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English Edition

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Forced Disappearances?

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INTRODUCTION



SUR 16 was produced in collaboration with the **Regional Coalition on Citizen Security and Human Rights**.¹ Every day individuals are subjected to countless forms of violations of their security. Entire impoverished communities have been deprived of their right to participate in the decisions about their own security; in some areas, citizens are exposed to violence both from criminals and from police allegedly combating crime; developments in the regional and international levels as well as in the local and national levels have been disparate and unsatisfactory. By discussing those topics and others, the articles in the dossier exemplify both the challenges and the opportunities in the field of citizen security and human rights.

The non-thematic articles published in this issue, some of which also touch upon the issue of security, albeit more tangentially, provide insightful analyses of other pressing matters relating to the field of human rights: violence against women, forced disappearances, genocide, the right to self-determination, and migrations.

Thematic dossier: Citizen Security and Human Rights

Security and human rights hold an intrinsic – and problematic – relationship in regions with high rates of criminal violence. In these contexts, lack of security can be both a consequence and a pretext for human rights violations, as human rights can be presented as impediments to effective policies against crime. It is precisely to conciliate the agendas of security and human rights, particularly in Latin America, that the concept of citizen security has emerged.

Citizen security places the person (rather than the state or a political regime) as the main focus of policies directed at preventing and controlling crime and violence. In Latin America, such paradigm shift took place in the last few decades, as part of the transition from military dictatorships to democratic regimes. The concept of citizen security seeks to reinforce the idea that security goes hand-in-hand with protecting human rights, and therefore clearly departs from the authoritarian idea of security as protection of the State, common in the times of military dictatorships in Latin America and elsewhere.

In its 2009 “Report on Citizen Security and Human Rights”,² the Inter-American Commission on Human Rights (IACHR) defines citizen security in the following terms: “The concept of citizen security involves those rights to which all members of a society are entitled, so that they are able to live their daily lives with as little threat as possible to their personal security, their civic rights and their right to the use and enjoyment of their property” (para. 23). Thus, the concept of citizen security used by the IACHR includes the issues of crime and violence and their impact on the enjoyment of personal freedom, specifically property and civil rights.

The report by the IACHR also intends to inform the design and implementation of public policies in this area. In paragraphs 39-49, the Commission highlights the States’ obligations regarding citizen security: (i) Taking responsibility for the acts of its agents as well as for ensuring the respect of human rights by third parties; (ii) Adopting legal, political, administrative and cultural measures to prevent the violation of rights linked to citizen security, including reparation mechanisms for the victims; (iii) Investigating human rights violations; (iv) Preventing, punishing, and eradicating violence against women, pursuant to the Convention of Belém do Pará.

In order to fulfill such obligations, the States should adopt public policies in the area of citizen security that incorporate human rights principles and that are comprehensive in their rights’ scope; intersectorial; participatory in regards to the population affected; universal, i.e. inclusive without discriminating vulnerable groups; and, finally, intergovernmental, involving different levels of government (para. 52). Even though these guidelines do not serve as a prescription, their focus on the actual impact of security policies on the enjoyment of the rights of individuals, their attention to the multi-sectorial nature and participatory mechanisms of those policies, as well as the obligation of preventing crime and violence by tackling its causes, serve as solid guide for States or for civil society organizations and victims wishing to advocate for security policies that promote human rights.

In other words, the concept of citizen security highlights that security policies must be, at very least, people-oriented, multi-sectorial, comprehen-

1. The Coalition is formed by the following organizations: Center for Legal and Social Studies (CELS) – Argentina, Brazilian Public Security Forum – Brazil, *Instituto Sou da Paz* – Brazil, Center for Development Studies (CED) – Chile, Center for Studies on Citizenship Security (CESC) – Chile, Center for the Study of Law, Justice and Society (Dejusticia) – Colombia, Washington Office on Latin America (WOLA) – United States, Myrna Mack Foundation – Guatemala, Institute for Security and Democracy (INSYDE) – Mexico, Miguel Agustín Pro Juárez Human Rights Center (Prodh Center) – Mexico, Fundar, Center of Analysis and Research – Mexico, *Ciudad Nuestra* – Peru, Legal Defense Institute (IDL) – Peru, Support Network for Justice and Peace – Venezuela. Representatives of the Andean Development Corporation (CAF) and the Open Society Foundations also took part in some of the meetings of the coalition.

