

JUDICIAL ONE-HIT?:  
THE DECRIMINALIZATION OF PERSONAL DRUG  
USE BY COLOMBIA'S CONSTITUTIONAL COURT

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I. INTRODUCTION

When the source of most of the world's cocaine decriminalizes personal drug use, the international legal community should take note. On May 5, 1994, Colombia's Constitutional Court ("the Court"), in a bitterly divided five to four decision,<sup>1</sup> declared provisions of a 1986 statute<sup>2</sup> unconstitutional which provided criminal penalties for the carrying or consuming of personal doses of marijuana, cocaine, heroin, crack, and other drugs. By this decision, the Court created a constitutional right to personal drug use based on the constitutional guarantee of the "free development of the personality."<sup>3</sup> The Court's decision, however, did not overturn any sections of the 1986 statute criminalizing drug trafficking.

As might be expected, reaction to the Court's decision was immediate,<sup>4</sup> wide-spread, and overwhelmingly critical.<sup>5</sup> Government officials led the outcry.

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1. Decision No. C-221 of May 5, 1994, La Corte Constitucional [Supreme Court], *Gaceta Constitucional Edición Extraordinaria* (Colombia) [hereinafter Decision No. C-221].

2. LEY 30 DE 1986 [LEY], art. 2, sec. 5, & art. 51.

3. CONSTITUCIÓN POLÍTICA DE COLOMBIA [CONSTITUTION], art. 16 (Colombia).

4. The judicial sector moved quickly to enact the decision. For example, the day after the opinion was issued the Inspector General of the District Police in Barranquilla opined that as a result of the Court's decision, 30 persons detained under the personal use statute would have to be set free. *Posible excarcelación de contraventores*, EL ESPECTADOR (Bogotá), May 7, 1994, at 10A. On May 18, 1994, in Ibagué 72 prisoners incarcerated for illegal drug use were set free in accordance with the Court's decision. *En libertad, 72 detenidos por consumo de droga en Ibagué*, EL TIEMPO (Bogotá), May 19, 1994, at 11B. One reason public reaction may have been so overwhelmingly negative was that the Court simply announced the result of its decision from the bench, not providing the actual decision until over a week later. As such, numerous political actors, including President Gaviria, were unaware of the scope of the decision, such as whether the Court had overturned sections of the statute pertaining to drug trafficking as well as consumption, and the jurisprudential reasoning of the Court. Understandably, sharp public outcry filled this Court-created information vacuum.

5. The author of the opinion, Judge Carlos Gaviria, strongly disagrees. Although there was a general negative public reaction to the decision, Judge Gaviria contends that this was a result of the way in which former President Gaviria framed the issue in his public comment on the decision before reading the opinion. In addition, the former president's reaction was politically motivated, as he was then a candidate for Secretary General of the Organization of

Former President Gaviria labelled the decision "frankly absurd,"<sup>6</sup> warned his ministers of increasing violence and criminality, and called for a popular movement to reform the 1991 Constitution (Constitution).<sup>7</sup> The Attorney General, echoing President Gaviria's concerns, called for a constitutional referendum and criticized the decision on social, moral, and legal grounds.<sup>8</sup> The Minister of Health lamented the loss of coercive methods at the penal level to fight drugs, warning of the likelihood of increased drug consumption and drug-related violence.<sup>9</sup> Only the nation's chief prosecutor, Gustavo De Greiff, endorsed the Court's decision legalizing personal drug use.<sup>10</sup> Presidential candidates also took advantage of the decision's issuance during the 1994 elections to express their disapproval. Andrés Pastrana, the Conservative Party

American States (OAS), and needed to show that his drug policy was in harmony with that of other OAS states. Further, the Judge is of the opinion that the negative statements of the two leading presidential candidates at that time represented no more than a politically expedient reaction to the trend of current, though uninformed, popular opinion. In Judge Gaviria's view, those who rejected the opinion essentially rushed to judgment. As such, their opinions were essentially misinformed and, thus, irrelevant. Interview with Carlos Gaviria, Magistrate, Constitutional Court of Colombia, in Bogotá, Colombia (Apr. 4, 1995) [hereinafter Gaviria] (on file with the *Indiana International and Comparative Law Review*).

6. *Grave y peligroso fallo: Gaviria*, EL ESPECTADOR, May 7, 1994, at 11A.

7. *Rechazo general a la despenalización*, EL TIEMPO, May 7, 1994, at 1A, 6A. It is instructive to note, as well, that of the 26 amendments to the U.S. Constitution, only four of them represent successful efforts to overturn decisions of the Supreme Court: Amendment XI (limiting the jurisdiction of federal courts to hear suits brought against the states); Amendment XIV (deeming citizens of African descent citizens of the United States); Amendment XVI (expanding the power of Congress to tax); and, Amendment XXVI (setting voting age). This paucity of Supreme Court reversals reflects the distinctly Madisonian view that the stability of the Constitution is one of its greatest virtues, and as a consequence, constitutional amendments should be rarely, and circumspectly, undertaken. This is not to suggest that U.S. constitutional history is bereft of calls for amending the Constitution. The more than 10,000 constitutional amendments proposed in Congress certainly reflects a Jeffersonian bent. However, only 27 of these proposals have been ratified. This demonstrates how daunting the procedural requirements for amending the Constitution are, which in turn reflects how high the stakes must be in order to amend. See generally RICHARD BERNSTEIN & JEROME AGEL, *AMENDING AMERICA*, xii (1993).

8. *Se incrementará la violencia*, EL TIEMPO, May 7, 1994, at 6A.

9. *Despenalizan uso de drogas*, EL TIEMPO, May 6, 1994, at 1A, 10A. Although difficult to estimate, various studies propose that Colombia has approximately 300,000 drug addicts, 586,000 consumers of cocaine, marijuana, heroin, and *basuco* (a native substance chemically related to crack), and approximately two million alcoholics. See *incrementará la violencia*, *supra* note 8, at 6A.

10. James Brooke, *Colombians Press for the Legalization of Cocaine*, N.Y. TIMES, Feb. 20, 1994, at 6. Gustavo De Greiff was later lambasted by the U.S. Department of Justice for endorsing negotiations with cartel leaders that could result in some of the world's most notorious criminals receiving prison sentences of less than five years, and for other activities associated with the U.S.-Colombian fight against drug trafficking. Pierre Thomas, *U.S. Criticizes Top Colombian Prosecutor Over Behavior in War on Drugs*, WASH. POST, Apr. 12, 1994, at A20. For a discussion of Gustavo De Greiff's controversial career, see generally MARIA TERESA HERRAN, *EL FISCAL: LA DUALIDAD DE LA IMAGEN* (1994).

presidential candidate,<sup>11</sup> called for a national referendum on the issue.<sup>12</sup> Ernesto Samper, the Liberal Party candidate, who was elected president in 1994, took to the bully pulpit to decry the decision as akin to "opening the doors to drug addiction."<sup>13</sup>

Non-governmental entities were equally vociferous in their criticism. The Roman Catholic Church called it an absurdity to decriminalize drug use while retaining criminal penalties for the sale and distribution of drugs,<sup>14</sup> adding that decriminalizing drugs would not further a just society because it would merely create dependency.<sup>15</sup> Members of the business community responded in a similar vein with a letter to President Gaviria expressing their astonishment with the decision.<sup>16</sup> Representatives of the tourist industry warned of the danger of undesirable tourists coming to Colombia to use drugs prohibited in their own countries.<sup>17</sup>

The United States government was equally critical. A senior Clinton Administration official called the decision "a very important and even devastating blow to both the Governments of Colombia and the United States," while Lee Brown, President Clinton's senior aid on drug policy, said he was "extremely disappointed."<sup>18</sup> The United States Department of State warned that the decision

11. See Steven Gutkin, *Colombia Inaugurates President Who Raised Drug Worries in U.S.*, WASH. POST, Aug. 8 1994, at A10; see also *Tainted Victory*, WORLD PRESS REVIEW, Aug., 1994, at 29. Mr. Pastrana later caused a national scandal by accusing his Liberal Party opponent, Ernesto Samper, of receiving millions dollars in campaign funds from the Cali cartel.

12. *Rechazo general a la despenalización*, supra note 7, at 6A.

13. *Id.*

14. *Id.*

15. *Es un despropósito jurídico: Iglesia*, EL ESPECTADOR, May 7, 1994, at 10A. Such was the view of the Roman Catholic establishment, represented by the Colombian Episcopal Conference. Colombia's most famous dissident priest, Mayor Bernardo Hoyos of Barranquilla, approved of the Court's decision on the grounds that marijuana is less harmful to society than alcohol and cigarettes. *Frente político contra dosis personal*, EL ESPECTADOR, May 7, 1994, at 10A. Adding an interesting twist to traditional notions of liberation theology, he later called for the legalization of drug trafficking as well, on the grounds that profits from drug trafficking will stay in the country and can be used to fight hunger and for other social programs. According to Hoyos, drug trafficking is not the fault of Colombia but that of North American imperialism. *Hoyos habla de legalizar la droga*, EL TIEMPO, July 25, 1994, at 7A. Fatal flaws in Father Hoyos' proposal to socialize the drug trade include: (1) his assumption that drug traffickers, who most recently have been killing lawyers, judges, police, and anyone else attacking their criminal enterprise, will willingly give up their profits to the state through the tax system; and (2) his assumption that the Colombian government will decide to use these profits to liberate the poor from their poverty and not for other governmental programs, or to beef up its military as part of its decades long counter-insurgency struggle.

16. *Rechazo general a la despenalización*, supra note 7, at 6A.

17. *Anato, contra despenalización del consumo de la droga*, EL COLOMBIANO, May 11, 1994, at 3A.

18. Joseph B. Treaster, *Use of Drugs Is Legalized By Colombia*, N.Y. TIMES, May 7, 1994, at A3.

endangered Colombians, especially young people, and lamented that Colombia had lost one of its most valuable instruments in the fight against drug trafficking.<sup>19</sup> The United States Drug Enforcement Administration (DEA) supported President Gaviria's call for constitutional reform and called the decision a "step backward" and a "formula for disaster."<sup>20</sup>

The global importance of this case cannot be overestimated. From the perspective of comparative criminal law, Colombia has joined a minority of countries which have decriminalized or have experimented with decriminalizing personal drug use. More importantly, this case is undoubtedly the most controversial to appear in Colombia's post-1991 constitutional jurisprudence, if not in the country's history.

How did the Court reach a decision so unexpected and unpopular that most major elements of Colombian civil society initially called for a constitutional referendum to remedy the situation?<sup>21</sup> A primary reason is that the Court, in an act of extreme judicial overreaching, enshrines a right to personal drug use premised on libertarian notions of radical individualism and personal autonomy, concepts foreign to the Colombian Constitution and civil society. The decision is rooted in a radical interpretation of a prominent version of liberal political theory requiring the state to remain neutral on moral matters and allowing individual rights to trump collective interests. This illustrates what many legal scholars see as part of an expanding "rights revolution" in which many current

19. *Rechazo general a la despenalización*, *supra* note 7, at 1A.

20. *Un paso atrás, dice la DEA*, *EL ESPECTADOR*, May 7, 1994, at 10A.

21. Article 373 of the Colombian Constitution establishes that the Constitution can be reformed by Congress, by a constituent assembly, or by the people through referendum. Although President Samper promised on his first day in office to have a constitutional referendum on the issue, his government decided on November 1, 1994, not to seek this remedy. John Gutiérrez, *Gobierno dijo no al referendo*, *EL TIEMPO*, Nov. 1, 1994, at 1A, 14A. Rather, the government announced the next day that, consistent with Constitutional Article 375, it would submit a constitutional reform project (a bill on constitutional reform) in the Congress in order to recriminalize personal drug use. The reasons offered by the government for this tactical change include: (1) a referendum would be too costly and difficult to put into effect (although the government had already collected over half a million signatures); (2) the country was suffering from "electoral fatigue," having gone through four elections in the year, and as such the public was not interested in going to the polls yet another time; and (3) a desire on the part of the executive not to create confrontations with the Constitutional Court. In essence, this bill attempts to reform Constitutional Article 49, protecting the right to health, by expressly permitting the state to restrict, prohibit, and sanction drug consumption — including criminal penalties. *Con ley atajaran la dosis personal*, *EL TIEMPO*, Nov. 2, 1994, at 1A, 3A. On Dec. 8, 1994, a primary commission of the Senate and House of Representatives approved this addition to Article 49. *Aprobada reforma para penalizar la dosis mínima*, *EL TIEMPO*, Dec. 8, 1994, Última A. Others suggest that the proposed referendum was dropped due to the lack of public support. *Mensaje de urgencia para acto que penaliza drogas*, *EL ESPECTADOR*, Nov. 12, 1994, at 6A.

legal and political issues are cast - and ultimately decided - in the non-compromising "exaggerated absoluteness" and "hyperindividualism" of "rights talk."<sup>22</sup>

One renowned scholar, Professor Mary Ann Glendon, has recently examined developments in diverse areas of United States law, concluding that this new way of talking about rights, or "rights talk," has indeed emerged.<sup>23</sup> Professor Glendon notes that "rights talk", which is commonly reflected in American legal culture, has spread to other countries adopting constitutions comparable to that of the United States, *i.e.*, those which contain enumerated rights reinforced with some form of judicial review.<sup>24</sup> As will be shown, Colombia joined this group of nations in 1991 in adopting its 380-article constitution containing a broad array of rights protected by the interpretative powers of the Constitutional Court.

This Article demonstrates how the Court, discovering a right to personal drug use premised on the constitutional guarantee of the "free development of the personality," engages in the precise type of "rights talk" described by Professor Glendon and others. This Article demonstrates how the Court's libertarian decision, placing individual autonomy on the constitutional pedestal and severely restricting the state's use of the criminal law to protect its citizens' health and well-being, reflects the "near aphasia [of "rights talk"] concerning responsibility, its excessive homage to individual independence and self-sufficiency, its habitual concentration on the individual and the state at the expense of the intermediate groups of civil society, and its unapologetic insularity."<sup>25</sup>

Part II of this Article discusses the creation of the 1991 Constitution, placing particular emphasis on the diverse social, political, and cultural values that members of the Constituent Assembly represented. This section also discusses the Constitutional Court, one of the many new judicial institutions created as part of the 1991 Constitutional Reform.

Part III provides a brief history of drug criminalization in Colombia, focusing especially on the 1986 statute which the Court declared unconstitutional. Part IV presents the Plaintiff's arguments. Part V presents the opinion of the Court's majority. It demonstrates how the Court engages in "rights talk" by formulating personal drug use as an absolute right essential to personal autonomy in the libertarian state. This section also illustrates how, as a policy matter, the Court has adopted an extreme position in the drug legalization debate, based on the supposition that each individual is sovereign and autonomous. This severely

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22. MARY ANN GLENDON, *RIGHTS TALK* x (1991).

23. *Id.* Professor Glendon concludes that "rights talk" can be identified by "its starkness and simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity and its silence with respect to personal, civic, and collective responsibilities." *Id.*

24. *Id.* at 7.

25. GLENDON, *supra* note 22, at 14.

restricts the State's ability to impose restrictions on drug consumption.<sup>26</sup> Part VI examines the dissent's opinion. It illustrates an alternative way of talking about rights, responsibilities, and the social role of the individual more reflective of Colombia's culture, civil society, and the 1991 Constitution. As a policy matter, the dissent argues that drug consumption should be criminalized as part of the State's constitutionally protected role in promoting health, and as part of the State's police power. Viewed together, the opinions of the majority and the dissent reflect what Professor Glendon calls the "great dilemma" of contemporary liberalism: "How to hold together the two halves of the divided soul of liberalism — our love of individual liberty and our sense of community for which we accept a common responsibility."<sup>27</sup>

Part VII questions the libertarian jurisprudence adopted by the Court. It shows how judicial authoritarianism is masked in the language of individual rights and personal autonomy. This Article concludes that the Court's decision is an extreme example of anti-democratic judicial overreaching.<sup>28</sup> This is an especially troubling development in a country which sought in its 1991 Constitution to reform and strengthen participatory democracy. Overall, this Article serves as a clarion call that Colombia's Constitutional Court, designed to protect a broad array of constitutional rights, may indeed turn out to be Colombia's most dangerous branch.

26. See FRANCISCO E. THOUMI, *POLITICAL ECONOMY AND ILLEGAL DRUGS IN COLOMBIA* 289 (1994). Professor Thoumi of Colombia's University of the Andes argues that this libertarian position recognizes that individuals are not islands and that their actions may affect others, but governmental intervention is not the solution except in extreme cases. *Id.* at 290, n.13.

27. See Mary Ann Glendon, *Rights in Twentieth Century Constitutions*, 59 U. CHI. L. REV. 519, 536 (1992).

28. The comments of Francisco Santos, an editor of *El Tiempo*, Colombia's major daily, are instructive:

I think we have a very active court, a court that has changed policy radically, because of its activism. I think that it is important if you look into its cases, how they write (their opinions), they are very weak. That's where I would see the danger. The problem is when you go deeper. What moves them - politics, ideology - that's where I don't see things very clearly. That's where I don't see a court that knows where it's going, that's where I see a court in which tactical alliances are more important than ideology and the thorough study of a case, and that's where I see the danger.

Interview with Francisco Santos, Editor, *EL TIEMPO*, in Bogotá, Colombia (Mar. 28, 1995) [hereinafter Santos] (on file with the *Indiana International and Comparative Law Review*). Specifically discussing decriminalization, he had this to say:

What came down? Why? Where does it come from? Out of the blue ... Is that how this Court is going to handle things? It has shown it is like that. Is that how this Court is going to change the law of the land? It looks like it, and it worries me, it worries me.

*Id.*

## II. THE 1991 CONSTITUTION

### A. *Political Crisis and the Culture of Violence*

The story of how the Court decriminalized personal drug use begins with the 1991 Constitution, signed into law on July 4, 1991, and praised by President Gaviria as a "peace treaty and a new instrument for national reconciliation."<sup>29</sup> The 1991 Constitution was a response to the profound political crisis affecting Colombia in the late 1980s, manifested by a lack of faith in the political system and increasing fears of violence attributed to drug traffickers' attacks on the Colombian state in the late 1980s.<sup>30</sup> The causes of the political crisis affecting Colombia were manifold and complex. Many political analysts, however, point to the *Frente Nacional*, or National Front,<sup>31</sup> as a primary cause. The National Front was a bipartisan power-sharing agreement that the two main Colombian political parties, the Liberals and Conservatives, entered into in 1958 to end a civil war known as *La Violencia*.<sup>32</sup> The agreement provided for the compulsory sharing of all elective and appointive positions between the Liberal and Conservative parties and the alternation of the two parties in the presidency every four years.<sup>33</sup>

Many observers agree that the National Front regime, terminating in 1974, achieved its main purpose — ending *La Violencia* and thus providing a respite from the political violence destroying the country.<sup>34</sup> The National Front, however, also effectively excluded third parties and others from political life, and ultimately proved incapable of responding to an increasingly complex and fragmented civil society.<sup>35</sup>

29. Carlos Obregon, *Constitución: El nuevo pacto social*, EL TIEMPO, Dec. 30, 1991, at 1.

30. See John Dugas, *La constitución política de 1991: ¿Un pacto político viable?*, in LA CONSTITUCIÓN POLÍTICA DE 1991: ¿UN PACTO POLÍTICO VIABLE? 15 (John Dugas ed., 1993).

