

# IF HARD DRUGS WERE LEGALIZED, WOULD MORE PEOPLE USE THEM?

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## INTRODUCTION

Several years ago, my organization received funding for opinion research on some legislative issues. As part of the package offered by the polling firm, we got an additional question for free, and we decided to try something different. We asked: “If hard drugs like heroin or cocaine were legalized, would you be likely to use them?”<sup>1</sup> Out of 1,028 people surveyed, only six answered “yes.” Nearly 99% said “no.” (Four weren’t sure.)<sup>2</sup>

A survey of this type doesn’t represent an analytic prediction about legalization, and shouldn’t be interpreted that way.<sup>3</sup> On the other hand, predictions about drug use post-legalization are inherently uncertain. What our question sought to probe was whether people have other reasons besides legality for their choice of which drugs to take. For so few of the respondents to answer “yes” – just 0.6% – suggests other factors besides legality play important roles in such choices.

Academic discussions of drug policy actually tend not to frame the legalization question solely in terms of drug use. Use is one of the central elements in the equation. Another central element, equally if not more important, is the harm caused by drug control efforts. Serious thinkers with a range of viewpoints all agree on the seemingly counter-intuitive notion that prohibiting a drug makes it more harmful to people who use it despite the prohibition, at least at the times they are using

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<sup>1</sup> *Zogby America Poll of Likely Voters 10/24/07 thru 10/27/07*, STOPTHEDRUGWAR.ORG, [http://stopthedrugwar.org/files/zogby\\_legalization\\_question.pdf](http://stopthedrugwar.org/files/zogby_legalization_question.pdf) (last visited May 9, 2014).

<sup>2</sup> Some additional results of possible interest: All the “yes” respondents were white, and individuals earning more than \$100,000 per year were significantly more likely than others to answer yes (to the extent such small numbers provide statistical significance).

<sup>3</sup> For numerically predictive purposes a question of this type would fall short. The past 30-day prevalence in the U.S. for cocaine use is 1.5%, a greater number than our “yes” respondents, and of course 12-month or lifetime prevalence is likewise higher. Did a respondent interpret the question as asking if they’d ever try such drugs, or whether they’d do so commonly? If a respondent has tried them in the past, but wouldn’t again, does that count? The poll didn’t query a risk group of particular interest, high school students. Some may also not want to admit their potential interest in heroin or cocaine to a phone pollster, or believe they’d never try these drugs, but be mistaken.

it, and creates other harms. It's further acknowledged some of prohibition's harms are focused on limited groups of people who thereby suffer disproportionately.<sup>4</sup>

In such an inquiry there is a distinction between the *average* degree of harm due to drugs for each user (to the user and others), versus the *total* social harm. There is agreement generally among thinkers that the former would decrease under legalization – drugs would on average become less damaging to their individual users. But there is disagreement as to what would happen to total harm. There is also disagreement about whether it is appropriate to increase the harmfulness of drugs for some people, in order to discourage or otherwise reduce their number of users, or by how much or for what types of harm. And there is disagreement as to where the burden of proof should lie; that is, whether on justifying a current policy with its demonstrated harms, or on a proposed new policy whose benefits and harms can only be deduced or guessed at.

If a poll like ours were conducted this year, it would come in the context of the prohibition debate now reaching the highest levels of officialdom, particularly in Latin America where the drug trade rises to the level of a security threat. Following calls by a number of former presidents under the umbrella of the Global Commission on Drug Policy, sitting presidents in Latin America in late 2011 began to press the issue, including Presidents Juan Manuel Santos of Colombia, Otto Perez Molina of Guatemala, José Mujica of Uruguay, Laura Chinchilla of Costa Rica, and then-President Felipe Calderón of Mexico.<sup>5</sup> In May 2013, the Organization of American States (hereinafter “OAS”) released an historic report on hemispheric drug control, not only assessing the current state of affairs, but also examining a number of alternate scenarios for drug policy, including legalization systems.<sup>6</sup>

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<sup>4</sup> These characterizations of the drug policy debate are illustrated below with excerpts from works by several academic drug policy experts who are not aligned with the legalization movement.

<sup>5</sup> *Tomorrow: War on Drugs to Be Top Focus at Annual General Assembly of the Organization of American States, June 4-6*, DRUG POL'Y ALLIANCE (June 3, 2013), <http://www.drugpolicy.org/news/2013/06/tomorrow-war-drugs-be-top-focus-annual-general-assembly-organization-american-states-ju>.

<sup>6</sup> Phillip S. Smith, *OAS Releases Historic Report on Drug Policy Alternatives*, STOPTHEDRUGWAR.org (May 17, 2013), [http://stopthedrugwar.org/chronicle/2013/may/17/oas\\_releases\\_historic\\_report\\_dru](http://stopthedrugwar.org/chronicle/2013/may/17/oas_releases_historic_report_dru).

Though much of the time their discussion has framed the issue using non-specific phrases like “legal and regulatory alternatives,” or “other routes have to be found for the war on drugs,” the “l-word” (as “legalization” is sometimes referred to in the field) has come up too.<sup>7</sup> For example, President Santos has not advocated a specific reform scenario, but has stated one of the alternatives we should consider is legalization.<sup>8</sup> President Chinchilla said Central Americans “have the right to discuss” legalization, despite U.S. opposition, because they “are paying a very high price.”<sup>9</sup> And the activity is not merely rhetorical – one country, Uruguay, has moved ahead with legalization of marijuana, as have the U.S. states of Colorado and Washington.<sup>10</sup>

In this Article, I make a case that predictions of greatly increased drug use under legalization are not founded on a careful analysis of the competing factors affecting people’s choices, and may downplay evidence suggesting the contrary. I argue that predictions of increased harm resulting from legalization are especially presumptive, even with respect to the more dangerous and addictive drugs. And I point out that some of the harms currently resulting from prohibition are of such an extreme nature, in terms of their overall impact as well as the suffering they focus onto limited groups, that they thereby raise troubling ethical questions regarding our current policy choices and the justifications.

On the basis of these points, I argue that criminal prohibition of drugs should be ended. I make this argument not only for marijuana, but also for the more dangerous drugs, each drug and each form of a drug to be addressed through the regulations and public health programs most appropriate for it. The basis for my argument is not limited to the freedom of personal choice ideal, although I ascribe to that ideal.

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<sup>7</sup> ORG. OF AM. STATES, LEGAL AND REGULATORY ALTERNATIVES, IN THE DRUG PROBLEM IN THE AMERICAS: STUDIES, *available at* [http://www.cicad.oas.org/main/policy/informeDrogas2013/alternativasLegales\\_ENG.pdf](http://www.cicad.oas.org/main/policy/informeDrogas2013/alternativasLegales_ENG.pdf) (last visited Oct. 20, 2013); *Full Interview: President Otto Perez Molina on Legalizing Drugs, Grades US Effort, & More*, FOXNEWS LATINO, at 9:43 (Sept. 26, 2012), <http://video.foxnews.com/v/1863079595001/>.

<sup>8</sup> *Supporters*, Breaking the Taboo, <http://www.breakingthetaboo.info/supportersv5.htm> (last visited May 9, 2014) (click on “President Juan M. Santos”).

<sup>9</sup> Adam Williams & Flavia Krause-Jackson, *Costa Rica’s Chinchilla Calls for Drug Legalization Debate*, BLOOMBERG (Mar. 1, 2012), <http://www.bloomberg.com/news/2012-03-01/costa-rica-calls-for-debate-on-drug-legalization-amid-record-trafficking.html>.

<sup>10</sup> Noah Rayman, *Uruguay First Country to Legalize Marijuana Industry*, TIME (Dec. 10, 2013) [hereinafter Uruguay], <http://world.time.com/2013/12/10/uruguay-poised-to-be-first-country-to-legalize-marijuana-industry/>.

Rather, my argument in this Article rests more on the demonstrated consequence prohibition has of transferring harm from some onto others, and the extreme nature of the demonstrated harms for some groups, versus hypothetical benefits that commonly are attributed to prohibition but whose magnitude or certainty are often exaggerated.

I also argue that the more thoughtful defenses one finds of prohibition depend significantly on an additional set of assumptions: namely that legalization would be implemented poorly, whereas prohibition can be improved and made to cause less harm than it does currently. But there is a lengthy history of draconian or poorly thought-out implementations of drug prohibition in the United States and elsewhere, whereas attempts thus far to improve prohibition have proven to be politically difficult, both to implement and to sustain.

The upcoming UN General Assembly Special Session on Drugs (hereinafter “UNGASS”), to be held in early 2016, is an opportunity to raise issues related to the treaties and on international drug policy in general.<sup>11</sup> Significantly, the UNGASS was originally slated for 2019, but was moved up at the request of the presidents of Colombia, Mexico, and Guatemala.<sup>12</sup> In UN documents leaked last November, several Latin American and European governments argued for reform of the international drug treaties during UNGASS, their reasons including the need to look beyond the drug prohibition regime.<sup>13</sup> The annual Commission on Narcotic Drugs (hereinafter “CND”) meeting held in Vienna this March had an unprecedentedly reformist tone.<sup>14</sup>

Experiments in outright legalization have so far have involved only marijuana. Nevertheless, the passage of these laws and their implementation by states, and the federal response, offer lessons that can be applied to the regulatory, diplomatic, legal and political challenges involved when considering broader drug legalization. This Article,

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<sup>11</sup> *Gearing Up: The 2016 United Nations General Assembly Special Session on Drugs*, INT’L DRUG POL’Y CONSORTIUM (Oct. 25, 2013), <http://www.idpc.net/events/2013/10/gearing-up-the-2016-united-nations-general-assembly-special-session-on-drugs>.

<sup>12</sup> *The UN General Assembly Special Session on Drugs*, INT’L DRUG POL’Y CONSORTIUM, <http://idpc.net/policy-advocacy/the-un-general-assembly-special-session-on-drugs-ungass-2016> (last visited Feb. 16, 2014).

<sup>13</sup> Jamie Doward, *Leaked Paper Reveals UN Split Over War on Drugs*, THE GUARDIAN, Nov. 30, 2013 <http://www.theguardian.com/politics/2013/nov/30/un-drugs-policy-split-leaked-paper>.

<sup>14</sup> Phillip S. Smith, *Growing Demands for UN Drug Policy Reform*, STOPTHEDRUGWAR.org (Mar. 18, 2014), [http://stopthedrugwar.org/chronicle/2014/mar/18/growing\\_demands\\_un\\_drug\\_policy\\_r](http://stopthedrugwar.org/chronicle/2014/mar/18/growing_demands_un_drug_policy_r).

therefore, also reviews the recent progression taking place toward marijuana legalization, the range of legal issues impacting that process or which are impacted by it, and the role of international treaties and agencies in drug control and how that affects legalization efforts, as well as how reform momentum in different countries is affecting countries' relations to the treaties. Lastly, I lay out some concrete options for making both short- and long-term policy progress for drugs other than marijuana – options that may appeal to those who favor caution when it comes to the handling of psychoactive substances, but who are also open to considering fundamental changes.

## I. THE KNOWN DISASTERS OF PROHIBITION

Prohibition causes a wide range of harms, including criminal and violent or subversive activity, public health harms, impediments to medical care, and curtailing of civil liberties, among others.<sup>15</sup> This Article focuses on the criminal and public health aspects.

### A. *State Weakness and Insurgency*

Prohibition increases the price and therefore profitability of street drugs, while transferring that profit from the legitimate economy to the illicit one. On the most extreme end of such problems, drug profits can fund civil wars, finance terrorism, and increase the risk of state failure. Mark Kleiman, Jonathan Caulkins and Angela Hawken (hereinafter “KCH”) write: “Drug production helps weaken states and fuels civil conflict; drug revenues support insurgents, other armed non-state actors, and corrupt officials, while counternarcotic efforts create hostility to state power . . . . If all we cared about was terrorism and insurgency, [then we should legalize drugs as a counterterrorist measure].”<sup>16</sup> Nigel Inkster observes: “[D]rugs have enabled a range of powerful actors . . . who are part of the state, or benefit from the state, but who actively wish that state to be weak, in order to maximize their own power base and revenue-earning capabilities.”<sup>17</sup>

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<sup>15</sup> The ACLU briefing paper *Against Drug Prohibition* provides a good overview discussion of prohibition's costs. *Against Drug Prohibition*, AM. CIVIL LIBERTIES UNION (Jan. 6, 1995), <https://www.aclu.org/drug-law-reform/against-drug-prohibition>.

<sup>16</sup> MARK A.R. KLEIMAN, JONATHAN P. CAULKINS & ANGELA HAWKEN, *DRUGS AND DRUG POLICY: WHAT EVERYONE NEEDS TO KNOW* 16 (Oxford Univ. Press 2011) [hereinafter *DRUGS AND DRUG POLICY*].

<sup>17</sup> ‘*Drugs, Insecurity and Failed States*’ – Nigel Inkster and Virginia Comolli, YOUTUBE.COM at 08:08 (May 15, 2012), <http://www.youtube.com/watch?v=oCdxasnunk8> (Inkster held the #2

And while other types of criminal activity can fuel insurgencies, the drug trade leads. Vanda Felbab-Brown explains that while insurgent groups derive support from “a broad range of illicit activities, including illegal logging . . . extortion . . . and illegal traffic in legal goods . . . [d]rugs are the main focus [of her book on the subject] because they best epitomize the nexus between crime and insurgency, because drugs are by far the most lucrative of all illicit economies.”<sup>18</sup> Mexico, where a billions-a-year illicit market met a state weakened by political transition but determined to escalate its war with that market, is a particularly bloody example just to our south of the mayhem prohibition can fuel.<sup>19</sup> In Syria and Lebanon, Hezbollah derives revenues from the marijuana and hashish crops.<sup>20</sup> In Afghanistan, taxes on opium growing finance the Taliban as well as warlords and other political actors.<sup>21</sup> Felbab-Brown writes, “Afghanistan . . . illustrates the extreme difficulty of state-building in a country where an illicit economy constitutes the dominant economic sector and where a multitude of actors across all segments of society . . . participate in the illicit economy.”<sup>22</sup>

### B. *Street Crime*

Also highly tragic, though sadly ordinary, is that illicit drug dealing fuels violence and fosters a climate of disorder focused on certain sections of our cities. Robert MacCoun and Peter Reuter (hereinafter “MR”), write: “One harm of current . . . prohibition policies . . . that is unquestionably concentrated in inner-city communities and has serious long-term consequences . . . is the extraordinary prevalence of drug selling. That selling not only produces massive incarceration rates . . . but

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spot in the British Secret Intelligence Service, and coauthored Nigel Inkster & Virginia Comolli, *Drugs, Insecurity and Failed States: The Problems of Prohibition* (Routledge 2012)).

<sup>18</sup> VANDA FELBAB-BROWN, *SHOOTING UP: COUNTERINSURGENCY AND THE WAR ON DRUGS* 3 (Brookings Inst. Press 2009) [hereinafter *SHOOTING UP*].

<sup>19</sup> Ioan Grillo, *Mexican Cartels: A Century of Defying U.S. Drug Policy*, 20 BROWN J. OF WORLD AFF. 253, (Oct. 2013) (“The brutal cycle of violence known as Mexico’s drug war has become one of the most destructive episodes in history linked to the narcotics trade.”).

<sup>20</sup> Yori Yanover, *Hezbollah Defending Cannabis Fields Against Rebel Takeover*, THE JEWISH PRESS (July 21, 2013), <http://www.jewishpress.com/news/breaking-news/hezbollah-defending-cannabis-fields-against-rebel-takeover/2013/07/21/>.

<sup>21</sup> Dexter Filkins, *Poppies a Target in Fight Against Taliban*, N.Y. TIMES, Apr. 28, 2009 <http://www.nytimes.com/2009/04/29/world/asia/29afghan.html>; John F. Burns, *Afghan Warlords Squeeze Profits from the War on Drugs, Critics Say*, N.Y. TIMES, May 5, 2002 <http://www.nytimes.com/2002/05/05/world/afghan-warlords-squeeze-profits-from-the-war-on-drugs-critics-say.html>.

<sup>22</sup> *SHOOTING UP*, *supra* note 18, at 9.

also affects the viability of those communities in both economic and social terms.”<sup>23</sup>

A particularly serious example of this in recent memory is the popularization of crack cocaine in the mid-1980s and the 1990s. Most of the violence was what Paul Goldstein termed to be “systemic,” referring not to the pharmacological effects of the drug, but violence in how the drug trade is conducted.<sup>24</sup> Carl Hart sums up, “[Crack cocaine]’s pharmacology didn’t produce excess violence. However, whenever a new illicit source of profit is introduced, violence increases to define and retain sales territory, then declines once turf has been marked out and the market stabilized.”<sup>25</sup>

The crack cocaine example bears some further examination here, as an example of the unpredictability plaguing large scale black market systems. One can predict that a new illicit product may increase violence in the way Hart summarizes, but it is difficult to know just when that new product may arrive or what form it will take. Craig Reinerman & Harry Levine (hereinafter “RL”) note that crack differed from other substances that had been prevalent as “a way of packaging a relatively *expensive and upscale* commodity (powder cocaine) in small, inexpensive units.”<sup>26</sup> That marketing innovation made the drug available to low income people who had previously not used cocaine – not because crack is “cheap” (it has prohibition-level high street prices as powder cocaine does), but because it can be purchased for a small dollar amount paying for one short-acting “hit” at a time.<sup>27</sup>

Alfred Blumstein has pointed out that users who are addicted to crack thereby engage in a greatly increased number of transactions relative to the number of transactions that take place for other drugs, which in turn required the new crack entrepreneurs to hire more people to

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<sup>23</sup> ROBERT J. MACCOUN & PETER REUTER, DRUG WAR HERESIES: LEARNING FROM OTHER VICIES, TIMES, AND PLACES (RAND STUDIES IN POLICY ANALYSIS) 112-13 (Cambridge Univ. Press 2001) [hereinafter DRUG WAR HERESIES].

<sup>24</sup> Paul J. Goldstein, *The Drug/Violence Nexus: A Tripartite Conceptual Framework*, 39 J. OF DRUG ISSUES 143, 174 (1985), available at <http://www.drugpolicy.org/docUploads/nexus.pdf>; Paul J. Goldstein et al., *Crack and Homicide in New York City, 1988: A Conceptually Based Event Analysis*, 16 CONTEMP. DRUG PROBS. 655-56 (Winter 1989) (two highly influential papers that continue to be cited).

<sup>25</sup> CARL HART, HIGH PRICE: A NEUROSCIENTIST’S JOURNEY OF SELF-DISCOVERY THAT CHALLENGES EVERYTHING YOU KNOW ABOUT DRUGS AND SOCIETY 187 (Harper 2013).

<sup>26</sup> CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 2 (Craig Reinerman & Harry Levine eds., 1997).

<sup>27</sup> *Id.* at 2.



work for them as sellers.<sup>28</sup> Many of those new sellers in turn were juveniles, who were willing to work for less than adults, partly because of not being subject to the stiff sentences adults face.<sup>29</sup> Some of these new juvenile drug sellers began to carry guns at increased rates to protect themselves and the money or valuable drugs they carried.<sup>30</sup> From there, the guns “diffused” to other teenagers in the same neighborhoods or schools or social circles.<sup>31</sup> And, because teenagers often lack the skills needed to resolve disputes peacefully, and can be reckless or engage in bravado, a heightened gun crime problem was born, its scope reaching beyond the drug trade.<sup>32</sup>

### C. *Making Drugs and Addiction More Damaging to Users*

As asserted above, prohibition actually worsens the public health consequences associated with drug taking, at least for those who use such drugs despite the laws, while they are using them.<sup>33</sup> For example, a heroin, cocaine or meth user may overdose because a batch is more pure than it was believed it to be, or suffer poisoning because a batch is adulterated.<sup>34</sup> Prohibition has also led to widespread sharing of syringes by injection drug users, which otherwise might be provided to them legally together with the drugs, thereby fueling epidemics of HIV/AIDS and Hepatitis C.<sup>35</sup>

Addicts who are unable to afford the high street drug prices that prohibition produces may also neglect to properly care for themselves or their families, because of the resulting lack of funds, as well as the time they spend raising funds for and procuring the drugs, or finding safe places to use them. MR write: “Perhaps the most general way in which prohibition worsens the health consequences of drug use is by making prices so high that little money or attention can be spared for anything

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<sup>28</sup> Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. OF CRIM. L. & CRIMINOLOGY 10, 30 (Fall 1995).