2. Inter-American Commission on Human Rights, “Report on Citizen Security and Human Rights”, Doc. OEA/Ser.L/V/II. Doc.57, 31 December 2009, available at: <http://www.cidh.org/countryrep/Seguridad.eng/CitizenSecurity.Toc.htm>. Last Accessed on: May 2012.

sive, context-specific and prevention-oriented,³ as well as participatory and non-discriminatory. The papers in the present dossier reveal how daunting and necessary this task is.

In **Citizen Security and Transnational Organized Crime in the Americas: Challenges in the Inter-American Arena**, Peru's former interior minister Gino Costa examines some of the main challenges and advances in inter-American efforts to combat organized transnational crime using the concept of citizen security. In **The Current Agenda of Security and Human Rights in Argentina**, researchers from Argentina's Center for Legal and Social Studies (CELS) describe the public security agenda in Argentina within the regional context, analyzing the first year of operations of the country's Ministry of Security and its attempt to implement policies incorporating the concept of citizen security. This same department is the subject of an additional article appearing in this issue. In **Civic Participation, Democratic Security and Conflict between Political Cultures - First Notes on an Experiment in the City of Buenos Aires**, Manuel Tufro examines a pilot program recently implemented by the Argentinian ministry with the aim of expanding public participation in the planning of local public safety policies. In the essay, Tufro analyzes the conflicts arising from this attempt to disseminate a practice in line with the ministry's agenda of promoting "democratic security" in places in which mechanisms of participation owing their existence to what he calls a "neighborhood political culture".

In **The March of Folly and Drug Policy**, Pedro Abramovay uses Barbara Tuchman's work to examine drug policies that have been implemented since 1912, arguing that they are example of policies that are not in the interest of the community being served by the policymakers who designed them.

Finally, this issue's dossier includes a double interview about the recent implementation of UPPs (Pacifying Police Units) in poor communities of Rio de Janeiro (Brazil) previously dominated by criminal organizations. The interviewees are José Marcelo Zacchi, who helped design and implement a government program to expand social and urban services in the areas served by the UPPs, and Rafael Dias, a researcher at human rights NGO Justiça Global.

Non-thematic articles

This issue includes five additional articles relating to important human rights issues.

In **Extraordinary Renditions in the Fight against Terrorism – Forced Disappearances?**, Patrício Galella and Carlos Espósito argue that the practice of kidnappings, detentions and transfers of presumed terrorists by United States officials to secret prisons in third-party States where they are presumably tortured – euphemistically called "extraordinary renditions" – guard similarities with the forced disappearance of persons. The distinction is important because

it means that perpetrators of forced disappearances may be prosecuted as having committed crimes against humanity.

Also dealing with crimes against humanity is an article by Bridget Conley-Zilkic in which she examines the field of genocide prevention and response as it furthers its professional development. In her essay, titled **A Challenge to Those Working in the Field of Genocide Prevention and Response** she explores some of the conceptual and practical challenges facing this field, such as how to define genocide, what can organizations do to prevent it, who are the subjects of these organizations' work, and how to measure success.

Another article, **The ACHPR in the Case of Southern Cameroons**, critically analyses decisions by the African Commission on Human and People's Rights concerning the right of self-determination. In it, Simon M. Weldehaimanot proposes that the case of Southern Cameroons has ignored previous jurisprudence and made this right unavailable for "peoples".

Also touching upon challenges to the sovereignty of nation-states is **The Role of the Universalization of Human Rights and Migration in the Formation of a New Global Governance**, in which André Luiz Siciliano reviews the literature on migration to propose that it is an issue which is still mired in anachronistic Westphalian notions that impede the broad and effective protection of fundamental human rights, as opposed to recent concepts such as cosmopolitan citizenship and the responsibility to protect.

In our final article, researchers from Brazilian think-tank Cebrap (Centro Brasileiro de Análise e Planejamento) examine challenges to the constitutionality of recent legislation on domestic violence, the so-called Maria da Penha law. In **Law Enforcement at Issue: Constitutionality of the Maria da Penha Law in Brazilian Courts**, the authors show that most judicial opinions favor positive discrimination of women in order to combat a scenario of chronic inequality. In a context of historical and ongoing oppression of women by men, they argue, treating men who commit domestic violence against women more stringently than women does not hurt the over-arching principle of non-discrimination.

