

THE PROBLEM OF PROHIBITION: CRIMINAL JUSTICE, HUMAN RIGHTS, AND THE EFFICACY OF CURRENT DRUG POLICY MODELS

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Submitted to
Central European University
Department of Legal Studies

In partial fulfillment of the requirements for the degree of
Masters of Arts in Human Rights

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Budapest, Hungary
2010

EXECUTIVE SUMMARY:

As the title of this paper suggests, the criminalization of drugs has resulted in some negative consequences concerning human rights. By examining different theories of criminal justice, various models of drug control currently being implemented and how these policies affect human rights, this paper will determine what drug policy model is the most prudent from a human rights standpoint. A comparison of the various models through examination of national policies, usage rates of illicit substances, and other key indicators of drug use will demonstrate the practical consequences of each model. After a discussion of legal philosophy, human rights violations, and the efficacy of current drug policy models, it will become clear that policies of prohibition have highly problematic consequences that outweigh any good they may produce. Such policies should accordingly be recalled in favor of more harm reductive and rights-friendly approaches to drug control.

ACKNOWLEDGEMENTS

I would like to thank those who helped me in writing this thesis, most notably my advisor Professor Károly Bárd, and Péter Sárosi and István Gábor Takács at the Hungarian Civil Liberties Union. I would also like to thank my beautiful wife, Sylvia Fináli, as well as my parents and in-laws for their support and patience with my research.

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ABBREVIATIONS

CDDA: Portugal's Commission for Dissuasion of Drug Addiction

CND: United Nation's Commission on Narcotic Drugs

DRD: Drug-Related Deaths (deaths per 100,000 persons)- deaths directly caused by illegal drugs.

PDU: Problematic Drug Use (users per 1,000 persons aged 15 to 64 years old)- intravenous drug use or long duration/regular drug use of opiates, cocaine and/or amphetamines.

ICCPR: United Nation's International Convention on Civil and Political Rights

ICESCR: United Nation's International Convention on Economic, Social, and Cultural Rights

IDU: Intravenous Drug Use(r)

INCB: United Nation's International Narcotics Control Board

LM: Legal Moralism

LP: Legal Paternalism

MDA: England's Misuse of Drugs Act of 1971

MP: Moral Paternalism

LTP: Lifetime Prevalence- Percentage of a population that has used a substance at least once in their lifetime.

LYP: Last Year Prevalence- Percentage of a population that has used a substance at least once in the past 12 months.

UDHR: United Nation's Universal Declaration on Human Rights

UNODC: United Nation's Office on Drugs and Crime

INTRODUCTION

Prohibitive legislative policies against the use of certain substances are commonplace in today's society. Yet despite the pervasiveness of such policies, few people seem to question whether they are effective in achieving their intended goals. Most countries in the world have criminalized narcotic drugs as a means to improve public health and reduce prevalence rates. Some countries even go so far as to declare the goal of a "drug-free society," denouncing the use of drugs as immoral and evil. The purpose of this essay, however, is to examine the efficacy of prohibitive legislative models on drugs and scrutinize the negative consequences of such policies. My hope is that after reading this paper and observing the evidences of prohibitive drug policies, you will come to the conclusion that prohibition of drug use causes more harms than it claims to alleviate. Keeping this in mind, you may even be inclined to advocate a change in international policies as well as those relevant to your own country.

Since President Nixon termed the phrase in 1971, the U.S. has been waging a "war on drugs" in an effort to curb drug use within its borders and eradicate drug production elsewhere in the world.¹ Using its significant influence in international politics, the U.S. has been able to convince other nations to join the war on drugs by strengthening their national drug policies and heightening enforcement of drug prohibition. The consequence of this oppressive approach to drug control is that "in both high-income and low-income countries across all regions of the world, human rights have been allowed to become a casualty of the 'war on drugs'".² However the goal of this war, a drug-free society, is entirely unrealistic and adherence to such an ideal can be harmful to the society that is allegedly being protected.

¹ Payan, Tony. *The Three U.S.-Mexico Border Wars*. Westport, Conn. : Praeger Security International, 2006. p. 23.

² Barret, Damon, et al. "Recalibrating the Regime: The Need for a Human Rights-Based Approach to International Drug Policy". *Beckley Foundation Drug Policy Programme*, report 13: Mar. 2008. Web. 10 Nov. 2010. p. 24.

The debate concerning the effectiveness of drug criminalization often results in highly polarized groups of liberals and conservatives taking their opponent's arguments to absurd ends. Joel Feinberg, a prominent legal philosopher, notes this and states that the topic "is in fact a litmus test example for distinguishing the paternalist from the liberal."³ To properly address this topic, we must consider everything from theories of criminal justice to hard evidence of the benefits and negative consequences of drug criminalization.

Chapter 1 is titled "Criminal Justice and Self-Regarding Acts" and explores various commonly held philosophical stances on what actions should be the target of criminal legislation. As drug use is an act that only directly affects the user, this chapter focuses on the criminalization of so-called "self-regarding" actions. The view of paternalism will be explained and the objections of a famous anti-paternalist, John Stuart Mill, will be addressed as well. Mill's most renowned contributions to this dialogue are the "harm principle" and the notion of "individual liberty." The stance of legal moralism will be discussed through the lens of the Hart-Devlin debate, and both legal paternalism and moral paternalism will be addressed as well. Finally, the merits of liberal autonomy will be examined and how this philosophy regards recreational drug use will be explained.

Chapter 2 is titled "Human Rights and Drug Use" and attempts to shift the discussion from the philosophical justifications for prohibiting drug use to the practical consequences of criminalizing drug use. The opinion that drug prohibition violates human dignity, autonomy, and individual self-determination will be examined, although these rights are difficult to claim in front of the United Nations. More concrete violations of human rights treaties will be addressed as well. These include arbitrary deprivation of life and extrajudicial killing, capital punishment for drug offenders, deprivations of liberty and due process, and finally the more controversial right to the highest attainable standard of health will be discussed.

³ Feinberg, Joel. *Harm to Self*, vol. 3 of *The Moral Limits of the Criminal Law*. New York: Oxford University Press, 1986. Print. p. 133.

Chapter 3 is titled “Comparing Drug Policy Models” and begins by examining evidence revealed through a comparison of alcohol prohibition in the U.S. during the 1920’s and the current U.S. war on drugs. A further examination of various drug control policies starts with an overview of the international policies held by the United Nations. Subsequently, the national policies of the U.S., Sweden, the U.K., the Netherlands, and Portugal will be explained and a comparison of each country’s rates of drug use will be undertaken in an effort to determine which model is most effective in reducing usage. Finally, the overall efficacy these national policies will be criticized by observing other key indicators of drug use such as problematic usage and drug-related deaths.

Lastly, a summarization of the research in this paper will be reviewed and any relevant findings will be explained clearly. Some gaps in research may also be addressed and future research possibilities suggested for those interested in continuing along this path. The most effective drug policy model will be chosen based on criteria that weigh both the benefits and consequences of the legislation. Additional policy models will also be proposed that could be more effective than any of those examined explicitly in this paper.

The research methodology for this paper utilized primary sources when available, although various secondary sources were also used to contribute to the analysis of certain topics. I strove to use the actual works of the legal philosophers that were mentioned in the first chapter to get a more authentic feel of each point of view. Various articles from academic journals were used in the second chapter on human rights, along with references to U.N. human rights treaties when appropriate. In the comparison of the national policy models I also tried to reference the actual legislation, but in some instances there were no adequate translations available. To supplement this information, I found summaries of national legislation on the U.N. Office on Drugs and Crime (UNODC) website as well as the European Monitoring Centre for Drug and Drug Addiction (EMCDDA) website. The data

that provided the graphs on usage rates, drug-related deaths, and problematic drug usage was taken from both the U.S. Office of Applied Sciences as well as the EMCDDA website. All data used in the analyses in the third chapter represents the most recent surveys and reporting methods.

CHAPTER 1: CRIMINAL JUSTICE AND SELF-REGARDING ACTS

Before explicitly examining the effects that drug prohibition has on society and individual human rights, this paper will address the theoretical justifications for criminalizing certain acts. As drug use is an act performed by an individual on themselves, this discussion will focus on the criminalization of so called “self-regarding” acts in particular. Although this chapter approaches criminalization of such acts from a philosophical perspective, every effort will be made to reference drug use in examples that elucidate the theories being analyzed.

1.1 PATERNALISM AND MILL’S HARM PRINCIPLE

Generally speaking, paternalism is the belief that an agent may be prohibited from doing something because the interference will prevent harm to said agent.⁴ Practically speaking, the actor who is interfering in the interest of the agent can be a single individual, a group of individuals, or a state (as we will focus on in this analysis). Paternalism is nothing new to society and we see it most commonly in the actions that parents take concerning their children in attempting to keep them safe. We can see, quite obviously, that if parents did not interfere with their children’s lives in the interest of their well-being, then hardly any child would make it to adulthood without inflicting grave physical or mental harm on themselves and others. By acting paternally and restricting the actions of a child when they want to play with matches or drop out of school, we impose our will on them because we know the consequences of these actions to be injurious.

As a child’s guardian, we treat our ward as a person with limited autonomy in the hopes that they will mature into an adult capable of making informed and rational decisions about their life. Of course, we justify this limited autonomy because we know that a child

⁴ Dworkin, Gerald. “Paternalism”. *Stanford Encyclopedia of Philosophy*. Stanford University, 1 Jun. 2010. Web. 29 Oct. 2010.

does not yet have the resources at its disposal to fully comprehend the consequences of its actions. A child may not truly understand that playing with matches is dangerous to both themselves and others, because the act of striking a match is fascinating and brings them joy. A child does not understand that a proper education is essential to effectively interacting with the world around them; they only know that learning can be difficult work. So, with the lofty hopes that our wards will one day become autonomous agents in their own right, we justify our temporary interferences in their autonomy because they are not yet developed enough as persons to make prudent and rational decisions. This interference with their autonomy is only temporary, however, as once our wards reach adulthood we relinquish our control over them and send them into the world as autonomous beings (or so we hope).

Consequently, once we are released by our parents into society, we find ourselves wards yet again. We find that the society we live in is governed by sets of rules intended to once again prevent harm to ourselves and others. Many of these rules or laws are necessary foundations for a society to function, particularly those that involve preventing harm to another person.⁵ Yet there are still other laws that are meant to prevent us from harming ourselves. Nearly every state has laws against suicide or using certain proscribed substances, and some states go so far as to require passengers in automobiles to wear safety belts and motorcyclists to wear helmets. States make laws against such actions (or inactions) regardless of the fact that as adults, we are presumed to be knowledgeable and informed about the consequences of our decisions. Even if we chose to act without coercion in a fully informed manner and are harming no one but ourselves in the process, we may still fall on the wrong side of the law and be subjected to punishment. This begs the question, as allegedly

⁵ Laws against murder, assault, and kidnapping are perfect examples of legislation that preserve a free society because without them, ordered society would regress into a state of living where personal liberty could not be preserved.

autonomous agents capable of making informed and voluntary choices, are at least some interferences of the state in self-regarding acts truly justifiable limitations of our autonomy?

One of history's greatest opponents of paternalism was John Stuart Mill, a widely read utilitarian, whom modern legal philosophers often reference in their works as a starting point for the debate about the limits of criminal justice. As a classic utilitarian, Mill believed people should seek to maximize the favorable consequences of their actions (or at least cause the smallest amount of harm).⁶ This can be a tricky thing to accomplish in practice, however, because if a person is constantly trying to weigh the possible good consequences of their actions against the bad, they may never get anything done in a timely fashion. In Mill's work, he addresses how to be an expedient utilitarian within a society and how that society should serve the individual in return. If we simplify the utilitarian principle into the phrase "the greatest good for the greatest amount of people," we see that this philosophy places great poignancy on society as a whole. Not only does the individual have obligations to society, but the society also has an obligation to govern in a manner that allows the greatest good to be achieved.

One of Mill's notions for how a society maximizes the good within its population is by respecting the autonomy of the individual and not unnecessarily interfering or limiting this liberty. Although a society ought to have laws to preserve itself, the power of the state should not be absolute:

(The) sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent *harm* to others.⁷

⁶ See J.S. Mill's book *Utilitarianism* for more information.

⁷ Mill, John Stuart. "On Liberty". *On Liberty*. Ed. David Spitz. New York: W. W. Newton & Co. , 1975. 1-87. Print. pp. 10-11, (*italics added for emphasis*).

This passage is Mill's succinct answer to the question of whether a state may justifiably use its power to interfere with the autonomy of its constituents. It sets the foundation for his "harm principle" and clearly limits the state's authority in enacting laws against actions that cause no harm to others (so-called "self-regarding" acts). Mill further explains about this principle:

His own good, either *physical* or *moral*, is not a sufficient warrant ... In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.⁸

Thus we can observe the interconnectedness of the harm principle with that of individual autonomy. Mill has conceived of a society in which an individual's autonomy is respected absolutely, so long as their choices do not harm anyone else in the community. It should also be noted that if we take Mill's statement about "good" to include both physical and moral elements, then we should also attribute these same elements to his definition of "harm."

According to Mill's philosophy, an individual should be sovereign over their mind and body, but we can certainly imagine that if a person harms themselves then they also harm the society in which they live. As a part of society, others depend on them to be productive contributors to the greater good through cultivation of property and support of those who cannot provide for themselves. In thinking this way, it is apparent that no man exists in isolation and that any action committed by an individual can also affect the community as well. Mill is aware of this and concedes as much,⁹ but he remains so entrenched in the belief that individual liberty is of such importance that an action which produces no direct harm to anyone other than the actor is an "inconvenience (which) society can afford to bear, for the

⁸ J.S. Mill, "On Liberty", op. cit 7, p. 11.

⁹ J.S. Mill, "On Liberty", op. cit 7, p. 75. "I fully admit that the mischief which a person does to himself may seriously affect, both through their sympathies and their interests, those nearly connected with him and, in a minor degree, society at large."

sake of the greater good of human freedom.”¹⁰ So we see that although people’s interconnectedness in society means that no one can harm themselves without harming others as well, these indirect harms ought to be suffered by society because respecting an individual’s sovereignty over themselves contributes to the greatest good for that society.

Mill’s philosophy is typically generalized as “anti-paternalistic” in that it rejects the use of coercion and law to interfere in actions where an actor may only harm himself. However, he is not just against *legal paternalism* (henceforth shortened to LP), the belief that the law should be used to prevent a person from harming themselves, but also against *moralistic legal paternalism* (henceforth referred to as *moral paternalism* and shortened to MP), the belief that the law should be used to prevent a person from morally harming themselves.¹¹ Recalling that Mill’s definition of harm involves both moral and physical elements, the statement that he is opposed to LP and MP should be easy to accept. The strongest arguments that Mill gives against the state acting paternalistically are fourfold and will be discussed below with some objections to each.¹²

To start off with, autonomous agents are the single most capable agent in knowing and acting in their own best interests.¹³ This seems like a fairly obvious statement, especially when a government assumes to know a person’s interests better than themselves. A person’s interests are highly individualized and subjective to them alone, but this will be addressed further in the next point. Yet just because a capable adult should know what is

¹⁰ J.S. Mill, “On Liberty”, op. cit 7, p. 76.

¹¹ Feinberg, Joel. *Harm to Others*, vol. 1 of *The Moral Limits of the Criminal Law*. New York: Oxford University Press, 1984. Print. pp. 26-27. LP and MP represent two of many legal philosophies addressed in Feinberg’s definitive 4 volume work. Also to be discussed later in this paper is *legal moralism* (LM), the belief that law should be used to prevent immoral conduct because it is injurious to society.

¹² These four arguments are recognized as the focal points of Mill’s objection to paternalistic interferences. See Dworkin, Gerald. “Moral Paternalism”. *Law and Philosophy* 24.3 (May 2005): 305-319. JSTOR. Web. 10 Oct. 2010; and Young, Robert. “John Stuart Mill, Ronald Dworkin and Paternalism”. *Mill’s ‘On Liberty’: A Critical Guide*. Ed. C.L. Ten. Cambridge: Cambridge University Press, 2008. Latrobe University. Web. 11 Oct. 2010.