<sup>29</sup> *Id.* at 30.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 30-31.

<sup>33</sup> Ernest Drucker, *Drug Prohibition and Public Health: 25 Years of Evidence*, 114 PUB. HEALTH REP. 14 (Jan.-Feb. 1999), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1308340/> (epidemiologist Dr. Ernest Drucker of Montefiore Hospital overviews 25 years of evidence regarding the health consequences of drug prohibition in a 1999 paper).

<sup>34</sup> DRUG WAR HERESIES, *supra* note 23, at 125.

<sup>35</sup> *Id.* at 126.

unrelated to the drug itself.”<sup>36</sup> In the worst (and most visible) cases of this type, such prices drive addicts to homelessness, or to resort to property crime or prostitution in order to afford them. A report for the Senate of Canada notes: “[L]aw enforcement agencies generally admit that many chronic drug users commit crimes to support their dependence. . . . [A] report . . . by the Ontario Association of Chiefs of Police stated that most crimes against property . . . as well as prostitution, are committed by drug users in order to feed their habit.”<sup>37</sup>

These observations highlight a “transformative” aspect of a drugs’ illegal status – an adverse type of transformation – that careful observers have recognized since national drug prohibition first took effect. In 1915, six weeks after passage of the Harrison Narcotics Act (the nation’s first federal prohibition law), a New York Medical Journal editorial observed:

As was expected . . . the immediate effects of the Harrison antinarcotic law were seen in the flocking of drug habitues to hospitals and sanatoriums. Sporadic crimes of violence were reported too, due usually to desperate efforts by addicts to obtain drugs, but occasionally to a delirious state induced by sudden withdrawal. . . . The really serious results of this legislation, however, will only appear gradually and will not always be recognized as such. These will be the failures of promising careers, the disrupting of happy families, the commission of crimes which will never be traced to their real cause, and the influx into hospitals to the mentally disordered of many who would otherwise live socially competent lives.<sup>38</sup>

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<sup>36</sup> *Id.* at 126 (MR offer a caveat with respect to cocaine addiction, as opposed to heroin, noting that “[t]hose dependent on cocaine are little better off, but the drug itself, precisely because it is positively reinforcing, must take more of the blame.”).

<sup>37</sup> LYNE CASAVANT & CHANTAL COLLIN, *ILLEGAL DRUG USE AND CRIME: A COMPLEX RELATIONSHIP* (Oct. 3, 2001) (a report to the Canadian Senate Special Committee on Illegal Drugs, which was examining the prohibition issue at the time, under the leadership of Sen. Pierre Claude Nolin), *available at* <http://www.parl.gc.ca/Content/SEN/Committee/371/ille/library/collin-e.htm>.

<sup>38</sup> EDWARD M. BRECHER, *LICIT AND ILLICIT DRUGS; THE CONSUMERS UNION REPORT ON NARCOTICS, STIMULANTS, DEPRESSANTS, INHALANTS, HALLUCINOGENS, AND MARIJUANA - INCLUDING CAFFEINE, NICOTINE, AND ALCOHOL* CHAPTER 8 (Little, Brown & Co. 1973) [hereinafter *CONSUMERS UNION REPORT*], *available at* <http://www.druglibrary.org/schaffer/library/studies/cu/cu8.html>. David Courtwright is an example of a scholar who does not accept the interpretation of an abrupt change in addicts’ criminal status from the Harrison Act. But his difference is with respect to the Act’s degree of importance in such changes, not the general principle described here. Below I will discuss a method Courtwright supports for reducing the harm of heroin addiction, namely heroin maintenance programs. DAVID T. COURTWRIGHT,

Baltimore Mayor Kurt Schmoke observed along these lines that most people's top concerns related to drugs were "crime, addiction, and AIDS," rather than use per se.<sup>39</sup> KCH express the problem formulaically: "[S]ome of the measures taken to reduce the prevalence of drug use and the volume consumed also tend to make the activity more harmful per user or per unit."<sup>40</sup> Kleiman observes with respect to heroin specifically: "Heavy users of legal heroin would . . . be much better off personally and much less of a problem to others than heavy users of illegal heroin, but much worse off personally and more of a problem socially than moderate users or non-users."<sup>41</sup>

Like the popularization of crack, the spread of AIDS due to drug injecting also demonstrates the unpredictability of prohibited markets, in this case on the user side. Kleiman remarks, "Perhaps, if the . . . epidemic had been foreknown . . . the increase in heroin addiction [from] . . . legal availability [might] have been more than compensated for by [reduced] HIV transmission. But the epidemic spread so quickly . . . that it is hard to see when that decision could have been made with information in hand."<sup>42</sup>

#### D. *Excesses of the Current "Drug War"*

There is another category of harm in our current drug policies, which in principle need not have resulted from prohibition, but which historically and politically did result from it, and which has so far defied solution. This is the excesses of the current "drug war." Such excesses range widely, from overreliance on arrest and incarceration, to the denial of needed medicines (for example the prohibition even for medical use of marijuana in most countries, or the denial of opioid prescriptions to chronic pain patients), to the loss of due process rights through practices like civil asset forfeiture, to aerial fumigation of coca and opium crops in populated areas, to name just a few.

One of the most egregious excesses is that of modern criminal sentencing, namely the controversial mandatory minimum sentencing re-

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DARK PARADISE: A HISTORY OF OPIATE ADDICTION IN AMERICA 1-8 (Harvard Univ. Press 2009) [hereinafter DARK PARADISE].

<sup>39</sup> Kurt Schmoke, Alternative Drug Policy in Baltimore, Speaker at the Partnership for Responsible Drug Information/Voluntary Committee of Lawyers Forum (May 21, 1996).

<sup>40</sup> See DRUGS AND DRUG POLICY, *supra* note 16, at 16.

<sup>41</sup> MARK A.R. KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS 363 (Basic Books 1992) [hereinafter AGAINST EXCESS].

<sup>42</sup> *Id.* at 361.

gime. The most well-known mandatory minimums are the infamous crack cocaine sentences, which until 2010 included mere possession offenses. Until their partial reform through the 2010 Fair Sentencing Act, only five grams of crack was needed to trigger a five-year mandatory minimum sentence; powder cocaine, by contrast, required 500 grams.<sup>43</sup> Roughly 8,829 prisoners continue to serve crack sentences that would be an average of 53 months shorter if they had been sentenced after the FSA was passed rather than before.<sup>44</sup>

The crack laws in turn demonstrate endemic racial disparities in how the drug laws are administered. According to the NAACP, “In 2002, blacks constituted more than 80% of the people sentenced under the federal crack cocaine laws and served substantially more time in prison for drug offenses than did whites, despite the fact that more than 2/3 of crack cocaine users in the U.S. are white or Hispanic.”<sup>45</sup> A 2013 ACLU report found that blacks are 3.73 times more likely to be arrested for marijuana possession than whites, despite equal use rates, and that “disparities in marijuana possession arrests exist regardless of county household income levels.”<sup>46</sup>

Michael Tonry argues that the results of “[m]andatory minimum, three-strikes, and truth-in-sentencing laws [include] . . . shift[ing] sentencing power from judges to prosecutors . . . greatly increas[ing] . . . lengths of prison terms and . . . [causing a] fivefold increase in America’s imprisonment rate between 1972 and 2007,” but “little or no effect on crime rates.”<sup>47</sup> While “relatively few major new punitive laws [have been] enacted [since the mid-’90s], the laws enacted during the tough

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<sup>43</sup> Phillip S. Smith, *Obama Signs Crack Sentencing Reform Bill*, STOPTHEDRUGWAR.org (Aug. 3, 2010) [http://stopthedrugwar.org/chronicle/2010/aug/03/obama\\_signs\\_crack\\_cocaine\\_senten](http://stopthedrugwar.org/chronicle/2010/aug/03/obama_signs_crack_cocaine_senten).

<sup>44</sup> *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences, Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 10 (2013), available at [http://www.uscc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Submissions/20130918\\_SJC\\_Mandatory\\_Minimums.pdf](http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/20130918_SJC_Mandatory_Minimums.pdf) (statement of Judge Patti B. Saris, Chair, United States Sentencing Commission). See also Smarter Sentencing Act of 2014, S. 1410, 113th Cong. § 3 (2014) (legislation that has passed the Senate Judiciary Committee would make the FSA’s sentencing reductions retroactive, and on March 11 was placed on Senate Legislative Calendar no. 320).

<sup>45</sup> *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/pages/criminal-justice-fact-sheet> (last visited Feb. 17, 2014).

<sup>46</sup> EZEKIEL EDWARDS, WILL BUNTING & LYNDA GARCIA, ACLU, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 17 (June 2013), <https://www.aclu.org/files/assets/1114413-mj-report-rfs-rel1.pdf>.

<sup>47</sup> Michael Tonry, *Sentencing in America, 1975–2025* [Research Paper No. 13-44], U. OF MINN. L. SCH. LEGAL STUD. 7 (June 11, 2013).

on crime period largely remain in place.”<sup>48</sup> Damon Barrett makes a case that drug laws have fueled human rights violations, noting the UN has guidelines for incorporating human rights concerns in programs addressing “terrorism . . . indigenous peoples, children, women, climate change, poverty and HIV, among many other [areas, but] . . . a century after the genesis of a worldwide fight against drug addiction and illicit trafficking, no such thematic guidelines or mechanisms exist today” for drug enforcement.<sup>49</sup>

Using a 2008 analysis by the UN Office on Drugs and Crime (hereinafter “UNODC”) that acknowledged some of the “unintended consequences” of drug control, Barrett paints a picture of “an international system of human rights risk.”<sup>50</sup> Barrett argues that the combined impact of the criminal market for drugs that prohibition creates, with states’ efforts to repress those markets as well as the budgetary shifts to law enforcement associated with those efforts, has generated “large-scale human rights abuses” and pushed “people who use drugs . . . to the margins of society.”<sup>51</sup>

Joanne Csete argues that UN agencies such as the International Narcotics Control Board (hereinafter “INCB”) have given short shrift to such concerns, noting a range of troubling human rights and public health issues in which INCB broke with other UN agencies that had criticized some nations’ practices.<sup>52</sup> One example was the case of compulsory “drug treatment” centers in some countries including Vietnam and Thailand, and some countries in the former Soviet Union, slammed in March 2013 by the UN’s special rapporteur on torture as “tantamount to torture or cruel, inhuman or degrading treatment” in a report delivered to the Office of the UN High Commissioner for Human

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<sup>48</sup> *Id.* at 46.

<sup>49</sup> Damon Barrett, *Reflections on Human Rights and International Drug Control*, in LSE IDEAS SPECIAL REP. GOVERNING THE GLOBAL DRUG WARS 56 (2012), available at <http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SR014/SR-014-FULL-Lo-Res.pdf>.

<sup>50</sup> U.N. OFFICE ON DRUGS & CRIME, MAKING DRUG CONTROL ‘FIT FOR PURPOSE’: BUILDING ON THE UNGASS DECADE 10 (Mar. 2008), <http://www.countthecosts.org/sites/default/files/Making%20drug%20control%20fit%20for%20purpose%20-%20Building%20on%20the%20UNGASS%20decade.pdf> (with respect to the UNODC’s 2008 analysis); Barrett, *supra* note 49, at 59.

<sup>51</sup> Barrett *supra* note 49, at 58-59.

<sup>52</sup> Joanne Csete, *Overhauling Oversight: Human Rights at the INCB*, in LSE IDEAS SPECIAL REP. GOVERNING THE GLOBAL DRUG WARS, *supra* note 49, at 63.

Rights.<sup>53</sup> A joint statement from twelve UN agencies, including UNODC, called on states to close such centers.<sup>54</sup> Yet INCB declined to sign the statement. According to Csete, then INCB chairman the late “Dr. Hamid Ghodse asserted that human rights is not the concern of the INCB or of the drug conventions.”<sup>55</sup> Another example Csete cited was “a major drug crackdown in Thailand [in which] more than 2500 persons were gunned down by the state . . . many . . . found to have little to do with drugs. . . . INCB [merely] noted . . . the action had decreased amphetamine use . . . and congratulated the government for investigating [despite the government having blocked] independent investigations.”<sup>56</sup>

Another dire consequence of current drug policies is the undertreatment of chronic pain. A 2011 report by the Institute of Medicine found that while “opioid prescriptions for chronic noncancer pain [in the U.S.] have increased sharply . . . [t]wenty-nine percent of primary care physicians and 16 percent of pain specialists report they prescribe opioids less often than they think appropriate because of concerns about regulatory repercussions.”<sup>57</sup> As the report noted, having more opioid prescriptions doesn’t necessarily mean that “patients who really need opioids [are] able to get them.”<sup>58</sup> In 2010 Senator Herb Kohl threatened to hold up the nomination of acting DEA administrator Michele Leonhart over DEA’s policies that hindered timely access to pain medications for nursing home patients.<sup>59</sup>

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<sup>53</sup> Phillip S. Smith, *UN Report Slams Cruel Drug Treatment As “Torture”*, STOPTHEDRUGWAR.ORG (Mar. 11, 2013) available at [http://stopthedrugwar.org/chronicle/2013/mar/11/un\\_report\\_slams\\_cruel\\_drug\\_treat](http://stopthedrugwar.org/chronicle/2013/mar/11/un_report_slams_cruel_drug_treat); JUAN E. MÉNDEZ, U.N. GEN. ASSEMBLY, REPORT OF THE SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (Feb. 1, 2013), [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf).

<sup>54</sup> UNHCR, OHCHR, UNICEF, WFP, UNDP, UNFPA, UNODC, ILO, UNESCO, WHO, UNAIDS, UN WOMEN, JOINT STATEMENT: COMPULSORY DRUG DETENTION AND REHABILITATION CENTRES (Mar. 2012), [http://www.unaids.org/en/media/unaids/contentassets/documents/document/2012/JC2310\\_Joint%20Statement6March12FINAL\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/document/2012/JC2310_Joint%20Statement6March12FINAL_en.pdf).

<sup>55</sup> Csete, *supra* note 52, at 65.

<sup>56</sup> *Id.* at 66.

<sup>57</sup> INST. OF MED., RELIEVING PAIN IN AMERICA: A BLUEPRINT FOR TRANSFORMING PREVENTION, CARE, EDUCATION, AND RESEARCH 143-44 (The National Academies Press 2011).

<sup>58</sup> *Id.* at 144.

<sup>59</sup> *Kohl Threatens to Hold Up DEA Nominee Over Nursing Home Drug-dispensing Issue*, MCKNIGHT’S (Dec. 2, 2010), <http://www.mcknights.com/kohl-threatens-to-hold-up-dea-nominee-over-nursing-home-drug-dispensing-issue/article/192036/>.

But even that is a luxurious situation compared with much of the world. INCB itself reports that “more than 90 percent of the global consumption of . . . opioid analgesics occurred in Australia, Canada, New Zealand, the United States of America and several European countries. This means that their availability was very limited in many countries and in entire regions.”<sup>60</sup> Here again, regulatory and legal restrictions contribute to the problem, as does underestimation by governments of the quantities of opioids their populations will need, and consequent underproduction in the (INCB-administered) global quota system.<sup>61</sup>

## II. THE UNCERTAINTIES OF LEGALIZATION

On the pro-prohibition side, there is one essential argument to be made, though it likewise has myriad aspects. This is the belief – often expressed “apocalyptically” as MR put it – that legalization would “open a floodgate” to massively increased drug use and the harms that attend it.<sup>62</sup> But “[n]one [of the commentators the authors cite] provide more

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<sup>60</sup> INTERNATIONAL NARCOTICS CONTROL BOARD, REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD ON THE AVAILABILITY OF INTERNATIONALLY CONTROLLED DRUGS: ENSURING ADEQUATE ACCESS FOR MEDICAL AND SCIENTIFIC PURPOSES 2 (2010) [hereinafter INCB PAIN REPORT], *available at* [http://www.incb.org/documents/Publications/AnnualReports/AR2010/Supplement-AR10\\_availability\\_English.pdf](http://www.incb.org/documents/Publications/AnnualReports/AR2010/Supplement-AR10_availability_English.pdf) (with respect to INCB’s administration of the global opiate quota system).

<sup>61</sup> See International Narcotics Control Board, <http://www.incb.org/> (last visited May 11, 2014).

<sup>62</sup> DRUG WAR HERESIES, *supra* note 23, at 72, (citing Morton M. Kondracke, *Don’t legalize drugs: the costs are still too high*, THE NEW REPUBLIC 16-19 (June 27, 1988) (“[Cocaine addicts] will number somewhere between 8.5 million . . . and 42 million,” according to journalist Morton Kondracke)); CENTER ON ADDICTION & SUBSTANCE ABUSE, LEGALIZATION: PANACEA OR PANDORA’S BOX? (Sept. 1995) (There will be “10-32 million ‘compulsive [cocaine] users,’” according to USC professor Jack Homer); ERICH GOODE, BETWEEN POLITICS AND REASON: THE DRUG LEGALIZATION DEBATE (George Ritzer, ed., St. Martin’s Press 1998) (former federal drug official Robert DuPont predicts 50-60 million cocaine users – Pollin predicts 60-100 million); *Nightline* (ABC television broadcast, Apr. 6, 1995) (there will be 40-50 million “heavy users” of all illicit drugs combined, says former U.S. drug czar Bill Bennett). A more recent example is Kevin Sabat, *Statement about new DOJ “Trust But Verify” Approach to CO and WA Marijuana Legalization*, LEARNABOUTSAM.COM (Aug. 29, 2013), <http://learnaboutsam.com/sam-releases-statement-about-new-doj-trust-but-verify-approach-to-co-and-wa-marijuana-legalization/> (Following the Obama Administration’s August 2013 announcement that it would cooperate with state’s implementing marijuana legalization systems, Christian Thurstone, a Denver-based treatment provider and board member of the group Smart Approaches to Marijuana said, “In Colorado, we’ve seen an explosion of consequences among kids as a result of the new industry that emerged around so-called medical marijuana after 2009. We now have to prepare the floodgates.”).

than the most superficial account of the basis of their estimate," they say.<sup>63</sup> A more cautious argument claims that legalization might "merely loosen a spigot," but enough so that consumption of drugs by heavy users as well as other types of problematic drug use would increase to such a degree that the costs of abuse would exceed the costs we incur from prohibition.<sup>64</sup>

Any non-superficial attempt to guess at a legalization system's outcome must necessarily acknowledge that the number of people using a drug does not automatically tell us how many people will use it heavily or in other problematic ways, how harmful problematic use will be for them (on average and in the more serious cases), or what form drug problems will tend to take. As the above discussion examines, the type and degree of harmfulness associated with drug habits are defined not only by the effects of drugs, but also by the circumstances in which a user consumes a drug – indeed by the overall circumstances in which a user lives – as well as the circumstances in which the trade in the drug is conducted. Drug laws play a role in defining both those circumstances.

Nevertheless, drug use levels (both prevalence and volume) are themselves of clear interest. They are one part of the equation when attempting to project costs versus benefits for a given policy choice. For reasons both thoughtful and otherwise, use rates post-legalization are a key question the public inevitably considers, if not as much for the relatively safer drug marijuana, then certainly when considering legalizing more dangerous drugs.

#### A. *Not All Drugs Are Equal*

Many thinkers believe that massive increases in hard drug use are unlikely, or see legalization's outcome as uncertain. Ethan Nadelmann writes: "[The] types of drugs and methods of consumption that are most risky are unlikely to prove appealing to many people precisely because they are so obviously dangerous."<sup>65</sup> Relatedly, Jeffrey Miron reasons: "Since those most likely to consume drugs when illegal are also those most likely to consume them in an irresponsible way, it is plausible that the increases in consumption . . . would not be accompanied by negative

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<sup>63</sup> DRUG WAR HERESIES, *supra* note 23, at 73.

<sup>64</sup> *Id.* at 72.