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3. See the report developed by the United Nations Development Programme (UNDP) in partnership with the Inter-American Institute of Human Rights (Costa Rica), available at: http://www.iidh.ed.cr/multic/default_12.aspx?contentid=ea75e2b1-9265-4296-9d8c-3391de83fb42. Last accessed on: May 2012.



PEDRO ABRAMOVAY

Pedro Vieira Abramovay received his law degree from the University of São Paulo in 2002 and his Master's Degree in law from the University of Brasília in 2010. He was adviser to the Office of the City of São Paulo (2001), legal adviser of government leadership in the Senate (2003), Special Adviser to the Minister of Justice (2004-2006), Secretary of Legislative Affairs of the Ministry of Justice (2007-2009) and National Secretary of Justice (2010).

He is also a professor of Legislative Process and Urban Crime and Violence at the Fundação Getúlio Vargas School of Law in Rio de Janeiro.

Email: pedro.abramovay@gmail.com

ABSTRACT

The article takes into account the concept of foolishness, used by Barbara Tuchman, to raise a debate on the global drug policy that has been implemented since 1912. From this concept it is evaluated how this foolishness has negative effects on the efficiency of public policy on democracy and fundamental rights. At the end, some alternatives to break this policy are presented.

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Drugs – War on drugs – Democracy – Fundamental rights – Public policies



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DRUG POLICY AND *THE MARCH OF FOLLY*

Pedro Abramovay

The March of Folly is the title of the classic book by Barbara Tuchman, in which the author traces the true history of human folly “from Troy to Vietnam”. Tuchman tries to explain why “those with political decision-making power so frequently act in a manner contrary to that dictated by reason and their own interests” (TUCHMAN, 1996, p.4). This refers to situations where, in retrospect, the chosen solution seems to have no concrete relationship with the interests of those who select the policy. Drug policies developed globally since 1912 through the International Opium Convention signed at the Hague, including the 1961 United Nations Single Convention on Narcotic Drugs, the war on drugs declared by former U.S. President Richard Nixon in 1971, the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the increasing militarization of the conflict in many Latin American countries, seems to be a strong candidate for inclusion in an updated volume of Tuchman’s book.

This article seeks to show that the folly of current global policies on drugs has adverse effects in three areas: (i) the possibility of crafting an efficient public policy, (ii) the development of democracy and (iii) the guarantee of fundamental rights.

1 Folly and public policies

The literature on public policies has evolved dramatically, particularly in the second half of the 20th century. A major contribution that this literature has provided to public managers is the clear idea that “the process of solving a political problem consists of a series of steps” (FREY, 1999, p. 14). This process has been given the name “policy cycle.”

Notes to this text start on page 198.

There are several definitions of each of the various stages that make up this cycle. As Klaus Frey (1999, p. 13) explains, all of these definitions presuppose the existence of three basic phases: formulation, implementation and monitoring results.

Formulation includes the diagnosis of the problem, the objectives to be achieved and the choice of means to achieve those objectives.

Implementation refers to the phase where the actions outlined in the formulation are executed and must be accompanied by process indicators and assessment tools to determine whether the actions proposed are indeed being followed and whether the objectives are being achieved.

The monitoring of results, based on the implementation indicators, allows us to evaluate whether the goals were achieved and whether the implementation costs (direct costs and negative externalities) exceeded the policy's benefits, producing an inefficient policy.

These elements have two basic functions. First, we seek to formulate a method for the production of efficient public policies. Second, public policies are an important instrument in holding public managers accountable. How can one publicly debate the merits of a policy if one does not have a clear diagnosis of the problem and know the objectives to be achieved, the means of its implementation and the results?

In the case of global drug policy this cycle is completely corrupted by ideological views that, as discussed above, confound public debate on this issue. What is the purpose of current drug policy? The 1961 Convention highlighted that the goal of creating an international system to monitor internationally banned substances was the increase in the "health and welfare of all." If this is the policy objective, there should be a diagnosis showing what actually damages one's health and, from these findings, solutions should be formulated to reduce this damage. Finally, indicators should be designed to enable the global community to assess whether the policies are actually being implemented and, once implemented, are producing the desired effects.

