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FROM MOUNTAINS TO MOLEHILLS: A COMPARATIVE ANALYSIS OF DRUG POLICY

BRIAN A. FORD

INTRODUCTION

I'm not exactly for the use of drugs -- don't get me wrong. But I just believe that criminalizing marijuana, criminalizing the possession of a few ounces of pot and that kind of thing, I mean, it's costing us a fortune and it's ruining young people. Young people go into prisons, they go in as youths, and they come out as hardened criminals. And that's not a good thing.

Pat Robertson¹

Many people never expected to hear the conservative pastor Pat Robertson come out in support of decriminalizing marijuana or for softening criminal sanctions on drugs in general. Addiction, crime, and disease are harms that are commonly associated with drug use and the drug trade - costs that are intangibly calculated in terms of human lives, medical costs, lost productivity, and law enforcement costs. The need to combat these harms has given broad support to an international effort by governments and organizations, materialized in an international

1. The 700 Club, (CBN television broadcast Dec. 16, 2010), available at www.cbn.com/media/player/index.aspx?s=/Archive/Club/700Club121610_WS. See also The 700 Club, (CBN television broadcast Mar. 1, 2012), available at www.cbn.com/media/player/index.aspx?s=/archive/club/700Club030112_WS (reiterating his calls for decriminalization Roberts states, “[i]t’s just shocking, especially this business about drug offenses. It’s time we stop locking up people for possession of marijuana. We just can’t do it anymore.”).

framework of prohibitionist drug policies, implemented through treaty law and domestic law and enforced through military and police powers. This prohibitionist effort is what has become known as the “war on drugs,” and is politically supported by the image of politicians who are “tough on crime.”

But Mr. Robertson is just one of many voices, some more unexpected than others, adding to a chorus of people calling for change in the global approach towards drug control efforts.² These voices are looking at the human costs of the war on drugs from the other end, the costs imposed on people by law enforcement, and are wondering where the benefit to a prohibitionist stance can be found. Among these voices are a growing number of politicians, organizations, and governments. For decades, some governments, like the Netherlands and Portugal, have been utilizing harms reduction models of drug policy in place of strict prohibition models.³ Even within the U.S., which leads the world in an effort to prohibit and criminalize drugs, the calls for decriminalization and legalization are growing.⁴

2. “Drug control” for the purposes of this paper is defined as the efforts of governments and legal institutions to address harms associated with drug use, production, and trade. “Drug policy” broadly refers to laws, regulations, and the behavior that governments and legal institutions can and have adopted towards drug control. As will be presented in this paper, drug policy at present is couched in a general policy of prohibition, whereby the use, production, and trade of drugs deemed illicit is met with criminal sanction. This paper takes the position that there are other viable policy options available and advocates the viability of these other options.

3. This paper divides drug policy options into three broad categories: (1) Prohibition; (2) Harms Reduction; and (3) Legalization. “Prohibition” is a model of criminalization whereby the substances deemed illicit and the people and organizations associated with their use, production, and distribution are punished with criminal sanctions. “Harms reduction” refers to a policy that focuses on the social and health problems associated with drugs, and seeks to treat these problems through social and medical institutions rather than criminal justice systems and police forces. “Legalization” removes criminal penalties associated with prohibition and in their place permits structures of regulations applied to the use, production, and distribution of drugs.

The Netherlands passed the Dutch Opium Act in 1976, which deprioritized the prosecution of laws prohibiting marijuana, hallucinogenic mushrooms, and other “soft drugs.” The effect of this law is seen in the “coffee shop” culture of Amsterdam, whereby businesses selling marijuana and other deprioritized drugs are permitted to operate free from fear of prosecution within certain limitations. See Scientific Committee of the Netherlands Drug Monitor (NDM), Report to the EMCDDA by the Reitoix National Focal Point: The Netherlands Drug Situation 2011, 15-17 (2012), available at www.emcdda.europa.eu/html.cfm/index191640EN.html.

Portugal passed the National Action Plan for the Fight Against Drugs in 2001, which decriminalized drug use. See European Monitoring Centre for Drugs and Drug Addiction, 2011 National Report (2010 data) to the EMCDDA by the Reitoix National Focal Point, “Portugal”: New Development, Trends and in-depth information on selected issues, 16-17 (2011), available at www.emcdda.europa.eu/html.cfm/index191616EN.html.

4. See Ethan A. Nadelmann, *Criminologists and Punitive Drug Prohibition: To Serve or to Challenge?*, 3 CRIMINOLOGY & PUB. POL’Y 441, 443 (2003-2004) (noting that, “The United States played a leadership role throughout much of the twentieth century in criminalizing opiates, cocaine, marijuana, and hallucinogens, adopting such laws before most other countries and proselytizing thereafter in favor of global prohibitions.” See also, Frank Newport, *Record-High 50% of Americans*

Additionally, the United Nations (UN) and a number of Latin American governments, like Colombia and Mexico, have become increasingly weary of the international war on drugs, with its ever-increasing costs and diminished to non-existent returns.⁵ In what many had hoped would be a watershed moment, the governments of the American continents had a formal discussion about the war on drugs and evidence-based approaches to tackling the problem of drugs at the Summit of the Americas in April of 2012.⁶ Because the possibility of legalization or a

Favor Legalizing Marijuana Use, Gallup Politics, Oct. 17, 2011, available at www.gallup.com/poll/150149/record-high-americans-favor-legalizing-marijuana.aspx (showing that 50% of Americans surveyed support the legalization of marijuana and 70% favor making it legal for medicinal use).

See also Public Policy Polling, *National Survey Results*, Nov. 30-Dec. 2, 2012, available at www.mpp.org/assets/pdfs/blog/MPPResults.pdf (reporting that 58% of 1,325 registered American voters sampled thought that marijuana should be legal).

See also Princeton Survey Research Associates International, *Reason-Rupe Public Opinion Survey: January 2013 Topline Results*, Jan. 31, 2013, available at reason.com/assets/db/13627701016988.pdf (reporting that 47% of 1,000 adults interviewed in the U.S. favor legalizing marijuana for recreational use and 53% think that the government should treat marijuana the same as alcohol).

5. E.g., U.N. Office on Drugs and Crime [UNODC], *Political Declaration and Plan of Action on International Cooperation Towards an Integrated and Balanced Strategy to Counter the World Drug Problem*, 52nd Sess. (2009) p.46-47, ¶¶48 & 49, available at www.unodc.org/documents/commissions/CND-Uploads/CND-52-RelatedFiles/V0984963-English.pdf (expressing frustration with drug eradication efforts, the UNODC writes, “Despite some significant progress made in certain areas, efforts have not led to a significant overall decrease in the global illicit cultivation of crops used for the production of narcotic drugs and psychotropic substances. The lack of understanding of demand/supply drug market dynamics and the lack of a long-term balanced approach, combined with ill-sequenced policy interventions, corruption and inadequate international development assistance to address the causes driving illicit crop cultivation, have impeded the ability Governments to sustain the gains achieved locally.”).

See also Ed Vulliamy, *Colombia calls for global drugs taskforce*, THE OBSERVER, (U.K.), Apr. 14, 2012, www.guardian.co.uk/world/2012/apr/15/colombia-global-drugs-taskforce (reporting that Colombian President Juan Manuel Santos “proposed the establishment of a taskforce of experts, economists and academics to analyse the realities of global drug addiction, trafficking and profiteering, with a view to a complete overhaul of strategy.”)

See also Juan Forero, *Latin American countries pursue alternatives to U.S. drug war*, THE WASHINGTON POST, Apr. 10, 2012, articles.washingtonpost.com/2012-04-10/world/35451300_1_latin-american-leaders-cartels-legalization (listing Colombian President Juan Manuel Santos, Guatemalan President Otto Perez, then-Mexican President Felipe Calderonas, former Colombian President Cesar Gaviria, former Mexican President Ernesto Zedillo, and former Brazilian President Fernando Henrique Cardoso among the Latin American leaders most forcefully offering new proposals and critiquing U.S. drug policy).

See also Adam Williams & Flavia Krause-Jackson, *Costa Rica's Chinchilla Calls for Drug Legalization Debate*, BLOOMBERG, Mar. 1, 2012, www.bloomberg.com/news/2012-03-01/costa-rica-calls-for-debate-on-drug-legalization-amid-record-trafficking.html (reporting Costa Rican President Laura Chinchilla saying that “[d]rug legalization in Central America merits a ‘serious’ debate as a solution to the crime and violence coursing through the region even if it runs up against U.S. opposition.”).

6. E.g., Jamie Doward, *‘War on drugs’ has failed, say Latin American leaders*, THE OBSERVER (U.K.) 1 Apr. 7, 2012. The Summit of the Americas is a regional meeting of the heads of state of nations in the Western hemisphere where regional policy issues are discussed and explored.

broader harms reduction or legalization approach was skillfully avoided by the U.S. at the summit, it seemed clear that, at least in the perspective of the U.S. government, the war on drugs would continue to be a foregone conclusion.⁷ However, international and domestic drug policy debates in the U.S. and abroad were rekindled when Uruguay proposed legalizing marijuana under a state-controlled monopoly, and Colorado and Washington of the U.S. defied the federal laws of prohibition by legalizing the recreational use of marijuana.⁸ Additionally, recent polls in the U.S. indicate that somewhere around 50% of Americans are currently in favor of legalizing and taxing marijuana instead of prohibiting it.⁹ These trends suggest the discussion of drug policy reform is occurring on both domestic and international levels, and a real possibility exists that major policy shifts will be experienced in the coming years.

This paper examines the debate surrounding the trend of global movements away from prohibition and towards a harms reduction approach to drug policy. This paper reviews the prohibitionist model that is, by and large, the global status quo of how countries deal with drugs. Under the prohibitionist approach, governments criminally ban the production, trafficking, sale, possession, and use of drugs in an effort to directly combat the harms associated with drugs. Section I of this paper presents the prohibitionist approach as the international status quo and

7. See Forero, *supra* note 5 (quoting U.S. Vice President as saying “It’s worth discussing, but there’s no possibility the Obama-Biden administration will change its policy on legalization.”). See also Andrew Cawthorne and Pablo Gariban, *UPDATE 3-Obama urged at summit to focus on Latin America*, REUTERS, Apr. 13, 2012, www.reuters.com/article/2012/04/13/americas-summit-idUSL2E8FDG9D20120413 (reporting that despite “Latin American leaders clamoring for a new approach to beat traffickers and reduce violence in the region” and many wanting to “start a discussion on possible legalization measures to take the vast profits out of the [drug] trade,” Obama opposed taking up that conversation at the summit.).

8. See Alan Duke, *2 states legalize pot, but don't 'break out the Cheetos' yet*, CNN, Nov. 8, 2012, www.cnn.com/2012/11/07/politics/marijuana-legalization (reporting that Washington’s measure I-502 and Colorado’s Amendment 64, both measures to legalize the recreational use of marijuana in those states, had passed by popular vote on November 7, 2012). See also Tim Johnson, *Ex-world leaders: Time for U.S. to rethink drug policy as states ease marijuana laws*, MIAMI HERALD, Mar. 18, 2013, www.miamiherald.com/2013/03/08/3274866/ex-world-leaders-time-for-us-to.html (reporting that Uruguayan President Jose Mujica announced a plan in June, 2012 to legalize marijuana under a state monopoly. He later tabled the bill in December, 2012 to rethink the approach.).

