



**An Economic Analysis of Prohibition and Harm
Reduction, and Application of Economic Theory to the
Polish Context**
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CONTENTS

EXECUTIVE SUMMARY	3
INTRODUCTION	5
1. Overview.....	5
2. Structure	6
CHAPTER I: PROHIBITIVE POLICY	8
1: Introduction and Overview of Issues	8
2. Economic Analysis of Crime and Punishment	8
3. Rational Addiction and Human Capital Considerations	13
4. Law and Economics Explanation and Critique of Prohibition: Overview	22
4.1. Justifications and Critique	22
4.2. Characteristics of Unjustified Prohibitive Policy.....	28
4.3. Concluding Economic Analysis- Prohibition Punishment: Everybody Loses	31
5. Other Considerations of Why We Prohibit Drug Use	34
5.1. Introduction to Harm Related Arguments.....	35
5.2. Considerations of Critique of Both Categories of Harm Related Arguments	43
5.3. Concluding Notes on Invalid Harm Arguments.	48
5.4. Morality and Deviance: General Considerations.....	49
CHAPTER II: HARM REDUCTION AND APPLICATION OF ECONOMIC THEORY TO THE POLISH CONTEXT ...	55
1. Overview of Main Issues.....	55
2. Harm Reduction Overview	55
2.1. The Subject of Harm Reduction And Characteristics of Harm Reduction	55
2.2. Applying Economic Theory to Harm Reduction	58
2.3. Concluding Thoughts: Harm Reduction as a Pragmatic Response	64
3. Intersectionality and Combination of Approaches: History of Drug Regulation in Poland	65
3.1. Overview.....	65
3.2. The Beginning: 1985-1997	65
3.3. 1997-2000: Public Health, But a Big Step Towards Prohibition	66
3.4. 2000 Amendments: The Real Beginning of Polish Prohibition	69

3.5. 2005 Act of Law on Counteracting Drug Addiction and 2006 Amendments.....	71
3.6. Whole History of Polish Drug Law Synthesis	73
CONCLUSION:	80
BIBLIOGRAPHY	85

EXECUTIVE SUMMARY

Prohibitive drug policies exist in varying degrees throughout much of the world. Economic theory is applicable to prohibitive theory and practice. Rational choice theory can be used to explain a variety of behavior, including criminality and drug addiction. Although the common conception of drug addiction is that it is not a choice, this paper shows that is a choice taking place under conditions of future discounting and a lack of willpower, with powerful desires influencing behavior. Drug addiction is also a function of having low human capital and low opportunity costs for one's time. Those with jobs and stable families are less likely to do drugs. Drug addiction is not only caused by human capital deficiency, but leads to lowered human capital.

Prohibitive policies aim to deal with the problem of "drug-related harm" and drug addiction. They are unjustified by economics and are not pragmatic policies, as examples will show. They are a form of stigmatization of the drug user, and the method of imprisonment actually fails to deter and leads to the increased likelihood of future drug use by lowering the human capital of the prisoner and those who rely on him, such as his family. Further, counterexamples show that prohibitive policies increase rather than reduce harm, and that more open-minded pragmatic solutions can alleviate this harm. The real justification for drug prohibition lies in morality, and drug prohibitions are a disenfranchisement and marginalization of people who do not agree with conventional morality.

Harm reduction is a response to the problem of drug related harm that is rooted in pragmatism. Harm reducing policies exist within a prohibitive regime, and are the opportunity cost of prohibitive policies. When prohibitive policies are present, there is more harm to be reduced, and less funding. Harm reduction aims to make the drug user safe in the present, and

help integrate the drug user into society. The drug user is treated as a sick patient, and is not moralized for their behavior. As harm reduction has the capability and proven successes to help drug users orient themselves away from future discounting and willpower lapses, thereby decreasing drug addictive tendencies, it is a preferable form of drug policy.

Polish drug law is a case of an interesting evolution from an almost purely public-health regime, towards a repressive regime with prevalent harm reduction policy as well. Polish policy at the same time invests in human capital of drug users, and aims to imprison and stigmatize them. Recent episodes show that this counterproductive commitment is only increasing, and the current environment of moralization in the Polish political situation indicate how dangerous and counterproductive this is.

Harm reduction has achieved success in the most unlikely of policy environments, as Polish policy becomes more repressive. Prohibitionists cannot take credit for the successes of harm reduction in Poland, because prohibitive policy operates as a barrier to harm reduction, and drives drug users away from harm reduction efforts. The success of harm reduction in Poland, despite the repressive laws, is a tribute to the effectiveness of harm reduction that must be heeded by any country serious about reducing drug-related harm.

INTRODUCTION

1. OVERVIEW

Injection drug use and abuse has proven to be a widespread problem¹, and the policy solutions that have developed lend themselves to an economic analysis. This paper applies economic theory to two different methods of dealing with the Polish injection drug usage problem: the prohibition method and harm reducing public health oriented methods.

Many different justifications are used for drug abuse regulations, including preventing drug-related harm to users and to others², and moral reasons³. This paper analyzes these justifications from a theoretical framework and in the Polish context. These justifications lead to regulations, but regulation is not a one-way street; as with any legislative solution, there are many different routes to solve the problem, including criminalization but also encompassing many less intrusive measures (as criminalization is usually considered the legislator's last resort)⁴. This paper sheds light on the economic implications of using two such regulatory strategies.

Drug prohibition and public health oriented methods will be evaluated using economic theory. They will be evaluated according to economic theory as regards their success in deterring drug usage and drug related harm, and the consequences of how each program treats

¹ Barton, Adrian, Illicit Drugs: Use and Control, London: Routledge, 2003. The following quote exemplifies the scope of the issue. "Globally, illicit drugs are one of the key issues and problem areas for governments and society, leading to pressure on governments to solve the problem", p.2.

² Posner, Richard S., Economic Analysis of Law, Fifth Edition, New York: Aspen Law and Business, 1998.

³ Whitebread, Charles H, "Freeing Ourselves from the Prohibition Idea in the Twenty-First Century", Vol. 33 Suffolk University Law Review 235, 2000.

⁴ Jareborg, Nils, "Criminalization as a Last Resort (Ultima Ratio)", Vol. 2 Ohio State Journal of Criminal Law 521, Spring, 2005. See also Barton, 2003, for a discussion of whether or not illicit drug use is a medical or law and order problem. It is evident from the word illicit that criminalization is assumed. p.2.

drug users from a human capital perspective. This method of evaluation has been chosen because both harm reduction and drug prohibition seek to decrease the harms associated with drug usage⁵ by different means. They must be evaluated on the basis of whether or not they advance these goals, and economic theory will help to clarify these issues.

2. STRUCTURE

In order to analyze these different styles of intervention in the Polish context, the first chapter will first give a conceptual overview of law and economics terminology regarding rational choice, the decision to commit a crime, and deterrence and imprisonment. This discussion will next extend to human capital and rational addiction. These economic theories will be used as a framework for evaluating and understanding prohibitive policies. After establishing that prohibitive drug policies lack economic logic and lead to an increase in current and future drug related harm while doing little to reduce drug addiction, the prevailing justifications for these policies will be discussed. It will become clear that moral disapproval plays a major role in the predominance of prohibitive policies, that is, prohibitive policies are the result of moral disapproval and arguments based on perceived harm, harm which is exacerbated by the very policies intended to combat it.

The next chapter begins with an explanation of harm reduction and endorsement of harm reducing public health oriented methods of drug regulation. This chapter contains a policy recommendation proposing a shift from the morality based prohibition of drugs to a more

⁵ For a brief summary of the viewpoint that prohibition solves the problems related to drug use, see Miron, Jeffrey A., and Zwiebel, Jeffrey, "The Economic Case Against Drug Prohibition", Vol.9 The Journal of Economic Perspectives No.4. Autumn 1995, 175-192. For a brief summary of both sides of this debate, but focusing mainly on harm reduction, see Parts, Mark, "Disease Prevention as Drug Policy: A Historical Perspective on the Case for Legal Access to Sterile Syringes as a Means of Reducing Drug-Related Harm", 24 Fordham Urb. L.J. 475, 1997. This paper will examine both of these conflicting views.

rational and economics based harm reduction policy. Harm reduction will be presented as an investment in human capital striking at the root of drug related harm and capable of deterring future injection drug use and helping ex-addicts stabilize their condition. The evolution of Polish drug law until present day will be used as a case study for analysis in regards to its emphasis on punishment and deterrence of drug users at each stage, as well as the human capital implications of each law. It must be understood that regulatory strategies overlap and are not mutually exclusive. Harm reduction efforts are public health oriented and exist within either a public health or prohibitive regime; it is just a matter of their relative priority, and this paper will show that when they exist together they counter each other because prohibitive laws present many problems from a human capital perspective and are a barrier to harm reduction efforts.

The conclusion presents a summary of main points and final thoughts and lessons to learn from the Polish context. Polish drug policies are increasingly contradictory, and Polish harm reduction has been successful despite Polish law's evolution towards harsher drug policies.

CHAPTER I: PROHIBITIVE POLICY

1: INTRODUCTION AND OVERVIEW OF ISSUES

In order to understand the economic implications of different kinds of drug policies, beginning with prohibitive drug policy, it is necessary to first have an understanding of the economic analysis of law. This chapter begins with an economic explanation of criminal law. Next comes an explanation of human capital and rational addiction. This chapter next briefly sketches an outline of the main justifications and characteristics of a prohibitive regime, using the aforementioned economic criterion in both defining and critiquing prohibition from an economic point of view. The reader will be introduced to arguments in favor of prohibition, as well as the problems of prohibition, including evidence that prohibition is economically illogical and creates harm and future drug usage. These anti-prohibition arguments are themes that will be further expounded in later sections. When it becomes clear that there is no economic logic to prohibition, the prevailing justifications for prohibition, harm related arguments and morality, will be discussed and analyzed. This chapter will use examples to show that prohibitive policies are not necessary or effective, and that prohibitive laws are dependent on moral disapproval and circular reasoning.

2. ECONOMIC ANALYSIS OF CRIME AND PUNISHMENT

To further understand prohibition and, later, to understand public health approaches, it is first necessary to understand some behavioral law and economics. The starting point of any discussion of behavioral law and economics must be rational choice theory. Rational choice is

defined as that choice which is “deliberative and consistent”⁶. It can also be defined more precisely, in the sense that an individual will consume another unit of a good or an activity if the additional cost of that unit is outweighed by the additional benefits⁷. People’s behavior, even criminals, is rational in the sense that people look to the future and generally have consistent preferences over time⁸. If the reader doubts that their own behavior is rational, deliberative or consistent, or based on a maximization of preferences, try a simple experiment. One day, arrange to have somebody you have never met and who knows nothing about you spend the day with you without receiving payment, making all of your choices for you, very quickly. Not only will this person likely decline (as there is no benefit in this for them), but if they agree you will likely find that you have a very unpleasant day ahead of you⁹. Most likely you will end up with a better understanding of your own preferences and the way that you choose your behavior, and this experiment shows the value of deliberation and a person’s preferences as regards decisions.

The literature on economic analysis is clear about when rational people will commit crimes. A person will commit a crime when the expected costs are outweighed by the expected benefits¹⁰. The criminal law functions to set penalties, or prices, for illegal behavior¹¹. These penalties function as prices of behavior equal to “the discounted sum of the earnings foregone

⁶ Ulen, Thomas S, “Rational Choice Theory in Law and Economics”, in The Encyclopedia of Law and Economics, Vol.1, The History and Methodology of Law and Economics, Bouckaert, Boudewijn and De Geest, Gerrit, eds., Cheltenham: Edward Elgar, 2000, 791.

⁷ Medema, Steven G., and Mercurio, Nicholas, Economics and the Law: From Posner to Postmodernism, New Jersey: Princeton University Press, 1997.

⁸ Becker, Gary S, “The Economic Way of Looking at Behavior”, Vol. 101 The Journal of Political Economy No.3. June 1993. pp.385-409.

⁹ If you really enjoy this day, you may have found your soul mate.

¹⁰ Posner, Richard S, 1998. For a critical discussion as well as a summary of the law and economics approach to crime, see also, Carnis, Laurent, “Pitfalls of the Classical School of Crime”, Vol. 7 The Quarterly Review of Austrian Economics, No.4. Winter 2004, 7-18.

¹¹ Medema, Steven G., and Mercurio, Nicholas, 1997.

and the value placed on the restrictions in consumption and freedom”¹². For instance, the price of my decision to kill my neighbor may be ten years in prison. This prison sentence will be a bigger cost to the man who makes \$300,000 a year than to the unemployed man, because of the sum of foregone earnings. Losing ten years of work and freedom is the opportunity cost of being imprisoned. Opportunity cost is “the benefit foregone by using a resource in a way that denies its use to someone else”¹³. In this case, the resource (the person) is foregoing other benefits (work to the tune of three million dollars and the utility from their freedom and other productive activities they may engage in) and is spending ten years in prison¹⁴.

If rational wealth maximizing individuals will engage in crime when the benefit of the crime outweighs the costs, deterrence theory seeks to stop people from engaging in future crime by raising the expected costs of crime. When the prospective criminal calculates the costs and benefits of a crime, a higher cost of crime will lead to a decrease in crime. For instance, if the benefit of a crime is 10, the criminal may engage in it if the cost is 5 but not if the cost is 11. This criminal has been deterred. A simple equation can help one understand the calculations criminals undergo. The expected cost of a crime is the product of the sanction, represented by y , multiplied by the probability of getting caught (z)¹⁵. A calculation of costs must also include the actual financial costs associated with the crime, including the time spent committing the crime and planning the crime¹⁶. When the expected cost of the crime is lower than the benefit, then the rational person will engage in the crime.

¹² Becker, Gary S, “Crime and Punishment: An Economic Approach”, Vol.76 The Journal of Political Economy No.2. Mar-Apr.,1968, 179.

¹³ Posner, 1998, 6.

¹⁴ Thinking of humans as resources will have important implications as this analysis continues.

¹⁵ Becker, 1968.

¹⁶ Becker, 1968. See also Carnis, 1993.

Deterrence theory works by raising either the expected sanction or the probability of getting caught to make a higher expected cost, and sometimes by raising both. When there is public enforcement of laws (i.e. police enforcing laws), sanctions are rarely applied because people are rarely caught¹⁷. It is intuitively understood that criminals very often get away with crime in most societies, as the police do not see everything that happens, and many crimes go unreported. This style of enforcement is in line with the reasoning of Gary Becker, who argued that it is economically efficient to save money and achieve the same level of deterrence by lowering the probability of law enforcement while raising the sanction¹⁸. In this way, the cost of the crime remains the same and the level of deterrence should be the same, while the money spent on enforcement is lowered because less judges and police are hired to achieve the same deterrence of crime. For example, a sanction of 50 years with a 1% probability of apprehension is preferable to a sanction of 10 years with a 5% probability. One tenth of the amount of funding and effort is spent on enforcement, and one tenth of the criminals will be caught but sentenced ten times as harshly. Both should achieve the same amount of deterrence. The two different ways of deterrence work in theory because one may no longer commit the crime if the chances of getting caught are suddenly increased, and also one may no longer commit a crime if they find out they may be imprisoned for a longer period of time.

A major problem with crime control policies is that they do not deal individually with people who have different degrees of preference to risk. People are characterized as either risk-

¹⁷ Shavell, Steven, "Law Versus Morality as Regulators of Conduct", In "Essays by the Founding Fathers". Parisi, Francesco and Charles K. Rowley, eds. p.403. UK: Edward Elgar, 2005.

¹⁸ Becker, 1993.

averse, risk preferring, or risk-neutral¹⁹. For a risk-averse criminal, a 50% probability of receiving a 2 year sentence is worse than a 100% probability of receiving a one year sentence. For the risk-averse criminal, the disutility of the sentence rises as the sentence length increases²⁰, and they are more deterred as the potential sentence rises. Conversely, for the risk-preferring, a 50% chance of a 2 year sentence is more preferable to a 100% chance of a one year sentence, although the expected sentence is still one year. For a risk-neutral criminal, it makes no difference whether the sanction or probability of sanction is increased. The risk-averse criminal is more forward looking than the risk-preferring in the sense that their future time is more valuable to them, and they will not risk losing a larger amount of future time in prison. However, when criminals prefer risk, deterrence theory may cause sentences to rise but crime to not decrease proportionally. It is considered economically efficient to increase the cost of crime by lowering the probability and raising the sentences, but this does not greatly deter risk-preferring criminals, and the literature points to the fact that many criminals prefer risk²¹. Risk-preferring criminals, deterred at a lower rate as the certainty of punishment decreases and severity increases, fit more the mold of the criminal envisioned by older deterrence theorists, such as Cesare Beccaria. Beccaria argued that it is not the magnitude of punishment, but the certainty, that deters criminals²². In essence, knowing with certainty that one will receive even a relatively minor punishment is enough to deter, according to this model. The risk-preferring

¹⁹ Shavell, Steven, Foundations of Economic Analysis of Law. London: The Belknap Press of Harvard University Press, 2004. Also see Posner, 1998.

²⁰ Shavell, 2004.

²¹ Becker, 1968.

²² Monachesi, Elio, "Pioneers in Criminology, IX, Cesare Beccaria (1738-1794)", Vol.46 The Journal of Criminal Law, Criminology, and Police Science No.4, Nov.-Dec. 1955, 439-449.

tendencies of criminals may lead us to doubt the truth of the premise that low probability, high sanction punishments are effective methods of deterrence²³.

3. RATIONAL ADDICTION AND HUMAN CAPITAL CONSIDERATIONS

The previous discussion asserted that many criminals are risk preferring, in contrast to more forward-looking risk-averse people. This section will go further with this analysis, showing that drug addicts are behaving rationally, but are not engaging in forward-looking thinking and are choosing based on their powerful appetites. The human, including the drug addict, as a resource will be considered and so will the impacts of drug addiction on human capital and the human capital deficiencies that lead people to become addicts, and to use criminal means to support their addictions.