31. *Id.* at 16. For a discussion of the National Front, see DAVID BUSHNELL, *THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF* 223-48 (1993); see also ROBERT E. DIX, *THE POLITICS OF MODERN COLOMBIA* 41-46 (1987).

32. See BUSHNELL, *supra* note 31, at 201-22; see also DIX, *supra* note 31, at 37-41. An estimated 200,000 Colombians were killed during *La Violencia*. Mary Williams Walsh, *In Colombia, Killings Just Go On and On*, WALL ST. J., Nov. 12, 1987, at 10.

33. See BUSHNELL, *supra* note 31, at 224; see also DIX, *supra* note 31, at 41, 42.

34. See BUSHNELL, *supra* note 31, at 226, see also DIX, *supra* note 31, at 42, 43.

35. Dugas, *supra* note 30, at 16. Bushnell notes, however, that the National Front regime was not as exclusive as it might seem. The bipartisan regime approximated the political desire of the electorate; electoral competition still took place; and, lax party rules allowed third-party candidates, even Communists, to run as Liberals or Conservatives. See BUSHNELL, *supra* note 31, at 224. Dix, on the other hand, notes that "the absence of partisan competition diminished political interest among the electorate, and may have helped to produce high rates of voter abstention, [contributing to] the declining legitimacy of the political system." DIX, *supra* note 31,

Along with the National Front regime, the 1886 Constitution was a major factor contributing to the political crisis of the late 1980s. "Colombia's 1886 Constitution was, after that of the United States, the oldest uninterrupted constitution in the Americas."<sup>36</sup> Unsurprisingly, the 1886 Constitution was seen by many as outdated, if not obsolete, and incapable of incorporating new social forces.<sup>37</sup> A primary purpose of the 1991 Constitution, then, was to serve as a new inclusive and pluralistic social compact representing a reconstruction of the diverse interests constituting Colombian civil society.<sup>38</sup>

The political crisis in the late 1980s was reflected in and related to the violence plaguing Colombia, marked by high rates of common crime, as well as by violence from leftist guerrillas, state security forces, private paramilitary groups, and most notoriously, drug traffickers.<sup>39</sup>

Concerning crime, Colombia has suffered for years from one of the world's highest crime and impunity rates.<sup>40</sup> During the past thirty years, for example, it is estimated that only 1.2% to 2.0% of all crimes reported ended in a sentence.<sup>41</sup> The high crime rate and the insecurity produced in daily Colombian life seriously diminished the confidence of Colombians in their political system and served as an important impetus prompting the 1991 Constitutional Reform.<sup>42</sup>

Along with crime, violence committed by numerous Colombian groups - leftist guerrillas, state agents such as the military and police, private paramilitary groups, and drug traffickers - has been pervasive, persistent, and deadly. Beginning with *La Violencia*, recent Colombian history is replete with examples of astonishingly high levels of violence. Certain events in the 1980s, however, brought this violence to a fever pitch. For example, M-19,<sup>43</sup> a leftist group, stormed the Palace of Justice in November of 1985, taking twenty-four Supreme Court justices and 300 judicial personnel hostage. The government refused to

at 42 (quoting JONATHON HARTLYN, PRODUCER ASSOCIATIONS, THE POLITICAL REGIME AND POLITICAL PROCESSES IN CONTEMPORARY COLOMBIA 27-28 (1984)).

36. See generally William C. Banks & Edgar Alvarez, *The New Colombian Constitution: Democratic Victory or Popular Surrender?*, 23 U. MIAMI INTER-AM. L. REV. 39, 40 (1991).

37. See Caroline Hartzell, *Las Reformas Economicas en la Constitución de 1991*, in LA CONSTITUCIÓN POLÍTICA DE 1991: UN PACTO POLÍTICO VIABLE?, *supra* note 30, at 77.

38. *Id.*

39. Dugas, *supra* note 30, at 18.

40. See BUSHNELL, *supra* note 31, at 252-53.

41. See Gabriel Gutierrez Tovar, *Reflexiones sobre la Impunidad*, in JUSTICIA, DERECHOS HUMANOS E IMPUNIDAD 219, 225 (Héctor Peña Días ed., 1991).

42. See Fernando Carillo Flores, *Presentación*, in LA REVOLUCIÓN PACÍFICA DE LA JUSTICIA 10 (Fernando Carrillo Flores ed., 1991).

43. The Movimiento 19 de Abril (M-19), an ideologically eclectic guerrilla group specializing in urban terrorism, originated as a reaction to Rojas Pinilla's defeat in the 1970 presidential elections. The movement eventually spread to the jungle areas of southern and western Colombia. M-19 became a legitimate political force in 1990, and their leader, Antonio Navarro Wolf, played a major role in the 1991 Constituent Assembly. See DIX, *supra* note 31, at 49.



negotiate, choosing a military option instead. In the ensuing raid, involving over twenty-eight hours of intense fighting and the eventual bombing of the Palace of Justice by the government, eleven Supreme Court justices, several dozen hostages, a dozen soldiers, and thirty-five members of M-19 were killed.<sup>44</sup>

The government's war against drug traffickers was another factor which brought violence to the boiling point in the late 1980s. The first major victim was Minister of Justice Rodrigo Lara Bonilla who was killed by drug traffickers in April of 1984 for destroying one of their largest clandestine laboratories.<sup>45</sup> Other threats and assassinations by drug traffickers followed, culminating in the gruesome presidential elections of 1989, when three presidential candidates were killed. Politically, the most important assassination was that of Luis Carlos Galán, considered most likely to be Colombia's next president.<sup>46</sup> Drug traffickers also were believed to have killed Bernardo Jaramillo, the leftist *Union Patriótica* (Patriotic Union) candidate, adding another name to the list of over one thousand Patriotic Union activists assassinated in the late 1980s.<sup>47</sup> Carlos Pizarro, the candidate of M-19, the former urban terrorist group, was assassinated in 1990 as well.<sup>48</sup>

## B. *The National Constituent Assembly*

As a result of this pervasive violence, which by the late 1980s had turned the country into the killing fields of Supreme Court justices, presidential candidates, leftist activists, judges, and others, a student protest movement arose in 1990 at Bogotá's El Rosario University. It promoted the creation of a national constituent assembly to reform the 1886 Constitution.<sup>49</sup> Two comparative legal scholars have summarized the need for constitutional reform as follows:

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44. FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, COLOMBIA: A COUNTRY OF STUDY 298 (Dennis M. Hanratty & Sandra W. Meditz eds., 1990). As Ana Carrigan of the N.Y. Times notes, it is impossible to determine precisely the number of deaths in the Palace of Justice tragedy because the Colombian army destroyed the building - and the evidence - in its attack against M-19. Carrigan portrays the government's bombing of the Palace of Justice, and subsequent cover-up, as part of the "dirty civil war" against the left which previously had been fought in the far reaches of the countryside, now brought home to the nation's capital by this famous attack. See ANA CARRIGAN, *THE PALACE OF JUSTICE: A COLOMBIAN TRAGEDY* (1993).

45. See Rachelle Marie Bin, *Drug Lords and the Colombian Judiciary: A Story of Threats, Bullets, and Bribes*, 5 U.C.L.A. PAC. BASIN L.J. 178, 179 (1986). See also, Jose Antonia Mantilla, *International News*, REUTERS, May 1, 1984, Tues. A.M. cycle, available in LEXIS, News Library, Curnws File.

46. See BUSHNELL, *supra* note 31, at 264.

47. *Id.* at 266.

48. *Id.*

49. Dugas, *supra* note 30, at 23.

Until 1991, Colombian constitutional reform has been as much an effort to avoid societal problems as it has been a means to solve them. The violence and social division which grew out of inattention to basic needs apparently caused Colombian leaders to recognize that a societal collapse would be inevitable without a genuine commitment to a more open, democratic, and responsive government.<sup>50</sup>

Concerning the above scholars' warning of a potential societal collapse, it is important to note that by seeking constitutional reform, these reformers respected the rule of law which proports to seek peace and a more pluralistic political system through constitutional reform. Thus, the reformers shunned violence and other repressive methods of reform which have been commonly utilized in the rest of the Americas.<sup>51</sup> Constitutional reform was first considered in the elections of March of 1990, when more than two million Colombians expressed their support for a constituent assembly.<sup>52</sup> This support became official in the presidential elections of May, 1990, when over eighty-eight percent of the voters approved of the convocation of the Constituent Assembly.<sup>53</sup> On October 9, 1990, the Supreme Court of Justice declared the convocation of the Constituent Assembly to be constitutional, and on December 9, 1990, Colombians went to the polls to elect the seventy-four members of the body.<sup>54</sup> After six months of debate, the Constituent Assembly produced a 380-article constitution (one of the lengthiest existing), signed into law by President Gaviria on July 4, 1991.<sup>55</sup>

The tasks of constitutional interpretation and of ensuring that pre-1991 laws conform to the Constitution were given to the Constitutional Court,<sup>56</sup> one of

50. Banks & Alvarez, *supra* note 36, at 43-44.

51. In contrast, consider the attempted *coup d'etat* against the Perez government in Venezuela in February of 1992, or more notoriously, the suspension of the Peruvian constitution by Alberto Fujimori on April 5, 1992. For a discussion of the failure of constitutionalism in Latin America due in large part to military coups and reliance on authoritarian means, see generally Keith S. Rosenn, *The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1, 6-9 (1991).

52. Dugas, *supra* note 30, at 23; see also Banks & Alvarez, *supra* note 36.

53. Banks & Alvarez, *supra* note 36, at 57.

54. *Id.* at 58.

55. A Look at the New Book of Rules; Congressional Clientelism is Curbed; Judiciary Reformed, LATIN AM. WKLY. REP., July 25, 1991, at 4.

56. See CONSTITUTION, *supra* note 3, arts. 239-245. Essentially, the Constitutional Court has exclusive jurisdiction on all constitutional matters. This role was previously played by the Supreme Court of Justice, now the highest court of ordinary jurisdiction. *Id.*, arts. 234, 235. Professor Glendon notes that most liberal democracies have not embraced the United States system of permitting ordinary courts to rule on constitutional questions. By contrast, most countries have variants of the system developed in Austria in the 1920s, where such matters are referred to a tribunal that deals exclusively or primarily with constitutional issues. See GLENDON,

the many new judicial institutions created as part of the 1991 Reform.<sup>57</sup> Upon creation, the Constitutional Court was granted much broader powers of judicial review than its United States counterpart. For example, the Constitutional Court not only reviews existing statutes, but it also reviews congressional bills and international treaties.<sup>58</sup> Also, citizens may challenge any law in the Constitutional Court, regardless of whether it is being enforced or whether a "case or controversy" exists.<sup>59</sup> Thus pursuant to its constitutional role, the Court reviewed the 1986 statute at issue.

### III. THE MODERN HISTORY OF DRUG PENALIZATION IN COLOMBIA

Colombia's first drug law appeared in 1920, following the 1912 International Convention on Opium at the Hague.<sup>60</sup> The 1920 law concerned the

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*supra* note 22, at 161. The need for a Constitutional Court, and specifically, the power of judicial review, was based on the following: (1) the fact that the general character of the Constitution does not permit frequent reform like other laws; (2) the ambiguity of some constitutional phrases; (3) the necessity to adapt abstract texts and the occasional myopic vision of the Constituent Assembly; and, (4) the need to balance and limit certain "fundamental" or "absolute" rights. One critic has noted that the only article *not* subject to interpretation by the Constitutional Court is the article describing the nation's flags and its colors. *See generally*, Matthias Herdegen, *El Desarrollo Constitucional a la Luz del Derecho Comparado*, 84 UNIVERSITAS 7 (1994).

57. *See generally* Jaime Giraldo Angel, *La Reforma Constitucional de la Justicia*, in LA CONSTITUCIÓN POLÍTICA DE COLOMBIA: UN PACTO POLITICO VIABLE?, *supra* note 30, at 97. For a description of the creation of the central prosecutor's office, or the *Fiscalía*, *see* Michael R. Pahl, *Wanted: Criminal Justice — Colombia's Adoption of a Prosecutorial System of Criminal Procedure*, 16 FORDHAM INT'L L.J. 608 (1993).

58. *See* CONSTITUTION, *supra* note 3, art. 241 (discussing the jurisdiction of the Constitutional Court).

59. *Id.*

60. Observers have noted that Colombian legislation concerning drugs has been primarily based on conventions and international treaties, at the expense of academic debate and public discussion. Others have noted that international pressure to conform to international norms has similarly limited the capacity of Colombia to draft drug legislation to meet its own, specific problems. *See* Ricardo Sánchez, *Droga: Legalidad y Política*, in LA LEGALIZATION DE DROGA 95, 112 (1994); *see also* Rodrigo Uprimny Yepes, *Mas allá del prohibicionismo: Políticas alternativas frente a las drogas*, in LA LEGALIZATION DE DROGA 117, 119 (1994). Professor Thoumi, as well, has observed that the majority of drug policies adopted by Colombia have been in response to immediate political, economic, and social pressures, not a result of a consensus or a social model oriented towards how society should advance in this area. THOUMI, *supra* note 26, at 209.

In comparison, laws in the United States concerning drug consumption first took effect in the late 19th Century. Narcotic addiction was considered an evil, but did not carry a criminal label. The most notorious case from this period, of course, was *Yick Wo v. Hopkins*, where a California statute was declared unconstitutional because it specifically applied against those of Chinese decent. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The movement in the United States to criminalize drug use and eradicate the drug problem first took root in the early part of the 20th

importation and sale of drugs, such as cocaine, opium, codeine, morphine, cannabis, and other substances, which allegedly were "forming pernicious habits."<sup>61</sup> The Second International Convention on Opium, taking place in 1925 in Geneva, Switzerland, served as the impetus for Colombia's second drug statute, Law 118. Enacted in 1928, this statute authorized the government to add to its list of prohibited substances, and criminalized drug trafficking with penalties from one to six months in prison.<sup>62</sup> This statute also served as a precursor for the statute challenged in this case by providing for the treatment of addicts in state facilities.<sup>63</sup>

The Penal Code of 1936 incorporated the above laws by prohibiting drug trafficking, although drug consumption was decriminalized for a brief period ending in 1946 (Law 45).<sup>64</sup> The rationale for drug laws passed during this period included the defense of public health, crime prevention, and what some have considered racism, as arguments against drug use focused on the "defense of the race," punishing those few consumers from poor sectors who were largely *mestizo*.<sup>65</sup>

The movement to include mandatory treatment as part of the criminal law was strengthened with Decree 1669 of 1964. This decree distinguished between those criminals requiring treatment, who were placed in medical establishments, and those not requiring treatment, who were sent to an agricultural colony or jail.<sup>66</sup> Similarly, Decree 1136 of 1970 established mandatory treatment for those disturbing the peace while intoxicated by alcohol or drugs. Critics have lamented,

century, similar to Colombia. *See generally*, LAWRENCE J. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1993).

The constitutionality of international treaties entered into by the United States relating to international drug trafficking was upheld as early as 1944. The United States may "enter into treaty stipulations with foreign powers designed to establish, through appropriate legislation, an internationally effective system of control over the production and distribution of habit-forming drugs[;] . . . and Congress is constitutionally empowered to enact whatever [law] is necessary and proper for carrying into execution the treaty making power . . ." *See Stutz v. Bureau of Narcotics of Dept. of Treasury of United States*, 56 F.Supp. 810, 813 (N.D.Cal. 1944) (citing U.S. Const. art. I, § 8).

61. *See* FERNANDO TOCORA, LA DROGA: ENTER LA NARCOCRACIA Y LA LEGALIZACION 65 (1992); *see also* EDUARDO VASQUEZ CHACON, TRATADO JURIDICO DE LAS DROGAS 11, 12 (1982).

62. TOCORA, *supra* note 61, at 65-66; *see also* VASQUEZ CHACON, *supra* note 61, at 12.

63. TOCORA, *supra* note 61, at 66; *see also* VASQUEZ CHACON, *supra* note 61, at 12.

64. TOCORA, *supra* note 61, at 66; *see also* VASQUEZ CHACON, *supra* note 61, at 13; ROY RIASCOS ELIAS & JAIME VALLEJO ZULETA, ESTUPEFACIENTES Y ALUCINOGENOS ANTE EL DERECHO PENAL DE COLOMBIA 78 (1971).

65. TOCORA, *supra* note 61, at 66; *see also* VASQUEZ CHACON, *supra* note 61, at 13; RIASCOS ELIAS & VALLEJO ZULETA, *supra* note 64, at 78 (1971).

66. VASQUEZ CHACON, *supra* note 61, at 13; *see also* RIASCOS ELIAS & VALLEJO ZULETA, *supra* note 64, at 93-95.

however, that the state was unable to provide sufficient public facilities to meet the good intentions of this law.<sup>67</sup>

The 1970s marked a rise in drug use, especially marijuana, due to various social changes associated with the cultural revolution of the 1960s. Because drug use was originally confined to socially marginalized groups and a few eccentrics, it was not considered a public threat and, accordingly, there was minimal political reaction.<sup>68</sup> In the 1980's, however, Colombia, like the United States, experienced a rise in cocaine-related drug use which posed a direct threat to society. As would be expected, the political response was to strengthen laws concerning personal drug use.<sup>69</sup>

Accordingly, in January of 1986, Congress passed Law 30 of 1986, which increased criminal penalties for personal drug use and drug trafficking.<sup>70</sup> In challenging this law, the Plaintiff in the case at hand limited his challenge to the statutory provisions concerning fines, prison time, and mandatory treatment for personal drug use. The constitutionality of the drug trafficking provisions was not raised.

The first provision defined the quantity of drugs considered as a personal dose.<sup>71</sup> The second provision classified different types of drug users: (1) first and

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67. VASQUEZ CHACON, *supra* note 61, at 14; *see also* RIASCOS ELIAS & VALLEJO ZULETA, *supra* note 64, at 107-8 (noting that personal use was not sanctioned under this decree because the decree only referred to carrying drugs in a public place or openly displaying them in public. The failure to mention carrying in a private place reflected, according to these authors, the legislative intent not to sanction personal use).

68. THOUMI, *supra* note 26, at 281.

69. *Id.* at 281-82.

70. The principle characteristics of Law 30 of 1986 include the prohibition of the production and commercialization of numerous substances; the regulation of chemicals used in making drugs and of plant seeds; the establishment of anti-drug programs in schools; the establishment of free treatment centers for chemical dependency in institutions of higher education; the regulation of the sale of cigarettes and alcohol; and the definition of the crime of selling drugs and the establishment of increased penalties. *Id.* at 280-81. One author has criticized Law 30 of 1986 on the grounds that it was developed under emergency legislation during a state of seige. *See* Sánchez, *supra* note 60 at 113. This argument cuts both ways, however. On one hand the validity of statutes can be questioned because they are enacted under states of seige. On the other hand, because Colombia has been under legal states of seige for most of its recent history, this argument could be used to attack all of Colombia's *corpus juris*. This view, taken to its extreme, would seem to invalidate most of Colombian law.