9. See Nadelmann, *supra* note 4, at 443 (noting that “The United States played a leadership role throughout much of the twentieth century in criminalizing opiates, cocaine, marijuana, and hallucinogens, adopting such laws before most other countries and proselytizing thereafter in favor of global prohibitions.” See also Newport, *supra* note 4. See also Public Policy Polling, *National Survey Results*, Nov. 30-Dec. 2, 2012, available at www.mpp.org/assets/pdfs/blog/MPPResults.pdf (reporting that 58% of 1,325 registered American voters sampled thought that marijuana should be legal). See also Princeton Survey Research Associates International, *Reason-Rupe Public Opinion Survey: January 2013 Topline Results*, Jan. 31, 2013, available at reason.com/assets/db/13627701016988.pdf (reporting that 47% of 1,000 adults interviewed in the U.S. favor legalizing marijuana for recreational use and 53% think that the government should treat marijuana the same as alcohol).

examines the effects and failures of that approach. Section II examines a variety of harms reduction approaches that attempt to address harms to drug users and society at large through treatment, tolerance, and the recognition of human rights. However, the potential successes of harms reduction models are still constrained by the reality of prohibitionist legal regimes whose stricter criminalization of drugs often contradict and frustrate the policies and legislative efforts of harms reduction proponents. Because the harms reduction approaches are restrained by a prohibitionist legal regime that criminalizes their policies, legalization becomes a necessary step to achieving the goals of harms reduction approaches. Therefore, section III of this paper presents an alternative to legal systems that ban drugs in order to remove this clash between prohibitionist and harms reduction policies. Section III lays out three arguments for the legalization of drugs on a global scale. This paper concludes that a legalization-based approach is the best drug policy. It advocates that governing bodies all over the world adopt an intelligent, legalized approach to the problem of drugs in society as a more effective approach to combating the harms of drug addiction and the crimes of the drug trade while upholding human rights, global equity, and rule of law.

I. THE PROHIBITION MODEL

The U.S. and most of the world utilize a prohibition model of drug control.¹⁰ The prohibition model is characterized by the use of legal sanctions and criminal penalties for the possession, production, trafficking, and sale of drugs deemed illicit by international bodies and domestic scheduling systems.¹¹ The possible penalties include imprisonment, fines, or a sentence of death. Further, the prohibition model is implemented on a near-universal global scale by three international treaties: (1) the Single Convention on Narcotic Drugs (SCND) of 1961; (2) the Convention on Psychotropic Substances (CPS)

10. The international treaty law governing the current global approach to drug control enjoys near universal acceptance. Of the 193 member states to the United Nations, there are 184 states party to the Single Convention on Narcotic Drugs of 1961, 183 states party to Convention on Psychotropic Substances of 1971, and 185 states party to Convention Against Illicit Trafficking of Narcotic Drugs of 1988. Single Convention on Narcotic Drugs, 18 U.S.T. 1407 (1961) [hereinafter "SCND"], Convention on Psychotropic Substances 32 U.S.T. 543 (1971) [hereinafter "CPS"], United Nations Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, 28 I.L.M.493 (1988) [hereinafter "CAIT"]. These treaties and more specifics on them can be found at www.unodc.org/unodc/en/treaties/index.html?ref=menutop [hereinafter "the treaties"].

11. International and national governing bodies determine which drugs are "illegal" by categorizing harmful or addictive drugs into different "schedules," or categories. Different drugs are treated differently based on what category the drugs are in. *E.g.*, 21 U.S.C. § 802(6) and § 812 (2013). *See also* the treaties, *supra* note 10.

of 1971; and the Convention Against Illicit Trafficking of Narcotic Drugs and Psychotropic Substances (CAIT) of 1988.¹²

This section of the paper focuses on the prohibition model employed internationally and by the U.S. The first part of this section outlines the three main treaties governing drug control internationally. The second part of this section looks at U.S. prohibition policies domestically. The third part of this section examines the U.S. prohibition approach internationally. While prohibition has been implemented by governments across the globe through the three treaties as one of the most accepted norms of international law, the effort to prohibit drugs was, and continues to be, spearheaded and largely funded by the U.S.¹³ Therefore, U.S. drug policy serves as a good model for prohibition in a domestic context. Specifically, this section presents Mexico and Colombia as representative focal points of the U.S.' efforts in the international war on drugs.

A. THE THREE MAIN TREATIES

In the name of “the health and welfare of mankind,” the UN, through the Economic and Social Council, has legislated an international war on drugs to combat the evil of addiction to narcotic drugs.¹⁴ While there was international consensus on the need to combat the illicit use of drugs, most nations recognized that narcotic drugs are “indispensable for the medical use of pain relief.”¹⁵ Therefore, the UN adopted a comprehensive strategy for the control of narcotic drugs, requiring member States to coercively prevent the illegal production, trafficking, and consumption of specified narcotic substances.¹⁶ This comprehensive strategy is implemented by the ascension of member States to three treaties: the SCND, the CPS, and the CAIT.¹⁷

12. The treaties, *supra* note 10, are available at UN Office on Drug and Crime (UNODC), www.unodc.org/unodc/en/treaties/index.html?ref=menutop.

13. See UNODC Annual Report 2010 at 16, 64, & 67 (reporting that in 2009, more than 88% of the total UNODC budget came from voluntary donations of member states, with the U.S. contributing roughly 5% of those donations. This is but a small portion of the over-all expenditure of the U.S. in fighting the war on drugs), available at www.unodc.org/unodc/en/about-unodc/annual-report.html?ref=menutop. See also Nadelmann, *supra* note 4, at 443 (noting that, “The United States played a leadership role throughout much of the twentieth century in criminalizing opiates, cocaine, marijuana, and hallucinogens, adopting such laws before most other countries and proselytizing thereafter in favor of global prohibitions.”).

14. SCND, *supra* note 10, Preamble.

15. *Id.*

16. Daniel Heilmann, The International Control of Illegal Drugs and the U.N. Treaty Regime: Preventing or Causing Human Rights Violations?, 19 CARDOZO J. INT'L & COMP. L. 237, 239 (2011).

17. The treaties, *supra* note 10.

The treaties have received near-universal acceptance, with almost every State in the world being a party to at least one.¹⁸ To date, of the 193 member States to the UN, there are 184 States party to SCND, 183 States party to CPS, and 185 States party to CAIT.¹⁹ Because of the way that the treaties were created and adopted, the international community has divided the illicit drug market into two broad categories: Narcotics and Psychotropics. The SCND framed the international community's general approach toward a global prohibition of drugs, but as new substances with similar effects began emerging, the international community expanded this prohibition under the CPS and implemented mandatory criminalization with the CAIT. This portion of the paper presents the history of this international prohibitionist regime.

As the foundational instrument of the current international prohibitionist legal regime, the SCND defined and scheduled "narcotics," resulting in prohibitive measures against heroin, cocaine, and cannabis. The SCND created four schedules of narcotic drugs, classifying over one hundred illicit substances according to how addictive they were perceived to be.²⁰ Under this scheme of schedules, heroin, cocaine, and cannabis were deemed to pose the greatest threat and were listed in Schedule I, subjecting them to all controls under the convention, whereas less stringent controls were placed on substances in the other schedules.²¹ SCND designates the scheduling of substances to the World Health Organization (WHO), with the approval of the UN Commission on Narcotic Drugs (UNCND).²²

The main strategy behind SCND was a supply-side approach to eliminating the international drug trade. The treaty attacked the supply-side of the drug trade by imposing state-controlled monopolies on the production of narcotic drugs so that trade with other nations was only allowed through a group of licensed agencies, strictly monitored by international bodies.²³ Producing nations were directed to take appropriate measures to destroy crops of raw narcotics (opium poppies, coca bush, and cannabis plants) if the crops were grown outside the aegis of the member States' estimates of production necessary to meet global

18. *Id.*

19. UNODC, *supra* note 5.

20. Heilmann, *supra* note 16, at 244.

21. SCND, *supra* note 10, at art. 2. Schedule II contains substances typically administered medically, Schedule III substances are generally available pharmaceutically, and Schedule IV substances are permitted in small amounts for medical and scientific research.

22. *Id.* at art. 3. The CND is a part of the UN Economic and Social Council, and can be understood as the political counterpart to WHO in the scheduling of substances under SCND.

23. *Id.* at art. 3, 23, 26, 29, 30, and 31.

medicinal and scientific needs.²⁴ The adoption of the SCND represented the first substantial codification of the international war on drugs.

As time passed, however, the international community found the need to expand the scope of international drug controls beyond narcotic drugs to synthetic drugs and psychotropic substances manufactured chemically, because they were not contemplated by the SCND.²⁵ Therefore, the UNCND drafted the CPS, which was largely modeled on the SCND and was quickly adopted by the international community. Under the CPS, a “psychotropic substance” was defined broadly as any substance that “has the capacity to produce: 1) A state of dependence, and 2) Central nervous system stimulation or depression resulting in hallucinations or disturbances in motor function or thinking or behavior or perception or mood,” or similar abuse and ill effects as a previously scheduled substance.²⁶ Additionally, the WHO is given wide discretion to recommend a substance for assessment and scheduling if “there is sufficient evidence that the substance is being or is likely to be abused so as to constitute a public health and social problem warranting the placing of the substance under international control.”²⁷ Any substance scheduled under the CPS is subject to a similarly strict scheme of internationally supervised and licensed agencies as required under the SCND.²⁸

The result of the SCND and the CPS together is a sweeping prohibition of the production of a broad spectrum of drugs for any purpose other than medical use and medical or scientific research.²⁹ Additionally, each treaty requires that possession of controlled substances be prohibited and requires member States to adopt penal provisions to enforce the treaties domestically.³⁰ However, as time passed, it was found that illegal production and trafficking of drugs was increasing, and global drug abuse continued to spike out of control, contrary to the efforts of the international community.³¹ In response, the UN General Assembly

24. *Id.* at art. 22 and 26.

25. Heilmann, *supra* note 16 at 246. Notably, although synthetic drugs and chemically produced psychotropics had existed prior to the adoption of the SCND, their production and use increased greatly after the adoption of the SCND created a general prohibition on other illicit substances.

26. CPS, *supra* note 10, at art. 2.

27. *Id.* art. 2.

28. *Id.* at art. 5, 8, 9, and 10. *See also* Heilmann, *supra* note 16 at 247-248.

29. SCND, *supra* note 10, art. 4 and 33. *See also* CPS, *supra* note 10, art. 5 and 22.

30. SCND, *supra* note 10, art. 33. *See also* CPS, *supra* note 10, art. 22.

31. Heilmann, *supra* note 16, at 248-249.

recommended that the UNCND prepare a draft convention against illicit drug trafficking, and within 3 years, the UNCND produced the CAIT.³²

CAIT acts as an extension to the SCND and CPS by reinforcing the controls that the earlier treaties laid down and requiring member States to impose criminal sanctions on all stages of the illegal drug market.³³ Crimes specifically enumerated by the CAIT are the possession, purchase, or cultivation of drugs for personal consumption, and the CAIT proscribes “imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation” as appropriate punishment for those offenses.³⁴ CAIT also improved the co-operation of law enforcement agencies internationally and included provisions enhancing the confiscation of drug proceeds, extradition of drug offenders, international legal assistance, and police training.³⁵

These three treaties taken together constitute the main pillars of the current international war on drugs. While there are provisions in both the SCND and CPS for the existence of legal domestic drug markets for limited purposes, the treaties are correctly read to criminally prohibit all production, traffic and sale of illicit drugs for anything other than scientific and medical purposes.³⁶ This prohibitionist stance was largely focused on supply-side controls in production and demand-side criminalization of consumption and was reiterated at the 1998 UN General Assembly Special Session (UNGASS) Political Declaration.³⁷ UNGASS targeted 2008 as a benchmark year for measurable results in the war on drugs.³⁸ In 2008, however, both global drug production and trafficking were still relatively stable, there was little discernible change in drug abuse worldwide, and levels of violence and lawlessness were increasing dramatically in multiple nation States.³⁹ Thus, the international community found itself changing direction in a renewed Political Declaration and Plan of Action in 2009 (Plan of Action).⁴⁰

32. *Id.* at 249.

