</sup> Rufus King, a lawyer active in the mid-century campaign to reform drug punishment who later became a historian of those efforts, takes a more classically materialist approach when he discerns the economic interests of pharmaceutical corporations at the heart of political decision making.<sup>9</sup> More influential, at least in terms of popular acceptance, has been the analysis of Naomi Murakawa and Vesla Weaver (and numerous others) who see the increased criminal punishment of the recent past as designed to check civil rights reform and, more broadly, as indicative of the persistence of institutionalized forms of white racism.<sup>10</sup>

“A State Both Weak and Strong,” *American Historical Review* 115 (June 2010): 779–85; Kathleen J. Frydl, *The GI Bill* (New York: Cambridge University Press, 2009); and Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the U.S.* (Cambridge: Harvard University Press, 1995).

<sup>7</sup> See Nancy Campbell, *Using Women: Gender, Drug Policy, and Social Justice* (New York: Routledge, 2000); Stephen R. Kandall, *Substance and Shadow: Women and Addiction in the United States* (Cambridge: Harvard University Press, 1999); Gail A. Caputo, *Out in the Storm: Drug Addicted Women Living as Shoplifters and Sex Workers* (Boston: Northeastern University Press, 2008); Stephanie R. Bush-Baskette, *Misguided Justice: The War on Drugs and the Incarceration of Black Women* (Bloomington, IN: iUniverse, 2010). A rare first-hand account of opiate addiction written by a woman can be found in Helen MacGill Hughes, *The Fantastic Lodge* (New York: Fawcett, 1971).

<sup>8</sup> David Courtwright, *Forces of Habit: Drugs and the Making of the Modern World* (Cambridge: Harvard University Press, 2002); David F. Musto, *The American Disease: Origins of Narcotic Control* (New York: Oxford University Press, 1973).

<sup>9</sup> Rufus King, *The Drug Hang-Up: America's Fifty Year Folly* (New York: Norton, 1972).

<sup>10</sup> See especially Naomi Murakawa, “The Origins of the Carceral Crisis: Racial Order as ‘Law and Order’ in Postwar American Politics,” in *Race and American Political Development*, Lowndes et al., eds. (New York: Routledge, 2008); Vesla M. Weaver, “Frontlash: Race and the Development of Punitive Crime Policy,” *Studies in American Political Development* 21, no. 2 (Fall 2007): 230–65; Doris Marie Provine, *Unequal Under the Law: Race in the War on Drugs* (Chicago: University of Chicago Press, 2007). Only very recently have some scholars put forward explanations more grounded in political economy or institutional preferences: see Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006); or the legal scholars interested in “overcriminalization” who note the importance of “external”

Cambridge University Press

978-1-107-01390-2 - The Drug Wars in America, 1940–1973

Kathleen J. Frydl

Excerpt

[More information](#)*Introduction*

7

Michelle Alexander takes this analysis one step further, arguing that the racially selective enforcement of criminal punishment for possession of illicit drugs is the crucial difference separating the lives of young blacks from that of young whites in the United States. Despite equal rates of drug use *and* drug dealing between whites and blacks (and other minorities), the nation's prisons are disproportionately filled beyond capacity with African American inmates. As Alexander points out, criminal conviction and prison service in the modern-day United States stymies – if it does not altogether stop – social and economic mobility, and it can also disenfranchise a voter. Considered as a system and judged by its effects, Alexander proclaims a new Jim Crow system of legal discrimination at work in the U.S. criminal justice system, and the drug war, in its modern form, lies at its heart.<sup>11</sup>

Most recently, a conversation growing out of mainly law school circles has devoted attention to the “overcriminalization” of American law.<sup>12</sup> This subject bears an obvious connection to the cultural roots of punishment as well as to the expansion of the carceral state. Indeed, the availability of the criminal justice system to accommodate various political crusades, as well as the use of law enforcement for social control – arguments that play an important role in other literatures – strike legal observers as significant as well. William J. Stuntz, one of the guiding lights in the field, marries both into an insightful history of the evolution of American criminal law.<sup>13</sup> Douglas Husak cites illicit drug possession as the principal example of overcriminalization, a term he uses to refer to both too much criminal law and too much punishment.<sup>14</sup> Hence, more than just incidence of crime or enforcement tactics accounts for imprisonment: it is the law itself, including what it punishes as criminal, how it is written, and how it operates, that leads to such staggering rates of incarceration.<sup>15</sup> Ethan A. Nadelmann elaborates on this basic observation when he notes

factors: Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2009); Daniel Richman, “Overcriminalization for Lack of Better Options,” in *The Political Heart of Criminal Procedure* (New York: Cambridge University Press, 2011).