71. Under this statute, personal use is defined generally as the amount of drug that a person carries or keeps for his personal consumption. Specifically, the statute defined: (1) personal use of marijuana as not exceeding 20 grams; (2) hash as not exceeding five grams; (3) cocaine or other cocaine-derived substance as not exceeding one gram; and, (4) heroin not exceeding two grams. The statute also provided that drugs found on the person with the intention of distribution or sale will not be considered a personal dose, regardless of the quantity. LEY, *supra* note 2, at art. 2, § j.

second-time offenders, subject to fines and imprisonment;<sup>72</sup> and (2) first-time offenders with a demonstrable drug addiction, subject to mandatory treatment—the statute’s “tough love” remedy.<sup>73</sup>

The statute provided that the addicted first-time offender be placed in a psychiatric or similar institution, public or private, for the time necessary for his rehabilitation.<sup>74</sup> At the judge’s discretion, the addict would undergo outpatient treatment or be placed in an institution until the treating physician certified that the addict had recovered.<sup>75</sup>

#### IV. FRAMING THE ISSUE: PLAINTIFF’S CASE

The most surprising aspect of the 1986 Personal Use statute challenged in this case is how unremarkable it seems at first blush. Like similar statutes in the United States and other countries, it appears to be a reasonable, indeed a commendable, statute designed to deter drug use through relatively minor criminal sanctions, and to help some of society’s most vulnerable members through mandatory treatment. Plaintiff,<sup>76</sup> however, construes this seemingly

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72. First-time offenders were subject to up to 30 days in prison and a fine up to one-half a minimum monthly salary. Second-time offenders were subject to up to a year in jail and a fine of one-and-a-half monthly salaries when the second crime occurred within 12 months of the commission of the first. LEY, *supra* note 2, art. 51, §§ a and b.

73. *But c.f., Ecuador prepara despenalización al consumo de drogas*, EL TIEMPO, Nov. 17, 1994, at 15A (illustrating that Ecuador is considering decriminalizing personal drug use because their current drug law fails to provide treatment for drug addicts, as occurs in other Latin American countries).

74. LEY, *supra* note 2, art. 51, § c.

75. *Id.*

76. One of the most important elements of the 1991 Constitution is its celebration of the country’s diversity, well represented by Plaintiff, Alexandre Sochandamandou. Proud of his Hindu ancestry and calling himself a “spiritual shaman of the New Age,” this 1960s National University philosophy graduate has served as sort of a juridical gadfly, bringing constitutional questions to the court over diverse areas such as the declaration of state holidays and the order of citizens’ last names. His suit concerning drug legalization was the first to be accepted by the court. This case reflects the philosophical considerations concerning individual liberties promoted in his book *LA FILOSOFIA DEL MESTIZO: UN MÉTODO PARA DESARROLLAR LOS PODERES DEL ALMA. Del brahmanismo al libre albedrío*, EL ESPECTADOR, May 7, 1994, at 10A.

One of Mr. Sochandamandou’s principal ideas is that drug use enhances the spiritual life. As such, he might have argued, or the Court might have considered, a free exercise-type claim afforded protection under Constitutional Articles 18 and 19. Such claims, however, generally have been rejected in the United States. For example, a number of states, including Arizona, Colorado, and New Mexico, have made an exception to their drug laws for sacramental peyote use. However, the Supreme Court has ruled that states, under the free exercise clause of the First and Fourteenth Amendments, may create exceptions to their drug laws for sacramental use. However, they are not required to create these exceptions. *See Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990) (emphasis added) (holding that the free

laudable statute as unconstitutional for three reasons. First, the statute interferes with a citizen's right to control their personal health. Second, the statute discriminates between and among different classes of drug users. Third, the statute masquerades harsh criminal penalties as benign medical treatment.

#### A. *Formulating New Rights: The "Right" to be Sick*

The Court begins its analysis by delicately noting the difficulty of framing Plaintiff's arguments, for Plaintiff's complaint was "not as clear as would be desirable."<sup>77</sup> Reconstructed by the Court, Plaintiff's first argument concerns the constitutional limits on state intervention in personal health. Plaintiff argues the statute violated Constitutional Article 366, which provides that the social ends of the State are general welfare and the betterment of the quality of life.<sup>78</sup> Plaintiff argues that if the State could not guarantee the addict's recovery through mandatory treatment, then the State could not deprive the addict of the (illegal) drug that would alleviate the addict's misery.<sup>79</sup>

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exercise clause does not relieve the individual of the obligation to comply with valid or neutral laws of general application - such as laws banning personal drug use - so long as the law does not violate other constitutional protections).

77. Decision No. C-221 at 7. This imprecision is understandable, given that Colombian law does not have a "case or controversy" requirement and, as a result, constitutional issues may be brought directly to the Court's attention. Consequently, constitutional questions are not filtered through the issue-narrowing appellate process as occurs in the United States. In 1910, Colombia first instituted this process, known as "popular action," which permits any person, regardless of any direct interest in the outcome, to bring an action directly to the Supreme Court challenging a statute. See generally JOHN HENRY MERRYMAN & DAVID S. CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* 775 (1978). For this reason, the Court was forced to piece together Plaintiff's "layman" arguments into a justiciable whole.

78. Decision No. C-221 at 7. Note here that such a general right was not designed by the Constituent Assembly for immediate application. Article 85 of the Constitution provides that certain fundamental rights and traditional liberties are of immediate application. All other rights, in particular social, economic and cultural guarantees, must await legislative action. See Mathias Herdegen, *Hacia Un Realismo Constitucional*, 83 *UNIVERSITAS* 11, 13 (1992). In this sense, the Colombian Constitution is similar to European constitutions containing commitments to welfare rights which do *not* give rise to enforceable individual rights. Rather, these "programmatic rights" are more statements of social goals and aspirations whose implementation must await legislative or executive action and budgetary appropriations. See GLENDON, *supra* note 22, at 99.

79. Decision No. C-221 at 7, 8. Note that in the United States, state courts have upheld criminalizing drug use with arguable medicinal value, such as marijuana, as constitutional statutes. See, e.g., *State v. Hanson*, 364 N.W.2d 786 (Minn. 1985) (holding that legislative classification of marijuana as a Schedule I controlled substance was constitutional, despite contention that marijuana had medicinal value). In *Hanson*, the court held that the defense of medical necessity was not available to a person charged with marijuana use or possession absent a showing that the proposed medical use was so unique or effective that it would have been inappropriate for legislative action. *Id.*

Plaintiff then turns to a panoply of constitutional provisions<sup>80</sup> to frame the issue of the statute's constitutionality in terms of inalienable rights. Because drug addicts are "psychophysically sick," Plaintiff argues that "the State cannot sanction with penalties or security measures the inalienable right of persons to be psychophysically ill whatever the cause, including drug addiction or toxicomania."<sup>81</sup> He also argues that the statute violated Constitutional Articles 28 and 95, using the libertarian argument that the State "cannot penalize those who simply use intoxicants, because their conduct does not hurt anyone other than themselves."<sup>82</sup>

#### B. *Discriminatory Aspects of the Personal Use Statute*

Plaintiff then provides three examples of how the statute violated the constitutional guarantee of equality.<sup>83</sup> First, the statute allegedly discriminated between sick persons and drug addicts because it permitted the use of addictive drugs to alleviate the suffering of sick persons, but prohibited the use of addictive

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80. See CONSTITUTION, *supra* note 3, arts. 5, 28, 29, 34, and 49.

81. Decision No. C-221 at 8.

82. *Id.*

83. *Id.* In the United States, defendants have challenged sentencing for cocaine base (crack) and cocaine powder offenses on equal protection grounds, due to the alleged discriminatory impact on African-Americans. A large percentage of African-Americans are sentenced for possession of cocaine base (carrying stiffer sentences), as opposed to the small percentage sentenced for possession of cocaine powder. Federal circuit courts, however, have overwhelmingly rejected this argument. See, e.g., *United States v. House*, 939 F.2d 659 (8th Cir. 1991). In *House*, the court held that the term "cocaine base" was not so vague as to not provide sufficient notice that the conduct was criminal. *Id.* at 664. Moreover, the court held that the statute did not discriminate on the basis of race, nor did it affect a fundamental right. *Id.* As such, the difference in penalties need only be rationally related to a legitimate governmental objective. *Id.* Here, the court found the distinction in sentencing to be "rationally related to Congress's objective of protecting the public welfare." *Id.* The court also upheld the propriety of the sentence here on the grounds that the Supreme Court has indicated in non-capital cases that "successful challenges to the proportionality of particular sentences [will be] exceedingly rare." *Id.* (citing *Solem v. Helm*, 463 U.S. 277 (1983)). See also *United States v. Willis*, 967 F.2d 1220 (8th Cir. 1992). One state supreme court, however, has bucked the federal trend, holding that the statutory distinction between crack cocaine and cocaine powder violates the equal protection clause of the state constitution. *State v. Russell*, 477 N.W.2d 886 (Minn. 1991). In this case, the court held that the distinction in sentencing failed under the tougher *state* rational basis test, because the state needed more than mere anecdotal support for the difference in sentencing. *Id.* at 889. Rather, the state, under the more stringent rational basis test, would have to show a reasonable connection between the actual, and not just theoretical, effect of the challenged classification and the statutory goal. *Id.*

The United States Sentencing Commission recently voted to make crack cocaine sentences equal to those for powder cocaine. The prosecutors and attorneys representing the United States voted to reject the proposal. *Reno Backs Strict Sentences for Sellers of Crack Cocaine*, N.Y. TIMES, April 16, 1995, at 18.



drugs to reduce the suffering of addicts.<sup>84</sup> Second, the statute allegedly used a double standard to discriminate between types of drug users, because those addicted to socially unacceptable drugs, such as cocaine or marijuana, were subject to criminal sanctions, while those addicted to socially approved drugs, such as nicotine or alcohol, were not.<sup>85</sup> Third, the statute allegedly discriminated based on the level of drug addiction, because establishing a criminal penalty based on a fixed personal dose fails to take into account the difference among persons as to their degree of addiction.<sup>86</sup>

### C. "Benign" Medical Care as Criminal Sanction

Plaintiff also takes issue with the medical treatment called for by the statute, construing it as a maleficent instrument of the State's penal power. Plaintiff argues that because the statute provided for medical treatment until the addict was "cured," it potentially placed the addict under State control in perpetuity if the addict proved to be incurable.<sup>87</sup> Plaintiff also argues that because the treatment often took place in jails, it was punitive in nature. If the addict was treated behind bars with common criminals, the distinction between benign medical care and punitive sanction might be lost.<sup>88</sup> Finally, Plaintiff objects to the statute because it placed the addict's life and liberty in the hands of the attending physician, not a judge.<sup>89</sup>

The Court also considers the arguments of the Ministry of Justice and the Attorney General, two governmental entities who argued for the constitutionality of the statute. The Ministry of Justice defended the statute on the scientific ground that Constitutional Article 366 was not violated because the health needs of drug users are neither served by administering the toxicant that is harming them, nor by the free use of the substance. Rather, the proper role of the State includes education, prevention, treatment and rehabilitation, all of which suppress drug use.<sup>90</sup>

The Attorney General, interestingly, agreed with the Plaintiff regarding the potential for perpetual treatment, and in fact had previously challenged, without success, the statute before the Constitutional Court to prevent the use of the statute to incarcerate addicts indefinitely. Unlike Plaintiff, however, the Attorney General emphasized the benign and progressive nature of the statute, under which drug addicts are viewed more as victims to be treated than criminals to be

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84. Decision No. C-221 at 8.

85. *Id.*

86. *Id.* at 9.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 10.

punished.<sup>91</sup> Generally, the Attorney General defended the statute as part of the State's police power, including the power to criminalize drug use, develop treatment programs, and set personal dosage limits.<sup>92</sup>

#### V. THE MAJORITY SPEAKS: CREATING A RIGHT TO USE DRUGS BASED ON THE FREE DEVELOPMENT OF THE PERSONALITY

After presenting the Plaintiff's and governmental intervenors' arguments, the majority begins its opinion by defining the general philosophical principles that should govern Colombian society. This penchant for philosophical argument at the expense of, or as a gloss on, constitutional text recurs throughout the Court's opinion. As a result, the majority's opinion often reads more like a philosophical treatise on the merits of drug decriminalization than reasoned jurisprudence grounded in the Colombian Constitution. It is of little wonder, then, that this attempt by the Court to find and then "enforce norms that cannot be discovered within the four corners of the document,"<sup>93</sup> supports the accusation by many that the Court is engaging in judicial activism.

The majority begins this search for governing principles with a philosophical consideration of Plaintiff's libertarian argument that the State should not penalize personal activities, such as drug use that does not affect others. According to the majority, the resolution of this question depends on two mutually exclusive philosophical notions of the citizen and the State.

The first is a theological notion, rooted in natural law, in which humans are the property of God and, therefore, can be regulated by the State in conformance

91. *Id.* at 11.

92. *Id.* As Professor Glendon emphasizes in *RIGHTS TALK*, the language used in legal cases to explain rights and responsibilities is of the essence. See GLENDON, *supra* note 22, at 7. Plaintiff used arguments steeped in the language of personal autonomy, individual rights and suspicion of the state, especially its power to discipline and punish. As such, in the Plaintiff's view the Constitution should be seen as a framework for the protection of individual rights within a *laissez-faire*, libertarian state, in which individual rights trump collective interests.

The governmental intervenors focused on the State's duty to care for the health of its citizens through treatment programs and to promote the general welfare through the exercise of its police power. Adhering to common strains of the civic republican tradition, they argued that the State, rather than being neutral on the question of personal drug use, may prohibit such use on moral grounds and should use various means - including education, treatment, and prevention programs, as well as the criminal law - to achieve this end. Most importantly, these distinctive ways of talking about rights and responsibilities, and the proper spheres of the State and the individual, serve here to define and refine the issues for eventual resolution by the Court, as parties and intervenors do in the United States appellate process.

93. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST 1* (1980). In this case, the norms at issue are of a libertarian nature.

with God's will.<sup>94</sup> Without much discussion, the majority rejects this theological, natural law based notion of the citizen and state and instead chooses secular liberalism, defining it as follows: "[t]he legislator can prescribe the form in which I must behave with others, but not the form in which I must behave with myself, to the extent that my conduct does not interfere with anyone else's world of action."<sup>95</sup>

In a certain sense, the reader can stop here since the eventual outcome of the case, as well as the Court's thinly veiled anti-religious bias, is obvious. By creating a theological strawman, the Court foreshadowed the eventual outcome of the case, namely, that the proper role of the Colombian state is to be neutral among ends, leaving moral issues, such as whether to use drugs, to be decided by individuals rather than by the State.

The Court's reductionistic philosophical "clash of absolutes," in which drug laws either take their cue from authoritarian theology or contemporary notions of liberalism, is hard to defend both in theory and in practice. Although never explicitly stated, the Court frames the issue with such bipolar philosophical opposites as if to suggest that those who support laws penalizing personal drug use are little more than God-fearing meddlers who seek to impose God's will and to reinstate a chemically-based Inquisition. At the same time, the Court apparently characterizes those who support legalization as the noble modern descendants of John Stuart Mill and defenders of freedom. Not at any time does the Court suggest, however, that there may be strains of gray between these two positions, or that portraying a Colombian drug law passed in 1986 as theologically based is anachronistic, at best. The Court also fails to consider that drug laws have long existed in countries such as the United States, with neither a natural law based jurisprudence nor an established church. Moreover, the logical extension of the Court's philosophical dichotomy suggests that atheists who support drug laws, or theists who support legalization, are in a state of some odd theological cognitive dissonance.

Beyond these theoretical considerations, however, the crucial point is that the Court never considers the validity of this jurisprudential cleavage in the most relevant context: Colombia.<sup>96</sup> The Court does not explain, for example, how

94. Decision No. C-221 at 14. Mark A.R. Kleiman, among others, has criticized the argument that drug use should be banned because it is an offense against God, noting that "(t)o employ the force of the state to ban voluntary behavior that is not demonstrably harmful is to legitimate the use of democratic politics to wage cultural holy wars." MARK A.R. KLEIMAN, *AGAINST EXCESS: DRUG POLICY FOR RESULTS* 59 (1992). The majority seems to focus on the mere possibility that the 1986 statute is rooted in natural law. Even if it is, which is never demonstrated, the pertinent question is what harm it produces.

95. Decision No. C-221 at 14.

96. Others have noted this scotoma in the Court's vision:

(There is) no reference to what Colombians are thinking. None whatsoever. It's an opinion that comes out of the blue, with no political context, with no social context, no philosophical context, no health context, no legal context, no violence

these two governing principles - natural law based jurisprudence or libertarian jurisprudence - can be gleaned from constitutional text. The Court also does not demonstrate, for example, that the legislative intent of the 1986 statute, or of any other Colombian statute relating to drugs, was premised on theological notions of the State's duty to impose God's will through penal law. More broadly, the Court fails to consider the historical context of the 1986 statute. After all, Colombia has never gone through the sort of moral crusade against alcohol as in the United States during Prohibition or, some might argue, in our current "war on drugs." For this reason, it is hard to conclude that the 1986 statute should be overturned because of some apparent improper theological taint. Even if it could be proven that the statute addressed here arose from natural law considerations, the Court is on exceedingly shaky ground if it is suggesting that any law based, in part or in whole, on theological considerations is *ipso facto* unconstitutional. Were that to be true, the Court would be effectively excluding religious citizens from the public square.<sup>97</sup>

The Court supports its view that those favoring drug criminalization are philosophically engaged in a sort of chemical holy war only by references throughout the case to the writings of Thomas Szasz, a psychiatrist who has described drug laws as akin to heresy laws.<sup>98</sup> Why the views of a U.S. psychiatrist carry more weight than the views of the Colombians who passed the 1986 statute, reformed the Constitution in 1991, and to whom the Court's

context, and I think that's a big threat. It's a threat to stability, not because of the sentence, but *how* it was done and *why* it was done, and the shallowness of the opinion. It's a threat to what many people might believe is a certain type of moral and legal type of conduct. What about if (the judges) say . . . extradition must be allowed again? They could do it, they can do exactly what they want.

Santos, *supra* note 28.

97. The view that constitutional issues can become impermissibly entangled with religious views has arisen in the United States in many contexts, especially abortion. The idea that religious views impermissibly taint governmental action in the abortion arena has been taken by such eminent scholars as Laurence H. Tribe. However, he has recently rejected this view. LAURENCE H. TRIBE, ABORTION, THE CLASH OF THE ABSOLUTES 116 (1990).