A conceptual problem occurs when considering the drug user as a rational wealth maximizer. It stems from the intuitive understanding that people do not choose or desire to be addicts. In the words of the famous American Partnership for a Drug Free America commercial I grew up listening to, “Nobody ever says ‘I want to be a junky when I grow up’”²⁴. When evaluating costs and benefits, people do not *ex ante* choose addiction; it is generally an unplanned consequence of drug usage²⁵.

²³It will be shown in later sections that prohibitive policies perfectly fit the model of low probability, high sanction deterrence schemes, and these conclusions instantly place in doubt the validity of this type of punishment scheme.

²⁴Grosvenor Jr, Charles R (webmaster), Commercials of the 90s. Available at <http://www.inthe90s.com/generated/commercials.shtml>. Accessed March 3, 2007.

²⁵To put this argument into perspective, a hypothetical mental calculation will be considered. It might go as follows: should I a) get a job and save money, or b) spend money and take loans to go to a university (and get a better future job), or c) spend all my money on drugs, earn a long criminal record, and possibly contract HIV and other health problems? Most people would choose option a) or b). However, the strength of rational choice theory is not that it holds true over every circumstance, or that it can explain exactly how people become drug addicts, but that it has predictive value.

As drug addiction is an unplanned and harmful²⁶ by product of the decision to use drugs, the process of addiction must be broken down and some factors related to it analyzed. The decision to try drugs is influenced by socio-cultural models and the behavior of others²⁷, and a person's addictive tendencies increase when a stressful event occurs in life²⁸. Factors such as familial upbringing, socioeconomic class, parental monitoring and exposure to the drug use of others make a person more likely to become addicted to a drug²⁹. Age is also a factor, as the prevalence of most drug usage declines with age³⁰. Addicts are suffering from difficult, stressful times and addictive behavior has been linked with all of these afore mentioned factors, which I will characterize as human capital deficiencies. Human capital refers to a person's ability to earn income or acquire other benefits³¹. Human capital investment is a process of "imbedding ... resources in people"³². Processes that increase human capital include good parenting and

²⁶ For the purpose of this discussion drug addiction is harmful primarily because it intoxicates the person, making them economically less productive before, during and after drug usage. This section also discusses impact of drug addiction on freedom of choice and how addiction leads one to rationally make harmful decisions. Later sections will discuss health implications, primarily in a prohibitive regime, and possible effects on the mind, including the belief that drugs make people violent.

²⁷ Saah, Tammy, "Review: The Evolutionary origins and significance of drug addiction", Vol. 2 Harm Reduction Journal No.8, 2005. Also available at www.harmreductionjournal.com/content/2/1/8.

²⁸ Becker, Gary S, and Murphy, Kevin M., "A Theory of Rational Addiction", Vol.96 The Journal of Political Economy No.4, Aug. 1988. See also Saah, 2005.

²⁹ Saah, 2005.

³⁰ Laub, John H., and Sampson, Robert F., "Understanding Desistance From Crime", In Vol.28 Crime and Justice: A Review of Research, Ed. by Michael Tonry, London: University of Chicago Press, 2001. This article further describes conditions which are linked to desistance from criminal activity, including "marriage, jobs and changing one's milieu", p.29, and economically these can be applied towards decision not to use drugs, or to quit, because they create higher opportunity costs for drug usage, and may provide a support network which is important for quitting drugs. For further information about the importance of support networks to drug remission, see Biernacki, Patrick and Stall, Rob, "Spontaneous Remission from the Problematic Use of Substances: an Inductive Model Derived from a Comparative Analysis of the Alcohol, Opiate, Tobacco and Food/Obesity Literatures", Vol.21 International Journal of the Addictions, 1986, 1-23.

³¹ Becker, Gary S., "Human Capital", The Concise Encyclopedia of Economics. Liberty Fund, Inc. Ed. David R. Henderson, Library of Economics and Liberty. Available at <http://www.econlib.org/library/Enc/HumanCapital.html>. Accessed March 4, 2007.

³² Becker, Gary S, "Investment in Human Capital: A Theoretical Analysis", Vol.70. The Journal of Political Economy, No.5, Part 2: Investment in Human Beings, 1962, 9.

education. Processes that decrease human capital include drug usage or dropping out of school. For instance, if I am born poor, in a neighborhood where I see people doing drugs on the street, with an absent father and a working mother, I will not have the kind of resources embedded in me, in terms of knowledge, skills, and moral upbringing, as the upper class child who will be born into a life of leisure and advantage, with a first-rate education and a stable home and family. Regardless of if we are born at the same moment, I start out behind this child in human capital investments. When human capital is low, people are more likely to try a drug because the opportunity cost of their time is lower and they will derive temporary pleasure from this drug that is greater than the pleasure they might experience otherwise. There are fewer incentives to maintain healthy behavior, and fewer productive uses of time for people with low human capital. In a strict economical sense, if I have a job and education I may not get high because I do not want to become intoxicated and miss my job, losing out on the current earnings and possibly the future earnings³³. The person who does not have a job, family or education is more likely to try and become addicted to drugs than the person who has a high paying job and loving familial relationships because families and steady work provide incentives that help people abstain from drug use.

Yet another important factor that is engaged in the process of becoming addicted is the person's degree of future discounting. Future discounting means disregarding the harmful future

³³ Robles, Elias and Silverman, Kenneth, "Employment as a Drug Abuse Treatment Intervention: a Behavioral Economic Analysis", NBER (National Bureau of Economic Research) Working paper No. 6402, February 1998 (copy on file with author). This article points to the research showing that maintaining a job provides incentive to quit or abstain from drug usage by raising the opportunity cost of the worker's drug usage, although this analysis in no way suggests that people who have jobs will unanimously choose to abstain from drugs. However, having a job must be treated as a factor that is capable of decreasing drug usage.

effects of one's behavior³⁴. For instance, if I begin smoking after I already know about the health problems associated with smoking, I am discounting the future. Future discounting is also associated with addictive behavior in that often people who are addicted are not concerned about the health problems of their addiction, and it takes a degree of future discounting to even experiment with drugs, knowing that it is possible to become addicted. The people who become addicts are those that did not take seriously the future consequences when they experimented (the common belief that "I can quit when I want to"), and were also influenced by the factors in the preceding paragraph, such as their familial upbringing, stressful events and socioeconomic status. Future discounting is more common amongst young and poor people, who have less human capital and a lower immediate opportunity cost for their time³⁵. This is not to say that every young and poor person is discounting their future, and this is not to say that people are not capable of decreasing their future discounting tendencies, but that these factors are crucial in determining whether use initially occurs, and if it leads to addiction.

George Loewenstein offers a complementary and valuable framework for understanding addiction³⁶, where willpower attempts to constrain our appetites when they are in conflict with what we know is right and or healthy. This theory explains the behavior of people who continue with addictive behavior, knowing it is not in their best interest, because their current desire is very strong and their willpower is weak. Willpower is related to future discounting, because if I

³⁴ Becker, Gary S, Grossman, Michael and Murphy, Kevin M., "Rational Addiction and the Effect of Price on Consumption", Vol.81 The American Economic Review No.2, Papers and Proceedings of the Hundred and Third Annual Meeting of the American Economic Association, May, 1991, 237-241.

³⁵ The decision to disinvest in one's own education, for example, which may be one of the opportunity costs of drug addiction, is a steep future opportunity cost, but this is not relevant or compelling upon first glance to the future discounting youngster, who is concerned with immediate utility.

³⁶ Loewenstein, George, "Willpower: A Decision Theorist's Perspective", Vol.19 Law and Philosophy, 2000, 51-76.

am engaging in future discounting, I am not trying to build up my will to abstain from a behavior that I know may cause me harm in the long run. Future discounting is the reason that “exertions of willpower always involve a sacrifice of *immediate* utility”³⁷, because by exerting willpower, I have put my future utility ahead of my present utility—if I had continued my future discounting, I would have chosen immediate utility and not exercised my willpower. For instance, as a smoker, I may know that smoking is harmful, and that I have a weak will to quit, and so continue smoking because of the immediate benefits it offers as well as the disutility involved with quitting. When I decrease future discounting is when I attempt to quit this behavior, and failures of willpower coincide with relapses and the return of future discounting. For instance, when after months of not smoking, my willpower fails and I try another cigarette, I immediately think “one cigarette won’t hurt, I can control myself”. My willpower has failed at the same time that I have discounted the future. Even unsuccessful attempts at quitting should not be characterized as irrational behavior, because they are still a response to a person’s desires at the moment, which is influenced both by their willpower and future discounting tendencies. In other words, at the moment of consumption the person’s motives and desire for consuming the addictive product are stronger than those for abstaining, but this is still a choice³⁸. This choice is rational on the part of the consumer, although it is not the choice an outside observer would see as the healthiest, and is governed by powerful desires and appetites of the body and mind³⁹.

³⁷ Loewenstein, 2000, 54.

³⁸ Skog, Ole-Jurgen, “Editorial: Addict’s Choice”, Vol. 95 Addiction No.9, 2000.

³⁹ Skog, 2000, explains this and argues that the addict always has a choice when he chooses to partake or abstain. Denying that there is choice when the person’s willpower fails and they indulge in their habit means that their behavior is strictly compulsive and not based on any element of freedom to choose—and the attempts of addicts to quit, among other rational behaviors, show that they do have choices, and that it must not only be considered a rational choice when they abstain.

Another important factor in addiction that cannot be overlooked is the nature of the substance itself. The theory of rational addiction explains addictive substances as goods that have the qualities of reinforcement and tolerance⁴⁰. Reinforcement means that current consumption influences future consumption. Tolerance means that over time there is less effect of the substance, and more is needed, and that past consumption plays a role in this process. This economic explanation is a simplification of the biological and physiological qualities that make a good addictive⁴¹. This theory can intuitively explain how people become drug addicts, because it explains the process whereby experimentation or casual usage can lead to addiction. This theory is not limited to just drugs, saying that anything, such as the internet, or work, can be addictive, and that addictions can be positive (such as exercising or eating healthy)⁴². For instance, the addict who is used to injecting 100 *zlotych* (25 euros) worth of drugs a day but injects 200 *zlotych* one day because this day she has more money, will need more drugs tomorrow because of the greater tolerance developed and the reinforcing characteristics of yesterday's usage on today's usage, and so on. The properties of reinforcement and tolerance show that her past usage will dictate that she needs more, and that to get the same satisfaction she will need the greater amount. It will be very difficult for her to engage her willpower and resist the cravings after taking a larger supply of drugs because of her higher tolerance, and the reinforcing characteristics of the previous day. The previous day, she may have discounted the future harmful effects of injecting a large amount of drugs. Similarly, it can work the other way around, that the person who wants to quit but is not yet ready to become completely abstinent

⁴⁰ Becker, Gary S, 1988.

⁴¹ For further information on the biological, physiological and social factors that lead to addiction, see Saah, 2005.

⁴² Becker, Gary S., 1988.

reduces their consumption and needs less in the future. People reduce their consumption before becoming abstinent in order to reduce the shock of not having their drug⁴³.

Raffi Balian and Cheryl White eloquently explain an alternative and related understanding of what it means to be addicted, in their work on defining a drug user⁴⁴. They define a drug user as one “whose life is circumscribed by her/his drug use” because “drug use is considered the most important issue by those who have power over our lives”, relating this to Howard Becker’s discussion of master status (the person’s most important characteristic), in the sense that drug usage becomes the most important feature of the person⁴⁵. This definition is applicable less to casual users than to serious addicts. The life of a drug addict is illustrated as a constant search for drugs and for ways to inject them, rife with all of the problems that can occur related to drug usage (specifically elaborated later in this chapter). When they say “whose life is circumscribed by her/his drug use”, they are referring not just to others labeling them only as a drug user, but to the fact that being a drug user can greatly influence one’s every decision. Getting a new job poses risks, because there can be discrimination based on their history and testing for drugs. The decision to travel, even for a short time, means leaving the supplier of the drug which the user is dependent on for their feeling of well being. In short, “every decision must factor in the variable of drug use and how everything will impact it”⁴⁶. Drug usage has become the essence of the drug user’s life. While the addict has the capacity to make choices, it must accommodate for

⁴³ Becker, Gary S., 1988. Further, from this example it can be inferred that when the user stops discounting the future, and tries to quit by slowly reducing their consumption, they know that when they finally become abstinent it will require less willpower than going all at once from a drug addict to abstinent.

⁴⁴ Balian, Raffi and White, Cheryl, “Commentary: Defining the Drug User”, Vol. 9 International Journal of Drug Policy No.6, 1998.

⁴⁵ Balian, Raffi, and White, Cheryl, 1998, 393. For information on master status, see Becker, H.S, “Labelling Theory Reconsidered”, in Outsiders: Studies in the Sociology of Deviance, New York: Free Press, 1973.

⁴⁶ Balian, Raffi and White, Cheryl, 1993, 393.

their powerful desire for drugs. The person's identity as a drug user is their "master status", or their defining characteristic⁴⁷.

Once a person has reached the status of addiction described above, their behavior as drug users and addicts is predictable from an economic perspective. "Addictions, even strong ones, are usually rational in the sense of involving forward-looking maximization with stable preferences"⁴⁸. The addict, like other people, has preferences and desires that they will attempt to maximize. For example, if the cost of drugs goes up drastically (which would stem from a dramatic decrease in supply), drug users may substitute with a legal drug⁴⁹ or permanently decrease their consumption⁵⁰. However, many addicts would also respond to a price increase by attempting to augment their income, possibly through illegal means⁵¹, especially as drug usage has such harmful effects on both present and future human capital that prevent them from earning money⁵². The amount of crime that occurs when users attempt to augment their means varies depending on the inelasticity of the demand for the drug⁵³, because if the price rises due to illegality and the demand does not respond proportionally and is still high (inelastic demand), the users must commit crimes to obtain their drug of choice. Instead of reducing consumption, when demand is inelastic people will commit crimes in order to obtain the necessary resources if they

⁴⁷ Becker, H.S, 1973.

⁴⁸ Becker, Gary S., 1988.

⁴⁹ Posner, Richard S, "The War on Drugs—Posner's comment", in "The Posner Becker Blog", March 20, 2005. Available at http://www.becker-posner-blog.com/archives/2005/03/the_war_on_drug.html. Accessed March 15, 2007.

⁵⁰ Becker, Gary S., 1991.

⁵¹ Posner, 1998, 267

⁵² Becker, Gary S., 1993, 392.

⁵³ Becker, Gary S., "The Failure of the War on Drugs", in "The Posner-Becker Blog", March 20, 2005. Available at http://www.becker-posner-blog.com/archives/2005/03/the_failure_of.html. Accessed March 14, 2007. Also see Friedman, David, "Drugs, Violence and Economics". Available at

http://www.daviddfriedman.com/Academic/drugs_and_violence/Drugs_and_violence.html. Accessed March 3, 2007.

do not have them. When the demand is elastic and price rises, people may just substitute or decrease their consumption. Demand for illegal drugs is inelastic⁵⁴, and so it is the case that drug users, especially serious addicts, still want drugs and go to great lengths to obtain them despite legal sanctions and inflated prices due to black marketing. This is a measure of the power of the desire for drugs and the immediate benefits one expects from drugs.

Drug related crime is a rational decision by the drug addict because of their strong immediate desire for the drug and the disutility associated with lacking the drug. Resulting from factors above that have led the individual to try drugs (low human capital, stressful events, for example), and have stopped them from quitting (future discounting, willpower related issues), the drug feels necessary to the addict, and the addict seeks to fulfill this appetite. Crime follows from this feeling of need for the drug because drug addicts usually lack the means to legitimately acquire resources and obtain their drug⁵⁵. Drug addiction destroys human capital and limits legal opportunities, making crime the most effective way of earning the required cash. For example, an Intravenous Drug User (IDU) may have trouble securing a legitimate job, because she spends most of her time either on drugs, or securing drugs⁵⁶. Also, if she has a criminal record from drug conviction, this stigma associated with criminality⁵⁷ and drug use⁵⁸ will lessen her ability to get a job. When she cannot afford her drug, whose price is artificially driven up due to

⁵⁴ Becker, Gary S., 2005.

⁵⁵ The crime is of course not a necessary behavior, and can be resisted via an exercise of willpower or a decrease in future discounting—the addict has a choice, but the nature of the addiction strengthens their desire and makes them likely to choose crime to fulfill it.

⁵⁶ Balian, et al., 1998.

⁵⁷ Becker, Gary S., 1968.

⁵⁸ For a discussion of, among other problems, the stigma associated with drug use, see MacDonald, Morag, "A Study of the health Care Provision, Existing Drug Services, and Strategies Operating in Prisons in Ten Countries from Central and Eastern Europe", Helsinki: European Institute of Crime Prevention and Control, affiliated with the United Nations, Publication Series No.45, 2005. Available at <http://www.heuni.fi/12542.htm> (copy on file with author).

prohibition, she is more likely to steal a television, become a prostitute, or rob a person on the street than to either have the necessary resources to pay for this drug, or acquire the resources legally⁵⁹. The drug user has no reason to commit crimes if their income is greater than their addictive need. For instance, if the drug user makes 300,000 *zlotych* a year, he can afford to consume drugs until he reaches this limit. For any consumption over this he may have to commit crimes to finance his habit. Similarly, if he can keep his drug addiction within the proper bounds he can pay for it with his legitimately earned income. However, if he happens to lose his job because he has a drug problem and cannot come to work, or if his addictive needs outstrip his income, he may commit crimes to earn money.

4. LAW AND ECONOMICS EXPLANATION AND CRITIQUE OF PROHIBITION: OVERVIEW

In this section, the justifications behind prohibitive policies will be discussed from an economic point of view. Further, the characteristics of prohibitive policy will be explained and analyzed using economic theory, and the method of punishment will be shown to be problematic from the point of view of economic analysis.