33. CAIT, *supra* note 10, art. 3.

34. *Id.* at art. 3. Article 3 also provides for measures that a state may impose in addition to criminal sanctions, such as treatment, education, aftercare, rehabilitation, or social reintegration.

35. *Id.* at art. 5, 6, 7, 9, and 10.

36. SCND, *supra* note 10, art. 4, 21, 23, 26, and 28, SCND. *See also* CPS, *supra* note 10, art. 5. *See also* CAIT, *supra* note 10, art. 3.

37. Heilmann, *supra* note 16, at 252.

38. *Id.*

39. U.N. Declaration, *supra* note 5, at 10-13, ¶12, 27, & 29. *See also* Heilmann, *supra* note 16, at 252.

40. U.N. Declaration, *supra* note 5, at 10-13, ¶12, 27, & 29. *See also* Heilmann, *supra* note 16, at 252.

The Plan of Action calls for member States to “[reduce] drug abuse and dependence through a comprehensive approach” with a focus on education and treatment based programs in addition to the prohibitionist approach to the illicit production and marketing of drugs for consumption.⁴¹ Also, the Plan of Action initiated a shift from traditional crop eradication and destruction strategies to a call for “innovative strategies to support alternative development.”⁴² While the Plan of Action recognizes that there is currently “an insufficient emphasis on human rights and dignity in the context of drug demand reduction efforts,” there is no mention of the protection of human rights in the process of supply-side drug interdiction efforts other than reducing levels of corruption and violence perpetrated by criminal organizations.⁴³

The effect that these policy shifts will have on the international war on drugs remains unclear. The law behind the global prohibition of drugs remains intact in the three main treaties, and the main thrust of enforcement remains centered on traditional eradication and interdiction efforts, including the domestic criminalization of illicit drug use and production. These policy shifts have, however, altered the on-the-ground efforts of certain international agencies in addressing the global drug problem and can be understood to some extent to represent a turn towards harms reduction approaches, which will be discussed in section II of this paper.

B. DOMESTIC PROHIBITION IN THE U.S.

The drug policy employed by the U.S. is prohibition. The policy of drug prohibition operates on simple economic theory, while the motivation of prohibition is moral.⁴⁴ The economic theory of prohibition contends that in any given market, if the price of production is increased, then the price of the good will increase and the demand will fall.⁴⁵ The moral argument is that the ends justify the means; the eradication of the social costs associated with the illicit drug market is worth the price paid in terms of people incarcerated and the money spent on law enforcement, courts, and

41. U.N. Declaration, *supra* note 5, at 19-20, ¶4.

42. *Id.* at 46-47, ¶¶48 & 49.

43. *Id.* at p. 31-33, ¶¶25 & 29.

44. A fuller discussion of the economics of the illegal drug market is presented in the first part of section IV of this paper.

45. See generally Eva Bertram and Bill Spencer, *Democratic Dilemmas in the U.S. War on Drugs in Latin America*. INSTITUTE FOR THE STUDY OF DIPLOMACY (ISD), (2000). Gary S Becker, Kevin M. Murphy, Michael Grossman, *The Market for Illegal Goods: The Case of Drugs* 114 JOURNAL OF POLITICAL ECONOMY 1 (2006). Michael L. Ross, *What Do We Know about Natural Resources and Civil War?* 41-3 JOURNAL OF PEACE RESEARCH, 337-56 (2004).

prisons. This portion of the paper presents the policy of prohibition in the U.S. and some of the costs of its operation.

The modern approach of drug control in the U.S. was launched by the Control Substances Act (CSA) of 1970 under President Richard Nixon as a means of implementing the U.S.' treaty obligations as a signatory to the SCND and CPS.⁴⁶ The CSA, in fulfillment of treaty obligations, created and implemented a drug schedule similar to that created internationally by the SCND.⁴⁷ In 1973, President Nixon created the Drug Enforcement Agency (DEA) to implement and enforce the provisions of this act.⁴⁸ This anti-drug policy of the U.S. was later intensified in the 1980s under President Ronald Reagan with the introduction of a series of laws that implemented mandatory minimum federal sentencing for drug law violations.⁴⁹ These sentencing laws ensured criminal sanctions of imprisonment for all drug offenses, including marijuana offenses and mere possession of illicit substances.⁵⁰ Additionally, the severity of the sentences that these laws required increased the length of incarceration for drug offenses.⁵¹ Combined, these policy choices have spawned a perfect storm of social harm and institutional harm, as detailed below.

The impacts of drugs and the war on drugs in the U.S. are best described in terms of dollars and arrests. The U.S. Department of Justice estimates that the annual economic impact of illicit drugs on the U.S. is approximately \$215 billion, considering an overburdened justice system, a strained healthcare system, lost productivity, and environmental destruction.⁵² In 2012, the U.S. federal government allotted \$26.2 billion

46. See 21 U.S.C. § 801(7) (2013) (referring to the treaty obligations of the U.S.). The Controlled Substances Act of 1970 was codified into law under §801. See also 21 U.S.C. §§ 801(a)(2)-(3) (2013) (referring to the treaty obligations imposed on the U.S. under the CPS).

47. 21 U.S.C. § 802(6) and § 812.

48. Exec. Order No. 11,727, 3 C.F.R. 785 (1971-1975).

49. See generally Comprehensive Crime Control Act, Pub.L. 98-473, Title II, Oct. 12, 1984, 98 Stat. 1976. This series of laws made marijuana offenses a violation of federal law and implemented policies of federal incarceration for drug offenders. See also generally Anti-Drug Abuse Act of 1986 (ADAA), Pub.L. 99-570, Oct. 27, 1986, 100 Stat. 3207. This series of laws generated mandatory minimum sentencing guidelines for a wide range of drug offenses, including a notably disparate treatment of crack cocaine offenses as compared to powder cocaine offenses. The disparity in cocaine offenses was reduced by the Fair Sentencing Act of 2010, which reduced the disparity in sentencing between crack and powdered cocaine to a ration of 18:1 (See, 21 U.S.C. §§ 841).

50. 21 U.S.C. § 802(6) and § 812.

51. *Id.*

52. U.S. Department of Justice, National Drug Threat Assessment 2010, 1, available at www.justice.gov/archive/ndic/pubs38/38661/38661p.pdf [hereinafter "Drug Threat Assessment"].

to fight the war on drugs.⁵³ Similarly, in 2011, the U.S. spent \$10 billion on eradication programs and \$9 billion on drug-related law enforcement domestically.⁵⁴ Clearly, the cost of prohibition at home is steep.

Meanwhile, the focus of U.S. police forces on drug crime is reflected in the number of people arrested and incarcerated for drug law violations. Drug violations constitute the most common category for arrests and have accounted for two thirds of the increase in the federal prison population.⁵⁵ To date, at least 20 million Americans have been arrested for the possession of marijuana since the Nixon-era prohibition went into effect in 1970.⁵⁶ There were 1,702,537 men and women arrested for drug violations in 2008 alone.⁵⁷

Contemporaneous with the policies implemented by Presidents Nixon and Reagan, the total amount of people incarcerated in the U.S. increased from roughly 330,000 in 1970 to approximately 2 million in the year 2000, with the national per-capita incarceration rate increasing well above 400% over the same time-span.⁵⁸ While many states and localities throughout the nation have recently reduced the criminal penalties associated with mere possession offenses, a violation of the federal drug laws in the U.S. still results in severe penalties.⁵⁹ Arrests for drug violations totaled about 14 million in 2008 or 12.2% of all arrests made in the U.S.⁶⁰ That figure represents an increase of nearly 65% in the proportion of drug arrests over the last two decades.⁶¹ While there were

53. Office of National Drug Control Policy, National Drug Control Budget - FY 2012 Funding Highlights, www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/fy12highlight_exec_sum.pdf, accessed November 2011 [hereinafter "National Drug Control Budget"].

54. *Id.* See also Gil Kerlikowske, What We Have to Say About Legalizing Marijuana: Official White House Response to "Legalize and Regulate Marijuana in a Manner Similar to Alcohol and 7 other petitions," www.whitehouse.gov/petition-tool/response/what-we-have-say-about-legalizing-marijuana?utm_source=wethepeople&utm_medium=response&utm_campaign=ondcp, accessed November 2011 [hereinafter "Official White House Response to Legalization"].

55. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 60 (2010).

56. Drug Threat Assessment, *supra* note 52, at 5 (citing annual data from the Federal Bureau of Investigation (FBI)).

57. *Id.*

58. See Justice Policy Institute, *The Punishing Decade: Prison and Jail Estimates at the Millennium*, Justice Policy Institute, Washington, D.C. (May 2000), available at www.justicepolicy.org/uploads/justicepolicy/documents/punishing_decade.pdf (showing the number of prison and jail inmates as 338,029 in 1970, 474,368 in 1980, 1,148,70 in 1990, and 1,965,667 in 2000. Also placing the U.S. incarceration rate at 166.3 in 1970, 209.39 in 1980, 461 in 1990, and 691 in 2000).

59. *E.g.*, 21 U.S.C. § 841.

60. Drug Threat Assessment, *supra* note 52, at 5 (citing annual data from the Federal Bureau of Investigation).

61. *Id.* at 5 (citing that in 1987, drug violations made up 7.4% of all arrests in the U.S.).

50,000 people incarcerated for drug violations in 1980, the number had risen to approximately 500,000 in 2010.⁶²

Additionally, the prohibition policies have dramatically increased the percentage of people in prison. Nearly 20% of state prisoners and 53% of federal prisoners in the U.S. are incarcerated for a drug offense.⁶³ Partially because of the effort to combat drugs with prohibition in the U.S., American prisons incarcerate roughly 23% of the world prison population, raising human rights concerns within the U.S. and international human rights organizations.⁶⁴ Further, the effect of a criminal record containing a drug offense in the U.S. is devastating to the individual. An arrest record can lead to permanent problems such as finding employment, housing, financing for college, or admission to college.⁶⁵ In fact, a criminal drug conviction can result in ineligibility for any federal assistance.⁶⁶ Based on these facts, the single largest issue of criminal law in the U.S., in terms of both resources spent and impact on society, is criminal drug law.

As a result of prohibitionist drug policy, the bulk of U.S. law enforcement is geared towards drug related crime. While many prohibitionists view the social costs of mass incarcerations as a necessary evil to reduce drug use and the crime associated with it, decades of experience indicate that drug use under prohibitionist policies remains relatively constant. The prohibitionist model actually elevates crime rates and the costs of law enforcement needed to stamp down the persistent illegal drug trade. These law enforcement costs include the money and officers devoted to detection, interdiction, prosecution, imprisonment, and rehabilitation of offenders.

C. U.S. PROHIBITION ABROAD

In addition to the effects of prohibition felt within the U.S., the international war on drugs has also created more severe problems abroad.

62. Stephen B. Duke, *Cannabis Captiva: Freeing the World from Marijuana Prohibition*, 11 GEO. J. INT'L AFF. 83, 86 (2010-2011).