<sup>11</sup> Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010).

<sup>12</sup> For a theory of criminalization, see Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008).

<sup>13</sup> William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge: Harvard University Press, 2011).

<sup>14</sup> Husak, *Overcriminalization*, *passim*.

<sup>15</sup> Stuntz, “The Pathological Politics of Criminal Law,” *Michigan Law Review* 100 (2001).



Cambridge University Press

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Kathleen J. Frydl

Excerpt

[More information](#)

that, in the recent past, federal statutes criminalized activities that “had not previously been regarded as criminal,” and that these in turn played a crucial role in expanding the international activities and authority of U.S. law enforcement agencies, especially the Drug Enforcement Administration (DEA).<sup>16</sup> Significantly, as Daniel Richman argues – and as this account of the drug war will bear out – incentives outside the legal system can greatly affect the nature of criminal law, encouraging prosecutors to act as catch-all administrators who could “assume any number of new assignments,” though, as Richman also notes, “without necessarily acting on them.”<sup>17</sup> The discretion in the application of criminal law highlighted by Richman is a key factor in maintaining support for and the viability of aggressive criminalization. Without it, most of the country would be in prison: as Stuntz calculates, more than 70 percent of American adults have committed some sort of imprisonable offense in their lifetimes. Thus, support for “law and order” policies depends upon the selective enforcement of them, an observation validated both by logic and by the history recounted in the pages that follow.<sup>18</sup>

Individually and taken together, all of this scholarship sheds light on the shift from a regulatory framework to a punitive one in the handling of illicit drugs. Yet none explicitly makes reference to the history of or reasons for this shift. Unlike previous work on the drug war, this book takes the United States’ first regulatory illicit drug regime – its initial tariff and tax apparatus – as an important expression of state power and, also unlike other work, it investigates the reasons for that regime’s downfall. Scholars and sometimes contemporary observers dismissed the tax and tariff apparatus as a ruse, a fig leaf donned out of concern for the constitutional limits of federal power, the real purpose of which was to

<sup>16</sup> See Nadelmann, *Cops Across Borders: The Internationalization of US Criminal Law Enforcement* (University Park: Pennsylvania State University Press, 1993), quote from p. 1.

<sup>17</sup> Richman, “Overcriminalization for Lack of Better Options.”

<sup>18</sup> For a sympathetic depiction of the rise and popularity of “law and order” rhetoric and its importance to the modern conservative movement, see Michael Flamm, *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s* (New York: Columbia University Press, 2007); and Stuntz, *The Collapse*, who holds low incarceration rates of the 1960s as responsible for the increase in violent crime in the 1970s. For a more critical appraisal of law and order rhetoric and the cultural appeal made “white ethnics” – as well as the contestations over employment that grounded that appeal – see Nancy MacLean, *Freedom Is Not Enough: The Opening of the American Workplace* (Cambridge: Harvard University Press, 2008); see also John Skretny and Thomas Sugrue, “White Ethnic Strategy,” in *Rightward Bound*, Bruce Schulman and Julian Zelizer, eds. (Cambridge: Harvard University Press, 2008), 171–92.



Cambridge University Press

978-1-107-01390-2 - The Drug Wars in America, 1940–1973

Kathleen J. Frydl

Excerpt

[More information](#)*Introduction*

9

disguise an enforcement operation.<sup>19</sup> Yet this depiction does not do justice to the fact that narcotics were relied upon as a medicine for decades; thus, the licit purposes structuring the tax and tariff regime were concrete and operational, not latent and abstract. Moreover, the abandonment of this regulatory approach involved more than just the expansion of federal constitutional powers beyond the power to tax or the advent of newer, synthetic drugs; it bore an immediate connection to broader questions of governance and to other transformations in government power. As the federal lawmakers and officials came to rely on income tax more for revenue, they retreated from the indirect or excise tax portfolio – of which narcotic regulation was a part – by leaps and bounds. In other words, one important reason why the federal government abandoned the tax regime for drugs is that officials of it favored taxes, and reliable tax collection, more for revenue, and correspondingly were less invested in the collection of taxes for the purposes of regulation.