¹³ J.S. Mill, “On Liberty”, op. cit 7, p. 71; “He is the person most interested in his own well-being: the interest which any other person, except in cases of strong personal attachment, can have in it, is trifling compared with that which he himself has; the interest a society has in him (except as to his conduct to others) is fractional, and altogether indirect; while with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else.”

best for them, does not necessarily mean that they will always act in such a way. Professor H.L.A. Hart brings up this very concern and claims that Mill gives too much credit to the “capable adult” in having the prudence and wisdom of a middle-aged man. Hart observes that “choices may be made or consent given without adequate reflection or appreciation of the consequences.”¹⁴ This objection is particularly cogent when considering the use of narcotic drugs because a person’s mind could be muddled by the addiction and physical dependence for the drug. However, we should also note that not all drug users are in the deleterious throws of a problematic addiction, so it is quite conceivable that a person might use narcotic drugs in a strictly recreational way without succumbing to the cravings which might otherwise compel a person to imbibe against their best interests. The same can be said of alcohol and tobacco usage: not all those who smoke and drink do so out of compulsion and against their best interests. Most competent adults enjoy their “poison of choice” knowing full well the responsible limits they should observe in consumption.

Thus we come to Mill’s second argument against paternalism: in preventing individuals from harming themselves, a government must enforce generalized laws that may overreach the circumstances of all individuals.¹⁵ If a state uses its power to prohibit or limit an act because it can harm the individual actors, then it must base this interference on a general presumption that all persons will be harmed by performing said act. By imposing a generalized interference on people’s self-regarding actions, a government may unduly infringe on a person’s liberty due to the myriad of subjective circumstances in which people find themselves. These presumptions might result in a “baseline” of safe activity, even though many people could be capable of acting in manner above the baseline without being harmed. The objection can be raised, though, that these baselines and generalizations

¹⁴ Hart, H.L.A. *Law, Liberty, and Morality*. Oxford: Oxford University Press, 1963. Print. p. 33.

¹⁵ J.S. Mill, “On Liberty”, op. cit 7, p. 71: “The interference of society to overrule (the individual’s) judgment and purposes in what only regards himself must be grounded on general presumptions; which may be altogether wrong, and even if right, are as likely to be misapplied to individual cases, by persons no better acquainted with the circumstances of such cases than those who look at them merely from without.”

contribute to a greater good of safety or health and should be valued because of it. We can see that regulations requiring safety equipment such as hardhats for individuals in industrial settings have saved countless lives.¹⁶ It may be true that some workers in these settings are aware enough of their environment that they avoid accidents and never require the use of their hardhat, but it could also be true that a majority of these workers have been saved because of the minor inconvenience of wearing a hardhat. In line with the counter-objection from the previous paragraph, a government should not have the power to punish people who willingly put themselves in harm's way by imposing such generalized interferences on personal liberty. Not all people who ride their motorcycles without a helmet will die a gruesome death and not all people who use narcotic drugs will kill themselves. If a competent adult makes an informed choice about an action, knowing full well the possible harm it may cause to them, then why should this person's individual liberty not be respected?

The third point Mill makes is that to live in a society where equality among persons is upheld, the autonomy of all competent individuals must be valued as a necessary condition.¹⁷ "Because the interests of each individual matter equally, compulsion is permissible only as a means of securing the interests of individuals when they are endangered by the conduct of others."¹⁸ Paternalism has no place in a free society that views its population as a society of equals and respects each individual's autonomy over themselves. By treating a person paternalistically, the state undermines their ability to make their own decisions and thus treats them as inferior to others. To put it more simply, a person must be trusted with their own self-regarding actions in order to be treated as an equal in society.

The third point is also closely related to the final point, by allowing individuals to make their own mistakes and learn from them, a person's character can be developed in a

¹⁶ Robert Young, "John Stuart Mill, Ronald Dworkin and Paternalism", op. cit. 12, p. 6.

¹⁷ J.S. Mill, "On Liberty", op. cit. 7, p 54.

¹⁸ Robert Young, "John Stuart Mill, Ronald Dworkin and Paternalism", op. cit. 12, p. 6.

more authentic way than by imposing another's will upon them.¹⁹ There seems to be two sub-points being made here: first, that a person's well-being and individuality is entirely dependent on them being able to learn from their experiences²⁰; and second, that forcing behavior onto a person is only met with restraint.²¹ This latter sub-point seems clear enough, as who among us has not wanted to lay a hand on the dinosaur bones at a museum simply because there is a sign that says "Do Not Touch!" (although this action is not truly self-regarding because it affects all who wish to see the exhibit)? But what Mill means to convey is that forcing rules on people about their own interests exacts a cost on their well-being. This brings us back to the first sub-point, that to truly understand why our parent's told us not to play with fire, we had to learn the hard way by burning ourselves. Our mistakes are what shape us in an "authentic" way through empirical interaction with the world around us. A lesson learned the hard way may seem all the more precious to us.

As forceful an argument as these four points make, there is also a sense of indecision in Mill regarding paternalism. As a utilitarian, Mill would have us always weigh the costs and benefits to reach a decision about what action would result in the greater good. It might be the case, at least in some circumstances, that the benefits of preventing harm by paternalistic interference could outweigh the costs to a person's individuality. We are left to assume for ourselves which value, the greatest good or individual liberty, is to be preserved when given a choice between the two. Joel Feinberg would add a valuable clarification on this point:

¹⁹ J.S. Mill, "On Liberty", op. cit. 7, Most of Chapter III is actually devoted to this topic.

²⁰ J.S. Mill, "On Liberty", op. cit. 7, p. 54: "If it were felt that the free development of individuality is one of the leading essentials of well-being; that it is not only a coordinate element with all that is designated by the terms civilization, instruction, education, culture, but is itself a necessary part and condition of all those things; there would be no danger that liberty should be undervalued, and the adjustment to the boundaries between it and social control would present no extraordinary difficulty."

²¹ J.S. Mill, "On Liberty", op. cit. 7, p. 60: "To be held by rigid rules of justice for the sake of others, develops the feelings and capacities which have the good of others as their object. But to be restrained in things not affecting their good, by their mere displeasure, develops nothing valuable, except such force of character as may unfold itself in resisting the restraint."

What justifies the absolute prohibition of interference in primarily self-regarding affairs is *not* that such interference is self-defeating and likely (merely likely) to cause more harm than it prevents, but rather that it would itself be an injustice, a wrong, a violation of the private sanctuary which is every person's self; and this is so whatever the calculus of harms and benefits might show.²²

Thus the onus of deciding between the utility of an action and individual liberty of a person is made simpler by tipping the scales in favor of individual liberty. By shorting individual liberty an injustice (not just a harm) is produced which outweighs any harm a paternalistic interference might prevent. My reading of Mill seems to fall in line with Feinberg as I believe the liberty of the individual over self-regarding acts should be given primacy, ensuring a society respectful of a person's interests and thus providing a background where the greatest good can be realized. Some scholars may object to this reading, but I find Mill to be more of an anti-paternalist than a utilitarian (although they should not be considered mutually exclusive).

1.2 SOFT AND HARD PATERNALISM

Mill is often pegged as being so strong in his opposition of paternalism that he would allow any competent adult to perform any self-regarding act without restraint, but this is not factually correct. When it comes to practical application of his anti-paternalistic beliefs, two poignant examples make him take a step back from his blanket prohibition. One circumstance he gives is of a person who willingly and voluntarily commits themselves into slavery. Regardless of the fact that this person is a competent adult and fully aware of the consequences of this action, Mill posits that any contract made as such should be stricken as "null and void."²³ The reason for this is simple, because by contracting themselves into

²² Feinberg, Joel. "Legal Paternalism". *Canadian Journal of Philosophy* 1.1 (Sep. 1971): pp. 105-124. *JSTOR*. Web. 29 Oct. 2010. pp. 108-109.

²³ J.S. Mill, "On Liberty", op. cit. 7, p. 95: "His voluntary choice is evidence that what he so chooses is desirable, or at least endurable, to him, and his good is on the whole best provided for by allowing him to take his own

slavery, they prevent the exercising of their own liberty in any future situation. Since individual liberty is a necessary component in achieving both personal well-being and the greatest good for society, the state has an obligation to act paternalistically by annulling this contract.

Using this same argument, I can imagine some persons making an argument for prohibiting narcotic drug use on the grounds that it may lead to an addiction that makes the user a “slave” to the drug. Although the individual may have been an informed and competent adult when they chose to voluntarily consume a drug, through their consumption an addiction could grow that would usurp their liberty from them, essentially rendering them slaves to their habit. It can also be correctly assumed that problematic drug addiction can lead to serious physical harm for the user and even death in some cases. Thus, LPs may make a case against narcotic drug use along these lines, but is this a rationally coherent argument?

Opponents of LP should point out that not all users of narcotic drugs become addicted and that analogizing between Mill’s voluntary slavery and drug addiction is categorical fallacy. In Mill’s slavery example, the person in question willingly and absolutely signs away all future liberty over themselves, while in the case of addiction a person still retains that sense of liberty and can choose to act otherwise. An addict can make the choice to seek treatment or otherwise take measures to assuage their habit. The proponent of individual liberty ought to also point out that other substances are legally consumed that may cause harm and are addictive. Feinberg recognizes this quandary and notes the trouble society has in drawing the line between tobacco, alcohol, narcotic drugs, antibiotics, and even fried foods.²⁴ Accordingly, questions ought to be raised about this very issue. Are alcohol and

means of pursuing it. But by selling himself for a slave, he abdicates his liberty; he forgoes any future use of it beyond that single act.”

²⁴ Joel Feinberg, “Legal Paternalism”, op. cit. 22, p. 106.

tobacco not addictive and can cause harm when not used in moderation and properly regulated? Is there a difference between alcohol, soft drugs like marijuana, and hard drugs like heroin? Let us continue to examine this issue and try to use recognize if interferences with our individual liberty via LP are ever justifiable.

Mill's second famous example which critics claim sullies his blanket prohibition on paternalism concerns a man being prevented from crossing a dangerous bridge.²⁵ In this example, an actor can justifiably be prevented from an action that may harm them so long as the interference is imposed to establish if the actor is aware of the harm. A person may be physically prohibited from this action to affirm their informed consent in committing the act. If, however, you stop the person from crossing the bridge to warn them and it turns out that they are crossing the bridge despite knowing the possible harm to themselves, then that person should be allowed to cross unhindered. This is the only other paternalistic interference Mill allows for, and it seems to be an extremely rational exemption from his otherwise "hard" anti-paternalistic stance.

Taking the examples of voluntary slavery and bridge crossing into consideration, it makes it difficult to continue to view Mill as a strict anti-paternalist. These supposed inconsistencies are frequently pointed out by the critics of Mill in an attempt to discredit his philosophy in favor of paternalism. To clarify the stance of Mill and his supporters, a distinction should be made between "hard paternalism" and "soft paternalism."²⁶ The hard paternalist would make the claim that "criminal legislation is necessary to protect competent adults, against their will, from the harmful consequences even of their fully voluntary choices

²⁵ J.S. Mill, "On Liberty", op. cit. 7, p. 89: "It is a proper office of public authority to guard against accidents. If either a public officer or anyone else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there was no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river."

²⁶ This distinction has been made by a few notable legal philosophers, including Gerald Dworkin and Joel Feinberg.

and undertakings.”²⁷ This is what most consider to be the classic LP ideal because it gives the state absolute power regarding the interference of a person’s self-regarding actions. A state can justifiably stop Mill’s man from crossing the bridge, even after he shows his awareness of the danger involved. Under hard paternalism, many states have outlawed voluntary suicide and euthanasia because of the clear physical harm it does to the person, regardless of the person’s reasons for wanting to end their life.²⁸ Most important for the purposes of this paper, the hard paternalist can prohibit all drug use because of the potential harms involved. It should be obvious at this point, that this is exactly the type of paternalism that Mill is attacking.

The concept of soft paternalism seems to be introduced by Mill’s bridge crossing example and it relies on the condition of voluntariness. Feinberg accepts soft paternalism and defines it:

Soft paternalism holds that the state has the right to prevent self-regarding harmful conduct (so far as it looks ‘paternalistic’) *when but only when* that conduct is substantially nonvoluntary, or when temporary intervention is necessary to establish whether it is voluntary or not.²⁹

He further labels this condition “the standard of voluntariness”³⁰ and suggests that soft paternalism is indeed a notion that Mill would find agreeable. Under this philosophy, the state may justifiably enforce age limits on driving, purchasing alcohol and tobacco, gambling, and joining the military because it is assumed that minors have not developed the cognitive faculties needed to voluntarily consent to acts which may harm them. However, under this philosophy, the state can only impose laws that regulate actions in order to determine their voluntariness. Allowing voluntary suicide after a required psychiatric evaluation and waiting period would be justifiable. Voluntary recreational drug use, I would argue, should be permitted from this standpoint under appropriate conditions. We should also note that

²⁷ Joel Feinberg, *Harm to Self*, op. cit 3, p. 12.

²⁸ Gerald Dworkin, “Paternalism”, op. cit. 4.

²⁹ Joel Feinberg, *Harm to Self*, op. cit 3, p.12.

³⁰ Joel Feinberg, “Legal Paternalism”, op. cit. 22, p. 114.

perhaps soft paternalism is not truly paternalism at all in the sense that it is preventing harm to an individual. Because it ensures the reason for the intervention is based not on preventing the harm to the individual, but on their *willingness* to accept the possibility of harm, it might be more appropriate to categorize it as something else besides paternalism.³¹ Feinberg seems unsure of what to label it, so for his purposes he continues to call it soft paternalism which I will do as well.

When it comes to the consumption of harmful substances, Feinberg takes the position of a soft paternalist. He analyzes this topic by considering three situations in which a person might ask their doctor for a prescription of a potentially harmful drug. In the first instance, the doctor warns his patient of the harm, and the patient responds by claiming there is no harm.³² Because the patient's ignorance regarding use of the drug is apparent, then it can be said he is not consuming the drug in an informed and voluntary manner. Here the state is justified in preventing the patient from getting the drug. The second instance involves the doctor warning about the possible harms of a drug, but the patient is aware of the harm and expresses that their desire is actually to harm themselves.³³ This is a problematic situation because intuitively we might assume no person in possession of their full faculties would desire to harm themselves. So long as there is no undue coercion making them act this way against their will, then the voluntariness standard is still fulfilled and the state has no justification for interfering with the patient's wishes. In the last instance, the doctor warns of the possible harm of the drug and the patient responds thusly:

I don't care if it causes me physical harm. I'll get a lot of pleasure first, so much pleasure in fact, that it is well worth running the risk of physical harm. If I must pay a price for my pleasure I am willing to do so.³⁴

³¹ Joel Feinberg, *Harm to Self*, op. cit. 3, p. 12-13.

³² Joel Feinberg, "Legal Paternalism", op. cit. 22, p. 114.

³³ Joel Feinberg, "Legal Paternalism", op. cit. 22, pp. 114-115.

³⁴ Joel Feinberg, "Legal Paternalism", op. cit. 22, pp. 115.

Here again we have an actor who meets the standard of voluntariness and seems to have made a choice based on informed reflection. Depending on the gravity of the harm and the degree of pleasure the patient might experience, we might even call this a rational decision (as the example of tobacco smoking or alcohol consumption can be paralleled). Simply because there are unreasonable risks associated with consumption of a harmful drug, Feinberg would posit that the state has no right to prohibit its consumption so long as the standard of voluntariness is met.