63. Drug Threat Assessment, *supra* note 52, at 5 (citing data from the United States Bureau of Justice Statistics).

64. ROY WALMSLEY, WORLD PRISON POPULATION LIST, SCHOOL OF LAW, KING'S COLLEGE LONDON, (8th ed. 2009), available at www.prisonstudies.org/info/downloads/wpp1-8th_41.pdf (noting that the U.S. is in the company of Iran and China). See also HUMAN RIGHTS WATCH, WORLD REPORT 2013 642-645 (2013) (noting the incredibly high incarceration rates, issues of rape in prisons, overcrowding, racial disparities, and a Supreme Court ruling in 2011 ordering the state of California to reduce its prison population due to inadequate medical and mental health care for inmates) (See *Brown v. Plata* 131 S.Ct. 1910 (2011)).

65. Duke, *supra* note 62, at 86.

66. *Id.*

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The U.S., a leader in the international war on drugs, as well as an influential world power, took the lead in supporting and conducting counter drug efforts in multiple countries. This section focuses on U.S.' efforts in Colombia under Plan Colombia and efforts in Mexico under the Mérida Initiative. Plan Colombia was launched in 1998 as a joint effort between U.S. President Clinton (and later, by President Bush) and Colombian President Pastrana (and later Presidents Uribe and Santos).⁶⁷ The Mérida Initiative was created in 2007 under U.S. President Bush (and expanded by President Obama) and Mexican President Calderón.⁶⁸

1. U.S. Policy in Colombia and Plan Colombia

In addition to prohibitionist efforts at home, the U.S. has made strong efforts abroad to fight the war on drugs by halting the production of drugs in other countries. Perhaps the clearest example of this policy is the anti-drug efforts of the U.S. under Plan Colombia. This portion of the paper presents Plan Colombia and its effects.

Plan Colombia was an effort to eradicate the coca crops in Colombia. These coca crops supply the world with 60% of its cocaine, and 90% of the cocaine consumed by individuals in the U.S. Over a span of less than 10 years, the U.S. spent \$4.7 billion on the Plan. Up to 75% of that figure (approximately \$3.5 billion) went directly to Colombian police and military forces. Despite these efforts, the U.S. State Department reported that attempted coca production in Colombia rose 36% between 2000 and 2008.⁶⁹ Further, the focus of Plan Colombia eventually became aerial eradication, the airborne fumigation of coca crops with poisonous chemicals.⁷⁰ The fumigation of these crops yielded a reduction in coca production of 0.001%, while indiscriminately destroying farmlands and water sources of the poorer farming class.⁷¹ The fumigations efforts resulted in the physical displacement of more than 281,000 people between the years of 2000 and 2005.⁷² Nevertheless, the U.S. continues to finance Colombia's drug interdiction efforts heavily under the newly

67. U.S. DEP'T OF STATE, *United States Support for Colombia: Fact Sheet*, Bureau of Western Hemisphere Affairs (March 28, 2000), available at www.state.gov/www/regions/wha/colombia/fs_000328_plancolombia.html.

68. Carina Bergal, *The Mexican Drug War: The Case for a Non-International Armed Conflict Classification*, 34 *Fordham Int'l L.J.* 1042, 1073 (2011).

69. Michelle L. Dion & Catherine Russler, *Eradication Efforts, the State, Displacement and Poverty: Explaining Coca Cultivation in Colombia during Plan Colombia*, 40-3 *J. LAT. AM. STUD.* 399, 400 (2008).

70. *Id.*

71. *Id.*

72. *Id.* at 403.

named Andean Initiative, contributing \$673 million in 2010 and \$482 million in 2012, for mostly military and police aid.⁷³

Like the U.S., Colombia has a strict approach to the criminalization of drugs. Possession, use, or trafficking in Colombia all constitute criminal offenses, punishable with long prison sentences in extremely harsh conditions.⁷⁴ Even after release from prison, Colombian law requires serious offenders to serve a lengthy parole, sometimes more than a year, preventing the offender from leaving the country.⁷⁵ Additionally, drug laws are strictly enforced, and Colombian police are well trained and equipped for drug detection and interdiction.⁷⁶

Paramilitary groups and the Colombian government's efforts to control those groups remain a major problem in Colombia. In the 1960s, a revolutionary group dubbed Revolutionary Forces of Colombia (FARC) came to prominence in Colombia and at one point controlled more than 40% of the Colombian territory.⁷⁷ In response to FARC and the Colombian government's inability to contain them, several paramilitary groups formed, including the United Self-Defense of Colombia (AUC), the Army of National Liberation (ELN), and a more recently formed organization known as Minga.⁷⁸ Additionally, all of these groups were known to engage in mass human rights violations, including massacres, killings, and rapes.⁷⁹ The ELN in particular was notorious for kidnapping politicians and holding them for ransom prior to signing a peace agreement being integrated into the current political system as a party.⁸⁰

The conflict between these groups and the Colombian government was fueled by money from the illegal drug trade.⁸¹ The amount of money funneling into Colombia through the illegal drug trade was estimated by

73. See HUMAN RIGHTS WATCH, WORLD REPORT 2011, 231 (2011) and HUMAN RIGHTS WATCH, WORLD REPORT 2013, 220 (2013).

74. United States Department of State, Colombia: Country Specific Information, travel.state.gov/travel/cis_pa_tw/cis/cis_1090.html#criminal_penalties (April 2012) [hereinafter "State Department: Colombia"].

75. *Id.*

76. *Id.*

77. See generally ENCYCLOPEDIA OF LATIN AMERICAN POLITICS, UNITED STATES: GEORGETOWN UNIVERSITY 79 (2002). See also, SOUTH AMERICA, CENTRAL AMERICA AND THE CARIBBEAN, LONDON: EUROPA PUBLICATIONS LTD 298 (16th ed. 2007).

78. See generally ENCYCLOPEDIA OF LATIN AMERICAN POLITICS, *supra* note 77, and SOUTH AMERICA, CENTRAL AMERICA AND THE CARIBBEAN, *supra* note 77.

79. See generally ENCYCLOPEDIA OF LATIN AMERICAN POLITICS, *supra* note 77, and SOUTH AMERICA, CENTRAL AMERICA AND THE CARIBBEAN, *supra* note 77.

80. See generally ENCYCLOPEDIA OF LATIN AMERICAN POLITICS, *supra* note 77, and SOUTH AMERICA, CENTRAL AMERICA AND THE CARIBBEAN, *supra* note 77.

81. See Ross, *supra* note 45, at 344-46. See also Dion & Russler, *supra* note 69, at 400.

one government study to be \$1 billion per year between 1982 and 1998.⁸² Other studies put this figure between \$1.5 billion and \$2.5 billion per year.⁸³ The sheer amount of money involved is compounded by the low cost of producing drugs, meaning that the return on investment in illegal drugs is immense. It is estimated that the disparity between production costs and profit are so great that the average drug organization could lose 70-80% of its product to anti-drug efforts and still be a profitable enterprise.⁸⁴

While Plan Colombia and increased military efforts by the Colombian government were eventually somewhat successful in combatting FARC, paramilitary groups continue to engage in drug trafficking and to commit abuses on the public including massacres, killings, rapes, and forced displacement.⁸⁵ Additionally, the drug trade has a tendency to corrupt the governments in producing nations.⁸⁶ Billions of dollars of drug money goes to government officials in the form of bribes.⁸⁷ Some progress has been made in the investigation of Colombian congress members with suspected ties to paramilitaries, resulting in over 150 congress members investigated and 20 convicted.⁸⁸ However, instead of curbing violence and undercutting the production of drugs in Colombia, the “successes” of Plan Colombia have more clearly pushed violence and criminality across borders into other Latin American nations. This shift in violence is seen in Mexico, which received a large portion of the drug trade when Plan Colombia made trafficking difficult in Colombia. These themes are explored in more detail in the next portion of this section.

2. U.S. Policy in Mexico and the Mérida Initiative

Mexico is among the nations suffering from the violence pushed from Colombia by militant anti-drug efforts under Plan Colombia. Mexico, at present, is arguably facing the ugliest aspects of the illegal drug trade and the greatest threats to the rule of law. In order to assist in re-establishing the rule of law under the Mexican government, the U.S. has intervened with the Mérida Initiative. This portion of the paper examines the Mérida Initiative and its effects in Mexico.

82. SOUTH AMERICA, CENTRAL AMERICA AND THE CARIBBEAN, LONDON: EUROPA PUBLICATIONS LTD 298 (16th ed. 2007).

83. *Id.*

84. Bertram & Spencer, *supra* note 45, at 7.

85. HRW WORLD REPORT 2011, *supra* note 73, at 228.

86. *See* Dion & Russler, *supra* note 69, at 411.

87. *Id.*

88. HRW WORLD REPORT 2011, *supra* note 73, at 228 (*see also* p. 229, noting that “The Supreme Court is currently investigating more than 20 members of Congress amid concerns of high levels of paramilitary infiltration”).

Mexican drug trafficking organizations (DTOs) have existed since the earliest formations of international drug policy, but since the early 1990s, when Plan Colombia was implemented, they have become increasingly stronger, better organized, more influential, and more militant.⁸⁹ Additionally, beginning with Mexican President Zedillo Ponce de León in the 1990s and continuing to the present, and with strong support from the U.S., the Mexican government has increasingly militarized its efforts to combat DTOs.⁹⁰ The situation has worsened as Mexican DTOs continue to expand in North American drug markets, making the illicit drug trade in Mexico worth tens of billions of dollars per year and fueling competition between Mexican DTOs over markets and trafficking routes.⁹¹

In 2007, U.S. President Bush joined with President Calderón to form the Mérida Initiative, which was modeled on Plan Colombia's militant anti-drug approach.⁹² Through the Mérida Initiative, the U.S. Department of State has contributed over \$1.5 billion to Mexico's war on drugs, with most of the money being devoted solely to federal programs and agencies.⁹³ With the Mérida Initiative, the U.S. Department of State has placed two experienced federal prosecutors and a forensics expert in Mexico to assist in the strengthening and developing of law enforcement task forces and restoring the internal integrity of Mexican law

89. See Bergal, *supra* note 68, at 1085 (noting that Mexican drug cartels gained notoriety through violence since the downfall of Colombia's Cali and Medellín cartels in the 1990s).

90. Jeremiah E. Goulka, *A New Strategy for Human Rights Protection: Learning from Narcotics Trafficking in Mexico*, 9 CARDOZO J. INT'L & COMP. L., 231, 246-47 (2001) ("Perhaps in response to international pressure, Zedillo declared drug trafficking, and the corruption it fosters within the government to be Mexico's principal national security threat ..."). See also Holly Buchanan, *Fleeing the Drug War Next Door: Drug-related Violence as a Basis for Refugee Protection for Mexican Asylum-Seekers*, 27 MERKOURIOS-UTRECHT J. INT'L & EUR. L. 28, 29 (2011) (reporting that Mexican President Calderón launched an unprecedented crackdown on drug trafficking organizations, deploying over 45,000 soldiers and 5,000 federal police since 2006 to combat DTOs). See also HUMAN RIGHTS WATCH, WORLD REPORT 261 (2011) (noting that the United States has allocated \$1.5 billion in aid to Mexico through the 2007 Mérida Initiative).

