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# Getting Away with Murder: Social Cleansing in Colombia and the Role of the United States

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# GETTING AWAY WITH MURDER: SOCIAL CLEANSING IN COLOMBIA AND THE ROLE OF THE UNITED STATES

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*Injustice anywhere is a threat to justice everywhere.*<sup>1</sup>

## I. INTRODUCTION

Homicide is the leading cause of death in Colombia.<sup>2</sup> An estimated 25,000 Colombians meet a violent death annually, making Colombia's murder rate the highest in the world.<sup>3</sup> Between 1987 and 1992, there were seventy-seven homicides per 100,000 people.<sup>4</sup> In addition, during the first half of 1995, 19,450 homicides<sup>5</sup> were reported within a population of thirty-

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1. Dr. Martin Luther King, Jr., 1963.

2. FREEDOM IN THE WORLD: THE ANNUAL SURVEY OF POLITICAL RIGHTS & CIVIL RIGHTS 1994-1995 195 (James Finn ed., 1995) [hereinafter FREEDOM IN THE WORLD].

3. LATIN AMERICAN REGIONAL REPORTS: ANDEAN GROUP REPORT, PROGRESS MADE, BUT NGOS NOT SATISFIED 2 (Apr. 13, 1995).

4. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1994, COLOMBIA 351 (Mar. 1995) [hereinafter 1994 COUNTRY REPORTS].

5. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1995, COLOMBIA, available from gopher://dosfan.lib.uic.edu:70/OF-1%3A23367%3AColumbia (page references unavailable in this medium) (Mar. 1996) [hereinafter 1995 COUNTRY REPORTS]. This number has increased by 8,274 homicides for the comparable period of time in 1994. See Annual Report of the Inter-American Comm'n on Human Rights 1994, OEA/ser.L/V/II.88, doc. 9 rev. 132 (1995).

six million.<sup>6</sup> The prevailing myth is that these deaths are primarily drug-related.<sup>7</sup> However, many of the killings are class-based, entirely unconnected to drugs. Between 1986 and 1993, 20,000 Colombians died as a result of extrajudicial executions by security forces, deaths in combat or "social cleansing."<sup>8</sup>

This Comment will focus on three aspects of the problem of social cleansing in Colombia:<sup>9</sup> (1) the Colombian National Police and military's "social cleansing" operations; (2) the uncertain role of the United States in providing future aid to Colombia to fight the War on Drugs;<sup>10</sup> and (3) the possibilities for ending

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6. U.S. CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK* 93 (1995).

7. Leslie Wirpsa, *Amnesty Report cites U.S. role in Colombia's political violence*, 30 NAT'L CATH. REP., Apr. 1, 1994, at 9 (citing AMNESTY INTERNATIONAL, *COLOMBIA: POLITICAL VIOLENCE — MYTH AND REALITY* (1994)).

8. Colombia Sec. of the Andean Comm'n of Jurists, *quoted in* 30 NAT'L CATH. REP., Apr. 1, 1994, at 9). The Center for Investigations and Popular Research (CINEP) reported 118 victims of social cleansing between January and June, 1995. 1995 COUNTRY REPORTS, *supra* note 5. Between January and October, 1994, there were 291 homicides, fifty-seven injuries, and twenty-two threats reported that CINEP considered part of social cleansing. 1994 COUNTRY REPORTS, *supra* note 4.

Social cleansing is a euphemistic term describing the murder of people considered "undesirable." One of the first works to thoroughly document Colombia's social cleansing is a joint report of the Colombia Human Rights Committee, Project Dignity for Human Rights in Colombia, and the International Gay and Lesbian Human Rights Commission (IGLHRC). It was written by a courageous Colombian exile and human rights attorney, Juan Pablo Ordoñez. See JUAN PABLO ORDOÑEZ, *NO HUMAN BEING IS DISPOSABLE: SOCIAL CLEANSING, HUMAN RIGHTS, AND SEXUAL ORIENTATION IN COLOMBIA* (1995) [hereinafter *NO HUMAN BEING IS DISPOSABLE*].

9. Social cleansing is not exclusive to Colombia. Violence throughout Latin America is relatively common; similar situations exist in Brazil and Guatemala. See generally *FREEDOM IN THE WORLD*, *supra* note 2. This Comment focuses only on violence in Colombia for several reasons: the relative lack of public awareness about the killings in Colombia, the influence of U.S. foreign policy there, and the zeal with which the United States has targeted Colombia in its War on Drugs. This last factor is particularly relevant, because Colombia's recent decertification by the U.S. marks the first time this action has been taken against any Latin American country. Yadira Ferrer, *Drugs-Colombia: Will Decertification Harm or Help Samper?*, INTER PRESS SERV., Mar. 5, 1996. See also *infra* note 10, 129.

10. The phrase "War on Drugs" was popularized by President Ronald Reagan in a 1982 speech in which he advocated aggressive supply-side efforts. See President's Radio Address to the Nation, 18 WEEKLY COMP. PRES. DOC. 1249 (Oct. 2, 1982).

On March 1, 1996, the U.S. decertified Colombia as an ally in the War on Drugs pursuant to the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (1986). Patti Lane, *Bullets for Santacruz: Chastised by the U.S. as a Bad Partner in the Drug War, Colombia Kills a Fugitive Trafficker Days Later*, TIME INT'L, Mar. 18, 1996, available in 1996 WL 8824959. Decertification means a cessation of "bilateral financial aid from Washington, with U.S. assistance restricted to the areas of human rights, police and legal support." Yadira Ferrer, *Colombia: Decertification is Vexation*, INTER PRESS SERV., Mar. 4, 1996. Decertification uses aid as leverage over foreign

U.S. complicity in the human rights violations through action in the American legislature and judiciary.

Social cleansing, or *limpieza social*, consists of "serial killings of people who have been economically pushed so far toward the fringes of misery that the more affluent members of society classify them as 'undesirable.'"<sup>11</sup> Social cleansing is an urban phenomenon where the victims belong to a marginalized socio-economic class and are perceived by the aggressors to be dangerous and unfit to participate in society.<sup>12</sup> The victims include indigents, street children, sexual minorities,<sup>13</sup> and sex workers.<sup>14</sup> The aggressors are often soldiers, the National Police, industrialists, guerrillas, or business owners looking to clean up their store fronts.<sup>15</sup> The aggressors justify their actions with concerns of "security, aesthetics, economic well-being, morals and religion."<sup>16</sup>

First, this Comment addresses social cleansing, a phenome-

governments to pressure them into "engaging in law enforcement measures such as crop eradication, law enforcement militarization, extradition of foreign nationals, and mutual legal assistance for prosecution." Sandi R. Murphy, Note, *Drug Diplomacy and the Supply-Side Strategy: A Survey of United States Practice*, 43 VAND. L. REV. 1259, 1263 (1990) (citation omitted). This move was probably a domestic political decision on the part of President Clinton, in an election year, to appease critical conservatives who question his commitment to hardline foreign policy, and Colombia will most probably be recertified in the future. In fact, decertification probably will not have a significant impact on social and economic conditions because there is "not even a semblance of a rule of law in Colombia. How can hell get worse?" Telephone Interview with Douglas Payne, Latin American Specialist, Freedom House (Mar. 19, 1996).

11. Leslie Wirpsa, *Deadly 'social cleansing' hits Latino poor: Police are Killing Kids In Columbia, Brazil*, 30 NAT'L CATH. REP., Dec. 17, 1993, at 12.

12. EL ESPECTADOR, June 20, 1992, quoted in CARLOS EDUARDO ROJAS R., LA VIOLENCIA LLAMADA LIMPIEZA SOCIAL 9 (1994).

13. For a thorough discussion of the concept of sexual minorities and the global human rights violations perpetrated against them, see JAMES D. WILETS, *THE HUMAN RIGHTS OF SEXUAL MINORITIES* (forthcoming Winter 1997) (using the term, "sexual minorities," to indicate that society oppresses those who are challenging traditionally defined gender roles, rather than those simply involved in same-sex relations).

14. "Sex worker" is a term preferred over "prostitute" as the latter is implicitly judgmental. See, e.g., Mary Jo Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1052 (1992) (referring to prostitutes as "sex workers").

15. NO HUMAN BEING IS DISPOSABLE, *supra* note 8, at 13. Because the focal point of this comment is on state participation, the military and National Police are the subjects of more intense scrutiny than are the other aggressors.

16. *Id.*

non distinct from ethnic cleansing. The latter refers to exterminating a group based on its ethnic identity — Bosnia being one recent example — while social cleansing is generally defined as class-based killing with little regard to religion or the color of a victim's skin.<sup>17</sup> Moreover, social cleansing is distinguished from the purely political killing,<sup>18</sup> designed to eradicate any opponents of the government, in that the former is geared toward individuals and groups who pose no real threat to the government; the "undesirables" simply do not have the power or the resources to pose such a threat. Those who carry out the murders, however, view all of their victims as threats to the government. Thus, "undesirables" are seen as threats to the social order.

Next, this Comment exposes four factors which contribute to the existence and perpetuation of this problem. The first two are structural and ideological elements endemic to Colombia. The structural consideration involves the way in which the Colombian Constitution gives an excessive amount of power to the Executive.<sup>19</sup> The second internal component is Colombia's wholehearted embrace of capitalism, a political ideology which blames the poor for their own poverty. The impact of Colombia's political and cultural traditions on human rights are aggravated by external political and economic pressures from the United States.

These political and economic factors within the U.S. are the third and fourth reasons why social cleansing remains a fixture on the Colombian landscape. The political pressures arise from the U.S. interest in fighting the War on Drugs, and the economic impact stems from investment interests, including oil, coffee and flowers.

This Comment will analyze U.S. complicity in supporting social cleansing in Colombia and argue that American funding

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17. "Forced disappearances" are also common. For a discussion of this phenomenon, see generally H.M. Kleinman, *Disappearances in Latin America: a Human Rights Perspective*, 19 N.Y.U. J. INT'L L. & POL. 1033 (1987).

18. Victims of political killings include human rights monitors, journalists, peasant organizers, and union supporters. For a thorough discussion of politically-motivated killings with an emphasis on documenting specific cases, see AMERICAS WATCH, POLITICAL MURDER AND REFORM IN COLOMBIA: THE VIOLENCE CONTINUES, AN AMERICAS WATCH REPORT (1992).

19. See *infra* part III.C.

has violated, and is likely to continue to violate, several U.S. laws<sup>20</sup> that prohibit giving or loaning funds to countries engaging in "a consistent pattern of gross human rights violations."<sup>21</sup> Furthermore, a substantial amount of taxpayers' money supports the U.S. government's activity.

Finally, this Comment will focus on potential legal remedies for U.S. complicity in both the U.S. Congress and courts.<sup>22</sup> One alternative is to lobby for passage of several proposed statutes, as well as a push for compliance with the statutes that the current policy violates. Additionally, this Comment will address the issue of whether one could satisfy the difficult standing requirement to contest the violations in an American court: and whether the courts would likely consider it an "act of state," the foreign relations counterpart to the "political question" doctrine.<sup>23</sup>

Social cleansing in Colombia in some respects parallels U.S. domestic policies, particularly with regard to our own internal War on Drugs and our dealings with indigents, drug addicts, racial and sexual minorities, and sex workers as "throw-aways."<sup>24</sup> This Comment will argue that, in fact, the U.S. is

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20. *E.g.*, Foreign Assistance Act of 1973, reprinted in 22 U.S.C. §§ 2151, 262d; § 502B of the Foreign Assistance Act of 1961 (as amended 22 U.S.C. § 2304).