Professor Tribe's current view of the relation between religious views and constitutional issues concerning the abortion debate has been expressed as follows:

(A)s a matter of constitutional law, a question such as (abortion), having an irreducibly moral dimension, cannot properly be kept out of the political realm merely because many religions and organized religious groups inevitably take strong positions on it . . . . Thus, the theological source of beliefs about the point at which human life begins should not cast a constitutional shadow across whatever laws a state might adopt to restrict abortions that occur beyond that point.

*Id.* If this is true for the question of abortion, on which religions have long taken a public position, it should be true concerning drug decriminalization, an issue about which organized religions have been especially prominent in the public sphere.

98. THOMAS SZASZ, CEREMONIAL CHEMISTRY: THE RITUAL PERSECUTION OF DRUGS, ADDICTS, AND PUSHERS 179 (1974).

decision will apply, is never explained.<sup>99</sup> This is not the only time the Court dives into the murky waters of philosophical speculation and bases their opinions, as here, on exclusively foreign sources. Regrettably, this look abroad for philosophical ideas occurs at the expense of the Colombian people who express their opinions through their elected representatives in both the Congress and the Constituent Assembly. The Court is acting as a sort of “constitutional *cognoscenti*,” and is remaking the historic constitution from materials, such as natural law or its own prophetic vision, to promote a more socially permissive society than called for by either the actual Constitution or the legislative opinion of the Colombian people.<sup>100</sup>

After expressing the need to weed out any theological taint in the law, the Court begins to blend its extra-textual libertarian notion of the person with Colombian law and constitutional text. Accordingly, once establishing the libertarian rubric, the Court narrows the constitutional issue to the proper interpretation of Constitutional Article 49, which concerns the duty of citizens to obtain the integral care of their health and of their community.<sup>101</sup> In its opinion, the Court does not state why the case turns on the interpretation of this article alone, especially when Plaintiff, governmental intervenors, and the dissent discuss other constitutional provisions.<sup>102</sup> However, this narrow constitutional support is not surprising given the Court’s predilection for philosophical speculation at the expense of constitutional text. The Court then formulates several “hermeneutic possibilities,” or interpretations, upon which to decide the constitutionality of the statute.

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99. Judge Gaviria defends his broad use of foreign thinkers. In his view, the problem of drug legalization is not a parochial one. As such, it is not the type of problem for which one should listen to Colombians simply because they are Colombians. According to Judge Gaviria, there is no reason that the thoughts of Colombians should prevail over that of “universally recognized thinkers,” such as the authors mentioned throughout his opinion. In his view, it would be unremarkable that in Colombia, people have not thought about this issue as profoundly as, say, Erich Fromm or John Rawls have thought about personal liberty. These thinkers should not be rejected simply because they are not Colombians. As to why Colombian jurists are not cited, Judge Gaviria opined that the function of a judge is not to reproduce particular opinions of jurists or magistrates. Rather, the proper role of a judge is to support his own opinion with a solid philosophical base, elaborating the ideological fundamentals which form part of the Constitution. In determining what constitutes the “free development of the personality,” the opinions of John Rawls, Erich Fromm and Thomas Szasz are more relevant than those of “local thinkers.” See Gaviria, *supra* note 5.

100. For a similar criticism in United States constitutional law, see ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 6 (1990).

101. Decision No. C-221 at 14.

102. Of course, the U.S. Supreme Court, for example, frequently decides constitutional issues as narrowly as possible. Here, however, the supposed restrictive reliance on Article 49 alone as constitutional support serves more as a fig leaf to cover the broad, noninterpretivist extra-textual approach taken by the Constitutional Court.

### A. *The First Hermeneutic*

The Court's first possible interpretation of Constitutional Article 49 is that the article reflects a general hortatory desire of the Constituent Assembly regarding health. According to this interpretation, the policy goal of protecting the citizen's health, construed broadly, could be used as the basis of a criminal sanction, such as the statute criminalizing personal drug use.<sup>103</sup>

#### 1. *Effects on the Family or the Argument from Propinquity*

Implicit in the Court's treatment of Article 49 is its exclusive use in support of the 1986 statute if the State can prove that drug use affects the health and well-being of others. In other words, once the Court determines that the general governing principle of the Constitution is libertarianism, the burden shifts to the State to prove that drug use affects the health and well-being of others, and not just the individual.

The Court next considers several arguments in support of the 1986 statute that addressed the harmful effects of drugs. The Court never states its standard of review. While it is clear the Court found fault with many of the policy arguments supporting the statute, the difficulty lies in determining whether the Court finds the statute unconstitutional because it simply disagrees with these policy arguments offered in support of the statute or because these policy arguments affect constitutionally protected rights. The Court does not seem to consider the fact that disagreement with the policy arguments in support of drug criminalization may not be tantamount to finding these arguments unconstitutional.

In the United States, for example, many of the arguments below would clearly pass constitutional muster under the rational basis test. In Colombia, however, the lack of an expressed standard of review is troubling for two basic reasons. The first is predictability. Establishing a standard of review is extremely important in a burgeoning constitutional system. Otherwise, those who wish to comply with the constitution are left in the dark as to what, in fact, is unconstitutional. The second reason is the international repercussions of the case. Due to Colombia's notoriety as the world's largest supplier of illegal drugs, it is all the more important that special attention be given to clarifying the standard of review and the rules of interpretation.<sup>104</sup>

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103. Decision No. C-221 at 14.

104. According to Judge Gaviria, an opinion does not have to mention the rules of interpretation used. He argues that constitutional protections of the free development of the personality, human dignity, and the construction of the ethical person gleaned from constitutional text, are sufficiently clear to establish that laws criminalizing drug use contradict these principles. As such, no specific standard of review was necessary. Gaviria, *supra* note 5.

The Court first discusses the argument that drug laws are constitutional because drug use affects not only the individual, but harms others as well.<sup>105</sup> However, the Court gives little value to the notion that penalizing drug use could be based on the consideration of harm done to others, such as those close to the user. If the purpose of the law is to protect the community who is "hurt" by being deprived of the presence, comfort or economic support of the drug user, then the statute could not punish the drug user who does not have these close relationships.<sup>106</sup> The Court assumes here, in apparent refutation of John Donne, that every man is indeed an island, at least regarding personal drug use, unless the State can prove otherwise. In any event, if the Court is saying that the statute is over-inclusive because some addicts lack these personal relationships, they imply that the statute is valid for those possessing such relationships. Unfortunately, most criminal laws are blunt instruments, and it is questionable whether any country could design a drug law that required proof of direct harm to those propinquitous to the users.

Moreover, the Court frames the issue in terms of the social good caused by the "lack" of drug addicts, rather than more plausibly, social bad caused by their existence. That is to say, the Court does not consider the millions of Colombians who might not want their families submitted to the "extravagances . . . and frequently the atrocities" of those addicted to or using drugs.<sup>107</sup> In addition, the Court argues that penalizing drug use has the perverse effect of causing greater harm to the community than if there were no drug laws at all. If the law is

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105. Concerning certain libertarian aspects of U.S. law, Professor Glendon has noted that "[t]o a greater degree than any other, the American legal system has accepted Mill's version of individual liberty, including its relative inattention to the problem of what may constitute 'harm to others' and unconcern with types of harm that may not be direct and immediate." GLENDON, *supra* note 22, at 72. Professor Glendon also notes that Mill's views underwent a sea-change in the United States, where his "stern sense of responsibility to family and country, and his decided rejection of any notion that all life-styles were equally worthy of respect, largely dropped out of sight." *Id.* Note that criminal statutes in the United States have repeatedly been upheld on the theory that drug use harms society generally. *See, e.g., Clark v. Craven*, 437 F.2d 1202, 1202 (9th Cir. 1971) (holding that California statutes proscribing the possession of marijuana do not violate due process on the theory that there is no basis for finding harm to society).

106. Decision No. C-221 at 15. Note the similarity between the Court's notion of the solitary, disconnected Colombian addict lacking familial and societal bonds, and Professor Glendon's "lone rights bearer." She contrasts the U.S. image of the lone-rights bearer with that of other countries where "the rights-bearer is imagined as a person situated within, and partially constituted by, her relationship with others." GLENDON, *supra* note 22, at 61.

107. Letter from Fernando Londoño Hoyos, Professor of Constitutional Law, Pontificia Universidad Javeriana, to Michael R. Pahl, Visiting Professor of Comparative Constitutional Law, Pontificia Universidad Javeriana 4 (March 27, 1995) (on file with the *Indiana International and Comparative Law Review*).

incapable of stopping drug use, even more deleterious is the amount of suffering the criminal sanction causes the family and others.<sup>108</sup>

## 2. *Effects on the Community or the Argument from Utility*

The Court then attacks what might be called the argument from utility, based on the civic republican notion that the State has an obligation to mold the moral character of citizens for their own good and the good of society through laws such as those penalizing drugs. The Court notes that to sustain the argument that drugs must be banned because they diminish the utility of certain individuals to society, those already marginalized by other types of anti-social behavior, egotists, misanthropes, etc., should be allowed to use drugs so that society could rid itself of these undesirables.<sup>109</sup> Arguing the slippery slope, the Court then questions why other substances proven pernicious to social welfare, for example tobacco, alcohol, or even fatty foods, should not be banned under this utilitarian logic as well.<sup>110</sup> However, the Court does not consider a possible reason for the legislature's refusal to ban these substances: because the use of tobacco, alcohol or fatty foods, unlike heroine and cocaine, for example, almost exclusively affects the individual user and not society at large.<sup>111</sup>

## 3. *Effects on Social Well-Being or Nipping Crime in the Bud*

The Court then considers another common utilitarian argument emphasizing the link between drug use and crime.<sup>112</sup> The Court first notes that the statute is under-inclusive because it does not penalize a toxic substance

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108. Decision No. C-221 at 15. Others in the United States have noted the harm caused to the community by criminalizing drugs because those with criminal records, especially minorities, are hindered from becoming productive members of society. See Raul Tovares, *How Best to Solve the Drug Problem: Legalize*, NAT'L CATHOLIC REPORTER, Dec. 22, 1989, at 20.

Judge Gaviria uses the idea of harm to the family to criticize the framing of the issue regarding constitutional referendum. According to Gaviria, the question posed to the public through the referendum should not be framed as, "Should consumption be legal?", but, "If your son has consumed a marijuana cigarette, should he go to jail?" See Gaviria, *supra* note 5.

109. Decision No. C-221 at 16.

110. *Id.*

111. Professor Kleiman argues, for example, that the health of users cannot serve as the fundamental basis for drug laws. After all, being overweight, eating too much meat, failing to exercise, and failing to wear a seat belt cause more preventable deaths than drugs do. KLEIMAN, *supra* note 94, at 291.

112. For example, 32% of men in prison for rape admit they were using illegal drugs at the time of the crime. Jeffrey A. Eisenbach, *Drug Legalization: Myths vs. Reality*, HERITAGE FOUNDATION REPORTS, Jan. 25, 1990.



commonly linked to violence and crime: alcohol.<sup>113</sup> Even if this is true, the Court glosses over the fact that the legislature may have had good reason to exclude alcohol from the list of banned substances. Alcohol is the quintessential "democratic" drug. The enforcement problem would be overwhelming. Indeed, rather than using the statute's apparent under-inclusiveness to overturn the 1986 statute, the Court might have made other suggestions due to the elevated social harms caused by drinking - traffic accidents, spousal abuse, family breakups, etc. - which suggest that the legislature might be wise to impose stiffer penalties for public drunkenness and drunken driving, or to raise alcohol taxes, in order to decrease consumption.<sup>114</sup> In any event, the argument that legal use and free availability of alcohol have been linked to increased violence and crime hardly serves as a good argument for legalizing other dangerous drugs like cocaine and heroin that are even more likely to produce these effects.<sup>115</sup>

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113. Decision No. C-221 at 16. At the time the decision was announced, health functionaries had been pressuring the government to adopt some restrictions on advertising and labelling of alcohol and tobacco, as occurs in the United States, due to the major health problems these substances cause to Colombian society. See THOUMI, *supra* note 26, at 270. Other critics, mainly from the left, have noted the paradox of the Colombian state being responsible for paying for health services and in charge of the citizen's quality of life, while simultaneously acting as a seller and promoter of alcohol. See, e.g., Hernando León Londoño Berrio, *La Problemática de la Droga en Colombia*, 47 NUEVO FORO PENAL 20 (March 1970).

Note that in the United States, state courts have repeatedly determined that under-inclusiveness is not a constitutional bar to narcotics laws. In *State v. Vail*, for example, the Minnesota Supreme Court concluded that "[t]he Legislature is not compelled to attempt to regulate all harmful substances merely because it attempts to regulate some." Thus, the fact that Schedule I, which includes marijuana, does not include all substances that meet the statutory criteria is not constitutionally fatal. *State v. Vail*, 274 N.W.2d 127, 136 (Minn. 1979); see also National Organization for Reform of Marijuana Laws (NORML) v. Gain, 100 Cal App.3d 586, 161 Cal.Rptr. 181 (Cal.Ct.App. 1979) (holding that marijuana laws do not violate potential user's right to equal protection merely because other substances, such as alcohol and tobacco, are not illegal); see also *In re Orosco*, 82 Cal. App.3d 924, 147 Cal.Rptr. 463 (Cal.Ct.App. 1978).

114. A central criticism of Judge Gaviria is that the government does not have any policy against alcohol consumption. In fact, at the time the opinion was issued, the government was attempting to decrease taxes on both alcohol and tobacco, tending to increase consumption. See Gaviria, *supra* note 5.

115. Supporters of drug decriminalization almost always point to the example of marijuana, not hard drugs, as substances closely analogous to legally available nicotine and alcohol. Indeed, the analogies between marijuana and alcohol use are compelling — wide social use, small harm in the short term, and, as the Court notes here, marijuana may be less criminal than alcohol. However, whatever the merits of drug decriminalization regarding marijuana, those supporting decriminalization often back away when the question of so-called hard drugs - heroin, crack, cocaine, LSD - are considered.

Judge Gaviria engages in a similar type of facile reasoning here. When asked about the discriminatory aspects of the 1986 statute, he replied that people who find themselves in analogous circumstances should be treated the same under the law. As support, however, he predictably cited analogous circumstances between alcohol and marijuana — not, of course, between casual alcohol use and casual crack smoking. See Gaviria, *supra* note 5.

The Court also argues that the statute was over-inclusive. In particular, the Court argues that the statute swept too broadly because certain substances penalized under this statute, such as marijuana and hashish, have a pacifying effect and have not been linked to crime.<sup>116</sup>

The problem with the Court's approach here is that the Court never provides a working definition of what it means by unconstitutional discrimination. It is unclear whether any statute that is under-inclusive or over-inclusive will be held unconstitutional by the Court. Even if the statute in fact sweeps too broadly, by including, for example, marijuana and hashish, it does not automatically follow that all drugs should be decriminalized. The Court might have considered here that, even assuming marijuana and hashish are not criminal, the legislature might have had some rational basis for banning other more dangerous drugs like heroin, cocaine, or crack.

Considering the argument that drugs should be banned as a deterrent because of their potential danger, the Court counters that in a positivist legal system a person cannot be punished for what he might do, but only for what he has done.<sup>117</sup> However, the Court does not consider whether other crimes under

116. For the classic defense of the view that hallucinogens are non-criminogenic and mind-expanding drugs, see ALDOUS HUXLEY, *THE DOORS OF PERCEPTION* (1954). While this is pure conjecture, it is highly unlikely that the decision would have been rejected so strongly if the Court had limited itself, as courts in Alaska and Germany have done, to decriminalizing personal use of hashish and marijuana. The specter of legally available cocaine and heroin, with well-recognized pernicious social effects, most likely contributed greatly to the case's poor reception.

117. Decision No. C-221 at 17. In the United States, for example, the Supreme Court has held that punishing drug addicts simply for their status as an addict, and not for any overt act, is a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Robinson v. California*, 370 U.S. 660 (1962). In *Robinson*, the Supreme Court held unconstitutional a California statute making it a misdemeanor offense for a person to "be addicted to the use of narcotics." *Id.* California courts had construed the statute as making the "status" of narcotic addiction an offense for which the offender may be prosecuted "at any time before he reforms," even though he has never used or possessed any narcotics within the state and has not been guilty of any antisocial behavior there. *Id.* at 666. Justice Douglass' concurrence is especially instructive, because he focuses on narcotics addiction more as a disease to be cured than as a crime to be punished, much like the intent of the Colombian statute under consideration here. "A prosecution for addiction, with its resulting stigma and irreparable damage to the good name of the accused, cannot be justified as a means of protecting society, where a civil commitment would do as well." *Id.* at 677. "Moreover, [this] prosecution is aimed at penalizing an illness, rather than at providing medical care for it. We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action." *Id.* at 678.

Justice Douglass, although opposed to criminalizing addiction, would not go as far as the Court here and hold unconstitutional all personal use law. On the contrary, "[t]he addict is a sick person. He may, of course, be confined for treatment or for the protection of society. Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime." *Id.* at 676; *Cf. Powell v. Texas*, 392 U.S. 514, (1968) (holding that conviction for public drunkenness of one who was to some degree compelled to drink did not amount to cruel and

Colombian law premised on the probability of harm rather than actual harm, such as carrying a concealed weapon or driving while intoxicated, could be unconstitutional under this analysis.<sup>118</sup> Equally questionable would be various aspects of the criminal code, such as pretrial detention.<sup>119</sup> After all, a defendant held in pretrial detention is being deprived of liberty based on either the potential danger to the community, or the potential of fleeing the jurisdiction.<sup>120</sup> If this deprivation of liberty can be construed as a "punishment" without due process of law, the defendant would have a valid constitutional claim based on the distinction between probable and actual harm established here by the Court.

The Court concludes this criminological analysis by noting that even if drug users are more likely to commit crimes than those who do not use drugs, they

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unusual punishment where it did not appear that defendant was incapable of staying off the streets on occasion in question); *State v. Fearon*, 283 Minn. 90, 166 N.W.2d 720 (1969) (reversing conviction for drunkenness because words "voluntarily drinking," as used in statute making intoxication by voluntarily drinking intoxicating liquors a criminal offense, meant drinking by choice, and that where defendant was a chronic alcoholic whose drinking was due to his illness and was involuntary, he could not be convicted under the statute); *Wheeler v. United States*, 276 A.2d 722 (D.C.Cir. 1971) (holding that constitutional prohibition against cruel and unusual punishment did not prevent conviction of defendant for possession of narcotics paraphernalia even though such paraphernalia was used to satisfy his own craving for heroin).

Others have raised issue, for example, with so-called recidivist statutes, in which criminal sentences are based, in part, on predictions of the likelihood of the defendant committing future crimes. See, e.g., Paul S. Robinson, *Moral Credibility and Crime*, THE ATLANTIC MONTHLY, March 1995, at 72-78.

118. This author refers here to the problem of using actual harm as a constitutional standard, because this would appear to invalidate so-called inchoate crimes, in which a crime is committed whether or not anyone gets hurt. Examples include drunken driving, concealing a weapon, and the possession of drugs. For an interesting discussion of this issue, see FRIEDMAN, *supra* note 60, at 281.