91. Drug Threat Assessment, *supra* note 52, at 2, 9 (noting that Mexican DTOs constitute the greatest drug trafficking threat to the United States and that Mexican DTOs have expanded operations into every region of the United States, especially into areas where influence of Colombian DTOs are diminishing). See also UNODC, WORLD DRUG REPORT 2011, 35 (2011) (noting that North America remains the world's largest drug market and that trafficking of drugs remains primarily directed towards North America, with cannabis, methamphetamine, and cocaine primarily being trafficked through Mexico to the United States), available at www.unodc.org/documents/data-and-analysis/WDR2011/World_Drug_Report_2011_ebook.pdf [hereinafter "World Drug Report"]. See also Buchanan, *supra* note 90, at 30 (noting that drug trafficking from South America to the US by Mexican DTOs is a business with an estimated value of \$13 billion per year).

92. See Bergal, *supra* note 68, at 1085.

93. *Id.* See also U.S. DEP'T OF STATE, The Merida Initiative: Fact Sheet, Bureau of International Narcotics and Law Enforcement Affairs, June 23, 2009, www.state.gov/p/inl/rls/fs/122397.htm, last accessed Nov. 2011 [hereinafter "Merida Initiative Fact Sheet"]. See also HUMAN RIGHTS WATCH, WORLD REPORT 261 (2011).

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enforcement and prosecutorial offices.⁹⁴ Nonetheless, a 2007 National Drug Intelligence Center (NDIC) study shows that Mexican DTOs had received at least \$17.2 billion solely from smuggled bulk cash shipments in 2003 alone.⁹⁵

Over the past few decades Mexico has suffered more carnage as a result of the international war on drugs than any other nation. Mexico has suffered the loss of between 23,000 and 43,000 lives in drug-related murders since 2006, with between 200 and 300 individuals being killed per week in turf wars between DTOs and the Mexican government's forces.⁹⁶ The uncertain quantity of murders in Mexico, as well as a lack of data related to civilian deaths, has been criticized by human rights groups as detrimental to the "common good."⁹⁷ The deaths are indicative of a larger problem of both accountability and transparency in Mexican institutions.⁹⁸

The Mexican government has deployed as many as 45,000 soldiers and 5,000 federal police agents within its borders to counter DTOs.⁹⁹ In 2010, allegations of abuse at the hands of Mexican authorities numbered in the thousands, including arbitrary and unlawful killings, torture, rape, disappearances, and prisoner abuse.¹⁰⁰ Many of these allegations go unanswered. Further complicating matters are extreme levels of corruption and collusion in the government with DTOs, who are

94. See Bergal, *supra* note 68, at 1085.

95. Drug Threat Assessment, *supra* note 52, at 47.

96. See Justice in Mexico Project, *August 2010 News Report*, August 2010, www.justiceinmexico.org (noting that official numbers from the Mexican government vary, ranging from 24,000-28,000 killed since 2006) [hereafter "Mexico Justice Report"]. See also Buchanan, *supra* note 90, at 29 (placing the number of deaths at, "Nearly 23,000 people [since 2006]"). See also Bergal, *supra* note 68, at 1044 (putting the death-toll at approximately 30,000 from 2006-2010). See also David Luhnnow, *Just an Ordinary Day of Death in Mexico's War on Drug Traffickers*, Wall Street Journal, August 27, 2011, online.wsj.com/article/SB10001424053111904787404576528413479614524.html (reporting "In the last four years, roughly 43,000 people have been killed in Mexico in drug-related killings"). See also U.S. Department of State, *Mexico: Country Specific Information*, travel.state.gov/travel/cis_pa_tw/cis/cis_970.html#criminal_penalties, (November 2011) (reporting that, "[a]ccording to Government of Mexico figures, 34,612 people have been killed in narcotics-related violence since December 2006") [hereafter referred to as "State Department: Mexico"].

97. Mexico Justice Report, *supra* note 96, at 10-11.

98. *Id.* at 10-11.

99. U.S. DEP'T OF STATE, 2010 HUMAN RIGHTS REPORT: MEXICO, REPORT: MEXICO, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES I (Apr. 8, 2011), *available at* <http://www.state.gov/documents/organization/160469.pdf>.

100. *Id.* at 10. See also HUMAN RIGHTS WATCH, WORLD REPORT 256 (2011) (reporting that Mexico's National Human Rights Commission received more than 1,100 human rights complaints in the first six months of 2010).

estimated to pay up to 60% of their \$13-48 billion dollar annual profits in bribes to Mexican authorities.¹⁰¹

In Mexico, possession, use, or trafficking of illegal drugs are all criminal offenses that are punishable with long jail sentences and heavy fines.¹⁰² Prison conditions are considered extremely poor. Further, jail sentences for drug offenses can be up to 25 years.¹⁰³ The Mexican prison population has grown by more than 90,000 inmates since 1998, with as many as 42% not being tried in court for their crimes.¹⁰⁴ Recently, however, Mexico has instituted new laws excusing the possession of small amounts of drugs for personal use or first time offenders, in an effort to shift its focus from prosecuting consumption to suppressing ongoing violence.¹⁰⁵ While these provisions do alter the criminal focus of drug prohibition in Mexico, they also reinforce a prohibitionist stance because the government has increased prison terms for the sale of drugs, which now can be up to eight years.¹⁰⁶ Further, these penalties are doubled when they occur within 300 feet of educational, police, or detention centers, or if the crime is committed by police, judicial, or health professionals.¹⁰⁷

As devastating as the prohibitionist policies of the U.S. have been on its own populace, the human costs weigh much more heavily on her neighbors to the South. The prohibitionist model results in an expensive war on drugs, paid for with both dollars and human lives. Still, prohibitionists, who continue to control the political sphere in the U.S., argue that these costs are necessary to suppress demand in the U.S. and that decriminalization and legalization both would only compound the current situation. However, the evidence suggests that demand for drugs would not go up if the government applied decriminalization or legalization policies instead of the prohibition model. These contrary

101. See Goulka, *supra* note 90. See also Colleen Cook, CRS Report for Congress: Mexico's Drug Cartels, 4 (October 2007) (reporting that Mexican DTO annual sales are estimated to range from \$13.6-48.4 billion annually). This figure has likely increased as Mexican DTOs have expanded greatly into American markets as Colombian DTOs have withdrawn in recent years. See Drug Threat Assessment, *supra* note 52, at 2, 9.

102. State Department: Mexico, *supra* note 96.

103. *Id.*

104. U.S. DEP'T OF STATE, *supra* note 99, at 13 (citing the King's College World Prison Brief, *supra* note 64).

105. State Department: Mexico, *supra* note 96. See also Embassy of Mexico, *Reforms to the General Health Act, the Federal Penal Code, and the Federal Code of Criminal Procedures*, 1 (August 2009) (allows for possession of up to 2 grams of opium, 50 milligrams of heroin, 5 grams of marijuana, 500 milligrams of cocaine, .015 milligrams of LSD, 40 milligrams of MDMA, or 40 milligrams of methamphetamine for personal use).

106. *Id.* at 1.

107. *Id.* at 2.

arguments are presented in the following sections, beginning with established harms reduction models.

II. THE HARMS REDUCTION MODELS

Despite the near-universal acceptance of the global prohibition of drugs, even from the signing of SCND in 1961, some nations have followed a model of harms reduction instead. Harms reduction, instead of strictly prohibiting drugs, focuses on reducing the impact of drug-related harms on society. Specifically, harms reduction approaches address the problem of drug addiction as a public health issue rather than a public safety or law enforcement issue, and seeks to address drug addiction as a social problem. Responses to drug addiction include treatment, rehabilitation, and clean needle exchanges. The extensive harms experienced under the prohibitionist model, as addressed in section I, have invigorated interest in harms reduction approaches presented in this section.

Harms reduction has been broken down into three basic schools of thought, largely divided by the actors behind them.¹⁰⁸ These three groups are: (1) the public health approach; (2) the citizens' rights approach; and (3) the global justice approach. All three approaches have been effective in addressing harms associated with drug and are therefore attractive alternatives to the prohibitionist model.

A. THE PUBLIC HEALTH APPROACH

The public health approach grew out of medical professionals treating drug addiction. The approach gained popularity in the face of the terrifying HIV/AIDS epidemic of the '80s and '90s. This approach focuses on the medical treatment of chemical addiction to drugs. Policies provide for the exchange of dirty needles for clean needles to prevent the spread of disease.¹⁰⁹ The professional/public health approach is well-represented by recent efforts in Portugal, which was faced with an alarming HIV/AIDS epidemic in the early 1990s.

108. Tuukka Tammi, *The Harm-Reduction School of Thought: Three Fractions*, 31 CONTEMP. DRUG PROBS. 381, 385 (2004). Tammi explains further that, "One can decipher some main—more or less commonly shared—features of harm reduction, such as: value neutrality toward drug use (vs. moralistic stance); the drug user is seen as a normal citizen full responsibilities and participation rights (vs. seen as a deviant person or as a helpless victim; as a target for coercion); pragmatism and scientism (vs. ideologies and beliefs); human rights and humanistic values (vs. human rights violations in 'the war on drugs' and other injustices); public health priority (vs. criminality perspective)."

109. *Id.* at 385-87.

Portugal identified needle drug usage, particularly in prisons, as the largest contributor to the HIV/AIDS epidemic it was facing.¹¹⁰ In 2001, Portugal implemented the National Action Plan for the Fight Against Drugs, which decriminalized drug use.¹¹¹ This implementation does not mean that drug consumption is legal, but the offense of drug use and possession is no longer punishable with criminal sanctions, such as jail time.¹¹² Instead, Portugal has made the consumption, acquisition, and possession of drugs for personal use and administrative offense punishable with mandatory drug treatment.¹¹³ Individuals are permitted to possess “acceptable” amounts of drugs without facing criminal sanction, based on a government determination of what constitutes a “dose.”¹¹⁴ Trafficking illicit drugs is still a serious criminal offense and results in severe penalties.¹¹⁵

Notably, Portugal’s shift to a decriminalization model has resulted in a general improvement in both levels of drug use and addiction, and the spread of HIV.¹¹⁶ Also, levels of HIV dropped drastically, because a new emphasis on treatment programs has curbed the spread of HIV among injection drug users, and it is believed that a decriminalized legal environment has reduced levels of drug addiction by making treatment more accessible.¹¹⁷ Additionally, decriminalization has resulted in a

110. EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION (EMCDDA), 2009 NATIONAL REPORT TO THE EMCDDA: PORTUGAL, 67 (2009), *available at* www.emcdda.europa.eu/html.cfm/index142806EN.html (attributing decreases in HIV to “the implementation of harm reduction measures, which may be leading to a decrease in intravenous drug use ... or to intravenous drug use in better sanitary conditions”).

111. *Id.* at 16-17 (The offender is evaluated by the national Commission for the Dissuasion of Drug Abuse, which administers a sanction aiming to treat and rehabilitate the person using the most appropriate interventions).

112. *Id.*

113. *Id.* There is a similar trend towards increasing treatment promotion within the prison system of the Netherlands, which provides for addiction counseling and the possibility of serving out portions of prison sentences in treatment centers. *See* EUROPEAN MONITORING CENTRE FOR DRUGS AND ADDICTION, COUNTRY PROFILE-THE NETHERLANDS, www.emcdda.europa.eu/html.cfm/index5174EN.html#, (last accessed April, 2012) [hereinafter “Netherlands Profile”].

114. EMCDDA, Drug policy profiles—Portugal Profile, 16-17 (June 2011), *available at* www.emcdda.europa.eu/publications/drug-policy-profiles/portugal (citing Law 30/2000, “When a person is caught in possession of no more than 10 daily doses of drugs and the police have no suspicions or evidence that supply are involved, the drug will be seized.”).