Both Mill and Feinberg, however, would also agree that regulations, licensing schemes, and taxation should be imposed on the sale and use of such harmful substances. They both recognize that substances capable of harming people should be made available only to competent adults who undertake consumption in a voluntary and informed fashion. Although Mill has alcohol consumption in mind when addressing the notion of regulation and taxation, his statements can nonetheless be extended equally as cogently to narcotic drugs as well.³⁵ I fully agree with this position on the consumption of harmful substances, whether it is tobacco, alcohol, or narcotic drugs. I believe that a state should allow such substances to be sold in a manner that gives due respect to personal liberty and autonomy. Strict regulations on selling such substances should be enforced and the funding required for following through with the regulations should come from taxation of the substances in question. This is already the case with tobacco and alcohol, so we know that the model is fairly practical and sustainable. Thus I come to the conclusion that strong LP expressed via prohibition of narcotic drugs violates a person's autonomy and according to Mill, is an injustice incompatible with the greater good of society.

³⁵ J.S. Mill, "On Liberty", op. cit. 7, p. 93: "It is hence the duty of the state to consider, in the imposition of taxes, what commodities the consumers can best spare; and *a fortiori*, to select in preference those of which it deems the use, beyond a very moderate quantity, to be positively injurious."

1.3 LEGAL MORALISM

Up until this point, the analysis of whether recreational drug use should be criminalized has come from the perspective of LP. As most critics of recreation drug use cite the physical harms they may cause to the user, I have focused primarily on this line of argumentation. However, Mill's arguments against paternalism speak of not only the *physical* harm that may be self-inflicted by a person, but also on the *moral* harm they may do to themselves. Thus, we must also consider whether self-regarding actions should be proscribed because of the moral harms it may inflict on the actor. This view is appropriately labeled *moral paternalism*³⁶ (henceforth referred to as MP), but before we examine the arguments for it, we ought to address another kind of proscription based on morality. The philosophy now being referred to is called *legal moralism*³⁷ (henceforth referred to as LM), and is based on the argument that certain acts are fundamentally bad and ought to be prohibited on this ground alone. This is contrasted with MP because the LM gives no consideration to the harm being inflicted on an actor; it is enough that the act is immoral and should thus be illegal.

A famous debate about the link between morality and the law was sparked in 1957 when a report was published by a committee at the request of the British government concerning the legality of homosexuality, the act of which was a crime at the time. What came to be known as the *Wolfenden Report* suggested that the act of homosexuality, when practiced in the privacy of one's home, should fall within the "realm of private morality and

³⁶ Joel Feinberg, *Harm to Others*, op. cit. 11, p. 27: "It is always a good reason in support of a proposed prohibition that it is probably necessary to prevent *moral harm* (as opposed to physical, psychiatric, or economical harm) to the actor himself. (Moral harm is 'harm to one's character,' 'becoming a worse person,' as opposed to harm to one's body, psyche, or purse."

³⁷ Joel Feinberg, *Harm to Others*, op. cit. 11, p. 27: "It can be morally legitimate to prohibit conduct on the ground that it is inherently immoral, even though it causes neither harm nor offense to the actor or others."

immorality which is, in brief and crude terms, not the law's business."³⁸ Although the suggestion to decriminalize homosexual behavior was not immediately acted upon by the British government, a debate between Lord Patrick Devlin and Professor H.L.A. Hart about the role of morality, law, and society began that would last for several decades and give rise to a thorough treatment of the subject that is still hotly discussed even today. For the purposes of this paper, we can plausibly analogize between the morality of homosexuality acts and the morality of recreational drug use. The findings of the Wolfenden Report are plain in that a sphere of privacy should be afforded to all people concerning self-regarding actions. It can be argued from a perspective of LP that neither consensual homosexuality nor voluntary recreational drug use, when practiced at home, produce any harm to third parties. Lord Devlin, a prominent Judge and legal theorist, argued quite differently. Although not expressly against the act of homosexuality, Devlin was of the belief that if an action is considered immoral by a society, then proscribing the action is fully justified to preserve the society.

As part of what he term as his "disintegration thesis," Devlin asserts that society is held together by its shared morality, or social *mores*. When people commit immoral acts, they are effectively endangering the society they live in because a society can begin to fall apart when affronted by too much immorality:

Societies disintegrate from within more frequently than they are broken up by external pressures.

There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage to disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions.³⁹

Thus, a society has an obligation to enact and enforce laws that mirror its morality as a means to ensure and preserve its existence *ad infinitum*. Indeed, Devlin holds that laws prohibiting

³⁸ *Report of the Committee on Homosexual Offences and Prostitution*. London: Her Majesty's Stationary Office, 1957. *SCRIDB*. Web. 15 Nov. 2010. Section 61. (henceforth referred to as the Wolfenden Report).

³⁹ Devlin, Patrick. *The Enforcement of Morals*. Oxford: Oxford University Press, 1965. Print. p. 10.

immoral actions are just as important as those that prohibit treason and sedition because they serve the same ends of self-preservation. But what exactly should be considered an “immoral” act according to Devlin?

Lord Devlin’s method of determining the morals of a society does not depend on a majoritarian vote, but instead concerns the “ordinary man,” the “reasonable man,” or the “right-minded man.”⁴⁰ If morality were determined by a simple vote, those in the minority might be considered as having immoral views which is highly problematic if the minority still represents a considerable portion of the population. The right-minded man, Devlin conceives, can be compared to those who sit in a jury box making judgments about case law. Those who sit in a jury box must come to a unanimous decision, they must utilize their moral instincts in coming to a conclusion, and they should also come to a judgment after careful deliberation and reflection.⁴¹ Using this jury example in defining the right-minded man, Devlin means to point out that issues of morality in dispute are not recognized as unanimously held and should thus not be legislated on. Yet in his mind, the issue of homosexuality is not in dispute, even as the Wolfenden Report suggests otherwise. This seems to be a major inconsistency in Devlin’s theory of LM, although he responds by noting that the Wolfenden Committee represents a class of “educated men.”⁴² Such men have the advantage of being heard by lawmakers, but nonetheless do not necessarily represent the beliefs of the society as a whole. Another serious problem develops when legislators must decide what part of morality should be translated to law.⁴³ Taking into consideration the suggestions of the educated man, determining the morals of the right-minded man, and still

⁴⁰ Devlin, Patrick. “Law, Democracy, and Morality.” *University of Pennsylvania Law Review* 110.5 (1962): 635-649. JSTOR. Web. 22 Oct. 2010. P. 639.

⁴¹ Patrick Devlin, “Law, Democracy, and Morality”, op. cit. 40, pp. 639-640.

⁴² Patrick Devlin, “Law, Democracy, and Morality”, op. cit. 40, p. 645.

⁴³ Although because Devlin is coming from a common law tradition, it is perhaps easier for him to place this burden on lawmakers because the law has been developed over a prolonged period of time and is already shown to work in practice. This task would be much more precarious in a new jurisdiction that is starting to legislate from scratch.

serving democracy by submitting to a majority vote, lawmakers are put in a very tenuous position in legislating morality.

Lord Devlin recognized the difficult responsibility that is placed upon legislators and thus offers four principles to better guide them in determining what morals should become the basis for law. The first principle is that there “must be toleration of the maximum individual freedom that is consistent with the integrity of society.”⁴⁴ This toleration only goes so far, however, because when a society responds to an action with strict “intolerance, indignation, and disgust,”⁴⁵ it should be clear that this limit has been reached. Secondly, legislators should be conservative in respect to changing the law simply because there is widening of tolerance of a certain action.⁴⁶ Devlin strongly believes that even though there might be greater tolerance towards acts like homosexuality, laws that prohibit such immoral acts should remain in force because they still preserve the moral integrity of the society. The third principle states that “as far as possible privacy should be respected.”⁴⁷ To me, the inclusion of this principle is Devlin’s safety net against liberal objections. Simply saying privacy should be respected is worthless in my opinion, particularly when you limit this privacy to only “moral” actions. Devlin’s fourth principle for lawmakers reminds that there is a “distinction between moral obligations and moral ideals.”⁴⁸ Through this final principle, Lord Devlin tells legislators that law regarding morality should represent a floor and not a ceiling. Laws should not dictate perfect behavior in every situation, but merely behavior that is necessary to maintain social cohesion.

⁴⁴ Patrick Devlin, *The Enforcement of Morals*, op. cit. 39, p. 16.

⁴⁵ Patrick Devlin, *The Enforcement of Morals*, op. cit. 39, p. 17.

⁴⁶ Patrick Devlin, *The Enforcement of Morals*, op. cit. 39, p. 18: “(I)n matters of morals the limits of tolerance (may) shift. Laws, especially those which are based on morals, are less easily moved. It follows ... that in any new matter of morals the law should be slow to act.”

⁴⁷ Patrick Devlin, *The Enforcement of Morals*, op. cit. 39, p. 18.

⁴⁸ Crane, Peter. “Taking Law Seriously: Starting Points of the Hart/Devlin Debate.” *The Journal of Ethics* 10.1/2 (2006): 21-51. JSTOR. Web. 22 Oct. 2010. p. 29.

Thus we have reviewed the LM espoused by Lord Devlin. According to this theory, law and morality is necessarily interconnected and they play a vital role in the self-preservation of a society. Devlin asserts that the glue keeping a society together is the common morality of said society, without which a society would “disintegrate” into an unordered and immoral chaos. In the interests of preservation, society has an obligation to protect itself from falling apart by proscribing certain immoral acts. This philosophy may be either intuitively acceptable, or met with the very “intolerance, indignation, and disgust” Devlin described earlier. Although it is true that Devlin does have some supporters of his LM in contemporary circles, they are few and far between. From a liberal position, it is generally accepted that the objections raised by H.L.A. Hart against Lord Devlin have rendered his arguments barren of their force.⁴⁹ My initial feelings towards LM are that it is an antiquated way of looking at morality and the role of law in society. It seems to leave very little room for progressive societies whose morality may evolve quite rapidly. LM also feels like it could be used to justify a much more authoritarian type of government, just as hard paternalism might. Certainly, if Devlin would consider an action like consensual homosexuality immoral and thus capable of destroying a society, he would similarly consider recreational drug use immoral and justifiably make it illegal.⁵⁰ He would further claim that such acts of vice exploit human weakness⁵¹ and would spread throughout society until all social bonds had collapsed and society as we know it had ceased to exist.

In stark opposition to Lord Devlin’s philosophy of LM, Professor H.L.A. Hart’s philosophy of legal positivism holds as a foundation that there is no necessary connection between law and morality. This starting point allows Hart to raise some cogent objections to

⁴⁹ Peter Crane, “Taking Law Seriously”, op. cit. 48, p. 23.

⁵⁰ Patrick Devlin, *The Enforcement of Morals*, op. cit. 39, p. 106: “Men who are constantly drunk, drugged, or debauched are not likely to be useful members of the community.”

⁵¹ Patrick Devlin, *The Enforcement of Morals*, op. cit. 39, p. 12.

LM, a few of which shall be examined. One major criticism of Devlin begins with the disintegration thesis, as this postulate states that morality should be expressed through legislation. The next objection raises the question of whether a society whose morality is misguided is still justified in preserving itself by enforcing such morality. The final objection that will be addressed concerns a society whose social morality is in flux, perhaps resulting in a morally pluralistic society.

Lord Devlin seems to have gleaned the disintegration thesis from what he perceived to be historical facts. I am quite sure he would claim the fall of the Roman Empire was due to a divergent morality (or immorality) that eroded the social cohesion until the empire collapsed. If we consider the disintegration thesis taken to an extreme, according to Hart it would state that “the enforcement of morality is regarded as a thing of value, even if immoral acts harm no one directly, or indirectly by weakening the moral cement of society.”⁵² As Hart so poignantly reminds us, Devlin gives no actual evidence that a common morality is what preserves a society.⁵³ Instead, Lord Devlin takes this as an *a priori* truth and common knowledge that immoral acts destroy society. Thus, by casting doubt on Devlin’s thesis, we invalidate his conclusion that society must preserve itself by legislating morality.

Another issue arises from this same “extreme thesis,” that protecting morality is a morally proper thing to strive for, regardless of the actual content of the morality in question. Hart makes a distinction between two types of morality in regards to this point: positive morality, and critical morality. Positive morality is “the morality actually accepted and shared by a given social group,” and critical morality concerns “the general moral principles used in the criticism of actual social institutions including positive morality.”⁵⁴ Devlin’s theory discounts the role of critical morality by ensuring that laws remain static regardless of

⁵² H.L.A. Hart, *Law, Liberty, and Morality*, op. cit. 14, p. 49.

⁵³ H.L.A. Hart, *Law, Liberty, and Morality*, op. cit. 14, p. 50: “No evidence is produced to show that deviation from accepted sexual morality, even by adults in private, is something which, like treason, threatens the existence of society.”

⁵⁴ H.L.A. Hart, *Law, Liberty, and Morality*, op. cit. 14, p. 20.

shifting moral tolerances. Thus in LM, we can imagine a society with a backward morality that continues to enforce its common morals *ad infinitum*. Because “it is not the quality of the morality but its cohesive power which matters,”⁵⁵ a society that allows slavery will never evolve morally to regard slavery as a base evil.

In this age of globalization, immigration, and multiculturalism, populations have ceased to be as homogenous as they once were. Just as there are now a plethora of ethnicities, nationalities, and religions in all but the most isolated societies, it is not so difficult to imagine a society with many moralities coexisting peacefully. Lord Devlin’s theory has another serious problem if it is applied to such a morally pluralistic society because there is hardly a common morality to be perceived (outside of do not kill, assault, and rape). According to Devlin, the introduction of multiple moralities would tear at the very fabric that holds society together. Hart points out that another option might be more intuitive:

Where moral pluralism develops in this way quarrels over the differences generated by divergent moralities must eventually destroy the minimal forms of restraints necessary for social cohesion. The counter thesis would be that plural moralities in the conditions of modern large scale societies might perfectly well be mutually tolerant.⁵⁶

Thus any change in the social mores and not only the conception of a morally pluralistic society is seen as a condition for social disintegration according to LM. If history has proven anything, it might be that societies need to be more flexible and allow an evolution of both their morality and legislation in order to survive the test of time.

⁵⁵ Hart, H.L.A. “Social Solidarity and the Enforcement of Morality”. *The University of Chicago Law Review* 35.1 (1967): pp. 1-13. *JSTOR*. Web. 22 Oct. 2010. p. 1.

⁵⁶ H.L.A. Hart, “Social Solidarity”, *op. cit.* 55, p. 13.

1.4 MORAL PATERNALISM

Having briefly summarized the Hart-Devlin debate regarding LM, I hope to have shown why the stance of Lord Devlin has some critical faults and has consequently not gained much of a following in contemporary legal circles. Thus as we lay LM to rest for the purposes of this paper, we shall again return to the concept of paternalism. It should be apparent by the previous analysis of LP that it is a very complex issue to address.

Proponents of individual liberty like Mill and Feinberg take the harm principle to be a valid reason why self-regarding acts should not be the target of legislation. Although they may ascribe to soft paternalism under certain conditions, in their view the rationality and self-determination of an individual is the greatest goal society should strive towards.

Hart seems to have been enamored by the arguments of Mill and the harm principle,⁵⁷ finding them very similar to some of principles suggested in the Wolfenden Report.⁵⁸ yet he stopped short of full endorsement because he believed that Mill gave too much credit to the individual in knowing their best interests and acting accordingly. Hart remained of the belief that self-regarding acts like euthanasia and narcotic drug use should still be illegal regardless of the standard of voluntariness. In his criticism, he claims that Mill “endows (the individual) with too much of the psychology of a middle aged man whose desires are relatively fixed, not liable to be artificially stimulated by external influences.”⁵⁹ This point was raised much earlier in this paper and is a very common objection to Mill’s stance on paternalism.

⁵⁷ H.L.A. Hart, *Law, Liberty, and Morality*, op. cit. 14, p. 5: “I do not propose to defend all that Mill said; for I myself think there may be grounds justifying the legal coercion of the individual other than the prevention of harm to others. But on the narrower issue relevant to the enforcement of morality Mill seems to be right.”

⁵⁸ *Wolfenden Report*, op. cit. 38, section 13: “[The] function [of the criminal law], as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious and to provide sufficient safeguards against exploitation or corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind or inexperienced ...”

⁵⁹ H.L.A. Hart, *Law, Liberty, and Morality*, op. cit. 14, p. 33.