21. 22 U.S.C. §§ 262d(a), 2304(a)(2).

22. A comprehensive analysis of available remedies in the international fora is outside the scope of this Comment. The author will not address the possible remedies the United Nations (U.N.), the Organization of American States (OAS), and the Inter-American Commission on Human Rights (IACHR) provide in response to reports of governmental human rights violations. For a thorough discussion of the role of the U.N., see Louis B. Sohn, *Human Rights: Their Implementation and Supervision by the United Nations*, in HUMAN RIGHTS IN INTERNATIONAL LAW 369-401 (Theodore Meron ed., 1984); *The UN Commission on Human Rights: 50th Session*, 52 INT'L COMM'N JURISTS REV. 72 (1994). For a discussion of the functions of the OAS and the IACHR, see J. Lauchlan Wash et al., *The Inter-American Human Rights System: Into the 1990s and Beyond*, 3 AM. U. J. INT'L L. & POLY 517 (1988); Thomas Buergenthal, *The Inter-American System for the Protection of Human Rights*, in HUMAN RIGHTS IN INTERNATIONAL LAW 439-93 (Theodore Meron ed., 1984).

23. *See, e.g.*, *Agapita Trajano v. Marcos*, No. 86-0207, slip op. (D. Haw. July 18, 1986) (holding that judicial review of the actions of a foreign sovereign committed under color of state law are non-justiciable under the "act of state" doctrine).

24. The documentation of these problems in the United States has been as poor as that of foreign atrocities. The Kerner National Advisory Commission on Civil Disorders has criticized the media's coverage of racial problems in the U.S.: "[t]he media report and write from the standpoint of a white man's world . . . [It] reflects the biases, the paternalism, the indifference of white America." REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968), cited in John C. Bolger, *Race and the American City: The Kerner Commission in Retrospect — An Introduc-*

struggling with its own drug problem by funding a war on drugs whose barbaric methods - if carried out on U.S. soil - would certainly violate its avowed commitment to civil rights. In effect, the U.S. is trying to resolve its internal conflicts surrounding class and drugs while exacerbating the same or similar conflicts abroad. United States citizens have a vested interest in protecting against rampant human rights violations in Colombia. To the degree that our values are reflected in our foreign policy, we are revealing a dubious commitment to civil rights with our tacit support of the human rights violations in Colombia.

## II. CONFLICT: THE HUNTED

An average of five people daily fall victim to social cleansing,<sup>25</sup> targeting socially undesirable<sup>26</sup> individuals.<sup>27</sup> The common characteristic among those seen as disposable is poverty. Currently, forty-six percent of Colombia's population lives below the poverty line,<sup>28</sup> and an estimated twelve million people live in a state of critical poverty.<sup>29</sup> This is over three times the poverty rate in the United States.<sup>30</sup> The Colombian government

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tion, 71 N.C. L. REV. 1289, 1349 n.58 (1993).

25. LATIN AMERICAN REGIONAL REPORTS: ANDEAN GROUP REPORT, *supra* note 3, at 2.

26. See generally ROJAS, *supra* note 12.

27. Juan Pablo Ordoñez points out that not all victims of social cleansing are considered per se "disposable"; there is evidence that Jews, ethnic minorities, and criminals who do not live on the street are victims of social cleansing. NO HUMAN BEING IS DISPOSABLE, *supra* note 8, at 15.

28. Steven Ambrus, *Colombian Candidates Fail to Inspire Voters*, L.A. TIMES, May 28, 1994, at A18. For information about poverty in Colombia, see THE WORLD BANK, POVERTY IN COLOMBIA (1994). The report reveals that several poverty lines are used in the incidence analysis due to the arbitrary nature of defining a poverty line. The Departamento Administrativo Nacional de Estadística (DANE) determines the "indigence line," indicating the incidence of poverty by compiling the numbers of people who make an average of fifty percent of the average monthly per capita income in rural areas, and an average of twenty-five percent in urban areas (because the rural poor are poorer than the urban poor). DANE calculates the poverty line by doubling the indigence line in rural areas and taking 2.3 times that in urban areas. *Id.* at 2 nn.1-2.

29. Consejo Gremial Nacional, *Hacia una Política de Desarrollo Colombiano* at 35, *quoted in* NO HUMAN BEING IS DISPOSABLE, *supra* note 8, at 12.

30. The United States' poverty rate was 14.2% in 1991. NUMBER IN POVERTY HITS 20-YEAR HIGH AS RECESSION ADDS 2 MILLION MORE POOR, ANALYSIS FINDS 4, CENTER ON BUDGET & BUDGET POLICY PRIORITIES (1992), *cited in* John C. Boger, *Race and the American City: The Kerner Commission in Retrospect — An Introduction*, 71 N.C. L. REV. 1289, 1315 (1993).

and upper classes view the poor as "surplus."<sup>31</sup> Rather than trying to deal with systemic problems, the existing structure blames the poor for their poverty.<sup>32</sup> Therefore, social class is the operative factor in deeming individuals undesirable.

### A. *Children Living in Poverty*

In Colombia, indigent street children are a primary target of the social cleansing operations; one child is murdered every four hours.<sup>33</sup> In Bogotá alone, there are over 4,000 homeless children over fifteen years of age and 3,500 under fourteen.<sup>34</sup> Leslie Wirpsa, who has written extensively on the subject of human rights abuses in Colombia, states that in 1993 alone, according to data supplied by the Colombian government, 2,190 street children were murdered, many of whom were killed by agents of the state.<sup>35</sup> Only twelve of these killings have come to trial.<sup>36</sup>

The only justification for these killings offered by the National Police is the assumption that all street children are involved in drug trafficking<sup>37</sup> and therefore pose a significant threat to society. While many are recruited by drug dealers,<sup>38</sup>

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31. Paul Jeffrey, *Social Cleansing in Colombia*, CHRISTIAN CENTURY, Apr. 12, 1995, at 380.

32. ROJAS, *supra* note 12, at 34.

33. "With perhaps greater frequency, children who have been arrested are beaten, raped, given electric shocks and tortured, primarily by members of the police force, an institution that receives \$20 million in U.S. security aid annually." Leslie Wirpsa, *Children Risk Violent Deaths in Colombia*, NAT'L CATH. REP., Jan. 13, 1995, at 6 [hereinafter *Children Risk Violent Deaths*].

34. Ken Dermota, "Social Cleansing" Targets Street Children, CHRISTIAN SCI. MONITOR, Jan. 6, 1994, at 14.

35. *Children Risk Violent Deaths*, *supra* note 33.

36. Tim Ross, *Colombia Assailed Over Street Kids' Plight*, MIAMI HERALD, Dec. 5, 1994, at A10 (citing AMERICAS WATCH, GENERATION UNDER FIRE (1995) ("to be a poor child, a runaway, a child prostitute, or a child in a war zone in Colombia is to live with the threat of murder in daily intimacy.")).

37. Many Colombian youths are indeed involved in gangs and militias, which has led to the erroneous perception that all children are criminals. *Children Risk Violent Deaths*, *supra* note 33 (quoting AMERICAS WATCH, GENERATION UNDER FIRE (1995)). Children are also involved in the drug trade in the United States. Children are seen as the perfect drug dealers because they are not suspected, are loyal and almost immune from the law. Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1782 (1992) (citations omitted).

38. Ross, *supra* note 36.

the reality is that most street children are suspected of delinquency because they are poor and must engage in petty shoplifting to subsist. "The Colombian Institute of Family Welfare reported that 31,818 minors had been abandoned or were in danger in 1992."<sup>39</sup>

Ironically, law enforcement officials are likely the greatest threat to Colombian youth. For example, investigations of the 1992 massacre of eight children, some of whom were activists who had protested National Police abuses, have implicated the U.S. trained F-2 National Police intelligence squad and the judicial police.<sup>40</sup> The Colombian government has been forced to reform the National Police through stricter internal disciplinary measures following a 1993 incident involving a nine-year-old girl who was raped and strangled in a National Police detention room.<sup>41</sup>

### *B. Sexual Minorities Living in Poverty*

Sexual minorities are another group impacted by social cleansing operations. Sexual minorities "[include] all individuals who have traditionally been distinguished by societies because of their sexual orientation, inclination, behavior, or nonconformity with gender roles or identity."<sup>42</sup> Colombia legalized homosexuality in 1980.<sup>43</sup> There is a sizable gay community,<sup>44</sup> mostly concentrated in the big cities,<sup>45</sup> but discrimination against sexual minorities is nevertheless rampant.<sup>46</sup>

39. NO HUMAN BEING IS DISPOSABLE, *supra* note 8, at 17 n.19 (quoting EL TIEMPO (Oct. 1993)).

40. *Children Risk Violent Deaths*, *supra* note 33.

41. NO HUMAN BEING IS DISPOSABLE, *supra* note 8, at 18 ("The reforms have been completely ineffective, and the police continue to be the principal violators of human rights.").

42. WILETS, *supra* note 13, at 2.

43. Prior to the enactment of Decree 100 in 1980, the Criminal Code of 1936 punished homosexuality. See NO HUMAN BEING IS DISPOSABLE, *supra* note 8, at 16.

44. In 1994, Ordoñez founded the Colombia Association of Gays and Lesbians, whose 120 members remain anonymous. Jennifer McKim, *Vigilante Slayings of Colombian Gays Alleged*, BOSTON GLOBE, Mar. 15, 1995, at 8. In an interview, Ordoñez remarked, "[t]hey are afraid of losing their jobs, they would be thrown out of their homes." *Id.*

45. Bogotá has sixty establishments serving "an exclusively gay clientele," and there are at least three gay establishments in most of the medium-sized cities. NO HUMAN BEING IS DISPOSABLE, *supra* note 8, at 59.

46. *Id.* (documenting the harassment gays face when members of the police and

"While homosexuality is not outlawed in Colombia, gays are among the *desechables* (disposables) routinely assassinated by off-duty military officers . . . [Other] social outcasts [are killed, but] special ire is reserved for homosexuals, who are tortured and raped and whose bodies are dismembered in particularly gruesome ways."<sup>47</sup>

It is estimated that at least three individuals who admit to being sexual minorities are killed each week in Colombia's poor neighborhoods.<sup>48</sup> Juan Pablo Ordoñez points out that any number estimating gay murder victims is underrepresentative:

[D]eath certificates . . . of murdered men list them as homosexuals only if they were dressed in women's clothing at the time they were killed. All government and non-governmental statistics of homosexual murders are based on these identifications. However, transvestites are a minority within the homosexual community, and many homosexuals whose rights are violated are not transvestites. Thus, the statistics are far from realistic and many human rights violations against homosexuals go unnoticed.<sup>49</sup>

### C. Other Victims

Statistics show that from 1988 to 1993, thirty-five percent of social cleansing victims were criminals and 21.3% were drug addicts.<sup>50</sup> Arguably, these groups are hardest hit by social cleansing in that the numbers of victims are so large. Particularly distressing is the fact that the advocates of these victims fear that their outrage will be seen as condoning criminal conduct.<sup>51</sup>

Sex workers are also perceived as not fit to participate in

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army raid bars and extort money from people discovered to be gay).

47. Robert Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Integration*, 29 HARV. C.R.-C.L. L. REV. 439 (1994) (citation omitted).