4.1. *JUSTIFICATIONS AND CRITIQUE*

This section serves as an economic explanation and criticism of the justifications for prohibitive drug policies, which seek to deter people from committing drug related crimes. Richard Posner identifies, and dismisses, three justifications⁶⁰ for prohibiting drugs and punishing drug users. These arguments are that drugs are destructive to users, that drug users are often unaware of this danger, and that drug usage cause accidents and crimes. Posner arrives at

⁵⁹ Crime in the sense described above is also a case of future discounting. When one's preferences are oriented towards short-term satisfaction, in the sense that they want drugs, they are more likely to commit a crime than if they are thinking about the long term consequences of their actions

⁶⁰ Posner, 1998, 266.

the conclusion that prohibiting drugs is not economically logical given the goal of prevention of harm, and that economics cannot justify prohibition. Another argument to be discussed is that making drugs legal will increase their usage, and the harm associated with their usage, emphasizing that drugs make people violent and that violence and dangerous behavior will increase if drugs are more readily available. Arguments of this type fall into the category of preventing social harm, positing there would be more social harm if drugs were not prohibited because of the negative effect drugs have on people and that more usage would equal more harm. Further arguments concern the practical problems and difficulties of legalization, and the lack of a coherent legalization strategy in many cases.

The first argument Posner discusses, that drugs are destructive to the users, is quickly dismissed as a paternalistic argument that should not apply to adults, who are free to make their own choices, as they choose to ingest legal, harmful substances such as alcohol and tobacco⁶¹. Posner takes issue with the argument that just because something is destructive (regardless of the truth of the statement), it should be banned. The second, related argument is that many drug users are ignorant of the harm they are doing to themselves, but this argument is also paternalistic and equally offers a justification for greater educational efforts to counter drug usage, which will reduce future drug costs⁶².

The argument goes as follows: suppose that Poland can spend \$500 today on a class for somebody that is judged to be at risk of drug abuse. This person can be identified by the fact that, for example, they have already committed a drug related offense at a young age. Further, it

⁶¹ Posner, 1998.

⁶² For further reading on this, see Shavell, 2004. On p.535-6 he has a discussion of state educational programs for at risk people to deter future harms.

can be assumed that he is unaware of the danger that he is in and would benefit from education. Providing a class to this person is analogous to an alcohol education class for people that are convicted of driving under the influence or public intoxication. By spending this \$500 today on educating this person, the state might have either wasted its money, and he will continue his harmful ways, or spent \$500 to convince him of the dangers of his actions. This person might stop doing drugs, or might seek rehabilitation, and this might save very much in the future. For example, this \$500 dollar class could help to save hundreds of thousands of dollars in medical bills because he will not become an IDU, and will not get HIV. In the worst-case scenario, \$500 is spent and achieves a negligible return, but it is likely that the at-risk person will at least learn something and may become safer in the future. This investment by the state is a feasible alternative that is justified by the claim that drug users do not know their own danger, and may in the long run be more economically efficient than punishment. The state may rationally choose to educate rather than punish drug users to save public funds in the future, and it is important to realize that even the existence of harm to ignorant citizens does not point automatically to prohibition.

The third case identified for punishment of drug users is based on the fact that drug use has third party effects, in that it causes accidents and crime. This one is problematic also, because it is assuming that drug-related crime is in some way caused by the drug, rather than to the consequences of its illegality. The claim that drug-related crime is caused by the drug is generally without justification because it presupposes a prohibitive regime where drugs are illegal and expensive, sold on the black market. As Posner said, “criminal punishment raises the price of drugs above the level that addicts can afford without committing crimes to augment their income and that drug traffickers are constrained to use violence to enforce their contracts

because they are denied the use of legal remedies; hence, turf wars”⁶³. Looking at drug prohibition from this angle, one sees that drug-related crimes are increased by the artificially high price of drugs and unsafe method of acquiring them. The legal situation and price of drugs coupled with the inelasticity of drug demand makes crime a rational choice for drug users and traffickers. Posner accepts the other part of the third justification, that drug use can be punished on the grounds that it can lead to accidents. However, even this justification is problematic because far from offering a justification for prohibitive drug laws, it can offer a justification for a regulatory scheme that encourages responsible usage and discourages risky behavior, such as driving under the influence or working under the influence. Instead of punishing all drug usage because it *can* lead to accidents, this justification can be construed to justify punishing drug usage in cases *when* it leads to accidents (as is the case with prohibition of drunk driving, but allowing responsible drinking).

Posner’s work shows that there is nothing automatic about the decision to prohibit drugs. The justifications he mentions are commonly used, however, and the decision to regulate drugs must be approached with an open mind, because merely believing that certain conditions exist does not necessitate prohibitive policies. As the above explanation has shown, sometimes the existence of a potential drug related harm offers no justification for prohibition, and indeed offers a justification for increased preventative efforts or a loosening of the prohibitive regime that contributes to these harms.

Although the logical connection between a possible harm and decision to ban has been severed, this section also deals with other arguments based on the claim that drugs are harmful.

⁶³ Posner, 1998, 267.

One argument goes as follows: that legalizing drugs will lead to an increase in usage, and drugs are harmful, so this is bad for society, because more people will do harmful drugs and legalization of drugs will lead to more harm in society. There is an economic case for an increase in usage after legalization, because legalization would create a free market with lower prices⁶⁴. Following the reasoning, increasing usage leads to increased harm, because drug usage is harmful. Drug usage is said to be harmful because of its effects on the mind of the user, leading to violence and crime. James Inciardi and Duane McBride argue that drugs alter perceptions, and that certain drugs, including heroin, lead to altered mental states that are more violent and unconcerned with reality and responsibilities⁶⁵. This view of a drug user is a person that has no control over their behavior, and is no longer truly a rational wealth maximizer. He dismisses the claims of others, who say that drug addicts choose crime as a means of financing their addiction, preferring to say that the drug makes the person violent and unreliable and that rationality goes out the door once drugs are involved. However, even positing the existence of such conditions (which effectively mean that the drug addict has no choice in their behavior), this does not offer so much a justification for criminalization as another justification for treatment and prevention of use. When it is suggested that substances make people unpredictably violent and without behavioral control or inhibition, does it necessarily follow that we shall punish and blame those that are addicted to said substances, having no control of their actions (if we follow this reasoning and for the moment accept this controversial premise)? Is this not similar to punishing the insane? Or imprisoning every alcoholic? The second chapter

⁶⁴ Posner, Richard, "The War on Drugs—Posner's Response to Comments", in "The Posner-Becker Blog", March 26, 2005. Available at http://www.becker-posner-blog.com/archives/2005/03/the_war_on_drug_1.html. Accessed March 25, 2007.

⁶⁵ Inciardi, James A, and McBride, Duane A, 1991.

deals specifically with an alternative approach for behavioral change, and highlights its successes. Also, in previous sections, it has become clear that rationality is engaged in the decisions of drug users, regardless of prohibitionist critiques, and I have shown that people commit crimes when they feel they need drugs, and can get them no other way. It has become clear that the method of acquiring drugs and inelastic demand with high prices under prohibition contributes to crime, as opposed to a drug making somebody violent and compelling them to violent action. In short, while the prohibitionists can argue that heroin makes people violent by nature of chemical properties, they do not offer a convincing counterargument to the claim that the addict behaves rationally (including committing crimes) based on their powerful appetites, which much evidence points to. Further, the expectation of increased harm caused by increased drug usage does not automatically lead to the conclusion of prohibiting harm because an analysis of other possibilities under legalization shows that, in fact, society may be safer when drugs are legal because drugs may be bought and sold without people having recourse to violence. It is also possible that a regulatory scheme may tax drugs and use this money to support drug prevention and treatment efforts⁶⁶. This brief discussion of legalization makes it clear that while drug usage may increase, drug related harm may decrease and society will be better equipped to deal with this harm and prevent and treat drug use because money will not be spent on enforcement and imprisonment, and tax money can be used to prevent and treat.

Finally, the practical difficulties of legalization as a strategy are used as justification for prohibitive policy, in the sense that legalization theorists must specifically detail their position. In particular, when considering legalization, questions arise such as which drugs will be legal, in

⁶⁶ Becker, Gary S, "It's Time to Give Up the War on Drugs, Business Week, 17, September, 2001.

what quantities, and in what circumstances? What kind of advertising and sale will there be? Will it be outright, complete legalization or regulation similar to alcohol? This paper does not attempt to address these problems, but I find it relevant to show that it is not the panacea for drug related harm to say “prohibition does not work” or “prohibition is harmful”, and that “drugs should be legal”. Complex and difficult decisions must be made, and prohibitionists argue that there are no coherent legalization strategies devised to solve these problems mentioned above⁶⁷. This paper does not provide a strategy for legalization, but will show the problems of prohibition and in Chapter 2, I will present another strategy that is more successful in deterring drug usage and drug-related harm.

4.2. CHARACTERISTICS OF UNJUSTIFIED PROHIBITIVE POLICY

The previous section showed that from an economic analysis standpoint, drug prohibition is not an automatic decision and is based on flawed and incomplete reasoning in most cases. However, drug prohibition is a widely used method of attempting to curb social problems associated with drug use, and it must be examined fully from an economic perspective. The justifications have been shown to lack economic logic, and to be far from compelling. It is now necessary to look at the practice, as it is prevalent throughout the world⁶⁸.

Drug users, dealers and large-scale suppliers and producers are targeted by prohibitive policies. The prohibitive regime seeks to reduce the problems associated with drugs by banning all consumption and punishing those who partake in these substances⁶⁹. Prohibitive laws aim to

⁶⁷ Inciardi, James A, and McBride, Duane A, “The Case *Against* Legalization,” in The Drug Legalization Debate, Ed. James A. Inciardi, Vol.7 Studies in Crime, Law and Justice, London: Sage, 1991.

⁶⁸ Krajewski, Krzysztof, “Polish Drug Policies: Between ‘Hard’ and ‘Soft’ Prohibition”, Vol.34 Journal of Drug Issues, No. 3, Summer 2004, 567-623.

⁶⁹ Mirron, 1995.

curb both the supply and demand of drugs. User demand is usually penalized in a prohibitive model⁷⁰. Thus, the drug user is defined as a criminal. Drug users are encouraged to quit their drug usage and modify their unlawful and dangerous behavior⁷¹. Under a prohibitive regime, the model citizen is a non-user.

In practice, prohibitory drug laws tend to have low probabilities of enforcement coupled with a high sanction, both for economic efficiency reasons discussed above and for the “victimless”⁷² nature of the crime⁷³. A victimless crime is one involving “a transaction between a willing seller and a willing buyer”⁷⁴. It is not often that a drug addict, for example, goes to the nearest police station after buying their drug of choice and reports their dealer. Further, once the person has this drug in their possession, they are not likely to report themselves to the police for being in possession of illicit drugs, and can make the evidence disappear after ingesting the substance. It is much more likely that this same hypothetical person will report to the police the person who has committed a property crime against him, or who has assaulted him on the street. This is not to say that because people do not report crime, little effort is made to catch criminals. In fact, it is shown that the enforcement efforts are usually concentrated on the most visible targets, the street drug users⁷⁵. This is a clear case of cost-benefit analysis on the part of the

⁷⁰ Krajewski, “Polish Drug Policies: Between ‘Hard’ and ‘Soft’ Prohibition”, 2004.

⁷¹ Peterson, James et al, “Getting Clean and Harm Reduction: Adversarial or Complementary Issues for Injection Drug Users (Abstinencia versus reducao de danos: questoes conflitantes ou complementares entre usuarios de drogas injetaveis)”, Vol. 22. Cad. Saude Publica, Rio de Janeiro 4, 2006, 733-740.

⁷² Posner, 2005.

⁷³ The effectiveness of these policies should already be in doubt, in strict economic terms, because of what we know about the risk-preferring nature of criminals and the future discounting tendencies of drug users.

⁷⁴ Posner, 2005.

⁷⁵ See Fitzgerald, John L., and Threadgold, Terry, “Fear of sense in the street heroin market”, Vol. 15 International Journal of Drug Policy 2004, 407-417, for a discussion of Canadian public surveillance, where touching of hands is treated as an indicator of drug dealing. Also, see Krajewski, Krzysztof, “Polish Experience in Drug Policies”, Presentation given at the Conference “Trends in European Drug Policies: A Meeting Between Eastern and Western European States”, Berlin, May 25-27, 2004 (Powerpoint presentation given to

police. Simply put, the street-level users are the ones that police can easily see and apprehend. The police have the benefit of making an arrest, with the least effort and expenditure of resources. When there is a drug deal between two people on the street, and two people in a five-star hotel, it is intuitively clear that the police may not find out about the one in the hotel, but are likely to see something on the street. It takes much more time and investigative effort, which consumes resources, to find out about the activities that are not occurring in the open.

Although visible targets may be apprehended, the prevailing low probability of enforcement of drug laws necessitates high penalties if deterrence is to be achieved, especially as it is economically less costly for society to set high penalties than to have the necessary machinery in place to substantially raise the probability of apprehension. The combination of the small probability and high penalties, as well as the moral disapproval of drug use (discussed later in Chapter 1 Section 5.4), often leads to imprisonment for drug offenses instead of fines. The penalties must be set high to deter, and a problem with setting high penalties, is that the limits of fines are determined by the solvency of the criminal⁷⁶. As drug users are often poor and young⁷⁷,

author via personal correspondence, and on file with author). This presentation shows the increase in drug possession offenses once possession is penalized. See also Small, Will, et al, "Impacts of intensified police activity on injection drug users: evidence from an ethnographic investigation", Vol. 17 International Journal of Drug Policy, 2006, 85-95, for an account of how police crackdowns focus on the visible users in an attempt to "dismantle the open drug market and improve public order".p.85, and see finally, for a brief discussion on the effects in Eastern Europe of police activity on injection drug users, Drug Law and Health Policy Network (DLHPN), "Drug Policies=Death: HIV/AIDS in Central and Eastern Europe, A report by the DLHPN on the Current Impact of Law and Policy on Spread of HIV in Central and Eastern Europe and the Former Soviet Union: A Preliminary Analysis of Twenty-One Countries", July 8, 2002 (copy on file with author, available at www.drugpolicy.org/docUploads/drugpolicies_death.pdf). Accessed March 15, 2007.

⁷⁶Posner, 1998.

⁷⁷For brief discussion of the role of age in desistance from drug use, see Laub, 2001. Also see Becker, 1988, for discussion of the relation between age and future discounting, which is a component of drug addiction. See Robles, Elias and Silverman, Kenneth, 1998, for the effects of a job on reducing drug usage by creating a higher opportunity cost.

they cannot afford to pay high fines, and often cannot afford top-notch legal representation, so this necessitates punishment by imprisonment.

4.3. CONCLUDING ECONOMIC ANALYSIS- PROHIBITION PUNISHMENT: EVERYBODY LOSES

Imprisonment of injection drug users presents many problems from the perspective of human capital and social cost. It is a socially costly form of punishment, with little return, and can lead to future criminality and perpetuation of drug addiction, and also disadvantages the family of drug users. Further, dangerous and unsanitary prison conditions lead to more health risks for injection drug users, and some of these conditions are evident in the Polish prison context.

While fines are a transfer of wealth from the offender to the state serving to compensate for damages and cost little to implement, imprisonment is socially costly⁷⁸. In a prohibitive drug regime, money is spent on enforcement of the law (catching and convicting criminals) and incarcerating users in prison, where they are not contributing to the economy (not working), and are also disadvantaging their families and loved ones⁷⁹. Incarceration of the drug user takes them out of the labor market and away from their family. Society pays double for this prisoner from an economic perspective, because they are precluded from the labor market and public funds are used to enforce the law and punish the drug user, which results in significant disutility and economic loss for all parties involved without compensation. It is also worth noting that when the family breadwinner is incarcerated, this can potentially lead to further expenditure by the state. For instance, if my father is incarcerated for drug possession, my mother's income may

⁷⁸ Becker, Gary S., 1968.

⁷⁹ Becker, Gary S., 1968.

not be enough to support the family, and now, while my father is in prison, the state may have to support my family.

The harm to society does not end in the present. Drawing on previous sections, it is clear that imprisonment of drug offenders can perpetuate future crime, harm and drug addiction because of the way that imprisonment lowers the human capital of the person imprisoned and of their family. To bring back my example, the child of a convicted drug user may be disadvantaged because of his father's imprisonment. As his father struggles to get a job after being labeled a criminal, the child may not have what he needs to survive and may drop out of school to take a job. This child may never have the opportunity to get a higher education, and his father's imprisonment is a factor that contributes to this. This child may similarly be pushed down a path of drug addiction by stressful events spurring from his increased responsibility, lower human capital and his family's example and this will perpetuate the cycle for his children and the children of his children⁸⁰.

Imprisonment also serves to perpetuate future harm because the conditions in prison lower human capital. A look at the Polish prison context shows some of the problems of prison. Not only does the prisoner experience general deterioration of their skills while in prison, receive no professional training, and become stigmatized, but they face concrete harm from other inmates and do not get adequate drug or medical treatment. They are also exposed to such harms as needle sharing, unprotected homosexual sex, and unsterile body mutilation⁸¹. Sterile syringes

⁸⁰ It must be remembered that it is by no means inevitable that the son follow in the footsteps of the father as regards becoming a drug addict, and children of very successful parents may become drug addicts. This example merely represents a plausible scenario following from economic logic.

⁸¹Open Society Institute International Harm Reduction Development (OSI IHRD), "Drugs, AIDS and Harm Reduction: How to slow the HIV epidemic in Eastern Europe and the Former Soviet Union", Heller, John, Jennifer Lisle, Jeff Hoover, Rebecca Foster, and Daniel Wolfe, eds., New York: OSI, 2001. For the purpose of

are not readily available in Polish prisons, because there is a low prevalence of injection drug use, and condoms are available but are not free⁸². It is estimated that 20% of prisoners in Poland between the age of 17 and 24 had already used drugs, at least occasionally before imprisonment, and 3% of prisoners use intravenous drugs, without access to clean needles and syringes⁸³. This is problematic, because although the percentage of IDUs in Polish prisons is small, they are forced by their prison environment to engage in risky behavior. Prison exposes drug users to the dangerous risk behaviors in prison and increases the harm that they will suffer and will spread to society when they come out⁸⁴. Further, substitution treatment is rarely available in Polish prisons⁸⁵ and prisoners are expected to become abstinent on their own⁸⁶. Studies have shown that “a relatively high number of HIV infections occur in prison”⁸⁷, and from the circumstances regularly present in prison this is not a surprise. While some studies have shown that Polish prisons have better health care than in the general public and that harm reduction information is distributed to prisoners⁸⁸, the Polish prison is still problematic, representing a potential breeding ground for infectious diseases. Prisoners’ lack of access to free harm reducing products, in an environment of great danger, shows how punishing at-risk people can further exacerbate their

the current discussion on prisons, it is necessary to know that condoms and sterile syringes help protect drug users from HIV/AIDS, and they are not readily available in prisons, particularly Polish ones.