Turning now towards the theory of MP, I shall begin by discussing the work of Ronald Dworkin who was one of Professor Hart's students. In line with Feinberg's standard of voluntariness, Dworkin applies a very similar standard to the concept of MP and makes a distinction between what I will call "soft MP" and "hard MP."⁶⁰ In making this distinction, he comes to the conclusion that soft MP, or what he calls *volitional paternalism*, could justify a valid interference in a person's individual liberty if it first meets the conditions of being limited in scope and only applicable over a fixed and short term. Volitional paternalism "supposes that coercion can sometimes help people achieve what they already want to achieve, and is for that reason in their volitional interests."⁶¹ Hard MP, or what Dworkin terms *critical paternalism* "supposes that coercion can sometimes provide people with lives that are better than the lives they now think good and is therefore sometimes in their critical interests."⁶² Dworkin concedes that taking the stance of the volitional paternalist or the critical paternalist is a matter of deep-set philosophical beliefs, but only one view is tenable for a society that holds individual autonomy in high regard.

To simplify the distinction between the two, critical paternalism allows that even if a person has voluntarily chosen and endorsed their lifestyle, the person might still be justifiably forced into another lifestyle if the state deems it better for the sake of the person. This argument runs aground the same argument that we have taken to invalidate hard LP: forcing someone to comply with a law that interferes with self-regarding actions only undermines their personal liberty and is not just a harm to the individual, but an injustice to a free society. In simplifying volitional paternalism, interferences with personal autonomy over self-regarding acts are justified to ensure that the acts are compatible with that person's

⁶⁰ It should be noted that the terms "soft MP" and "hard MP" are not used by Dworkin, but were created by myself to show the similarities of his arguments to the distinction between soft paternalism and hard paternalism. IN the same way we may question whether soft paternalism is actually paternalism at all, we should also question whether soft MP is paternalism also.

⁶¹ Dworkin, Ronald. *Sovereign Virtue: The Theory and Practice of Equality*. Cambridge: Harvard University Press (2000). Print. p. 217.

⁶² Ronald Dworkin, *Sovereign Virtue*, op. cit. 61, p. 217.

conception of a good life. This is not exactly the same as soft paternalism though, because volitional paternalism justifies both interferences to determine voluntariness as well as interferences to preserve a person's ethical integrity. Under this view, people who have a weakness of character that cannot prevent themselves from acting in a certain way are justifiably forced to stop these actions. The perfect example of this is narcotic drug use because people may initially use substances recreationally, and by doing so endorse the view that drug use without addiction is an acceptable life choice. If they happen to become addicted though, according to volitional paternalism it is perfectly justifiable for the state to step in and coerce the person to resolve their addiction.

Through this example, we can see that an individual may be forced to change their lifestyle in the hopes that they might become aware of its shortcomings. Dworkin does put a caveat on this interference, however, and requires that the "paternalism (be) sufficiently short-term and limited so that it does not significantly constrict choice if the (person's) endorsement never comes."⁶³ This is an extremely crafty move on behalf of Dworkin because it allows a temporary imposition of a paternalistic interference in order to test if the individual will endorse the new lifestyle. Strict liberals from Mill's school of thought might even allow this as a slightly harder stance of soft paternalism. Dworkin seems to have found a way to permit MP by preserving a person's ethical integrity:

Someone has achieved ethical integrity, we may say, when he lives out the conviction that his life, in its central features, is an appropriate one, that no other life he might live would be a plainly better response to the parameters of his ethical situation rightly judged.⁶⁴

Dworkin appeals to the individual's ethical integrity in the same way Mill and Feinberg appeal to individual liberty, thus validating a certain "soft" view of MP. We could certainly conceive of Dworkin allowing recreational drug use, provided that there are certain

⁶³ Ronald Dworkin, *Sovereign Virtue*, op. cit. 61, p. 269.

⁶⁴ Ronald Dworkin, *Sovereign Virtue*, op. cit. 61, p. 270.

safeguards against uninformed use and effective treatment programs available for those who become addicted.

My concern with this soft view of MP, however, is that compulsory treatment programs may be imposed by the state against a person's will. From my perspective, even though such compulsory treatment would be administered just long enough to beat an addiction, the chances of a relapse of the addiction would be extremely high without the voluntary admission of a need for help. This would make the interference a futile effort and doom it from the start. In my opinion, the need for a person to voluntarily seek treatment if they want to sustainably beat an addiction is of the utmost importance. For my money (or the state's), I would prefer not to waste resources on coercive efforts that have dubious chances of either failing or succeeding. I'm not convinced that such a coerced interference renders someone a better person morally, especially when it was forced on them against their will.

Another legal philosopher, coincidentally named Gerald Dworkin, has also expressed this same objection to MP. Gerald Dworkin points out, very similarly to Ronald Dworkin, that the endorsement of a life changed via MP is necessary for a person's life to actually become better. "If a person is prevented from living the life of an addict, and genuinely regrets not being able to live that life, never endorses(ing) the value of the drug free life, (then) his life is not better for him."⁶⁵ I find myself agreeing with this point in particular as an argument against MP. There is a chance it might change some people, but surely not all will come to endorse the change. As both Ronald and Gerald raise this question, I'm sure that many people ponder it as well: is it truly possible to make someone a morally better person against their will? And what if their sexual preference, a biologically determined characteristic, leads society to try and "fix" their immorality? There are many such acts that

⁶⁵ Gerald Dworkin, "Moral Paternalism", op. cit. 12, p. 310.

are deemed immoral by one group of persons, but not by the persons committing the acts.⁶⁶ Perhaps we are simply left with a morally pluralistic society, in which case MP should not justifiably be enforced. In such circumstances, I find myself agreeing with Hart that society should value tolerance of divergent moralities and prevent the linking of morality to legislation the way Lord Devlin and LM does.

Although this paper has focused primarily on liberal responses to paternalism in the realm of self-regarding acts and criminal law, there are undoubtedly many proponents of the conservative view that desire to restrict liberty on the grounds of morality. This paper has discussed some objections to this conservative view and has hopefully been fairly successful in convincing the reader of the necessity for personal liberty when it comes to private acts, regardless of their harm or morality. The debate about whether morals should be translated into criminal law and whether there should indeed be limits on this criminalization is important for three reasons: “first, the criminal law is coercive; secondly, criminal liability carries social stigma; and thirdly, criminal penalties invade and restrict individual autonomy.”⁶⁷ We have touched upon the first and third points already, but as of yet have not addressed the issue of social stigma.

Lord Devlin was aware of the connection between acts that are met by “intolerance, indignation, and disgust” from society and the corresponding stigma the person committing the act would feel.⁶⁸ But his focus was on why certain immoral acts should be prohibited, and because of this he may have failed to consider the stigma that criminal sanctions carry by themselves. Even if society does not respond to an act with disgust, criminalizing the act will still lead to stigmatization of the perpetrators. Once a person is deemed a criminal by

⁶⁶ Gerald Dworkin, “Moral Paternalism”, op. cit. 12, p. 311. Other examples given include drug use, atheism, and homosexuality.

⁶⁷ Peter Cane, “Taking Law Seriously”, p. 39.

⁶⁸ Patrick Devlin, *The Enforcement of Morals*, op. cit. 39, p. 17.

society, their livelihood, family, and future are put at risk. For this reason, we must be supremely careful in criminalizing acts and always remember that the law is meant to be a floor and not a ceiling. One point of Devlin's that I think is good to remember is the difference between obligations and ideals. Obligations to society should be legislated on and include not murdering your neighbor or stealing their property, but ideals are too lofty to be pragmatically turned into law. If we do transform ideals into legislation, we would essentially be stigmatizing all those who cannot achieve such a level of propriety and perfection.

1.5 LIBERAL AUTONOMY AND DRUG USE

The word 'liberal' is taken from the Latin term 'liberalis,' meaning "of freedom."⁶⁹ This paper has so far considered some conservative views on criminalizing self-regarding acts, but the more forceful arguments (in my opinion) have come from the view that privacy and autonomy of the individual should be respected in the interests of a free society. There are, of course, a myriad of views that might be categorized under the heading of "liberal autonomy," starting with the truly hands-off philosophy of Mill and reaching to the soft paternalism of Feinberg and Dworkin. Perhaps the most well developed and extensively held view of liberal autonomy comes from Joel Feinberg, who takes the firm stance that private and self-regarding actions should not be limited through paternalistic interferences.

The kernel of the idea of autonomy is the right to make choices and decisions – what to put into my body, what contacts with my body to permit, where and how to move my body through public space, how to use my chattels and physical property, what personal information to disclose to others, what information to conceal, and more.⁷⁰

⁶⁹ "Liber". *Latin Dictionary and Grammar Aid*. University of Notre Dame, n.d. Web. 18 Nov. 2010.

⁷⁰ Joel Feinberg, *Harm to Self*, op. cit 3, p. 54.

To be subjected to legal coercion on the grounds of paternalism or LM, in his opinion, is an abrogation of an individual's liberty and self-determination as well as a violation of their rights as human beings.

Recreational drug use can be a tricky subject to approach, as many people have an intuitive aversion to the subject when the debate around decriminalization arises. Liberals who accept individual autonomy and privacy as a right, permitting acts such as homosexuality and euthanasia of terminally ill patients, might still be apprehensive about legalizing recreational drug use. Feinberg himself notes this and states that the topic "is in fact a litmus test example for distinguishing the paternalist from the liberal."⁷¹ It amazes me that society can be so accepting of the consumption of caffeine, alcohol, tobacco, and aspirin, yet still be so ardently prohibitive of recreational drugs like marijuana, ecstasy, and cocaine.⁷² Are alcohol, caffeine, and nicotine not addictive and harmful in their own right? If narcotic drugs are strictly prohibited, why do we allow alcohol and nicotine to be legal (albeit regulated)? The fact that they are pervasively used in our society may have something to do with it, effectively removing any stigma associated with their usage. We have also witnessed the miserable failure of alcohol prohibition in the United States during the 1920's, which shall be discussed later in this paper.

Another reason that drug prohibitionists use to justify their stance is based on the harm of drug use on children.⁷³ This argument seems like a ridiculous red herring in the debate about criminalization, as people claim that if drug use is legalized then children will be able to buy drugs at school. Well guess what: children already buy drugs at school even though they are illegal. It could even be argued that it's easier for children to get drugs than alcohol or tobacco because the market is not regulated in the same way. Most societies have

⁷¹ Joel Feinberg, *Harm to Self*, op. cit 3, p. 133.

⁷² Husak, Douglas. "Recreational Drugs and Paternalism". *Law and Philosophy* 8.3 (1989): 353-381. *JSTOR*. Web. 29 Oct. 2010. P. 359.

⁷³ Douglas Husak, "Recreational Drugs and Paternalism", op. cit. 72, p. 362.

placed strict age limits on the purchasing of alcohol and nicotine products, coupled with sanctions on those who provide these substances to children. If recreational drug use was decriminalized, it would require the same models of regulation used on alcohol and prescription medications.

Another objection raised by those in favor of prohibition focuses on the addictive characteristics of some substances and how this addiction leads to a “life of ruin.” The fact remains that other addictive substances are legal and can ruin a person’s life just as easily as illegal ones. The question of whether addicts consume voluntarily is sometimes raised. However, “the model of the drug user who would like to quit but cannot overcome his addiction applies to only a small percentage of individuals.”⁷⁴ It should further be noted that the term “addiction” is used to cover a wide set of circumstances which will be addressed in the following paragraph.⁷⁵ Another poignant objection can be raised against the view that drugs should be prohibited because they cause addiction: substances like LSD and Psilocin (“magic mushrooms”) do not cause any dependency, while a person may suffer from physical withdrawals if they quit using caffeine as a stimulant.⁷⁶

People might be called addicts if their bodies accrue a *tolerance* to a substance which makes them have to consume more to feel intoxicated. Although this might allow for greater harm to a person due to a greater quantity of substance being exposed to their body, this does not mean that a person is consuming involuntarily. Another type of “addiction” that we can dispel as involuntary is *psychological dependence*. This behavior has more to do with an adjustment of priorities in their lives, as using might become a preferred way of relaxing similar to watching movies or exercising. The last category of addiction involves a physical dependence on a substance, where withdrawal symptoms may manifest in the absence of the

⁷⁴ Douglas Husak, “Recreational Drugs and Paternalism”, op. cit. 72, p. 365.

⁷⁵ Douglas Husak, “Recreational Drugs and Paternalism”, op. cit. 72, p. 375.

⁷⁶ Douglas Husak, “Recreational Drugs and Paternalism”, op. cit. 72, p. 376.

substance. This is apparent not only in heavy opiate users, but also in some alcoholics who might undergo an unpleasant detoxification period when quitting. But does this mean that consumption has become an involuntary action? I answer this question negatively, as many people may voluntarily seek treatment to break the physical dependency on a substance.

Douglas Husak reminds us that in the US, “the experience or fear of drug withdrawal cannot render addictive conduct legally involuntary.”⁷⁷ If this legal standard exists and we cannot blame illicit actions on addiction as a means to circumvent the law, then the same principle should be extended elsewhere. Addiction does not enslave a person and violate their autonomy, so we cannot analogize with Mill’s prohibition on voluntary slavery.

The stance of liberal autonomy may not be held by all people, but it is surely becoming more popular as nations strive towards the realization of a free society. It should now be apparent that the debate surrounding the decriminalization of recreational drug use in such societies is a hotly debated topic and often results in very polarized views. But if we ascribe to the philosophy of Feinberg, that personal liberty and autonomy are a necessary foundation for liberal societies, then we must also accept that voluntary recreational drug use should not be restricted by imposing criminal sanctions on those who choose to consume. Accordingly, to ensure the standard of voluntariness is being met and to dispel any misconceptions about the possible harms involved with consumption, public education should become commonplace. The same way many countries require health warnings on nicotine and alcohol products, similar messages should be issued regarding drug use. Along with regulations such as taxation, quality controls, age limits, and possibly even prescriptions to ensure moderate consumption, education will be the keystone for a society with liberal ideals towards decriminalizing drug use. Finally, I fully agree with Peter Cane when he

⁷⁷ Douglas Husak, “Recreational Drugs and Paternalism”, op. cit. 72, p. 376.

stated, “discussions that pay attention only to the question of what sorts of conduct may be criminalized and ignore issues such as motivation and culpability, are too short by half.”⁷⁸ Simply debating which actions should be criminalized on the grounds of harm or morality fail to see the bigger picture. Societies should be less quick to impose criminal sanctions as a way to better themselves, and instead look to the underlying issues that cause people to behave against their best interests. If we instead look to solve a major issue like poverty, we might be more effective in steering society in a healthier direction for years to come.

⁷⁸ Peter Crane, “Taking Law Seriously”, op. cit. 48, p. 45.

CHAPTER 2: HUMAN RIGHTS AND DRUG USE

To this point, a fairly comprehensive examination of paternalistic and moralistic motives to criminalize drug use and other self-regarding acts and has been undertaken. Most of the objections to these arguments have focused on the right to personal liberty and autonomy, but these rights have only been established in this paper on a theoretical level. In the following section, an examination of human rights violations caused by the criminalizing of drug use will be conducted according to various United Nations treaties. Although this paper has thus far been limited to the debate around criminalizing recreational drug use, the international policies that are aimed at reducing drug use are much broader in scope and have resulted in a “war on drugs” that affects not only drug users and traffickers, but innocent people as well. These international drug policies will be examined in a later chapter, and might be viewed as conflicting with certain obligations held by human rights treaties. This section will address violations of human rights at the U.N. level, but it should be noted that there have yet to be any specific violations recognized as resulting from the criminalization of drug use. My hope is, however, that you will come to see the pervasive culture of criminalizing drug use as the cause of other (perhaps more concrete) violations. There are evidences of extrajudicial killings of drug users and innocent people alike, death penalties given to drug users, forced treatment for addiction, defiance of due process requirements, and denial of lifesaving medical treatment under the guise of drug legislation. It should be noted that some of these violations occur in developing countries where a more systemic problem of violence and abuse of state power is the norm; however, some of these violations are also visible in developed nations which ought to be more conscious of the repercussions of the war on drugs.