Fifty years after the 1961 Convention, the outlook is quite another one. The report by the Commission on Global Drug Policy¹ states that:

In practice, the result attained was the opposite of the desired result: the global growth of the illicit drug market, largely controlled by organized crime on a transnational scale. Although there are no precise estimates on the overall consumption of drugs over the past 50 years, an analysis focused on the past 10 years shows a market for illicit drugs that is increasingly widespread and that continues to grow.

(GLOBAL COMMISSION ON DRUG POLICY, 2011, p. 4).

The report noted that between 1998 and 2008 there was a 34.5% increase in the consumption of opiates, 27% in cocaine and 8.5% in marijuana.

In the case of Brazil, statistics about consumption are scarce and do not allow for a proper assessment of the relevant policies. The absence of studies relating to a subject that arouses great interest in the national political debate is also an indicator of an unwillingness to formulate efficient public policies.

With respect to repressive drug policies, it is natural that the policy objective

is, in addition to improved public health, the reduction of violence related to the use and trafficking of drugs. Nevertheless, there are few studies on the relationship between drugs and violence.² In addition, the relevant indicators are not directly related to these objectives. The Global Commission's report explains that:

Today we continue evaluating the success in the war on drugs based on parameters [...] that deal with the judicial process such as the number of arrests, quantities seized or the severity of sentences. The indicators are able to prove the rigor with which a given policy is being implemented but are not able to measure the extent to which this policy is successful in meeting its goal.

(GLOBAL COMMISSION ON DRUG POLICY, 2011, p. 5).

What is noticeable is that the folly that hinders the debate, as discussed in the next section, is extended to the planning and execution of public policies, distorting the very notion of public policy. It is no longer a "sequence of steps" to achieve a certain goal but a political necessity to provide answers to address a widespread fear of the population. Answers that are beyond the logic of public policy use the logic of war.

It is important to note that this approach to the subject, outside the logic of public policy, has detrimental effects on the population. There are some sectors of the population that suffer from these effects far more severely than others. Any policy that uses criminal law as its main instrument, as stated by Zaffaroni, Batista, Slokar and Alagia (2003), will have a more severe effect on vulnerable populations.

In the case of drugs, this phenomenon can manifest itself in many different ways. Domestically in each country, the most vulnerable populations suffer far more severely the effects of incarceration. In the United States, this is clear. A recent survey in California, for instance, shows that the rate of incarceration among blacks for possession of marijuana is 300% higher than that among whites (MALES, 2011).

In Brazil there are no consistent data on this topic, but research conducted in São Paulo showed that 80.28% of those arrested for drug trafficking have only a first-grade education (JESUS, 2011, p. 68).

In the international sphere, the effects are also not felt equally across groups. Although consumption is highly concentrated in developed countries like the United States and European countries, the deaths produced by the war on drugs occur primarily in Latin America, and more recently, in West Africa. And these inequalities are increasingly documented. In 2011, a bipartisan group of U.S. senators produced a report that explicitly links the increase in violence in Mexico and Central America to drug use in the U.S. (UNITED STATES, 2011).

2 Folly and democracy

It would not be appropriate in this article to parse through different definitions of democracy, but freedom of expression, an open space for public debate and the possibility that an idea espoused by a minority can become a widely held idea are common to all definitions.

Folly, therefore, finds it difficult to co-exist with democracy. The development and implementation of current drug policies does serious damage to the workings of democracy. This is the case not only for the reasons that were described in the previous section—a lack of accountability in a public policy that is built on the logic of war and not in pursuit of the desired goals—but, as we shall see, this damage is also inflicted by suppressing the possibility of public debate on the issue.

As Moises Naim (2009) stated, “banning everything related to drugs has created a climate where it is also prohibited to think freely about alternatives to prohibition.”

Some examples corroborate this idea. Among them, the Bolivian case is quite impressive.

The 1961 United Nations Single Convention stated in Article 49.2, “the chewing of the coca leaf should be abolished within 25 years.” In 2009, the Bolivian state, which has an ex-user of coca leaf as president and a Constitution that protects the coca leaf as part of its cultural heritage, filed with the United Nations a request to revoke the article.