⁸² MacDonald, 2005.

⁸³ Wodowski, Grzegorz, “Methadone in the Slammer”, in Special English Edition *Monar na bajzlu* (Monar in the Drug Scene), Wodowski, Grzegorz, Jacek Charmast, and Joanna Weck, eds., Krakow, 2004.

⁸⁴ MacDonald, 2005. See also AIDS Action Europe: The Pan European NGO Partnership on HIV and AIDS, “Situation Analysis and Action Plan on HIV/AIDS in Central and Eastern Europe and Central Asia in the Context of EU Enlargement”, Version 2.4, 2004. Available at www.integration-projects.org/keydocs/Draft_ActionPlanHIVcee.pdf, Accessed March 15, 2007.

⁸⁵ Wodowski, 2004. See also AIDS Action Europe, 2004. They discuss the recommendation that drug users in prison should have at the very least access to similar services they would get outside of prison, especially in light of repressive drug policies.

⁸⁶ See AIDS Action Europe, 2004, Wodowski, 2004, and MacDonald, 2005.

⁸⁷ Wodak, Alex and Annie Cooney, “Effectiveness of Needle and Syringe Programs”, Vol. 16 S. International Journal of Drug Policy, 2005, 38, 31-34.

⁸⁸ Macdonald, 2005.

problems. While prohibitive drug policies expect the model citizen to be abstinent, they do not foster the conditions that will help the prisoner, a rational wealth maximizer, quit their addiction. Prohibitive policies place drug users in prison, where drugs are easier to get than alcohol⁸⁹ and they are undergoing many stresses and human capital reductions that contribute to drug usage. These circumstances only increase the likelihood from a law and economics perspective that they will continue to use drugs, and the prisoner does not have the option to use drugs in a safer way while in prison. After they get out, they will spread further harm to society.

Imprisonment is a socially costly form of punishment and is doomed to fail in its goal of reducing drug demand by deterring and incarcerating drug users. Previous sections have illustrated that rational addicts will continue to use drugs in the face of high sanctions because of future discounting tendencies and because of the inelastic nature of their drug demand. In prison, they are more likely to continue using drugs because of the unrealistic expectation that they will remain abstinent in an environment saturated with risk behavior and drug availability, and lacking most harm reducing products. Imprisonment helps to perpetuate future drug addictions and harm to society by reducing the prisoner's human capital and not providing them with the means to fix their drug problem. Prison attempts to punish the symptoms of drug addiction, while doing next to nothing to help defeat the addiction, and ensuring a steady stream of social costs.

5. OTHER CONSIDERATIONS OF WHY WE PROHIBIT DRUG USE

The previous section has shown that there is no implicit economic logic to drug prohibition, and that there is a strong case to be made against prohibition based on economics. It is necessary

⁸⁹ Wodowski, 2004.

to further analyze the justifications for prohibitive policies in reality and see the way that anti-drug policies are created and persist. Although prohibition has been shown to be lacking economic logic and to increase drug-related harm, it is a widespread phenomenon. This section seeks to further understand the justifications for prohibitive policies that are so prevalent throughout the world, and will show that the harm related arguments, analogous to the economic justifications based on paternalism and protection of others, are invalid. This section later shows from an economic and sociological perspective that drug prohibition relies on strong moral condemnation and while using inaccurate claims about harm as a supplementary way of marginalizing drug users. The case for prohibiting drug abuse revolves around two main concerns: preventing harm and proscribing immoral acts⁹⁰. These two are linked, and in a manner of speaking, are dependent upon each other in order to prohibit drugs, as will be shown below.

5.1. INTRODUCTION TO HARM RELATED ARGUMENTS

The case for preventing harm in the context of injection drug use will be discussed first. “Usually a belief that other members of society are harmed is the motivation behind outlawing or otherwise restricting an activity”⁹¹, and there is a common perception that drugs are intrinsically harmful⁹². Drug use is said to cause concrete, measurable harm to both the user and to the public, and thus the case for preventing harm is twofold. Harm to the individual and harm to the public will be separately analyzed. As regards harm to the individual, the plight of Polish IDUs will be used as a case study. In my critique of harm related arguments, it will become clear that

⁹⁰ Whitebread, 2000.

⁹¹ Becker, Gary S., 1968.

⁹² Kopp, Pierre, Political Economy of illegal Drugs, London: Routledge, 2004.

these harms are mostly a result of the criminalization. In addition, it will become clear that another social harm stemming from drug use is the money spent to solve drug-related problems and prosecute drug related offenses. This section does not consider human capital reduction as discussed above as a form of harm that is intrinsically related to the drug usage, because it will become clear that most of the human capital reductions and other harms, besides the individual's intoxication and unproductiveness, are stemming from illegality⁹³.

5.1.1. Harm to the Individual

The IDU suffers greatly from their drug usage, and as such there is a case for a paternalistic banning of injection drug use⁹⁴. The IDU is at risk of fatal overdose, near-fatal overdose and the transmission of blood-borne diseases, such as HIV and Hepatitis B and C⁹⁵. It is estimated that outside of Africa, one out of every three HIV infections is due to injection drug usage⁹⁶, and that in Central and Eastern Europe injection drug use has been the most important means of transmission⁹⁷. IDUs are at such a high risk because of needle sharing⁹⁸. Needle sharing refers

⁹³ The previous section's discussion of Posner's dismissal of economic justifications explains that people frequently choose to ingest harmful substances. If the only problem with injection drugs due to the drug is that they are harmful, this is not implicitly a strong enough argument to ban drugs. This section looks at how the illegality of drugs contributes to the harm attributed to them, in particular at the form of the human capital decreases, such as contracting an infectious disease, and this chapter does not in any way diminish or understate the harm caused to drug users by using drugs. This harm exists and is serious.

⁹⁴ Kopp, 2004. He explains on p.2, how paternalistic policy is justified by the belief that drug users cannot be rational, because once they try a drug, they are hooked and will do everything in their power to get the drug, disregarding health effects, legal sanctions and budgetary constraints. This is in direct contradiction to discussion of rational addiction, and is relevant not for its truth but for its usefulness in policymaking, which will be discussed in Chapter 1 Section 5.4.2.

⁹⁵ Malkin, Ian, "Establishing Supervised Injecting Facilities: A Responsible Way to Minimise Harm", 25 Melbourne University Law Review 680, December 2001. See also, Smith, Laura, et al, "A Focus Group Evaluation of Drop Boxes for Safe Syringe Disposal", Vol.28 Journal of Drug Issues No.4, Fall 1998.

⁹⁶ UNAIDS (2006), "Report on the Global Aids Epidemic". Available at http://www.unaids.org/en/HIV_data/2006GlobalReport/default.asp

⁹⁷ UNAIDS & WHO Report, "Aids Epidemic Update," (UNAIDS/2.58E), December 2002, p.12. Available at http://data.unaids.org/Publications/IRC-pub03/epiupdate2002_en.pdf. Accessed March 15, 2007.

⁹⁸ OSI IHRD, 2001.

to “the use of contaminated injection equipment”⁹⁹. Injection drug users can also become infected with HIV through drug sharing practices like frontloading, which refers to using one syringe to distribute drugs amongst several others¹⁰⁰.

The Polish drug scene has its share of risky behavior. Of 37.5% of respondents to a survey who were at one point injecting narcotics, 27.9% reported to currently injecting regardless of their HIV status, 23.2% of those injectors reported to sharing needles, 15.4% of respondents who had a history of drug use claimed HIV positive status, and 40.9% reported never being tested or not knowing their status¹⁰¹. There are IDUs who are sharing needles with no knowledge of their HIV status, which can change any day because of this risky behavior. It is estimated that anywhere between 10 and 20% of Polish opiate addicts are HIV positive, and the mortality rate of Polish opiate addicts is significantly higher than the mortality rate of non-using peers¹⁰². It is without question that health problems are a fact of life for the IDU. By the year 2004, there had been 9151 HIV infections in Poland and 1537 AIDS infections, and IDUs account for the majority of these infections¹⁰³. The number of HIV infections could be artificially low, as many

⁹⁹ Grund, Jean-Paul C, et al, “Drug Sharing and HIV Transmission Risks: The Practice of Frontloading in the Dutch-Injecting Drug User Population”, Vol. 23 *Journal of Psychoactive Drugs*, 1991, 1, 1-10.

¹⁰⁰ Des Jarlais, Don C., et al, “HIV Risk Behaviour Among Participants of Syringe Exchange Programmes in Central/Eastern Europe and Russia”, Vol. 13 *International Journal of Drug Policy*, 2002, 165-174.

¹⁰¹ DLHPN, 2002.

¹⁰² “The National Plan For Counteracting Drug Addiction 2002-2005”. Accessible at www.emcdda.europa.eu/index.cfm?fuseaction=public.AttachmentDownload&nNodeID=2665&languageISO=EN. Accessed March 19, 2007.

¹⁰³ Rosinska, M, “Surveillance Report: Current Trends in HIV/AIDS Epidemiology in Poland, 1999-2004”, Vol. 11 *Eurosurveillance Issues* 4-6 Apr-Jun 2006. See also, UNDP, “Reversing the Epidemic: Facts and Policy Options”, Bratislava: UNDP, 2004. UNDP reports different numbers, but in a similar range. “By August 2003, Poland had reported 8300 people living with HIV, 1308 people living with AIDS, and 641 AIDS deaths. Injecting drug users account for the majority (4898, or 59%) of all reported cases...” p.37. However, estimates are wide ranging, and there are no reliable numbers. In MacDonald, 2005, the number is estimated as 25,000 people living with HIV/AIDS on p.45. The best practice when evaluating these numbers is to assume that the number is somewhere in the range of these indefinite, conflicting statistics, because so many people do not know their status.

people are not aware of their status and are still injecting¹⁰⁴. HIV and other health problems disproportionately affect Polish injection drug users, shortening their lives, and these problems are primarily related to the risk behavior associated with drug usage.

IDUs are not only endangered by their own behavior. Other drug users and dealers may endanger them. Users may be bullied and threatened by more powerful users¹⁰⁵. These threats can end in violence and even death for users.

Provided that they can safely secure their drugs, inject without being harassed or sharing needles and avoid an overdose, the composition of the drug is a problem for Polish IDUs. “When you have a glass of wine you have a fair idea of its effect, when you take an illicit drug you take a chance”¹⁰⁶. This kind of reasoning is especially true for Polish drug users. Polish homemade heroin, a.k.a. *kompot*, is toxic to users¹⁰⁷. *Kompot* “is used by approximately 75% of drug addicts in Poland”¹⁰⁸, so it is the most prevalent drug in the Polish context. Besides the fact that illegal drug users do not usually know how strong the drug is, which can lead to overdose, *kompot* users are using a poisonous drug. Users of homemade drugs, such as *kompot*, additionally run an increased risk of HIV due to the fact that oftentimes blood is used as a mixing agent, which leads to a high chance of infection for everybody who uses the batch¹⁰⁹. Even if the user is careful, she may harm herself by injecting this toxic drug and sentence herself to death by

¹⁰⁴ DLHPN, 2002.

¹⁰⁵ Malkin, 2001.

¹⁰⁶ Kroes, Simon, “City of Stonnington Drug Strategy”, 2001. Available at www.stonnington.vic.gov.au/gui/files/file3dc07d9aa6580.pdf. Last accessed March 2, 2007.

¹⁰⁷ Krajewski, “Polish Drug Policies: Between ‘Hard’ and ‘Soft’ Prohibition”, 2004.

¹⁰⁸ DHLPN, 2002.

¹⁰⁹ DLHPN, 2002. See also, Wodowski, Grzegorz, “Kompot: Polish Heroin”, In Special English Edition *Monar na bajzlu* (Monar in the Drug Scene), Wodowski, Grzegorz, Jacek Charmast, and Joanna Weck, eds., Krakow, 2004, for explanation of the method of distribution of *kompot*. It is often distributed by drawing the substance from another needle, or a syringe filled with the substance is sold to the addict. This is a very risky form of distribution. There is a chance that both the needle and the substance have been exposed to HIV or other blood-borne diseases.

injecting with an HIV infected batch of *kompot*, which may or may not have been distributed by frontloading or similar risky practices.

The risk behaviors, in addition to the factors that are out of the control of the IDU, such as the violence of others or method of drug production, illustrate the many dangers facing IDUs, in Poland and around the world. It is particularly worrisome that users inject and share needles not knowing their status, trusting to luck that they will not be infected. Risk behaviors are a definite case of future discounting, where the immediate benefits outweigh the harm that is risked, in the mind of the drug user.

5.1.2. Harm to Others

Shifting the analysis to harm to others, it is clear that drug use has extensive effects on others besides the drug user. These effects include missed work, medical fees, property and violent crimes, and causing a nuisance to citizens, including entrepreneurs¹¹⁰. On a strictly financial basis, drug use harms employers who employ drug users, and other employees. Workers who use drugs are more likely than non-using workers to be late for work, more likely to miss work, and more likely to injure themselves or others on the job¹¹¹. Medical fees also financially affect other citizens. For example, Poland has only a public health system, and when a drug user needs medical treatment it is the public health system that intervenes¹¹². This medical treatment encompasses not only life saving treatment or treatment for medical problems, but also usually rehabilitation and methadone treatment services. The nuisances created by drug

¹¹⁰ Malkin, 2001.

¹¹¹ Inciardi, James A and Kleber, Herbert D., "Clinical and Societal Implications of Drug Legalization" in Substance Abuse: A Comprehensive Textbook, 4th Edition, Langrod, John G., Pedro Ruis, Robert B. Millman, and Joyce H. Lowinson, eds., New York: Lippincott, Williams and Wilkins, 2004, 1391.

¹¹² Krajewski, Krzysztof, Interview taken by the author on January 10, 2007 in Krakow at Dr. Krajewski's office, regarding initial observations on the Polish situation. Notes taken and used with permission.

users include having to see drug users injecting on the streets, the presence of discarded needles on the ground, and drug deals occurring in public¹¹³. These nuisances cause disutility and financial loss. The property and violent crimes committed by drug addicts, like the public nuisance of seeing them and their needles, lower the property value of the neighborhood and may scare away potential customers and employers. If a neighborhood becomes bad enough, the money invested in the business can become sunk costs¹¹⁴. These property crimes, besides leading to disutility, lower property values and fear amongst the public, are also a transfer of wealth directly from non-drug users to drug users. Some Polish IDUs in Krakow are stealing 300 *zlotych* a day worth of merchandise to finance a 100 *zlotych* a day drug habit¹¹⁵. This kind of crime is a perfect example of a rational wealth maximizing drug user discounting both the harm from their drug use, and the social costs of crime and the potential sanction in order to achieve a temporary benefit, that is, the high from injection drug use. This kind of crime is the reason why private citizens and businesses make “vast investments in money and time to protect themselves from crime”¹¹⁶. For example, a local business may spend \$100,000 a year on security guards and an alarm system because they operate in a neighborhood known for its high incidence of drug use and drug-related crimes. This money may help stop drug-related crime,

¹¹³ Malkin, 2001. Also see Moore, Clover, Member of the NSW Legislative Assembly, Transcript of Proceedings, NSW Drug Summit 1999, May 16, 1999 available at <http://www.parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/V3Key/LA19991116051at> March 15, 2007, for discussion in the Australian context of the problem of nuisance. See also Krajewski, Krzysztof, “Drugs, markets and criminal justice in Poland”, Vol.40 Crime, Law and Social Change, 273-293, 2003, for discussion of how the poorest drug users are a nuisance by virtue of their street existence.

¹¹⁴ For a discussion of sunk costs, refer to Posner, 1998.

¹¹⁵ Wodowski, Grzegorz, Interview taken by the author on March 1, 2007 in Krakow at Mr. Wodowski’s office. Notes taken and used with permission. Wodowski referred to drug addicts stealing anything they could, including instant soup packets, to sell to others, and they sell it on the streets for roughly a third of its retail price.

¹¹⁶ Nagin, Daniel S, “Measuring the Economic Benefits of Developmental Prevention Programs.” In Vol. 28 Crime and Justice: A Review of Research. Edited by Michael Tonry. London: University of Chicago Press, 2001.

but it comes with a high opportunity cost, as it could have been used, for example, to attempt to expand the business. Crime also damages the lives of non-victims by forcing them to adjust their own behavior in order to avoid crime, for instance, by avoiding certain areas or hiring security¹¹⁷, or carrying firearms¹¹⁸, and intuitively one can see that others may follow the example of those who hire private security and take precautions even if they have not been targeted. Even when crime does not occur, it is costly because crime is expensive to prevent. When money is spent to prevent crime, there is no gain to the business, and the money is socially unproductive¹¹⁹.

Besides these various, mostly financial harms discussed above, IDUs also serve as an important avenue for the transmission of HIV to non-IDU populations through sexual relations or childbirth¹²⁰. There are also rare cases of concrete harm to others in the case of, for instance, stepping on or otherwise being accidentally stuck by a used syringe that has been used by an

¹¹⁷Cook, Phillip J., "Costs of Crime", In Vol.1 Encyclopedia of Crime and Justice, Edited by Kadish, Stanford H., New York: Macmillan, 1983. See also Cohen, Mark A, "Measuring the Costs and Benefits of Crime and Justice", Chapter in Vol. 4 Measurement and Analysis of Crime and Justice, Criminal Justice 2000. National Institute of Justice, July 2000, NCJ 182411; available at http://www.ncjrs.org/criminal_justice2000/vol_4/04f.pdf. Accessed March 15, 2007.

¹¹⁸ Miron, Jeffrey, and Zwiebel, Jeffrey, 1995.