2.1 HUMAN DIGNITY, AUTONOMY, AND SELF-DETERMINATION

The concept of autonomy and individual liberty has been discussed at great lengths thus far, but the way it fits into human rights in a practical way has yet to be touched upon. As just how much autonomy a person should be afforded is up for debate, I have found myself aligning with the philosophy of Feinberg when it comes to self-regarding actions. The notion that a person should have total sovereignty over their mind and body concerns not just autonomy, but human dignity as well. Human dignity, in fact, is the foundation for human rights and was first recognized in the Universal Declaration of Human Rights (UDHR).⁷⁹ Both the International Covenant on Civil and Political Rights (ICCPR)⁸⁰ and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)⁸¹ build on this foundation of human dignity as they reaffirm that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.”⁸² Taken together, these three documents represent the “International Bill of Rights,”⁸³ from which the protection of human dignity is the primary goal. Regarding human rights, I consider a person’s autonomy to play a major role in respecting their dignity, especially when it comes to a person’s self-regarding actions.

Unfortunately, simply violating a person’s autonomy and human dignity are not held as treaty violations, even though they may be seen as human rights violations. Nonetheless, dignity remains an underlying theme in all human rights treaties and so leads to more tenable

⁷⁹ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 (1948). *Office of the High Commissioner on Human Rights*, n.d. Web. 22 Nov. 2010. (henceforth referred to as UDHR). Although not a binding international treaty, the United Nations Declaration of Human Rights speaks of “inherent human dignity” in the first stanza of its preamble and also mentions dignity in Article 1.

⁸⁰ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. *Office of the High Commissioner on Human Rights*, n.d. Web. 22 Nov. 2010.

⁸¹ International Covenant on Economic, Social and Cultural Rights. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976. *Office of the High Commissioner on Human Rights*, n.d. Web. 22 Nov. 2010.

⁸² ICCPR, op. cit. 80, preamble; ICESCR, op. cit. 81, preamble.

⁸³ Damon Barret, “Recalibrating the Regime”, op. cit. 2, p. 17 at note 61.

rights that might be violated. Both the ICCPR and the ICESCR begin the substantive parts of their treaties by positing that “all peoples have the right to self-determination.”⁸⁴ Building on the protection of human dignity, self-determination should be viewed akin to autonomy. Although it is frequently interpreted to refer to a state’s right to self-determination and sovereignty, there is no reason why it should not also entail individual rights. This extension of self-determination to the individual is seen in Feinberg’s statement: “A person’s right to self-determination, being sovereign, takes precedence even over his own good.”⁸⁵ Taken in this light, self-determination is an important aspect of not just national development, but also of personal development as well. By viewing self-determination as an individual right enforceable by UN treaties, it might be possible to argue that criminalizing self-regarding acts like drug use is a violation of that right. As previously mentioned, though, this right is more commonly read as a nation’s right to sovereignty and self-rule, so it would be quite difficult to claim the criminalization of drug use as a violation of self-determination under current treaty mechanisms.

2.2 RIGHT TO PRIVACY

A main argument against criminalizing self-regarding acts is that they are private in nature and have little-to-no direct implications on third parties. The Wolfenden Report suggested that such acts should remain in a “private realm” beyond the reach of the law.⁸⁶ The right to privacy is indeed protected by the ICCPR, which states that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.”⁸⁷ The notion of

⁸⁴ ICCPR, op. cit. 80, art. 1.1; ICESCR, op. cit. 81, art. 1.1. This article further states “By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.”

⁸⁵ Joel Feinberg, *Harm to Self*, op. cit. 3, p. 61.

⁸⁶ Wolfenden Report, op. cit. 38, section 61.

⁸⁷ ICCPR, op. cit. 80, art. 17.1.

privacy, as recognized by the jurisprudence of the UN Human Rights Committee (HRC)⁸⁸, has been used primarily to defend against defamation and invasions of private data. Cases where self-regarding acts such as homosexual intercourse have been outlawed are typically raised under the right to nondiscrimination⁸⁹, but it could be argued that this right to privacy protects all self-regarding acts when not performed in public. Feinberg would agree with his interpretation: “My right to determine by my own choice of what enters my field of experience is one of the various things meant by the ‘right to privacy,’ and so interpreted, that right is one of the elements of my personal autonomy.”⁹⁰ This statement unites the notions of autonomy, self-determination, and privacy together under the flag of liberal autonomy. Although criminalizing drug laws could thus be perceived as violating the right to privacy, there is no precedent for such a claim in the jurisprudence of the HRC.

2.3 ARBITRARY DEPRIVATION OF LIFE AND EXTRAJUDICIAL KILLINGS

Since President Nixon termed the phrase in 1971, the U.S. has been waging a “war on drugs” in an effort to curb drug use within its borders and eradicate drug production elsewhere in the world.⁹¹ Using its influence in international forums such as the U.N., the United States has encouraged other nations to join this war by taking drastic measures to ensure that prohibition of drug use is a standard policy. Yet by using the term ‘war’ to describe what should essentially be a law enforcement action, a military mindset has become pervasive regarding drug policies, often resulting in an overzealous approach to enforcement that is not always rights-friendly. The consequence of this oppressive approach to drug control is that “in both high-income and low-income countries across all regions of the world,

⁸⁸ Established as the enforcement body of human rights violations according to the ICCPR, op. cit 80, in part IV.

⁸⁹ See ICCPR, op. cit. 80, art. 2.

⁹⁰ Joel Feinberg, *Harm to Self*, op. cit 3, p. 54.

⁹¹ Tony Payan, *The Three U.S.-Mexico Border Wars*, op. cit. 1, p. 23.

human rights have been allowed to become a casualty of the ‘war on drugs’”.⁹² One way that human rights have been violated by this aggressive policy is a relaxation of standards and accountability in law enforcement concerning drug-related activity.

As lack of accountability and oversight for law enforcement is more of a problem in low-income and developing countries, the effects of fighting the “war on drugs” become most salient under these conditions. Brazil has many poor urban areas, which due to high population density and lack of complicity with law enforcement have become veritable havens for drug gangs. Brazil’s police forces have regressed to military style tactics in an attempt to combat the criminality that has resulted from these powerful drug gangs, but there is little accountability for extrajudicial killings and unnecessary use of force. Police carry automatic weapons and patrol the areas in armored troop carriers, frequently using their firearms with no regard for innocent people who might get caught in the crossfire. In 2007, law enforcement officers killed in excess of 1,000 people in skirmishes aimed at these drug gangs. Unfortunately, few of these killings were investigated and most were dismissed as self-defense or “resistance followed by death.”⁹³ This fact seems to admit to a culture of impunity regarding the actions of law enforcement, and we can only speculate as to how many of the people killed were innocent bystanders who were simply in the wrong place at the wrong time. Brazil is an excellent example of how human rights are being violated in the name of the “war on drugs.”

Another example of extrajudicial killings comes from an ultra-violent three month period in 2003 when the government of Thailand instituted a heightened response to the “war on drugs.” From February through April of 2003, an estimated 2,500 people were killed in connection with the new policy, 1,400 of which were later found to have no ties to drugs.⁹⁴

⁹² Damon Barret, “Recalibrating the Regime”, op. cit. 2, p. 24.

⁹³ “Brazil: Amnesty International Report 2007”. *Amnesty International*, n.d. Web. 22 Nov. 2010.

⁹⁴ Smith, Phillip. “Southeast Asia: Most Killed in Thailand’s 2003 Drug War Not Involved With Drugs, Panel Finds”. *Drug War Chronicle* 512 (2007). *StoptheDrugWar.org*. Web. 22 Nov. 2010.

None of the perpetrators of the killings were ever brought under review, even after significant pressure came down from the international community for justice. Just as the case was with Brazil, a culture of impunity for law enforcement allowed for such an atrocity to be committed. It is bad enough that 2,500 people were summarily executed for participation in drug-related activities, but the majority of these people were actually innocent casualties of a drug war gone awry. Make no mistake that these persons, whether involved with drugs or not, had their human rights violated by a state under the pretence of a criminalizing policy towards drugs.

Examples such as Brazil and Thailand are not isolated incidents of people being targeted and killed for involvement in drugs. Although they represent the more extreme end of the spectrum of violent human rights violations, such occurrences surely happen in higher-income countries as well (albeit on a much smaller scale) due to the lowering of standards of accountability in matters concerning drugs. The ICCPR states that “no person shall be arbitrarily deprived of their life,” and further outlines that due process should be ensured to all those facing death sentences.⁹⁵ It is undisputable that extrajudicial killings are blatant violations of this right, without which a state would have unlimited control over the lives of its population.

2.4 CAPITAL PUNISHMENT FOR DRUG OFFENDERS

Aside from extrajudicial killings and summary executions, drug offenders in some countries may still find their lives at risk at the hands of the state. As just mentioned, the ICCPR protects from any arbitrary deprivation of life, but it also goes one step further and requires party states to reserve the death penalty for only the most serious of crimes (typically

⁹⁵ ICCPR, op. cit. 80, art. 6: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

read as crimes involving loss of life).⁹⁶ The U.N. has made clear its feelings that the practice of capital punishment, even for serious crimes, has no place in a society that holds regard for human rights. The original text of the ICCPR allows for the death penalty for those countries who currently practice it, but an addition protocol has since been added that abolishes capital punishment as an appropriate criminal sanction.⁹⁷ Many countries party to the ICCPR have yet to ratify this protocol, choosing instead to retain the death penalty as an available punishment in their national law. There are currently 64 such countries that reserve the right to use the death penalty and 34 of them maintain legislation allowing for capital punishment of drug offenders (including the United States).⁹⁸ While it may be true that these countries reserve such punishment only for serious drug trafficking, the HRC has made it clear that such an offense does not fall under the category of “serious crime” by itself.⁹⁹

Just as excessive use of force and extrajudicial killings seem to be most salient in low-income and developing countries, so does the use of capital punishment for drug offenders. It should be remembered, however, that the United States still reserves the right to sentence a drug offender to death under federal law. In Malaysia, the government has executed 229 people for drug offenses in the last three decades.¹⁰⁰ Vietnam reportedly executes around 100 people for these crimes every year.¹⁰¹ China is the worst offender in this regard, as they make a spectacle every year on the U.N.’s International Day against Drug Abuse and Drug

⁹⁶ ICCPR, op. cit. 80, art 6.2: “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.”

⁹⁷ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. G. A. res. 44/128. 44 UN GAOR, *entered into force* Dec. 15, 1989. *Office of the High Commissioner on Human Rights*, n.d. Web. 22 Nov. 2010.

⁹⁸ Commission on Crime Prevention and Criminal Justice. “Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty.” E/CN.15/2001/10, para. 90 (29 Mar. 2001).

⁹⁹ UN Human Rights Committee. “Concluding observations of the Human Rights Committee: Thailand”. UN Doc. No. CCPR/CO/84/THA, para. 14 (8 Jul. 2005).

¹⁰⁰ Damon Barret, “Recalibrating the Regime”, op. cit. 2, p. 28.

¹⁰¹ Damon Barret, “Recalibrating the Regime”, op. cit. 2, p. 28.

Trafficking (June 26th) by publicly executing scores of drug offenders. On this day in 2002, 64 people were publicly executed at anti-drug rallies across China.¹⁰² Although these countries have retained their right to impose the death penalty on criminal offenders, they are nonetheless still bound by the ICCPR as signatories. The UN Special Rapporteur to summary or arbitrary executions has further denounced the sentencing to death of drug offenders as summary execution, thus making these acts clear violations of the ICCPR and international human rights law.¹⁰³ Those who have been executed have indeed had their human rights violated and can be added to the list of casualties of the war on drugs.

2.5 DEPRIVATION OF LIBERTY, DUE PROCESS, AND COERCIVE TREATMENT

Returning to the rights of drug users and not just traffickers, many states have employed the practice of forcing drug offenders into treatment centers for rehabilitation against their will. In some instances, this coercive practice even occurs in the absence of due process before a court. When law enforcement in these countries arrests drug offenders, they sometimes skip any judicial processing and are forcibly put into prison or rehabilitation, thus violating their right to liberty and due process granted in the ICCPR.¹⁰⁴ The HRC has ruled in favor of individuals whose right to liberty has been violated in these circumstances, and further states that international law against deprivations of liberty pertain specifically to forced institutional treatment for drug addiction.¹⁰⁵ Apart from the explicit violations that occur in the absence of due process, evidence shows that even when due process has been allowed coercive treatment is still ineffective. Why should a government practically waste

¹⁰² Damon Barret, "Recalibrating the Regime", op. cit. 2, p. 28.

¹⁰³ UN Commission on Human Rights. "Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions". UN Doc. E/CN.4/2004/7, para. 48 (22 Dec. 2003).

¹⁰⁴ ICCPR, op. cit. 80, art. 9.1: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law"; art. 9.4: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

¹⁰⁵ See *Khudobin v. Russia*, UNHCR app. No. 59696/00, 26 Oct. 2006.

their resources by forcing them into rehabilitation when studies show that between 90 to 100 percent of these persons return to drug use when set free?¹⁰⁶

Here we can return to the argument for autonomy, and although violating a person's autonomy is not *per se* a violation of any human rights treaty, I posit that it is still a violation of their rights as humans. Even if a person is afforded due process and is forced into rehabilitation not because of any crime, but because they are drug addicts, the study cited above shows that individuals do not take well to such a paternalistic interference. For treatment of addiction to be effective, a person should voluntarily seek help and endorse the notion that change is needed in their lives. If a state was actually trying to help people with drug addictions, they would stop the archaic practice of imprisoning addicts in "treatment centers" that are indistinguishable from prisons, and instead fund voluntary rehabilitation centers that might truly help an individual recover from a substance abuse problem. The next section will attempt to justify this idea within the existing treaty framework of human rights.

2.6 RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH

Although a controversial subject that garners much debate, many view the criminalizing of drug use to be a violation of the ICESCR's right to the highest attainable standard of health. The ICESCR requires that "the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health," including "the prevention, treatment and control of epidemic, endemic, occupational and other diseases."¹⁰⁷ Proponents of this view claim that all members of society, including drug users, have the right to health and as such, states should implement

¹⁰⁶ Crofts, N. "Treatment in Southeast Asia: The need for effective approaches". *Open Society Institute Briefing on Drug Treatment, HIV and the Challenge of Reform*, 2006. OSI. Web. 19 Nov. 2010.

¹⁰⁷ ICESCR, op. cit. 81, art. 12.

measures to assure that this right is upheld. Regarding drug users, proponents argue that measures implemented by the state should include access to voluntary treatment as well as other programs intended to reduce the harm of drug use.

Champions of this view have termed this the “harm reduction principle,” proposing that instead of criminalizing and prohibiting the use of drugs, society should seek to reduce the harms associated with drug use.

Harm reduction is a pragmatic and humanistic approach to diminishing the individual and social harms associated with drug use, especially the risk of HIV infection. It seeks to lessen the problem associated with drug use through methodologies that safeguard the dignity, humanity, and human rights of people who use drugs.¹⁰⁸

Harm reduction measures may involve education about the harms associated with drug use and addiction as well as more controversial means like opiate replacement therapy, safe-injection rooms for intravenous drug users (IDU), and clean needle exchanging sites so IDUs will not share dirty needles. Safe injection sites allow a user to consume substances under the supervision of a medical professional, ensuring that safe practices are being implemented and also providing emergency assistance in cases of overdose.

Opponents of harm reduction efforts claim that such a policy condones and even encourages drug use among the population, but there is actually no compelling evidence provided to support such claims.¹⁰⁹ Needle exchange programs have been operating in the Netherlands for almost 25 years (since 1984) with no increase in IDU prevalence recorded.¹¹⁰ In fact, harm reduction programs like needle exchanges and safe injection sites for IDUs have been shown to reduce the prevalence of HIV, hepatitis C virus (HCV), and other blood-borne

¹⁰⁸ Elliot, Richard et al. “Harm Reduction, HIV/AIDS, and the Human Rights Challenge to Global Drug Control Policy.” *Health and Human Rights* 8.2 (2005): pp. 104-138. *JSTOR*. Web. 9 Nov. 2010. P. 115.