Mark Kleiman defends inchoate crimes on the grounds that merely punishing behavior, what the person in fact does, is not always a sufficient response. In the case of drunken driving, for example, the misbehavior involved, reckless driving and speeding, is often more difficult to detect and prove than the fact that the person is legally drunk. Proving actual misbehavior might involve, for example, constant video surveillance of our roadways, whereas drunkenness can be proven by a simple breath or blood test. Kleiman implicitly recognizes that the law is being used as a blunt instrument here; some may in fact drive better when drunk. Nevertheless, he notes that it is hard to doubt that there would be more deaths and injuries without drunken driving laws than in a world with such laws, albeit imperfect and sometimes punishing those who have caused no actual harm. Drunken driving, accordingly, is punishable even if no accident occurs because the drunken driver shows a culpable indifference to the safety of others, which must be deterred through criminal law. See KLEIMAN, *supra* note 94, at 80, 222.

119. See arts. 396-414, Código de Procedimiento Penal Colombiano [hereinafter CPPC].

120. For example, Article 395 of the CPPC provides the mechanisms for prohibiting the defendant from leaving the country.

should only be punished for the crimes they commit, not for drug use which does not lead to any crimes at all.<sup>121</sup>

### B. *Second Hermeneutic Possibility*

Returning to the operative constitutional article guaranteeing the right to health, the Court presents the second possible interpretation as follows: “[t]hat the Colombian State is assumed to be the owner and Lord of the life and destiny of each person subject to its jurisdiction,” and therefore it is prescribed behaviors that under a less absolutist perspective would be decided on a personal basis and not by the State.<sup>122</sup> The Court rejects this natural law interpretation, noting that the Constitution “is libertarian and democratic in character, not authoritarian and much less totalitarian.”<sup>123</sup> The Court did not provide here, however, any support for its view that the overriding philosophical principle of the Constitution is libertarianism.

Nevertheless, the Court maintains that any law suggestive of an authoritarian or totalitarian regime will have to be overturned so that it does not conflict with the Constitution as a whole. It remains to be seen whether the Constitutional Court, charged under the Constitution to review all Colombian legislation, will review the entire Colombian *corpus juris* in light of the libertarian principles.

The Court does not say, for example, whether economic and social regulation could be overturned under the rubric of libertarianism, in a sort of Colombian *Lochner* period. The Constitution contains many clauses regarding a planned economy,<sup>124</sup> as well as a clause stating that property serves a “social function.”<sup>125</sup> The Constitution clearly permits a mixed-economy, with blends of both *laissez-faire* and vestiges of socialism. This blend would place clear constitutional obstacles to Colombia becoming libertarian in the economic sphere. The problem is that the Court provides no philosophic or constitutional rationale for applying these libertarian principles to the social sphere, but not the

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121. The Court does not explain here the historical root for its notion of “positivistic legal system” in criminal law. According to Judge Gaviria, Colombia passed a statute in 1955 (Estatuto 14 de 1955) which sanctioned the unemployed for being in a “dangerous state.” The justification of the law was that the unemployed, in order to survive, were more likely to commit property crimes, such as assault and robbery. *See Gaviria, supra* note 5. The unconstitutionality of various “status crimes” has been determined by many U.S. courts. *See supra* note 117 and accompanying text.

122. Decision No. C-221 at 18.

123. *Id.*

124. *See generally* CPPC, *supra* note 119, arts. 332-373. Much of the constitutional articles concerning a mixed-economy and state intervention are the direct result of bargaining with left-wing groups during the Constituent Assembly, who favored a more interventionist and social-welfare oriented state.

125. *Id.* art. 58.

economic sphere.<sup>126</sup> In sum, the Court construed the “paternalistic” statute at issue here as reflective of an authoritarian judicial order because excluding the right to use drugs from the ambit of personal liberty is inconsistent with the Constitution’s reigning libertarian principles.

### C. *The Court’s Conclusion*

In light of the above arguments, the Court concludes that the only possible interpretation of the intent of Constitutional Article 49 was a hortatory expression of the Constituent Assembly encouraging citizens to care for their health. Such an indistinct, aspirational desire of the Constituent Assembly could not serve as the basis for the statute’s penal sanctions.<sup>127</sup> The Court does not consider why the indistinct, aspirational nature of Constitutional Article 16, guaranteeing the “free development of the personality,” is not subject to similar criticism when used to strike down the 1986 statute.<sup>128</sup> The Court grounds its conclusion with the following arguments.

#### 1. *Medical Treatment: Protection of the Addict or Criminal Sanction?*

Having declared the criminal sanctions called forth in sections a and b of the statute unconstitutional, the Court then considers whether the mandatory medical treatment called forth by section c of the statute constitutes a criminal penalty or a humanitarian method which benefits the sick. According to the Court, the former would be unconstitutional because personal drug use cannot be criminalized for the reasons given above. Similarly, the latter is unconstitutional because the same orbit of liberty permitting a person to use drugs protects the decision whether to undertake medical treatment.<sup>129</sup> The Court does not consider here, however, whether the concepts of “orbit of liberty,” or “free choice,” are applicable to those hopelessly addicted to drugs. A crucial flaw in the majority’s opinion, generally, is that by relying on a “rational choice” model for those

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126. After all, if the Court is interested in foreign thinkers, they might have considered critics from the right in the United States, such as William F. Buckley and Milton Friedman, who advocate the philosophically consistent libertarian position in which both drug criminalization and government control of the economy should be abolished.

127. Decision No. C-221 at 19.

128. Francisco Santos had the following to say about the Court’s use of the phrase “free development of the personality” to overturn the personal use statute. Asked how the Court defines this phrase, he said “[p]ersonally I don’t know. That’s what worries me. It’s not obvious, it’s just ‘develop the personality.’ Jesus Christ! You don’t change something as important as that (the 1986 statute) with that. You don’t do it with that shallowness of thought.” See Santos, *supra* note 28.

129. Decision No. C-221 at 20.

addicted to drugs, the opinion reflects a broad misunderstanding of the type of compulsion and loss of free will inherent in drug addiction.<sup>130</sup>

Turning for the first time to a consideration of other areas of Colombian law that may shed light on the issue of personal drug use, the Court argued by analogy that since suicide is not a crime, the individual citizen, not the state, is the owner of the individual's life and body.<sup>131</sup> Thus, the individual is free to decide whether or not to undergo treatment.<sup>132</sup> Indeed, rather than considering the humanitarian intent of mandatory treatment, the Court compares it to the treatment of dissidents in totalitarian regimes to "cure" the heretics.<sup>133</sup> The Court does not explain why the experience of totalitarian countries is applicable to Colombia, nor is there any consideration of whether treatment programs in Colombia have, in fact, resembled that of totalitarian countries. Instead, the Court engages in a sort of legal McCarthyism, raising the "red scare" of treatment in totalitarian regimes, without ever showing what relevance whatsoever this has to the concrete Colombian situation. Although Colombia, like other civil law countries, does not have a doctrine of *stare decisis*, the Court cited as guidance a previous Circuit Court opinion holding the forced medical treatment of a citizen unconstitutional on the grounds that this violated the constitutional guarantee of the "free development of the personality."<sup>134</sup> The Court's limited discussion of this case makes it difficult to see how this case serves as a basis on which the Court would declare a right to use drugs. After all, medical treatments are not all equally intrusive. For example, forcing a citizen to undergo a surgical operation and forcing a drug addict to undergo treatment are not equally intrusive. In citing

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130. See generally KLEIMAN, *supra* note 94, at 5, 29-45. Kleiman notes the paradox that drug use challenges, in fact, the very personal autonomy upon which rational-choice models rely in theory. Drug addiction, for example, means that dichotomy between "voluntary" and "involuntary" actions is false. *Id.* at 41. As such, he concludes that it is not unreasonable "for a society that makes most of its regulations about consumer choice on the basis of the rational actor assumption to be somewhat more paternalistic when it comes to choices about drug use." *Id.* at 45.

131. Decision No. C-221 at 20. From the perspective of comparative law, Prof. Glendon has noted that while the notion of the human body as individual property is common to the Anglo-American tradition, this notion is foreign to Europeans whose legal systems reflect that the human body is not subject to ownership by anyone. By extension, this notion is also foreign to Latin Americans who adopted European-based civil law systems. See GLENDON, *supra* note 22, at 21.

132. Decision No. C-221 note 20. The Court did not consider here whether a person with an infectious disease, for example, would still have the right to decide whether to undergo treatment.

133. *Id.*

134. *Id.* at 21. Colombia, like other civil law countries, does not generally have a system of *stare decisis*. However, under the pre-1991 system, Supreme Court decisions on constitutional matters "constitute[d] an important part of Colombian constitutional law and [were] followed as precedent." MERRYMAN & CLARK, *supra* note 77, at 569. This judicial tradition has remained unchanged with the creation of the 1991 Constitutional Court.

this case for support of its opinion, the Court does not discuss any essential differences between these two actions and, apparently, views them as equally intrusive.

## 2. *The Sanction (or Treatment) of the Drug User and the Free Development of the Personality*

Constitutional Article 16,<sup>135</sup> which guarantees the “right to the free development of the personality,” was interpreted by the Court to secure a general right to autonomy.<sup>136</sup> This right is premised on the notion of the state as an instrument serving the citizen, not of the citizen as means to the state’s end.<sup>137</sup> The Court stated that the fundamental characteristic of an autonomous person consists of him or her making decisions on moral and other matters.<sup>138</sup> However, the ground for this decision is hopelessly obscure. For example, the Court does not cite the *Gaceta Constitucional*, an extensive public record of the debates in the Constituent Assembly, or any other source, for this view.

By interpreting the article this way, the State must be neutral on moral matters and may not collectively take over the responsibility of individual citizens to decide moral questions such as personal drug use. Again, the Court does not consider whether the rational choice model can be applied to drug addicts, be they heroin users, alcoholics, or smokers. Because the decision whether or not to take drugs is intimately tied to personal autonomy, which is constitutionally guaranteed by the “free development of the personality,” the Court concluded that “norms making drug use a crime are clearly unconstitutional.”<sup>139</sup> Again, the Court does not consider that some types of drug use may be the polar opposite of an autonomous choice.

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135. “Everyone has the right to the free development of their personality without more limitations than those imposed by the rights of others or judicial order.” Decision No. C-221 at 22.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 24. In contrast, in the United States most state courts have explicitly rejected the notion that laws criminalizing drug use are unconstitutional on the grounds that they violate an individual’s right to privacy or personal autonomy. *See, e.g., State v. Vernon*, 283 N.W.2d 516 (Minn. 1979) (holding that because intrusion into the personal right to choose what to possess was a necessary and reasonable way to advance the legitimate interests of the state in regulating cocaine, the statute prohibiting and providing criminal penalties for possession of cocaine did not unconstitutionally intrude on any right of privacy or personal autonomy), *cert. denied*, 444 U.S. 1062 (1980).

A notable exception is the Alaska Supreme Court, which held that prosecution of an adult for possession of marijuana for use in the home violated the state’s constitutional right of privacy. *Ravin v. State*, 537 P.2d 494 (Alaska 1975). In 1990, a referendum to reverse the ruling passed with 55% of the vote, leaving the courts to decide whether such a referendum can modify a constitutional interpretation. KLEIMAN, *supra* note 94, at 279.

Moreover, the Court argued that forcing a person who has not committed any penal infraction to undergo medical treatment is not only violative of the Constitution, but is "monstrous and contrary to the most elemental principles of civilized law."<sup>140</sup> What those elemental principles are is not stated by the Court. Also, as previously noted, because the Court does not consider actual medical treatment in Colombia, one cannot infer what the Court means by "monstrous." Perhaps this comment is best dismissed as unfortunate hyperbole. After all, many "civilized" countries, such as the United States, with a much less monstrous and bloodied past - and present - than Colombia, rely heavily on forced medical treatment to cure addicts and control crime.

### 3. *Liberty, Education, and Drugs*

The Court then considers how the state, by finding drugs undesirable, could discourage and limit their use while respecting the liberty of citizens. Educational programs designed to remove ignorance about the dire effects of drugs are the only constitutionally permissible policy.<sup>141</sup> Whether educational programs have been effective in the absence of criminal law in reducing drug use, or whether a developing country like Colombia replete with social problems can actually put in place an effective drug education program, is not considered by the Court.<sup>142</sup>

However, the Court emphasized the potential danger in this educational role, restricting the state to "showing in an honest and rigorous method the causal connection existing between distinct methods of living and their inevitable

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140. Decision No. C-221 at 26.

141. *Id.* While emphasizing that education was the sole permissible method in reducing drug use in the libertarian state, the Court did not consider whether education alone, unbuttressed by criminal sanctions, is effective in reducing drug consumption. Numerous studies in the United States have indicated that drug education alone has had little or no effect on drug use. *See*, Eisenbach, *supra* note 112; *see also*, *Stopping Drugs in Schools: Tough Policies Work*, THE HERITAGE FOUNDATION EDUCATIONAL UPDATE (Fall 1988). As Professor Kleiman explains, educational programs often do not work because those most susceptible to rational persuasion are the least likely to engage in self-destructive, chronic drug use. He sums up his doubts that education alone, without criminal sanctions, can be successful, as "[t]he widespread faith in prevention through persuasion seems to rest on the feeling that persuasion would be wonderful if it worked, rather than a well-founded conviction that we know how to make it work." KLEIMAN, *supra* note 94, at 175-76.

142. When Francisco Santos was asked whether a developing country like Colombia, whose major city, Bogotá, suffers from long traffic jams, periodic blackouts, water shortages, horrific air pollution and one of the world's highest rates of impunity, could establish an effective drug education program, he replied that "[s]ometimes they think they live in Switzerland or something like that. And that opinion looks like it was written by a Swiss magistrate." *See* Santos, *supra* note 28.



consequences, without manipulating consciences.”<sup>143</sup> Note the Court’s insistence that the state’s generally accepted hortatory role be carefully watched lest the bully pulpit slip into propaganda, misinformation and other means of manipulation.

However, one wonders how an education effort headed by the government will not run the risk of repeating the same type of discrimination alleged by the Plaintiff and others in the legalization debate — namely, targeting society’s undesirables and rebels to change them. Moreover, how is the state to educate citizens “without manipulating consciences?” If the Court does not trust the state to force addicts to be treated, why does the Court trust the state to educate people?

In any event, it is not at all clear that a governmental propaganda effort would not be violative of the “free development of the personality.” If citizens have a “right to be left alone” in choosing to use drugs, should they not be free from government propaganda and preaching that seeks to influence their constitutionally protected free choice?<sup>144</sup> Moreover, if the state is to be truly neutral on the issue, should not Colombia adopt a sort of “Fairness Doctrine”<sup>145</sup> in which government financed propaganda designed to dissuade drug use is

143. Decision No. C-221 at 24 (emphasis added). However, the Court did not consider whether one can indeed teach about the effects of drugs without somehow bringing moral issues to the fore.

144. This precise issue, of course, arose in the United States in regard to informed consent provisions of state statutes passed after the Supreme Court’s 1973 decision in *Roe v. Wade*. The Supreme Court has upheld informed consent provisions requiring doctors and clinics to persuade women to give up their right to abortion. See generally *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992) (O’Connor, Kennedy & Souter, JJ.).

While the Constitutional Court has not yet considered (and may never consider) the constitutionality of government propaganda against drug use, given the Court’s mistrust of state power, it would not be surprising if the Court adopted a position regarding drug education efforts somewhat akin to Justice Stevens’s dissent in *Casey* regarding informed consent. In *Casey*, Justice Stevens argued that the plurality was unjustifiably obtuse regarding the anxiety-producing and distorting effects of state-imposed “misinformed consent” speech. *Id.* at 2841-43.

When asked about this precise issue, Judge Gaviria responded that regarding persons who wish to take drugs, there are those who understand the effects and those who do not. The State may develop educational programs to aid those in the latter group. See Gaviria, *supra* note 5. As a practical matter, it is hard to imagine how the state could make such a distinction, unless requiring some form of informed consent procedure before purchasing drugs, or through individual questioning to determine what one knows, which may be as over-intrusive in the private sphere as the criminal statute challenged in this case. Information aimed at the public in general will not necessarily ensure that those who wish to use drugs, but do not understand the effects, will be reached.

145. The Fairness Doctrine, a Federal Communications Commission policy in existence until 1985, required FCC licensees broadcasting political messages to give equal time to opposing views. See generally 47 C.F.R. §76.209(d) (1994). I raise this issue as a mere intellectual matter; I am not advocating in any way that the Colombian state in fact subsidize public advertising for drug users and dealers.

matched by state funding for known drug users to advocate their constitutionally protected lifestyle choice?

Also, it is interesting to note how the Court, paying heed to the liberal state's hesitance to decide moral questions, strains to maintain its neutrality on the issue of drug use. The court even states that while it neither proposes nor judges to be desirable a society of educated free men who resolve to live in a drugged state, it recognizes that "nothing ethical can oppose this decision."<sup>146</sup> The exclusive means for the state to discourage drug use that is consistent with liberty is education, with the Court ever vigilant to other methods more proper to the totalitarian state, such as "electric shocks, surgical cuts, and chemical treatments."<sup>147</sup> Note the similarities between the Court's paranoid suspicion of state power and the democratic process, and the Critical Legal Studies, a nihilistic neo-Marxist movement which views all law as inherently oppressive and political.

The Court concludes by noting that the state has a regulatory role as well.<sup>148</sup> Once personal drug use is legalized, the state can establish reasonable limits on use as with other legal substances such as alcohol or tobacco.<sup>149</sup> Such regulation could include reasonable time, place and manner restrictions, as well as internal regulations by private and public institutions.<sup>150</sup>

However, the Court did not discuss the constitutionally permissible limits of such restrictions. Any "sin tax" on legal substances, for example, restricts free

146. Decision No. C-221 at 25.

147. *Id.* Judge Gaviria defends the opinion's references to totalitarian regimes by arguing that although Colombia, fortunately, has not been in such a situation, Colombia and other democratic countries could enact this type of treatment. *See* Gaviria, *supra* note 5. Otherwise stated, the Court is overturning a statute in part because of its potential application in a totalitarian manner. If the experience of totalitarian countries is to be used as a constitutional benchmark, other areas of Colombia law should be subject to similar scrutiny. For example, Constitutional Article 58 defines property as having a "social function," and sets forth powers of eminent domain. CONSTITUTION, *supra* note 3, art. 58.

It is well known that totalitarian countries have not only used treatment programs to cure the heterodox but have also expropriated property without compensation. Should constitutionally-protected takings also be held unconstitutional due to their potential application in a totalitarian manner?