The proposal was an act of respect towards the Convention. A country that protects the coca leaf in its Constitution could not continue to be a signatory. To avoid acting like other countries such as Peru and Argentina, who admit the leaf is chewed in their countries and simply ignore the Convention, Bolivia decided to tackle the issue head-on and tried to use regular procedures to modify the agreement. It was proposed that if no country opposed the Convention’s modification within 18 months, the change would be accepted.

Eighteen countries, led by the United States, opposed Bolivia’s petition. Their opposition was manifested in a half-page document with nearly identical wording among the countries that opposed the initiative, without any consistent rationale.³

The Bolivian example shows the resistance of the international community in accepting any debate on a modification to the present legal framework of prohibition, even if it is a *fait accompli* and a cultural practice protected by other UN conventions, such as the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

Another example of the difficulty in engaging in a public debate about drugs that does not meet the interests of prohibitionists was the resignation of the renowned scientist David Nutt. Professor Nutt, of King’s College in London, occupied the chair of the Advisory Council on Drug Abuse of the British government. Nutt published a study in *The Lancet*, one of the most prestigious medical journals in the world, claiming that LSD and marijuana were less dangerous than alcohol. The British government said that with the research Nutt had undermined efforts to communicate a clear message about the harm caused by drugs (TRAN, 2009). How can scientific data hinder the communication of a clear message? Only by the logic of Orwell’s Ministry of Truth from his famous work *1984* can one accept such reasoning.

The last example of a failure of public debate is the Brazilian case of the *Marijuana March*.⁴ In 2011, the Supreme Court (STF) recognized that it was

unconstitutional to ban the Marijuana March in Brazil. This was without a doubt a praiseworthy decision. However, one cannot forget that if the issue did reach the Brazilian Supreme Court, it was only because for several years, judges in São Paulo had banned the march. There could be no clearer example of how the subject of drugs suppresses democratic freedoms than the suspension of the right of public expression that has endured for so long in the state of Sao Paulo.

3 Folly and fundamental rights

The last section of this article seeks to show how unwise drug policy directly affects the guarantee of fundamental rights.

International examples are numerous. From countries that impose the death penalty for drug trafficking to countries that implement some of the drug policies mentioned above, one could make a huge list of complaints.

However, I will not go down that path. I will instead address an important aspect of drug policy in Brazil as an example of the violation of fundamental rights.

In Brazil, the implementation of the Drug Law is executed with complete disregard to constitutional requirements. The Brazilian Supreme Court in September 2010 held unconstitutional a provision of Brazilian law concerning drugs that prohibited the substitution of a penalty of imprisonment for a penalty restricting rights in cases where the judge applied a reduced sentence because the defendant was not part of a criminal organization or had no prior criminal record. In such cases the minimum penalty is one year and eight months. According to Brazilian criminal law, someone who has been sentenced to a term of up to four years in prison can instead be given by a lesser penalty restricting rights. The Brazilian Drug Law expressly nullifies this right. The Brazilian Supreme Court found this unacceptable and declared the Drug Law unconstitutional (BRAZIL, 2010).

Although the Brazilian Supreme Court recognized the unconstitutionality of the Drug Law, the judges at the trial and appellate level are still applying the law. In research carried out in São Paulo, it was shown that in 58% of cases the penalties for drug trafficking are less than four years (JESUS, 2011, p 82). Therefore, the defendant would be entitled to the substitution of an alternative sentence in lieu of imprisonment. However, in 95% of cases, the judges did not award an alternative, lesser sentence (JESUS, 2011, p. 85).

The provision of law that denies bail to those accused of drug trafficking has also been attacked on constitutional grounds. The right to the presumption of innocence is constitutionally enshrined in Brazil. But according to the same survey, 93% of defendants fighting drug trafficking charges were unable to secure a provisional release from detention (JESUS, 2011, p. 89).

Finally, data from the same survey reveals another practice that disregards the Constitution when it comes to drug policy. In 17.5% of cases resulting in imprisonment in São Paulo during the specified period, there was seizure of drugs by the police in people's homes obtained without a warrant (JESUS, 2011, p. 41). Such a practice expressly violates the Constitution and the drugs seized in

these circumstances should be considered illegal evidence, nullifying the process. However, once again, the Constitution's provisions are not respected.