<sup>65</sup> Ethan A. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, 245 SCI. 939 (Sept. 1, 1989).



externalities in all cases.”<sup>66</sup> Miron also hypothesizes that the price sensitivity of use rates found for these drugs under prohibition may overstate the likely impact that a price drop following legalization would have, because the people most interested in the drugs are already using them.<sup>67</sup>

Samuel Walker points out that “[s]ome evidence . . . suggests . . . use would not increase. The National Household Survey [shows] millions of Americans use illegal drugs . . . without becoming heavy users, addicts, or criminals . . . [and] drug abuse is not rampant in . . . countries that have relatively tolerant drug policies. . . . The full impact of legalization remains entirely a matter of speculation.”<sup>68</sup>

### B. *What Would Happen to Harm?*

It is often assumed that the use of drugs would increase under legalization as well as the harm connected with it – possibly the total harm, or at least the harm suffered by users, and by others as a result of users’ behavior. But as I argue in Part I, such assumptions fail to address the impact of criminalization on a host of critical variables, includes the status of users. Blumstein cautions against such assumptions, presuming

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<sup>66</sup> JEFFREY A. MIRON, *DRUG LEGALIZATION AND THE CONSUMPTION OF DRUGS: AN ECONOMIST’S PERSPECTIVE* CHAPTER IN *SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES* 72 (Melvyn B. Krauss & Edward P. Lazear eds., Hoover Press 1991).

<sup>67</sup> *Id.* at 73 (“If . . . the world [at least in part] consists of individuals who have some demand for [drugs] at positive prices [e.g., inflated prohibition-level prices in the illicit market] and others who do not, then it is likely that those who have the greatest desire to consume [currently illegal drugs] are the ones already doing so. [E]xtrapolation from elasticities estimated on the basis of existing consumers is likely to overstate the increases in consumption that would occur as the result of lower prices under legalization.”).

<sup>68</sup> SAMUEL WALKER, *SENSE AND NONSENSE ABOUT CRIME AND DRUGS* 285 (Wadsworth Publ’g 2006); *see also* JEFFREY A. MIRON, *LIBERTARIANISM FROM A TO Z* (Basic Books 2010); Jane Palmer, *Working to Keep Lady Justice Blind*, OMAHA WORLD-HERALD, Mar. 12, 2011, available at [http://www.omaha.com/apps/pbcs.dll/article?AID=/20110312/NEWS02/703129939/0&ss=blogger&at\\_xt=4d7b6c55d57e2955,0](http://www.omaha.com/apps/pbcs.dll/article?AID=/20110312/NEWS02/703129939/0&ss=blogger&at_xt=4d7b6c55d57e2955,0) (The World-Herald describes Walker as “a widely quoted researcher and author on the topics of civil liberties, criminal justice and police misconduct and. . . professor emeritus of criminal justice at the University of Nebraska at Omaha.”). While Nadelmann and Miron have known ideological leanings – Nadelmann heads a drug policy reform organization, The Drug Policy Alliance, and Miron is a professed libertarian – it is not only scholars with known ideological leanings who refrain from assuming the worse outcomes from legalization. Walker is a mainstream academic who is recognized as one of the leading scholars of policing in America. *See Ethan Nadelmann, Executive Director*, DRUG POL’Y ALLIANCE, <http://www.drugpolicy.org/staff-and-board/staff/ethan-nadelmann-executive-director> (last visited Feb. 17, 2014).

there will be “probable consequences of greater use of illegal drugs if they were legalized,” but calling “[l]egalization of drugs . . . a complex issue,” noting 18,600 “excess murders” estimated from the current enforcement policy if his “diffusion hypothesis” stands up.<sup>69</sup> He highlights former U.S. Surgeon General Joycelyn Elders’ call for a study of legalization, as well as his own call for “a careful assessment of the costs and benefits of the current policies.”<sup>70</sup>

Conversely, a non-superficial case that total harm from drug use would increase following legalization is made by KCH:

Legalizing possession and production would eliminate many of the problems related to drug dealing, but it would certainly worsen the problem of drug abuse. . . . Any form of legal availability that could actually displace the illicit markets in cocaine, heroin and methamphetamine would make those drugs far cheaper and more available. If these “hard” drugs were sold on more or less the same terms as alcohol, there is every reason to think that free enterprise would work its magic of expanding the customer base, and specifically the number of problem users, producing an alcohol-like toll in disease, accident and crime.<sup>71</sup>

KCH note similarly that the ban on sales of the legal drug alcohol to minors is “massively evaded,” and call the “abuse of diverted pharmaceuticals . . . not encouraging.”<sup>72</sup> The substantial harms related to the legal drugs alcohol and nicotine, which far exceed that of all illicit drugs combined, also “aren’t . . . encouraging.”<sup>73</sup>

But despite KCH having presented their prediction of “an alcohol-like” toll from legalized drugs as an assertion, it should be regarded instead as conjecture – an expression of their instincts, but nothing approaching a certainty, nor even a clear probability. The correct comparison to make on this question is not between drugs that are legal now versus drugs that are illegal now; but rather between one drug when illegal versus *the same or similar drugs* while legal. The alcohol and nico-

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<sup>69</sup> Blumstein, *supra* note 28, at 35.

<sup>70</sup> Alfred Blumstein, *Making Rationality Relevant: The American Society of Criminology 1992 Presidential Address*, 31 CRIMINOLOGY 1, 16 (1992).

<sup>71</sup> Mark A.R. Kleiman, Jonathan P. Caulkins & Angela Hawken *Rethinking the War on Drugs*, WALL ST. J., Apr. 22, 2012 [hereinafter *Rethinking the War on Drugs*], available at <http://online.wsj.com/article/SB10001424052702303425504577353754196169014.html>.

<sup>72</sup> See DRUGS AND DRUG POLICY, *supra* note 16 at 19-20.

<sup>73</sup> *Id.* at 19.

tine examples are useful for identifying the limitations of regulatory systems and as cautionary examples, but they have much less meaning when it comes to predicting use or harm levels for other drugs under legalization, absent a fuller consideration of a wider range of factors. Pharmaceutical diversion is also a flawed analogy (although likewise useful as a caution), because the substances are only legal to use with a prescription, and otherwise become illegal once diverted, gaining black market profitability and acquiring many of the dangers for users that illegally produced drugs have.

Just as likely is that factors affecting people's *inherent* levels of interest in different substances have played a role politically in keeping alcohol and tobacco legal at most times, while doing less to protect users of less popular drugs from prohibitions. More generally, to justify a prediction of increased total *harm*, if not of use following legalization, much less of alcohol-level harm, requires a careful assigning of magnitude ranges to the full set of factors likely to be in play under legalization when thinking it through. KCH have contributed considerably to our ability to evaluate drug policy at that elevated level, to be sure. But on this particular point they have stopped short of providing the analysis needed to justify such assertions.

### C. *Different Drugs Have Different Inherent Levels of Market Appeal*

That the most popular substances could *naturally* be more popular than others seems plausible. Nadelmann discusses the pervasiveness of alcohol and tobacco:

Alcohol has long been the principal intoxicant in most societies, including many in which other substances have been legally available. Presumably, its diverse properties account for its popularity: it quenches thirst, goes well with food, often pleases the palate, promotes appetite as well as sociability. . . . The widespread use of tobacco probably stems not just from its powerful addictive qualities but from the fact that its psychoactive effects are sufficiently subtle that cigarettes can be integrated with most other human activities. None of the illicit substances now popular in the United States share either of these qualities to the same extent, nor is it likely that they would acquire them if they were legalized.<sup>74</sup>

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<sup>74</sup> Nadelmann, *supra* note 65.

Conversely, Miron points out that many illicit drugs just don't have the same draw as the more popular legal ones:

Many people may have no desire to consume any quantity of [certain] goods no matter how low the price, in the same way that many currently have no desire to attend the opera and others have no desire to watch baseball. Some opponents of legalization appear to believe there is an enormous latent demand for drugs that would surface the instant such goods became legal. The people who make such arguments, however, do not find it the least implausible that millions do not watch the hours of free and legal television programming that are available, or that many who could easily afford to smoke or to drink alcohol and coffee choose not to do so.<sup>75</sup>

Of course there are qualitative differences between drugs and many other consumer goods. Drugs have an addictive quality for some users – some more than others – a quality neither shared by every good on the market, nor by most goods with respect to the intensity and the physical aspects that drug addiction can have.<sup>76</sup> KCH have argued that a moderate increase in the number of *heavy* users would mean a large increase in total use, because heavy users account for the most consumption, that such use would be accompanied by the “negative externalities” described above, and that the businesses selling drugs would use the available modern marketing measures to try to increase the number of these heavy users, their best customers.<sup>77</sup>

Nevertheless, most goods on the market, addictive or otherwise, fall well short of alcohol in their market penetration, despite having the resources of major corporations behind their promotion. It isn't necessary to argue that drugs are equivalent to other classes of goods with respect to their commercial potential, to recognize that drugs can differ from one another inherently in terms of their likely market share. Indeed, different alcoholic beverages capture different shares of the beverage market, despite all being based on alcohol.<sup>78</sup>

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<sup>75</sup> MIRON, *supra* note 66, at 72.

<sup>76</sup> Mary Jane Borden, *Drug Rankings By Harm*, DRUGWARFACTS.ORG (Jan. 2011), <http://drugwarfacts.org/cms/files/Drug-Rankings-by-Harm.pdf>.

<sup>77</sup> See DRUGS AND DRUG POLICY, *supra* note 16, at 29-30; MIRON, *supra* note 66, at 72.

<sup>78</sup> For example, a recent Gallup Poll found 71% of U.S. drinkers prefer beer or wine, vs. 23% who opt for liquor. Jeffrey M. Jones, *U.S. Drinkers Divide Between Beer and Wine As Favorite*, GALLUP (Aug. 1, 2013), <http://www.gallup.com/poll/163787/drinkers-divide-beer-wine-favorite.aspx>.

Drugs in fact differ very widely from one another in terms of popularity. For example, the 2011 National Survey on Drug Use and Health (hereinafter “NSDUH”) found 18.1 million past month users of marijuana, versus just 1.4 million cocaine users, 439,000 methamphetamine users, and 281,000 heroin users.<sup>79</sup> The difference between the numbers of users of each drug cannot be accounted for by their legal statuses, because all four of these drugs are illegal.

#### D. *Differing Penalty Levels Don’t Appear to Make a Difference*

Research suggests that differing use rates are not likely to be explained by penalties either. Although some states and countries have decriminalized marijuana possession, for example, in most jurisdictions it is punished frequently (there were 750,000 arrests for marijuana in 2012 in the U.S., nearly half the drug arrests that year), and is sometimes punished harshly.<sup>80</sup> Moreover, in states that have decriminalized marijuana, the impact on use rates has been nil. A 1981 paper examining outcomes in the 11 states that decriminalized in the 1970s, published by the national drug use survey program Monitoring the Future (hereinafter “MTF”), found: “[T]he preponderance of the evidence . . . points to the conclusion that decriminalization has had virtually no effect either on the marijuana use or on related attitudes and beliefs about marijuana use among American young people.”<sup>81</sup> A 2008 report on World Health Organization global survey data found more broadly, “[d]rug use does not appear to be related to drug policy, as countries with more stringent policies (e.g., the U.S.) did not have lower levels of illegal drug use than countries with more liberal policies (e.g., The Netherlands).”<sup>82</sup> The study examined both marijuana and cocaine use

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<sup>79</sup> SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., RESULTS FROM THE 2011 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 13-16 (Sept. 2012), <http://www.samhsa.gov/data/NSDUH/2k11Results/NSDUHresults2011.pdf>.

<sup>80</sup> See Phillip S. Smith, *FBI Reports More Than 1.5 Million Drug Arrests Last Year*, STOPTHEDRUGWAT.ORG, (Oct. 29, 2012), [http://stopthedrugwar.org/chronicle/2012/oct/29/fbi\\_reports\\_more\\_15\\_million\\_drug](http://stopthedrugwar.org/chronicle/2012/oct/29/fbi_reports_more_15_million_drug); *Texas Laws and Penalties*, NORML.ORG, <http://norml.org/laws/item/texas-penalties-2> (last visited Sept. 13, 2013) (providing the example that possession of two ounces of marijuana or less in Texas can earn one 180 days in jail).

<sup>81</sup> Lloyd D. Johnston et al., *Marijuana Decriminalization: The Impact on Youth, 1975-1980* at 27, U. MICH. INST. FOR SOC. RESEARCH (1981) [hereinafter *Marijuana Decriminalization*], available at <http://www.monitoringthefuture.org/pubs/occpapers/occ13.pdf>.

<sup>82</sup> Louisa Degenhardt et al., *Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys*, PLOS MED. (July 1, 2008), <http://www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0050141>.

rates, and involved researchers from the first 17 countries to participate in the WHO survey.<sup>83</sup>

It is plausible that both legality and specific penalties could fail to produce differing use rates, but factors indirectly related to legal status could impact them. For example, marijuana may be more widely used than cocaine because it is usually easier to obtain.<sup>84</sup> Marijuana is extensively distributed through informal, peer-to-peer networks, and many U.S. states have local growing, whereas cocaine distribution does not involve peer networks to quite the extent that marijuana distribution does; additionally cocaine is solely a trafficked good, not locally produced for consumers at least in the U.S. or most parts of the world.<sup>85</sup> The “idea” of meeting and conducting a buy from a cocaine dealer, or even of possessing cocaine, may also feel less comfortable than buying marijuana feels, particularly to those who are uninitiated in cocaine use or lack personal familiarity with any sellers of it.

#### E. *Availability's Impact is Also Uncertain*

Availability (which conceptually includes both location and price) is another factor in play, and which may well account for some of the disparity between marijuana and cocaine consumption rates. But there are reasons to question how much. One is that the availability of a given substance in an illicit market is likely to be affected by consumer interest in the substance – for example, if more people were inclined to use cocaine, in the long term the entrepreneurs operating the supply networks would find ways to make themselves more accessible to those people.<sup>86</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> See Lloyd D. Johnston et al., *Monitoring the Future National Survey Results on Drug Use 1975–2012: Volume 2, College Students & Adults Ages 19–50* at 284, U. MICH. INST. FOR SOC. RESEARCH (July 2013), [http://www.monitoringthefuture.org/pubs/monographs/mtf-vol2\\_2012.pdf](http://www.monitoringthefuture.org/pubs/monographs/mtf-vol2_2012.pdf).

<sup>85</sup> Jonathan P. Caulkins & Rosalie Liccardo Pacula, *Marijuana Markets: Inferences from Reports By the Household Population*, CARNEGIE MELON UNIVERSITY (June 2005), <http://repository.cmu.edu/heinzworks/20/> (“We find that most [marijuana users] obtain marijuana indoors (87%), from a friend or relative (89%), and for free (58%). Retail marijuana distribution appears to be embedded in social networks, rather than being dominated by ‘professional’ sellers.”); Coca today is grown and processed into cocaine in the Andean countries Bolivia, Colombia and Peru. See Intelligence Division, Strategic Intelligence Section, *Coca Cultivation and Cocaine Processing: An Overview*, DRUG ENFORCEMENT ADMIN. (Sept. 1993, <http://www.erowid.org/archive/rhodium/chemistry/coca2cocaine.html>).

<sup>86</sup> In a conversation I had years ago, an individual confided to me he had previously sold marijuana and psychedelics, and had done so in Harvard Square, Cambridge, but got out of the

Perhaps the most obvious reason is that the differences in availability levels among various drugs fall well short of the differences in their use rates. For example, for 2012, MTF found 85-87% of young adults reporting marijuana as “fairly easy” or “very easy” to obtain, versus 54-56% reporting this for amphetamines, 33-42% for cocaine, and 20% for heroin.<sup>87</sup> The factors separating marijuana’s greater availability from that for the other drugs mentioned – 1.5 to 4 times as many young people report marijuana to be easy to obtain as report that for the other drugs mentioned – are not insignificant. But the factors separating the use rates of the same drugs from marijuana’s use rate are far greater, with 13 to 65 times as many young people using marijuana than the others.

As noted above, the perceived “scariness” of doing business with a cocaine dealer as compared with a marijuana dealer, and the higher cost of cocaine today relative to marijuana, could account for some disparity in use rates, even if the ease or difficulty of obtaining the drugs doesn’t. Assessing this would require asking different kinds of survey questions of current or potential drug users, or perhaps other methods. However, it may be possible to draw some indirect inferences based on the use rates found when looking at higher income subjects, for which the cost concern is less than for other income groups, and who in at least some cases may have access to dealers with whom they feel comfortable.

MTF compares socioeconomic subgroups indirectly, using Average Educational Level of Parents as a proxy for family income. A look at the annual prevalence numbers for 12th graders in 2011 finds only small differences between the use rates reported in the highest socioeconomic bracket segmented (students whose parents had at least some graduate or professional school) versus those for all 12th graders surveyed, and in fact with the rates found for the lowest socioeconomic bracket measured (students whose parents had completed grade school or less):

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business after being instructed by a new acquaintance that he would have to instead sell cocaine from then on, if he wished to continue.

<sup>87</sup> Lloyd D. Johnston et al., *Monitoring the Future National Survey Results on Drug Use 1975–2012: Volume 2, College Students & Adults Ages 19–50* at 284, THE UNIV. OF MICH. INST. FOR SOC. RESEARCH (July 2013), [http://www.monitoringthefuture.org/pubs/mono/graphs/mtf-vol2\\_2012.pdf](http://www.monitoringthefuture.org/pubs/mono/graphs/mtf-vol2_2012.pdf).

- For marijuana, MTF found 34.5% 12-month prevalence in the high-income bracket, 35.7% in the low-income bracket, and 36.4% for all 12th graders.<sup>88</sup>
- For cocaine MTF found 3.0% at high incomes, 4.2% at low incomes, and 2.9% overall.<sup>89</sup>
- For any illicit drug other than marijuana they found 18.3% at high incomes, 16.0% at low incomes, and 17.6% overall.<sup>90</sup>

It is interesting that cocaine is used more by lower-income students despite its costliness, 4.2% annual prevalence for that group vs. 3.0% for all students surveyed. Perhaps this group has more people getting involved with drug selling (possibly due to having fewer economic opportunities generally), or has more contact with the “street scene” and is therefore less wary of the typical cocaine dealer. That finding points in the opposite direction than my presumption made above. But the rates are still too similar to counter the greatly disparate use rates observed for the drugs.<sup>91</sup>

A reason to question the sole primacy of price in determining relative use rates of different drugs is the example of powder cocaine vs. crack cocaine. Although crack is not “cheap,” as RL point out, it has a low price entry point – one can buy some of it to try for a very small amount.<sup>92</sup> Yet four times as many people have ever tried powder cocaine, NSDUH finds, as have tried crack cocaine.<sup>93</sup>

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<sup>88</sup> Lloyd D. Johnston, et al., *Demographic subgroup trends for various licit and illicit drugs, 1975–2011 (Monitoring the Future Occasional Paper No. 77)*, THE UNIV. OF MICH. INST. FOR SOC. RESEARCH, 296 (2012) [hereinafter MTF Occasional Paper No. 77], <http://www.monitoringthefuture.org/pubs/occpapers/mtf-occ77.pdf>.

<sup>89</sup> *Id.* at 321.

<sup>90</sup> *Id.* at 291.

<sup>91</sup> Note that MTF does not seem to publish tables segmenting the demographic subgroups for 30-day or shorter prevalence. These figures would be interesting to have, given their greater relevance to the heavy use question, and hence the total consumption question. Nevertheless, the 12-month prevalence rates cited here make the point.

<sup>92</sup> The price for a “rock” of crack cocaine has been known to go as low as \$2. See e.g., Bruce Johnson, et al., *Crack Distribution and Abuse in New York*, 11 CRIME PREVENTION STUD. 19, 29 (2000) available at [http://www.popcenter.org/library/crimeprevention/volume\\_11/02-JohnsonDunlap.pdf](http://www.popcenter.org/library/crimeprevention/volume_11/02-JohnsonDunlap.pdf).

<sup>93</sup> *Results from the 2012 National Survey on Drug Use and Health: Detailed Tables Table 1.1A, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN.* (2013), <http://www.samhsa.gov/data/NSDUH/2012SummNatFindDetTables/DerTabs/NSDUH-DerTabsSect1peTabs1to46-2012.htm#Tab1.1A>.