148. Decision No. C-221 at 27.

149. *Id.*

150. *Id.* For example, on May 24, 1994, the Gaviria government proposed the prohibition of drug use in public places, recreational facilities and educational centers. Gutierrez, *supra* note 21, at 1A, 11A. The Samper government has considered civil sanctions such as firing public employees who use drugs, fines, suspensions and cancellations of drivers licenses for those using drugs. *Id.* at 14A. Similarly, United States courts have upheld the constitutionality of statutes concerning time, place, and manner restrictions, such as those establishing enhanced penalties for drug use and sale in specially protected areas. *See, e.g.,* United States v. Thornton, 901 F.2d 738 (9th Cir. 1990) (holding that federal statute mandating enhanced penalty when drug distribution occurs within 1000 feet of a school does not violate equal protection, nor is it unconstitutionally over-inclusive or under-inclusive).

choice by making the goods more costly. The Court did not consider whether such a tax on legal drugs, similar to those for alcohol and tobacco, would be a constitutional infringement on the free development of the personality. Future cases will have to clarify the constitutionally permissible ambits of governmental restrictions on legal substances.<sup>151</sup>

Along with providing for reasonable time, place and manner restrictions, the Court hastens to emphasize that this decision does not affect any provisions of the 1986 statute penalizing activities associated with the drug trade.<sup>152</sup> Why drug trafficking does not fall within the ambit of the elastic constitutional clause guaranteeing the free development of the personality, as well, is inexplicably and alarmingly left unexplained by the Court.<sup>153</sup>

## VI. THE DISSSENT: AN OVERVIEW

The rejection of the majority's opinion by important elements of Colombian civil society finds its intellectual support in the dissent's opinion,

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151. Judge Gaviria argues that when the Court held that criminalizing drug use was held unconstitutional, the Court was not declaring that all governmental policies which dissuade users from using drugs are unconstitutional. See Gaviria, *supra* note 5.

152. Decision No. C-221 at 27. However, some have questioned the practical effect this decision will have on street-level dealing, which will make enforcement virtually impossible. Similar to the division of dirty money into smaller portions through a practice known as "smurfing" to avoid cash transaction limits, some suggest that savvy drug dealers will now only carry the legal personal doses on their person to avoid criminal sanctions attendant to trafficking. Each small portion can be sold at the street level, and if one is stopped, "personal use" can be used as a defense. Once a sale is made, dealers will simply replace this amount with another legally accepted amount. This practice, combined with the inefficiency and corruption of the police, may lead to virtual impunity for some types of street-level dealing. Letter from Fernando Londoño Hoyos, *supra* note 107.

153. Letter from Fernando Londoño Hoyos, *supra* note 107. Specifically, the Court only mentions in passing that all norms relating to narcotics trafficking remain intact. According to Judge Gaviria, it was obvious that the Court was only referring to personal consumption, not trafficking. However, once the Court starts using vague constitutional phrases like the free development of the personality, the question that naturally follows is whether various activities associated with the drug trade can be seen and, thereby, constitutionally protected as the free development of the entrepreneurial personality. The case could have clarified this point, as Judge Gaviria did in his interview. Plaintiff only challenged the portions of the statute pertaining to personal drug use. Accordingly, only those portions of the statute relating to drug consumption, not those relating to drug trafficking, were under review. Moreover, according to Judge Gaviria, the constitutional question relating to drug trafficking would be much more complex, because Colombia, like the United States, is a signatory to international treaties related to drug trafficking. See Gaviria, *supra* note 5. That Plaintiff did not challenge the portions of the statute pertaining to drug trafficking, or that the constitutional issues relate to international treaties, does not end the issue. Because the Court does not have discretionary jurisdiction, it will have to hear and decide any constitutional case challenging the drug trafficking portions of the 1986 statute.

known as the *salvamento*.<sup>154</sup> According to the dissent, the majority's invalidation of the drug criminalization statute, based on the constitutional guarantee of the free development of the personality, is an exercise of "raw judicial power."<sup>155</sup> The dissent posits that the majority's decision is not reasoned jurisprudence grounded in the 1991 Constitution and Colombian law and will likely have deleterious effects on Colombian society.<sup>156</sup>

As a jurisprudential matter, the dissent explicitly rejects the majority's absolutist, libertarian and individualistic rights talk model.<sup>157</sup> The dissent views

154. Colombian law provides the "opportunity to dissent and state reasons," as in the United States. In contrast, certain civil law systems, such as France, encourage judicial unanimity and dissents are not publically acknowledged. See MERRYMAN & CLARK, *supra* note 77, at 569.

155. *Roe v. Wade*, 410 U.S. 179, 222 (1973) (J. White, dissenting). While the reference to Justice White's dissent in *Roe* may seem farfetched at first, several similarities between the United States Supreme Court's striking down a Texas statute criminalizing abortion and the Colombian Constitutional Court's invalidation of a statute prohibiting personal drug use make it appropriate here. Both cases involved the establishment of a new constitutional right affecting what many view as the inner or personal sphere through a broad interpretation of nebulous constitutional guarantees (various constitutional "penumbras" and "emanations" in the United States and Constitutional Article 16's right to the free development of the personality). Both cases replaced political participation and decision-making with judge-made law, one by restricting the states' regulation of abortion, the other by overturning the Colombian state's criminalization of drugs. Also, both cases are highly controversial and lead to the drastic remedy of constitutional amendment to overturn the decisions, such as bipartisan support for a Human Life Amendment (included in the Republican Party's platform) and the Colombian government's consideration of constitutional referendum.

The language used by Justice White in his dissent could easily have been used by the Colombian *salvamento*, as well. Questioning the majority's decision to overturn a Texas law criminalizing abortion, Justice White stated that he could:

[f]ind nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes.

*Id.* at 221-22. The *salvamento* similarly finds little support in the language or history of the 1991 Constitution to overturn the 1986 statute. Justice White goes on to note that the "people and the legislatures of the 50 states are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand." *Id.* This silencing of persons in the political process is similar to the *salvamento* noting that the upshot of this case is that the collectivity is rendered inert by this decision. Accordingly, it is reasonable to argue that the criticism made by Justice White in *Roe v. Wade* could legitimately be applied to the *salvamento*: "As an exercise of raw judicial power, the Court perhaps has the authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution lends this Court." *Id.* Moreover, the Supreme Court's decision in *Roe*, like the Constitutional Court's decision here, produced ripple effects throughout the judiciary. Even liberals like Laurence Tribe admit, albeit favorably, that *Roe* has "led to a radical transformation" of the American judiciary. TRIBE, *supra* note 97, at 79.

156. Decision No. C-221 at 31.

157. *Id.*

the majority's model as reflective of an outdated model of *laissez-faire* liberalism contrary to the concept of the Social State of Law<sup>158</sup> called forth by Constitutional Article 1.<sup>159</sup> Instead, the dissent views the Colombian Social State of Law as one rooted in the civic republican tradition, with rights and liberties being limited by considerations of the common good and the general interest prevailing over the individual interest in the State's pursuit of a just social order.<sup>160</sup>

Turning to the constitutional article guaranteeing the free development of the personality, the dissent emphasizes that this right does not exist in stark form, an autocratic trump untempered by limits or obligations.<sup>161</sup> Rather, it must be viewed in light of the rights of others and the maintenance of the juridical order.<sup>162</sup> Other similar constitutional articles, as well as the Court's own jurisprudence, illustrate that constitutional guarantees may be limited by the rights of others, as well as by moral, political and judicial considerations.<sup>163</sup> As an interpretive matter, the dissent's focus on constitutional text rather than philosophical speculation reflects a distinctly interpretative bent, in which judges should confine themselves to enforcing norms that are stated or clearly implied in the written constitution.<sup>164</sup>

The dissent's critique is not restricted to jurisprudential questions. As a practical matter, the dissent cautions that several social goods provided for by the Constitution, such as physical and mental health, peaceful coexistence, social solidarity and most importantly, the integrity of the family, will be harmed by legalizing drugs.<sup>165</sup>

Most significantly, the dissent's focus on the family as the fundamental social unit provides the basis for an alternative image of the Colombian person envisioned by the Constituent Assembly and serves as a basis to challenge the individualistic rights talk model adopted by the majority. The dissent's family-centered image reflects what Professor Glendon has called a person "situated within (personal) relationships (with others) . . . constituted in part by society."<sup>166</sup> Note how far afield this image is from that of the majority's, what Professor Glendon has called the "[lone] rights-bearer [-] a self-determining,

158. The Social State of Law has been defined by one commentator as "the acknowledgment of a vast array of rights proper to the social life of individuals, of adapting the state to the social and economic realities of a country without abandoning the postulates of a Liberal State of Law." See Julio Andrés Sampedro Arrubia, *El Estado Social de Derecho y La Estructura del Proceso Penal de Primera Instancia en Colombia*, 83 UNIVERSITAS 61 (1994).

159. Decision No. C-221 at 32.

160. *Id.* Professor Glendon has noted the tendency of rights talk to regularly promote "particular interests over the common good." GLENDON, *supra* note 22, at xi.

161. Decision No. C-221 at 32-33.

162. *Id.* at 33.

163. *Id.* at 32.

164. See ELY, *supra* note 93, at 1.

165. Decision No. C-221 at 31.

166. GLENDON, *supra* note 22, at 74.

unencumbered, individual, a being connected to others only by choice."<sup>167</sup> To the dissent, the addict's linkage to family and society implies that drug use affects not only the user but also others, thereby justifying the state's intervention in her personal sphere through criminal law.

A. *The Critique of the Free Development of the Personality as an Absolute Right*

The dissent begins by critiquing the majority's interpretation of Constitutional Article 16 as an absolute right. The dissent construes the majority opinion as "[t]he unlimited faculty of each person to do or not do what they please with their life, even going to the extremes of irrationality - such as endangering their own physical or mental integrity."<sup>168</sup> The dissent asserts that the majority's absolutist and individualistic interpretation of this Article is inconsistent with the Court's jurisprudence in which all rights or liberties are limited by the rights and liberties of others as well as the judicial order.<sup>169</sup> To support this position, the dissent considers the specific case of the drug addict. The dissent argues that the right to use drugs cannot be construed as an absolute right because the addict harms not only the addict, but the addict's family as well.<sup>170</sup> Society is also affected due to the heightened risk of the addict committing crimes. Given these societal effects, drug use cannot be simplistically reduced to a mere personal matter.<sup>171</sup>

Moreover, to consistently construe the free development of the personality as an absolute right, other conduct apparently proper to the inner sphere, such as abortion, would have to be lawful as well.<sup>172</sup> However, this contradicts the Court's recent jurisprudence. For example, two months before this case was decided, the Court held a 1980 statute constitutional, which penalizes abortion on the grounds that abortion cannot be constitutionally protected as an act solely affecting the individual mother because it involves the killing of another human

167. *Id.* at 48.

168. Decision No. C-221 at 32.

169. *Id.* Professor Glendon as well has described how rights talk must be tempered by considerations such as:

[t]he relation a given right should have to other rights and interests; the responsibilities, if any, that should be correlative with a given right; the social costs of rights; and what effects a given right can be expected to have on the setting of conditions for the durable protection of freedom and human dignity.

GLENDON, *supra* note 22, at 177.

170. Decision No. C-221 at 33.

171. *Id.*

172. It would have been interesting here if the dissent had examined other potential areas of Colombian law that could possibly be considered unconstitutional if viewed through the prism of the "free development of the personality."

being.<sup>173</sup> The right to abortion is equally controversial, if not more so, than the right to use drugs and has frequently been defended as an individual moral decision that is not the state's concern. As such, the majority's failure to consider this obvious analogue is a troubling scotoma in their constitutional vision.

### B. *Drug Addiction as Violation of Human Dignity*

After starting the opinion with several compelling jurisprudential arguments that place limits on the free development of the personality, the dissent stumbles a bit as it seeks teleological arguments in favor of criminalization based on the constitutional guarantee of human dignity. It is arguable that the unclear phrase "human dignity" is as constitutionally unclear as the majority's favored clause, "the free development of the personality." A better approach might have been to first consider the general power of the state to regulate narcotics. Then the dissent could have considered various constitutional articles which, when taken as a whole, indicate that the Colombian Constitution does not call forth a libertarian state. The dissent then could have concluded that drug criminalization and other laws affecting the personal sphere typically fall within state police power. However, because the majority has framed the constitutional issue in terms of value-neutral libertarianism, the dissent has to respond to their arguments with the constitutional articles that fit. Hence, the dissent uses the rubric "human dignity" in order to present several arguments concerning the societal dangers of drug use.<sup>174</sup>

Accordingly, the dissent followed with a consideration of the majority's argument that drug penalization is an affront to human dignity. This argument is premised on the philosophical notion that individuals should retain the right to decide moral questions such as drug use, regardless of the consequences. In contrast to this libertarian and morally relativistic conception, the dissent posits a teleological vision in which persons are perfectible beings oriented to good.<sup>175</sup>

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173. Decision No. C-221 at 35. Note that abortion appears to be the type of legal issue envisioned by the Constituent Assembly for future adjudication by the Constitutional Court. Unlike most other Latin American countries whose constitutions specifically prohibit abortion, the Colombian Constitution avoids the question of when life begins and whether a fetus should be deemed a living person. Given the influence of the Catholic Church, the strong legal tradition supporting the criminalization of abortion and Colombia's signature on the American Convention on Human Rights, which guarantees that the right to life shall be protected by law, in general, from the moment of conception, it is not surprising that the Colombian Constitutional Court upheld this law criminalizing abortion. See generally Keith S. Rosenn, *A Comparison of the Protection of Individual Rights in the New Constitutions of Colombia and Brazil*, 23 U. MIAMI INTER-AM. L. REV. 659 (1992).

174. Decision No. C-221 at 35.

175. *Id.* It is interesting to note that both the majority and dissent begin their opinions in search of general principles rooted in natural law, somewhat akin to what Professor Dworkin has called the unique role of courts in setting out the "principles" governing society. See RONALD

Natural reason is the means by which humans beings, both individually and collectively through the exercise of state power, achieve this end. Thus, constitutionally protected spheres, such as the free development of the personality, must sound in acts of rationality, not barbarism.<sup>176</sup>

Consistent with this teleological vision, drug use is an affront to human dignity and inconsistent with natural reason because it constitutes the deprivation of a good - mental and physical health - in an irreversible and always progressive manner.<sup>177</sup> Blending natural law reasoning with constitutional text, the dissent turns to Article 1, which provides that Colombia is a state "founded on the respect for human dignity."<sup>178</sup> The dissent broadly interprets this article to prohibit any violation of human dignity.<sup>179</sup> According to this interpretation, the state cannot permit a person to enslave themselves with addictive drugs, nor run the risk of being under the effects of drug addiction.<sup>180</sup> To the contrary, the state, consistent with its search for the good through natural reason, must play a paternalistic role in preserving citizens in their dignity and in defending youth from moral and physical danger.<sup>181</sup>

Turning again to the practical sphere, the dissent argues that permitting drug use in the name of liberty and human dignity is tantamount to abandoning liberty to the caprice of those who manipulate and control the drug market.<sup>182</sup> This would replace autonomous individual choice with dependence on lethal drugs.<sup>183</sup> This argument is buttressed by the well-known pernicious effects drugs have on the addict — mentally, physically and spiritually. The drug user is thereby converted into a being lacking self-control and engaging in undignified, irrational and anti-social behavior.<sup>184</sup> Due to these obvious deleterious effects, the dissent remains perplexed as to how this self-destruction of the individual can be construed by the majority as a form of realizing the constitutional mandate for respect of human dignity.<sup>185</sup>

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DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). Because the dissent searches for principles of natural law outside of the constitutional text, however, does not mean that the dissent has "crossed the line" into non-interpretivism. The dissent roots its opinion much more closely in specific articles of the Constitution than the majority.

176. *Id.* at 38.

177. *Id.*

178. *Id.*

179. *Id.* at 39.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* The dissent is referring here to one of the most critical scotomas in the majority's vision, which lacks any consideration of whether its model of the rational citizen choosing among ends is applicable to drug users. The majority's use of a rational choice model is one of their weakest points, and the dissent rightly refers to it here.

184. *Id.*

185. *Id.* at 40.



### C. *Drug Use is Not an Indifferent Act*

The dissent then challenges the majority's consideration of drug use as an indifferent act. The dissent presents an image of a holistic society which cannot permit a person to endanger their health because "the well-being of each of its members is in the general interest."<sup>186</sup> The dissent then responds to the majority's argument that the statute is under-inclusive and that if the government was genuinely concerned about health, then cigarettes and alcohol should be banned as well.<sup>187</sup> The dissent distinguishes between these substances and illegal drugs based on the probability of harm.<sup>188</sup> In essence, the majority sweeps all drugs off the criminal code and into the libertarian hamper, while the dissent tries to defer to the apparent legislative judgment that different drugs - due to their varying effects - must be treated on a case-by-case basis. For example, while conceding the possible harm from cigarettes and alcohol, the dissent cautions that drugs present a "grave and imminent danger" due to their certain harm and high probability of addiction.<sup>189</sup> The dissent is careful to note that a liberal society cannot broadly cast the criminal net to control all vices. While some vices may be permitted, drugs, due to their high probability of harm, must be included in the catch. Although the dissent acknowledges the danger discussed by the majority of the "authoritarian temptation" in any drug control effort, or the use of the criminal law generally,<sup>190</sup> the dissent resists this temptation in recognizing the inherent limits in a free society in which all vices cannot be controlled by criminal law.<sup>191</sup>

### D. *The Constitutional Foundations of the Norms Declared Unconstitutional*

Having discussed the philosophical issues as a counterpoint to the majority's libertarian analysis, the dissent then turns to a strict interpretive analysis to demonstrate various constitutional grounds supporting the provisions of the 1986 statute declared unconstitutional by the majority. At the most general level, the dissent points to the constitution's preamble, calling on the state to "ensure to its citizens life, coexistence, work, knowledge, liberty and peace inside of a juridical framework which guarantees a just social order."<sup>192</sup> According to

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186. *Id.* at 41.

187. *Id.* See also TOCORA, *supra* note 61, at 30-31, 58.

188. Decision No. C-221 at 41.

189. *Id.*

190. *Id.*

191. For example, gambling and prostitution are not crimes under Colombian law.

192. Decision No. C-221 at 42.

the dissent, these general principles are gravely harmed by the effects of drug addiction and provide a sufficient basis for upholding the constitutionality of the challenged provisions.<sup>193</sup> Other, more specific, constitutional provisions call into question the dissent's analysis as follows.

1. *The Social State of Law*

The dissent begins its textual analysis by discussing Constitutional Article 1, which establishes that Colombia is a Social State of Law "founded in the respect of human dignity, work, and solidarity."<sup>194</sup> Repeating its argument concerning the pernicious effects of drug use on human dignity, the dissent demonstrates how these same effects prove deleterious in the economic sphere by diminishing the capacity of workers which results in higher levels of unemployment.<sup>195</sup>

2. *The Social Ends of the State*

The dissent then turns to Constitutional Article 2, which defines the social ends of the state as "serving the community, promoting general prosperity, and guaranteeing the effectiveness of the principles, rights and duties provided for by the Constitution, in order to assure peaceful coexistence and the operation of a just order."<sup>196</sup> The dissent argues that a truly just order, peaceful coexistence and general prosperity are incompatible with the destruction of large sectors of the population, especially youth, by drug use.<sup>197</sup> Moreover, the dissent warns that drug legalization will serve as an incentive for drug production and trafficking, increasing the power of drug cartels which for many years have been "the worst enemy of Colombian society."<sup>198</sup>

3. *The Duty of the State to Protect the Health of its Members*

The dissent then turns to one of Plaintiff's primary arguments concerning the State's duty to protect the mental and physical health of citizens. In support of the constitutionality of the disputed statute, the dissent focuses on four constitutional articles specifically concerning the State's duty to care for the health of its citizens. Although none of these articles specifically call for drug criminalization or the treatment of addicts, the health concerns expressed therein

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193. *Id.* at 42.