These examples show us how the application of the Drug Law in Brazil also operates under the logic of war, trampling constitutional rights and guarantees.

The Brazilian case is an example of a problem that is present in several countries.

4 New possibilities

Despite this scenario, there are glimpses of new possibilities in the global debate. Since the three previous presidents of Brazil, Colombia and Mexico, Fernando Henrique Cardoso, Cesar Gaviria and Ernesto Zedillo, respectively, met at the Latin American Commission on Drugs and Democracy, denouncing the failure of the drug war and lobbying for more intelligent policies,^[5] Latin America has produced some very interesting discussions far removed from folly.

Colombian President Juan Manuel Santos said in an interview with the British newspaper *The Observer* that a new approach was needed to “take away the violent profit that comes with drug trafficking: [...] If that means legalising, and the world thinks that's the solution, I will welcome it. I'm not against it.”(DOWARD, 2011).

This comment was followed by the Joint Statement on Organized Crime and Drug Trafficking, signed by the presidents of Chile and the member-countries of the Mechanism of Tuxtla Dialogue and Consultation (including Mexico, Colombia and several countries in Central America and the Caribbean). In item 7 of the Declaration, the Heads of State:

Noted that it would be desirable to achieve a significant reduction in the demand for illegal drugs. However if this is not possible, as evidenced by recent experience, the authorities in consumer countries should then explore all possible alternatives to eliminate the exorbitant profits of criminals, including regulatory or market options. This would prevent the transfer of these substances from continuing to cause high levels of crime and violence in Latin American and Caribbean countries.

(MEXICO, 2011).

For the first time, a group of leaders has begun to recognize the failure of current policies. Barbara Tuchman insists upon not judging former leaders by contemporary ideas, as one can only consider an idea foolish if it was perceived that way at the time it was presented (TUCHMAN, 1996, p 5). The question is whether the Latin American presidents who are beginning to denounce the folly of drug policy will be the vanguard of a new approach or will serve only to endorse, in voicing their concerns during this time, the inclusion of drug policy in the updated volume of *The March of Folly*.

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NOTES

1. The Commission on Global Drug Policy, composed of influential international players, was created to spur a lively debate on the subject by calling attention to the failure of current policies.
2. The existing ones demonstrate, often, that the relationship is not driven by use, but by illicit traffic, as suggested by João Manoel Pinho de Mello in *Assessing the crack hypothesis using data from a crime wave: the case of São Paulo* (MELLO, 2010).
3. The texts objecting to the petition are available at: <<http://www.druglawreform.info/>

issues/unscheduling-the-coca-leaf/item/1184-objections-and-support-for-bolivias-coca-amendment>. Last accessed on: 18 Mar. 2012.

4. The Marijuana March, a public demonstration advocating the legalization of marijuana, was held in various cities around the world and was banned by decisions of trial and appellate courts in the State of São Paulo on the grounds that the event would be condoning drug use. However, in 2011, those decisions were reversed by the Brazilian Supreme Court.
5. Available at: <www.drogasydemocracia.org>. Last accessed on: 18 Mar. 2012.

RESUMO

O artigo parte do conceito de insensatez, usado por Barbara Tuchman, para fazer um debate sobre a política global de drogas que vem sendo implementada desde 1912. A partir deste conceito se avalia como essa insensatez produz efeitos negativos sobre a eficiência da política pública, sobre a democracia e sobre os direitos fundamentais. Ao final são apresentadas algumas alternativas para o rompimento dessa política.

PALAVRAS-CHAVE

Drogas – Guerra às drogas – Democracia – Direitos fundamentais – Políticas públicas

RESUMEN

El artículo parte del concepto de insensatez, utilizado por Barbara Tuchman, para realizar un debate sobre la política global de drogas que viene siendo implementada desde implementada desde 1912. A partir de este concepto es evaluado como esta insensatez produce efectos negativos sobre la eficiencia de la política pública, sobre la democracia y sobre los derechos fundamentales. Al final se presentan algunas alternativas para romper con esta política.

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