115. *Id.*

116. *Id.* EMCDDA, 2009 National Report to the EMCDDA: Portugal at 69, Graph 33 (showing a general downward trend in HIV prevalence across both drug users and non-drug users; from 3,326 new cases in 2002 to 1,588 new cases in 2008, or a decrease of almost 53%). *See also* EMCDDA, “Portugal”: New Development, Trends and in-depth information on selected issues, *supra* note 3, at 20 (observing that “Portugal remains among the countries [in Europe] with the lowest prevalence of use for most substances, with the exception of heroin, where Portugal shows higher prevalence’s”).

117. Portugal Report to EMCDDA, *supra* note 109 at 67 (attributing decreases in HIV to “the implementation of harms reduction measures, which may be leading to a decrease in intravenous drug use ... or to intravenous drug use in better sanitary conditions”). *See also* EMCDDA, Drug policy profiles—Portugal Profile, *supra* note 113, 20 (noting that the number of newly diagnosed

significant decrease in the use of opiate drugs.¹¹⁸ These results indicate a general success of decriminalization, without the law enforcement and incarceration expenses associated with prohibition.

The positive effects under the public health model stand in a stark contrast to the observable effects of the prohibition mode presented in section I of this paper. As a result, the professional/public health model has gained popularity in a number of domestic contexts, as well as in the international order. The UN Office on Drugs and Crime (UNODC) is the international body charged with implementation and monitoring of the three main international drug control treaties. The UNODC focuses on drug prevention, treatment, and rehabilitation efforts among at-risk groups. In 2009, the UNODC launched regional programs in East Asia and the Pacific reinforcing the rule of law. The programs focused on health-oriented drug demand reduction initiatives and HIV/AIDS education among injecting drug users, prisoners, and other vulnerable groups.¹¹⁹

The benefit of the public health harms reduction approach is its proven ability to reduce harm. This is the evidence-based drug policy that is commonly referred to in drug policy debates, and its support is growing. The ability of this policy to obtain results, both in disease reduction and addiction treatment, makes it an attractive alternative to the prohibitionist status quo. However, merely applying the public health model still falls short in terms of treating the larger harms of prohibition - the way that drug users are demeaned in a punishment oriented system and in its inability to cure the effects of drug war carnage in producer nations.

B. THE CITIZENS' RIGHTS APPROACH

The citizens' rights approach is closely related to the public health model, because it focuses on medical treatment of chemical addiction and the use of needle exchange programs. But it differs in that its proponents are drug users who have organized to make the use of drugs safer and more responsible. The objective is to protect the rights of the drug user as an individual who should not be discriminated against on the basis of his or her drug use.¹²⁰ The Netherlands is a good example of the citizens' rights approach, because its policy is based on the view that drug use is not really a "crime" worthy of state intervention. Because of

HIV cases among drug users, 13.4 per million, is well above the European average, 2.85 per million).

118. *Id.* at 20, 23.

119. UNODC, *supra* note 13, at 27-28, 66.

120. Tammi, *supra* note 107, at 388-90.

this view, drug policy enforcement is effectuated mostly by users and dispensaries, not police. This emphasizes the citizens' approach because of its tolerance towards drug use. Drug use is seen as an activity rather than a social status, and therefore the drug user is not dehumanized.¹²¹

The Netherlands citizens' rights approach distinguishes drugs based on a "risk scale."¹²² The risk scale amounts to a domestic rescheduling of illegal drugs into those with unacceptable risks (opiates, cocaine, amphetamines, and LSD) and those with tolerable risks (cannabis, and certain tranquilizers and barbiturates).¹²³ When this approach was codified into law under the Dutch "Opium Act" by amendment in 1976, unacceptably risky drugs were prohibited with criminal sanction, whereas less risky drugs were listed in the act with no corresponding sanction.¹²⁴

Thus, the act neither legalizes "soft drugs," nor does it offer any actual legal protection to users or possessors of them, aside from the Dutch government's assertions that it will not prosecute.¹²⁵ Trafficking and selling scheduled drugs remains statutorily illegal and punishable with imprisonment. However, cannabis is openly and popularly distributed from commercially established "coffeeshops," so long as they do not sell more than five grams to any one person.¹²⁶

In the U.S., advocates of harm reduction often point out that treatment for drug offenders is preferable to incarceration, because it is both more effective and less expensive. These advocates point to the fact that the U.S. prison system houses more than 2.2 million people out of an estimated population of 310.64 million or roughly 0.0073% of the U.S.¹²⁷ By contrast, out of a population of 16.79 million, the Netherlands has a prison population of only 13,749, or roughly 0.00082%.¹²⁸ To place that

121. *Id.*

122. EMCDDA, COUNTRY PROFILE-THE NETHERLANDS, www.emcdda.europa.eu/html.cfm/index5174EN.html# (last accessed April 2012) ("tolerable risks" results in not criminalizing drug use or possession, and permitting the controlled sale of cannabis).

123. *Id.*

124. *Id.* (The "risk scale" evaluates risk based on medical, pharmacological, sociological, and psychological data).

125. *Id.* ("Prosecution policy in drug related cases is substantially determined by the directives issued by the Prosecutor-General").

126. *Id.* (noting that the penalty for hard drug trafficking can be up to 16 years in prison, while the tolerated sale of cannabis in coffeeshops falls outside the scope of the act).

127. INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD PRISON BRIEF, THE UNITED STATES OF AMERICA, www.prisonstudies.org/info/worldbrief/wpb_country.php?country=190, (last accessed April 2012).

128. INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD PRISON BRIEF, THE NETHERLANDS, www.prisonstudies.org/info/worldbrief/wpb_country.php?country=157, (last accessed April 2013).

in perspective, the U.S. imprisons eight times the proportion of its citizens as does the Netherlands. In real numbers, the U.S. is housing over 2 million more prisoners than the Netherlands. Therefore, the drug citizens' rights approach has a very tangible benefit in that it drastically relieves criminal justice systems by removing the heavy burden of criminal prosecution of an entire class of society. However, decriminalizing drugs does little to remove problems existing in producing nations who face massive rates of violence and corruption. These harms are better addressed under the global justice approach.

C. THE GLOBAL JUSTICE APPROACH

The social global justice approach shares the rights focus of the citizens' rights approach. The global justice approach expands the dialogue of harms-reduction in "consumer" nations to harms-reduction in "producer" nations.¹²⁹ In many ways, this approach is an offshoot of a larger critique of the Neo-Liberal political agenda and the effects of a newly globalized trade under international free trade agreements.¹³⁰ This approach also focuses on disparities between the Global North and South in the impact of drugs.¹³¹ The North consumes drugs and suffers addicts while the South produces drugs and suffers organized crime, militaristic violence, destabilized and corrupted governments, deplorable human rights abuses, and massive losses of human life.¹³² Latin America, especially over the past few years, has embraced this line of argument—possibly because the bulk of the blood shed in the name of prohibition has been of her citizens on her soil. Bolivia, in particular, represents a good example of this approach because Bolivia stood up to the world and decriminalized the production and use of the coca leaf.

Bolivia is regarded as one of the big three coca growing regions in the world. Bolivia grows about half the productive coca area of either Colombia or Peru.¹³³ What makes Bolivia's drug policy unique is its approach to the coca leaf, which has historically been widely regarded by

129. "Producer nations" vary depending on the type of drug discussed. For example, the UN World Drug Report indicates that the major producer nations of cocaine are Colombia, Bolivia, and Peru, while the major opium producing nations are Afghanistan and Myanmar, and cannabis appears to be widely produced across the globe. Likewise, consumer nations also vary depending on the drug. However, drug consumption is generally centralized in North America and West/Central Europe. WORLD DRUG REPORT, *supra* note 91, at 19-20, 24.

130. Tammi, *supra* note 107, at 391-93.

131. The global North/South divide has been likened to more traditional characterizations of "developed" and "undeveloped" nations, or the first and third worlds.

132. Tammi, *supra* note 107, at 393.

133. WORLD DRUG REPORT, *supra* note 91, at 100 (noting that Colombia is estimated to have 30,900 hectares of coca production in 2009, as compared to Peru's 61,200 hectares and Colombia's estimated 62,000 hectares in 2010).

indigenous Bolivians as a sacred medicine and served as part of the unifying platform for a reformer Evo Morales' (an indigenous coca farmer and union leader) popular election to the Bolivian Presidency in 2005.¹³⁴

In 2003, under mounting pressure of unionized coca producers, Bolivia reformed its fundamental drug law, Law 1008, to allow for limited production of the coca leaf in its raw form.¹³⁵ In 2006, President Morales announced in a speech to the UN General Assembly his intention to repeal Law 1008 and replace it with a law that distinguished between coca and cocaine, allowing for the legal production and sale of the coca leaf in a limited area called "traditional indigenous zones."¹³⁶ Oddly, and perhaps because of strong pressure from the international community and the United States, Morales's policies have also employed forceful eradication of coca in areas of illicit drug production outside of the traditional zones, resulting in a net increase of coca eradications.¹³⁷ Regardless, Morales continues to present appeals to the UN to recognize the cultural and medicinal value of the coca leaf to the indigenous peoples of Bolivia.¹³⁸ As such, Morales has long been at the forefront of the global harms reduction movement.

At present, Bolivia's drug policies are not clearly defined. Morales's government has been attempting to reduce the amounts of coca that can be legally produced, but has also received strong resistance from his power base, with mass demonstrations mounting against the efforts.¹³⁹ Possession, use, and trafficking of illegal drugs in Bolivia are all criminal offenses with punishment including long jail sentences and heavy fines.¹⁴⁰ Bolivia's Law 1008 does not distinguish between small-scale drug dealers and drug traffickers, which results in very harsh penalties for illegal drug activities, sometimes with sentences in excess of 30

134. Will Reisinger, *The Unintended Revolution: U.S. Anti-Drug Policy and the Socialist Movement in Bolivia*, 39 CAL. W. INT'L L.J. 237, 248-249 & 276-280 (2009).

135. Diego Giacoman, *SYSTEMS OVERLOAD - DRUG POLICY AND THE PRISON SITUATION IN BOLIVIA* 21, 2010, available at www.druglawreform.info/images/stories/documents/Systems_Overload/TNI-Systems_Overload-bolivia-def.pdf [hereinafter "Drug policy and prison in Bolivia"].

136. Kathryn Ledebur and Coletta A. Youngers, *Balancing Act: Bolivia's Drug Control Advances and Challenges*, Washington Office on Latin America (3 May 2008), available at www.wola.org/sites/default/files/downloadable/Drug%20Policy/past/AIN-WOLA%20Balancing%20Act%205-23-08.pdf.

137. *Id.* at 1, 2.

138. *Bolivia's Evo Morales urges end to ban on coca chewing*, BBC (March 12, 2012), available at www.bbc.co.uk/news/world-latin-america-17338975.

139. Ledebur & Youngers, *supra* note 135, at 3.

140. UNITED STATES DEP'T OF STATE, *BOLIVIA: COUNTRY SPECIFIC INFORMATION*, travel.state.gov/travel/cis_pa_tw/cis/cis_1069.html#criminal_penalties, November 2011 [hereinafter "State Department: Bolivia"].

years.¹⁴¹ Nevertheless, under President Morales, Bolivia has undertaken one of the broadest attempts at decriminalization seen in the world.