48. McKim, *supra* note 44, at 8. A Colombian human rights group called Grupo de Ambiente estimated that 328 gay men were murdered by death squads from 1986-1990. See WILETS, *supra* note 13, at 81 n.256.

49. NO HUMAN BEING IS DISPOSABLE, *supra* note 8, at 16.

50. ROJAS, *supra* note 12, at 27 (these groups often overlap and it is thus difficult to refer to them separately).

51. NO HUMAN BEING IS DISPOSABLE, *supra* note 8, at 20.

society.<sup>52</sup> The act of prostitution is legal, but soliciting it is illegal, as are brothels.<sup>53</sup> There is a large number of female sex workers,<sup>54</sup> 36.3% of whom are induced into prostitution because of a lack of income.<sup>55</sup> There is also a large population of male sex workers who are often harassed by the authorities.<sup>56</sup> The National Police often demand a "tax" from them where failure to pay results in beatings or imprisonment.<sup>57</sup>

Another group targeted by social cleansing operations is the *recicladores*, or recyclers. They pick through the trash looking for reusable items as their chief source of income. They are frequently killed and their bodies are sold to the local University for use in the medical school.<sup>58</sup> In 1994, National Police intentionally set ablaze three indigent people who were sleeping in cars. One of the victims stated that the police officers laughed as the victims burned.<sup>59</sup>

### III. BACKGROUND: THE HUNTERS

Liberal and Conservative parties currently dominate the political scene in Colombia.<sup>60</sup> In 1994, Colombian voters elected Liberal Party candidate Ernesto Samper Pizano to serve as President until 1998.<sup>61</sup> Samper has issued several state-

52. ROJAS, *supra* note 12, at 25.

53. NO HUMAN BEING IS DISPOSABLE, *supra* note 8, at 24.

54. The most recent study, conducted in 1991 by the Chamber of Commerce of Bogotá, reported 14,211 sex workers in the city of Bogotá. *Id.* at 25.

55. Lack of skills training was the second most common reason (27.4%), followed by domestic violence (22.3%), unemployment (10.2%), and other reasons (3.8%). On the whole, 73.8% of prostitution is induced by economic factors. *Id.*

56. *Id.* at 26.

57. *Id.*

58. *Id.* at 23 (finding that the National Police were reportedly receiving U.S. \$150 per corpse).

59. *Id.*

60. These two parties are distinguished from the liberal and conservative political ideologies as they are known in the United States. In Colombia, the chief distinction is in the parties' view of the role of the clergy in the political arena. Liberals, who tend to favor a more federalist government, see the clergy as an impediment to progress. Conservatives, who tend to favor a centralist government, see the church as a unifying force which can keep society from unravelling. See David Bushnell, *Politics and Violence in Nineteenth Century Colombia*, in *VIOLENCE IN COLOMBIA: THE CONTEMPORARY CRISIS IN HISTORICAL PERSPECTIVE* 24-29 (Charles Bernquist et al. eds., 1992).

61. Second Report on the Situation of Human Rights in Colombia, Inter-American Commission on Human Rights, OEA/ser. L./V./2.88, doc. 9 rev. (1995). Samper

ments<sup>62</sup> saying that he hopes to improve the human rights situation in Colombia.<sup>63</sup> However, his objectives have failed to significantly improve conditions in Colombia,<sup>64</sup> partly because his government has not allocated the necessary funds to combat the problem.<sup>65</sup>

The Colombian government is a constitutional democracy, but because of the executive's power to give the military complete control through the "state of siege,"<sup>66</sup> Colombia can more accurately be characterized as a country ruled by executive fiat.<sup>67</sup> Colombia is commonly referred to as a "democracy without people,"<sup>68</sup> and has also been termed a "democratorship"<sup>69</sup>

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was elected amid allegations, which persist, that drug money financed his campaign. See, e.g., *Claim that Samper Campaign Got Cartel Money Verified*, MIAMI HERALD, Nov. 10, 1995, at A27.

62. In an unprecedented admission, Samper made public and took responsibility for the Trujillo massacre detailed in the 1995 Inter-American Human Rights Commission report (in which government actors murdered 100 peasants) and other Colombian human rights violations. Annual Report of the Inter-American Comm'n on Human Rights 1994, *supra* note 5, at 139.

63. Samper has reportedly established a program to educate Colombia's military about human rights abuses and how to avoid them. However, Jose Miguel DeVanco, head of Human Rights Watch Americas says that nobody has really put into practice any effective measures to stop the violence, and urges the United States to exert its influence through diplomatic channels. *All Things Considered: Human Rights Advocate Urges U.S. to Use More Leverage*, Interview with Jose Miguel DeVanco, Director, Human Rights Watch Americas (National Public Radio broadcast, Dec. 11, 1994), Transcript No. 1692-2 [hereinafter *All Things Considered*].

64. 1994 COUNTRY REPORTS, *supra* note 4, at 351.

65. To use Cali as an example, Francisco Murgueito, the city's high commissioner for peace, notes that Cali's budget for combatting social cleansing is a mere \$500,000. Howard LaFranchi, *A Drug World Capital Struggles to Get a Life*, CHRISTIAN SCI. MONITOR, Mar. 9, 1995, at 6. See also Norman Kempster, *Rights Panel Demands Colombia Prosecute its Soldiers, Sources Say*, L.A. TIMES, Feb. 9, 1995, at A6.

66. For a discussion of the state of siege provisions and the resulting sacrifice of human rights, see *infra* text accompanying notes 120-129.

67. Mark A. Sherman, *United States International Drug Control Policy, Extradition, and the Rule of Law in Colombia*, 15 NOVA L. REV. 661, 686 (1991).

68. JENNY PEARCE, COLOMBIA: INSIDE THE LABYRINTH 206-7 (1990) ("Marginalised economically and politically, the state has reserved for the majority the 'state of siege' and all the exceptional repressive legislation and procedures that can guarantee order where other mechanisms fail."); Noam Chomsky, *Introduction, in NO HUMAN BEING IS DISPOSABLE*, *supra* note 8 (noting that the Latin American Bureau in Britain once described Colombia as a "democracy without people").

69. Chomsky, *supra* note 68, at xv (using the term "democratorship," which was coined by Eduardo Galeano for Colombia).

because of the government's use of violence<sup>70</sup> to maintain social order given the large gap between the rich and the poor.<sup>71</sup> These structural elements of Colombian society maintains the social cleansing operations.

### A. *The Development of Violence*

Colombia's history has been characterized by frequent periods of political violence.<sup>72</sup> In fact, a thirteen-year period of Colombia's history is known as *La Violencia* (The Violence).<sup>73</sup> The original conflict stemmed from a civil war between the Liberals and Conservatives which plagued Colombia since the nineteenth century.<sup>74</sup> While some of today's violence stems from guerilla groups, much of the current political conflict is still between the Liberals and Conservatives.<sup>75</sup> What started as a battle to establish the political power of the parties developed into full-fledged class-based warfare.<sup>76</sup>

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70. This violence includes killing, torture, harassment and "disappearing."

71. See Ramon Isberto, *New Democracies Can't Cope with Rise of Violence*, INTER PRESS SERV., Dec. 9, 1991 (quoting Eric Sottas, a Swiss national who heads the World Organization Against Torture). There is a "double state" in the new democracies. "Real power is in the hands of private groups who use paramilitary groups to protect their privileged status." *Id.*

72. See generally PEARCE, *supra* note 68, at 49-66; VIOLENCE IN COLOMBIA, *supra* note 60. The problem of violence is one that faces Latin America as a whole. Influence from the U.S., French, and German cultures has had a negative impact on the treatment of human rights in Latin America. One theory is that France, during the Algerian War of Independence, informed the Latin American cultures of rigid, simplistic distinctions between "good and evil, friend and foe, and of the methods of total elimination which were employed." Francisco Orrego Vicuña, *Domestic Policies and External Influences on the Human Rights Debate in Latin America*, in FOREIGN POLICY AND HUMAN RIGHTS: ISSUES AND RESPONSES 105, 107 (R.J. Vincent ed., 1986).

73. This period occurred between 1948-1965. PEARCE, *supra* note 68, at 49-66.

74. *Id.* at 51.

75. KEVIN JACK RILEY, THE IMPLICATIONS OF COLOMBIAN DRUG INDUSTRY AND DEATH SQUAD POLITICAL VIOLENCE FOR U.S. COUNTERNARCOTICS POLICY 7 (A Rand Note) (1993) (a document prepared for the Under Secretary of Defense for Policy).

76. Much of the continuing violence since the 1930s is a "by-product of the repeated and generally frustrated attempts by the country's marginalised sectors and emerging social forces to gain a greater share of Colombia's abundant wealth." LAWRENCE BOUDON, GUERRILLAS AND THE STATE: THE ROLE OF THE STATE IN THE COLOMBIAN PEACE PROCESS 4 (1995) (unpublished manuscript submitted to Journal of Latin American Studies) (on file with author).

Social cleansing as a manifestation of the class-based warfare began on December 5, 1979, in the city of Periera,<sup>77</sup> and has since expanded throughout the entire country<sup>78</sup> with frequent incidents in the major cities of Bogotá, Cali, Medellín and Barranquilla.<sup>79</sup> Conceived by the city's Office of Security as a means to combat increasing activity of thieves, the original method was to mark the thief's face and hands with indelible red ink.<sup>80</sup> This practice ended on January 13, 1980, when one victim was hospitalized after trying to remove the ink with acid.<sup>81</sup>

In November, 1979, bodies of assassinated victims began to appear with their hands tied behind their backs and bullets in their heads.<sup>82</sup> A preferred method of assassination in Medellín is "the ride," whereby the death squads make the victim board a vehicle, kill him, and then leave the body in an unpopulated area.<sup>83</sup> Those ritualized killings spread from the major cities to the rural areas and began targeting a wider range of groups.<sup>84</sup> The Colombian press began to publish reports that "death squads"<sup>85</sup> were carrying out these atrocities to rid the country of undesirables.<sup>86</sup>

The means used to identify undesirables is by appearance. Dirty people with matted hair and bad teeth are assumed to be delinquents.<sup>87</sup> Men dressed in drag are killed because it is assumed they are homosexual.<sup>88</sup> The aggressors' stated intentions are to provide security to the citizenry and to discipline, displace, and confine delinquents.<sup>89</sup>

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77. ROJAS, *supra* note 12, at 15.

78. *Id.* at 14.

79. Telephone Interview with Juan Pablo Ordoñez, Esq., Founder and Executive Director, Project Dignity for Human Rights (Oct. 6, 1995).

80. ROJAS, *supra* note 12, at 16.

81. *Id.*

82. *Id.* at 15.

83. *Id.* at 16.

84. *Id.* at 23.

85. The number of death squads in 1992 was estimated at 140. RILEY, *supra* note 75, at 2 n.2.

86. ROJAS, *supra* note 12, at 16.

87. *Id.* at 33.

88. *Id.* Sexual minorities, including sex workers, it is said, began to be targets in collective actions when they got caught in a crossfire aimed at drug traffickers.

89. *Id.* at 57-58.