### III. COMPARING USE RATES UNDER LEGALIZATION AND PROHIBITION SYSTEMS

Ideally one would compare use patterns of a given drug or class of drugs across times and societies in which its legal status has varied, as opposed to drawing inferences from the legality versus illegality of different drugs. There is not a lot of data on that topic. But there are a few examples that allow for making cautious inferences.

#### A. *The Netherlands*

One of these examples is that of marijuana in the Netherlands, which is technically illegal, but since the 1970s has been provided through the “coffee shop” system.<sup>94</sup> On the production and distribution end, the Dutch suffer the “back door” problems of an illegal supply of the substance.<sup>95</sup> But for the users, the experience is a de facto kind of legalization, buying marijuana in a legal, safe and attractive environment.<sup>96</sup> One difference from full legalization is that prices continue to approximate that of the fully illicit markets elsewhere in Western Europe, about \$10 per gram for fairly high potency product.<sup>97</sup> Another is that the system, while profit-based, stops short of the full-blown commercialization of say the tobacco or alcohol industries, including with respect to advertising.<sup>98</sup> On the other hand, residents of Dutch cities commonly walk past coffee shops and their colorful signs on any ordinary day.<sup>99</sup>

Prevalence of Dutch marijuana use falls squarely in line with the range seen in other Western European countries. According to the most recent country figures compiled by the European Monitoring Center on Drugs and Drug Addiction (hereinafter “EMCDDA”), the Dutch 30-day prevalence rate for marijuana use by young adults (age 15-24) was

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<sup>94</sup> *The Netherlands Drug Control Data and Policies*, DRUGWARFACTS.ORG, <http://www.drugwarfacts.org/cms/The+Netherlands#Law> (last visited Aug. 29, 2013).

<sup>95</sup> Phillip S. Smith, *With Legalization Looming, Lessons from the Netherlands*, STOPTHEDRUGWAR.ORG (July 18, 2013), [http://stopthedrugwar.org/chronicle/2013/jul/18/legalization\\_looming\\_lessons\\_net](http://stopthedrugwar.org/chronicle/2013/jul/18/legalization_looming_lessons_net).

<sup>96</sup> *Id.*

<sup>97</sup> See DRUGS AND DRUG POLICY, *supra* note 16, at 25.

<sup>98</sup> Kathleen Maclay, *New Research Points to Lessons from Dutch Cannabis System*, UC BERKELEY NEWS CTR. (Sept. 13, 2011), <http://newscenter.berkeley.edu/2011/09/13/lessons-from-dutch-cannabis-system/>.

<sup>99</sup> See STONERS COLONY, <http://www.stonerscolony.com/map.php> (last visited Sept. 13, 2013).

5.3% in 2009, as compared with 7.0% across the border in Germany and 11.8% in nearby France.<sup>100</sup> U.S. past-month-use of marijuana by young adults (18-25) was 18.1%<sup>101</sup>

Another way of testing the policy is to look at changes over time within the Netherlands itself. KCH write: “[C]annabis use . . . doubled after the coffee shops began to proliferate . . . albeit from a much lower level than that of the United States, the United Kingdom, or Canada. However, how much [resulted from] ‘commercialization’ . . . is hard to tell; other parts of Western Europe saw prevalence rise over the same period.”<sup>102</sup>

Peter Cohen and Hendrien Kaal compared marijuana use in Amsterdam with use in San Francisco and Bremen, Germany, looking not only at use rates, but other details of use patterns, finding:

[T]he percentage of adults . . . who have ever used cannabis is 62% for San Francisco, 15% for Bremen and 34% in Amsterdam. However . . . experienced users in the three cities . . . used similar quantities . . . with a similar frequency, provided the same . . . reasons . . . and applied the same restrictions to their own use.<sup>103</sup>

Questions about the impact of limited legalization in the Netherlands versus the impact of other possible factors remain subject to a degree of uncertainty. Nevertheless, it is hard to make a compelling case for legality having produced any radical change in Dutch marijuana use rates.

### B. *Morphine and Cocaine Before and After Prohibition*

A second example is drugs in the U.S. before they were banned. This comparison suffers from the limitation of having to look at a different “era” of time, but it may still provide information of use. Mike

<sup>100</sup> *Statistical Bulletin 2013*, EUROPEAN MONITORING CTR. FOR DRUGS & DRUG ADDICTION, at Table GPS-3 (2013) <http://www.emcdda.europa.eu/stats13#display:/stats13/gpstab3c>.

<sup>101</sup> Office of Applied Studies, *Results from the 2009 National Survey on Drug Use and Health: Volume I. Summary of National Findings*, U.S. DEPT. OF HEALTH & HUMAN SERVS., at Figure 2.7 (2010), <http://www.samhsa.gov/data/2k9/2k9Resultsweb/web/2k9results.htm>.

<sup>102</sup> See DRUGS AND DRUG POLICY, *supra* note 16, at 25.

<sup>103</sup> Peter D.A. Cohen & Hendrien L. Kaal, *Press Release: Penal Policy Has Little to No Influence on the Use Patterns of Experienced Cannabis Users: Comparative Study of Cannabis Use in Amsterdam, San Francisco and Bremen*, UNIV. OF AMSTERDAM CTR. FOR DRUG RESEARCH (2001), <http://www.cedro-uva.org/lib/cohen.3cities.pdf>; (“The ages at which [respondents] first started using cannabis (16/17 years), reached their period of top use (ca. 21 years) and quit using (ca. 34 years) were almost identical.”).

Jay writes that drugs initially were “only available in mild preparations like opium tinctures and coca teas.”<sup>104</sup> But “in the late nineteenth century . . . pure cocaine and injectable morphine were readily available.”<sup>105</sup> Nevertheless, “the great majority of the public chose to continue consuming these drugs in dilute and manageable preparations.”<sup>106</sup>

Courtwright finds that between 1880 and 1902, pharmacists surveyed estimated opiate addiction rates at just 0.8 per thousand population to 2.5 per thousand population.<sup>107</sup> Figures were similar for the 1910s and 1920s, after opiate dispensing had shifted from pharmacies to clinics, based on patient registration figures at clinics in major cities (though not every user is likely to have registered with the clinics).<sup>108</sup> Nadelmann comments, “late 19th-century America is an example of a society in which there were almost no drug laws or even drug regulations but levels of drug use were about what they are today.”<sup>109</sup>

### C. *U.S. Alcohol Prohibition*

Another example is alcohol use before, during, and after U.S. prohibition. There is scholarly debate over the degree to which prohibition suppressed use of alcohol – partly over data, mostly over the role of conflating factors.<sup>110</sup> Prior to enactment of national prohibition, there were laws prohibiting alcohol in some states, and some states continued to prohibit alcohol through the 1960s.<sup>111</sup> In fact, some counties still

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<sup>104</sup> Mike Jay, *Legalisation: The First One Hundred Years*, CEDRO (July 17, 2002), available at <http://www.cedro-uva.org/lib/jay.legalisation.html> (presentation at conference of the Institute for Public Policy Research, London).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See DARK PARADISE, *supra* note 38, at 11.

<sup>108</sup> *Id.* at 13-14.

<sup>109</sup> Nadelmann, *supra* note 65.

<sup>110</sup> Some papers written on the topic in recent decades include: Mark Asbridge & Swarna Weerasinghe, *Homicide in Chicago from 1890 to 1930: Prohibition and Its Impact on Alcohol- and Non-alcohol-related Homicides*, 3 ADDICTION 355-364 (2009); Wayne Hall, *What Are the Policy Lessons of National Alcohol Prohibition in the United States, 1920-1933*, 7 ADDICTION 1164-1173 (2010); Gary F. Jensen, *Prohibition, Alcohol, and Murder: Untangling Countervailing Mechanisms*, 2000 HOMICIDE STUD. 18-36 (2000); Jeffrey A. Miron, *Alcohol Prohibition*, EH.NET, <http://eh.net/encyclopedia/alcohol-prohibition/> (last visited Sept. 13, 2013); Emily G. Owens, *The Birth of the Organized Crime? the American Temperance Movement and Market-Based Violence*, CORNELL UNIV. (March 2013), <http://www.human.cornell.edu/pam/people/upload/Birth-of-the-Organized-Crime-3-7-2013.pdf>.

<sup>111</sup> *Dry State*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Dry\\_state](http://en.wikipedia.org/wiki/Dry_state) (last visited Sept. 13, 2013).

do.<sup>112</sup> Prohibition was also preceded by “temperance,” which in some places included moves toward prohibition, but in others sought to discourage excess through persuasion.<sup>113</sup> Among the factors contributing to alcohol misuse or abuse were World War I, occurring just before prohibition’s enactment, and the Great Depression, hitting in the midst of prohibition and continuing after it.

Miron’s picture regarding prohibition’s impact on alcohol consumption is as follows:

At the beginning of prohibition, consumption declined . . . to approximately 30 percent of its preprohibition level. Beginning in the early 1920s, however . . . consumption increased sharply, to about 60-70 percent of the preprohibition value. Most important, alcohol consumption immediately after the repeal of prohibition remained virtually the same as during the latter part of prohibition, although consumption increased to approximately its preprohibition level during the subsequent decade.<sup>114</sup>

If we posit for the sake of argument that prohibition kept alcohol consumption down, even toward its end, and that it would have continued to do so if prohibition had continued, that would suggest a 40-50% increase in consumption and at least some of its attendant harms based on the foregoing. But while that seems significant for a drug as widely used as alcohol, it’s not enough to justify calling alcohol prohibition a success as some have attempted in recent years. To justify such a characterization, one would also need to assess how much of the drop in consumption could have been achieved through less intrusive or less costly measures, along with prohibition’s role in establishing organized crime as a major force in this country, and other harms. With respect to other substances, a 50% increase in consumption after legalization would fall

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<sup>112</sup> Laura Cox, *The Prohibition Map of America: Graphic Shows the Counties Where You STILL Can’t Buy Alcohol*, THE DAILY MAIL (Mar. 23, 2012), <http://www.dailymail.co.uk/news/article-2119663/Its-modern-day-Prohibition—200-counties-VOTED-alcohol-free-eighty-years-ban-lifted.html>.

<sup>113</sup> *Prohibition: A Case Study of Progressive Reform*, LIBRARY OF CONGRESS <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/progress/prohib/> (last visited Sept. 13, 2013).

<sup>114</sup> MIRON, *supra* note 66, at 74-75 (while official consumption data during prohibition (as opposed to before and after) are not available, “the death rate from cirrhosis of the liver, the death rate from alcoholism, the drunkenness arrest rate, and the number of first admittances to mental hospitals for alcoholic psychosis” provide proxy data on alcohol consumption – all these measures have potential flaws, but all happen to all line up).

well short of the kind of problem that some observers have predicted, and would be far less likely to justify a claim of increased total harm following legalization. Of course it may well be that the increases in heroin or cocaine use would be much greater than 50%. But such a prediction would need to be justified by data other than what has been found related to the alcohol prohibition experience.<sup>115</sup>

#### IV. THE CRIMINAL UNDERGROUND AS A SOURCE OF INSTABILITY

A final point is that the most dangerous harms which need to be considered in a cost-benefit calculation may be the most difficult to know about before they happen, and therefore the most difficult to plan for. As Kleiman notes, a major cost of heroin prohibition was the rapid spread of HIV through the drug-injecting population at the time the virus hit, but we didn't know in advance about HIV.<sup>116</sup> The changes in the inner-city drug trade that occurred as part of the crack trade, and its impact on gun prevalence, were unpredicted consequences going beyond those previously seen for cocaine prohibition – arguably of crack-downs on the marijuana trade and of intensified federal sentencing as well – and of the marketing innovation in the cocaine trade that crack represented, itself unpredicted.

Felbab-Brown notes success in “suppressi[ng] production [of the drug trade] in one location will only shift production elsewhere,” absent reduced global demand.<sup>117</sup> Should the production “re-emerge, for example, in an area dominated by a major terrorist group . . . it could bring the terrorists windfall gains, both in military strength and in political capital.”<sup>118</sup> This “balloon effect” can cause the greatest trauma.<sup>119</sup> Among these traumas is that “criminal activity . . . [f]requently . . . is rechanneled into the production and smuggling of other illicit commodities . . . that [can] be even more pernicious and difficult to control.”<sup>120</sup>

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<sup>115</sup> MacCoun & Reuter write that an increase of “between 50 and 500 percent” in heroin use following legalization “seems possible” to them. MACCOUN & REUTER, *supra* note 23, at 331-332.

<sup>116</sup> AGAINST EXCESS, *supra* note 41, at 363.

<sup>117</sup> SHOOTING UP, *supra* note 18, at 182.

<sup>118</sup> *Id.*

<sup>119</sup> Modernising Drug Law Enforcement at Int'l Inst. for Strategic Studies, Washington D.C. (Nov. 6, 2013) [hereinafter MDLE forum], *available at* <http://www.iiss.org/en/events/events/archive/2013-5126/november-fc4b/modernising-drug-law-enforcement-e4a8> (forum attended by the author).

<sup>120</sup> SHOOTING UP, *supra* note 18, at 182-183.

All of this is not to argue that legalization will simply reverse every bad situation that was created by prohibition, or that every move toward legalization will have straightforward consequences. Felbab-Brown posits that following marijuana legalization in Mexico, drug trafficking organizations (hereinafter “DTOs”), having lost that revenue stream, “could intensify their effort to take over other illegal economies . . . and also . . . [try] to franchise who [gets to participate in the informal economy . . . to mitigate their financial losses.”<sup>121</sup> Interestingly, she adds, “the shrinkage of the U.S. cocaine market is one of the factors that precipitated the current [Mexico] DTO wars.”<sup>122</sup>

But prohibition likely does more to increase DTO control over the economy than legalization could, at least in the long term, by providing DTOs with much of their investment capital. Jonathan Haken warns, “[A]ny profits that are made [by DTOs] rarely serve to bolster the official economy or the capacity of the state. . . . [I]n many cases, profits will be funneled into an unofficial ‘shadow’ economy where they fund other criminal enterprises like human trafficking, prostitution, arms dealing, and more.”<sup>123</sup> Felbab-Brown likewise notes that DTOs “are already” expanding their tentacles into more areas.<sup>124</sup>

Drug trade profits have also jeopardized the integrity of political systems at a time of democratic reform. Kevin Casas-Zamora writes, for example, “the confluence of a vigorous, regionwide democratic process [in Latin America] with the noticeable expansion of organized crime . . . has attracted the attention of political reformers. . . . The risk that money from . . . drug trafficking in particular, poses to the integrity of political parties and electoral processes has been cited in country after country.”<sup>125</sup>

The instabilities discussed here lie on both the supply side and the consumption side of the drugs chain. They include instabilities in how drugs are provided and the crime associated with drug selling. They

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<sup>121</sup> Vanda Felbab-Brown, *Why Legalization in Mexico Is Not a Panacea for Reducing Violence and Suppressing Organized Crime*, BROOKINGS INSTITUTION (Sept. 23, 2010), <http://www.brookings.edu/research/opinions/2010/09/23-mexico-marijuana-legalization-felbabbrown>.

<sup>122</sup> *Id.*

<sup>123</sup> Jeremy Haken, *Transnational Crime in the Developing World* 6, GLOBAL FINANCIAL INTEGRITY (2011), [http://www.gfintegrity.org/storage/gfip/documents/reports/transcrime/gfi\\_transnational\\_crime\\_web.pdf](http://www.gfintegrity.org/storage/gfip/documents/reports/transcrime/gfi_transnational_crime_web.pdf).

<sup>124</sup> *Id.*

<sup>125</sup> DANGEROUS LIAISONS: ORGANIZED CRIME AND POLITICAL FINANCE IN LATIN AMERICA AND BEYOND 1-2 (Kevin Casas-Zamora ed., 2013) [hereinafter DANGEROUS LIAISONS] (Casas-Zamora currently serves as secretary for political affairs for the Organization of American States).

include instabilities in how drugs are used, what drugs are used and how damaging they are. A public health success, a *reduction* in addictive drug use in the United States, has contributed to the outbreak of horrific violence seen in Mexico. Success suppressing the drug trade in one place helps insurgent groups in other places. The instability reaches into the realm of deadly epidemic diseases, the spread of HIV and AIDS, even more devastating to parts of the world like South Asia and Eastern Europe than it's been here.<sup>126</sup> It has even affected the process of democratization, in Latin America, in Jamaica,<sup>127</sup> and undoubtedly elsewhere, by adding all the fuel to organized crime and its capacity that drug trade profits bring.

It may be possible to more readily posit what some short-term reactions by DTOs following legalization could be – for example, redoubled efforts to control and exploit their remaining possible business areas – than it is to project for the long term how a substantial reduction in the scale of the global illicit economy may help with all of the concerns that it impacts. But if the scale of an illicit economy is a likely factor in the prevalence of instabilities of the type described here, that is another reason to consider undertaking the climb down from prohibition, rather than continuing to finance organized criminal activities at the substantial level that drug trade profits have so far enabled. Surely any social systems, even licit, aboveground ones, have the potential for instabilities and consequent harms that are difficult to predict. But the instabilities seen to commonly occur in underground systems seem to have a greater propensity to wreak havoc, especially systems that commonly make use of weaponry in their maintenance.

## V. PREDICTING THE POST-LEGALIZATION FUTURE

MR lay out a sophisticated model for attempting to project the outcome of legalization in terms of use. Making use of the model requires one to make assumptions, not only about the system a jurisdiction will adopt for legalization, but about the importance of several different effects that go into the equation. Use, they write, is impacted by seven main factors.<sup>128</sup> Some of them are concepts discussed above:

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<sup>126</sup> *Injecting Drug Use*, WORLD HEALTH ORG., <http://www.who.int/hiv/topics/idu/about/en/> (last visited Nov. 9, 2013).

<sup>127</sup> Orlando Patterson, *Jamaica's Bloody Democracy*, N.Y. TIMES, (May 29, 2010) <http://www.nytimes.com/2010/05/30/opinion/30patterson.html>.

<sup>128</sup> DRUG WAR HERESIES, *supra* note 23, at 92.

the availability of drugs, their price, and the penalties.<sup>129</sup> Of these, availability seems likely to increase<sup>130</sup> while price and fear of sanctions seem likely to decrease following legalization, suggesting the possibility for increased use.<sup>131</sup>

MR also highlight four effects drawn from sociological research, only three of which they regard as well understood. One is the “symbolic threshold,” the line an individual crosses when violating a law or social norm for the first time.<sup>132</sup> This “threshold” would either disappear with the repeal of legal prohibition, or continue but be diminished, suggesting this effect points to higher use or at least its possibility as well.<sup>133</sup>

Two other effects, however, suggest lower use rates – the “forbidden fruit effect” (a dynamic legalization advocates commonly point out), the idea that young people may want something more *because* it’s been forbidden; and the “stigmatization/labeling” by society of people convicted or found out as illegal drug users.<sup>134</sup> Although some view social stigma as a way to discourage drug use, research suggests it instead increases drug use levels through a “disintegrating” effect on social relations.<sup>135</sup> Only temporary stigma, non-legal social sanctioning by a community for teaching purposes, with the goal of bringing the stigmatized person back in soon and the stigma ending, has been found to increase integration with society and reduce problematic behavior, the authors write.<sup>136</sup>

The final effect MR raise, with no verdict from the research yet on where it points, is the impact drug laws or their repeal may have on

<sup>129</sup> *Id.* at 76.

<sup>130</sup> Availability might not increase for everyone. Under prohibition, banned drugs are commonly sold in schools, something that might be stopped under a legalization system, even given the limited power of regulation.

<sup>131</sup> I’ve reasoned here that increases of “hard drugs” are not likely to be so major as to come near alcohol’s level of use or harm, but the case doesn’t go so far as to suggest no increase. Some research findings suggest that penalties may not play a great role in determining use rates, as discussed above. But most though not all of the relevant information available on that relates to differing penalty levels under prohibition, as opposed to an entirely new system in which a user may fear no theoretical penalty. The commonly assumed impact of penalties seems likely to be overstated, but for now we should include it as a factor that will be in play at some level following legalization.