Each of the harms reduction approaches embodies some form of distinguishing smaller offenses of drug law from greater offenses. However, all existing harms reduction policies are subservient to the current prohibitionist policy because they must work within the framework of an international prohibition imposed by the SCND, CPS, and CAIT, and domestically under the principle of *pacta sunt servanda*.¹⁴² While harms reduction models have been demonstrably more effective in addressing harms in the drug trade, the benefits of harms reduction cannot be maximized until a legalization and regulation framework is adopted.

III. LEGALIZATION

The argument for legalization has existed throughout the modern prohibition-era, but has gained a large amount of support in recent years. After forty-two years of prohibition, it appears that many have taken note of the ever-increasing costs of the war on drugs. Recently, leaders from across Latin America have begun calling loudly for reforms to the international war on drugs, ranging from decriminalization to outright legalization.¹⁴³ Uruguay attempted to legalize the possession and sale of

141. Drug Policy and prison in Bolivia, *supra* note 136, at 22.

142. "Pacta sunt servanda" is the principle of good faith that underlies all international agreements and treaties. The principle is that states are bound to act as they represent they will act. In this instance, the principle means that states who sign on to the SCND, CPS, and CAIT are bound to act in accordance with those treaties.

143. See generally DRUGS AND DEMOCRACY: TOWARD A PARADIGM SHIFT. LATIN AMERICAN COMMISSION ON DRUGS AND DEMOCRACY (2009), available at www.drogasedemocracia.org/Arquivos/declaracao_ingles_site.pdf.

See also Ed Vulliamy, *Colombia calls for global drugs taskforce*, THE OBSERVER, (U.K.), April 14, 2012, www.guardian.co.uk/world/2012/apr/15/colombia-global-drugs-taskforce (reporting that Colombian President Juan Manuel Santos "proposed the establishment of a task force of experts, economists and academics to analyze the realities of global drug addiction, trafficking and profiteering, with a view to a complete overhaul of strategy.").

See also Juan Forero, *Latin American countries pursue alternatives to U.S. drug war*, THE WASHINGTON POST, Apr. 10, 2012, articles.washingtonpost.com/2012-04-10/world/35451300_1_latin-american-leaders-cartels-legalization (listing Colombian President Juan Manuel Santos, Guatemalan President Otto Perez, then-Mexican President Felipe Calderonas, former Colombian President Cesar Gaviria, former Mexican President Ernesto Zedillo, and former Brazilian President Fernando Henrique Cardoso among the Latin American leaders most forcefully offering new proposals and critiquing U.S. drug policy).

See also Adam Williams & Flavia Krause-Jackson, *Costa Rica's Chinchilla Calls for Drug Legalization Debate*, BLOOMBERG, Mar. 1, 2012, www.bloomberg.com/news/2012-03-01/costa-rica-calls-for-debate-on-drug-legalization-amid-record-trafficking.html (reporting Costa Rican President Laura Chinchilla saying that "[d]rug legalization in Central America merits a 'serious' debate as a solution to the crime and violence coursing through the region even if it runs up against U.S. opposition.").

marijuana outright.¹⁴⁴ The legalization movement has even gained a strong presence in the U.S., with 19 states legalizing marijuana for medicinal purposes, and two states legalizing the recreational use of marijuana, production, and sale for adults over the age of 21.¹⁴⁵ Additionally, it appears that roughly half of Americans support the legalization of marijuana.¹⁴⁶

As presented in section I of this paper, the number of reasons favoring legalization is constantly increasing. These reasons range from the tens of thousands murdered in Mexico to the growing instability of governments and rule of law in producer nations. Along with the hundreds of thousands of Americans imprisoned, and the millions arrested in the name of prohibition, the market in illegal drugs created by prohibition generates well-organized and militant criminal organizations with near limitless profits. The status quo of prohibition practically begs for legalization if only to stem the violence. This section goes further by presenting three fundamental arguments for preferring legalization to prohibition.

First, legalization would destroy the illegal drug trade, or black market, through economic force by introducing legal actors who would be regulated by normal governmental agencies regulating production and

144. Johnson, *supra* note 8 (reporting that Uruguayan President Jose Mujica announced a plan in June, 2012 to legalize marijuana under a state monopoly. He later tabled the bill in December, 2012 to rethink the approach.).

145. See NORML, *Medical Marijuana*, available at norml.org/legal/medical-marijuana-2 (Mar. 22, 2013) (listing Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and Washington D.C. as American states and districts with medical marijuana laws currently enacted).

See also Duke, *supra* note 8 (reporting that Washington's measure I-502 and Colorado's Amendment 64, both measures to legalize the recreational use of marijuana in those states, had passed by popular vote on November 7, 2012).

146. See Nadelmann, *supra* note 4, at 443 (noting that, "The United States played a leadership role throughout much of the twentieth century in criminalizing opiates, cocaine, marijuana, and hallucinogens, adopting such laws before most other countries and proselytizing thereafter in favor of global prohibitions." See also Frank Newport, Gallup, Record-High 50% of Americans Favor Legalizing Marijuana Use, www.gallup.com/poll/150149/record-high-americans-favor-legalizing-marijuana.aspx (October 17, 2011) (showing that 50% of Americans surveyed support the legalization of marijuana and 70% favor making it legal for medicinal use).

See also Public Policy Polling, *National Survey Results*, Nov. 30-Dec. 2, 2012, available at www.mpp.org/assets/pdfs/blog/MPPResults.pdf (reporting that 58% of 1,325 registered American voters sampled thought that marijuana should be legal).

See also Princeton Survey Research Associates International, *Reason-Rupe Public Opinion Survey: January 2013 Topline Results*, Jan. 31, 2013, available at reason.com/assets/db/13627701016988.pdf (reporting that 47% of 1,000 adults interviewed in the U.S. favor legalizing marijuana for recreational use and 53% think that the government should treat marijuana the same as alcohol).

commerce.¹⁴⁷ Increased competition in a more transparent market would both remove the high levels of profit generated by criminal activity and would create a more ethical drug market that would be restrained from the violence and lawlessness.¹⁴⁸ Violence and lawlessness are implicit in an illegal market.¹⁴⁹ Second, it is immoral to criminalize the use and possession of drugs because criminalization has become a systematic destruction of human lives. The harms of an individual's drug use, if there are any, do not justify the social destruction of the user. Third, legalization ends a clash between law and fact by permitting the harmonization of the new social norm of harms reduction policies into the domestic and international legal regime. Under the existing prohibitionist regime, all harms reduction policies are in actuality illegal under domestic law or violative of international treaty obligations. By legalizing drugs, a legal shield would extend to harms reduction models, and the benefits of such approaches could be implemented on a universal scale. In other words, we could minimize the harms of drugs on society by legalizing harms reduction instead of merely tolerating it.

A. ELIMINATION OF THE BLACK MARKET BY WAY OF ECONOMIC FORCE

At the heart of the legalization argument is the possibility of regulatory control. While prohibition is a regulation of sorts, prohibitionist policy limits government options for interaction with the drug market to the decision to prosecute or to not prosecute.¹⁵⁰ With a legalized framework, government expands its power to influence the market at all stages.¹⁵¹ From production, to trafficking, to distribution, to consumption, and the individual, the government would have the ability to tax and regulate to exert controls on the market.¹⁵² The drug market under the prohibition model exists wholly outside the scope of government regulation, with actors that are criminal by definition and who do not have any incentive to respect governmental controls.¹⁵³

The illegal drug market under prohibition is a popular example in economic textbooks. This popularity is because the black market in illicit drugs is perhaps the truest expression of free market principles. A black

147. "Black market" refers to a market operating outside of governmental control and regulation. Commonly, the term is understood to mean a market for illegal goods, or a market where goods are purchased illegally.

148. Becker, *supra* note 45.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

market is a market that is as unbridled by government intervention as can be imagined because no governing authority operates in a black market; there are only buyers and sellers. Additionally, the drug market presents a good example of several peculiarities such as inelastic demand, low cost of production, oligopolistic supply, massive profit, and no governmental regulation. But because the black market is free of all regulation, there is no rule of law.¹⁵⁴ There is no guarantee of goods for services, or of the quality or value of goods provided.¹⁵⁵ There is only supply, demand, production, consumption, and protection of business interests through any means necessary. The illicit drug market is further compounded by massive profits.

Economists contend that legalization would squeeze illegal actors out of the drug market by making the legal drug market more profitable.¹⁵⁶ Thus, regulation eliminates the bulk of the illegal market's share. Importantly, the black market in drugs is created, and hugely empowered by the illegal status of drugs.¹⁵⁷ The illegal status of drugs increases the risk associated with the product, thus inflating the price and generating an illegal market worth an estimated \$500 billion annually.¹⁵⁸ The inflation in the price of drugs is actually the policy purpose of prohibition.¹⁵⁹ The hope is that by inflating the price of drugs, less people will want to purchase them. However, the demand for illegal drugs has proven to be highly inelastic, meaning that the demand for drugs does not respond to price.¹⁶⁰ As a result, prohibition creates an ideal market for organized crime: high profits, low costs, and few competitors. Somewhere between an estimated \$8 billion and \$24 billion in cash is smuggled into Mexico annually for illegal drugs.¹⁶¹ These high levels of cash flow are not only an incredible incentive to perform criminal acts, but they also generate massive amounts of violence in turf wars and transactional disputes between criminal actors that cannot be settled in a court of law.¹⁶²

Legalization of drugs would economically squeeze illegal actors out of the market by making it more cost effective to submit to government

154. *Id.* at 56.

155. *Id.*

156. *Id.* at 53-57.

157. Matthew S. Jenner, *International Drug Trafficking: A Global Problem with a Domestic Solution*, 18 *IND. J. GLOBAL LEGAL STUD.* 901, 904-905 (2011).

158. *Id.* at 905.

159. *See* Betram & Spencer, *supra* note 45. Becker, *supra* note 45. Ross, *supra* note 45, at 337-56.

160. Becker, *supra* note 45, at 53-57.

161. Jenner, *supra* note 156, at 905.

162. *Id.* at 905-906.

regulation. Essentially, legalization removes many of the risks inherent in the drug trade and drives the price of drugs down steeply.¹⁶³ By forcing the prices down and increasing competition, the incentives for illegal actors to take part in the illegal drug trade are diminished, and illegal actors are replaced with legal actors who are subject to regulation.

Opponents argue that a legal market will make drugs more accessible, and therefore result in a sharp increase in drugs consumed. In actuality, the demand for drugs has remained inelastic over time under a variety of drug policies. The demand for drugs tends to remain stable regardless of price because many people will not use drugs regardless of cost for health and moralistic reasons, while others will always use drugs regardless of cost due to addiction.¹⁶⁴ This means that there would likely be only a slight increase in demand. Additionally, legalization opens up the possibility of a variety of regulative possibilities, such as steep excise taxes, which could be used to keep the price of drugs high and the profits low.¹⁶⁵ Such an excise tax could also be understood as transforming criminal profits into government revenues. These revenues, among other things, could be used for treatment programs and other harms reduction policies that have a proven record of suppressing drug demand to manageable levels. Therefore, under legalization, the overall profitability of drugs would decrease, government revenues would increase, regulatory options would increase, the benefits of harms reduction models could be amplified, and illegal actors would be replaced with law abiding actors subject to governmental controls.

B. CRIMINAL PROSECUTION OF DRUG USERS IS IMMORAL

The moral argument for legalization is that it is simply wrong to punish an individual for using a substance, because there is no direct harm to any person other than the user. Drug use is a prime example of a victimless crime.¹⁶⁶ Under this argument, it is paramount to remember that the criminal penalties and civil consequences of drug conviction are willingly and systematically imposed on the drug law violator by the state. As discussed in the section I, the U.S. has fallen into a position where it now houses 23% of the global prison population.¹⁶⁷ Over half of

163. *Id.* at 921.