### B. The 1991 Constitutional Reforms

The 1991 Constitution<sup>90</sup> was created to strengthen democracy and the rule of law in a country experiencing widespread political violence.<sup>91</sup> It attempted to accomplish this goal in three ways.<sup>92</sup> First, it permitted the existence of a wider range of political parties<sup>93</sup> and assured all citizens the right to vote.<sup>94</sup> Second, there was movement toward equalizing the division of powers between the three branches of government by granting greater powers to the legislative and judicial branches to compensate for the previously dominant executive branch.<sup>95</sup> Third, it established a human rights agenda and the formation of organizations to safeguard these rights.<sup>96</sup>

The Constitution provides for many protections not included in most constitutions of the Western world.<sup>97</sup> Were the document adhered to, Colombian society could be a bastion of freedom and liberty for its inhabitants. Human rights concerns<sup>98</sup> apparently were of paramount importance in drafting the document.<sup>99</sup> The Constitution created several new causes of action allowing citizens to challenge arbitrary governmental actions. One such challenge is the controversial *tutela*,<sup>100</sup> which is a temporary measure to prevent irreparable harm. It provides for the immediate protection of one's "fundamental constitutional rights" by entering an injunction against "individuals entrusted with providing a public service or whose conduct may affect seriously and directly the collective interest or in respect of

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90. CONSTITUCIÓN POLÍTICA DE COLOMBIA [COLOMBIAN CONSTITUTION] (enacted Feb. 5, 1991) [COLOM. CONST.].

91. Donald T. Fox & Anne Stetson, *The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia*, 24 CASE W. RES. J. INT'L L. 139 (1992).

92. See generally *id.* (enumerating the several causes of action added by the new Colombian Constitution and considering the human rights provisions and methods for their implementation).

93. COLOM. CONST. art. 40, cl. 3.

94. *Id.* art. 40.

95. Fox & Stetson, *supra* note 91, at 139.

96. *Id.*

97. Jayni Edelstein, *Colombia: Impact of the New Constitution*, 47 INT'L COMM'N JURISTS REV. 4 (1991).

98. One can find these provisions primarily in COLOM. CONST. tits. 1, 2.

99. Fox & Stetson, *supra* note 91, at 154.

100. COLOM. CONST. art. 86.

whom the applicant may find himself/herself in a state of subordination or vulnerability."<sup>101</sup> While this new measure has been partially effective<sup>102</sup> in protecting rights to adequate health care, equal protection, due process, and equal opportunity in the workplace, social cleansing circumvents the *tutela* by denying its victims the opportunity to vindicate their constitutionally-guaranteed rights.

Because one-third of the Constitution's provisions will require legislative enactments to take effect, support of these measures by the Colombian Congress is vital<sup>103</sup> or the human rights guarantees become empty promises.<sup>104</sup> To address this concern, the Constitution creates a mechanism to effectuate the changes in human rights policies; the *Defensor del Pueblo* (Defender of the People)<sup>105</sup> under the Public Ministry. This office, independent of the executive, is charged with protecting human rights by representing the people alleging governmental violations. Ideally, the new Constitution's positive changes would result in increased accountability and a greater awareness of the importance of respecting human rights. Nevertheless, problems still remain.

### C. Impunity

The new Constitution failed to make some fundamental, structural changes. Perhaps the most flagrant is the broadening of the military's functions, effectively increasing the already rampant impunity with which violations are committed by arms of the government.<sup>106</sup> A complaint frequently voiced against the

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101. *Id.*

102. Of the 2500 actions for *tutela* brought by private citizens in the first four months of 1992, 209 were decided in favor of the complainant. Fox & Stetson, *supra* note 91, at 160 (citing roundtable discussion with Manuel José Cepeda, Presidential Advisor for the Development of the Constitution, Republic of Colombia, at Columbia University Institute of Latin American and Iberian Studies (May 11, 1992)).

103. See Fox & Stetson, *supra* note 91, at 140.

104. Edelstein, *supra* note 97, at 5.

105. COLOM. CONST. arts. 281-84. It is similar to the ombudsman in European countries. See Edelstein, *supra* note 97.

106. Limitations on the military's power were proposed in the new constitution, but were successfully lobbied against by the military. Fox & Stetson, *supra* note 91, at 162.

Constitution is that it lets the military courts try members of the armed forces for human rights violations.<sup>107</sup> Furthermore, the office of the Attorney General has excepted from the crimes it must investigate any crimes committed by members of the public force in the course of their service.<sup>108</sup> This perpetuates the problematic secret trials and, in effect, "constitutionally enshrines impunity."<sup>109</sup>

No matter how one defines and describes "the state,"<sup>110</sup> it is apparent that the Colombian government is engaged in promoting social cleansing. Narcotics traffickers and paramilitary groups violate human rights along with, and often sanctioned by, official forces.<sup>111</sup> In 1992, seventy-four percent of the 4,300 murders were attributed to the National Police, armed forces and their paramilitary clients.<sup>112</sup>

These groups are rarely held accountable; ninety-seven percent of crimes go unpunished.<sup>113</sup> Since there is no effective system of punishment or deterrence, the majority of crimes are carried out with impunity.<sup>114</sup> The Colombian judicial system frequently assists in covering up many of these atrocities.<sup>115</sup>

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107. COLOM. CONST. art. 221 provides, "[r]egarding the crimes committed by the members of the public force in active service, and in connection with the same service, they will appear before military courts or military tribunals, in accordance with the provisions of the Military Penal Code." *Id.* See also Fox & Stetson, *supra* note 91, at 162.

108. COLOM. CONST. art. 250.

109. Edelstein, *supra* note 97, at 9.

110. Scholars have argued that the state is more than just an agency providing public goods, but rather an entity comprised of public services, legal systems, security and public administration. BOUDON, *supra* note 76, at 13. See also COLOM. CONST. tit. 1, art. 2 (stating the essential goals of the state); tit. 12, ch. 5 (enumerating the social purposes of the state).

111. The limited scope of this Comment requires a focus on the aggressors who act as a functional arm of the government since it is the violence carried out under color of law that is most egregious, particularly where the government has been heavily funded by the U.S.

112. See Colombian Section of the Andean Comm'n of Jurists, *cited in* THE NATION, May 17, 1993); *Vigilantes in Colombia Kill Hundreds of "Disponables,"* N.Y. TIMES, Oct. 31, 1994, at A7 (stating that "members of the security forces have been directly implicated in several killings," and quoting an official at the Attorney General's office claiming that, "[t]here is evidence that members of the police go to these neighborhoods at night and shoot or burn children alive.").

113. 1995 COUNTRY REPORTS *supra* note 5.

114. An estimated 1.2 to 2% of all crimes have ended in a sentence over the past 30 years. Michael Pahl, *Wanted: Criminal Justice: Colombia's Adoption of a Prosecutorial System of Criminal Procedure*, 16 FORDHAM INT'L L.J. 608-34 (1992) (citation omitted).

115. For example, judicial authorities deemed the farmer who witnessed the

The death squads justify their actions by asserting the ineffectual nature of the judiciary in punishing criminals.<sup>116</sup> In referring to this "private justice," one commentator expressed the belief that, "[t]he judicial system is so discredited that it never even occurs to anyone to resort to the law."<sup>117</sup>

Fortunately, those responsible, at least in the National Police force, are slowly beginning to take responsibility for their actions. An average of seven officers are fired daily for improper conduct, even though none have been sentenced for their role in social cleansing.<sup>118</sup> President Samper has publicly expressed concern about impunity.<sup>119</sup> Nevertheless, whether real change will result from his platitudes remains to be seen.

Constitutional provisions and presidential pronouncements are mere formalities if practice undermines those protections.<sup>120</sup> In actuality, methods such as the State of Emergen-

1990 chain-saw beheadings of thirty-seven people a paranoid psychopath and sent him to a mental hospital, rather than prosecuting the killers. Norman Kempster, *"Rights Panel Demands Colombia Prosecute Its Soldiers, Sources Say; Massacre: OAS Group Wants Compensation for Survivors, Country's President Has Admitted Army Troops Killed More Than 100 Peasants in Two-Year Reign of Terror,"* L.A. TIMES, Feb. 9, 1995, at A6.

116. This problem is circular in that complaints of an ineffective judiciary result in people "taking the law into their own hands" — yet part of their vigilante justice is to threaten judges into complying with their wishes so true justice is too threatened to prevail. See Pahl, *supra* note 114; Richard L. Fricker, *A Judiciary Under Fire: In Bogotá, Bullets and Hard Questions About U.S. Drug Policies*, 76 A.B.A. J. 54-58 (Feb., 1990); PEARCE, *supra* note 68, at 268-69. ("[The state] is ceasing to be a regulator of social conflict or a dispenser of justice and equality of opportunity. The gigantic stain of impunity has spread to almost all our public activities.") (quoting Alvaro Tirado Mejía, presidential human rights adviser, Declaration to the *Encuentro Nacional, 'la lucha contra la impunidad, avances y dificultades,'* Sept. 19, 1988)).

117. Dermota, *supra* note 34, at 14 (quoting Sonia Zambrano, researcher for the Andean Commission of Jurists, Colombian Section).

118. *Id.* (quoting Col. Eduardo Arevalo, spokesman for the Defense Ministry, of which the National Police is a part).

119. President Samper stated that,

Impunity has attained alarming levels in Colombia, resulting in a substantial increase in human rights violations in the country. We are faced with a widespread phenomenon of criminal conduct that overtakes the capacity of the legal system. To confront it, the justice system shall be given the necessary human, financial, physical and technical resources to carry out its duties. It is indispensable that the punitive authority of the state be brought to bear with full weight on the conduct of those who betray their trust as protectors of democratic legality. To this end the government will press with its utmost political will and determination.

Annual Report of the Inter-American Comm'n of Human Rights 1994, *supra* note 5.

120. Tom J. Farer, *Reinforcing Democracy in Latin America: Notes Toward an*

cy<sup>121</sup> have been imposed by the Colombian executive branch for thirty-six out of the last forty-eight years.<sup>122</sup> This clever tool allows the government to strengthen the armed forces as well as to criminalize the minimal offenses often committed by the poor.<sup>123</sup> These effects benefit the middle and upper classes in Colombia by keeping "undesirables" off the street,<sup>124</sup> while at the same time Samper makes statements committing himself to human rights reforms which are not implemented.

States of Emergency<sup>125</sup> have been codified in Colombian law since the Constitution of 1886.<sup>126</sup> The current Constitution also provides for them<sup>127</sup> but states that, during this period, "[n]either human rights nor fundamental freedoms may be suspended."<sup>128</sup> Sadly, this provision, like many others, is virtually ignored by the Colombian government, and provides a loophole through which human rights abuses can be legitimized while granting a higher degree of impunity.<sup>129</sup>

*Appropriate Legal Framework*, 11 HUM. RTS. Q. 434 (1988) ("Where the process is weak, the formal law is a formality.").

121. Also known as a state of siege, and, in the translation of the Colombian constitution, as a state of exception. See CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, COLOMBIA 212 (Gisbert H. Flanz ed., 1995).

122. 1994 COUNTRY REPORTS, *supra* note 4, at 350.

123. Telephone Interview with Juan Pablo Ordoñez, *supra* note 79.

124. *Id.*

125. For a thorough, yet somewhat outdated discussion of the effects of the states of siege in Colombia, see INT'L COMM'N OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS 45-67 (1983).

126. COLOM. CONST. art. 121 (1886). This provision gave the President the power to declare, with the approval of his ministers, a state of siege during an internal disturbance and to expand the government's powers during such a time to those it would have in times of war.