¹¹⁹ One could say that the prevention of loss is a gain to the business, so it is a case of addition by preventing subtraction, however, it is clear that investing the money to improve the business in some way is more socially productive. A further concern to be examined from the point of view of entrepreneurs is if it is economically logical to prevent crime to their business. For instance, the company which sells stuffed animals is less likely to have an alarm system than the company which sells jewelry, and the company in a neighborhood with low crime rate is unlikely to invest as heavily as one in a neighborhood with lots of crime.

¹²⁰ Burris, Scott (ed.), "Report of the AIDS Coordinating Committee of the American Bar Association. Deregulation of Hypodermic Needles and Syringes as a Public Health Measure: A Report on Emerging Policy and Law in the United States", December 28, 2000. Available at www.drugpolicy.org/docUploads/deregulation.pdf. Accessed February 22, 2007. See also Small, Dan, et al, "Review: Policy makers ignoring science and scientists ignoring policy: the medical ethical challenges of heroin treatment", Vol.3 Harm Reduction Journal No.16, 2006.

IDU¹²¹. This harm due to accidental exposure to unsanitary injection equipment extends as well to health care professionals and law enforcement officers¹²².

Drug use also causes harm by triggering costs to non-users to combat the effects of drug use. In some cases community officials have taken extensive steps to counter this problem, for example, by installing needle disposal boxes¹²³. This is a further diversion of public money away from other public services and towards countering the drug problem. All of the appropriate training and medical treatment (for example, boosters of anti-retroviral drugs after accidental exposure) are a harm stemming from drug use in that they represent public money spent which increases the social cost of drug use¹²⁴.

An economic discussion of the harm to society from drug use cannot be complete without mention of the costs of a scheme of imprisonment or treatment of drug users. The social costliness of imprisonment has been previously discussed, and must be further highlighted. The public money spent on enforcement comes with a heavy opportunity cost, as others are denied services so that money may be spent imprisoning drug users. Thus, public money is spent to punish behavior, and this is in effect another social harm. For instance, instead of spending on building a public park, provision of low cost medical services to the elderly, or education, public money is spent on law enforcement, judges and prisons. Also, money that is spent on treatment

¹²¹ Smith, et al, 1998.

¹²² Beletsky, Leo, et al, "Attitudes of Police Officers Towards Syringe Access, Occupational Needle-Sticks, and Drug Use: a Qualitative Study of One Police Department in the United States", 16 International Journal of Drug Policy, 2005.

¹²³ Smith, et al. 1998.

¹²⁴ Wodowski, Grzegorz, Interview taken by the author on March 3, 2007 in Krakow at Mr. Wodowski's residence. Notes taken and used with permission. Wodowski explains that Polish police departments now are equipped with ARV drugs, while it is difficult for HIV positive drug users to get these.

has the same opportunity cost. Public officials are constantly deciding whether to help drug addicts or the law-abiding and less marginalized population.

5.2. CONSIDERATIONS OF CRITIQUE OF BOTH CATEGORIES OF HARM RELATED ARGUMENTS

The purpose of this section is to show that drug problems must be approached with an open mind, and to further the argument through counterexamples that although harmful effects of drug use exist it is not necessarily the case that the drug causes those harms. Much of the harm associated with injection drug use is due to its illegality, as opposed to anything inherent in the substance¹²⁵. This section briefly explains that the harms caused to users and others are exacerbated and sometimes created by the illegal status of the drug. This section will also discuss supervised injection facilities in the context of both harms to the user and society to demonstrate the dangers stemming from the illegality of heroin and the effects of an alternative policy solution, and will show how provisions of the Polish 1985 drug law led to crime and harm that was previously not present in Polish society.

5.2.1. Harm to Users

This section aims to briefly critique the argument that injection drugs are harmful to the user. No effort will be made to repudiate the claim that drugs can incapacitate users, in essence, that they make them less productive by virtue of their intoxication. This section, however, focuses on the major health risks associated with injection drug usage, including HIV, Hepatitis B and C, and overdoses, and provides an example of how drug related harms to the user can be minimized.

¹²⁵ Skirrow, J, "Lessons from Krever - a personal perspective", Vol.4 Canadian HIV/AIDS Policy & Law Newsletter Issue 2/3: 40-41, 35-41, 1999.

Regarding harm to IDUs, there is no property of heroin that puts its users at risk of HIV, Hepatitis B and C, and overdoses¹²⁶. Rather, it is due to factors stemming from the illegality of the drugs that there is such risk. For example, Thomas Kerr explains how most drug users inject quickly and with unsafe equipment often because of fear of the police, and often in unsanitary public places such as toilets¹²⁷, or alleyways¹²⁸. These users do not take the time to find a safe place and may not acquire a sterile syringe because they fear that the police will harass them. Also, IDUS are not medical professionals and are untrained in how to inject safely and in what dosages to give, and as illegal drugs do not come with a list of ingredients, are not sure what they are injecting and how strong it is. In most cases, IDUs cannot ask a health care professional or receive help with their injection because the drug is illegal. When a drug user is injecting a substance of which they have no quality control (and which may be mixed with the blood of others, like *kompot*), without safe equipment and no training, in an unsanitary public place, and is hurrying to avoid the police, it is intuitive and it is backed up by statistical data that they are more likely to be harmed by the drug. This risky behavior is a rational choice by the user, made using a short-term frame of reference, during a time of great desire for their drug. Users would rather use these unsafe methods than risk police harassment, and also do not have other options

¹²⁶ Skirrow, J. 1999. Also, as discussed above an exception to this general argument, which is highly relevant in the Polish context, is that often blood is used in the making of *kompot*, which makes *kompot* users more susceptible to blood-borne diseases.

¹²⁷ Kerr, Thomas, "Safe Injection Facilities: Proposal for a Vancouver Pilot Project", Harm Reduction Action Society, 2000. Available at http://www.lindesmith.org/librarydf_files/sif_proposal.pdf, accessed February 19, 2007.

¹²⁸ Kerr, Thomas, et al, "Harm reduction by a 'user-run' organization: A case study of the Vancouver Area Network of Drug Users (VANDU)", Vol. 17 International Journal of Drug Policy, 2006, 61-69.

in most cases. Prohibitory laws create and increase drug-related harms for users, who respond as rational addicts and attempt to avoid jailtime¹²⁹.

In contrast to dangerous, unsanitary street drug injection, supervised injection facilities offer persuasive proof that it is the method of delivery and not the drug itself which makes it harmful to users. Supervised injection facilities provide safe equipment and a safe environment to inject, and European facilities have had no deaths, and have achieved a decrease in the overdose rate of the surrounding areas¹³⁰. Supervised injection facilities cannot slow the spread of HIV if the drug, for instance, *kompot*, has been mixed with HIV infected blood, but can provide clean syringes and supervision to users, minimizing risks in all other areas of injection. Also, if an IDU takes too much of their drug, in a supervised injection facility there is the opportunity for immediate medical help. The success of European facilities in promoting the health of drug users show that the drug is not inherently dangerous to the user, and that harms stemming from injection drug use are minimized when they are not in fear of prosecution.

Supervised injection facilities serve a dual purpose in that they are also sites where drug users can be referred to health care professionals or rehabilitation programs¹³¹. Viewed with this feature in mind, supervised injection facilities not only helps reduce the harm associated with drug usage of the most marginalized users, street users, but helps these people have access to health care and treatment options¹³². The drug user is less marginalized and underground when they have access to this sort of facility. Thus, a user may start out by going to the supervised

¹²⁹ This argument extends further to prison, where the conditions may be equal to or worse than the worst street conditions.

¹³⁰ Malkin, 2001.

¹³¹ Kerr, 2000.

¹³² This effect is common as well with needle exchange programs. While the drug user is initially receiving a method of safer injection, they may end up getting the help necessary to reduce or quit their drug use.

injection facility but this can be used as a springboard for entrance into a drug treatment program.

The preceding analysis shows one example in which the harm to the drug user may be greatly curbed with a more open-minded policy. The harm to the drug user must not be taken for granted, as the case of supervised injection facilities shows that the harm to the user is greatly alleviated when the user has a safe place to inject.

5.2.2. Harm to Others

The harm that other members of society suffer from injection drug abuse can similarly be explained as a by-product of the criminalization. Analysis of Poland's 1985 drug law will show how a previously legal behavior was proscribed, creating a black market and a class of criminals, and a marked increase in crime. Next, a closer look at other benefits of supervised injection facilities will show how these help to curb and eliminate the nuisance of drug use, as well as to decrease individual private expenditures to protect oneself from crime. It also becomes clear in this section that the social cost of drug usage to the public is increased by drug prohibition and may be alleviated with safer injection facilities.

5.2.2.A. 1985 Polish Drug Law: Creating Criminals and a Black Market

A look at Polish history shows how criminalization leads to black marketing and different kinds of crime and harm. Prior to the Polish 1985 drug law, there was no market for drugs in Poland¹³³, and in addition the oppressive nature of the Communist regime made drug trafficking and trade especially dangerous, with no need for a drug law¹³⁴. Addicts were supplying *kompot*

¹³³ Krajewski, 2003.

¹³⁴ Wodowski, Grzegorz, Interview taken by the author on February 19, 2007, in Krakow in Mr. Wodowski's office. Notes taken and used with permission. Wodowski also spoke of the oppressive nature of Communist

for free to each other, through “mutual societies”¹³⁵. Once the 1985 drug law came into effect and started regulating how much poppy people could grow, there became a problem of supply, and there was a market for drugs with increased prices. Whereas *kompot* was previously given out for free when there was an unlimited, easily accessible source of poppy, now that poppy was a regulated substance, people were willing to obtain it and sell it to users. The violence and property crimes committed by users stem from the fact that there is a black market for this drug, and that it now has a high value that is greater than the resources of the user. After the fall of Communism in Poland, organized crime stepped in to sell the drug, and this also leads to crime by and against addicts¹³⁶. Obviously, addicts are in a more difficult situation and are forced to take more desperate measures when a drug costs money as opposed to when it is being provided freely by fellow users. Also, when the drug was free, there was never any risk of a drug deal gone wrong, or a drug dealer breaking your legs for failing to pay. The criminalization of poppy growth in Poland created a class of deviants and crimes previously unknown to Poland. Krzysztof Krajewski refers to this process in the Polish context as creating a “crime tariff”, whereby a previously valueless product acquired value, and said that the majority of drug offenses after the 1985 drug law were committed by “elderly peasants, hardly criminal

regime, saying “they did not need a law, because they could do anything to you without a law”. Krajewski, 2003 also alludes to this problem, saying on p.273, regarding drug smuggling, “it would have been just too difficult and risky, unless local authorities, and above all the communist secret services, were somehow interested and involved in such an activity and organized it or granted protection...there was little chance to make drug selling on the domestic market profitable, especially that any profits would have to compensate for considerable risks and special differences involved in such activities in that part of Europe.” Krajewski suggests, however, on p.274, that this law was not typical of the Communist regime in the sense that the communists tended to “legislate social problems to death”. In Krajewski, “Polish Drug Policies: Between ‘Hard’ and ‘Soft’ Prohibition”, 2004, he refers to a previous Communist law, which was an effective scapegoating of marginalized undesirable people.

¹³⁵ Krajewski, 2003, 273-4. Krajewski explains that the only real price of the drug in these mutual societies was the expectation of reciprocity, in the sense that if I give you drugs today I would hope you have them for me another time.

¹³⁶ Krajewski, “Polish Drug Policies: Between ‘Hard’ and ‘Soft’ Prohibition”, 2004.

entrepreneurs”¹³⁷. Growing poppy was a common cultural practice in Poland, as it was used for cooking purposes, and because poppy was so readily available *kompot* was provided for free. Once poppy growth was restricted, the drug market appeared, with commercial production of *kompot* as the norm¹³⁸. Although people were using *kompot*, the crime and violence associated with the drug market were not present before this law came into effect.

5.2.2.B. Curbing Nuisance: Hypothetical Case of Supervised Injection Facilities Revisited

Various forms of drug-related nuisance are further cited as a reason for anti-drug legislation. However, evidence shows that the nuisance of drug users to the public may be curbed if drug users have access to supervised injection facilities. Supervised injection facilities help to stop drug users from injecting on the streets, possibly dying on the streets, and discarding needles on the streets¹³⁹. The users will be able to discreetly inject in a building not clearly advertised to the public, and this will be a benefit to the local entrepreneurs and citizens¹⁴⁰. No longer would they complain about all of the drug users on the street taking away their business, and people would feel more comfortable coming to the neighborhood. If there are less drug users and less drug related crime, then the businesses and the individuals may be able to save the money they spend avoiding crime or to invest it in something with a higher return.

5.3. Concluding Notes on Invalid Harm Arguments.

¹³⁷ Krajewski, 2003, 275.

¹³⁸ Krajewski, 2003, 275-6.

¹³⁹ Malkin, 2001.

¹⁴⁰ Fischer, Benedikt, et al, “Drug use, risk and urban order: examining supervised injection sites (SISs) as ‘governmentality’”, Vol. 15 International Journal of Drug Policy, 2004, 357-365. This article agrees that supervised injection facilities decrease the nuisance of the drug user injecting in public, but characterizes this process sees this process as a further exclusion from society’s public space and further marginalization, at the same time that it is a benevolent offering of services.

For the purposes of this discussion, it is important to note that prohibitionist policies are often guilty of circular reasoning in that they are justified as a means of controlling their own side effects. Counterexamples show that it is not necessarily the case that drugs cause harm, and that prohibition actually increases drug-related harm. The arguments, often used to justify prohibitionist policies, that drugs cause harm to the self and to others are less compelling upon a close analysis, and Chapter 1 Section 4.4 also showed that they are lacking economic logic. One must look beyond economics or harm related arguments to find the underlying reasons why prohibitive drug regulations exist.

5.4. MORALITY AND DEVIANCE: GENERAL CONSIDERATIONS

Since the previous section has shed light on the dubiousness of claims that drug use causes harm, one must look elsewhere to find the justifications for regulation of drug usage. It is necessary to look at morality and deviance to explain why it is the case that the public interest in health and paternalism as regards these ‘dangerous substances’ translates into prohibitive anti-drug legislation. This section deals with an economic explanation of moral rules and their intersection with legal rules. It will be argued that in the case of drug usage, moral rules are often determined insufficient due to the perceived dangers of drug use to the public and the social classification of the drug user as deviant. Considerations of politics and political power will also be discussed.

5.4.1. Morality and Moral Rules with Moral Sanctions- An Alternative System of Control Leading to Imposition of a Moral Order Through Law

Morality comprises “rules of conduct that are associated with certain distinctive psychological and social attributes”¹⁴¹. Moral rules are generally expensive to establish, as they take years of socialization, but are very likely to be applied when one is a member of a community and involve low costs of enforcement (i.e. it is cheaper to disapprove of somebody, and it may make them change their behavior, than to prosecute them)¹⁴². Moral rules, such as the rule not to take drugs, can be enforced by moral sanctions, such as social disapproval and stigmatization. For example, if I become known as a drug user in my community, family members and friends may cease to have contact with me. This is a moral sanction. Moral sanctions are not applied solely by the public. There are also internal moral sanctions, such as guilt. Even if somebody commits an act that is deemed immoral by community standards and nobody finds out, they may still feel such guilt that they are deterred from future wrongdoings. By the same token, the societal disapproval can be enough to deter an individual, and these two are not mutually exclusive. A person can feel guilt before, during or after being disapproved of by society, or in the absence of societal disapproval.

There is a long tradition of attempting to impose a moral order through law¹⁴³. Law and morality frequently function together to sanction offenders when there are substantial harms to be averted and moral sanctions might not be sufficient¹⁴⁴. There are a variety of reasons why moral sanctions might not be enough to deter certain behavior, but a major reason is that certain individuals do not feel virtue and guilt regarding the activity, and do not agree that it is

¹⁴¹ Shavell, Steven, “Law Versus Morality as Regulators of Conduct”, in “Essays by the Founding Fathers”. Parisi, Francesco and Charles K. Rowley, eds., UK: Edward Elgar, 2005, 403.

¹⁴² Shavell, 2005.

¹⁴³ Whitebread, 2000.

¹⁴⁴ Shavell, 2005.

immoral¹⁴⁵. The difficulty of imposing a moral order is magnified when one does not agree with the community morality. For instance, if I do not believe that drug usage is immoral, I do not share the mainstream view of my community and societal condemnation of my drug usage will not make me feel guilt, and it is likely that no amount of efforts at socialization will make me feel this way. In fact, I may view drug usage as a valuable form of pleasure and recreation¹⁴⁶. I will continue to use drugs although the community may disapprove. Similarly, if I have no ties to the community, the moral sanctions of the community will not bother me. This kind of argument applies to anybody who is not in agreement with popular community morality. As moral sanctions are not sufficient in this case and cases like it, it is necessary to supplement moral sanctions with legal ones.

5.4.2. From Moral Disapproval to Prohibition- The Role of Political Power

As the preceding discussion has shown, moral rules are not always powerful enough methods of proscribing socially undesirable behavior. Political majorities can decide what behavior is deviant by enacting laws that prohibit this behavior¹⁴⁷. Drug use becomes deviant not because of anything inherent about it, but because of popular disapproval it is socially constructed as deviant and inherently wrong. People with political power (for example, businessman or community leaders who experience the public nuisance of drug users near their buildings) are able to mobilize political support for prohibitionist policies more effectively than drug users can mobilize for their own interests¹⁴⁸, especially because injection drug users,

¹⁴⁵ Shavell, 2005.

¹⁴⁶ Duff, Cameron, "Drug Use as a 'Practice of the Self': Is There Any Place for an 'Ethics of Moderation' in Contemporary Drug Policy?", Volume 15 International Journal of Drug Policy, 2004, 385-393.

¹⁴⁷ Becker, H.S., 1973.

¹⁴⁸ Drug users are generally unable to organize effectively because they are already marginalized and driven underground. For a brief critical discussion of the role of political power in criminalization or legalization

already poor and alienated¹⁴⁹ are driven further underground from fear of police harassment when regulations punish their illegal addiction¹⁵⁰. There is a strong tradition of banning behavior because “a social majority objects morally to the specific conduct, value-system, or culture of others and imposes regulation upon them”¹⁵¹, and drug prohibitions around the world are a stellar example of this tradition.