<sup>132</sup> DRUG WAR HERESIES, *supra* note 23, at 88.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 89-91.

<sup>135</sup> *Id.* at 91-92.

<sup>136</sup> *Id.*



“informal self-controls and social controls.”<sup>137</sup> Legalization could “send the wrong message,” thereby weakening social norms that keep the use of certain drugs in check.<sup>138</sup> Or “[l]aw could [vary] inversely with other social control,” that is, “actors . . . [may] compensate for *reductions* in legal control, by more vigorously enforcing related laws and norms that remain intact.”<sup>139</sup> Conversely, “people [may] compensate for overprotective policies by behaving more recklessly,” while reacting to “under-protective policies by behaving more cautiously.”<sup>140</sup>

To the question of harm, MR list nearly 50 effects of drugs, drug enforcement, or drug laws themselves, that produce harm.<sup>141</sup> They caution, “little is known about the magnitude” of many of these harms and “less is known about how to translate such consequences into costs.”<sup>142</sup> They identify the *dimensions* of the problem – the variables one would use to try to measure it – as the “nature of the harm or cost,” “who bears the cost,” and the “primary source of the harm or cost.”<sup>143</sup> “[O]ne’s position [on the result] will depend on how one weights alternative harms and how the harms compare across regimes,” they say.<sup>144</sup>

At the end, MR attribute enormous harm to current policies, but decline to guess how much should be attributed to drug prohibition inherently versus the U.S. implementation of it, or how that balance could change under legalization or a different implementation of prohibition:

The extraordinary prices of cocaine and heroin, the massive involvement of young minority males in center cities, foreign corruption, and the violence of the drug trades are all plausibly much increased by the nation’s decision to be highly punitive toward these drugs. Prohibition might be implemented differently with much less of this specific collateral damage.<sup>145</sup>

MR also offer predictions for both cocaine and heroin legalization under an adult legalized market, though cautioning that “[a]ll . . . are

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<sup>137</sup> *Id.* at 99.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 99-100.

<sup>140</sup> *Id.* at 100.

<sup>141</sup> *Id.* at 106-107 (“A Taxonomy of Drug-Related Harms.”).

<sup>142</sup> *Id.* at 103.

<sup>143</sup> *Id.* at 108-09.

<sup>144</sup> *Id.* at 111.

<sup>145</sup> *Id.* at 127.

uncertain.”<sup>146</sup> Briefly, they project increases in addiction, health care costs, and impaired functioning for cocaine legalization, but decreases in economic crime, and in criminal justice costs and harms. For heroin legalization, they project increased treatment costs, but decreases in illness, impaired functioning, and crime.<sup>147</sup>

MR call the drug legalization question “genuinely hard,” and make a “case for agnosticism” about it.<sup>148</sup> Nevertheless, they acknowledge that “many if not most sociological scholars [they] meet [see] legalization as a superior alternative to prohibition.”<sup>149</sup>

## VI. CAN PROHIBITION BE MADE BETTER?

Many of the thinkers cited here believe that legalization in the U.S. would be likely to take on a highly commercial form, eventually if not initially, based on our experience with alcohol and tobacco.<sup>150</sup> Whereas prohibition, they believe, could be implemented in ways that are less punishing or destructive than the current “drug war.”<sup>151</sup>

Can prohibition be made better? That is, can the collateral damage caused by prohibitionist drug policies be decreased enough through reforms that stop short of legalization, and its effectiveness sufficiently improved, to make it worth it in cost benefit terms? That would not address all of the philosophical issues raised in the previous section, but it’s a legitimate question.

There are signs of improvement in U.S. drug policy, albeit cautious ones. Marijuana may soon be taken out of the prohibition equation, at least in the U.S.<sup>152</sup> Interest in reducing incarceration, including repealing or reducing the use of mandatory minimum sentences, has grown among both liberals and conservatives.<sup>153</sup> In August 2013, U.S. Attor-

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<sup>146</sup> *Id.* at 131.

<sup>147</sup> *Id.* at 330. See also *AGAINST EXCESS*, *supra* note 41, at 302-307, 361-365.

<sup>148</sup> Robert J. MacCoun & Peter Reuter, *Assessing Drug Prohibition and Its Alternatives: A Guide for Agnostics*, 74 ANN. REV. OF L. & SOC. SCI. 62, 63 (2011) [hereinafter *Agnostics Guide*] (following up on the authors’ work in *Drug War Heresies*).

<sup>149</sup> *Id.*

<sup>150</sup> *Rethinking the War on Drugs*, *supra* note 71.

<sup>151</sup> *DRUG WAR HERESIES*, *supra* note 23, at 127.

<sup>152</sup> Phillip S. Smith, *Senate Holds Hearing on State Marijuana Legalization*, STOPTHEDRUGWAR.ORG (Sept. 19, 2013), [http://stopthedrugwar.org/chronicle/2013/sep/10/senate\\_marijuana\\_legalization\\_hearing](http://stopthedrugwar.org/chronicle/2013/sep/10/senate_marijuana_legalization_hearing).

<sup>153</sup> Phillip S. Smith, *Is There a Perfect Storm for Federal Sentencing Reform?*, STOPTHEDRUGWAR.ORG (Aug. 15, 2013) [http://stopthedrugwar.org/chronicle/2013/aug/15/there\\_perfect\\_storm\\_federal\\_sent](http://stopthedrugwar.org/chronicle/2013/aug/15/there_perfect_storm_federal_sent).

ney General Eric Holder announced new guidelines for reducing the scope of cases in which the government will seek mandatory minimums, also calling for Congress to act on them.<sup>154</sup> In January 2013, the Senate Judiciary Committee approved the “Smarter Sentencing Act,” legislation that would reduce or eliminate mandatory minimum sentences for some offenders, and provide retroactive sentencing relief to crack cocaine prisoners who were sentenced before the passage of the Fair Sentencing Act.<sup>155</sup>

We’ve been down this road before, though. Federal mandatory minimum sentences for drug offenses were first enacted by Congress in 1950, only to be repealed in 1970.<sup>156</sup> Rep. George H.W. Bush was among the congressmen supporting their repeal.<sup>157</sup> But sixteen years later, following the overdose death of a young Boston Celtics recruit, the Democratic Speaker of the House, Bostonian Tip O’Neill, brought them back.<sup>158</sup> Vice President Bush had moved to the drug warrior side, in line with the currents of the times.<sup>159</sup> It took a quarter of a century to pass the Fair Sentencing Act to reduce crack cocaine penalties – a partial reform, for just one drug. Despite moves by states to reduce their use of incarceration, the total prison and jail populations have decreased only slightly from their historic peak levels.<sup>160</sup>

There is certainly space to improve on the current implementation of prohibition. Wider implementation of “harm reduction” programs such as needle exchange or opioid maintenance, for example, could lower the public health toll caused by criminalization. On the criminal justice side, sentences could be reduced, and incarceration made use of less frequently. Arrests could be made less frequently, and persons ar-

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<sup>154</sup> Phillip S. Smith, *As Pressure Mounts, Holder Acts on Sentencing Reform*, STOPTHEDRUGWAR.ORG (Aug. 12, 2012), [http://stopthedrugwar.org/chronicle/2013/aug/12/pressure\\_mounts\\_holder\\_acts\\_sent](http://stopthedrugwar.org/chronicle/2013/aug/12/pressure_mounts_holder_acts_sent).

<sup>155</sup> Smarter Sentencing Act, S. 1410, 113th Cong. (2013).

<sup>156</sup> Families Against Mandatory Minimums, *Sentencing History Repeating?*, 17 FAMMGRAM 1 (Spring 2007).

<sup>157</sup> *Id.*

<sup>158</sup> Eric E. Sterling & Julie Stewart, *Undo This Legacy of Len Bias’s Death*, WASH. POST, (June 24, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/23/AR2006062301261.html>.

<sup>159</sup> Michael Isikoff, *Drug Buy Set Up for Bush Speech*, WASH. POST (Sept. 22, 1989), <http://www.washingtonpost.com/wp-srv/local/longterm/tours/scandal/bushdrug.htm>.

<sup>160</sup> Phillip S. Smith, *US Prisoner Count Declines Again, but 330,000 Still Doing Time for Drugs*, STOPTHEDRUGWAR.COM (July 25, 2013, 5:59 PM), [http://stopthedrugwar.org/chronicle/2013/jul/25/us\\_prisoner\\_count\\_declines\\_again](http://stopthedrugwar.org/chronicle/2013/jul/25/us_prisoner_count_declines_again).

rested for drug possession could be spared criminal records and the lasting damage those tend to do to one's work and life prospects.

Policing innovations developed by David Kennedy, such as that implemented in Highpoint, North Carolina, reduce the disruptive effects the drug trade can have on a community.<sup>161</sup> Such programs don't necessarily attempt to reduce drug sales, if the sales are conducted discreetly. They can thereby reduce the use of arrest and prosecution as well. Kennedy describes the essential thrust of the programs: "A particular drug market is identified; violent dealers are arrested; and nonviolent dealers are brought to a 'call-in' [with law enforcement, family and so forth, and] told that . . . local law enforcement has worked up cases on them . . . [and if they] continue to deal, the . . . cases . . . will be activated."<sup>162</sup>

While the illegal drug trade is often violent, the levels of violence vary. Felbab-Brown points out that while the Asian drug trade is very violent, it is far less violent than the Latin American drug trade, and for that matter that the District of Columbia's drug trade is less violent today than it was 20 years ago – the response made to an illicit market, and to social conditions generally, are also factors in the violence level, not just the fact of illegality.<sup>163</sup> Highpoint is an example of an innovative type of response to an open air drug market that can produce different results than the traditional responses.

But while reforms like Highpoint can provide relief to strained communities, they do little to reduce the prevalence of drug use itself. There is still drug use and therefore a drug market of some type. Users remain tied to the criminal underground and the damaging and dangerous circumstances that creates for them. Money continues to flow into the hands of criminal organizations, creating crime and funding terrorism and insurgency. And for programs of this type to become a standard, national practice in the U.S., they will have to be embraced by the thousands of police agencies operating across the country, and by the city, county and state governments that fund them and the DA's offices that will be involved. The sophistication and even more so the degree of

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<sup>161</sup> *Cleaning Up the 'hood*, *ECONOMIST* (Mar. 3, 2012), <http://www.economist.com/node/21548989> (Highpoint and similar programs are credited with being able to close down brazen open-air drug markets without simply displacing them to other locations).

<sup>162</sup> David Kennedy, *Drugs, Race and Common Ground: Reflections on the High Point Intervention*, NATIONAL INST. OF JUSTICE 262 (Mar. 2009), <http://www.nij.gov/journals/262/Pages/high-point-intervention.aspx>.

<sup>163</sup> MDLE forum, *supra* note 119.

political discipline needed, to implement a policy that involves refraining from arrests and prosecution and looking the other way to tolerate drug sales in many cases, seem like heavy lifts in our decentralized policing system. Perhaps reform of our federal policing grant programs could help.

One of the most referred to alternatives to incarceration is drug courts. Since the first drug court was founded by Dade County, Florida in 1989, drug courts have spread to every U.S. state and territory, numbering 2,734 by mid-2012.<sup>164</sup> According to the National Association of Drug Court Professionals (hereinafter “NADCP”), “Eligible drug-addicted persons may be sent to Drug Court in lieu of traditional justice system case processing,” where they attend “treatment long enough for it to work,” and are “held accountable by the Drug Court judge for meeting their obligations to the court, society, themselves and their families.”<sup>165</sup> The status with which drug courts are regarded as the default alternative approach to incarceration is demonstrated in the Obama administration’s fiscal year 2014 budget, which allocates \$44 million in assistance to state and local justice systems for courts of this type.<sup>166</sup>

Although many drug court professionals are doubtless motivated by the desire to spare deserving offenders hard prison time, the model merits caution and demonstrates the risks involved in strategies that may “widen the net” of criminal justice control. A 2011 report by the Drug Policy Alliance (hereinafter “DPA”) warns, for example, that “[d]rug courts leave many people worse off for trying” and “have made the criminal justice system more punitive toward addiction – not less.”<sup>167</sup> Kleiman argues that drug courts are too resource-intensive and that their

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<sup>164</sup> *History*, NAT’L ASSOC. OF DRUG COURT PROF’LS, <http://www.nadcp.org/learn/what-are-drug-courts/drug-court-history> (last visited Feb. 22, 2014).

<sup>165</sup> *What Are Drug Courts?* NAT’L ASSOC. OF DRUG COURT PROF’LS, <http://www.nadcp.org/learn/what-are-drug-courts> (last visited Feb. 22, 2014).

<sup>166</sup> *State, Local and Tribal Law Enforcement Assistance in FY 2014 Budget & Performance Summary*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/jmd/2014summary/pdf/fy14-state-local.pdf> (last visited Mar. 10, 2014).

(the Drug Court Program is now subsumed within a “Problem Solving Justice” program, effective this budget).

<sup>167</sup> DRUG POLICY ALLIANCE, *DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE 2* (Mar. 2011) [hereinafter *DRUG COURTS NOT THE ANSWER*], [http://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Nor%20the%20Answer\\_Final2.pdf](http://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Nor%20the%20Answer_Final2.pdf).

good outcomes depend on filtering out offenders who have serious criminal histories.<sup>168</sup>

Drug court professionals have tended to do a poor job even of just learning the basics about addiction and its treatment. DPA notes,

[M]any, and perhaps most, drug courts . . . prohibit methadone treatment or other maintenance therapies because of an ideological preference for abstinence. This denial of a highly successful treatment for opioid dependence nearly guarantees that most opioid-dependent individuals will fail in drug court.<sup>169</sup>

This situation persists despite endorsements of methadone therapy by all of the world's major public health organizations and even NADCP.<sup>170</sup> As long as drug courts continue to ignore widely accepted treatment methods, efficacy will remain low, while harm and injustice remain high. But the model may have too many other flaws to begin with.

A more targeted approach is known as "mandated desistance" or "coerced abstinence." MR write that "a large fraction of all cocaine, heroin, and methamphetamine is consumed by individuals under the supervision of the criminal justice system. . . . Mandated desistance simply requires that such individuals be frequently tested for [drug use] and subject to short but immediate sanctions if they fail."<sup>171</sup> The goal, tested on Hawaii's probation population through the Hawaii's Opportunity Probation with Enforcement (hereinafter "HOPE") program, for example, is "to reduc[e] the number of drug users incarcerated for drug-related crimes and also reduc[e] the number of frequent users of cocaine, heroin, and methamphetamine."<sup>172</sup> HOPE differs from the traditional drug court model by limiting treatment referrals to those probationers who have the most sustained drug problems or who request them.<sup>173</sup>

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<sup>168</sup> "Drug courts are too resource-intensive to be practicable at scale, and their good outcomes depend in large part on filtering out participants with histories of serious criminality. Spending the most attention on the least dangerous is hardly good policy." See Mark A.R. Kleiman, *Smart on Crime*, 28 DEMOCRACY (Spring 2013), <http://www.democracyjournal.org/28/smart-on-crime.php>.

<sup>169</sup> DRUG COURTS NOT THE ANSWER, *supra* note 167, at 13.

<sup>170</sup> *Id.* at 12.

<sup>171</sup> *Agnostics Guide*, *supra* note 148, at 73-74.

<sup>172</sup> *Id.* at 74.

<sup>173</sup> Angela Hawken & Mark Kleiman, *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE*, HOPE 4, (Dec. 2, 2009), <http://hopehawaii.net/assets/hawkins-full-report-hope-2009.pdf> (unpublished final grant report, disseminated electronically by the Nat'l Criminal Justice Reference Serv. December 2009).

HOPE does not significantly reduce jail time spent by probationers, but substantially reduces prison time.<sup>174</sup> That's a big improvement – but jail is still a dangerous place, even with short stays, and can have ripple effects such as loss of employment or family troubles. HOPE does not directly distinguish between users who manage their drug use adequately vs. users who don't, although a problematic drug user is more likely to come under criminal justice supervision. Many users, even heavy ones, will never get sent to court in the first place, and so the market for illicit drugs, optimistically, may be dented but never eliminated. And so like Highpoint, it leaves in place some of the fundamental and most severe harms of the prohibition system – the increased harm suffered by addicted users, at least while they are addicted, and the flow of funds into the hands of criminals, terrorists and insurgents. Like Highpoint, HOPE also leaves drug policy in a place where it could easily revert to less enlightened types of policing and sentencing.

One may legitimately ask what types of state control are appropriate for problematic users whose drug-related behavior jeopardizes the safety or rights of others. For that reason, and because of the urgent need for politically viable approaches for stemming the epidemic of mass incarceration, even some legalization advocates might not reject approaches like HOPE out of hand. But it would be better to look for less intrusive alternatives – ones that don't rely on drug testing and jail stays – as a starting point. One that has shown demonstrated success is Portugal's decriminalization system. Instituted in 2000, the Portuguese system specifies that:

[A] person caught [possessing] drug[s] . . . is no[t] arrested, but . . . appear[s] before a local "dissuasion commission" comprised of [a legal official and two health officials]. . . . Based on [their] findings, the commission can order someone to attend a treatment program . . . other monitoring . . . a fine or . . . other administrative sanctions.<sup>175</sup>

According to Glenn Greenwald, "fines are expressly declared to be a last resort. . . . [T]he Dissuasion Commissions are not authorized to mandate treatment, [though] they can make suspension of sanctions conditioned on the offender's seeking treatment. . . . [But] there are

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<sup>174</sup> *Id.* at 25-26.

<sup>175</sup> *Approaches to Decriminalizing Drug Use & Possession*, DRUG POLICY ALLIANCE 1 (Feb. 2013), [http://www.drugpolicy.org/sites/default/files/DPA\\_Fact%20Sheet\\_Approaches%20to%20Decriminalizing%20Drug%20Use%20and%20Possession.pdf](http://www.drugpolicy.org/sites/default/files/DPA_Fact%20Sheet_Approaches%20to%20Decriminalizing%20Drug%20Use%20and%20Possession.pdf).

very few ways to enforce the condition.”<sup>176</sup> The focus is on drug treatment with the user still maintaining a significant degree of autonomy. With over a decade of hindsight, decriminalization seems to have been a success. Caitlin Elizabeth Hughes and Alex Stevens write that “contrary to predictions, the Portuguese decriminalization did not lead to major increases in drug use,” and indeed, Portugal achieved “reductions in problematic use, drug-related harms and criminal justice overcrowding.”<sup>177</sup>

Another approach that is currently being piloted in Seattle is Law Enforcement Assisted Diversion (hereinafter “LEAD”), in which low-level drug and prostitution offenders from the Belltown and Skyway neighborhoods are diverted from the criminal justice system pre-arrest, instead being referred to community-based services and treatment programs.<sup>178</sup> LEAD represents “an unusual collaboration among diverse stakeholders [ranging from] The Seattle Police Department and The Washington State Department of Corrections [to] The Defender Association [and] the ACLU . . . and community members.”<sup>179</sup> Participants in LEAD “aren’t required to abstain from using drugs, nor are they kicked out of the program if they relapse . . . [but are] allowed to set their own goals,” according to *The Seattle Times*.<sup>180</sup> “Once you’re in LEAD, you’re always in LEAD, unless our [operational] group votes [you] out,” reports a group member.<sup>181</sup> The collaborative’s contracted treatment provider, Evergreen Treatment Services, follows “harm reduction principles.”<sup>182</sup> The program commenced in October 2011, and is currently in the midst of a two-year evaluation.<sup>183</sup>

There are also ways to make the international drug war less damaging. Felbab-Brown argues that eradication of drug crops in source coun-

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<sup>176</sup> Glenn Greenwald, *Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies* CATO INST. (2009), [http://object.cato.org/sites/cato.org/files/pubs/pdf/greenwald\\_whitepaper.pdf](http://object.cato.org/sites/cato.org/files/pubs/pdf/greenwald_whitepaper.pdf).

<sup>177</sup> Caitlin Elizabeth Hughes & Alex Stevens, *What Can We Learn from the Portuguese Decriminalization of Illicit Drugs?*, 50 BRIT. J. OF CRIMINOLOGY 999 (2010), <http://bjc.oxfordjournals.org/content/50/6/999.abstract>.