127. *Id.* art. 213 provides, in pertinent part:

In the case of a serious disruption of the public order imminently threatening institutional stability, the security of the state, or peaceful coexistence of the citizenry, and which cannot be met by the use of the ordinary powers of the police authorities . . . [the President may declare a state of siege for no more than ninety days, extendable twice, the second time with Senate approval].

*Id.*

128. *Id.* art. 214.

129. "The government attributes the continuing violence in Colombia largely to the drug traffickers, but uses the crack-down as a pretext to legitimize state repression." *Colombia: The Other Faces of the War Against the Mafia*, 43 INT'L COMM'N JURISTS REV. 6, 8 (1989).

## IV. THE ROLE OF THE UNITED STATES

Until the recent decertification, the United States Government gave more money to Colombia than to any other Latin American country;<sup>130</sup> Colombia had been the Western Hemisphere's largest recipient of U.S. military aid,<sup>131</sup> and might regain that status.<sup>132</sup> The money was given specifically to curb the supply-side narcotics trade, but the U.S. acknowledges that much of its money has been used to fight Colombia's civil war.<sup>133</sup> Support from executive agencies, mainly the U.S. Central Intelligence Agency (CIA) and the U.S. Drug Enforcement Agency (DEA), has helped keep the corrupt Colombian government in control and stocked with deadly weap-

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130. For fiscal year 1996, the U.S. allocated a total of \$79.4 million. Congressional Presentation for Foreign Operations, Fiscal Year 1996.

131. Jeffrey, *supra* note 31, at 380.

132. Commentators are speculating that this measure is a temporary one which is designed to motivate Colombia in its counternarcotics efforts. Telephone Interview with Douglas Payne, *supra* note 10. It is plausible that the U.S. is so eager to bring about the end of Samper's presidency that it used decertification on the drug issue as a shroud for its true goal. Some Colombian business leaders and politicians have described the decertification as "a moral sanction" against the Samper regime to be lifted once Samper falls. Ferrer, *supra* note 9.

133. *U.S. Government Anti-Narcotics Activities in the Andean Region of South America: Hearing of the Permanent Investigations Subcomm. of the Senate Governmental Affairs Comm.*, 101st Cong., 1st Sess. (1989). Melvyn Levitsky, testifying on behalf of the Department of State, stated that the priority is "to help the governments concerned gain control and restore civil authority." Mr. Levitsky later says, in response to Senator Sam Nunn's criticism of a program lacking crop substitution and economic development,

whatever we do against drugs, if we reduce demand in this [drug-producing] country so we don't need the product anymore, the effect of that will drive those people who are growing the drugs into the hands of — or towards something else, and maybe it will be into the hands of the guerrillas.

Mr. Levitsky's statements show a lack of regard for human life and result in foreign policy which recklessly assumes that the entire citizenry is involved in drug-production. He also assumes that force is the most effective way to curb this problem. See *also* THIRTEENTH REPORT BY THE COMMITTEE ON GOVERNMENT OPERATIONS TOGETHER WITH ADDITIONAL VIEWS, STOPPING THE FLOOD OF COCAINE WITH OPERATION SNOWCAP: IS IT WORKING? 80 (1990) (reporting the testimony of a U.S. embassy official in Bogotá recognizing that U.S. aid funds counterinsurgency efforts as well as narcotics control: "[It] was not U.S. policy to tell the Colombians what equipment they needed or how to use the United States-provided assets."), *quoted in* Elena S. Manitzas, *Human Rights, Justice, and U.S. Aid: The Colombian Contradiction*, 1 U. MIAMI Y.B. INT'L L. 309, 323 n.38 (1991).

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Stopping the drug supply is not the only interest the United States has in giving money to Colombia. The U.S. has significant investment interests in Colombia's natural<sup>135</sup> and manufactured<sup>136</sup> commodities. The U.S. is Colombia's principal trading partner. As one commentator reminds us: "[F]avorable investment conditions are often systematically maintained by oppressive regimes at steep human rights costs."<sup>137</sup>

Among the most vital of Colombia's investment interests is its oil reserve. Colombia has recently discovered that it has some of the largest oil fields in Latin America.<sup>138</sup> One United States oil company has allegedly bribed Colombian authorities to secure its position in the impending oil rush.<sup>139</sup> This undertaking is in clear violation of the Foreign Corrupt Practices Act (FCPA),<sup>140</sup> which prohibits U.S. companies from bribing foreign officials. This investment interest may well tie into the reluctance of the U.S. to enforce its own laws, which would demand Colombia's compliance with international human rights norms.

#### A. U.S. Aid to Fight the War on Drugs

In a discussion about Colombia, past and present U.S. drug policy, both internal and external, cannot be ignored. The U.S. response to Colombia's production and export of cocaine has been to provide staggering amounts of funds, police and military training to the Colombian government to combat drug trafficking.<sup>141</sup> For the 1996 fiscal year, \$35 million was allocated to

134. *All Things Considered*, *supra* note 63.

135. The U.S. imports 39% of Colombia's natural commodities — petroleum, coffee, coal, flowers and fruit. WORLD FACTBOOK, *supra* note 6, at 94.

136. The U.S. imports 36% of Colombia's manufactured commodities. *Id.*

137. Carlo Filice, *On the Obligation to Keep Informed About Distant Atrocities*, 12 HUM. RTS. Q. 397, 411 (1990).

138. Wirpsa, *supra* note 11, at 11; U.S. CENT. INTELLIGENCE AGENCY, WORLD FACTBOOK 40 (1994) ("A major oil find in 1993 in eastern Colombia may provide an extra \$3 billion annually to the economy by 1997.").

139. *Id.*

140. Foreign Corrupt Practices Act, Pub. L. No. 95-213 (1995) (codified as amended in scattered sections of 15 U.S.C.) [hereinafter FCPA]. For a detailed discussion of the FCPA, see Walter Sterling Surrey, *The Foreign Corrupt Practices Act: Let the Punishment Fit the Crime*, 20 HARV. INT'L L.J. 293-303 (1979).

141. For a thorough discussion of U.S. policy against drugs in Colombia and a breakdown of the aid given, see RILEY, *supra* note 75, at 44-50.

Colombia in the "narcotics" category.<sup>142</sup> In reaction to several narcotic-related murders in Colombia in 1989, the United States approved \$65 million<sup>143</sup> in emergency aid and an additional \$2.5 million to provide security for Colombian judges.<sup>144</sup>

Among the judges who went on strike to get additional protection was Judge Helmoot Romero.<sup>145</sup> Romero is critical of the U.S. role, stating that it is "anxious to fight drug lords, but frightfully slow to solve the social problems that reinforce the drug trade in Colombia and at home."<sup>146</sup> This statement represents a central argument of this Comment: the U.S. is losing the War on Drugs from the consumer end and instead has tolerated the use of brutality on foreign soil to combat the supply end, all the time ignoring the social forces which induce people to consume and supply drugs.

Romero asserts an alternative: "More could be done to boost the economy and thereby lessen the temptation that draws peasants into the drug-processing trade."<sup>147</sup> The U.S. could be instrumental in helping legitimate industries to thrive, but instead has had a hand in gutting several.<sup>148</sup> The U.S. has destroyed the coffee cartel,<sup>149</sup> according to judicial and political leaders in Colombia,<sup>150</sup> while clamoring for Colombia to increase expenditures on its drug war. This is ironic given that the only money available to spend on fighting the drug war in Colombia, excluding income from licit business, is, of course, drug money in some form or another. Decertification is likely to exacerbate this problem since, absent U.S. funds,<sup>151</sup> Colombians will become more

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142. See Congressional Presentation for Foreign Operations Fiscal Year 1996.

143. The aid consisted mostly of helicopters, transport teams and military advisors. *Faces of the War*, *supra* note 10, 129, at 8.

144. *Id.*

145. President of Asonal, an organization representing Colombia's judges and judicial clerical workers. Fricker, *supra* note 116, at 54.

146. *Id.* at 57.

147. *Id.*

148. One might wonder whether it is a coincidence that social cleansing has taken place in the plantain regions where two major U.S. fruit producers, Dole and Chiquita, have fields. Telephone Interview with Juan Pablo Ordoñez, *supra* note 79.

149. For a thorough analysis of the poverty coffee-growers face, see NEW INTERNATIONALIST, Sept. 1995. ("The industry generates multi-million-dollar profits, which the people who actually produce the coffee never see . . . . Although they work all their lives for coffee, coffee has never worked for them.")

150. Fricker, *supra* note 116, at 57.

151. Funds will be depleted from both the U.S. government and investors. Tele-

dependent on the drug trade.

The drug war has been a primary focus of U.S. foreign policymakers for approximately twenty years. Some argue that since the loss of Russia as a prime concern, U.S. attention has refocused on the drug war.<sup>152</sup> The belief is that if the U.S. can battle external enemies — drug-producing countries — drug addiction will be reduced within U.S. borders. This is a myth. The solution to the U.S. internal drug problem lies in focusing on internal demand for drugs, education and rehabilitation rather than in increased foreign aid and military action.<sup>153</sup> The decertification measure is possibly an acknowledgment of the futility of these efforts. However, the refusal to recognize Colombia's human rights violations is a tragic omission, as is the abdication of U.S. responsibility as drug consumers.

It is U.S. policy to make "assistance for the prevention and suppression of international criminal activities . . . a priority."<sup>154</sup> In Colombia, the National Police seize four times as much cocaine as the military.<sup>155</sup> Unfortunately, the bulk of U.S. aid to Colombia since 1989 has "had a military emphasis,<sup>156</sup> outnumbering at a ratio of two to one the aid offered to

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phone interview with Bruce M. Bagley, Professor of International Relations, Graduate School of International Studies, University of Miami (Apr. 22, 1996) ("There will be a chilling effect on investment because of decertification.").

152. "Now that the cold war is over, the armed services have become eager participants in the drug war. It's their new meal ticket now that the commies are not their big threat,' says a congressional staffer." Waller, Miller, Barry & Reiss, *Risky Business: As its Involvement in the Drug War Grows, the Pentagon Outlines a Plan to Crush the Cartels*, NEWSWEEK, July 16, 1991, at 16, quoted in Manitzas, *supra* note 133, at 323 n.37 (1991). See also Sherman, *supra* note 67, at 663 (citing *Nightline: Washington's Dwindling Importance* (ABC television broadcast Apr. 27, 1990) (comments of P.J. O'Rourke, columnist for Rolling Stone Magazine, noting that this observation was made prior to the Gulf War)).

153. Michael T. Klare, *Scenario for a Quagmire: Fighting Drugs With the Military*, THE NATION, Jan. 1, 1990, at 8 (noting the punitive approach and arguing that a supply-side focus would be more effective in the long run, but expensive as treatment and education in the inner-cities is what would be required).

154. Act of Nov. 2, 1994, Pub. L. No. 103-447, § 106, 108 Stat. 4694.

155. Peter D. Moore, *Looking Ahead: The Drug War's Other Agenda*, L.A. TIMES, June 27, 1990, at D3.

156. An April 1990 report of the United States Committee on Government reveals that the majority of emergency assistance provided to Colombia in August 1989 under Section 506(a) of the Foreign Assistance Act was allocated to the military (58.1%), whereas the police received only 16.1%. IS U.S. ANTI-NARCOTICS ASSISTANCE PROMOTING HUMAN RIGHTS ABUSE?, INSTITUTO LATINAMERICANO DE SERVICIOS LEGALES ALTERNATIVOS, HUMAN RIGHTS WORKING PAPER 2 (Mar. 1991).

the police forces (acknowledged to be the institution most capable of countering the narcotics trade).<sup>157</sup>

Cocaine production troubles the U.S. (the consumers) more than Colombia (the suppliers). The drug war has been waged by the U.S. under a presumption that drugs are an undesirable thing in Colombia.<sup>158</sup> In fact, the U.S. is the greatest consumer of drugs in the world, while Colombians sell far more than they consume.<sup>159</sup> This connection is important as evidence of the obvious self-interest that has motivated U.S. policy in Colombia, particularly decertification.