Some more cynical observers elucidate how politicians must create an enemy to fight against as a way of mobilizing public support for their policies¹⁵². “People with vested interests in such wars (on drugs) make claims about the existence of certain conditions”¹⁵³. Drug abuse is an easy enemy for the politicians to mobilize support against, and a hard battle to actually win, making it an effective political platform for politicians to use over and over again. Publicly endorsing prohibitionist policies is generally an uncontroversial and inoffensive platform¹⁵⁴. Drug abuse is also politically mobilizing because of the powerful imagery that can be used to justify drug prohibition. Powerful imagery is used, for example, of the ruthless, seductive drug kingpin who thrives on the addictions of others, or the addict, who is enslaved by their substance¹⁵⁵. This kind of imagery reinforces popular perceptions about the immorality of drug

efforts, see Posner, Richard S. 1998, 267. He talks about how one reason that alcohol and tobacco are legal is because of the political power of the companies which provide these goods.

¹⁴⁹ Krajewski, “Polish Drug Policies: Between ‘Hard’ and ‘Soft’ Prohibition”, 2004.

¹⁵⁰ DHLPN, 2002.

¹⁵¹ See Whitebread, 2000. See also Becker, H.S., 1973, for similar discussion of the role of social disapproval. Becker also explains how those who have been judged and legislated against may also disapprove of the mainstream, but highlights that it is a question of power.

¹⁵² Bruun, K and Christie, N., *Der Nuetzliche Feind: Die Drogenpolitik und ihre Nutzniesser* [The Useful Enemy: Drug Policy and its Beneficiaries], Bielefeld, AJZ Verlag, 1991.

¹⁵³ Jensen, Eric (ed.), “Drug War American Style: The Internalization of Failed policy and its Alternatives.” London, Garland Publishing, 2001.

¹⁵⁴ Lapham, Lewis H, “A Political Opiate: the War on Drugs is a Folly and a Menace, Harper’s Magazine, Dec. 1989, 43.

¹⁵⁵ See DLHPRN, 2002, 8, which describes society rejecting the drug user, who is portrayed as “an ill person attached to an infected blood stained needle”. This rejection occurred as HIV/AIDS cases rose.

use and the danger drug use poses to society¹⁵⁶. This imagery and these perceptions justify the construction of drug abuse as deviant behavior to be banned. Once behavior is banned, it becomes easy to class the actor as “Other”, as the criminal who is different from the rest of society¹⁵⁷. The level of stigmatization can be very high, and the criminal may solely identify with this label (it achieves so-called “master status”) and “the labeled individual begins to be excluded from conventional interactions”¹⁵⁸. At the point when an individual who may have already disagreed with popular morality is alienated and labeled a deviant, it is politically easy to proscribe their behavior and avoid a proper analysis of economic and harm related justifications.

5.4.3. Concluding Remarks on Influence of Morality

The perceived harms stemming from drug use, discussed earlier, are used to further justify the imposition of an anti-drug moral and legal order¹⁵⁹. However, many activities are harmful, such as overeating or smoking, but are not proscribed. The moral element is crucial in the prohibition of deviant behavior. There has been a complex and mutually reinforcing interaction between the justifications for proscription of drugs on the grounds that drugs are harmful and that drug usage is immoral. People believe that drug usage is both harmful and immoral because

¹⁵⁶ Schultz, David, “Rethinking Drug Criminalization Policies”, Vol. 25 Texas Tech Law Review 151. 1993. See also Inciardi, 1991.

¹⁵⁷ For further discussion of the exclusion from society of drug users through imagery and difference, see also, Szasz, Thomas, Ceremonial Chemistry: The ritual persecution of drugs, addicts and pushers (revised edition), Garden City: Anchor Press, 1974. Szasz mentions drug users as a challenge to the social order, and as people who do not belong. Also see Fitzgerald, et al, 2004.

¹⁵⁸ Becker, H.S., 1973, 91. For more discussion of “master status” as it pertains to the drug user, see Balian., et al, 1998. This discussion of creating a class of deviants and excluding them from conventional interactions is directly analogous with the experiences of drug addicts in prohibitive regimes.

¹⁵⁹ Sometimes harm and morality may be mutually reinforcing. In Wodowski, March 3, 2007, Wodowski talked about the nuisance of needles in a public park in Krakow. Part of the reasons that drug users do not care about keeping the park clean is that there is such anti-drug and anti-drug user sentiment in Poland. The majority does not care about them, and they do not care about the majority. However, part of the reason that this anti-drug sentiment increases, and leads to more anti-drug laws is because of situations like the one of the park filled with discarded syringes. One leads to the other and it is difficult to know which came first, only that both exist and feed off of each other.

in a prohibitive regime, which much of the world in varying degrees subscribes to¹⁶⁰, it is clear that drug usage and harm are linked. However, a critical observer must always remember that correlation between harm and drug use does not in any case imply a causal relationship between the two. In fact, the preceding section's critical analysis has shown that there is no causal relationship between drug usage and harm, but that moral disapproval plays a heavy role in the prohibition of drugs and that the only causal link is between prohibition and harm. Moral disapproval makes prohibition possible, and prohibition directly causes harm. Further, this analysis has shown that moral arguments help policy makers avoid the tricky question of how to best deal with drug-related harm.

¹⁶⁰ Krajewski, "Polish Drug Policies: Between 'Hard' and 'Soft' Prohibition", 2004.

CHAPTER II: HARM REDUCTION AND APPLICATION OF ECONOMIC THEORY TO THE POLISH CONTEXT

1. OVERVIEW OF MAIN ISSUES

This chapter introduces the reader to an alternative method of dealing with the problem of drug-related harm. After an economic analysis of harm reduction, it will become clear that harm reduction represents a potentially limitless investment in human capital with the capacity, and the proven results, to help alleviate many drug-related harms. The evolution of Polish drug law will next be examined in light of the effects of prohibitive and harm reducing policies from a human capital perspective.

2. HARM REDUCTION OVERVIEW

The previous chapter dealt with the justification of and implications of treating drug users as criminals. It became clear that there is no economic logic to prohibition, that harm related arguments are victims of circular reasoning, and that the reason drugs are widely condemned and banned is because of moral disapproval. This section seeks to move away from moral disapproval of drug usage, and look at public health oriented harm reduction methods as an alternative, economically logical and pragmatic policy solution to reduce the drug related harm that undoubtedly exists. The methodology for discussion will first be an analysis of who is the subject of these policies, and next an analysis of their capability to increase human capital and deter drug use.

2.1. THE SUBJECT OF HARM REDUCTION AND CHARACTERISTICS OF HARM REDUCTION

A public health oriented approach to drug regulation treats the drug user as a sick patient¹⁶¹, as opposed to a criminal. User demand is usually not criminalized, or is at least not penalized¹⁶². Although there is still effort to decrease drug trafficking and organized crime, individual users are not punished for possession¹⁶³. Rather than driving users underground, as occurs during a prohibitive regime, users of drugs are less stigmatized and are encouraged to get help for their addictions. According to Grzegorz Wodowski, this model of policy creates the impression both within the society and within the drug user that the drug user is a citizen with a health problem, as opposed to a marginalized individual¹⁶⁴.

Public health oriented approaches are the opportunity costs of prohibition, in a sense. As they do not place emphasis on imprisoning users and penalizing demand, it becomes clear what policy solutions are possible when user demand is depenalized. For instance, in Spain, 75,000 people are receiving methadone treatment, the largest number in any European country, while there are less than 1,000 in Poland¹⁶⁵. The money that is spent in a prohibitive regime like Poland on the imposition of justice (and which, from the standpoint of rational addiction and human capital, leads to more addiction and future harm) may be spent on treatment of drug users

¹⁶¹ For a discussion of addiction as a matter of public health and illness, see Saah, 2005, and for brief discussion of Western European public health oriented policies, see Krajewski, "Polish Drug Policies: Between 'Hard' and 'Soft' Prohibition", 2004, see also Malinowska-Sempruch, Kasia, "OSI: IRHD Director Criticizes Polish Antidrug Policies", January 15, 2004. Available at: http://www.soros.org/initiatives/health/focus/ihrd/articles_publications/articles/polityka_20040115. Last accessed March 15, 2007.

¹⁶² Krajewski, 2004.

¹⁶³ Krajewski, "Polish Drug Policies: Between 'Hard' and 'Soft' Prohibition", 2004.

¹⁶⁴ Wodowski, Grzegorz, "Interview taken by the author on March 2, 2007 in Krakow at the office of Mr. Wodowski". Notes taken and used with permission.

¹⁶⁵ AIDS Action Europe, 2004. See also, "The National Plan for Counteracting Drug Addiction, 2002-2005". Accessible at

www.emcdda.europa.eu/index.cfm?fuseaction=public.AttachmentDownload&nNodeID=2665&slanguageISO=EN. On p.32, the Polish government claims substitution treatment was available in 2002 for 4% of opiate addicts in Poland. It will be discussed later, but the situation has not changed significantly in the present.

if public health is prioritized. In direct contrast to prohibition, the public health approach treats drug addiction as an illness, and seeks to cure the illness rather than punishing its symptoms¹⁶⁶.

Public health approaches aim to reduce the harms associated with drug use. The basic theory of harm reduction can be introduced as follows: “you ride a bicycle, use a helmet”¹⁶⁷. Rather than banning the bicycle riding, which is a potentially dangerous form of recreation, harm reduction proposes that people ride the bicycle as safely as possible, knowing that it is unrealistic to expect that every person will abstain, but that failure to abstain may harm people. Harm reduction recognizes that people have been using psychoactive drugs for a long time and will continue to use psychoactive drugs, and that it is not realistic to expect a drug free society¹⁶⁸. Harm reduction programs aim to reduce the individual and social harms associated with drug use, and focus mainly on reducing the spread of the HIV epidemic¹⁶⁹. They comprise programs providing education about and treatment for drug addiction, including substitution therapy, distribution of condoms, needles and syringes, and sometimes cleaning of injection equipment¹⁷⁰. In some cases, as discussed above, there are safe injection clinics. The distinction must be made between harm reduction theory and practice, and the endorsement of drug usage. Harm reduction theory accepts the reality that some people are not willing or able to

¹⁶⁶ Saah, 2005.

¹⁶⁷ Nadelmann, Ethan, “Press Release, Lindesmith Center, The Nation Exclusive Profiles Soros/Nadelmann Role in Drug policy: Magazine Article Extols Soros Funded Lindesmith Center and Its Director Ethan Nadelmann as Center of Drug Policy Reform Movement”, Sept. 7, 1999. Available at http://drugpolicyalliance.org/news/pressroom/pressrelease/pr_sep7_99.cfm. Accessed March 19, 2007.

¹⁶⁸ Nadelmann, Ethan, in OSI IHRD, 2001, 20.

¹⁶⁹ OSI IHRD, 2001.

¹⁷⁰ For a summary of HIV prevention techniques, see Ball, Andrew L., et al, “HIV prevention among Injecting Drug Users: Responses in Developing and Transitional Countries”, Vol. 113 Public Health Reports, Supplement 1, June 1998. For further information on worldwide effects of harm reduction projects, see OSI IHRD, “Fact Sheet: Saving Lives by Reducing Harm”, August, 2006. Available at http://www.soros.org/initiatives/health/focus/ihrd/articles_publications/publications/saving_20060818/footnoted_20060823.pdf. Last accessed March 19, 2007.

quit their drugs, and that these people are still deserving of medical help. Whereas prohibitive policies are heavily based on moral disapproval of drug usage, harm reduction policies do not make a value judgment or promote complete abstinence, seeking to treat each individual as a sick patient¹⁷¹.

Harm reduction policies can exist in either a prohibitive or public health oriented atmosphere. When user demand is depenalized, most of the resources can be allocated towards harm reduction programs¹⁷². However, when a prohibitive policy regime exists it has already been shown that problems of drug users are exacerbated and drug users are marginalized. There is a greater need for harm reduction in a prohibitive policy environment, and there are fewer resources because public money is spent on prohibition. In a public health drug law regime, harm reduction policies are the norm, and users are less stigmatized. In a prohibitive regime, harm reduction policies have a greater task to fulfill but are less prioritized.

2.2. APPLYING ECONOMIC THEORY TO HARM REDUCTION

Harm reducing public health methods of treating drug addiction are preferable to prohibition, according to economic theory. Addiction is not only a process resulting from low human capital and lack of opportunity, but is a process that reduces human capital because the person is intoxicated, and because of all of the health and legal risks associated with drug use in primarily prohibitive regimes around the world. While harm reduction cannot change the fact that drugs are addictive and intoxicating, and can lower a person's human capital because of this, harm reduction seeks to reduce the other harms associated with drug use and to help people quit

¹⁷¹ Spade, Dean, "Undeserving addicts: SSI/SSD and the penalties of poverty", 5 HOWSCR 89, 2002.

¹⁷² Drawing on my previous arguments, it is clear that there is less harm to reduce in an environment that is focused on harm reduction than in an environment where drug users are penalized and forced to be either abstinent or criminal.

their drug and integrate into a life with less drugs and/or safer usage, and less crime. In contrast to prohibition, which exacerbates harm and punishes addicts (leading to more harm), harm reduction invests in patient's human capital and helps them achieve behavioral change, and this is preferable "because saved lives are so valuable"¹⁷³. Prohibition is analogous to punishing the mentally ill and expecting them to get better without help, while harm reduction is an attempt to save the lives of these people and provide incentives to lead a more healthy life.

Harm reduction increases human capital by reducing risk behavior and helping users become healthier and more productive in both the short run and the long run. Harm reduction methods appeal to the drug user as an ill member of society, but also as a rational wealth maximizer. It has been shown that drug addicts respond to expected benefits, and harm reduction provides a way of changing those incentives and increasing the expected benefits of healthy behavior. In previous sections it was explained that the drug addict is a rational wealth maximizer, but has short-term preferences that are generally dominated by the powerful desire to feed their addiction, which can lead to crime. Harm reduction policies aim to shift the user's orientation away from these future-discounting tendencies. In other words, the drug addict is always viewed as a rational wealth maximizer, and harm reduction tries to make the drug user engage in rational calculations regarding healthier behavior and a decrease in future discounting¹⁷⁴.

¹⁷³ Becker, Gary S, "Health and Human Capital", Vol.28 Review of Agricultural Economics, Number 3. 2006, 323-325.

¹⁷⁴ For information on the successes of harm reduction in decreasing risk behavior, see Des Jarlais, Don C., et al, "HIV Risk Behaviour Among Participants of Syringe Programmes in Central/Eastern Europe and Russia", Vol.13 International Journal of Drug Policy, 2005. See also Ksobiech, Kate, "Review: Return Rates for Needle Exchange Programs: A Common Criticism Answered", Vol. 1 Harm Reduction Journal No.2, 2004. For more evidence that harm reduction works in Poland and helps achieve increased health effects, see "The National

Decreasing future discounting does not imply that the individual will go from a needle exchange client to the CEO of a corporation in one year. Often, this starts with small lifestyle changes, such as one day deciding to do fewer drugs, or deciding to exchange needles, or to come to a harm reduction center and meet with a therapist to discuss treatment options¹⁷⁵. Harm reduction programs provide increased information and opportunity for drug users. One volunteer at Monar, in Krakow, told me that the most important thing most of the patients needed was somebody who would listen to them¹⁷⁶. Needle and syringe exchange programs bring users into contact with therapists and refer them to other professional help¹⁷⁷. This is true as well of supervised injection clinics¹⁷⁸. The users may realize that there are people who want to help them, and that there can be an improvement in their situation¹⁷⁹. In this way, the dual utility of harm reduction projects is visible. While street workers are distributing needles, they are also cultivating trust and relationships with the drug users. The drug user is reducing their own risk of harm in the present, and may decide to reduce their future harm by seeking treatment options. The harm reduction model is a proactive path in this sense, because even if the drug user does not seek therapy or treatment, they are reducing their present risks.

Harm reduction programs further increase patient's human capital by leading to jobs in some cases. There are many success stories of people who came into contact with the harm

Plan for Counteracting Drug Addiction". This document attributes the decreasing HIV infection rate in Poland among injection drug users to the development of needle exchange programs.

¹⁷⁵ Wodowski, G., March 2, 2007.

¹⁷⁶ Anonymous, Interview taken on March 19, with G, a volunteer, at Monar, Krakow. Notes taken and used with permission.

¹⁷⁷ Malkin, 2001.

¹⁷⁸ Malkin, 2001.

¹⁷⁹ Wodowski, Grzegorz, March 3, 2007, explained that a barrier initially to helping drug users is first getting into contact with them, which is facilitated by needle and syringe exchange, and then helping them overcome the feeling of helplessness and inevitability of their addiction.

reduction facility through the needle exchange program, and were frequently injecting. They came to Monar, a harm reduction facility in Krakow, Poland for help and eventually were referred to methadone programs¹⁸⁰. This eventually led to stabilization in their lives and they now successfully hold jobs¹⁸¹. For many, they first become employed at the harm reduction facility, working as street workers¹⁸², where their experiences and inside knowledge of drug addiction are invaluable in their efforts at outreach towards current injection drug users¹⁸³. The benefits of methadone on stabilizing people's condition and helping them to hold a job cannot be underestimated. Wodowski, director of Monar in Krakow, said, "I would be uncomfortable hiring a person who had just gone 'cold turkey', but have no problem hiring people on methadone"¹⁸⁴. The reasons for this are that the person who has completed an abstinence program is constantly in danger of a relapse and is rarely successful¹⁸⁵, while the methadone user experiences less heroin cravings because of their treatment. For many who have been injecting drugs long enough, methadone is the only way that they can reintegrate back into society. This reintegration includes leaving behind lives of crime that in the past served to finance the drug addiction¹⁸⁶. When the person no longer craves the drug so much that their willpower may fail them and they will disregard the future harmful effects and commit crimes to

¹⁸⁰ Wodowski, Grzegorz, "Methwork 2005-2006", Krakowskie Towarzystwo Pomocy Uzależnionym, Kraków 2006 (Paper copy on file with author. Electronic access at <http://www.monar.kki.pl/programy/pnepm.html>). Wodowski, March 3, 2007, also talks about this issue.