194. *Id.*

195. *Id.* at 43.

196. *Id.*

197. *Id.*

198. *Id.*

provide some guidance regarding these issues, especially in comparison with the nebulous "free development of the personality."

The first textual support used by the dissent, Constitutional Article 13, establishes that "the state will especially protect those persons who, due to their physical or mental condition, find themselves in circumstances of a manifest disability."<sup>199</sup> The drug addict was deemed to fall into this category due to the manifest disability caused by the addict's dependence on hallucinogenic drugs.<sup>200</sup>

The second textual support, Constitutional Article 47, states in part that "[t]he state will promote a policy of foresight, rehabilitation and social integration for those physically, sensorially or psychically disabled, giving them the special attention required."<sup>201</sup> To the dissent, this Article provides almost direct support for the treatment for which the contested statute calls because it provides mechanisms for the rehabilitation and social reintegration of drug addicts, as well as special treatment for addicts by placing them in psychiatric centers or similar establishments.<sup>202</sup>

The third textual support, Constitutional Article 49, provides in part that "attention to health and a healthy environment are public services of the state," and that the state "guarantees to all access to the services of health promotion, protection and recuperation."<sup>203</sup> The dissent placed special emphasis on the part of this article calling for the duty of citizens "to procure the integral protection of their health and of their community."<sup>204</sup> This constitutional duty indicates to the dissent that the problem of health is a not matter of individual caprice but rather subject to the general interest of the state and that of the community.<sup>205</sup> According to the dissent, Constitutional Article 366, stating "the general welfare and the betterment of the quality of life are social ends of the state" and that "a fundamental objective [of the state] will be the provision of the basic necessities for health," provides further support of this view.<sup>206</sup>

The dissent stated that these various constitutional provisions, viewed together, provided clear support for the parts of the 1986 statute requiring the State to pay special attention to those affected by drug addiction.<sup>207</sup>

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199. *Id.*

200. *Id.* at 44.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 45.

206. *Id.*

207. *Id.*

#### 4. *General Versus Particular Interests and General Duties*

The dissent then focused on Constitutional Articles 2, 58 and 82 in order to establish, as a general interpretive constitutional principle, the prevalence of the general interest over the particular to challenge the majority's conception of an absolute right to the free development of the personality.<sup>208</sup> The dissent's interpretative principles then can at least, in part, be gleaned from specific constitutional text; they do not remain obscure like those of the majority.

The dissent began with the political problem of individual rights being used to trump collective interests. From the dissent's view, the majority's decision replaces legislative decision-making with judicial fiat because drug use cannot be repressed through criminal law, nor can the community work with the addict through rehabilitation. Essentially, the political branches and civil society have been shut out by this decision.

Note the similarity of this trumping of the collective interest by an individual, absolute right with what Professor Glendon has called the "American rights dialect of no compromise," which precludes the more balanced dialect of political compromise because "the winner takes all and the loser has to get out of town."<sup>209</sup> Expressed in the Colombian dialect, the dissent lamented "[t]he elements of social defense have thus been excluded from the judicial order."<sup>210</sup>

#### 5. *The Rights of the Family, Children, and Adolescents*

In contrast to the majority's focus on the individual and individual rights, the dissent placed special emphasis on Constitutional Article 5, recognizing and protecting the family as the "basic institution of society," and Constitutional Article 42, defining it as the fundamental nucleus of the same.<sup>211</sup> The dissent repeats its pattern of focusing not on the abstract, autonomous and rational decision-maker favored by the majority, but on the concrete and common effects of drug use on the Colombian family. At the general level, drug addiction is seen as destroying family unity, generating violence and causing the loss of respect among family members and the self-respect of the user.<sup>212</sup> Turning to particular family members, drug use is considered especially pernicious to the father, the supreme authority in the traditional Colombian patriarchal family. Specifically, drug use effectively renders the father incapable of educating his children, leading his family to moral and material ruin and consequently reflecting poorly upon him

208. *Id.* at 46.

209. GLENDON, *supra* note 22, at 8-9.

210. Decision No. C-221 at 46.

211. *Id.* at 47.

212. *Id.* As practical support, observers have noted that belonging to a nuclear family significantly decreases the probability of addiction to all types of drugs. See THOUMI, *supra* note 26, at 268.

as the head of the household.<sup>213</sup> The child user, for her part, will fail to acknowledge her parents' authority and will serve as a bad example for her siblings, constituting a permanent danger to other members of the family.<sup>214</sup>

These deleterious effects cannot be permitted in a society whose Constitution in Article 42 calls for the "integral protection of the family." This constitutional article similarly establishes that "the dignity of the family is inviolable" and that family relations should be based on reciprocal respect among its members. Both concepts are grievously affected when drugs enter the home.<sup>215</sup> Because the Constitution places such emphasis on the protection of the family, the dissent is perplexed by the majority's invocation of the nebulous constitutional phrase providing for the free development of the personality as a means for trumping the Constituent Assembly's obvious concern with the protection of the family.

The dissent focuses as well on Constitutional Articles 44 and 45 concerning the rights of children and adolescents. These fundamental rights include the right "to have a family" as well as the right to "care and love," which disappears when parents or older siblings are dependent on drugs.<sup>216</sup> The Constitution also provides that children "will be protected against all form[s] of abandonment and from physical or moral violence."<sup>217</sup> Children whose parents or siblings are addicted to drugs are seen as being abandoned to fate and almost assuredly subject to physical violence.<sup>218</sup> Finally, the dissent considers Constitutional Article 45, providing that adolescents have a "right to protection and integral formation," noting that the recuperation of an adolescent who has fallen into drug addiction is none other than the fulfillment of the constitutional mandate.<sup>219</sup>

#### E. *A Comparative Overview of Drug Legalization*

Having established several grounds for rejecting the majority's decision, the dissent turned to extra-constitutional arguments to criticize the majority's holding, such as the experiences of other countries that have legalized drugs. The dissent first observed that a majority of countries have maintained laws criminalizing drug use, after which it specifically focused on countries such as Spain, England and Holland, whose experimentations with legalization have

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213. Decision No. C-221 at 47.

214. *Id.*

215. *Id.*

216. *Id.* at 48.

217. *Id.*

218. *Id.*

219. *Id.*

failed due to increased drug use.<sup>220</sup> Once again, the dissent referred to Colombia's political problem of drug legalization, a problem that these other non-drug-producing nations have not faced.<sup>221</sup>

F. *The Dangerous Effects of Drugs Compared to Nicotine and Alcohol*

The dissent reconsidered its argument that drugs are more dangerous than nicotine or alcohol in responding to the majority's argument that the 1986 statute was under-inclusive because it did not penalize these substances. The dissent recognized that nicotine creates health problems and is an addictive drug but focused on the crimogenic effects to argue that nicotine does not present a risk to society: "[n]o one commits a crime induced by doses of nicotine."<sup>222</sup> Similarly, no one is incapacitated for work, at least not in the short term, nor experiences learning problems in school due to tobacco.<sup>223</sup>

Concerning alcohol, the dissent, perhaps, minimizes the pernicious effects of addiction on the individual in an effort to draw a sharper contrast with the more serious social effects caused by drug addiction, notably, an increase in crime. For example, the alcoholic does not usually attack or kill for a drink, unlike the drug addict who does so daily in all parts of the world.<sup>224</sup> The dissent does not deny that alcohol has been the cause of violence; rather, they argue that drug use is much worse.<sup>225</sup> Moreover, the risk of addiction is much greater with drugs than it is with alcohol. Approximately ten percent of drinkers become addicted, while eighty percent of cocaine users and virtually all crack and heroin users become addicted.<sup>226</sup>

The dissent might have pointed out that the majority's arguments based on the inherent discrimination between alcohol and tobacco, both of which are legal,

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220. *Id.* at 50. The dissent, for example, cites studies that indicate in England the number of heroin addicts increased by 100% and illegal traffic increased by 300% during the 1960's and 1970's when addicts could receive heroin legally in pharmacies. The dissent also notes that when Alaska legalized the personal use of marijuana, use among youths aged 11 to 14 was three times higher in Alaska than in the rest of the United States. *Id.* While the dissent cites these figures to argue that drug use will rise in legalization, Kleiman and others have noted the problems with using comparisons with other countries' experiences when considering drug policy. In Kleiman's view, what has happened in other countries is not always known, and the social and institutional settings are so different that we cannot import drug policies like we do our drugs. See KLEIMAN, *supra* note 94, at xiii.

221. Decision No. C-221 at 50.

222. *Id.* at 53. Cigarettes are currently not classified as "drugs" in the United States. *Action on Smoking and Health v. Harris*, 655 F.2d 236 (D.C. Cir. 1980) (rejecting anti-smoking group's challenge to FDA's determination not to assert jurisdiction over cigarettes).

223. Decision No. C-221 at 53.

224. *Id.*

225. *Id.*

226. *Id.*

and other illegal drugs is misplaced. If anything, the problems associated with legal drugs diminish the strength of the legalization argument and instead support increased state regulation to diminish the social harms caused by these substances.

### G. *The Inexplicable Paradox*

The dissent ends with a discussion of what many have noted as the fundamental paradox in the majority's decision. The Court strikes down penalties for personal use, yet leaves intact all criminal penalties related to drug trafficking.<sup>227</sup> According to the dissent, the only way out of this contradiction is to legalize drug trafficking by "converting the drug mafia overnight into honest businessmen and exporters."<sup>228</sup>

The dissent also spoke - with much prescience - of the predicted rejection of the opinion by society in general, which would endanger the high esteem earned by the Court in its efforts to defend the juridical order, the fundamentals of the Social State of Law and the highest values of Colombian society.<sup>229</sup> The dissent expressed its hope that the legal parameters of regulation permitted by the majority would restore, in part, the norms declared unconstitutional by the majority.<sup>230</sup>

## VII. WAS THIS CASE CORRECTLY DECIDED?

The crucial questions are whether the majority's decision represents reasoned jurisprudence grounded in constitutional text, or whether it is a potentially dangerous anti-democratic step towards "raw judicial power" in a country desperately seeking to strengthen representative democracy. The primary focus in answering this question is institutional: Who should decide the issue of drug decriminalization under Colombia's constitutional scheme - the legislature or the courts?

### A. *The Argument from Social Contract Theory*

As a jurisprudential matter, one argument in favor of judicial deference to democratic, legislative decision-making is based in social contract theory as

227. *Id.* at 55.

228. *Id.* The Court will have to decide this issue as soon as a plaintiff challenges the drug trafficking portions of the 1986 statute. Whether drug trafficking becomes another constitutionally protected personality to develop remains to be seen.

229. *Id.*

230. *Id.* at 56.

developed in the Anglo-American tradition by Thomas Hobbes, John Locke and others. According to this view, a constitution is a sacred contract entered into by a people to form a government through means of a constituent assembly or constitutional convention. The specific and general intent<sup>231</sup> of the peoples' representatives in this assembly serves as a control or check on the power of the judiciary not to go beyond provisions of this contract. The role of the judiciary is limited largely to enforcing this contract by focusing on the intent of the constituents to decide constitutional cases.<sup>232</sup>

In the Colombian context, the contract-based argument suggests that the Court should have deferred to the legislature and upheld the statute in the absence of any specific or general intent within the Constituent Assembly to decriminalize personal drug use or clear constitutional language supporting decriminalization. Without such support, this case can be seen as a dramatic example of Colombian-style judicial activism weaving libertarian jurisprudence out of scant constitutional threads.

### 1. *The Argument from Ideological Intent: Teasing Libertarianism Out of a Non-Ideologic Body*

The Court supports its decision decriminalizing personal drug use by claiming that the philosophy governing the 1991 Constitution is libertarian and democratic in nature, not authoritarian or totalitarian.<sup>233</sup> Note, however, that the Court never consults the public record of the debates in the Constituent Assembly, academic writings or other support, and instead defers to philosophers such as Richard Rorty and John Rawls to defend its philosophical vision.

231. In terms of specific intent, a relevant question is: If the members of the Constituent Assembly wanted personal drug use decriminalized, why was it not done? The easy answer is that they were busy drafting a Constitution, not considering its specific application. In light of the public outcry over this decision and subsequent efforts by the government to establish limits on drug use and to reform the Constitution, one has to wonder that if the issue of the Constitution being used to decriminalize drug use had been raised in the Constituent Assembly, whether the right to criminalize drug use would have been specifically provided for. By including a ban on extradition, this issue was put beyond the Constitutional Court's purview.

232. This principle has a long heritage in the United States system of judicial review. For example, Joseph Story states that "[t]he first and fundamental rule in the interpretation of all instruments is to construe them according to the sense of the terms and the intention of the parties." JOSEPH STORY, L.L.D., COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 383 (1833).

More recently, Judges often base decisions on the language of a statute or on the intent of Congress. By so doing, they essentially rest the legitimacy of decisions on the will of the more majoritarian branches of the government, perhaps subconsciously expecting this co-optation of majoritarian legitimacy to speed the acceptance of judicial decisions. Michael D. Daneker, *Moral Reasoning and the Quest for Legitimacy*, 43 AM. U.L. REV. 49, 51-52 (1993).

233. Decision No. C-221 at 18.



While the Court is correct in praising the democratic nature of the Constitution and its rejection of authoritarianism and totalitarianism, social contract analysis seriously calls into question the Court's determination that the Constitution represents any specific political philosophy, much less the libertarianism as the *tierra firma* into which the Court sinks its constitutional pillars. This can be seen either in the composition of the Constituent Assembly or, more importantly, in the Constitution itself. Alternatively, if certain ideologies are discernible, the Court should not have used libertarianism and the radical autonomy of the individual as the basis for its decision.

As noted previously, the Constituent Assembly was convened for two main purposes: the search for peace caused by narcoterrorism and guerrilla violence, and the creation of a more participatory, democratic, and inclusive "social pact."<sup>234</sup> These two goals were achieved through pluralistic representation in the Constituent Assembly reflecting Colombia's diversity. Three major groups were represented: the traditional political parties, Liberal and Conservative; non-traditional groups, like M-19; and the significant presence of minority forces, such as Protestant evangelicals, indigenous peoples and ex-guerrillas.<sup>235</sup> Perhaps this is the first time in Colombian history the Constituent Assembly brought together people as diverse as members of the business and financial community, union leaders, Catholics, Protestant evangelicals, educators and leftist activists. The result of this pluralism was a pragmatic, non-ideologic constitution-making body devoted to the search for peace and the opening up of the political system.

Numerous commentators have noted the non-ideologic nature of the Constituent Assembly.<sup>236</sup> Dr. John Dugas of Colombia's University of Los Andes explains that the election of members of the Constituent Assembly divided the traditional powers ruling the country. Consequently, no single group could

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234. See *supra* text accompanying note 50.

235. See John Dugas, *El Desarrollo de la Asamblea Nacional Constituyente*, in LA CONSTITUCIÓN POLÍTICA DE 1991: UN PACTO POLÍTICO VIABLE?, *supra* note 30, at 46.

236. See Daniel Fernando Gómez Tamayo, Eduardo Mantilla Serrano, & Carlos Gerardo Mantilla G., *Anotaciones Críticas a la Carta del 91: Una Constitución Illegal pero Legitimada*, 82 UNIVERSITAS 298, 302 (1992) (arguing that Constitution lacked a systematic ideology due to the diverse elements represented in the Constituent Assembly); see also José Gregorio Hernández Galindo, *La Persona Humana y Sus Derechos en la Constitución de 1991*, 82 UNIVERSITAS 395, 398 (1992) (arguing the although the Constituent Assembly opened itself to ideological elements of diverse origins, no distinctive ideology emerged as the Constituent Assembly faced concrete situations); Hernando Valencia Villa, *Los Derechos Humanos en La Constitución de 1991*, in DUGAS, *supra* note 30, at 209 (arguing that diversity of rights represented in Constitution is a direct result of the process used to reform the Constitution, marked by the high level of distinct forces integrated into the 1991 Constituent Assembly and "notorious absence of a dominant ideology"); Hartzell, in LA CONSTITUCIÓN POLÍTICA DE 1991: UN PACTO POLÍTICO VIABLE?, *supra* note 37, at 77 (noting from the economic point of view that the Constitution contains no clear economic ideology, with the result that the Colombian economy is a hybrid or mix providing space for both state intervention and the private sector).

direct the agenda, control the debate, or determine the results of the Assembly.<sup>237</sup> Moreover, political groups in the Assembly, such as the Liberal Party, were fragmented and lacked internal cohesion, further weakening ideological univocality.<sup>238</sup> The end of the Cold War also contributed to a non-ideological nature by cooling rhetoric at the extremes, enabling the left to be more pragmatic concerning the use of public force and private property and enabling the right to be more moderate on social issues.<sup>239</sup> Consequently, the Constituent Assembly was marked by non-ideologic pragmatism, seriously calling into question the Court's determination that the Constitution somehow represents an assembly of libertarians par excellence. In the most general terms, the Constituent Assembly was not a deliberative body dominated by, inclined towards, or even less representative of libertarianism in the common sense of the term. Nor, most emphatically and crucially, is the Constitution a "libertarian" document.

## 2. *The Libertarian Gloss on a Non-Ideologic Constitution*

Textual analysis<sup>240</sup> of the Constitution demonstrates that its most central attribute and reigning principle is ideological pluralism, not libertarianism. Although most commentators have noted the general, non-ideological nature of the Constituent Assembly, this does not mean that certain social and cultural values were not written into the Constitution. A look at these values, however, reveals that the Constitution is more an ideogical stew than a one-ingredient libertarian soup. To be sure, a hint of libertarianism and the radical autonomy of the individual may be savored here and there, but they do not make up the whole broth. In essence, these assorted libertarian principles are either too weak or too vague to serve as adequate governing adjudicatory principles for the Court. Hence, the Constitution serves neither as a *tabula rasa* onto which judges can draft their personal philosophical predilections, nor as a libertarian document on which to protect and promote libertarian ideas such as the radical autonomy of the self.

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237. See Dugas, *supra* note 30, at 47. For example, in voting for the Constituent Assembly, the Liberal Party received 33.7%; M-19, 25.7%; and the Conservative Party a miniscule 6.8%.

238. *Id.*

239. *Id.* at 70.

240. In determining the meaning of a text, two suggested focuses are the intention of the drafters, and the text itself. Judge Gaviria rejects the first approach: "What the interpreter uses is not a series of opinions of the people who created the rules . . . it would be worthless to try to discover what each member of the Constituent Assembly would in regards to the Court's decision." Rather than focusing on the psychological intention of the authors, the interpreter should focus on the text itself. The role of the interpreter is to find "logical harmony" within the text, determining the spirit of the text without consulting the persons who wrote it. See Gaviria, *supra* note 5. Because I find both the intention of the drafters and the text relevant, I focus on each interpretative approach here.