Since drugs entered their economy, Colombians were faced with the dilemma of whether to fight the influx of drugs and the violence which often resulted or to accept it is a viable industry, i.e., legalize it,<sup>160</sup> and celebrate the economic benefits.<sup>161</sup> Colombia has already legalized possession of an amount of addictive drugs suitable for personal use in a private place.<sup>162</sup> The U.S. was outraged by this development.<sup>163</sup> The U.S. appears to prefer the use of force to rehabilitation and a focus on serious drug offenders. As one writer noted, "United States' international drug control policy has addressed neither cultural, political, nor socioeconomic underpinnings which have given rise to the major role of Colombia in international drug trafficking."<sup>164</sup>

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157. Manitzas, *supra* note 133, at 323.

158. Sherman, *supra* note 67, at 666 ("[An] assumption is that Colombia should view the drug trafficking problem with moral disdain equal to that of the United States.").

159. *Id.* at 668.

160. See C. Torres, *Legalize It? Narcotics in Colombia*, THE NATION, June 20, 1994, at 857.

161. Arthur L. Berney, *Cocaine Prohibition: Drug-Induced Madness in the Western Hemisphere*, 15 B.C. THIRD WORLD L.J. 19 (1995).

162. See *In re Sochandamandou*, File No. C-221/94 (Colom., C.S.J. May 5, 1994) (the court indicated it was acting in the interest of human dignity and personal freedom).

163. Torres, *supra* note 159.

164. See Sherman, *supra* note 67, at 668.

### B. Existing Statutes

U.S. statutes proscribing aid to countries violating human rights exist, but implementation is lacking. The level of enforcement depends upon each administration's willingness to enforce adherence to U.S. laws.<sup>165</sup> In litigation related to U.S. involvement in international human rights violations, the most cited statute is Section 502B of the Foreign Assistance Act of 1961 on human rights violations<sup>166</sup> and security assistance.<sup>167</sup> Section 502B provides, in pertinent part:

No security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights. Security assistance may not be provided to the police, domestic intelligence, or similar law enforcement forces of a country . . . unless the President certifies in writing . . . that extraordinary circumstances exist warranting provision of such assistance . . . .<sup>168</sup>

In addition, the Act provides that education and training activities should be geared toward the promotion of human rights.<sup>169</sup> The United States is violating this statute in its training of Colombian soldiers, 6,844 of whom were trained under the U.S. International Military Training and Education program between 1984 and 1992.<sup>170</sup>

165. Steven B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246, 248 (1982) (noting the Nixon and Ford administrations avoided implementation of § 502B of the Foreign Assistance Act of 1961 (as amended 22 U.S.C.A. § 2304)).

166. § 2304 (d)(1) provides for "gross violations of internationally recognized human rights" to include: "Torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by abduction and clandestine detention of those persons, and other *flagrant denial of the right to life, liberty, or the security of the person.*" *Id.* (emphasis added).

167. The statute defines security assistance as including aid, education, supplies and training for the military, peacekeeping operations, antiterrorism assistance, and economic support. 22 U.S.C.A. § 2304(d)(2)(A-C).

168. Foreign Assistance Act of 1961, § 502B (as amended 22 U.S.C. § 2304).

169. 22 U.S.C. § 2347b(3) is Congress' declaration that education and training "increase the awareness of nationals of foreign countries participating in such activities of basic issues involving internationally recognized human rights." *Id.*

170. Wirpsa, *supra* note 7, at 9.

Not only does Colombian aid violate the letter of the law, it violates its spirit as well. The existing statutes demonstrate that the aid given to Colombia is contrary to Congressional intent.<sup>171</sup> Congress' policy on foreign assistance to developing countries, codified at 22 U.S.C.A. Section 2151, provides that the prosperity, security and liberties of the people of the U.S. are best protected when humanitarian ideals are pursued and civil rights defended.

### C. *Why We Should Act*

Colombia is not as different from the United States as many would like to think. The two societies share several qualities: both are democracies; both are dominated by two political parties; both have great disparity between the wealthy and the poor; and both are fighting the War on Drugs. Perhaps the most compelling similarity is that both societies view the lower-class groups as eyesores. These similarities, together with the fact that foreign policymakers are willing to violate U.S. statutes by supporting gross human rights violations, must alert Americans that violence and injustice akin to that seen in Colombia may not be too implausible in the U.S.

This potential direction can be seen in America's internal War on Drugs, which is also fraught with class-based discrimination. For example, the criminal penalties for crack-cocaine possession are much harsher than for cocaine possession in its powder form.<sup>172</sup> Drug enforcement is, therefore, often seen as a war against the poor and an opportunity for the state to reassert

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171. "It is the intent of the committee of conference to place renewed emphasis on human rights as a major factor that must, as a matter of law, be taken into account in making security assistance decisions." H.R. REP. NO. 95-1546, 95th Cong., 2d Sess. 27 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1868, 1874.

172. Mandatory minimum sentencing guidelines have resulted in racial disparities in sentencing for drug-related offenses. Nathaniel R. Jones, *For Black Males and American Society — The Unbalanced Scales of Justice: A Costly Disconnect*, 23 CAP. U. L. REV. 1, 14-15 (1994). Possession of five grams of crack cocaine results in a five-year sentence without parole. Ten grams results in a fifty year sentence. "For the same sentence, a person would need 100 times as much powder cocaine." *Id.* at 22 n.59. See also Ronald Smothers, *Wave of Prison Uprisings Provokes Debate on Crack*, N.Y. TIMES, Oct. 24, 1995, at A12 (connecting recent prison uprisings to Congress' refusal to overturn disparities in sentences between crack offenders and other drug offenders).

its legal authority.<sup>173</sup>

The average U.S. taxpayer's contribution to the atrocities in Colombia is not insignificant, but rather worthy of consideration. One argument makes an analogy to the principal-agent relationship, in which the latter is vested with control to act on behalf of the former. This argument establishes the link as follows: democratic government invests some of its citizens' tax money in foreign affairs, with the knowledge and approval of the taxpayers, serving as their agent or broker; the United States has clearly supported brutal regimes, and continues to, with this money; a person shares responsibility with her agent for the actions of the latter, even if the former has no specific knowledge of what the latter does with its broad powers.<sup>174</sup> This argument seeks not to indict the public for the social cleansing in Colombia, but rather to encourage the active pursuit of knowledge on these issues.

## V. SEEKING JUSTICE IN THE UNITED STATES

Social cleansing is a complex problem involving many actors which will continue as long as the prejudices exist in Colombian culture. Nevertheless, the U.S. and Colombian governments do not have to perpetuate the violence. Although eliminating the U.S. role will not end the problem, reducing complicity is both legally and morally required.

### A. *In the Legislative Branch*

The U.S. is violating several statutes by giving any aid to Colombia<sup>175</sup> and it must end its involvement in social cleansing. This can be done in the legislature by passing a specific statute either ceasing all aid and preferential tariffs to Colombia or making aid conditional upon Colombia's compliance with

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173. Austin, *supra* note 37, at 1784. "The drug war is the health of the state." *Id.* (quoting Jefferson Morley, *Contradictions of Cocaine Capitalism*, THE NATION, Oct. 2, 1989, at 341, 347).

174. Filice, *supra* note 135, at 409-10. (presenting this argument in a linear fashion in response to an inquiry into U.S. citizens' responsibility for the atrocities in Vietnam).

175. See *supra* part IV.B.

international human rights law. Measures have been taken recently which address Colombia specifically, but none concern its human rights violations. On the contrary, any conditions included in pending statutes are geared toward soliciting a solid commitment from Colombia to fight the drug war, not on improving human rights conditions. The statutes reward this commitment by helping to strengthen police and military power in order to combat drug trafficking. This enhancement of law enforcement frequently leads to a deterioration in compliance with human rights standards.<sup>176</sup>

### 1. Currently Pending Statutes

Lobbying Congress is a primary means by which the public urges change in U.S. policy. The first step in this process is to enact the Hatfield-McKinney Code of Conduct on Arms Transfers Act of 1995,<sup>177</sup> introduced in both the House and the Senate, which prohibits United States military assistance and arms transfers to foreign governments failing to adequately protect human rights.<sup>178</sup>

The Code of Conduct bill requires presidential certification that all governments receiving military aid meet certain requirements, including promotion of civilian-controlled military<sup>179</sup> and respect of individual and minority rights.<sup>180</sup> In addition, the foreign government must promote human rights.<sup>181</sup> The bill expands the definition of "gross violations of internationally

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176. "[P]rosecution of the drug wars [as presently conceived], places increasing autonomy and authority in the hands of Latin American armed forces. To put it bluntly, drug wars encourage militarization. This can pose a substantial threat to still-fragile democracies . . . and alter the political course of the region as a whole." Peter H. Smith, *The Political Economy of Drugs: Conceptual Issues and Policy Options*, in *DRUG POLICY IN THE AMERICAS* 4-5 (Peter H. Smith ed., 1992), quoted in Berney, *supra* note 160, at 47 (1995).

177. H.R. 772, 104th Cong., 1st Sess. (1995) [hereinafter Code of Conduct bill].

178. In addition to passing this bill, enacting the Torture Victim Protection Act, H.R. 1416 will provide rehabilitative services for victims of torture and protect torture victims seeking asylum or refugee status in the United States. See generally M.E. Tardu, *International Complaint Procedures for Violations of Human Rights*, 28 *INDIAN J. INT'L L.* 337 (1988).

179. Code of Conduct Bill, *supra* note 176.

180. *Id.*

181. *Id.*

recognized human rights" provided in Section 502B<sup>182</sup> to include "systematic official discrimination on the basis of race, ethnicity, religion, *gender*, national origin or political affiliation."<sup>183</sup> The government must also be one which "vigorously investigates, disciplines, and prosecutes those responsible"<sup>184</sup> for the violations, and "does not impede the free functioning of domestic and international human rights organizations."<sup>185</sup> If the President certifies to Congress that the country has ceased to meet the requirements, the certification for that fiscal year "shall cease to be effective."<sup>186</sup> The force of this bill in protecting international human rights depends upon the President's active awareness and initiative. This is no small hurdle considering the political ramifications of terminating aid to a country in which the U.S. has investment interests.

## 2. Country-Specific Legislation

Aside from lobbying efforts for new protections for international human rights generally, Congress must be lobbied to draft and pass legislation which specifically addresses Colombia's violations. Several of these legislative measures are currently pending,<sup>187</sup> but the ones relating to Colombia have not conditioned aid on the ceasing of its human rights violations, but rather on its successful counternarcotics efforts.

One of the pending bills addressing the drug-producing countries seeks to amend 22 U.S.C.A. Section 2291(k) and to include conditions before Colombia can be certified.<sup>188</sup> Section

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182. See *supra* note 108.