<sup>178</sup> *About LEAD*, LEADKingCounty.org [hereinafter *LEAD*], <http://leadkingcounty.org/about/> (last visited May 5, 2014).

<sup>179</sup> *Id.*

<sup>180</sup> Sara Jean Green, *LEAD Program Turns Drug Bust into Help, Not Jail*, THE SEATTLE TIMES, Jan. 2, 2013, available at [http://seattletimes.com/html/localnews/2020045102\\_lead03m.html](http://seattletimes.com/html/localnews/2020045102_lead03m.html).

<sup>181</sup> *Id.*

<sup>182</sup> *LEAD*, *supra* note 178.

<sup>183</sup> *Id.*



tries should be deemphasized or employed very selectively, because it “is unlikely to weaken belligerents severely but . . . frequently . . . alienates farmers from the government and reduces their willingness to provide intelligence on belligerents.”<sup>184</sup> Laissez-faire, that is “tolerating the cultivation of illicit crops during conflict, leaves belligerents’ resources unaffected but may decrease their political capital,” by preventing the belligerents’ from positioning themselves as defenders of the farmers who are depending on the crops against the government.<sup>185</sup> Other strategies like interdiction, or licensing drug crops for the licit medical market, “can decrease belligerents’ financial resources without . . . visibly threaten[ing] the population’s livelihood.”<sup>186</sup> Taking out a “high-value” target like a drug lord can cause destabilization and violence without achieving its goals; it’s better to go after mid-level targets in drug trafficking operations.<sup>187</sup>

The current distribution of foreign aid funding is also problematic. Comolli points out that foreign aid budgets go disproportionately to law enforcement, in a funding process that seems insulated from the policy debate.<sup>188</sup> Donor preferences as to their domestic priorities – for example, the belief by U.S. policymakers that eradication programs can reduce substance abuse in the U.S. politicizes the aid process.<sup>189</sup> Enforcement should not be the most key priority, but rather we should tend more to priorities like economic development, public health, justice and human rights.<sup>190</sup>

U.S. history is “not encouraging,” to borrow KCH’s term, when it comes to instituting even relatively non-punitive drug policies in the context of prohibition. RL note that “alcohol problems and other drug problems often seem to occupy separate intellectual and professional universes.”<sup>191</sup> Griffith Edwards notes that “[b]etween the two world wars, the American prohibition experience virtually wiped out interest in alcoholism as a disease, and many private US treatment institutions

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<sup>184</sup> SHOOTING UP, *supra* note 18, at 7.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> MDLE forum, *supra* note 119 (although the opposite may be true for insurgent groups led by charismatic figures).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Harry G. Levine & Craig Reinerman, *The Trouble with Drink and Drugs: Why Prohibition and Criminalization Matter*, 105 ADDICTION 806 (2010).

closed.”<sup>192</sup> Since ending alcohol prohibition, the nations that experimented in it “have focused upon developing non-punitive responses, reducing the stigma of abuse and making it easy for people to get help . . . [but] [f]or most of the 20th century, and now in the 21st, this has not been the situation for other common drugs.”<sup>193</sup>

Prohibition is not likely to end in 2014, and so attempts to moderate the harshness of our drug policies while making them more effective should be encouraged. Nevertheless, past improvements to prohibition have not been politically stable for the most part. Alongside legitimate concerns such as commercialization of legalized drugs, the record of how poorly drug prohibition has been implemented historically must likewise figure into this discussion.

## VII. MOVING FORWARD

This Article has made a case for legalization as a less harm-ridden basis for approaching drug policy. Obviously not everyone is yet persuaded. A 2012 Rasmussen poll, for example, found only 11% of respondents said they favored legalization of cocaine, as opposed to the slim majority supporting marijuana legalization.<sup>194</sup> When asked by Rasmussen whether they’d favor cocaine legalization if they knew in advance that it would reduce border violence in Mexico, the number ballooned to 47%.<sup>195</sup> Increased debate on the issue, such as that which Latin American presidents and other public figures are now promoting, could well shift public opinion in the legalization direction. Such a shift would in turn influence policymakers.

The reconsideration of marijuana policy has raised legal issues on the state, national and international levels, some of which are likely to come up in the context of any larger move away from prohibition, others perhaps less so. The lesser degree of public support for legalizing other drugs, the smaller number of users and consequent smaller potential markets, and the greater the challenges involved in manufacturing many of the currently illegal drugs compared to marijuana, all make it less likely that quasi-legal markets in those drugs will sprout up any-

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<sup>192</sup> G. Edwards, *The Trouble with Drink: Why Ideas Matter*, 105 ADDICTION 797 (2010) (Levine and Reinerman were responding to Edwards’ piece in their letter to Addiction).

<sup>193</sup> Levine & Reinerman, *supra* note 191, at 806.

<sup>194</sup> 47% Favor Legalizing Pot, Cocaine to Reduce Border Drug Violence, RASMUSSEN REPORTS (May 22, 2012), [http://www.rasmussenreports.com/public\\_content/lifestyle/general\\_lifestyle/may\\_2012/47\\_favor\\_legalizing\\_pot\\_cocaine\\_to\\_reduce\\_border\\_drug\\_violence](http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/may_2012/47_favor_legalizing_pot_cocaine_to_reduce_border_drug_violence).

<sup>195</sup> *Id.*

where in the U.S. in the advance of changes to federal law. But the progression of the marijuana issue merits some examination here. On at least two possible fronts for moving forward with other drugs' policies – medical availability of controlled substances to addicts and decriminalization or depenalization of users and low-level sellers – states and the federal government also have options for moving forward in advance of Congressional legislation.<sup>196</sup>

### A. *Federal Marijuana Policy*

The history of marijuana policy reform in the U.S. demonstrates the limits of federal power in the face of changing public opinion, as well as the constraints federal law places on states wishing to regulate the trade. Ironically, some of the more cautious and responsible approaches to regulation are precluded (clearly or potentially) by the current regime.

Administration policy toward the medical marijuana states has been what Stuart Taylor aptly terms “A Study in Chaos.”<sup>197</sup> Despite what looked and sounded like promises from the president and the attorney general to tolerate suppliers of marijuana who were acting in accordance with their states' laws, “Justice Department crackdowns on medical marijuana suppliers in states including California, Washington, and Montana began to proliferate [in 2011].”<sup>198</sup> Along with raids, the Department of Justice (hereinafter “DOJ”) and other officials have used a variety of tactics against the medical marijuana industry that are more cost-efficient for them and which have less political fallout than raids and prosecutions. These have included threat letters to state officials considering dispensary laws, intimating that state employees regulating

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<sup>196</sup> Although currently federal law prohibits provision of most drugs to addicts for non-medical use, medical use not including maintenance use (excepting the authorized maintenance treatments involving methadone and buprenorphine), a supportive administration could issue licenses for trial maintenance programs in a research framework. Depenalization is usually defined as the removal of penalties for a given act, while decriminalization commonly means the reduction of penalties for low-level offenses to a mild level such as a small fine.

<sup>197</sup> Stuart S. Taylor, Jr., *Marijuana Policy and Presidential Leadership: How to Avoid a Federal State Train Wreck*, in GOVERNANCE STUDIES AT BROOKINGS, Appendix 1 in (Apr. 2013), available at [http://www.brookings.edu/~media/Research/Files/Papers/2013/04/11%20marijuana%20legalization%20taylor/Marijuana%20Policy%20and%20Presidential%20Leadership\\_Appendix%201.pdf](http://www.brookings.edu/~media/Research/Files/Papers/2013/04/11%20marijuana%20legalization%20taylor/Marijuana%20Policy%20and%20Presidential%20Leadership_Appendix%201.pdf).

<sup>198</sup> Marijuana Policy Project, *Barack Obama and Medical Marijuana (interview Q&A)*, YOUTUBE (Apr. 21, 2008), <http://www.youtube.com/watch?v=LvUziSfMwAw>; *US Attorney General Eric Holder: Ending Medical Marijuana Raids Now US Policy*, YOUTUBE (Feb. 26, 2009), <http://www.youtube.com/watch?v=kjZeW2fcQHM>; Taylor, *supra* note 197, at 21.

the marijuana trade could run afoul of the federal Controlled Substances Act (hereinafter “CSA”); letters to landlords of dispensary buildings threatening asset forfeiture; pressure on the banking industry about dispensary bank accounts; and IRS audits, using a provision of federal law, section 280E, which disallows enterprises trafficking in Schedule I or Schedule II substances from deducting ordinary business expenses like salaries and rent.<sup>199</sup>

The threat letters in particular point to the question of preemption: Should this or a future administration sue state governments in order to block their implementation, or to block regulatory portions of them, can state laws that differ (if not conflict) with federal drug law withstand a court challenge? Should a state’s officials or other parties with standing sue in that state’s courts, could *state courts* find that federal law preempts a state’s legalization regime, and block or halt its implementation?

The famous *Gonzales v. Raich* medical marijuana case affirmed that Congress can use the Interstate Commerce Clause to prohibit medical marijuana use under *federal* law.<sup>200</sup> The ability of Congress to constrain state lawmakers, however, is narrower, as “[t]he Supreme Court has never squarely addressed the preemption issue.”<sup>201</sup> But “the anti-commandeering principle [of the U.S. Constitution] protects the states’ prerogative to legalize activity that Congress bans [despite federal supremacy],” despite the fact that “the objectives of the state and federal

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<sup>199</sup> Compilation of DOJ Threat Letters to States Considering Licensing of Medical Marijuana Facilities, PROCON.ORG (Feb.-May 2011), <http://medicalmarijuana.procon.org/sourcefiles/DOJ-Threat-Letters.pdf>; Taylor, *supra* note 197, at 23; *Federal Dismissal of Medical Marijuana Asset Forfeiture Cases*, MARKETWATCH.COM (Oct. 18, 2013, 2:36 PM), <http://www.marketwatch.com/story/federal-dismissal-of-medical-marijuana-asset-forfeiture-cases-2013-10-18>; *Bills to Ensure Fair Treatment of Medical Cannabis Industry Members Are Introduced in U.S. House*, STOPTHEDRUGWAR.ORG (May 25, 2011, 5:46 PM), [http://stopthedrugwar.org/trenches/2011/may/25/bills\\_ensure\\_fair\\_treatment\\_medi](http://stopthedrugwar.org/trenches/2011/may/25/bills_ensure_fair_treatment_medi); 26 U.S.C.A. § 280E (West 1982).

<sup>200</sup> See generally *Gonzales v. Raich*, 125 S. Ct. 2195, 2197 (2005) (Justice Stevens wrote for the majority, “Congress’ power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally. Well-settled law controls our answer. The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case. We accordingly vacate the judgment of the Court of Appeals [which had ruled in favored of Angel Raich].”).

<sup>201</sup> Robert A. Mikos, *On the Limits of Federal Supremacy When States Relax (or Abandon) Marijuana Bans*, 714 POL’Y ANALYSIS, 1, 9 (Dec. 12, 2012), available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/PA714.pdf> (Mikos is professor of law and director of the Program in Law and Government at Vanderbilt University).

governments clearly conflict [with regard to marijuana legalization],” Robert Mikos writes.<sup>202</sup>

Preemption actions brought by state and local officials have had varied results. A district court judge in Arapahoe County, Colorado refused to order a dispensary to pay a debt that a grower claimed to be owed to him, due to federal illegality.<sup>203</sup> But when the California counties San Diego and San Bernardino brought a preemption suit over a 2004 medical marijuana patient ID card law, the state courts disagreed, and the Supreme Court declined to hear the case.<sup>204</sup> In 2012 a federal judge declined to hear a petition by Arizona Governor Jan Brewer, seeking to block implementation of the state’s voter-approved medical marijuana law, which includes a dispensary system, citing a lack of jurisdiction.<sup>205</sup> In February 2014, the Michigan Supreme Court overturned a municipal law banning medical marijuana in *Ter Beek v. Wyoming*, rejecting the City of Wyoming’s claim that federal law preempted the state’s medical marijuana law.<sup>206</sup>

An amicus brief submitted by the ACLU of Northern California in *Pack v. Long Beach* lays out a case against preemption.<sup>207</sup> The brief supported an appellant to the California Supreme Court who had sought to overturn a Court of Appeal ruling, which had found the city’s medical marijuana ordinance to be preempted.<sup>208</sup> The city subsequently moved toward banning dispensaries entirely, and an appellate court then dismissed the case, finding that the arguments on both sides had moved to new legal ground and that the case was therefore moot.<sup>209</sup> But the arguments in the brief merit review.

Congress, the brief notes, actually included an anti-preemption clause in the CSA, stating that the CSA should not preempt state drug laws, “unless there is a positive conflict between [the CSA] and that

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<sup>202</sup> *Id.* at 1.

<sup>203</sup> *Haeberle v. Lowden & Blue Sky Care Connection*, No. 2011CV709 (Arapahoe Co. Dist. Ct., Aug. 8, 2012).

<sup>204</sup> *Cnty. of San Diego et al. v. San Diego NORML*, 81 Cal. Rptr. 3d 461 (Cal. Ct. App. 4th Dist. 2008)

<sup>205</sup> *Arizona v. United States*, No. CV 11-1072 (D. Ariz. Jan. 4, 2012).

<sup>206</sup> *Ter Beek v. City of Wyoming*, 828 N.W.2d 381 (Mich. 2013).

<sup>207</sup> *Amicus Curiae Letter in Support of Petition for Review Or, Alternatively, Request for Depublication (Cal. Rules of Court 8.500(g), 8.1125(a)) Pack v. Superior Court (City of Long Beach)*, AM. CIVIL LIBERTIES UNION OF N. CAL. (Dec. 12, 2011) [hereinafter *Pack Brief*], [https://www.aclunc.org/sites/default/files/asset\\_upload\\_file37\\_10740.pdf](https://www.aclunc.org/sites/default/files/asset_upload_file37_10740.pdf).

<sup>208</sup> *Id.*

<sup>209</sup> *Pack v. City of Long Beach*, 132 Cal. Rptr. 3d 633 (Cal. Ct. App. 2d Dist. 2012).

State law so that the two cannot consistently stand together.”<sup>210</sup> It reasons, therefore, that of the “four species of federal preemption – express, conflict, obstacle and field. . . conflict preemption is the only one at issue.”<sup>211</sup> Additionally, the brief noted, “regulation of medical practices and state criminal sanctions are historically matters of state police power.”<sup>212</sup>

The Court of Appeal’s central error, amici argued, was in its finding that the city ordinance “goes beyond decriminalization [of marijuana for medical purposes, for example, a mere *removal* of previously existing state penalties] into authorization [to provide medical marijuana].”<sup>213</sup> “Even assuming, [arguendo], that implied obstacle preemption [were] applicable [to the case] . . . [the lower court’s finding] rests on an untenable distinction between decriminalization and authorization.”<sup>214</sup> That is, in allowing medical marijuana centers to operate in the city under certain circumstances specific in its ordinance, the city did not interfere with the federal government’s ability to apply its own enforcement resources within the city.

The critical legal distinction protecting state marijuana reforms is that “[c]ommandeering compels state *action*, whereas preemption, by contrast, compels *inaction*. Congressional laws blocking state action (preemption) are permissible, whereas congressional laws requiring state action (commandeering) are not.”<sup>215</sup> The 1997 case *Printz v. United States*, in which the court struck down a provision of the Brady gun control law requiring local law enforcement officials to carry out background checks, lays out a recent anti-preemption standard by the court: “We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States’ officers directly.”<sup>216</sup> Similarly, Congress cannot compel a state to enact a prohibition program, nor conscript the state’s officers into federal prohibition enforcement. Conversely, however, a state may not impede the opera-

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<sup>210</sup> 21 U.S.C. § 903 (1970).

<sup>211</sup> *Pack Brief*, *supra* note 207, at 3-4.

<sup>212</sup> *Id.* at 6.

<sup>213</sup> *Id.* at 7.

<sup>214</sup> *Id.* at 6.

<sup>215</sup> Mikos, *supra* note 201, at 10.

<sup>216</sup> *Printz v. United States*, 521 S. Ct. 898, 935 (1997).

tion of federal or federally-authorized activity.<sup>217</sup> An issue more likely to come up in the context of state marijuana legalization is whether a given regulation instituted as part of a legalization system would make it impossible for an individual to simultaneously comply with both federal and state requirements.

The Obama administration appears to have decided it is better not to try to preempt the Colorado and Washington laws. In August 2013, nine months after the initiatives passed, DOJ outlined eight priorities “that are particularly important to the federal government” and “[serve] as guidance to Department attorneys and law enforcement to focus their enforcement resources.”<sup>218</sup> The memo also implied the administration does not intend to challenge the states’ laws in court, although it also indicated in what circumstances it might consider doing so: “If state enforcement efforts are not sufficiently robust to protect against the harms set forth, the federal government may seek to challenge the regulatory structure itself.”<sup>219</sup> The priority list is worth reprinting here in full:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and

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<sup>217</sup> The 1819 case *McCulloch v. Maryland* overturned a state tax that aimed to impede the operation of a congressionally chartered bank. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

<sup>218</sup> Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement, from James M. Cole, Deputy Attorney General 2 (Aug. 29, 2013) [hereinafter New Cole Memo], available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

<sup>219</sup> *Id.* at 3.

- Preventing marijuana possession or use on federal property.<sup>220</sup>

The reasoning behind this priority list was put forth in a Senate Judiciary Committee hearing last September: “It would be very challenging to preempt decriminalization. . . . We might have an easier time preempting the regulatory scheme, but then what do you have? Legal marijuana and no enforcement mechanism, which is probably not a good situation.”<sup>221</sup> “No enforcement mechanism,” could refer to a reality in U.S. law enforcement that has enabled medical marijuana, and now legalization of marijuana, to proceed. Most police officers work for state or local agencies and enforce state and local laws. There aren’t enough federal law enforcement agents to take up the slack left by local police who no longer have marijuana statutes as a basis for which to arrest people.

Whether the administration will implement their new policy more consistently than their prior medical marijuana policy remains to be seen. But a few things suggest hope. One part of the memo seems to effectively green-light large-scale marijuana operations.<sup>222</sup> It seems doubtful that DOJ would send such a message if officials did not intend or at least hope for the policy to stick. A second hopeful sign is a follow-up to the Cole memo issued in February by the Dept. of the Treasury Financial Crimes Enforcement Network (hereinafter “FinCEN”), which “clarifies how financial institutions can provide services to marijuana-related businesses consistent with their [Bank Secrecy Act] obligations.”<sup>223</sup> A third hopeful sign is comments made by President Obama

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<sup>220</sup> *Id.* at 1-2.

<sup>221</sup> Phillip S. Smith, *Senate Holds Hearing on State Marijuana Legalization [FEATURE]*, STOPTHEDRUGWAR.ORG, (Sept. 10, 2013) [http://stopthedrugwar.org/chronicle/2013/sep/10/senate\\_marijuana\\_legalization\\_hearing](http://stopthedrugwar.org/chronicle/2013/sep/10/senate_marijuana_legalization_hearing).

<sup>222</sup> New Cole Memo, *supra* note 218, at 3 (The memo notes that while “previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other. . . the existence of . . . [an] effective . . . regulatory system . . . may allay the threat that an operation’s size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department’s enforcement priorities listed above . . . [but] should weigh all available information and evidence.”).