164. *Id.* at 921.

165. Becker, *supra* note 45, at 53-57.

166. Nadelmann, *supra* note 4, at 445.

167. WALMSLEY, *supra* note 64.

those imprisoned in federal facilities are prisoners for violating prohibitionist drug laws.¹⁶⁸

The price paid by those prosecuted for drug offenses far exceeds mere imprisonment or fines assigned by criminal sanction. The prospects of that individual ever being rehabilitated into society are dashed by a stigma that is born by criminal prosecution or conviction. Employers have the right to examine an applicant's criminal background, as do landlords and schools. Further, federal aid to that person is cut off. Since the prohibition model was launched in 1970, there have been over 20 million Americans arrested for mere possession of marijuana, and therefore who are ineligible for student loans, housing assistance programs, and many other benefits enjoyed by most citizens.¹⁶⁹ When examined in consideration of legalization, it cannot be ignored that these prosecutions are avoidable in the sense that drug prohibition was, and is, a conscious choice made by society. Even if drug use is seen as a punishable offense, the price paid by those prosecuted is widely disproportionate to the harms of the "crime."

The morality of the issue becomes even more relevant considering what the harms of the crime are. At heart, we must ask why we are prosecuting individuals for drug use at all. The preamble to SCND, in announcing the international war on drugs, states that the purpose is to combat the problem of drug addiction, "a serious evil for the individual...fraught with social and economic danger to mankind."¹⁷⁰ So the harm that we are seeking to combat by criminalizing drug use is the addiction to drugs. However, as all of the harm reduction models indicate, it is both more effective and efficient to combat this evil without criminal sanctions. Further, as demonstrated by the carnage wrecked upon people in Latin America in the name of a prohibitionist model, the harms associated with prohibition far outweigh the moralistic purpose of the prohibitionist model. Therefore, the only moral choice is to step away from prohibition.

However, recent events in the Netherlands and the U.S. indicate that solely adopting a harms reduction approach is not enough. Prohibition has been written into law both internationally and domestically in every harms reduction nation. Harms reduction, therefore, is dependent on the

168. Drug Threat Assessment, *supra* note 52, at 5 (citing data from the United States Bureau of Justice Statistics).

169. Duke, *supra* note 62, at 86.

170. Preamble to the Single Convention on Narcotic Drugs 1961, as Amended by 1972 Protocol, (SCND).

willful lack of enforcement of the law by whoever is in power at the time. The costs of this dependency are explored below.

C. LEGALIZATION HARMONIZES THE HARMS REDUCTION APPROACH WITH EXISTING LAW

Besides the ability to prevent mass death, human rights atrocities, and the social destruction generated by prohibitionist policies, the legalization of drugs would resolve the clash between the laws of prohibition and the realities of harms reduction approaches. The reality that harms reduction policies are in fact pursued internationally and domestically contradicts the existence of prohibitionist law, creating a clash between fact and law. This clash is readily apparent when comparing the national harms reduction policies of the Netherlands, Portugal, and Bolivia to the international obligations of prohibition imposed under the SCND, CPS, and CAIT. However, the effect of this clash on the rule of law is better expressed in the U.S., where state laws embracing harms reduction approaches and the use of federally scheduled and prohibited substances results in arbitrary enforcement of the law and legal uncertainty.

Despite a federal prohibition of drugs in the U.S., many states have loosened their drug laws to decrease criminal sentences and enforcement. Nineteen states and the District of Columbia have passed medical marijuana laws, which aim to permit the use of a federally prohibited drug in the medical treatment of patients.¹⁷¹ Since California passed the first medical marijuana law in 1996, the number of states duplicating such laws has grown steadily. There are an additional eleven states with legislation currently under consideration to legalize medical marijuana.¹⁷²

Similar to state efforts to legalize medical marijuana, state efforts to legalize the recreational use of marijuana are also rapidly gaining momentum. In 2010, California attempted to pass a law legalizing the

171. See NORML, *supra* note 144 (listing Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and Washington D.C. as American states and districts with medical marijuana laws currently enacted).

172. See also Tim Dickinson, *The Next Seven States to Legalize Pot: Why Oregon, California and more are likely to follow Colorado and Washington toward legalization*, ROLLING STONE, Dec. 18, 2012, www.rollingstone.com/politics/news/the-next-seven-states-to-legalize-pot-20121218 (listing Oregon, California, Nevada, Rhode Island, Maine, Alaska, and Vermont as states likely to pass laws legalizing marijuana for recreational use).

See also Medical Marijuana, *11 States with Pending Legislation to Legalize Medical Marijuana*, ProCon.org, available at medicalmarijuana.procon.org/view.resource.php?resourceID=002481 (last visited Mar. 6, 2013) (listing Alabama, Florida, Illinois, Iowa, Kansas, Kentucky, Maryland, Missouri, New Hampshire, New York, and West Virginia as American states considering medical marijuana legislation).

possession and use of marijuana under state law, but narrowly failed.¹⁷³ Two states have gone so far as to legalize the recreational use of marijuana, and as many as seven other states are considering similar legislation.¹⁷⁴

While these hard fought legislative efforts represent the evolution of drug policy in the U.S. and perhaps even herald the eventual demise of prohibition, these states' laws remain in conflict with established and preemptive federal law. The production, transportation, possession, and sale of federally scheduled substances is criminally prohibited by the CSA, and the federal government still uses a scheme of mandatory sentences to guarantee the imprisonment of offenders.¹⁷⁵ However, what the federal government does with the enforcement of the federal law in relation to the states has proven to be inconsistent at best.

Generally, the federal government in the U.S. has chosen not to interfere with state medical marijuana laws. Recently, the U.S. Attorney General even went so far as to issue what is popularly called the Ogden Memo, a memo to all U.S. Attorneys instructing them that state law regarding medical marijuana is to be respected.¹⁷⁶ However, the Obama administration has drastically changed the course of federal enforcement on facilities operating within the precepts of state law. Contrary to the Ogden Memo, U.S. Attorneys issued letters to state governments threatening prosecution of state officials participating in the regulation of medical marijuana dispensaries.¹⁷⁷ In 2012, the U.S. DEA and Internal

173. See, California Secretary of State Debra Bowen, *Proposition 19: Legalize Marijuana in CA, Regulate and Tax* (Jan. 5, 2011) available at <http://www.sos.ca.gov/elections/sov/2010-general/maps/prop-19.htm> (showing the final count on Proposition 19 to be 46.5% in favor and 53.5% opposed).

174. See Duke, *supra* note 8 (reporting that Washington's measure I-502 and Colorado's Amendment 64, both measures to legalize the recreational use of marijuana in those states, had passed by popular vote on November 7, 2012).

See also Johnson, *supra* note 8 (reporting that Uruguayan President Jose Mujica announced a plan in June, 2012 to legalize marijuana under a state monopoly. He later tabled the bill in December, 2012 to rethink the approach.).

See also Tim Dickinson, *The Next Seven States to Legalize Pot: Why Oregon, California and more are likely to follow Colorado and Washington toward legalization*, ROLLING STONE, Dec. 18, 2012, www.rollingstone.com/politics/news/the-next-seven-states-to-legalize-pot-20121218 (listing Oregon, California, Nevada, Rhode Island, Maine, Alaska, and Vermont as states likely to pass laws legalizing marijuana for recreational use).

175. See 21 U.S.C. §§ 801; Comprehensive Crime Control Act, Pub.L. 98-473, Title II, Oct. 12, 1984, 98 Stat. 1976; and Anti-Drug Abuse Act of 1986 (ADAA), Pub.L. 99-570, Oct. 27, 1986, 100 Stat. 3207.

176. David W. Ogden, Memorandum for Selected United States Attorneys, (Oct. 19th, 2009), available at blogs.justice.gov/main/archives/192.

177. See David Klepper, *RI lawmakers to take up marijuana dispensary rules*, BOSTON GLOBE, Mar. 27, 2012, www.boston.com/news/local/rhode_island/articles/2012/03/27/ri_lawmakers_to_take_up_marijuana_dispensary_rules/.

Revenue Service recently raided Oaksterdam University and the home of its proprietor, Richard Lee.¹⁷⁸ Richard Lee was a pioneer in developing the medical marijuana system in California and an advocate for legalization of marijuana but decided to surrender all of his businesses out of fear of federal prosecution.¹⁷⁹ Richard Lee and Oaksterdam University serve as examples of the legal risk implicit in a flawed system that yields a clash between fact and law. Oaksterdam University was similarly situated to many of the coffee shops in the Netherlands in that its business is technically prohibited by national law but permitted by local law. With the recent advent of legalized marijuana for recreational use in two states, it remains unclear how the federal government will respond.

Legitimate businesses will not take part in the drug trade under the current prohibitionist regime, because they are under threat of prosecution by a national government. Illegal actors, however, will participate in the drug trade regardless of the legality of the market. Legalization, however, would encourage legitimate businesses to participate in the drug market. A policy encouraging legitimate businesses is best understood as a harms reduction approach to drug policy. Legitimate businesses willingly submit to regulation and can be monitored and controlled more easily. They do not perpetuate violence, and they sell a product that can be subjected to governmental controls of quality and taxation. Illegal actors are not subject to any of these controls and have no incentive to comply with government regulations at all.

If efforts to address the harms imposed by the international prohibition of drugs are ever to be realized, it is clear that some form of legal protection from prosecution is necessary. On the international level, there is no enforcement mechanism equivalent to the U.S. federal government over state governments, but there are other means by which the global norm of prohibition is enforced. Specifically, member States can exert significant pressure on each other to comply with international law, to get back in line with the herd. We can see this at practice with the pressures the U.S. exerts over its neighbors to the South, both financially and politically, with efforts like Plan Colombia and the Mérida Initiative. The need for legalization on all levels of government, domestic and international, is essential to ever effectively combat the problems with drugs.

178. John Hoeffel, *Oakland Activist to turn over marijuana businesses after raid*, L.A. TIMES (April 6, 2012), available at www.latimes.com/news/local/la-me-oaksterdam-divest-20120406,0,7901222.story.

179. *Id.*

CONCLUSION

[H]arm reduction is too limited to meet the political problems that discrimination-based drug policy creates for us. Maybe we have to move to a different philosophical position and say that some of the harms that are created by our discriminatory drug policies can no longer be accepted...The intolerable damage inflicted on third world drug producers [is] merely the side effects of trying to keep illicit drugs out of the United States of the European Union; this damage is simply not acceptable. We have to develop ideas about harm refusal. Human rights are of course the philosophical background against which we can judge those harms and I think that is what we should apply. Harm reduction is relevant for certain social conditions and for certain political contexts...In some areas of drug politics we have to move from harm reduction to harm refusal.

-Peter Cohen-¹⁸⁰

Prohibition has failed as a policy to reduce drug use. The failure has been recognized by leaders across the globe for years. The international community and many domestic governments have expressed and committed to principles of harms reduction that have proven to be more effective and efficient than the current prohibitionist model. However, without the legal protections and policy options available under a legalization model, harms reduction will always be at risk to prosecution under prohibitionist laws. Given the profitability of the illegal drug market, it is unlikely that the black market in illegal drugs will ever be contained, let alone eliminated. It is high time that the world realize that there is a moral obligation to end prohibition.

180. Tammi, *supra* note 107, at 393 (quoting a speech delivered by Peter Cohen at the World Social Forum 2003).