183. Emphasis added to stress Congressional contemplation of gender discrimination which arguably covers the abuse of homosexuals. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that State's ban on same-sex marriage presumptively violated the Hawaiian constitution's prohibition against sex discrimination because discrimination against gay persons is gender discrimination where if that victim were of the opposite gender, it would be acceptable to maintain sexual relations with his or her lover).

184. Code of Conduct Bill, *supra* note 176.

185. *Id.* The Colombian government is in clear violation of this provision, as evidenced by the frequent killings of human rights monitors. See generally AMERICAS WATCH, POLITICAL MURDER AND REFORM IN COLOMBIA: THE VIOLENCE CONTINUES, AN AMERICAS WATCH REPORT, *supra* note 18.

186. Code of Conduct Bill, *supra* note 176.

187. S. 961, 104th Cong., 1st Sess. (1995); S. 681, 104th Cong., 1st Sess. (1995).

188. *Id.*

506 of the Foreign Aid Reduction Act of 1995 delineates eleven conditions, none of which refers to the protection of human rights. In fact, the bill suggests just the opposite in its promotion of "tightening the law enforcement capabilities."<sup>189</sup>

Ideally, Congress would enact a statute making aid to Colombia conditional on compliance with human rights norms. Juan Pablo Ordoñez states that "money is the only pressure that works in Colombia. We're just telling you to follow your own laws."<sup>190</sup> Conditionality is an interesting prospect because it allows economic growth to promote compliance with human rights. The U.S. saw a dramatic improvement in Peru's respect of human rights when aid was made conditional.<sup>191</sup> A bill of this kind, relating to Turkey, is currently on the House and Senate floors.<sup>192</sup> This bill, introduced in March of 1995, is entitled the "Turkish Human Rights Compliance Act." The sources of information on the Turkish government's human rights abuses are the same as those that have documented the atrocities in Colombia: the Department of State's "Country Reports on Human Rights," Amnesty International, Human Rights Watch and others.<sup>193</sup>

The Turkish Human Rights Compliance Act indicates that the aid given will be diminished by \$500,000 for each day that Turkey does not comply with several conditions, including: allowing human rights organizations to monitor the area, recognizing Kurdish citizens' civil, cultural and human rights, and protection of minority rights.<sup>194</sup> Enactment of a similar statute relating to the human rights abuses of the Colombian government would force it into compliance with international human rights norms. One might think the U.S. has been reluctant to condition aid to Colombia based on human rights considerations because there is a concern that doing so would result in Colombia's inability to fight its War on Drugs. Given the recent decertification despite human rights concerns, perhaps the U.S. has given up on fighting the War on Drugs, or else it was never

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189. *Id.*

190. Telephone Interview with Juan Pablo Ordoñez, *supra* note 77.

191. *All Things Considered*, *supra* note 63.

192. H.R. 1274, 104th Cong., 1st Sess. (1995).

193. *Id.*

194. *Id.*

committed to it in the first place. It is more likely that the U.S. is preoccupied with its own political and investment interests.

### *B. In the Judicial Branch*

One might attempt to bring a suit in the U.S. courts enjoining any grant of aid to Colombia as violation of U.S. law. The judicial branch defers to the legislative and executive branches and avoids hearing cases on controversial issues in two ways: standing and political question. In this case, these two doctrines of judicial restraint are formidable obstacles to relief, considering the presumption that foreign policy should be left to the executive branch.<sup>195</sup>

#### 1. Standing

The United States Constitution, Article III, Section 2 limits what federal courts can hear to "cases or controversies." In other words, to bring a case in federal court, one must have a credible claim that (1) actual or threatened injury resulted; (2) which can fairly be traced to the defendant's illegal conduct; and 3) can be redressed through the judicial system.<sup>196</sup> These requirements are known as personal standing.<sup>197</sup>

It would be difficult to obtain personal standing in a challenge to U.S. funding of Colombian atrocities. Suppose the plaintiff was a survivor of torture at the hands of the Colombian government, or the family of a murdered victim, or a refugee fleeing the oppressive situation; any one of these individuals might be able to prove the injury in fact requirement, but that the United States Government's policy was the cause in fact of

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195. See, e.g., *Smith v. Reagan*, 637 F. Supp. 964 (E.D.N.C. 1986). "[The] President is exclusively responsible" for the "conduct of diplomatic and foreign affairs." *Id.* (citing *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950)).

196. *Valley Forge College v. Americans United*, 454 U.S. 464 (1982).

197. Third party standing is not discussed here because its success has been limited due to notions of judicial self-restraint. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80, 98 (1978) (noting the prudential concerns for limiting third party standing). However, the Court might grant third party standing if one could show his or her ability to vindicate the rights of another, that their relationship is strong enough to warrant such representation, and that the rights of the third party would be diluted if standing were disallowed. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 2.12 (5th ed. 1995).

the injury would be more difficult to prove. Indeed, redressibility would also be a problem because there is no guarantee that if the government stops giving money, or gives it conditionally, that the killings will cease.<sup>198</sup>

*a. Organizational Standing*

A possible option is for an affected organization, such as Amnesty International, to bring suit on this issue. An organization "may have standing in its own right to seek judicial relief from injury to itself."<sup>199</sup> Such an injury can be created by the expenditure of the organization's resources to assure that the challenged action or event does not occur.<sup>200</sup> For example, Amnesty might argue that it has to spend more money and time in Colombia because U.S. policy flies in the face of Amnesty's humanitarian efforts there. In addition, the organization would need to show a concrete injury to its own interests rather than one of "abstract social interests."<sup>201</sup>

It is important to note that the requirements for personal standing are the same as those for organizational standing: injury, traceability and redressability.<sup>202</sup> Arguably, Amnesty International or any of the organizations focusing on human rights atrocities in Colombia might be able to allege a cognizable interest to its efforts and to its members.

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198. The remedy the plaintiff demands is vital. For example, if money damages are sought in a wrongful death action, the courts might be reluctant to find for the plaintiff unless she could prove she is in a distinct class. Otherwise, damages would be available to the public at large. NOWAK & ROTUNDA, *supra* note 196. If, on the other hand, the plaintiff seeks an injunction to prevent further disbursement of funds to Colombia, the courts may hear reverberations from proponents of judicial self-restraint.

199. Warth v. Seldin, 422 U.S. 490, 511 (1975).

200. Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1470 (C.D. Cal. 1992); *see also* U.S. v. SCRAP, 412 U.S. 669 (1973).

201. Douglas A. Parker, *Standing to Litigate "Abstract Social Interests" in the United States and Italy: Reexamining "Injury in Fact"*, 33 COLUM. J. TRANSNAT'L L. 259, 318 (1995) (citing Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)). There would probably not be the risk here of conflict among dissenting members inherent in cases about organizational standing. CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3531.9 (1984) [hereinafter WRIGHT & MILLER].

202. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

### b. Congressional Standing

If a person is unable to establish that she has a personal or organizational stake in the outcome of a suit, she might attempt to assert that Congress created standing in that case. Arguably, by enacting a statute such as Section 502B of the Foreign Assistance Act of 1961, the legislature expected that it would be adhered to and suits would arise upon violation.<sup>203</sup> In other words, by proscribing certain conduct Congress might create a built-in remedy. One district court found, however, that this is not the case with Section 502B of the Foreign Assistance Act of 1961 (as amended 22 U.S.C.A. Section 2304): “[t]he only parties with standing to seek adjudication under Section 2304 are the executive and legislative branches.”<sup>204</sup>

Perhaps the best way to obtain standing when litigating this issue is to have a member of the legislature bring the complaint. The injury would be that a Congressperson who voted for a particular bill to become law - which is thus compromised by U.S. policy - has a right to demand compliance with the same and standing to challenge the violation.<sup>205</sup> The encroachment of this right creates a personal injury in a professional capacity. Traditionally, the only time a member of Congress can get standing to sue the Executive is when the executive action at issue nullified the Congressperson's vote.<sup>206</sup>

In *Crockett v. Reagan*,<sup>207</sup> however, the D.C. Circuit court granted standing to twenty-nine members of Congress finding that a grant of aid to El Salvador violated Section 502B of the Foreign Assistance Act of 1961<sup>208</sup> because El Salvador was engaging in gross human rights violations.<sup>209</sup> In *Crockett*, the

203. *But see* Clark v. United States, 609 F. Supp. 1249, 1251 (D.C. Md. 1985) (holding that § 2304 “does not create standing for any taxpayer or any private party to sue for its enforcement.”).

204. *Id.* at 1249.

205. Another less certain injury alleged could be that the member of Congress is breaking his or her oath to uphold the Constitution by serving a body which is in violation of one of its own laws.

206. *See* Goldwater v. Carter, 617 F.2d 697, 702 (D.C. Cir. 1979) (affording a basis for standing only when the actions of the executive objectively nullify a congressional vote or opportunity to vote).

207. 558 F. Supp. 893 (D.C. Cir. 1982).

208. 22 U.S.C. § 2304.

209. Standing in *Crockett* was granted because the plaintiffs were members of

court found that there was a valid claim, but that the claim fell into the category "characterized by a lack of judicially discoverable and manageable standards for resolution"<sup>210</sup> known as political question.<sup>211</sup>

### c. Taxpayer Standing

Perhaps the weakest basis on which standing can be asserted is based on taxpayer status. Suits involving a challenge to the spending power<sup>212</sup> are extremely difficult to assert, and even harder to win.<sup>213</sup> There is a possibility that a court would grant standing to individuals challenging the appropriation of funds as violative of statutory law.<sup>214</sup> For example, Congress is violating several statutes<sup>215</sup> which provide that the U.S. will not educate, train, or otherwise fund any country engaged in a continual pattern of human rights violation. Unfortunately, *Clark v. United States*<sup>216</sup> denied standing to taxpayers bringing a Section 502B challenge to U.S. aid to El Salvador.<sup>217</sup>

If a person or class is able to show a concrete injury in fact,

Congress; the case reached the political question stage and was dismissed at that point. *Clark v. United States*, 609 F. Supp. 1249, 1251 n.1 (D.C. Md. 1985) (noting that *Crockett* is the only reported case under § 2304).

210. *Id.* at 898.

211. See *infra* part V.B.2.a.

212. *Id.* The seminal case in this area is *Frothingham v. Mellon*, 262 U.S. 447 (1923) (holding that a federal taxpayer lacks standing to challenge a federal law providing grants to states as violative of the Fifth Amendment Due Process Clause because there was no injury particular to the plaintiff).

213. In *Flast v. Cohen*, 392 U.S. 83 (1968), the Court insisted that it was not imposing an absolute bar to suits by federal taxpayers challenging unconstitutional spending. *Flast* imposed a two-part test under which the taxpayer must be challenging an exercise of Congress' taxing and spending power, as well as establish a nexus between her taxpayer status and the precise nature of the constitutional infringement alleged. While this test is workable, *Flast* has been limited to its facts.

214. See, e.g., *Andrews v. Ohio Bldg. Auth.*, 74 Ohio Ops. 2d 184 (1975) (recognizing the common law right to maintain actions against public officials enjoining the misapplication of public funds).

215. See 22 U.S.C.A. §§ 2151, 2304, 2347b, 5036 (1995).

216. 609 F. Supp. 1249 (D.C. Md. 1985) (holding that despite ample proof of El Salvador's human rights violations, § 2304 does not create standing for private parties).