¹⁸¹ Wodowski, 2006.

¹⁸² Wodowski, 2006.

¹⁸³ Balian, et al, 1998.

¹⁸⁴ Wodowski, Grzegorz, March 3, 2007.

¹⁸⁵ Hall, Wayne, "Methadone Maintenance Treatment as a Crime Control Measure", in Crime and Justice Bulletin: Contemporary Issues in Crime and Justice, No. 29, June 1996.

¹⁸⁶ Hall, 1996.

obtain the drug (also an example of future discounting), this is a powerful step towards a healthy and socially productive lifestyle, and methadone makes this possible¹⁸⁷.

The effects of harm reduction on the individual are comparable to the conditions that are prevalent in cases of spontaneous drug remission. These characteristics include getting married, having a family, and a new job¹⁸⁸. When one is addicted to drugs, it is difficult to form steady relationships with others¹⁸⁹, because of the person's instability (which is already a reason that they have tried drugs), and lack of concern for their future or that of others, and focus solely on the immediate goal of getting drugs. Drug cessation can help people achieve the stability necessary to have enriching interpersonal relationships¹⁹⁰. Jobs, in particular, have been further linked with drug avoidance or desistance in the sense that people with increased human capital are less likely to do drugs, as the opportunity cost of their time is higher, and they are less likely to commit crimes because they can make money while legitimately employed. For example, "a rise in the income available in legal activities or an increase in law-abidingness due, say, to 'education' would reduce the incentive to enter illegal activities and thus reduce the number of offenses"¹⁹¹. This reasoning applies also to drug users, because when there is a legitimate job where they may occupy their time and save money, the rational wealth maximizer is less likely

¹⁸⁷ Jofre-Bonet, Mireia, and Sinclair, Jody L., "Drug Treatment as a Crime Fighting Tool", NBER (National Bureau of Economic Research) Working paper No. 9038, July 2002. Copy on file with the author, also available at www.nber.org/papers/w9038. Accessed March 19, 2007. This study shows how drug treatment is a cost effective method of reducing drug-related crime, including crime for profit and possession offenses. This is not meant to say that methadone and treatment are a foolproof cure for heroin addiction, but is meant to illustrate that patients undergoing treatment are likely to desist or reduce criminal activities.

¹⁸⁸ Laub, 2001.

¹⁸⁹ Wodowski, 2006.

¹⁹⁰ Laub, 2001. In Wodowski, 2006, there are also accounts of this problem.

¹⁹¹ Becker, Gary S., 1968, 117.

to have a relapse because the legitimate incentive structure is in place and they are equipped to earn the incentives.

Harm reduction programs help individuals who have struggled with drug addiction to orient their minds towards the future and increase their abilities, and have stable jobs and lives by reproducing some conditions that help people quit drugs and have successful lives. Of particular interest are the conditions that the person remove themselves from the world of addiction and drugs, and develop new activities and relationships that will help them to stay clean¹⁹². For instance, while on methadone, a person is no longer injecting drugs. This is an important behavioral change for somebody previously described as “circumscribed by his/her drug use”¹⁹³. This not only makes the person no longer a deviant, as discussed above, but this also helps them to sever ties with the addict world. When I am on methadone, no longer am I in contact with my old drug dealer and my drug using friends. Sudden contact with former drug using friends, among other visual and sensory cues, has been linked with the risk of relapse because it helps to overcome willpower¹⁹⁴. In this way, not only does methadone reduce the amount of willpower necessary because it reduces the cravings that must be overcome, but it also reduces the contact between former drug using associates. As methadone can help people get a job and sever ties with the addict world, they may develop a new life filled with the incentives to help them maintain strong willpower and stay off drugs.

¹⁹² Laub, John H., et al. 2001.

¹⁹³ Balian, et al. 1998.

¹⁹⁴ Loewenstein, 2000.

Rational choice views drug usage as a form of “self-medication”¹⁹⁵, usually stemming from individual problems (discussed above). The term “self-medication” is used in the sense that it is used as an attempt to improve a person’s utility and state of mind. An analysis of the effects of drug usage on human capital shows that drug use does not actually fix these problems, but can lead to more in the future (especially in a prohibitive regime). Harm reduction represents an attempt to provide drug addicts with new options and new ways of being happy that do not involve drugs, and at the very least to help those who cannot or will not stop using drugs use them safely. In short, drug usage is an attempt at medication, and harm reduction is at least a safety measure and at most a potential cure. Harm reduction’s capacity to re-orient people’s minds towards the future and towards productive goals is in effect a form of re-education, whereby the person who has been labeled as deviant and disenfranchised begins to become a part of society again. As their human capital and confidence increase, there is less of a feeling of addictive need and they may develop an identity as a non-user.

2.3. CONCLUDING THOUGHTS: HARM REDUCTION AS A PRAGMATIC RESPONSE

This section has shown that public health oriented harm reduction methods of coping with drug usage in society are preferable to prohibitive. They are consistent with treating the individual as a rational wealth maximizer, and are a pragmatic response to the dangers of prohibition. Harm reduction methods save lives and help people start new lives, while prohibitive methods punish people for crimes while leading them down the path to further drug addiction and crime. Harm reduction offers a model for decreasing drug usage and drug related

¹⁹⁵ Loewenstein, 2000.

harm, and stabilizing and helping those members of the drug addicted population that should be followed by any country serious about tackling these problems.

3. INTERSECTIONALITY AND COMBINATION OF APPROACHES: HISTORY OF DRUG

REGULATION IN POLAND

3.1. OVERVIEW

The purpose of this section is to apply the theory and research previously expounded to an economic analysis of contemporary and historical drug policy in Poland. Between 1985 and the present day, the situation regarding drug abuse in Poland has constantly evolved. It is characterized by 4 main periods, that will be dealt with separately, and that show how regulatory strategies exist on a continuum from almost purely public health to almost purely prohibitive. The laws will be examined in terms of their treatment of user demand (in essence, their prohibitive tendencies) and their friendliness towards harm reduction. These characteristics act as a proxy to illustrate the relative human capital investments versus stigmatization and punitive deterrence based attitudes.

3.2. *THE BEGINNING: 1985-1997*

The Drug Abuse Prevention Act came into effect in Poland in 1985 under Communism¹⁹⁶. It has already been briefly explained as regards some harmful effects in Chapter 1 Section 5.2.2.A, but will be examined according to our new framework of analysis. This law was primarily public health oriented, with the only criminalization being aimed towards suppliers of drug material. This was a liberal law in which “drug use was not criminalized, although it was illegal; trade and production constituted criminal offenses”, but drugs were confiscated and

¹⁹⁶ Krajewski, “Polish Drug Policies: Between ‘Hard’ and ‘Soft’ Prohibition”, 2004.

addicts were treated as ill people¹⁹⁷. As mentioned earlier, the widely available and used poppy became a restricted product¹⁹⁸. However, possession of any amount of drugs was not penalized. This law was drafted primarily by the Polish Ministry of Health, including doctors and people involved with the treatment of drug users, and had a decidedly public health oriented, harm reducing approach¹⁹⁹.

3.2.1. Analysis

This law represents a serious investment in human capital, in the most unlikely of times. Rather than seeking to repress undesirable people or scapegoat political opponents, the Communist government allowed the Ministry of Health to work with doctors to draft a drug law that set the stage for a public health oriented approach to drug problems in Poland²⁰⁰. Rather than marginalizing drug users, this policy helped drug users, and did not punish them. Drawing on the previous analysis of deviance and the role morality plays in prohibitive laws, the importance of this first law in shaping future policy attitudes cannot be overemphasized. The drug user was first defined by law as an ill person, and not initially stigmatized. Starting from 1985, there is a tradition of helping these ill people, not persecuting them.

3.3. 1997-2000: PUBLIC HEALTH, BUT A BIG STEP TOWARDS PROHIBITION

In 1997, the Drug Abuse Counteraction Act was passed, which criminalized all forms of drug use, while it still depenalized possession of small amounts for personal consumption²⁰¹.

¹⁹⁷"Moving Harm Reduction Policy Forward, A Report on the Current Situation in Poland and Action Plan", Presentation developed at the conference "Moving Harm Reduction Policy Forward", Kiev, Ukraine: OSI, October 4-6, 2004. Copy on file with author, and available at <http://health.osf.lt/downloads/news/Poland-presentation-group.ppt>. Accessed March 18, 2004.

¹⁹⁸ Krajewski, "Polish Drug Policies: Between 'Hard' and 'Soft' Prohibition", 2004.

¹⁹⁹ Krajewski, "Polish Drug Policies: Between 'Hard' and 'Soft' Prohibition", 2004.

²⁰⁰ Krajewski, "Polish Drug Policies: Between 'Hard' and 'Soft' Prohibition", 2004.

²⁰¹ Krajewski, Krzysztof, "Polish Drug Law", in Special English Edition *Monar na bajzlu* (Monar in the Drug Scene), Wodowski, Grzegorz, Jacek Charmast, and Joanna Weck, eds., Krakow, 2004

Other than these cases of small quantities for personal use, there were two other quantities specified: large quantities (Art. 48(3)) and “case of minor importance” (Art. 48(2))²⁰². Drug possession was punishable by up to three years in prison²⁰³. The wording of this law is important, as it does not distinguish between the type of drug and does not define the quantity which fits into each category. This was left fully up to the discretion of the justice system. Other relevant provisions of this law allow for purchase of drug paraphernalia (including syringes)²⁰⁴. A significant provision is Article 57, where “public prosecutors may suspend investigation against any drug addict suspected of committing any offence under condition that the addict agrees to undergo appropriate treatment”, and the prosecutor, upon successful completion of treatment, must place the suspect under probation for two years²⁰⁵. There is also the possibility of forced therapy for addicted offenders, and of suspended sentences until after the offender undergoes therapy²⁰⁶. This law punishes facilitation of another person’s drug use, but only if it is for profit²⁰⁷. This exception allows needle exchanges to operate. This law also allows for methadone maintenance, but makes restrictions about when it is applicable: the care must be provided by a public health care institution, and the patient must be 21 or older, have a three year history of drug abuse, and must be able to prove that they have previously failed at abstinence programs²⁰⁸.

3.3.1. Analysis

²⁰² Krajewski, “Polish Drug Law”, 2004, 31.

²⁰³ Krajewski, “Polish Drug Law”, 2004, 30.

²⁰⁴ Krajewski, “Polish Drug Law”, 2004, 31.

²⁰⁵ Krajewski, “Polish Drug law,” 2004, 31.

²⁰⁶ Krajewski, “Polish Drug Law”, 2004, 31-2.

²⁰⁷ Krajewski, “Polish Drug Policies: Between ‘Hard’ and ‘Soft’ Prohibition”, 2004.

²⁰⁸ Krajewski, “Polish Drug Policies: Between ‘Hard’ and ‘Soft’ Prohibition”, 2004.

This law in many ways represents a similar effort to the 1985 drug law, and a continuation of the public health approach. Drug addicts were not only defined as patients to be treated, but the law explicitly allowed for and sets guidelines for harm reduction operations. The wording of the facilitation clause was crucial, as it helped to punish suppliers and dealers of drugs, who facilitated for their own benefit, but not harm reduction workers. The possibilities for suspension of sentences for drug addicts showed that while penalization was present in the law, it was not the only option. This law was the first Polish drug law to punish drug possession, but it still recognizes that it is a better investment in human capital to help the person undergo drug treatment instead of sending them to jail for years.

The law was problematic in the sense that it created difficult conditions for an addict to receive methadone treatment, however, on the other hand it is also important that the first mention of methadone in the law is consistent with the approach of treating drug users as patients and not stigmatizing them. It is better that methadone show up in limited form than not at all, or that the law bans methadone. A major change in this drug law is that it begins to punish users for possession of more than small amounts, and does not define how much of each drug constitute a given category of drug possession (small, minor importance, large). If I am a drug user, and am trying to rationally maximize my wealth and avoid imprisonment while gaining temporary utility from drug use, I do not know how much of any given drug I am safe to carry. This uncertainty is problematic from the standpoint of treating the individual as a rational wealth maximizer. Although this criminalization of some forms of possession is problematic, and a major step in the direction of prohibition, in theory a law like this does not overload the criminal justice system with drug offenses (because of the exception for personal possession and the

treatment options for drug users) and allows for harm reduction and human capital investment to be the priority.

3.4. 2000 AMENDMENTS: THE REAL BEGINNING OF POLISH PROHIBITION

Important amendments were passed to the Drug Abuse Counteraction Act in 2000²⁰⁹. The situation was changed considerably, as the provision that depenalized personal possession was removed²¹⁰. Since 2000, all forms of possession are penalized in Poland. Dependant on different factors, a drug possessor could count on receiving as little as a suspended sentence or a fine, or up to five years in prison under this law. This amendment also changed the wording of the facilitation clause, and this clause now says that no person may facilitate another person's drug use, without exception²¹¹.

3.4.1. Analysis

This amendment is the beginning of the prohibitive period in Polish drug law, as all forms of drug possession are punishable. Some reasoning given before the passage of this amendment were that it would help catch dealers and allowing possession does not send the pedagogical message that drug use is wrong²¹². However, it is the most visible street users who are began to be prosecuted when personal possession became punishable. Since 2000, there has been a steady increase in possession charges, although this law was in essence supposed to target drug dealers²¹³. As discussed above, drug use is a difficult crime to detect, so the most visible violators are the ones punished, and suffer the harsh punishments that are thought necessary in order to help deter the others. These amendments are greatly problematic from the point of view

²⁰⁹ Krajewski, "Polish Drug Law", 2004.

²¹⁰ Krajewski, "Polish Drug Law", 2004.

²¹¹ Krajewski, "Polish Drug Law", 2004.

²¹² Krajewski, "Polish Experience in Drug Policies", 2004.

²¹³ Krajewski, "Polish Experience in Drug Policies", 2004.

of human capital investment. Punishment of all forms of drug use stigmatizes the drug user, marking them as a criminal—the Polish government has found the pedagogical message they will send. This leads to increased fear of law enforcement on the part of users and drives them further underground. Further, the problems of prison for drug users in Poland have been previously elaborated, and it suffices to say here that sending the drug addict to prison is at best a disinvestment in human capital, and at worst an inevitable death sentence.

The change of wording to the facilitation clause further stigmatizes drug users, marking them by law as somebody unworthy of treatment, and possibly prevents a barrier to harm reduction. The combination of punishing all forms of drug use and clouding the legal basis of needle exchange shows the beginnings of a much greater commitment to the idea of deterrence and forced abstinence than treatment. Although needle exchanges have not been forced to close under the facilitation clause, this law temporarily led to police harassment of needle exchange²¹⁴, and undoubtedly increased surveillance of exchange locations. This problem was resolved with a 2001 amendment, which mandated a “harm reduction friendly approach”²¹⁵, but it was initially problematic.

The reason these amendments are so problematic is that finally, all drug users are stigmatized and criminalized, rather than treated as a patient. When a law sends drug users to prison, generally limits their ability to get harm reduction treatment (even temporarily) and leads to moral stigmatization, this represents a serious marginalization and disinvestment in human capital. It is important to note that these prohibitive amendments were preceded by an increase

²¹⁴ Krajewski, “Polish Drug Policies: Between ‘Hard’ and ‘Soft’ Prohibition”, 2004.

²¹⁵ Krajewski, “Polish Experience in Drug Policies”, 2004.

in intolerance towards drug addicts and an increased anti-drug media propaganda effort²¹⁶. Chapter 1 Section 5.4 showed that moral disapproval is a major factor in passing prohibitive laws, and these anti-drug laws fit the model. The massive disinvestment in human capital can only occur if the drug user is labeled deviant, and their behavior shown to run so counter to conventional morality that it must be proscribed and punished, rather than treated. A “sick person with an addiction” is somebody that is worthy of medical treatment, but a “criminal drug addict” is somebody who is dangerous and must be punished.

3.5. 2005 ACT OF LAW ON COUNTERACTING DRUG ADDICTION AND 2006 AMENDMENTS

The 2005 Act of Law on Counteracting Drug Addiction²¹⁷ places emphasis on drug treatment, prevention of use and harm reduction. Drug abuse prevention is to be fostered through such institutions as schools, the Army, the media and corrections (Art 5.2), among others. Just like the 2001 Amendment, this law endorses harm reduction. Needle exchange programs are still punishable under Article 58, the facilitation clause; however, this law has a pro-harm reduction approach, as one of the aims of this Act is reduction of social harm, so in practice needle exchange is not criminalized²¹⁸. The regulations regarding methadone treatment were loosened around this time, and now 18 year olds may receive methadone²¹⁹. In practice, Polish programs are still high-threshold, meaning that they are difficult to get into, and

²¹⁶ Krajewski, “Polish Drug Policies: Between ‘Hard’ and ‘Soft’ Prohibition”, 2004.

²¹⁷ Act of Law of 29 July 2005 on Counteracting Drug Addiction. Available at <http://www.kbpn.gov.pl/>

²¹⁸ European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), “Drug Treatment Overviews: Poland”, 2006. Available at <http://www.emcdda.europa.eu/index.cfm?fuseaction=public.Content&nnodeid=19864&sLanguageiso=EN>. Accessed March 19, 2007.

²¹⁹ Krajewski, Interview taken by the author in Dr. Krajewski’s office on March 23, 2007, Notes taken and used with permission.

See also Reitox National Focal Point, “2005 National Report (2004 data) to the EMCDDA: ‘Poland’, New Development, Trends, and in-depth information on selected issues”, National Focal Point, Warsaw, 2005.

this situation has not greatly changed, although now private health care may also distribute methadone²²⁰. The legal regulations are less a barrier than the fact that there are not enough programs, as less than 1,000 patients receive treatment while the estimated need is 20,000 and the Polish government has an expensive methadone contract and not enough clinics²²¹.