Once severed from the tax structure, illicit drug enforcement was subsequently embraced as an instrument of state power in other venues, offering a versatile set of tools for projects ranging from fashioning the terms of international engagement to policing the inner city. These endeavors did little to affect the drug market, but they remained useful in the eyes of their proponents as a bridge between the task at hand and the political will and institutional capacity available for it. Law enforcement in the United States, for instance, previously had neglected inner city minority neighborhoods; during the postwar era, they provided service in these areas for the first time, but only with the benefit of the discretionary power afforded to them under illicit drug enforcement, a policing agenda that, unlike other discretionary tools, remained impervious to civil rights reform. At the same time, drug treatment clinics, even when sponsored by the state and pursued with real conviction, withered on the vine. Although clinics regularly achieved unprecedented success in managing the problems most associated with illicit drug use, they offered none of the utility to the exercise of state power as did punishment. The drug war performed with similar usefulness in the nation's foreign policy portfolio. During the Cold War, Americans faced the prospect of endorsing tremendous global aid packages; policymakers mollified the country's long-standing reluctance for these by tying them to

<sup>19</sup> Most exemplary of this tendency in the scholarship to present taxing power as a concession to constitutional limits – and to downplay opiate's continuing use as a medicine – is David F. Musto, *The American Disease: Origins of Narcotic Control* (New York: Oxford University Press, 1999 edition).

Cambridge University Press

978-1-107-01390-2 - The Drug Wars in America, 1940–1973

Kathleen J. Frydl

Excerpt

[More information](#)

drug interdiction efforts. Likewise, covert operations or a political interest too bald or embarrassing for open pursuit found cover in operations conducted under the aegis of drug suppression. After the U.S. defeat in South Vietnam, at a time when Cold War ideology suffered serious blows and American enthusiasm for global engagement flagged, the drug war revived and sustained elements of the foreign policy agenda.

At first, during the immediate post–World War II era and throughout the 1950s, government officials confined their interest in illicit drugs to specific agendas and venues. At home, the police investment in illicit drug enforcement was restricted to (overwhelmingly corrupt) urban vice squads and the work of a small band of (equally corrupt) Federal Bureau of Narcotics agents. Abroad, most mentions of illicit drug trafficking were made for the purpose of vilifying a political opponent or international rival of the United States. Alternatively, illicit narcotics trafficking was itself described as the work of an evil cabal, a depiction that spared expanding trade flows of routine inspections, earning the gratitude of business interests, and one that suggested that illicit drugs appeared as the result of a conspiracy of a morally dubious set of people, rather than the cold calculations made by a multitude of enterprises and interests.

Over time, official interest in punitive drug enforcement expanded, though its moralistic and sensationalized cast remained. By the time Nixon declared his “war on heroin” in 1971, most police officers could recognize illicit drugs – something that was not true just twenty years earlier – and they routinely made arrests for drug violations. In a sense, entire police departments had become vice squads with a primary interest in narcotics and, conversely, illicit drug enforcement emerged not just as something to police but as a *way* to police, especially in urban minority neighborhoods. During the same period, the U.S. foreign policy apparatus seized upon the illicit drug portfolio as an instrument to cajole allies, advance other international objectives, and justify certain political relationships. In shouldering so many difficult tasks, the drug war became a valued tool of statecraft, especially in regard to the developing world. Whereas the government’s illicit drug agenda was once a discrete objective, it developed into less of a specific mission and more of a modality, a way to exercise state power. Of course, other complex and costly mobilizations of the state did not lack for applications beyond their original scope – uses of the Cold War, for instance, ranged far beyond military containment of the Soviet Union. Yet the drug war stands alone as a set of policy interventions, the value of which lay principally in their usefulness for other purposes of interest to the state, irrespective of (and