217. While not binding, *Clark* might prove dispositive in a case challenging the U.S. aid to Colombia in that the violated statutes are the same in both situations. *Id.*

economic or otherwise,<sup>218</sup> and prove that the injury is within the "zone of interests"<sup>219</sup> that Congress intended to protect when it enacted the statute, courts might grant relief. Given the Court's reluctance to consider constitutional challenges, this approach might be more successful. Since granting aid to a country engaging in human rights violations is a difficult issue to resolve in light of separation of powers concerns, the Court is likely to use standing as a tool to avoid decision.<sup>220</sup> Therefore, it is important to think strategically when attempting to establish standing.

## 2. Political and Foreign Policy Considerations

In addition to standing, three other issues are implicated by judicial redressibility of this problem. Essentially, each issue involves adhering to separation of powers notions.

### *a. Political Question*

Even if one is able to prove standing, U.S. courts might regard the issue as a nonjusticiable political question violating the separation of powers doctrine.<sup>221</sup> The courts would probably not entertain a suit brought against the executive branch for the violation of Section 502B of the Foreign Assistance Act of 1961 because it could be regarded as an issue which involves policy choices delegated to another branch by the Constitution.<sup>222</sup> For similar reasons, law suits brought by Congresspersons enjoining the actions of the executive branch are likely to be avoided by

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218. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970).

219. *Id.* at 153.

220. NOWAK & ROTUNDA, *supra* note 194 (noting that the Court often requires "more standing" in hard cases than it might require in easier cases).

221. Political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the executive branch. *Japan Whaling Ass'n v. American Cetacean Soc.*, 106 S. Ct. 2860 (D.C. Cir. 1986). See generally WRIGHT & MILLER, *supra* note 200, § 3534.

222. See *In re Schiavone v. U.S.*, 766 F.2d 70 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 569 (1985) (holding that the doctrine of separation of powers precludes an individual from invoking power of a court to compel the government to act on behalf of all members of society to vindicate the administration of justice).

the judiciary.<sup>223</sup>

*b. General Deference to the Legislature*

The U.S. government executive and legislative branches are granted broad discretion in developing foreign policy. Courts are reluctant to take an active role in formulating foreign policy<sup>224</sup> and deference therefore constitutes an important exception to judicial review.<sup>225</sup> Case law provides that foreign affairs is demonstrably committed to the legislative and executive branches of the government,<sup>226</sup> and therefore the courts are normally deferential on issues implicating foreign affairs.

*c. Act of State*

If suit was brought against Colombia in U.S. courts for violations of its own constitution, the suit could be barred by the act of state doctrine. The act of state doctrine<sup>227</sup> has been described as the foreign policy counterpart of the political question doctrine.<sup>228</sup> It is a judicially-created doctrine with "constitutional underpinnings"<sup>229</sup> based on separation of powers concerns.<sup>230</sup> The Supreme Court explained the doctrine as follows:

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223. *Burton v. Baker*, 723 F. Supp. 1550 (D.C. Cir. 1989) (holding that law suits by members of Congress for declaratory or injunctive relief against either officials of the Executive Branch or their fellow legislators respecting the constitutionality of the way the latter have gone about their business are generally not to be entertained by the Judicial Branch).

224. NOWAK & ROTUNDA, *supra* note 196, § 6.4.

225. *Marbury v. Madison*, 5 U.S. 137, 165-66 (articulation of the doctrine of judicial review where Justice Marshall said questions would be deemed "political" if there was "legal discretion" in the circumstances).

226. *Baker v. Carr*, 369 U.S. 186, 217 (1962). *Baker*, however, indicated that there are some instances where there was no conclusive Congressional or executive action, and where judicial review of foreign affairs issues is appropriate. Congress' blatant disregard of international human rights concerns in its decertification of Colombia for its drug war failures might constitute one of these exceptions.

227. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) (recognizing that there is a "federal common law" which is binding upon the U.S. and holding that the act of state doctrine bars judicial condemnation of the validity of public acts of a recognized foreign sovereign committed within its own territory).

228. *Agapita Trajano v. Marcos*, No. 86-0207, slip op. (D. Haw. 1986).

229. *Id.* at 423.

230. NOWAK & ROTUNDA, *supra* note 196, § 6.4.

"Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."<sup>231</sup> The Courts use restraint<sup>232</sup> and generally defer to the executive on issues of foreign policy,<sup>233</sup> although not every issue dealing with foreign relations is unreviewable.<sup>234</sup> This uneven use of the act of state doctrine has prompted calls for its abolition.<sup>235</sup> The problem is accentuated where the president's political considerations<sup>236</sup> will not allow the necessary changes.

In Latin America, there is a phrase which translates as "[t]he water must be taken away from the fish."<sup>237</sup> Applying the concept of conditionality is one way to force Colombia to improve its human rights compliance without running afoul of the act of state doctrine. Perhaps the U.S. should follow the example of the European Community, which adopted a declaration in 1986 stating that respect for human rights would be a condition of cooperation and that denouncing a country's human rights violations was not an interference in the state's affairs.<sup>238</sup> Under President Jimmy Carter, favorable trade status

231. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

232. "The doctrine was developed . . . as a principle of judicial restraint, essentially to avoid disrespect for foreign states." RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 cmt. a (1987).

233. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767-68, *reh'g denied*, 409 U.S. 897 (1972), *on remand*, 478 F.2d 191 (2d Cir. 1973) (the Court should not apply the act of state doctrine when the executive branch claims that such application would impede U.S. foreign policy).

234. *Smith v. Reagan*, 844 F.2d 195 (4th Cir. 1986), *cert. denied*, 109 S. Ct. 390 (1988).

235. Some believe that the act of state doctrine should be abolished because it is implemented with inconsistency. See Michael J. Bazylar, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 329 (1986).

236. There are significant ramifications to ceasing or conditioning aid to a foreign country to insist on conformity with human rights standards. Human rights are usually not the highest priority in devising foreign policy.

The question is not human rights versus no human rights; instead it is human rights versus friendly relations with existing regimes versus economic benefits to the domestic economy versus humanitarian aid to impoverished people.

Lars Schoultz, HUMAN RIGHTS AND UNITED STATES POLICY TOWARD LATIN AMERICA 109-10 (1981).

237. Manitzas, *supra* note 131, at 316.

238. K. Kumado, *Conditionality: An analysis of the policy of linking development aid to the implementation of human rights standards*, 50 INT'L COMM'N JURISTS REV. 23, 25 (1993).

and foreign aid to Colombia were conditional upon improved compliance with human rights norms.<sup>239</sup> Colombia announced at the 1993 United Nations Human Rights Conference in Vienna, that human rights are a "matter of national sovereignty, arguing that punitive trade sanctions would hurt its economy."<sup>240</sup>

## VI. CONCLUSION: IDEAS FOR ACTION

Colombia flagrantly violates the human rights of its lower-class inhabitants. Vigilante groups, often composed of police officers as well as members of the military, engage in social cleansing with impunity. Social cleansing is well-organized and ritualistic, rather than sporadic.<sup>241</sup> What is unique about this problem is that Colombia has simultaneously been the recipient of the largest amount of U.S. military aid for several years and the region's worst human rights violator.<sup>242</sup>

The United States must follow its own laws and policies and exert pressure on the Colombian government to end the senseless killings characteristic of social cleansing. The Colombian authorities have concealed the human rights crisis, enabling the security forces to "literally get away with murder on a daily basis."<sup>243</sup> The U.S. needs to develop "a fresh approach to Colombia, one divorced from the drug war."<sup>244</sup> In fact, social cleansing is ancillary to the drug war; there is no necessary correlation between them.<sup>245</sup> As one reporter writing from Bogotá noted, "[t]he problem here is less the war on drugs than the war against the poor."<sup>246</sup>

The U.S. is ostensibly committed to fighting for human

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239. Dermota, *supra* note 34, at 14 (quoting Juan Tokatlian, dean of the School of International Studies at the University of the Andes in Bogotá).

240. *Id.*

241. ROJAS, *supra* note 12, at 78.

242. Jeffrey, *supra* note 31, at 380.

243. Wirpsa, *supra* note 7.

244. Robin Kirk, *A War Against Ideas, Not Drugs: Political Cleansing in Colombia*, THE NATION, May 17, 1993, at 64.

245. The only aspect in which social cleansing is a direct result of the drug war is in cases where children believed to be drug runners are killed. See *supra* text accompanying notes 37-39.

246. Jeffrey, *supra* note 31, at 380.

rights and holds itself out to be a country that promotes compliance with international human rights norms. While we cannot expect to stop the violence, we must at least end our role in promoting it. The change can most likely be effected in the legislature because the restrictive doctrines of standing and political question probably preclude judicial consideration of the issue. Lobbying the legislature to pass currently pending bills, or draft a new Colombia-specific bill is the most plausible solution, but it must be one that seeks to enforce compliance with human rights norms. Another method is to exert pressure on Congresspersons to obey the existing laws by threatening to expose their support of the aid to the media. This might be effective if the media campaign is high-profile and uses the names of those who support this policy. The best places to exert pressure are within "officialdom": government, educational institutions and the press.<sup>247</sup> Word of mouth is effective in creating a "ripple effect," especially when someone in power or with access to the public becomes aware.<sup>248</sup>

Whether the ultimate means are conditionality<sup>249</sup> or total withdrawal of funds, the U.S. must send a clear message that the international community will not tolerate, much less support, a government that directly, or indirectly, violates its citizens' human rights with impunity. Rather than providing the very weapons used to carry out the massacres, the United States should help to avert these atrocities through the creation of an international climate hostile to offending regimes.<sup>250</sup> "Perhaps if most people acted collectively, harm-prevention would be quite significant."<sup>251</sup> It is conceivable that several world powers on whom Colombia depends can come together to exert affirmative pressure on Colombia to comply with international human rights norms.

It is unrealistic to expect an end to social cleansing without a total change in those attitudes and values in Colombian society that have resulted in this legacy of violence. The impunity with which the violence is carried out may be curbed by external

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247. Filice, *supra* note 137, at 405.

248. *Id.*

249. A viable option is to place similar conditions on funding as were imposed against Peru in 1991. Kirk, *supra* note 243.

250. Filice, *supra* note 137, at 413.

251. *Id.* at 404.

pressure. This pressure could force the Colombian government to use its resources to develop effective educational programs to end these class-based killings. Perhaps most important is the need for effective and humane public safety so that people do not feel they have the option of taking the law into their own hands. Colombia must return to the rule of law<sup>252</sup> and a more equal distribution of power among the arms of the government to increase accountability. Only by changing these structural inadequacies will an ideological shift begin to take place.

The media gatekeepers must consider the morality of maintaining the ignorance of U.S. citizens concerning this issue.<sup>253</sup> One can hardly use the appellation "moral" when one is concerned only with the "pursuit of ends benefitting oneself and one's own."<sup>254</sup> The economic interests of the government and private corporations, combined with a perception that some of the victimized groups are not worthy of concern, might explain why there is a dearth of information available to the public in the mainstream media. But the problem of ignorance is easily solved, and the U.S. is not solving it. It is my hope that comments such as this can open a path toward greater awareness.

ELIZABETH F. SCHWARTZ\*

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252. See generally Pahl, *supra* note 4 (an analysis of Colombia's current system and recommendations for how to institute reforms in the criminal justice system).

253. See, e.g., *id.* ("The press are guilty of failing to inform themselves and the public of the atrocities.").

254. *Id.* at 405.

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