<sup>223</sup> Memorandum from Dep’t of the Treasury Fin. Crimes Enforcement Network on BSA Expectations Regarding Marijuana-Related Businesses 2 (Feb. 14, 2014), *available at* [http://extras.mnginteractive.com/live/media/site36/2014/0214/20140214\\_113553\\_Guidance-Marijuana-Related-Businesses.pdf](http://extras.mnginteractive.com/live/media/site36/2014/0214/20140214_113553_Guidance-Marijuana-Related-Businesses.pdf). Whether the administration’s guidelines will suffice to allay bankers’ concerns remains to be seen. A number of banking associations have taken the position that an act of Congress is needed to address their concerns about the possibility for prosecution



in a New Yorker interview with David Remnick. The president called the Colorado and Washington experiments in legalizing marijuana “important.”<sup>224</sup>

A better path would be for Congress to harmonize federal law with current realities. There are currently several bills that would advance this goal for outright marijuana legalization, or at least for the legalization of medical marijuana, all of which have attracted bipartisan support:

- Jared Polis’s “Ending Federal Marijuana Prohibition Act” would remove marijuana from the CSA. States could continue to prohibit marijuana, or not.<sup>225</sup>
- Dana Rohrabacher’s “Respect State Marijuana Laws Act” would end federal enforcement of marijuana laws in states that have either legalized marijuana or enacted medical marijuana laws.<sup>226</sup>
- Earl Blumenauer’s “States’ Medical Marijuana Protection Act,” would legalize medical marijuana federally and let states regulate it.<sup>227</sup>
- Sam Farr’s “Truth in Trials Act” would create an affirmative defense in federal trials for conduct authorized by state medical marijuana laws.<sup>228</sup>
- Blumenauer’s “Marijuana Tax Equity Act” would remove the marijuana trade from the reach of section 280E, replacing it with an excise tax.<sup>229</sup>

The Obama administration could also ease the way through executive action, by:

- Removing marijuana from Schedule I of the CSA (a designation intended for drugs with no accepted medical use and a

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under current law. See Herb Weisbaum, *Banks Balk on Marijuana Money Despite US Guidelines*, CBNC (Feb. 21, 2014), <http://www.cnn.com/id/101433431>.

<sup>224</sup> David Remnick, *Going the Distance: On and Off the Road with Barack Obama*, NEW YORKER, (Jan. 27, 2014) available at [http://www.newyorker.com/reporting/2014/01/27/140127fa\\_fact\\_remnick](http://www.newyorker.com/reporting/2014/01/27/140127fa_fact_remnick) (“[I]t’s important for [the Colorado and Washington marijuana legalization experiments] to go forward because it’s important for society not to have a situation in which a large portion of people have at one time or another broken the law and only a select few get punished.”).

<sup>225</sup> Ending Federal Marijuana Prohibition Act of 2013, H.R. 499, 113th Cong.

<sup>226</sup> Respect State Marijuana Laws Act of 2013, H.R. 1523, 113th Cong.

<sup>227</sup> States’ Medical Marijuana Patient Protection Act, H.R. 689, 113th Cong. (2013).

<sup>228</sup> Truth in Trials Act, H.R. 710, 113th Cong. (2013).

<sup>229</sup> Marijuana Tax Equity Act of 2013, H.R. 501, 113th Cong.

high potential for abuse), assigning it instead to Schedule III or below. Doing so would remove marijuana from the reach of Section 280E (both the medical and legalization markets), and would ease the way for researchers wishing to conduct FDA-qualifying research.<sup>230</sup>

- Directing the FDA to reopen an Investigational New Drug program founded in the 1970s, through which several patients still receive marijuana grown at the University of Mississippi for the National Institute on Drug Abuse.<sup>231</sup>
- Directing federal agencies to approve particular medical studies or research programs, and grant the necessary licenses, in order to move FDA evaluation of marijuana forward.<sup>232</sup>

### B. *Regulation of Marijuana*

Moving forward with legalization requires making decisions on a host of regulatory questions. The legalization initiatives in Washington and Colorado deal with them similarly in many ways: both set age limits, and mandate quality controls. Washington's I-502 (hereinafter I-502) places limits on store locations and numbers, and "bans advertising in places frequented by youth." Both measures establish a tax regime. Colorado's Amendment 64 allows home growing; I-502 doesn't.<sup>233</sup>

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<sup>230</sup> Rick Doblin, executive director of the Multidisciplinary Association for Psychedelic Studies, writes that the primary obstacles to FDA-approved marijuana research is the National Institute on Drug Abuse's monopoly on research marijuana (the DEA refuses to grant other licenses to would-be medical researchers) and an additional Public Health Service protocol review that currently applies to any privately-funded marijuana research. Should marijuana be moved to Schedule III, however, this would be likely to increase the political pressure on DEA to grant the necessary licenses to researchers, as well as to decrease DEA's concern over take-home amounts and allow for looser security arrangements. Interview with Rick Doblin, Executive Director of the Multidisciplinary Association for Psychedelic Studies (Feb. 14, 2014); Press Release, Multidisciplinary for Psychedelic Studies, Public Health Service Blocking FDA-Approved Medical Marijuana Research for PTSD (Feb. 24, 2014), *available at* [http://www.maps.org/media/view/press\\_release\\_public\\_health\\_service\\_blocks\\_fda-approved\\_medical\\_mariju/](http://www.maps.org/media/view/press_release_public_health_service_blocks_fda-approved_medical_mariju/).

<sup>231</sup> *What Is the US Government's Compassionate Investigational New Drug (IND) Program for Medical Marijuana?* PROCON.ORG, <http://medicalmarijuana.procon.org/view.answers.php?questionID=000256> (last visited Feb. 17, 2014).

<sup>232</sup> The National Institute of Drug Abuse recently agreed for the first time to provide marijuana for a medical research study. See Suzanne Sisley, Letter from NIDA to MAPS Approving Provision of Research Marijuana for PTSD Study Dept. of Health & Human Services (Mar. 12, 2014), *available at* <http://www.maps.org/mmj/HHS-CoverLetter-Doblin-electronic-14Mar14.pdf>.

<sup>233</sup> *About the Initiative* NEW APPROACH WASH. [hereinafter *New Approach*], <http://www.newapproachwa.org/content/about-initiative> (last visited Oct. 20, 2013). *Overview of Amend-*

I-502 enacted a Driving Under the Influence of Drugs (hereinafter “DUID”) provision that was controversial in the movement and led some activists to oppose it. The provision establishes a “per se” standard defining a 5 nanogram per milliliter or greater Tetrahydrocannabinol blood concentration level as constituting impaired driving, irrespective of the observed effect of the substance on the driver.<sup>234</sup> Proponents modeled the provision after Washington’s alcohol DUI law, to increase the initiative’s chance of passage. Some advocates felt it could have been written as a “rebuttable presumption” instead – presuming 5 nanograms to represent impairment, but allowing defendants to attempt to rebut that presumption.<sup>235</sup>

A third 2012 initiative, but one that failed to pass, Oregon’s Measure 80, would have implemented a state-run system for distribution – the state would buy all the marijuana from private producers, and would sell it.<sup>236</sup> Had it passed, however, it is unlikely it would have taken effect, because a state paying its employees to actually handle and sell marijuana would constitute a positive conflict with the CSA.<sup>237</sup>

Should Congress move to repeal federal prohibition of marijuana, or at least remove the federal ban in states that enact legalization, state-run systems could become an option. Some observers would prefer a non-commercial system in which marijuana is not promoted, at least not in ways that would encourage heavy use of it. Alexander Wagenaar frames the overall regulatory challenge as, “eliminat[ing] the deleterious side effects of prohibition policy, without generating new problems.”<sup>238</sup>

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ment, CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL 64 [hereinafter *Regulate Marijuana*], <http://www.regulatemarijuana.org/about> (last visited Oct. 20, 2013).

<sup>234</sup> Dominic Holden, *Pot Activists Vs. Pot Activists*, STRANGER (Mar. 7, 2012) <http://www.thestranger.com/seattle/pot-activists-vs-pot-activists/Content?oid=12927887>.

<sup>235</sup> Joe Klare, *Reader Poll: Would You Vote for Washington’s I-502?*, 420 TIMES, (Aug. 27, 2012) <http://the420times.com/2012/08/reader-poll-would-you-vote-for-washingtons-i-502/>.

<sup>236</sup> Open Letter from Kate Brown, Or. Sec’y of State, Containing Oregon Cannabis Tax Act 2012 (Jan. 18, 2011) [hereinafter *OCTA*], <http://oregonvotes.org/irr/2012/009text.pdf>.

<sup>237</sup> Mikos, *supra* note 201, at 10-11 (“It is the state of nature – and not action/inaction, per se – that defines the boundary between permissible preemption and impermissible commandeering.” State employees distributing marijuana would be a departure from the state of nature that existed before passage of the state’s marijuana prohibition law, in which the state merely did not criminalize marijuana distribution; “Congress may preempt any state law that obstructs, contradicts, impedes, or conflicts with federal law.” Unlike allowing private individuals to distribute marijuana without facing punishment by the state, distribution of marijuana *by the state itself* would impede the federal government’s objective of stopping marijuana distribution.).

<sup>238</sup> RAND Drug Policy Research Ctr., *Public Health Effects of State Marijuana Laws*, 01:23:37 (C-Span Video Archive Feb. 11, 2013) <http://www.c-spanvideo.org/program/310927-2>.

To that end, “[i]f the state has a monopoly [on sales], almost all regulatory [efforts] tend to be stronger, or more actively enforced, or more uniform or more consistent, and more stable over time.”<sup>239</sup> In this vision, a state could sell marijuana, but choose not to advertise it. This approach would also help to clear up legal uncertainty regarding some other regulatory provisions broadly considered useful, such as requirements to do chemical analysis on marijuana product samples to ensure quality control.<sup>240</sup>

Short of those statutory changes, states’ options for reducing commercialization of marijuana will have limits, due to First Amendment jurisprudence. The current standard for constitutionality was set out by the Supreme Court in the 1980 case *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>241</sup> In keeping with this standard, alcohol advertising restrictions that have passed constitutional muster tend to focus on preventing the targeting of youth, or on other limited state interests. Similarly, I-502 contains a provision banning marijuana advertising in places frequented by youth.

### C. Regulation of Other Drugs

Regulation of drugs other than marijuana involves even more complexity, due to the drugs’ greater inherent risks. Nevertheless, work has been done exploring potential regulatory models for other drugs, and there are steps which stop short of legalization that can be much more extensively pursued than they have to date.

Regulatory systems of legal drugs can be classified into five broad categories: prescription (required for purchase), pharmacy sales (not necessarily requiring a prescription, but with relatively strict controls over

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<sup>239</sup> *Id.* at 01:01:39.

<sup>240</sup> The positive requirement to submit marijuana for testing before selling it risks preemption, due to it requiring individuals to engage in a violation of federal law by transferring the marijuana.

<sup>241</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 563-64 (1980) (The Supreme Court ruled that the government may ban speech that is “more likely to deceive the public than to inform it,” but otherwise “[t]he State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State’s goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.”).

how drugs are provided), licensed sales (through stores of one type or another), licensed premises (for example, bars or Dutch coffee shops at which consumption is done on site), and unlicensed sales (more likely for low potency products like coca leaf, coffee, et cetera).<sup>242</sup> The May 2013 OAS report also presents some models for legal availability of drugs, examining the Netherlands coffee shop system, Spain's "social clubs," the Colorado, Washington, and pending Uruguay systems, and drug consumption rooms.<sup>243</sup> A report from the Friedrich Ebert Foundation also approaches legalization solutions, discussing a variety of issues including, "considerations related to the production and commercialization of coca and cocaine," "proposals to regulate the retail sale and consumption of plant-based drugs," and "regulatory options in the UN drug control framework [for] coca and opium poppy."<sup>244</sup>

With the exception of consumption rooms, short-term progress on the regulatory level for drugs other than marijuana seems likely to take the form of the most restrictive category: prescription models.<sup>245</sup> The prescription models for which we have the most experience to draw on are opioid maintenance programs – methadone maintenance, and the newer programs of buprenorphine maintenance – as well as heroin maintenance, also known as Heroin Assisted Treatment (hereinafter "HAT"). The first such program to become famous operated in Liverpool, England.<sup>246</sup> A *Sixty Minutes* report that brought the HAT program to U.S. attention highlighted gripping examples of addicts whose lives had been transformed – they became "regular people," so to speak – after enrolling in the program.<sup>247</sup>

Today there are HAT programs in Switzerland, The Netherlands, Germany, Denmark, and the Canadian cities of Vancouver and Mon-

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<sup>242</sup> STEVE ROLLES, *AFTER THE WAR ON DRUGS: BLUEPRINT FOR REGULATION* 13-27 (2009), available at <http://tdpf.org.uk/resources/publications/after-war-drugs-blueprint-regulation>.

<sup>243</sup> ORG. OF AM. STATES, *supra* note 7.

<sup>244</sup> FRIEDRICH EBERT STIFTUNG FROM REPRESSION TO REGULATION: PROPOSALS FOR DRUG POLICY REFORM 5, 7 (Hans Mathieu & Catalina Niño Guarnizo eds., 2013), <http://library.fes.de/pdf-files/bueros/la-seguridad/10246>. (FES is the abbreviation of the untranslated German name of the foundation.)

<sup>245</sup> Consumption rooms are an example of the "premises" category of regulation (as well as an example of harm reduction).

<sup>246</sup> *Sixty Minutes: Ed Bradley, Rx Drugs - the Liverpool, England Method* (CBS television broadcast Dec. 27, 1992).

<sup>247</sup> *Id.*

treat.<sup>248</sup> Patients in such programs receive a supply of pharmaceutically-produced heroin from a clinic for free (though one can infer similar benefits if the heroin were merely cheap). They regularly access health services as a part of their participation.<sup>249</sup> Those who need to inject the drug to relieve their cravings receive instruction on how to do so without damaging their veins, while heroin is made available in other forms to avoid intravenous use.<sup>250</sup> After instituting HAT programs, Switzerland found a decrease in criminal involvement – from 70% of patients down to 10% after 18 months – and an increase in employment – from 14% to 32%.<sup>251</sup> The results for basic health safety were particularly striking, including decreased contact with the street drug scene, and with very few adverse health events or safety issues in any of the programs.<sup>252</sup>

Maintenance programs for stimulants have yet to be widely attempted, but the same logic ought to apply. There are greater inherent challenges in managing the use of such drugs – cocaine or methamphetamine use may be difficult for some users to manage, with or without prohibition. Nevertheless, prohibition increases their harmfulness to the addicted. In 2007, Mayor Sam Sullivan of Vancouver, British Columbia, proposed the city trial a maintenance program for stimulant drugs, a move that would have required permission from Canada's currently conservative federal government.<sup>253</sup> Research shows that such programs have promise.<sup>254</sup> Research conducted on self-regulation models for cocaine treatment programs bolsters the case for stimu-

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<sup>248</sup> DRUG POL'Y ALLIANCE, HEROIN ASSISTED TREATMENT TIMELINE, [http://www.drugpolicy.org/docUploads/HAT\\_Timeline.pdf](http://www.drugpolicy.org/docUploads/HAT_Timeline.pdf) (last visited Sept. 14, 2013).

<sup>249</sup> DRUG POLICY ALLIANCE, HEROIN ASSISTED TREATMENT FREQUENTLY ASKED QUESTIONS [http://www.drugpolicy.org/docUploads/HAT\\_FAQs.pdf](http://www.drugpolicy.org/docUploads/HAT_FAQs.pdf) (last visited Sept. 14, 2013).

<sup>250</sup> *Sixty Minutes: Ed Bradley, Rx Drugs – the Liverpool, England Method*, *supra* note 246.

<sup>251</sup> PETER REUTER, CAN HEROIN MAINTENANCE HELP BALTIMORE? WHAT BALTIMORE CAN LEARN FROM THE EXPERIENCE OF OTHER COUNTRIES 5 (Jan. 2009), [http://www.abell.org/pubitems/cja\\_HeroinMaintenance\\_0209.pdf](http://www.abell.org/pubitems/cja_HeroinMaintenance_0209.pdf) (reviewing research done for Switzerland (1994-1996), The Netherlands (1998-2001), and Germany (2002-2006)).

<sup>252</sup> *Id.* at 5.

<sup>253</sup> Phillip S. Smith, *Canada: Vancouver Mayor Pushes Stimulant Maintenance Plan*, STOPTHEDRUGWAR.ORG (Feb. 16, 2007), [http://stopthedrugwar.org/chronicle/2007/feb/16/canada\\_vancouver\\_mayor\\_pushes\\_st](http://stopthedrugwar.org/chronicle/2007/feb/16/canada_vancouver_mayor_pushes_st).

<sup>254</sup> Bruce K. Alexander & Jonathan Y. Tsou, *Prospects for Stimulant Maintenance in Vancouver*, 2 ADDICTION RES. & THEORY 99 (2001), <http://globalizationofaddiction.ca/pdf/Prospect%20for%20Stimulant%20Maintenance%20in%20Vancouver-1.pdf> (Alexander & Tsou write that “[s]mall-scale stimulant maintenance trials for users of cocaine and other stimulants have already shown promising results in England, Australia, South America, and the United States.”).

lant maintenance by showing that users are capable of learning to control their use under such regimes.<sup>255</sup>

One can derive lessons of relevance to the legalization debate from HAT, and more generally from the behavior of people whose incomes enable them to afford the illegal substance to which they're addicted, or least to sustain it non-disruptively, although such evidence has limits. MR write: "Only HAT comes close to creating the conditions of legalization: easy access to cheap drugs. However, [HAT is so] narrowly targeted . . . that it is difficult to see . . . more than a hint [about] the general population['s response] to cheap and available drugs."<sup>256</sup> Heroin is reportedly the drug of choice among sailors, but Wall Street cocaine use is reputedly common. Not all such users are addicted, but if usage is continued over a period of time then some are likely to be. But the addiction does not routinely blow their lifestyles apart, suggesting that many users even if addicted could live normal lives under legalization, as opposed to continuing to suffer their current plight.

#### D. *International Treaties, and the International Drug Control Agencies*

Although moves toward legalization face obstacles, some obstacles are proving stronger than others. An international obstacle that has proven weak so far (or at least lately), but which is likely having an impact on deliberations in some countries, is the international drug control treaty regime. As briefly noted above, while there are many reforms to drug policy that can be made without running afoul of international treaty obligations, the drug control treaties do proscribe outright legalization.<sup>257</sup>

There are three major drug treaties. The primary one is the Single Convention on Narcotic Drugs, drafted in 1961, which subsumed and superseded prior agreements dating back to 1912 and codified prohibition as an international governing norm.<sup>258</sup> The Convention on

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<sup>255</sup> GRAZIA ZUFFA, COCAINE: TOWARDS A SELF-REGULATION MODEL: NEW DEVELOPMENTS IN HARM REDUCTION (Transnational Inst. & Forum Droghe Feb. 2014), <http://www.tni.org/sites/www.tni.org/files/download/dlr24.pdf>.

<sup>256</sup> *Agnostics Guide*, *supra* note 148, at 72.

<sup>257</sup> *Functioning of the International Drug Control System*, in REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2012, at 11 (2012), available at [http://www.incb.org/documents/Publications/AnnualReports/AR2012/AR\\_2012\\_E\\_Chapter\\_II.pdf](http://www.incb.org/documents/Publications/AnnualReports/AR2012/AR_2012_E_Chapter_II.pdf).

<sup>258</sup> United Nations Conference For the Adoption of a Single Convention on Narcotic Drugs, Final Act (Mar. 30, 1961) [hereinafter Single Convention], [https://treaties.un.org/doc/Treaties/1964/12/19641213%2002-14%20AM/Ch\\_VI\\_15.pdf](https://treaties.un.org/doc/Treaties/1964/12/19641213%2002-14%20AM/Ch_VI_15.pdf).

Psychotropic Substances of 1971<sup>259</sup> and the Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988<sup>260</sup> are also major agreements in international drug policy. The latter recommends the criminalization of drug possession, not just sales.<sup>261</sup>

While the treaties present legal obstacles to establishing legalization systems, other choices made by the international drug bureaucracy, as well as individual countries, are also very problematic. Kasia Malinowska-Sempruch observes that UN agencies and some hardline countries have “over-interpreted” the treaties with respect to their restrictiveness, while under-interpreting them in terms of their obligations to deal with public health issues such as overdoses, HIV and Hepatitis C.<sup>262</sup> Russian officials say that the country bans methadone maintenance because it would violate the treaties.<sup>263</sup> But while INCB officials have protested the legalization of marijuana by Uruguay, they have shown no such outrage over this denial of one of the primary interventions available for heroin addiction.<sup>264</sup> Methadone is listed by the World Health Organization as an “essential medicine,” and the UN Office on Drugs and Crime – headed by a Russian diplomat, Yury Fedotov – has itself implemented methadone maintenance programs.<sup>265</sup>

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<sup>259</sup> United Nations, *Convention on Psychotropic Substances (with Lists of Substances). Concluded at Vienna on 21 February 1971* (1971), <https://treaties.un.org/doc/Publication/UNTS/Volume%201019/volume-1019-I-14956-English.pdf>.