¹⁰⁹ Takahashi, Saul. “Drug Control, Human Rights, and the Right to the Highest Attainable Standard of Health: By No Means Straightforward Issues”. *Human Rights Quarterly* 31.3 (2009): 748-776. *JSTOR*. Web. 7 Oct. 2010. p.764.

¹¹⁰ Reference Group to the United Nations on HIV and Injecting Drug Use 2007. “The Global Epidemiology of Methamphetamine Injection”. *The Lancet* 372 (2008). *The Lancet*, 24 Sep. 2008. Web. 29 Nov. 2010.

pathogens spread through unsanitary drug use.¹¹¹ Because of evidence like this, harm reduction has been encouraged by the World Health Organization (WHO), the Joint U.N. Programme against AIDS (UNAIDS), as well as the U.N. Office on Drugs and Crime (UNODC).¹¹² Harm reduction has been lauded by these U.N. agencies as a practical solution to the HIV/AIDS epidemic that the world now faces. Of course, such measures cannot be enacted in many countries because of the strict prohibition of drug use.

One consequence of the war on drugs is that many countries have become entrenched in restrictive “zero tolerance” policies towards drug use. The criminalization of even small amounts of a drug for personal consumption has driven drug users underground and made them very wary of help offered by governments. Especially with regards to IDUs, this has led to unsanitary conditions where users share needles and potentially spread disease at an alarming rate. This becomes a public health hazard as even those who do not use drugs could come into contact with or be otherwise exposed to such illnesses. “Given that unsafe drug use, particularly by injection, is now one of the major factors fueling the global epidemic, it is only natural that the legal regime that affects drug users comes under human rights scrutiny.”¹¹³ If criminalizing drug policies remain the norm, harm reduction efforts are undermined from the very start. As long as possession of a controlled substance is illegal, why would anyone risk going to a safe injection site or needle exchange when law enforcement might be waiting to arrest them? In the interest of public health, decriminalization of drug use and personal possession needs to be addressed to not just

¹¹¹ Richard Elliot, “Harm Reduction, HIV/AIDS, and the Human Rights Challenge to Global Drug Control Policy”, p. 111: “An international investigation found that in cities with syringe exchange or distribution programs HIV seroprevalence decreased by 5.8% per year, while HIV prevalence increased by 5.9% per year in cities without such programs.”

¹¹² *Guide to Starting and Managing Needle and Syringe Programmes*. Geneva: World Health Organization, 2007. Print.

¹¹³ Richard Elliot. “Harm Reduction, HIV/AIDS, and the Human Rights Challenge to Global Drug Control Policy.”, op. cit 111, p. 106.

prevent the epidemic of diseases like HIV, but also because it allows drug users access to a higher standard of health than is currently being provided.

Apart from the few mentioned here, there are numerous other human rights violations that might be seen as consequences of the war on drugs. Drug users are often the victims of abuse at the hands of law enforcement and are sometimes subjected to cruel and degrading treatment. Once imprisoned, users may also be denied access to healthcare such as retroviral treatment for HIV users or medications to suppress the symptoms of withdrawal. Many countries also use drug legislation as an excuse to discriminate against groups perceived to have a higher prevalence of drug use. This is the case in the United States, where African-American men are almost 14 times more likely to be sentenced to prison on drug charges than whites, even though their usage rates are comparable to that of white men.¹¹⁴ The “war on drugs” has even had an effect on the environment as efforts to eradicate drug crops have used herbicides that damaged other agriculture as well.¹¹⁵ Hopefully after shedding some light on these violations of human rights, it will be evident that criminalizing drug use has resulted in more problems than it may have resolved. In light of these problems, U.N. Secretary-General Ban Ki-Moon has made the statement that “No one should be stigmatized or discriminated against because of their dependence on drugs.”¹¹⁶ For all these reasons and more, countries should critically examine their national drug legislation and decide whether prohibition is an effective means of preventing drug use. In the name of human dignity, the right to privacy, the right to liberty and security of person, the right to nondiscrimination, and the right to health, policies that aim to criminalize drug use should to be replaced with more rights-friendly policies like toleration and harm reduction.

¹¹⁴ Damon Barret, “Recalibrating the Regime”, op. cit. 2, p. 7.

¹¹⁵ Damon Barret, “Recalibrating the Regime”, op. cit. 2, p. 5.

¹¹⁶ U.N. Secretary-General Ban Ki-Moon. “Message on the International Day against Drug Abuse and Illicit Trafficking, 26 June 2008”. UNIS/SGSM/053. *U N. Information Service*, 24 Jun. 2008. Web 28 Sep. 2010.

CHAPTER 3: COMPARING DRUG POLICY MODELS

3.1 ALCOHOL AND DRUG PROHIBITION IN THE UNITED STATES

National policies of prohibition, whether targeting alcohol or drugs, do not have the drastic effect on reducing consumption that many might believe. Evidence shows that a “modest” reduction in consumption is observable, but some direct consequences of these policies may perhaps outweigh any benefit derived from such a reduction.¹¹⁷ Jeffrey Miron’s research on this topic begins with an analysis of the effectiveness of federal alcohol prohibition in the United States during the 1920’s. He then analogizes between the efficacy of alcohol prohibition, which was repealed after only a decade, and drug prohibition, of which he is highly critical. Continuing this analogy past usage rates, he also points out some negative consequences of alcohol prohibition and posits the same effects are recognizable in drug prohibition. These consequences include an increase in violent crime, a decrease of civil liberties, lack of quality control on substances, and a general weakening of respect for the law. Miron’s conclusion that the harms of prohibition outweigh any benefit mirrors my own hypothesis, and so a brief review of his research and findings serves to strengthen my own. To those who claim that the analogy of drug and alcohol prohibition is fallacious, Miron responds, “Although current U.S. drug prohibition is not identical to alcohol prohibition, the similarities are substantial in terms of the commodity prohibited and the prohibition regime imposed.”¹¹⁸ By accepting this analogy, we may draw some valuable inferences about the efficacy of prohibitive policies and the consequences of their enforcement.

¹¹⁷ Miron, Jeffrey A. *Drug War Crimes: The Consequences of Prohibition*. Oakland: The Independent Institute, 2004. Print. p. 7.

¹¹⁸ Jeffrey Miron, *Drug War Crimes*, op. cit. 117, p. 25.

Federal prohibition of alcohol began in January of 1920 when the 18th Amendment to the U.S. Constitution went into effect.¹¹⁹ This social experiment was deemed a failure after less than 15 years and prohibition was repealed by the 21st Amendment in December of 1933.¹²⁰ The focus of Miron's research was primarily on the consumption rates during prohibition, but due to a lack of reliable data from the period he settled on liver cirrhosis death rates as a "plausibly good proxy for alcohol consumption."¹²¹ The use of cirrhosis death rates is obviously not an ideal indicator of alcohol consumption because such a malady is only evidence of moderate to severe alcohol abuse over a prolonged period of time. Also, other factors may contribute to liver cirrhosis besides alcohol, but without reliable data on actual consumption rates we are left with liver cirrhosis death rates as a "plausibly good proxy."

In the decade prior to alcohol prohibition, cirrhosis death rates decreased by nearly 50 percent from around 13 (deaths per year per 100,000) in 1910 to 7.5 in 1920.¹²² This is indeed a substantial reduction in cirrhosis rates, but it can hardly be claimed by a federal policy that had not yet been enacted. It should be noted, however, that state-level prohibitions on alcohol had begun as early as 1900 and by 1918, 32 states had become so-called "dry states." Despite the fact that a majority of states had passed legislation on alcohol prohibition prior to 1920, just over 52 percent of the population still lived in "wet states" that had yet to join the prohibition craze.¹²³ Still, if we look at the drastic drop in cirrhosis death rates between 1910 and 1920, it is difficult not to consider that state-level prohibition may have been the cause.

¹¹⁹ "The Constitution of the United States," Amendment 18, Clause 1: "After one year from the ratification of this article (Jan. 16, 1919) the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

¹²⁰ U.S. Const. am. 21.

¹²¹ Jeffrey Miron, *Drug War Crimes*, op. cit. 117, p. 26.

¹²² Jeffrey Miron, *Drug War Crimes*, op. cit. 117, p. 27.

¹²³ Jeffrey Miron, *Drug War Crimes*, op. cit. 117, p. 30.

Miron concedes that the 50 percent drop in cirrhosis death rates were certainly aided by state-level prohibition, but his research shows other key factors might have played a more prevalent role. He suggests that heavy federal regulation, taxation, and quality control measures enacted prior to 1920 played such a role by decreasing home production and making alcohol less affordable. Other key factors included a significant reduction in immigration, World War I, and the Spanish Influenza epidemic of 1918, all of which “depleted the ranks of those susceptible of dying from cirrhosis.”¹²⁴ Miron concludes that the effectiveness of state prohibition prior to 1920, minus the factors mentioned above, resulted in an adjusted 10 to 20 percent decrease in cirrhosis deaths, which is undoubtedly a modest impact but not nearly as significant as the unadjusted 50 percent implies.¹²⁵ Liver cirrhosis death rates remained relatively stable during the 13 years of federal prohibition, and began to rise only slightly following its repeal in 1933.¹²⁶ Thus, if we take Miron’s research to be correct, we can see that alcohol prohibition in the U.S. did have an effect on consumption, albeit a much more modest one than prohibition hawks might claim. Also, cirrhosis death rates did not jump dramatically after prohibition ended, which only further implies that policies criminalizing substances might be repealed without an exponential jump in consumption rates.

Miron’s research on alcohol prohibition in the U.S. is relevant because it suggests that as a policy, prohibition is only moderately effective in reducing consumption of substances which may cause harm to the user. This stance is the beginning of a poignant objection to those who claim prohibition is the only effective way to decrease consumption. Building on this argument, Miron continues his research by examining the relationship between prohibition, the corresponding increase in law enforcement, and the violence that is often the

¹²⁴ Jeffrey Miron, *Drug War Crimes*, op. cit. 117, p. 34.

¹²⁵ Jeffrey Miron, *Drug War Crimes*, op. cit. 117, p. 34. A more detailed statistical analysis of this adjusted cirrhosis rate is available in an article by Jeffrey Miron and Angela Dills entitled “Alcohol consumption and alcohol prohibition,” published in the *American Law and Economics Review* in 2003.

¹²⁶ Jeffrey Miron, *Drug War Crimes*, op. cit. 117, p. 28.

result of such an increase. By comparing the period of U.S. alcohol prohibition (1910-1934) and the period when the U.S. began its “war on drugs” (1970-present), Miron takes note that as law enforcement efforts are increased to support prohibitive policies, a corresponding increase in violence and homicide rates is clearly observable. This represents a clearly unwanted consequence of prohibitive policies and directly undermines the arguments of those who believe prohibition to be in the best interest of society.

Simply enacting a policy of prohibition does not cause a drastic rise in violence by itself. Legislation prohibiting drugs has been in place in the U.S. since the Harrison Narcotics Act of 1914 which criminalized cocaine and opiates for nonmedical use.¹²⁷ Marijuana was criminalized in 1937, but enforcement of these policies was never as intense as during alcohol prohibition and later during the “war on drugs.” When Nixon declared this “war” in 1971, he was promising a massive law enforcement action against drug users and traffickers alike. Miron points out that this increase in law enforcement actually corresponds to a dramatic increase in violent crime. He further notes that, “roughly speaking there have been two periods with high homicide rates in U.S. history, the 1920-1933 period and the 1970-1990 period.”¹²⁸

Miron’s research shows that from 1920 to 1933, the homicide rate rose from around 6.5 (persons per 100,000) and peaked at nearly 10 following the repeal of alcohol prohibition in 1934. After this, the homicide rate declined slowly until 1970 when it spiked again, increasing from about 7 to 10 in just a few years.¹²⁹ Since the 1970’s, the homicide rate has remained at a much higher level (on average) than the period of non-enforcement from 1934 through 1970. In comparison, the expenditure for enforcement of alcohol prohibition rose from almost \$0 (per capita) to \$5. After 1934 it dropped back down to \$0.10, only to

¹²⁷ Jeffrey Miron, *Drug War Crimes*, op. cit. 117, p. 38.

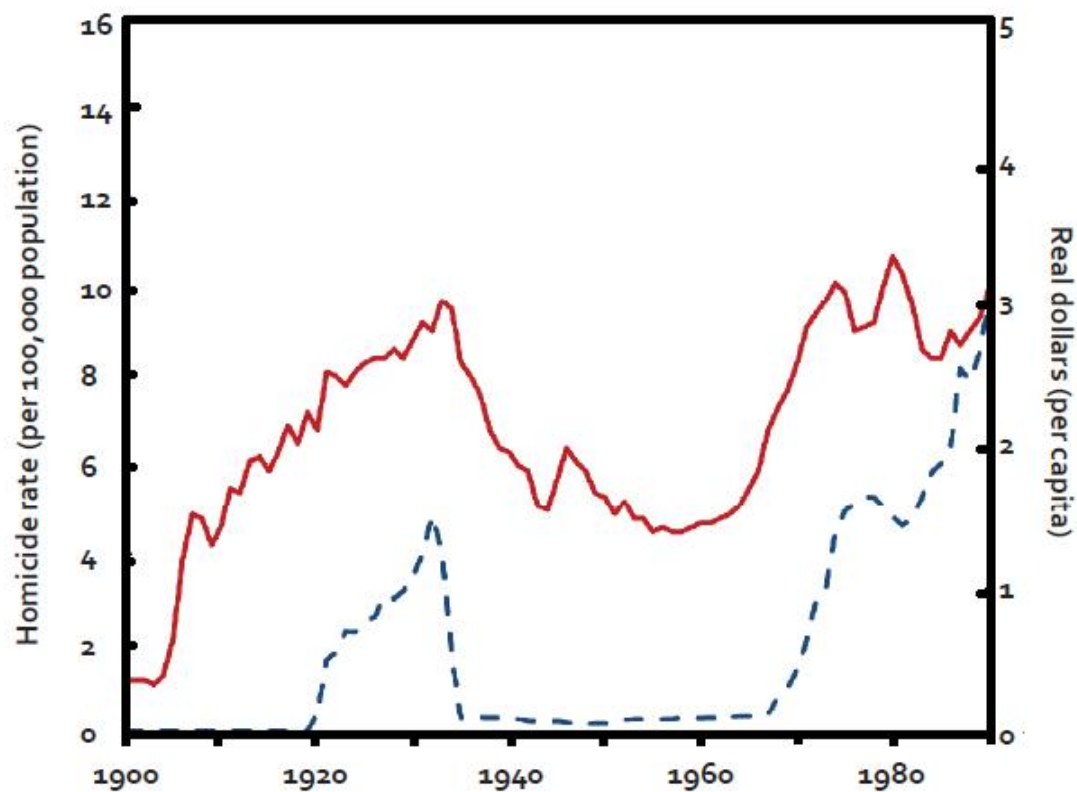
¹²⁸ Jeffrey Miron, *Drug War Crimes*, op. cit. 117, p. 46.

¹²⁹ Jeffrey Miron, *Drug War Crimes*, op. cit. 117, p. 47, figure 4.1.

exponentially increase from approximately \$1 in 1970 to its peak of \$10 in 1990.¹³⁰ Taking these figures into account, Miron claims that prohibition was not itself the cause of the drastic rise in violence, but that the corresponding increase in enforcement bred an environment where violence became much more prevalent.

Figure 1: Prohibition and Homicide Rates of the U.S. from 1900-1990¹³¹

Trends in Expenditure for Prohibition Enforcement (Blue Line) and Homicide Rates (Red Line) in the United States from 1900-1990



There are numerous reasons why such an increase in enforcement results in higher levels of violence and they all seem plausible. The primary reason is that higher levels of enforcement create a sizeable black market where these illegal goods are bought and sold.¹³² The consequence of a thriving black market is that participants are prevented from utilizing methods of dispute resolution that do not resorting to physical force. As entities compete

¹³⁰ Jeffrey Miron, *Drug War Crimes*, op. cit. 117, p. 49, figure 4.2.