While this law has a harm reduction friendly orientation, it retains a similar punishment scheme and definition of offenses to the previous law. Article 62 punishes possession of drugs with up to 3 years imprisonment. In cases of minor importance the sentence can be up to one year, and with greater magnitude offenses the punishment is 5 years. Article 58 punishes inciting a minor to use drugs or supplying large quantities with up to 5 years imprisonment. The punishment scheme regarding suspended sentences for addicts upon completion of rehabilitation is still in place, but there are practical difficulties with the implementation of this policy²²². In principle all forms of possession remain punishable.

The amendment to this law in April 2006²²³ changed the punishment scheme for provision to minors and supplying large quantities from up to 5 years, to between 6 months and 8 years. This is a significant increase in penalty. Further provisions of this amendment were also aimed at increasing penalties for production and cultivation.

3.5.1. Analysis

The 2005 drug law and Amendments are similar to the 2000 drug law. They speak about harm reduction and the way that the government will support harm reduction programs, and keep or increase the same strict penalties as the previous law. The amendments attempt to further

²²⁰ EMCDDA, 2006.

²²¹ "Moving Harm Reduction Policy Forward", 2004. Also, Krajewski, March 23, 2007 talked about this.

²²² Malinowska-Sempruch, 2004.

²²³ Act of Law of 17 February 2006 on Amending the Act of Law on Counteracting Drug Addiction. Available at <http://www.kbpn.gov.pl/>

punish drug suppliers and big dealers, and the text of the law leaves open the possibility of crackdowns on street level drug users for possession, as well as people manufacturing their own drugs (which is especially relevant in the Polish context, where kompot is home made). These can go hand in hand, for instance, if I am a drug user that makes my own kompot for my best friend, and myself, I may be punished for production, possession and dealing, with the severe penalties this entails²²⁴.

This law is problematic because it becomes abundantly clear that the Polish government does not know how to approach the drug problem within its own borders. They have realized that harm reduction works, which is evidenced by the increasing commitment to harm reduction and reducing drug addiction. At the same time, penalties for drug related offenses are either rising or staying at the same levels, and users can still be imprisoned for possession. In typical prohibitive fashion, the penalties are high and rising to compensate for the difficulty of apprehension. If the law is read in two sittings, it has the appearance of reading two different laws, as the first half goes to great lengths to explain, define and codify into law harm reduction practices, while the other half goes to the same lengths to stipulate the punishments for drug users.

3.6. WHOLE HISTORY OF POLISH DRUG LAW SYNTHESIS

My interpretation of the history of Polish drug law is that the law passed under Communism and continuing until 1997 was the best drug policy Poland ever had. The Communist-era drug law (perhaps the Communists inadvertently missed out on a chance to

²²⁴ For an example of this kind of prosecution, see Frasz, Jowita, "Cold Turkey: Vivisection", in Special English Edition *Monar na bajzlu* (Monar in the Drug Scene), Wodowski, Grzegorz, Jacek Charmast, and Joanna Weck, eds., Krakow, 2004.

scapegoat) was the least repressive and most long-lived drug law in Polish history. For 12 years, whatever moral disapproval regular people and those in positions of power may have had about drug usage, the government did not join in and officially stigmatize the user, and the user was free to get help without fear. Harm reduction operated with no legal impediments, even if it was not yet an official government policy.

Beginning the process in 1997, the Polish government joined in on the moral disapproval and began disowning its drug users, and has since repeatedly strengthened its commitment to incarcerating drug offenders. Since 2000, the proportion of drug possession offences as a percentage of total offences has steadily increased, while there has been little impact on dealing offenses²²⁵. In contrast, between 1997 and 2002, all drugs besides *kompot* become more available to young respondents to a survey²²⁶. This evidence shows that the law designed to stop drug dealing did not result in increased difficulty obtaining drugs. While the 2000 law in principle targeted dealers, it fell disproportionately on small-time users, and failed to achieve its goals. Drug laws like this operate at great costs, both financial to the Polish government and costs as a result of the disinvestment in human capital, which put drug users at greater risk of harm in a prohibitive regime.

Polish drug law has reached a critical state. It began as an almost purely public health approach, and has now evolved to an approach where public health is still emphasized strongly while penalties become more repressive. While Poland maintains a *prima facie* commitment to harm reduction, it is only a matter of time before they go one way or the other. There is no coherent strategy regarding whether they seek to punish and deter, and treat drug users solely as

²²⁵ Krajewski, "Polish Experience in Drug Policies", 2004.

²²⁶ Krajewski, "Polish Experience in Drug Policies", 2004.

criminals, or whether they want to enable them to develop their human capital and cure their addictions without fear of harsh penalties.

Krajewski elucidates how this lack of a consistent strategy is a result of a lack of agreement, whereby the current ruling coalition's most repressive recommendations are being resisted by those scholars, activists and experts who do not want the laws to become more repressive and still fight to keep harm reduction a part of the law²²⁷.

This problem becomes increasingly evident when one compares two separate, but related, Polish government proposals for change in drug policy. These proposals are the 2006-2010 Plan for Counteracting Drug Addiction²²⁸ and the newest amendment proposal²²⁹ from the LPR, a member of the ruling coalition in Poland.

On the one hand, the Polish National Bureau for Drug Prevention, a group fitting the mold that Krajewski mentioned (being committed to a public health oriented approach), has set the goal in the National Programme for Counteracting Drug Addiction, that by 2010, the methadone availability in Poland will be increased from the current level of 3-4% of the country's need to 20% of the country's need. This is a drastic increase, and an ambitious goal. It is a goal that recognizes the importance of methadone treatment in stabilizing the lives of drug users. Previous sections have explained through theoretical, scientific and practical examples that methadone helps keep drug addicts off of drugs and employed. This goal is a commitment of the

²²⁷ Krajewski, March 23, 2007.

²²⁸ REGULATION OF THE COUNCIL OF MINISTERS of 27 June 2006 on National Programme for Counteracting Drug Addiction 2006-2010, available at <http://www.kbpn.gov.pl/>, Accessed March 30, 2007. See also Wodowski, Grzegorz, "We're Not Standing Still: Interview with Piotr Jablonski, director of the Polish National Bureau for Drug Prevention", in Special English Edition *Monar na bajzlu* (Monar in the Drug Scene), Wodowski, Grzegorz, Joanna Weck, Michael Murtagh eds., Krakow, 2007.

²²⁹ Ligi Polskich Rodzin (League of Polish Families), "Projekt nowelizacji ustawy o przeciwdziałaniu narkomanii oraz ustawy Kodeks Pracy", Available at <http://lpr.pl/?sr=!czytaj&id=5596&dz=Inicjatywy&x=0&pocz=0&gr=>, Accessed March 28, 2007.

government to increasing the availability of methadone, and is an acknowledgement of the successes of methadone and the necessity of increasing its availability for improving the lives of drug users.

At the same time that the National Bureau for Drug Prevention works to increase methadone availability, there is currently an initiative proposed by Liga Polskich Rodzin (League of Polish Families, ref. LPR), a right-wing Polish party²³⁰, which proposes making the Polish law more repressive and pushing it in a direction which runs directly counter to my policy recommendations. The LPR initiative not only would make it illegal to advertise and promote illicit drug usage through materials, such as publications or clothing, but it would add an amendment to the Code of Practice that says an employee may be held financially liable if they come to work under the influence of drugs, including substitution treatment. This initiative is problematic on both counts.

The first part of the LPR initiative, concerning the advertisement of illicit drug use, is problematic because of the way that it can be used to ban harm reduction related publications, which do not promote drug usage *per se* but warn drug users of the dangers of drug usage and of safer ways to use drugs. For instance, a pamphlet explaining the dangers of needle sharing and advising users to exchange needles is potentially banned on the grounds of this proposed initiative, as well as the typical example, a shirt with a marijuana leaf. In this way, this law may help keep drug users less informed and hampers harm reduction efforts, and also holds the potential to over-burden regulatory authorities, such as the police, with what may be termed minor drug related offenses. For instance, as opposed to chasing the drug traffickers the police

²³⁰ Wilanowski, Krzysztof, "Abysmal Brilliance", in Special English Edition Monar na bajzlu (Monar in the Drug Scene), Wodowski, Grzegorz, Joanna Weck, Michael Murtagh eds., Krakow, 2007.

will become worried about the harm reduction workers teaching drug addicts about needles, and can also chase after the teenagers wearing marijuana leaf t-shirts. Adding this new law not only hampers harm reduction efforts by limiting what kind of informative materials may be distributed, but is an opportunity cost of more effective law enforcement because of the burden placed on the police.

The second part of the initiative is much more problematic from the point of view of human capital development, because it clearly shows the contrast in Poland between progressive and repressive policies. At the same time that the National Bureau for Drug Prevention is attempting to drastically increase methadone provision, the LPR initiative is characterized as very likely to pass based on the current political situation in Poland²³¹. This means that while access to methadone may be increased sevenfold, methadone patients would be subjected to increased monitoring and stigmatization. This fear of drug tests, and the potential fines and difficulties with keeping employment, will drive ex-drug users who are under methadone treatment away from jobs. This proposal also removes part of the incentive structure to take methadone. For instance, knowing I may take methadone and not be able to get a job, or be subject to fines, both because of my methadone, makes methadone less of an attractive solution for some people. Although it has been shown that methadone helps people integrate into society and helps them become able to function and hold a job, the LPR Amendment would effectively bar methadone patients from securing gainful employment. The benefits of methadone in helping one stabilize their condition enough to get a job and integrate in society have been shown, and policies like the LPR initiative effectively remove this incentive. Drug users are

²³¹ Wodowski, Grzegorz, Personal correspondence with the author on March 27, 2007, Copy on file with author, used with permission.

rational wealth maximizers, as this paper has shown, and if the LPR initiative passes they will realize that even if methadone is more available by 2010, they have less reason to take it if it will be a barrier to gaining and maintaining employment.

It is no surprise that a proposal like this would come from LPR, the same group who recently proposed a constitutional ban on abortion²³². Recently Poland has taken a sharp turn towards conservatism, with the Kaczynski twins as President and Prime Minister, and a conservative ruling coalition²³³. This paper is not primarily concerned with an analysis of the Polish political situation, but it is relevant that this is a time of great conservatism and morality-based politics in Poland. A proposal such as the current LPR initiative, lacking in pragmatism and directly countering the National Programme for Counteracting Drug Addiction, fits the mold of prohibitive policies, discussed in Chapter 1 Section 5.4, which are dependant on moral disenfranchisement but are not designed with pragmatism in mind or effective in reducing harm.

Openly committing the government to harm reduction in name is not enough to foster a sense of belonging and an environment where treatment of the sick comes first. As this recent example shows, even having some policy makers attempting to improve the situation of drug users is not enough. When the government also furthers the intolerance and conception of drug use as deviance that is evident in Polish society, which motivates proposals like the LPR one, merely committing to harm reduction will not solve the problems of drug usage and drug related harm, but may make them into permanent problems. The Polish situation is a perfect example of

²³² "Abortion Debate Hits Polish Streets, Parliament", DPA German Press Agency, March 28, 2007, Accessed at http://rawstory.com/news/dpa/Abortion_debate_hits_Polish_streets_03282007.html, Accessed March 30, 2007.

²³³ Curry, Andrew, "Poland Takes Conservative Turn Under Twin Leaders", The Christian Science Monitor, August 29, 2006.

what AIDS Action Europe described, where although there is a commitment to harm reduction, the conflicting policies of the government limit its availability and effectiveness²³⁴. The moral disapproval of drug use in Poland, which has been both a factor leading to the creation of prohibitive penalties and a by-product of them because of the attitudes they foster, is still evident and problematic in this time of conservatism.

²³⁴ Aids Action Europe, 2004.

CONCLUSION:

The first chapter served to explain the relevant economic theory and introduce the reader to prohibition and the nature of drug related harm. Prohibition was critiqued from an economic standpoint and shown to be socially costly and ineffective in reducing drug-related harm, both from a theoretical and practical standpoint. This essay has shown that prohibitive policies, so prevalent throughout the world, are lacking from both pragmatic and economic standpoints. They are not justified by any implicit economic logic, and it is clear that the prohibitive policies are actually increasing harm in many respects. Counterexamples have shown how harm reduction methods reduce many of the harms traditionally associated with drug use. Punitive drug laws, with their low probability of enforcement necessitating high sanctions and imprisonment, are leading to stigmatization and current and future drug use by further decreasing the human capital of drug users, and are based on moral disapproval rather than pragmatic or economic concerns.

The second chapter presented harm reduction and public health oriented methods as beneficial from an economic perspective because they are investments in human capital. From a law and economics perspective, harm-reducing methods, preferably within a public health oriented approach to drug law, are preferable to prohibitive methods. They are preferable because they treat the drug-using individual as a rational wealth maximizer, albeit a sick one with short-term preferences in mind and problems with their own willpower to resist cravings. Harm reduction methods reproduce the circumstances that are necessary for successful drug remission and help the individual achieve a stable life and integrate back into society. They enable the individual to change their outlook from regarding only short-term preferences and to

begin putting together a healthy and economically productive future where they will not try to fix their problems through drugs.

The evolution of Polish anti-drug law presents a case study in schizophrenia and mixed messages. On the one hand, they have a progressive policy approach as regards harm reduction. Since 2001, harm reduction has been an official goal of the Polish government. The Polish government currently, at least *prima facie*, recognizes the importance of harm reduction as a means of addressing drug related health problems, and increasing the human capital of its drug using citizens. It is not surprising that harm reduction efforts have achieved such recognition, given the public health oriented approach that began in 1985. However, while Polish drug law has consistently fostered harm reduction and began to formally recognize it, they have done the same with prohibition. Since 1997, elements of prohibition have been firmly entrenched and have become harsher with the advent of the 2000 and 2005 drug laws, respectively. The Polish government has not yet formulated coherent policies recognizing that prohibitive drug policies cause much of the harm that harm reduction attempts to clean up. The political commitment to anti-drug legislation increases and penalties rise at the same time that harm reduction becomes more firmly entrenched. The current context in Poland, with the contrasting drug policy proposals, is further evidence of the contradictions inherent in Polish drug law.

Harm reduction has achieved success in Poland, despite the fact that Polish society has become more intolerant of drug users. The negative impact of prohibition in Poland is evidenced by the increasing stigmatization, incarceration and marginalization of drug users, as well as the

difficulty drug users experience receiving health care²³⁵. The attitudes of stigmatization and the taboo surrounding HIV and injection drug use in Poland still represent barriers to the effective implementation of harm reduction, as well as budgetary constraints²³⁶.

For Poland, a measure of harm reduction's success is merely that the HIV epidemic has not exploded in recent years, as it has in neighboring countries with similar policies, and that injection drug use now represents a decreasing proportion of the HIV infections²³⁷. Further successes of harm reduction in Poland include programs such as that previously described which occur at Monar, where methadone patients are given jobs, and other forms of job training. It has been shown that both methadone and work help keep people clean of injection drugs and productive in the labor force. These are human capital investments, and economic benefits to the society²³⁸. Regardless of one's moral views on drug use, it is impossible to deny that programs such as this are more beneficial to a recovering drug addict and to society than imprisonment, especially when one examines the problems of imprisonment from a human capital and societal perspective which were discussed in Chapter 1 Section 4.3.

HIV is a serious threat not only to individuals in Poland and around the world, but to all societies because of the loss of productivity, and resources spent on HIV and AIDS patients. Polish society has begun to counter this threat, and has so far been relatively effective, but the newest drug laws and proposals in Poland represent a serious challenge to the human capital

²³⁵ Wasson-Simon, Arnaud et al, "Fighting HIV as a democratic responsibility: an overview of the situation in Poland in 2003", Integration Projects, 2003. Available at www.integration-projects.org. Accessed March 15, 2007.

²³⁶ Wasson-Simon, et al., 2003. Also, see Krajewski, "Polish Experience in Drug Policies", 2004.

²³⁷ Wasson-Simon, et al, 2003.

²³⁸ These can be counted as benefits also for the reason that it is a lack of future costs of health care for HIV/AIDS and less punishment costs in the future (which lead to reduced human capital as well).

investments of harm reduction and only serve to increase the problematic stigmatization and marginalization of injection drug users.

The Polish harm reduction successes have occurred in a policy regime that simultaneously fosters and subverts harm reduction efforts. Poland has been recognized as “a leader...in halting the spread of (HIV)”²³⁹, in spite of its repressive laws, which marginalize users and drive them underground and into prison. When I say that harm reduction has achieved success in spite of Polish policies that foster intolerance, I mean that prohibitive policies cannot take credit for the successes of harm reduction. For example, a prohibition supporter may make an argument to the effect, “we have achieved some success in controlling HIV, that means our drug laws work well”. It is true that Poland has had success in controlling the HIV epidemic, but there is nothing to suggest that putting drug users in prison, which is harmful to them and to society, and driving them away from harm reduction services has in any way helped to slow the epidemic, nor has committing resources towards prohibition efforts strengthened harm reduction efforts. The way that Polish drug users are criminalized hinders harm reduction efforts. It is harm reduction, and not prohibition, that has been shown to contain an implicit economic logic of human capital investment and avoidance of socially costly harm, including HIV, and it is harm reduction that has the proven track record of reducing drug-related harm.

It will be exciting to see what harm reduction efforts in Poland are capable of when drug possession is no longer penalized. The true benefits of harm reduction will be realized only

²³⁹ MacDonald, 2005. For information on the history, scope and breadth of Polish harm reduction, and a comparison to other countries in Central and Eastern Europe and the Former Soviet Union, see Sarang, Anya, et al, “Implementation of Harm Reduction Measures in Eastern Europe and Central Asia: Lessons Learned, Central and Eastern European Harm Reduction network. Available at [www.ceeurn.org/EasyCEE/sys/files/HR%20in%20CEECA%20\(ARR%20Oct2004\).doc](http://www.ceeurn.org/EasyCEE/sys/files/HR%20in%20CEECA%20(ARR%20Oct2004).doc). Last accessed March 18, 2007.

when Polish policy becomes more uniform and abandons its counter-productive commitment to prohibition. It is not such a utopian and unrealistic vision that one day drug usage will be depenalized in Poland. In fact, just ten years ago this was the case. Until the day when this history repeats itself in Poland and harm reduction is again the prevailing policy, the Polish government will continue to actively pursue two policy goals that counteract each other.

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