Determining the governing principles of the Colombian Constitution is a difficult task due to the excessive number of articles and resulting repetition and contradiction between constitutional norms. Defining what is and is not constitutionally protected is exceedingly difficult with a constitution containing ample - and sometimes contradictory - fundamental rights.<sup>241</sup> Accordingly, one should be hesitant in criticizing the court for using vague and elastic portions of constitutional text to support general philosophical positions. Poor constitutional construction makes for poor constitutional law.<sup>242</sup> Nevertheless, vague constitutional clauses only offer judges more interpretative liberty; such liberty must be coupled with the desire to construe constitutional rights in an amplified form.

Numerous commentators have attempted to describe the reigning principles of the 1991 Constitution. For example, one commentator has described the 1991 Constitution as follows: a blend of the respect of the individual as a subject of rights before the state reflecting the influence of the American and French Revolutions; the social doctrine of the Church (balancing the autonomy of the individual and her social responsibility); the clear and definite precedence of the juridical order over political options; and the Latin predilection for presidential systems and vestiges of moderate socialism.<sup>243</sup> Notably absent from this analysis is any mention of, or even a tendency towards, libertarianism. Others have focused on aspects of the Constitution such as its secular inclination, as well as its institutional features such as endorsement of popular sovereignty, participatory democracy, decentralization, and other governmental changes.<sup>244</sup> In questions of governing ideology, however, many have noted that because the Constitution opened itself to ideological elements of diverse origins, ample uncertainty exists as to the application of these diverse values to concrete

241. See Hernández Galindo, *supra* note 236, at 396.

242. See Santos, *supra* note 28. Many have criticized Colombia's Constitution. Francisco Santos, although not a jurist, reflects well some of the more common complaints about Colombia's new Charter:

I wouldn't say that it's a well-written constitution and a well-thought constitution, and that's the main problem . . . [T]here is everything for everybody, and you don't rule a country like that. The law of the land gives you choices, gives you rights, gives you obligations and gives you a very small set of rules under which you live, work, and die. They didn't do this. It was a deterministic constitution, full of rights but no obligations.

*Id.*

243. Herdegen, *supra* note 56, at 8. This author has also suggested that respecting the autonomy of the individual (common to all constitutional liberal democracies) is not the equivalent of value-free libertarianism. Specially concerning the Colombian Constitution, this scholar has noted that "[f]rom the comparative perspective, the new constitutional statute forms part of a pluralistic order which proclaims the autonomous develop of individuality *without an indifference to values* (emphasis added)." Herdegen, *supra* note 78, at 13.

244. See Hernández Galindo, *supra* note 236, at 398.

situations.<sup>245</sup> Faced with the perplexing question of decriminalizing drug use, the Court appears to have opted for using a few hints of libertarian inclination as support for a governing principle of the constitution. Such univocality is impossible given the diverse ideologies represented in the Constitution. From the perspective of social contract theory, the majority appears to have misinterpreted - perhaps intentionally - both the intent of the Constituent Assembly and the Constitution itself, in its desire to move Colombia towards a more libertarian state.

### B. *The Argument from Democratic Theory*

Troubling as the majority's opinion is as an interpretative matter - treating the Constitution as a *tabula rasa* on which to impose their libertarian ideology - so is the danger that the opinion poses to the democratic process. Colombia is similar to other civil law countries in that judges traditionally have been extremely deferential to the other political branches. Only recently have Colombia's judges been granted broad powers of judicial review. As such, they must be careful to exercise institutional self-restraint, applying only those norms indicated, or clearly implied, by constitutional text and tradition. Judges who abuse their interpretative powers by deciding fundamental political or policy questions on the basis of moral or economic philosophies "discovered" from vague constitutional norms, are a threat to representative democracy.

The reason such judicial policy-making is especially pernicious is that judges, unlike other elected officials, are ordinarily immune from the check of the electoral process. In the United States, for example, the danger of an activist judiciary is especially acute, at least in the federal system, because federal judges are not popularly elected and ordinarily cannot be removed from office. The Colombian Constitution attempts to preserve liberties by providing that those deciding difficult and tendentious policies, such as legalizing drugs, are held directly accountable to the people through regular elections. Federal judges, by contrast, alone are given life tenure so as to shield them from being held accountable to the people.<sup>246</sup>

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245. *Id.*

246. *See, e.g.*, ROBERT BORK, *THE TEMPTING OF AMERICA*, at 5. The United States system of checks and balances limits the Supreme Court in other ways as well:

Under Article III of the United States Constitution, Congress can control the appellate jurisdiction of the Supreme Court (*see* the Reconstruction Laws), as well as the size of the Court. Under Article V, Congress can, in conjunction with the States, overthrow Court decisions by amending the Constitution. *See* U.S. CONST. amend. XVI which authorized the federal income tax. Congress can overturn specific Court rulings by explicit legislation. *See* the Civil Rights Restoration Act of 1988. Under Article II, the President can nominate, and the Senate can approve, strict constructionists for life-time terms, for example, William Rhenquist, 1970-

In Colombia, the danger of a long-term activist judiciary is lessened because Constitutional Court judges are appointed for eight year terms, not life, and cannot be re-elected.<sup>247</sup> As such, a truly activist judiciary would be relatively short-lasting, at least in comparison to the United States. Indeed, those in the United States who oppose judicial activism of either the conservative or liberal stripe might prefer a system like Colombia's with fixed term limits where time, not the electoral process, will "boot the bums out."<sup>248</sup>

Given this difference between the United States' legal system and that of Colombia's, the specific danger to the Colombian democratic process lies less in the accountability of the judges, whose terms are relatively short. Rather, the danger is the judicial hubris that judges, not elected officials, are especially enabled to discern the reigning principles that govern - or should govern - Colombian political life. It no doubt has come as a surprise to the thirty-five million Colombians that their principle values, at least according to the five person majority of the Court, resound in libertarianism, the radical autonomy of the self, and an almost paranoid suspicion of state power. Part of the answer to the harsh reaction to the case lies in the way the Court seems to speak a separate and exclusive cultural language from the people its decisions will affect. As others have noted, it is of vital importance that the judiciary "take care to speak and act in ways that allow people to accept its decisions on the terms (the judiciary) claims for them."<sup>249</sup>

This cultural gap between the people and the judiciary cannot be bridged as long as the Court insists that it, and not the Colombian people, should have the final say on what values should govern society. The problem of the judiciary's search for "fundamental values" has perhaps been best expressed by Dean John Hart Ely:

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present. The Court neither gives advisory opinions, nor does it seek out cases. Instead, it must wait for "cases and controversies" brought by plaintiffs who have "standing." Finally, the Court has to rely on the executive branch to enforce its rulings. See *Brown v. Board of Education*, 349 U.S. 294 (1955), for the "proceed with all deliberate speed" opinion.

Letter from Thomas L. Pahl, Ph.D., Instructor, Lakewood Community College, to Michael R. Pahl, Visiting Professor of Comparative Constitutional Law, Pontificia Universidad Javeriana, (Mar. 30, 1995) (on file with the *Indiana International and Comparative Law Review*).

247. Constitutional Article 239 establishes that justices of the Constitutional Court are nominated by the President, the Supreme Court of Justice, and the Council of the State, approved by the Senate and serve a single term of eight years. Constitutional Article 245 prohibits judges serving in other official capacities while on the bench and for one year after completion of service.

248. Political commentator and former Republican presidential candidate, Patrick Buchanan, for example, has advocated limiting the terms of service of the federal judiciary, parallel to current political movements seeking to limit congressional terms. *Look for Federal Term Limits to be Stronger*, THE SAN DIEGO UNION-TRIB., June 1, 1995, at B11.

249. *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2814 (1992) (O'Connor, Kennedy & Souter, J.J.).

[The problem with the] idea that society's "widely shared values" should give content to the (United States Constitution) is that the consensus is not reliably discoverable, at least not by the courts. [In] any event the comparative judgment is devastating: as between courts and legislatures, it is clear that the latter are better suited to reflect consensus. [We] may grant, until we are blue in the face, that legislatures aren't wholly democratic, but it isn't going to make courts more democratic than legislatures.<sup>250</sup>

The crucial problem is that if Colombia has turned over a new libertarian leaf, this is not readily discernible from constitutional text. If libertarianism is to be the new Colombian political reality, this is fundamentally a matter for the peoples' representatives, not the judiciary, to decide.

The danger posed to the democratic process by judges donning policy-making garbs rather than judicial robes is especially acute regarding drug policy, given that the Colombian Senate had recently reviewed Ley 30 de 1986 and discussed the progressive decriminalization of personal drug use. While decriminalization had little grass-roots support, the fact that the topic was undertaken by the Senate indicates that the political branches were functioning as they should in considering this difficult policy issue.

In June of 1993, a special congressional commission began studying some of the problems of narcotics trafficking.<sup>251</sup> The commission's conclusions regarding drug consumption are of particular interest. Many praised Ley 30 de 1986, considering it rich in possibilities and alternatives to confront drug dependence through treatment.<sup>252</sup> Moreover, many members of the commission expressed their support for a drug consumption law containing a caveat which provides for gradual depenalization when effective prevention programs have been put in place.<sup>253</sup> The balanced, incremental approach, favored by the congressional commission, evinces a laudable concern with a compelling practical problem: Is a developing country like Colombia able to provide adequate treatment and prevention programs to handle the probable increase in drug use and addiction inherent with drug decriminalization? This cautious approach is a far cry from the Court's immediate depenalization of all drugs. Indeed, the Court does not appear to express any acknowledgement of the possible societal effects of its decision, or the ability of problem-burdened Colombia to add increased drug addiction to its list of social headaches.

In a related matter, the members of the congressional commission specifically rejected the unilateral decriminalization of consumption. Rather, they

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250. ELY, *supra* note 93, at 63.

251. See *Informe y Conclusiones de la Comision Accidental para el Estudio del Problema del Narcotrafico*, in LA LEGALIZACION DE DROGA, *supra* note 60, at 313.

252. *Id.*

253. *Id.*

advocated that this difficult and tendentious topic be studied further, planting the seed for the policy debate both within and outside Latin America. The commission ended with the sanguinary comment that "in a short time the Congress will be an excellent and natural forum for debating this idea."<sup>254</sup>

The Court's decision proved them wrong, taking the decriminalization debate off the legislative agenda. Temporarily muzzled politically by the Court's decision, the Colombian people have been forced to seek two options outside normal legislative channels: constitutional reform and various time, place and manner restrictions on drug use alluded to by the Court majority. The first, a constitutional reform of Article 49 concerning the duty of the state to provide for the health of the citizenry, was introduced by the Minister of Justice and the Minister of Health in May of 1995. This legislative act would change Constitutional Article 49 so that the state can:

[r]estrict or prohibit the carrying or conserving of drugs for use or consumption, and establish sanctions, including criminal penalties, to preserve the public interest and protect the health, harmonic and integral development, and the full exercise of citizens' rights.<sup>255</sup>

The Ministers, perhaps acknowledging some of the concerns raised in the Court's decision, were careful to note that criminal sanctions should be used only in certain circumstances and ultimately as a last resort.<sup>256</sup> Moreover, any criminal sanctions passed pursuant to the Act should be flexible and reasonable, with due consideration given to other, non-penal methods.<sup>257</sup> Examples of the latter include fines, suspensions of drivers licenses, and rehabilitative methods.<sup>258</sup> This mini-decriminalization, however, must be matched by increased penalties for hard drugs, as opposed to soft drugs. Exceptions should also be established for therapeutic or cultural uses.<sup>259</sup> Echoing the concerns of the *salvamento*, the Ministers referred to drug policies in the United States and other Latin American countries to support the reasonableness of their proposal.

In part because the Ministers were advocating the reform of an amendment specifically concerning health, they emphasized that the problem of drug use is best confronted through prevention and education, not criminal law which dissuades, but does not ensure, the rehabilitation of the addict.<sup>260</sup> This balancing of criminal sanctions with treatment and rehabilitation is the precise type of policy

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254. *Id.* at 331.

255. Proyecto de Acto Legislativo *Por el cual se adiciona el artículo 49 de la Constitución Política de Colombia 1*. [hereinafter Legislative Act].

256. *Id.* at 1.

257. *Id.* at 2.

258. *Id.*

259. *Id.*

260. *Id.* at 4.

question best left to the political branches. They concluded by asking Congress to approve their proposed Act, which would reimpose criminal sanctions for drug consumption whose only end is to feed the coffers of the growing drug market. They hoped that doing so would preserve Colombia's image in the international arena.<sup>261</sup>

The second approach taken by the government concerns the Court's constitutional window regarding time, place and manner restrictions. On March 31, 1994, less than a month after the opinion was issued, former President Gaviria issued an Executive Decree concerning various dispositions in the legal codes concerning minors, the National Police and penitentiaries, for example, to establish limitations on the carrying and consumption of drugs.<sup>262</sup> Examples of reasonable time, place and manner restrictions enacted under this Executive Decree include forcing teachers to inform parents when students are suspected of using or dealing drugs<sup>263</sup> and prohibiting drug use in public places,<sup>264</sup> as well as in the nation's jails.<sup>265</sup>

The proposals and reactions undertaken by legislative and executive branches, however, do not stop here. A third approach goes directly to the heart of the Constitutional Court itself. A group of senators, supported by the government, recently introduced a bill in Congress to do away with simple majority decisions, requiring a two-thirds super-majority of six judges.<sup>266</sup> Personal drug use, of course, would not have been decriminalized under this heightened standard.

The stated purpose of this reform goes directly to the issue of judicial activism: to prevent the Court from "legislat(ing) and assum(ing) congressional functions."<sup>267</sup> To this end, the bill also would limit the Court to deciding the constitutionality of issues, "without establishing conditions or judicial rules of obligatory observance."<sup>268</sup>

This second, interpretive limitation derives, in part, from another controversial Court decision, holding that military officials in active service, subject to command influence, lack the necessary impartiality to administer military justice.<sup>269</sup> The Court suggested that retired military officials could serve in their place as judges in Court Martials. The Retired Military Officers

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261. *Id.* at 5.

262. Decreto Número 1108 de 1994 [hereinafter Executive Decree 1108].

263. *Id.* art. 11.

264. *Id.* art. 16.

265. *Id.* art. 27.

266. John Gutierrez, *Lista Reforma a la Corte Constitucional*, EL TIEMPO, April 28, 1995, at 14A; see also *Minjusticia Defiende Corte Constitucional*, EL TIEMPO, Apr. 29, 1995, at 10A (expressing support of the Minister of Justice, Néstor Humberto Martínez, for a supermajority vote to give more security and legitimacy to Constitutional Court opinions).

267. Gutierrez, *supra* note 266, at 14A.

268. *Id.*

269. *Los Magistrados Dejaron Afuera El Fuero Militar*, EL TIEMPO, Apr. 9, 1995, at 3B.



Association, however, rejected the Court's decision, stating that none of its members would serve as judges.<sup>270</sup> As a consequence, military justice was temporarily put on hold.

As with the decision to decriminalize drugs, Congress moved quickly to overturn the Court's decision regarding military courts through calls for constitutional reform.<sup>271</sup> Political fallout from the Court's activism includes bitterly divided Court decisions, followed by saber-rattling between the judicial and the political branches and proposed constitutional amendments. Others have gone even further, suggesting that the Constitutional Court be shut down entirely - hardly a propitious start for a four-year-old Court.

### VIII. CONCLUSION

"When you look at the opinion you realize, Jesus Christ! They really could become dictators . . . . [T]hat is what really worries me about this Court."<sup>272</sup>

The tough questions of drug policy cannot be easily reduced to mere slogans, such as the quasi-militaristic "War on Drugs", the simplistic "Just Say No", or the philosophically tempting, but societally irresponsible, "free development of the personality." Due to the complexity of the policy questions surrounding personal drug use, their resolution lies quintessentially in legislative action rather than judicial action.

Recent experience shows that those countries which have decriminalized personal drug use have generally done so through the elective process, not judicial fiat. Even those few countries or states which have legalized drug use through judicial decision have never done away with all restrictions on all drugs as the Court has done here.

A comparison with the decision of the German Constitutional Court is instructive. That opinion came down at roughly the same time as that of Colombia's and considered a constitutional article similar to the free development of the personality. However, the German court decriminalized only small quantities of marijuana and hashish, leaving all other criminal sanctions intact. That there was little outcry over the German court's decision, which reflects, in part, the generally accepted distinction between soft and hard drugs. The German court's legalization of a widely used and arguably harmless substance simply

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270. *Id.*

271. *Bloque de Apoya a Fuero Militar*, EL TIEMPO, May 4, 1995, at 6A (104 congressmen signed a proposal to amend the Constitution to permit officials in active military service to continue judging crimes in the system of Court Martial).

272. See Santos, *supra* note 28.

pales in comparison with the sweeping decriminalization undertaken by the Colombian Court.

Suffice it to say that the Court, in an act of extreme judicial overreaching, has enshrined a constitutional right to personal drug use premised on libertarian notions of radical individualism, a concept foreign to the Colombian civil society and the 1991 Constitution. The Colombian people have overwhelmingly rejected the Court's efforts to partake in the expanding rights revolution. The Court's refusal to exercise self-restraint in its constitutional role has even lead to calls for its abolition.

The Court's decision is insufficient as a jurisprudential matter and as sound drug policy. A more sensible drug policy, like one suggested by a commission of the Colombian Senate and most recently in the government's proposed reform of Constitutional Article 49, might have found ample room between the two policy extremes of what Professor Mark Kleiman has called "do what you like" and "go to jail." This search for legislative compromise through the democratic process, a middle ground acceptable to the Colombian people, has been muzzled by the Court's embrace of the non-compromising, exaggerated absoluteness and hyperindividualism of "rights talk." The Court's libertarian jurisprudence severely curtails the state's use of the criminal to protect its citizens' health and well being through laws penalizing pernicious drug use. This is all the more so because the Colombian Constitutional Court, unlike the United States Supreme Court, is empowered to consider the constitutionality of any law passed by Congress before the law takes effect.<sup>273</sup> Any restrictions regarding time, place and manner of drug use consequently fall within the Court's ambit. It is highly unlikely that the Court will approve any statute remotely resembling the statute declared unconstitutional. As such, the Court, at least in regards to personal drug use, will continue to sit less as a judicial body and more as a super-legislator.

This judicial power, and the inherent trumping of the democratic process through the placing of individual rights on the constitutional pedestal, is especially troubling in a country which sought in its 1991 Constitution to create democracy anew. Let this analysis serve as a clarion call to Colombia's Constitutional Court, which is designed to protect a broad array of constitutional rights and which may turn out to be - unexpectedly and unfortunately - Colombia's most dangerous branch of government.

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273. The U.S. Supreme Court does not issue so-called advisory opinions, due to the "case or controversy" requirement of U.S. Const. art. III.