¹³¹ This figure is a overlay of two graphs taken from Jeffrey Miron's *Drug War Crimes*, op. cit. 117, p. 47 and p. 49.

¹³² Jeffrey Miron, *Drug War Crimes*, op. cit. 117, p. 44.

over a market share, this competition is frequently manifested in violent “turf wars” where territory is brutally fought over.¹³³ A culture of swift retaliation is also encouraged because the most violent entities are able to maintain their hold of the market. Those who are wronged in transactions cannot seek remedy through the courts and thus must resort to dubious methods to be recompensated. All these factors augment an already volatile and unregulated market where big players are removed by force only to be replaced by other players with a more violent reputation. Finally, by focusing so many resources on enforcement of prohibition, law enforcement agencies have much less time and money budgeted towards prevention of violent crimes like homicide, assault, and robbery.¹³⁴ This results in an escalation of violence where more resources are poured into prohibition, which in turn only makes the black market more volatile and prone to violence.

The findings of Miron’s research may be surprising to those who believe that prohibition is an effective policy when backed by heightened enforcement. The evidence provided shows that prohibition does have the effect of reducing prevalence rates, although much less than might originally be assumed. His research shows that this modest decrease in usage is negated by the detrimental consequences of prohibition like an increased in violent crime. Evidence also points to a direct correlation in increased expenditure in enforcement of prohibition and an increase in homicide rates. Miron concludes that any benefit that prohibitive policies may produce is outweighed by the harms they cause and as such, he calls for other policies to be enacted that might not be as deleterious to society.

¹³³ Jeffrey Miron, *Drug War Crimes*, op. cit. 117, p. 45.

¹³⁴ Jeffrey Miron, *Drug War Crimes*, op. cit. 117, p. 46.

3.2 COMPARISON OF DRUG POLICIES

3.2.1 United Nation's Convention and Enforcement Bodies

Drug policy that has been implemented at the international level of the U.N. is derived from three separate treaties: the 1961 Single Convention on Narcotic Drugs amended by the 1972 Protocol (1961 Convention), the 1971 Convention on Psychotropic Substances (1971 Convention), and the 1988 U.N. Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances (1988 Convention).¹³⁵ Taken as a whole, these conventions aim at controlling the legal trade of controlled substances by party states so that they are not diverted into the illegal market.¹³⁶ To keep controlled substances off the illicit market, the conventions also require strict law enforcement measures be taken to ensure supply of these substances remains at a minimum. As of 2008, the three conventions have been ratified almost universally by 182 countries, thus ensuring that these policies become international law.¹³⁷

A common claim among human rights organizations is that these conventions oblige party states to follow a model of prohibition with heightened enforcement of their policies.¹³⁸ It is evident that the conventions are based on paternalistic and moralistic grounds as the preamble of the 1961 Convention asserts its focus is the “health and welfare of mankind” and references the “evils of drug addiction,”¹³⁹ seemingly preferring prohibitive policies to more liberal ones. There are some notable provisions which call for state parties to seek “early

¹³⁵ Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961. 976 U.N.T.S. 105, entered into force 8 Aug. 1975 (henceforth the 1961 Convention); Convention on Psychotropic Substances, 1971. 1019 U.N.T.S. 175, entered into force 16 Aug. 1976 (henceforth the 1971 Convention); United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, 1988. U.N. Doc. E/XONF.82/14, entered into force 11 Nov. 1990 (henceforth the 1988 Convention).

¹³⁶ Saul Takahashi, “Drug Control”, op. cit. 109, p. 750.

¹³⁷ International Narcotics Control Board. *Report of the International Narcotics Control Board on Follow-up to the Twentieth Special Sessions of the General Assembly*. U.N. Doc. E/INCB/2008/1/Supp.1, para. 56 (19 Feb. 2009).

¹³⁸ Damon Barrett, “Recalibrating the Regime”, op. cit. 2, p. 11.

¹³⁹ 1961 Convention, op. cit. 135, preamble.

identification, treatment, education, aftercare, rehabilitation and social reintegration”¹⁴⁰ of addicts as a means to prevent abuse, but it also suggests “the most effective methods of treatment for addiction is treatment in a hospital institution having a drug free atmosphere.”¹⁴¹ This language is actually suggesting that forced institutional treatment is the “most effective” measure to be taken against addicts, which the HRC later deemed to be a violation of the right against arbitrary detention.

It is the existence of such provisions and the complicity of state parties that call into question the compatibility of U.N. policies of drug control with human rights standards. Language in the 1988 Convention attempts to remedy this problem by suggesting “in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment (for possession of a controlled substance), measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.”¹⁴² This provision, though it uses fairly weak language, allows for an exception to punishing drug users at the discretion of the state. But aside from this single provision, the rest of the convention recommends drug use should be penalized in the same way (although much less harshly) as traffickers and producers.

The bodies that oversee and maintain the U.N. drug policies are the Commission on Narcotic Drugs (CND), the International Narcotics Control Board (INCB), and the U.N. Office on Drugs and Crime (UNODC).¹⁴³ The CND is the actual policy making body concerning illicit drugs, meeting once a year in Vienna. The INCB is tasked with enforcement of the three conventions and meets three times a year to report on the extent national compliance with U.N. policy. The UNODC acts as the support body for state parties and performs the brunt of the work. It is part on the U.N. Secretariat but only

¹⁴⁰ 1961 Convention, op. cit. 135, art. 38.

¹⁴¹ 1961 Convention, op. cit. 135, res. 2.1.

¹⁴² 1988 Convention, op. cit. 135, art 3 sec.4(c).

¹⁴³ Saul Takahashi, “Drug Control”, op. cit. 109, p. 751.

receives 12 percent of its yearly budget from them, relying on voluntary donations from party states to keep it functioning.¹⁴⁴ There is some evidence that this reliance on voluntary contributions allows the influence of larger contributors to be felt. Two examples of this are the U.S. who has been quite adamant about enforcing prohibition as a rule and straying away from words like ‘harm reduction’ in policy,¹⁴⁵ and Sweden who is the single largest contributor to UNODC’s annual publication, the *World Drug Report*. Interestingly enough, the UNODC published a special report in 2007 praising Sweden for its strictly prohibitive policies.¹⁴⁶ Perhaps due to the influence of such significant prohibition-minded donors, the UNODC has continued to steer drug policies towards criminalization as a means to prevent drug use. This is even evident in the most recent Political Declaration of the CND from 2009 which states, “We are determined to tackle the world drug problem and to actively promote a society *free of drug abuse* in order to ensure that all people can live in health, dignity and peace, with security and prosperity.”¹⁴⁷

With declarations stating the goal of a society “free of drug abuse,” it is clear that the policies of the U.N. remain firmly aligned with the “war on drugs” first declared by the U.S. In a response to some issues raised by the UNODC in the *World Drug Report* 2008, the Transnational Institute stated that:

¹⁴⁴ U.N. Office on Drugs and Crime. *UNODC Strategy 2008-2011: Towards Security and Justice for All: Making the World Safer from Crime, Drugs, and Terrorism*. U.N. Doc. E/CV.7/2007/14-E/CN.15/2007/5 (Jun. 2008), sec. 8: “Although the increase in earmarked contributions represents a vote of confidence in UNODC by Member States, it creates an unstable and unpredictable funding situation, making it difficult to plan even one year ahead.”

¹⁴⁵ Saul Takhashi, “Drug Control”, p. 751.

¹⁴⁶ U.N. Office on Drugs and Crime. *Sweden’s Successful Drug Policy: A Review of the Evidence*. Vienna, February 2007. Web. 20 Apr. 2010.

¹⁴⁷ U.N. Economic and Social Council. “Draft Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem.” Commission on Narcotic Drugs, 52nd session. E/CN.7/2009/L.2 (10 Mar. 2009), at I.

A world without drugs will never exist. The ideology of ‘zero tolerance’ needs to be replaced by the principle of harm reduction, which offers a more pragmatic approach that favors policies capable of reducing drug related harms as far as possible, for the consumer and for society in general.¹⁴⁸

The focus of the three conventions is to control the supply of the legal drug market and enforce prohibition of all illegal drugs trade. Little concern for the drug user was indicated in discussions leading up to the first two conventions¹⁴⁹ and even the third uses weak language in offering an alternative to punishment for addicts. Due to the advocacy of prohibition and enforcement at this level, it is no wonder why some NGOs that deal with human rights claim an incompatibility exists between U.N. drug policies and human rights mechanisms.

3.2.2 The United States

As one of the primary contributors to the UNODC budget and one of the strongest supporters of prohibition, the U.S. has been exerting its significant influence in world affairs to export their “war on drugs” to every corner of the globe. Federal legislation proscribes possession, trafficking, or production of all substances named in the Comprehensive Drug Abuse Prevention and Control Act (hereafter be referred to as the Controlled Substances Act of 1970).¹⁵⁰ Up until very recently, the national strategy to achieve a drug-free society was criminalization and punishment for illegal possession, trafficking, and production of controlled substances. This strategy was to be realized by significantly increasing the annual expenditure on enforcement the same way it had during alcohol prohibition. However, this “zero tolerance” approach has been shifted towards treatment, rehabilitation, and general demand reduction with the election of President Obama in 2008. Even using the term “war

¹⁴⁸ *Rewriting History: A Response to the 2008 World Drug Report*. Transnational Institute, Jun. 2008. Web. 19 Nov. 2010. p. 3.

¹⁴⁹ McAllister, William B. *Drug Diplomacy in the Twentieth Century: An International History*. Routledge: New York, 2000. p. 229.

¹⁵⁰ Controlled Substances Act of 1970. 21 USC CHAPTER 13. Drug Enforcement Agency, 1 Feb. 2010. Web. 28 Nov. 2010.

on drugs” has become a thing of the past as the new national strategy is implemented.¹⁵¹

Despite this recent shift in policy, the U.S. has maintained a strictly prohibitive policy model with a focus on incarceration for those who violate the law.

The Controlled Substances Act of 1970 divides illicit substances into five “schedules” depending on the potential for abuse, whether the substance has an accepted medical use, and the likelihood of physical or mental dependence for users. Schedule I drugs are “highly addictive” and have “no currently accepted medical use.” They include heroin, LSD, and marijuana. Schedule II drugs are less likely to be abused and may have some medical use, including cocaine and amphetamine-type stimulants (AST). Schedules III through V have a decreasing potential for abuse and are more widely used as medicines.¹⁵² At the federal level, “simple unlawful possession” of any controlled substance is punishable by “a term of imprisonment of not more than one year, a fine of not more than \$5,000, or both.”¹⁵³ There is an exception that allows for possession of “small amounts of certain controlled substances” to be dealt with as a civil offense at the discretion of the prosecutor and judge.¹⁵⁴ In the past, this provision has been interpreted to apply to first time offenders and can result in a fine not to exceed \$10,000.

Due to the tough federal stance of zero-tolerance, the only federally funded harm reduction measure is a childhood education program call “DARE.” There has been a federal ban on needle exchanges for some time, although a few municipalities do sponsor them against federal law.¹⁵⁵ Methadone treatment for opiate addiction has been in place for over 30 years, although it is highly regulated by the federal government. Despite its recognized

¹⁵¹ Fields, Gary. “White House Czar Calls for End to ‘War on Drugs’: Kerlikowske Says Analogy Is counterproductive; Shift Aligns With Administration Preference for Treatment Over Incarceration”. *The Wall Street Journal* 14 May 2009. Web. 12 Nov. 2010.

¹⁵² Husak, Douglas N. *Drugs and Rights*. New York: Cambridge University Press, 1992. Print. pp. 28-29.

¹⁵³ Controlled Substances Act of 1970. 21 USC Sec. 844: “It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner.”

¹⁵⁴ Controlled Substances Act of 1970. 21 USC Sec. 844a.

¹⁵⁵ Gary Fields, “White House Czar Calls for End to ‘War on Drugs’”, op. cit. 151.

effectiveness, only 20 percent of opiate addicts are eligible for the treatment.¹⁵⁶ The U.S. has a long history preferring incarceration to treatment when it comes to drug offenders.

Through the “war on drugs,” an estimated \$33 billion¹⁵⁷ in taxpayer’s money is spent on prohibition enforcement efforts and this has resulted in the U.S. laying claim to the highest inmate population in the world. Over a quarter of the two million prisoners in the U.S. are incarcerated on drug charges, and for this reason we will call this policy the “incarceration model.”¹⁵⁸

3.2.3 Sweden

Sweden’s national drug policy can be described as “severe prohibition” with a national strategy aiming for a totally drug-free society. The objectives of this restrictive and oppressive strategy are “to reduce the number of new recruits to drug use (mainly through prevention directed at young people), to encourage more drug users to give up the habit (through care and treatment), and to reduce the supply of drugs (through criminal measures).”¹⁵⁹ The current drug policy arises from the Narcotic Drugs Criminal Act of 1968 which punishes use, possession, production, supply, and trafficking of any substance that falls within one of their five proscribed lists. Sweden also provides proscription for substances that are not in their lists but can be used for intoxication by labeling them “Goods dangerous to public health.”¹⁶⁰ Sweden represents one of the strongest prohibitive policy models in Europe and allows for only limited harm reduction measures to be pursued.

¹⁵⁶ “Methadone”. *Office of National Drug Control Policy*, 2000. 20 Jul. 2006. Web. 28 Nov. 2010.

¹⁵⁷ Jeffrey Miron, *Drug War Crimes*, op. cit. 117, p. 1.

¹⁵⁸ *Substance Abuse Treatment and Public Safety*. Washington D.C.: Justice Policy Institute, Jan. 2008. *Justice Policy Institute*. Web. 28 Nov. 2010. P. 1.

¹⁵⁹ Lafrenière, Gérald. “National Drug Policy: Sweden.” *Special Committee on Illegal Drugs (37th Parliament- 1st Session): Committee Research Papers*. Parliament of Canada, 18 Apr. 2002. Web. 24 Apr. 2010.

¹⁶⁰ “Situation summary for Sweden.” *EMCDDA: European Monitoring Centre for Drugs and Drug Addiction*. 29 Jul. 2009. Web. 20 Apr. 2010.

According to the above mentioned act, any form of involvement (consumption, possession, manufacturing, supply, and trafficking) with an illicit substance is punishable according to the degree of the offense. This degree is determined by considering the nature and quantity of the substance as well as other conditions, resulting in a classification of either a minor, ordinary, or serious drug offense.¹⁶¹ A minor offense can result in up to six months imprisonment, ordinary offenses up to three years, and serious offenses mandate between two to ten years imprisonment. Minor offenses, which the government has determined as possession for personal use, may be sanctioned with a simple fine. Ordinary offenses are also frequently sanctioned without imprisonment by offering probation, conditional sentences, or even compulsory treatment. The existence of compulsory treatment is provided by the Act on the Forced Treatment of Abusers and allows for “an addict who is dangerous to himself or to others” to be deprived of their liberty for a period of up to six months (and even longer if the addict is under the age of 20).¹⁶²

Under Sweden’s drug legislation, police are permitted to submit those under suspicion of drug use to urine or blood tests and if the tests are positive, the person may be subject to charges of consumption along the lines of a minor offense.¹⁶³ Following the highly restrictive national strategy, opiate replacement therapies are allowed but only in limited pilot programs and the number of recipients is strictly regulated.¹⁶⁴ Also, in the case of supply, production, or trafficking, both the drugs and the person’s assets are liable to be forfeited and seized at the discretion of the court.

¹⁶¹ “Situation summary for Sweden.” Op. cit.

¹⁶² “National Drug Policy: Sweden.” Op. cit.

¹⁶³ “National Drug Policy: Sweden.” Op. cit.

¹⁶⁴ “Situation summary for Sweden.” Op. cit.