<sup>260</sup> *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (with Annex). Concluded at Vienna on 20 December 1988*, 1582 U.N. TREATY SERIES 164 (1990), <https://treaties.un.org/doc/Publication/UNTS/Volume%201582/volume-1582-A-27627-English.pdf>.

<sup>261</sup> *Id.* at 172 (Article III of the 1998 convention states: “Each Party shall adopt such measures as may be necessary to establish as criminal offences . . . [t]he possession or purchase of any narcotic drug or psychotropic substance.” However, it goes on to offer alternatives to criminalization that nations may utilize instead: “[I]n appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.”).

<sup>262</sup> Telephone Interview with Kasia Malinowska-Sempruch, Director of the Open Society Foundations Global Drug Policy Program (Feb. 14, 2014) [hereinafter Malinowska-Sempruch].

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> WORLD HEALTH ORGANIZATION, WHO MODEL LIST OF ESSENTIAL MEDICINES, 18th List 32 (Apr. 2013), available at [http://apps.who.int/iris/bitstream/10665/93142/1/EML\\_18\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/93142/1/EML_18_eng.pdf); Yury Fedotov Biography, U.N. OFFICE ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/eds-corner/biography.html> (last visited Feb. 16, 2014); DR. M. SURESH KUMAR, UNDOC, METHADONE MAINTENANCE TREATMENT INTERVENTION TOOLKIT (2012), available at [http://www.unodc.org/documents/southasia/Trainingmanuals/Methadone\\_Low\\_res\\_09-06-12.pdf](http://www.unodc.org/documents/southasia/Trainingmanuals/Methadone_Low_res_09-06-12.pdf) (the manual describes efforts by UNODCs Regional Office for South Asia to establish



Similarly, INCB to its credit has drawn attention to the unavailability of pain medications in a large part of the world, noting that some of the obstacles to effective pain relief are regulatory.<sup>266</sup> But the issue about which INCB is “*gravely* concerned. . . [is] legalization. . . of cannabis.”<sup>267</sup>

Nations that have experimented with new policies within the bounds of the treaties have done so quietly. For example, the successes Portugal’s far-reaching decriminalization of personal drug use and Switzerland’s heroin maintenance policy are largely kept out of the international public eye.<sup>268</sup> Similarly, while there are more than 70 countries that have syringe exchange programs, only 26 of them, mainly European states, were willing to sign an “Interpretative Statement” during the 2009 CND meeting declaring their understanding of CND’s Political Declaration and Action Plan as supporting harm reduction.<sup>269</sup> Bewley-Taylor posits the others didn’t wish to expend political or reputational capital on the issue.<sup>270</sup>

There are essentially four possible approaches to take with respect to legalization and the treaties. One is for nations to vote in a UN proceeding to allow for legalization under certain conditions and/or to remove a particular drug such as marijuana from the reach of the treaties. A second approach would be for a nation to denounce one or more of the treaties, then to seek re-accession to them with a reservation stating that it is not agreeing to the provisions that bar legalization systems.

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methadone maintenance programs, notes their importance as an HIV prevention measure in the drug using population, and lists dozens of government agencies in the region as their partners).

<sup>266</sup> INCB PAIN REPORT, *supra* note 60.

<sup>267</sup> CONTRIBUTION OF THE INTERNATIONAL NARCOTICS CONTROL BOARD TO THE HIGH-LEVEL REVIEW OF THE IMPLEMENTATION BY MEMBER STATES OF THE POLITICAL DECLARATION AND PLAN OF ACTION ON INTERNATIONAL COOPERATION TOWARDS AN INTEGRATED AND BALANCED STRATEGY TO COUNTER THE WORLD DRUG PROBLEM, at ii, [http://www.incb.org/documents/Publications/E-Publication\\_FINAL.pdf](http://www.incb.org/documents/Publications/E-Publication_FINAL.pdf) (last visited Feb. 16, 2014) (emphasis added).

<sup>268</sup> Malinowska-Sempruch, *supra* note 262.

<sup>269</sup> David Bewley-Taylor, *The Contemporary International Drug Control System: A History of the UNGASS Decade*, 52 LSE IDEAS SPECIAL REP. GOVERNING THE GLOBAL DRUG WARS 49 (Oct. 2012) [hereinafter David Bewley-Taylor], <http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SR014/SR-014-FULL-Lo-Res.pdf> (Harm reduction is a category of programs and policies that seek to reduce the harmful consequences of both substance abuse and drug policies, doing so irrespective of whether a user desists from drug use or not. Some examples of harm reduction strategies are syringe exchange, opioid substitution therapy, overdose prevention measures and safe injection sites.).

<sup>270</sup> *Id.* at 52-53.

Bolivia did this in 2012, objecting to provisions barring the growing of coca, a traditional practice in the region.<sup>271</sup>

A third approach is to ignore the treaties, or particular portions. Uruguay has done this, through its launching of a regulated marijuana system early this year. Arguably, Colorado and Washington, together with the Obama administration's accommodating position toward them, means the U.S. is on a similar path. One can argue that for non-national governments like U.S. states to act inconsistently with treaties is not necessarily a violation, because it's our federal government that has ratified the treaties, not the states. Arguments of that type feel too legalistic, though, whether or not they would be likely to win the day if it went to court.

Another argument the administration could use to argue that it is not violating the treaties is that it is pursuing the best option available to it for addressing federal interests within the constraints placed by federalism and the structure of U.S. law enforcement. The federal interests in turn are also treaty objectives. In this "best we can do" argument, the question is whether the government is doing as much as it should, in this new situation that voters in some states chose to create, a legitimately subjective judgment call. Alternatively, the U.S. can be seen to have indeed breached the drug treaties, but it lacks any available statutory or practical options to be able to mend that breach. Either way, little practically stands in the way for most countries wishing to move to legalization.<sup>272</sup>

The fourth approach is to argue that the drug control treaties are inherently in tension with the goals of other UN treaties, particularly those dealing with human rights. In this approach, a nation does not set aside drug treaty obligations lightly, but also does not set aside its human rights obligations in order to conform to them. The International Drug Policy Consortium has identified eight human rights areas,

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<sup>271</sup> Phillip S. Smith, *Bolivia Rejoins UN Drug Treaty, Sans Coca Ban*, STOPTHEDRUGWAR.ORG (Jan. 11, 2013), [http://stopthedrugwar.org/chronicle/2013/jan/11/bolivia\\_rejoins\\_un\\_drug\\_treaty\\_s](http://stopthedrugwar.org/chronicle/2013/jan/11/bolivia_rejoins_un_drug_treaty_s).

<sup>272</sup> INT'L NARCOTICS CONTROL BOARD, <http://www.incb.org> (last visited Nov. 5, 2013) (While the INCB describes itself as a "quasi-judicial monitoring body for the implementation of the United Nations international drug control conventions," it has no sanctioning powers that would be likely to affect the U.S.); Single Convention, *supra* note 258.

involving nine UN treaties, in which violations are being committed in the name of drug control.<sup>273</sup>

This fourth approach is gaining rhetorical force. Emboldened by official support in their own countries, for example, Latin American drug reformers have made the argument a refrain. Daniel Mejía says that the drug treaties should not trump other treaty obligations, including human rights.<sup>274</sup> Uruguayan congressman Julio Bango states, “If I have to choose what international treaty I prefer to violate, it would be drugs rather than human rights.”<sup>275</sup> At least one major human rights organization, Human Rights Watch, has now staked out the position that criminalization of personal drug possession is a human rights violation.<sup>276</sup>

U.S. action or lack thereof with regard to the treaties would have consequences. Traditionally a hardline presence in the issue, U.S. drug diplomacy has lost much credibility in the wake of the state marijuana legalization votes and the subsequent response by the Obama administration. But turning back the clock on drug policy reform would be inconsistent with the direction the president has taken in his second term, if not his first, and is probably impossible in light of the direction U.S. public opinion is heading. Regression in U.S. drug policy would also constitute undesirable policy, as argued throughout this Article. A better course leading up to UNGASS would be for the administration to update its international drug policy stances to reflect the reality of where drug policy is heading domestically.

Conversely, for the administration to ignore the drug treaties through its domestic policies, but to leave diplomatic stances in place increasingly at odds with them, would further damage U.S. diplomatic

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<sup>273</sup> CHRISTOPHER HALLAM ET AL., INT’L DRUG POLICY CONSORTIUM, DRUG POLICY GUIDE, 2ND EDITION 5-6 (Mar. 2012), [http://dl.dropboxusercontent.com/u/64663568/library/IDPC-Drug-Policy-Guide\\_2nd-Edition.pdf](http://dl.dropboxusercontent.com/u/64663568/library/IDPC-Drug-Policy-Guide_2nd-Edition.pdf).

<sup>274</sup> Forum entitled Open for Debate: A Latin American Proposal for Drug Policy Reform at Wash. Office on Latin America (Oct. 18, 2013) (paraphrase from forum attended by the author; Mejía is Director of the Center for Studies on Security and Drugs at the University of the Andes and President of the Government of Colombia’s Advisory Commission on Drug Policy).

<sup>275</sup> Roundtable: Models of Marijuana Regulation from Around the World in International Drug Policy Reform Conference Program & Agenda at Washington D.C. (Oct. 26, 2013) (paraphrased from panel attended by the author).

<sup>276</sup> Speech by HRW Deputy U.S. Programs Director Maria McFarland Sanchez-Moreno, Beyond Violations: Human Rights Strategies for Challenging Drug Laws, in International Drug Policy Reform Conference Program & Agenda 27 (Oct. 23-26 2013) (paraphrased from panel attended by the author).

credibility. It would also represent a significant inconsistency on the part of the administration, reflecting on the president's historical record. Similarly, denouncing the drug conventions and then rejoining with reservations about the marijuana and/or drug criminalization provisions, while legal, should also be seen as a last resort, a step for our government to take only if it has first sought revisions to the treaties but failed to obtain them.

#### E. *Governments Can Open Up Space for Experimentation*

In evaluating paths for moving forward – both their wisdom and their prospects – it is not necessary to contemplate a social consensus favoring full legalization of all drugs. All that is needed is a willingness to allow for flexibility and experimentation. Former U.S. President Bill Clinton recently characterized the drug debate as complex, and said he didn't think hard drugs should be treated the same as marijuana.<sup>277</sup> But he also said that drug policy “should be decided by people in each country, based on what they think is right. . . . We have a process in America for doing it that's being revisited state-by-state. And Latin America is free to do the same thing.”<sup>278</sup>

A flexible and cautious process, as seen from the 2014 vantage point, would naturally include:

- revision of U.S. federal law to facilitate state experiments with marijuana legalization;
- revision of the UN drug treaties to permit nations to experiment with legalization systems without running afoul of them;
- reform of the international drug control agencies, with particular attention to incorporating human rights concerns into drug policy;
- crafting of and experimentation with various regulatory systems for marijuana;
- exploration of regulatory frameworks for drugs besides marijuana, including licensing in the U.S. and elsewhere of pilot heroin maintenance programs; and
- pursuit by governments of a wide range of drug policy reforms which may stop short of legalization, but which are politically

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<sup>277</sup> *Bill Clinton Says Attitudes Toward Legalizing Marijuana Loosening*, UNITED PRESS INT'L (Dec. 4, 2013), [http://www.upi.com/Top\\_News/US/2013/12/04/Bill-Clinton-says-attitudes-toward-legalizing-marijuana-loosening/UPI-92131386157442/](http://www.upi.com/Top_News/US/2013/12/04/Bill-Clinton-says-attitudes-toward-legalizing-marijuana-loosening/UPI-92131386157442/).

<sup>278</sup> *Id.*

feasible in the short term, and which will have humanitarian and other policy benefits while expanding the landscape of policy possibilities for the future.

Robin Room and Sarah MacKay lay out options for reforming the international drug treaties:

- Amend provisions obligating nations to restrict the personal use of drugs to medical and scientific use.<sup>279</sup>
- Amend provisions obligating nations to restrict drug markets to medical and scientific purposes.<sup>280</sup>
- Remove specific substances (such as marijuana) from the reach of the treaties, or changing their classification.<sup>281</sup>
- For cannabis, opium and coca, depending on what kind of markets are desired, revise provisions that obligate state control of production and wholesale distribution.<sup>282</sup>

With respect to marijuana specifically, Bewley-Taylor, Tom Blickman and Martin Jelsma note additional options for the treaties, including:

- Review by the World Health Organization of cannabis scheduling, either downgrading its classification to a less restrictive category or removing it from treaty scheduling altogether. This would require approval through a vote by the CND.<sup>283</sup>
- Two or more countries modifying the treaties “inter se,” meaning with respect to their obligations to each other, without renouncing their obligations under the treaties to other countries.<sup>284</sup>

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<sup>279</sup> ROBIN & SARAH MACKAY, BECKLEY FOUND. , ROADMAPS TO REFORMING THE UN CONVENTIONS at 33-34 (2012), <http://www.beckleyfoundation.org/Roadmaps-to-Reform.pdf> (See Articles 4(c), 9(4), 23, 26, 28, 29, 30, 31, 33 and 36 for the 1961 Convention; Articles 5, 7, 8, 9 and 22 for the 1971 Convention; see Articles 3(1) and 3(2) for the 1988 Convention).

<sup>280</sup> *Id.* at 40-41 (see Preamble and Articles 1, 4(c), 9(4), 12(5), 19, 20, 21, 21 bis, 30(2)(b), 33 and 36 for the 1961 Convention; see Articles 5, 7, 9, 16(4) and 22 for the 1971 Convention; see Articles 3(1) and 3(2) for the 1988 Convention).

<sup>281</sup> *Id.* at 11.

<sup>282</sup> *Id.*

<sup>283</sup> DAVE BEWLEY-TAYLOR, TOM BLICKMAN & MARTIN JELSMAN, THE RISE AND DECLINE OF CANNABIS PROHIBITION: THE HISTORY OF CANNABIS IN THE UN DRUG CONTROL SYSTEM AND OPTIONS FOR REFORM 60-61 (2014), [http://www.tni.org/sites/www.tni.org/files/download/rise\\_and\\_decline\\_web.pdf](http://www.tni.org/sites/www.tni.org/files/download/rise_and_decline_web.pdf).

<sup>284</sup> *Id.* at 65-66. Inter se agreements are normally made in order to establish higher standards among specific countries than are specified by the global treaties themselves, the authors explain. But with respect to the drug treaties, cooperating nations might use the avenue to legalize importing and exporting between their countries for purposes allowed under their national laws; or

Law Enforcement Against Prohibition (hereinafter “LEAP”) has called for repeal of the Convention on Psychotropic Substances and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and has proposed an amended version of the Single Convention on Narcotic Drugs. The LEAP amendment replaces the convention’s prohibitionist language with language addressing a range of regulatory areas such as price and tax measures, regulating packing and ensuring quality control, age limits and so forth; as well as supply-side measures taken against illicit trafficking (for example, gray-market production smuggling in violation of a government’s regulations).<sup>285</sup>

Irrespective of any changes to treaty language, steps the U.S. and other governments can take in preparation for UNGASS include:

- Seek CND resolutions supporting harm reduction approaches to drug policy, calling for sentencing reform up to and including decriminalization and depenalization approaches, as well as affirming their legality under the treaties.
- Seek CND resolutions calling for comprehensive integration and prioritization of human rights concerns into international and national drug policies.
- Internationalize the administration’s domestic sentencing reform initiatives, perhaps by incorporating them into the judicial reform assistance programs the U.S. and UN provide to developing countries.
- Engage with hardline countries like Russia to negotiate international drug policy reforms while encouraging changes to their own internal drug policies.
- Seek greater openness on the part of the international drug bureaucracies, perhaps the most closed to scrutiny of all UN agencies.

### CONCLUSION

The foregoing discussion has explored the uncertainties, some of the (limited) evidence available, and the forces likely to be in play affecting drug use post-legalization. When it comes to actually setting policy,

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to establish that a legalization regime by one or more countries in such a group is not viewed as a treaty breach for the purposes of their relationships with each other.

<sup>285</sup> LAW ENFORCEMENT AGAINST PROHIBITION EDUC. FUND, PROPOSED AMENDMENT OF UNITED NATIONS DRUG TREATIES (2014), [http://www.leap.cc/wp-content/uploads/2014/03/LEAP\\_UN\\_Treaty\\_Amendment\\_2.26.1421-1.pdf](http://www.leap.cc/wp-content/uploads/2014/03/LEAP_UN_Treaty_Amendment_2.26.1421-1.pdf).

“values” inevitably inform any judgment calls. How much state control over a person’s personal choices is appropriate? How much control over a real or hypothesized future industry? How much harm due to government interventions can ethically be tolerated – harm suffered by whom, and to help whom? Does the burden of proof of help versus harm lie on a current policy, or with a new proposed policy?

Along with weighing costs and benefits, it is also important to set boundaries. Some of prohibition’s harms discussed here are of an extreme nature, in their overall impact as well as the harm they focus onto limited groups. This naturally calls for skepticism as to whether greater harms are actually being prevented by incurring them. But it also calls for hard ethical consideration as to whether it is appropriate to incur such harms, *whether or not* they comparably reduce other harms.

Three of the harms of prohibition particularly require a recalibration of society’s thinking on the issue. These are problems highlighted above: the drug trade’s financing of civil conflict (a security issue); the concentration of violence and disorder by prohibition in areas of our inner cities (a crime, racial justice, and economic issue); and the spread of infectious, deadly diseases.

Of these, prohibition’s security issues strike me as a particularly heavy lift to justify. Suppose it could be known in some way that drug trade money at prohibition levels would make the difference in building a simmering civil conflict up to the level of full-blown civil war, with one or more of the human catastrophes that can go with war – dislocations, warlord-ism, failure of the food distribution or medical systems. Could one persuasively argue, knowing that in advance, for the policy to proceed as a strategy to reduce drug abuse – most such abuse being suffered in countries other than the one being ruined? Conflicts are invariably complex matters driven by more than one cause. But the drug trade has especial importance in determining funding levels for insurgents in many cases, and so the hypothetical is relevant.

It’s one thing to say that people should be willing to do without certain drugs, even if they are able to handle them well, in order to guard against the problems arising when some people are more adversely affected by them. It’s another thing to punish people when they don’t accept the legislated restriction. It’s yet another to destroy people over it, as some of the harms of prohibition acknowledged by the scholars cited here can fairly be described as doing. Similarly, it is one thing to tolerate the kind of gray market, smuggling and so forth, that regulation

of legalized drugs is bound to leave us with. But it's another to maintain policies that threaten the very viability of some communities. And it's yet another to jeopardize the stability of entire countries.

For these reasons, moral and practical concerns require a transition away from the global drug prohibition system, which has failed to meet the necessary burden of proof for coercive intervention, replacing it with a set of state and national policies that instead seek to reduce substance abuse through regulation and public health programs.

In the meanwhile, officials should acknowledge that things have changed, at least with regard to the marijuana issue, and adapt their approaches. It is wrong, maybe even wrongful, to continue carrying out arrests and prosecutions as usual, seeking years or decades of prison time in many cases, over a law which a majority of the public demonstrably doesn't agree with and for which there are known viable alternatives. If discretion in criminal justice means anything, now is the time for it. Of particular urgency is the need for discretion to be more judiciously exercised in the context of the shift from prohibition to regulation that is unfolding in the legalization and medical marijuana states. An individual who runs afoul of some rule, but who largely is working within a state-established framework, should not be the subject of a SWAT raid and a mandatory minimum prosecution. There is room in the law for decency – there is a need for it.

With world leaders now for the first time calling for a reexamination of prohibition, it is time for media, civil society organizations and other leaders to take the opportunity to support them. Governments in turn should take the opportunity that this time presents, by taking concrete steps to incorporate flexibility and greater attention to human rights into national and international drug policies. And we should re-examine our own assumptions about the issue in the process. The people of developing countries and inner cities now troubled by the drug trade, the addicted suffering great harm due to prohibition, countless others affected by the drug situation in some way, all deserve this from us. The prohibition debate is past due.