3.2.4 The United Kingdom

The United Kingdom's current national drug policy can be described as "clear prohibition" and arises from the Misuse of Drugs Act of 1971 (MDA), which has been amended numerous times, as well as the Drug Trafficking Act of 1994.¹⁶⁵ The MDA distinguishes between three types of substances (Classes A, B, and C) according to the harm caused, and also allows for a sliding scale of punishment depending on the offense and the class of the drug. Under this act, drug consumption is not proscribed and an offense is only found through possession of an illicit substance. The British drug policy model is still strongly prohibitive, but is more accepting of harm reduction measures than Sweden.

The MDA gives police the wide power to search both premises and persons if they suspect any possession of controlled substance.¹⁶⁶ Class A possession covers the most harmful drugs like heroin, cocaine, opium, hallucinogens, and cannabis extracts with a maximum penalty of seven years imprisonment. Class B possession offenses cover moderately harmful drugs like cannabis, barbiturates, oral amphetamines, and less potent opioids like codeine and can carry up to five years imprisonment. Class C possession offenses are triggered by substances like mild opioids, tranquilizers, and less potent stimulants and may incur up to two years imprisonment.¹⁶⁷ It should also be noted that the police are given discretion concerning cautions and official warnings for personal possession, a trend which is proving to be more common regarding the possession of less harmful drugs like cannabis. An amendment to the MDA in 2001 has provided for opiate substitution treatment for addicts under the supervision of a doctor.

The production and trafficking of drugs are much more serious crimes and the severity of the sanction follows the sliding scale along the three classes of substances with the

¹⁶⁵ "Data Sheet: United Kingdom." *EMCDDA: European Monitoring Centre for Drugs and Drug Addiction*. 28 Jul. 2009. Web. 20 Apr. 2010.

¹⁶⁶ Lafrenière, Gérald. "National Drug Policy: United Kingdom." *Special Committee on Illegal Drugs (37th Parliament 1st Session): Committee Research Papers*. Parliament of Canada, 3 Jul. 2001. Web. 24 Apr. 2010.

¹⁶⁷ Gérald Lafrenière, "National Drug Policy: United Kingdom.", Op. cit.

most severe punishment being lifetime imprisonment.¹⁶⁸ The Drug Trafficking Act allows for confiscation of assets of anyone convicted for production, trafficking, or supplying of illicit substances along with any prison term doled out by the courts. A third offense of trafficking Class A drugs also incurs a minimum seven years imprisonment as a means to deter repeat offenders.

3.2.5 The Netherlands

The Dutch lay claim to what many consider to be the most liberal drug policy in the world because of the sale of marijuana for consumption in coffee shops. Many believe that drug use is actually legal in the Netherlands, but this is not a correct assumption. According to the Dutch Opium Act upon which their drug legislation is based, drugs that are traditionally illicit in other countries are illicit in the Netherlands as well. The big difference between Dutch legislation and other drug policies around Europe is that the Opium Act separates drugs into the categories of “soft” and “hard,” and soft drug use like marijuana is actually tolerated under certain conditions.¹⁶⁹ The Dutch national drug strategy has four goals: “first, to prevent drug use and to treat and rehabilitate drug users; second, to reduce harm to users; third, to diminish public nuisance caused by drug users; and fourth, to combat the production and trafficking of drugs.”¹⁷⁰ You may notice the inclusion of both harm reduction and a respect for liberal autonomy so far as it creates no “public nuisance.” The most appropriate name for this policy model would be “tolerant prohibition” or “non-enforcement” and it has stood the test of time for three decades.

Drug possession, trafficking, and production still remain illegal under this policy, which allow the Dutch to stay in compliance with the three U.N. conventions. Commercial

¹⁶⁸ “Data Sheet: United Kingdom.” Op. cit.

¹⁶⁹ “Situation summary for the Netherlands.” EMCDDA: *European Monitoring Centre for Drugs and Drug Addiction*. 29 Jul. 2009. Web. 20 Nov. 2010.

¹⁷⁰ “Situation summary for the Netherlands.” Op.cit.

distribution of either hard or soft drugs can be punishable by imprisonment up to eight years (plus fines) depending on the severity of the offense. Users who are frequent offenders are subjected to heavier sanctions than first-timers. As mentioned before, the use and possession of small amounts of hard and soft drugs is tolerated when the user is not causing a public nuisance, and the sale of cannabis in coffee shops is illicit but not enforced when operating under strict guidelines.

Drug traffickers face sanctions of imprisonment up to 16 years, also depending on the severity of the offense and the nature of the substance involved.¹⁷¹ Drug production is also explicitly illegal, which causes problems for the coffee shops that need a constant supply to sell to customers. There is thus a grey area regarding cannabis cultivation where non-enforcement is the rule under certain conditions, but producers of hard drugs face the same sanctions as traffickers. As noted in the national drug policy, harm reduction measures are encouraged and some, such as detoxification and residential treatment are actually covered by medical insurance.¹⁷² Opiate substitution therapies and needle syringes have been in place since the late 1960's and have even been publicly funded in some areas.

3.2.6 Portugal

Unbeknownst to most of the world, Portugal (and not the Netherlands) is home to Europe's most progressive national drug policy. The national strategy is to affectively reduce the prevalence of drug use in the population and alleviate the negative social and health consequences associated with it. Unlike the Netherlands, which still has criminal sanctions in place concerning illicit drugs (even though a certain amount of drug production, sale, and consumption is *tolerated*), the Portuguese have fully removed criminal sanctions for personal consumption.

¹⁷¹ "Situation summary for the Netherlands." Op.cit.

¹⁷² "Situation summary for the Netherlands." Op.cit.

“Decriminalization” comprises removal of a conduct or activity from the sphere of criminal law.

Prohibition remains the rule, but sanctions for use (and its preparatory acts) no longer fall within the framework of criminal law.¹⁷³

By implementing Law n. 30/2000 on 1 July 2001, the Portuguese became the first country in Europe to make possession of any illicit drug a strictly administrative offense.¹⁷⁴ Portugal has been criticized by prohibition-minded nations for this liberal policy, but nonetheless has claimed they are still in observance of the three U.N. treaties because they are exercising the discretion provided in the 1988 Convention.¹⁷⁵ Narcotic drugs maintain an illegal status in legislative frameworks, however, and offenses like trafficking and sale to minors still incur criminal sanctions. Portugal thus represents the most liberal of all the countries examined in this paper with a model focused on decriminalization and harm reduction to reduce usage rates.

Under this “model of decriminalization,” persons found to be in possession of a small quantity of drugs for personal use, defined as “less than the quantity required for an average individual consumption during a period of ten days,” are merely cited by police officers.¹⁷⁶ If cited, an individual is obligated to appear before the Commission for Dissuasion of Drug Addiction (CDDA) within 72 hours of the citation. The commission consists of three persons: a lawyer, a doctor, and a social worker. In a non-confrontational environment that is a far cry from the battlefield of a courtroom, the CDDA evaluates the situation of the offender and encourages voluntary treatment for problematic users. Sanctions may be

¹⁷³ Greenwald, Glenn. “Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies.” *The Cato Institute*. April 2, 2009. Web. 8 Jan. 2010. P. 2.

¹⁷⁴ “Situation summary for Portugal.” *EMCDDA: European Monitoring Centre for Drugs and Drug Addiction*. 29 Jul. 2009. Web. 20 Apr. 2010.

¹⁷⁵ 1988 Convention, op. cit. 135, art 3 sec.4(c). It may be controversial move to decriminalize possession of controlled substances under this provision, but because they have not legalized drug use *per se*, they still comply with U.N. treaty obligations.

¹⁷⁶ 1988 Convention, op. cit. 135, art 3 sec.4(c).

imposed by the CDDA such as fines or community service, but frequently the Commission offers a warning in the absence of addiction or repeated violations.¹⁷⁷

As mentioned before, drug trafficking and providing drugs to a minor are illegal and punishable with between four to twelve years of imprisonment.¹⁷⁸ The actual sanction is determined in the courts by considering various criteria such as the amount and the nature of the substance in question. In accordance with the national strategy, education plays a vital role and universal drug prevention is incorporated into every school's curriculum.¹⁷⁹ For those who fall astray of the message of prevention in school, a variety of state sponsored treatments are available including a wide array of substitution therapies. The policy model of decriminalization that Portugal has had in place for over ten years is perhaps the most rights-friendly policy in the world to date, and other countries would do well to consider changing their policies to match it.

3.3 COMPARISON OF USAGE RATES

The data used to compile these figures comes strictly from primary sources. The U.S. data comes from the Office of Applied Sciences which archives the country's statistical information. The data covers the years from 2002 through 2009 because these years all used the same reporting methods in collecting data, making them easily comparable to each other. The data for the E.U. countries comes from the European Monitoring Centre for Drug and Drug Addiction (EMCDDA) which is funded by the Council of Europe. The data is assembled from the various member states and published in regular statistical bulletins. The ages of reported users in the U.S. data are 12 and older, while the ages of reported users from the E.U. are between 14 and 64. Although this makes a strict comparison between U.S.

¹⁷⁷ Glen Greenwald, "Drug Decriminalization in Portugal", Op. cit. p. 3.

¹⁷⁸ Glen Greenwald, "Drug Decriminalization in Portugal", Op. cit. p. 4.

¹⁷⁹ "Situation summary for Portugal." Op. cit.

usage and E.U. usage difficult, it still allows for a relevant evaluation. Lifetime prevalence (LTP) refers to persons who reported using a certain substance even once in their lifetime and last year prevalence (LYP) refers to persons who reported using a certain substance within the last 12 months.

3.3.1 The United States

Despite its “incarceration model” of drug policy and the \$33 billion spent annually on enforcement, the U.S. maintains one of the highest usage rates in the world (with the U.K and New Zealand as the only other countries coming close).¹⁸⁰ LTP of any illicit substance has remained at nearly 50 percent for the past decade, and prevalence of marijuana, cocaine, heroin, and amphetamine-type stimulants (AST) has barely budged in that time period. LYP of any illicit substance has actually shown a slight increase in the past few years, but this most likely due to usage rates in marijuana increasing. It should be noted that LYP of cocaine, heroin, and AST have remained fairly stable in the past decade and may be showing signs of trending downwards.

¹⁸⁰ Jeffrey Miron, *Drug War Crimes*, op. cit. 117, p.1.

Figure 2: Lifetime Prevalence of Illicit Drugs in the U.S.¹⁸¹

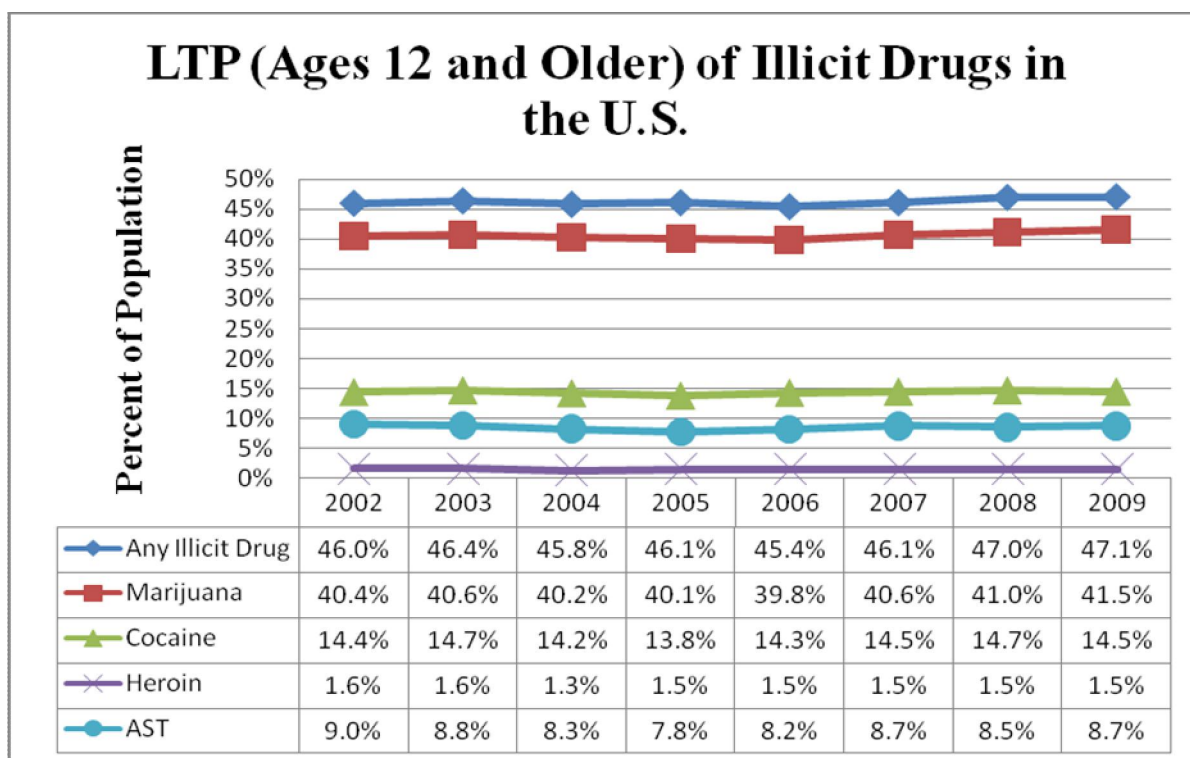
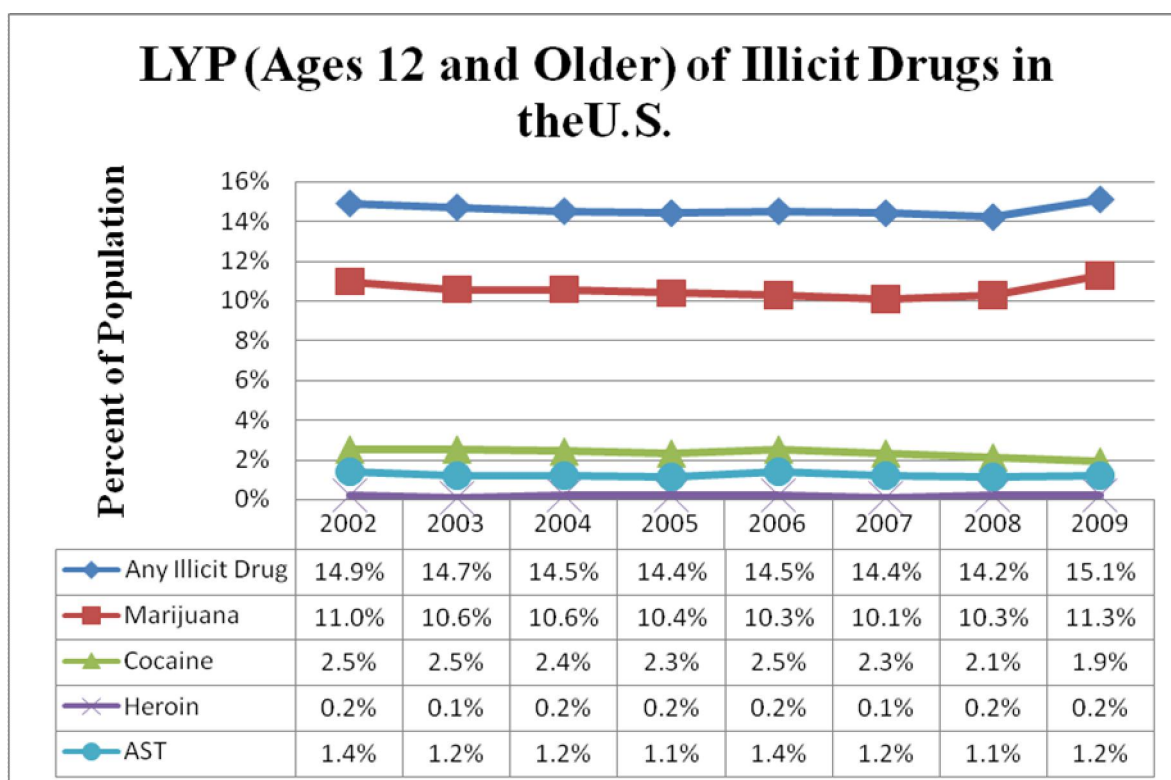


Figure 3: Last Year Prevalence of Illicit Drugs in the U.S.¹⁸²



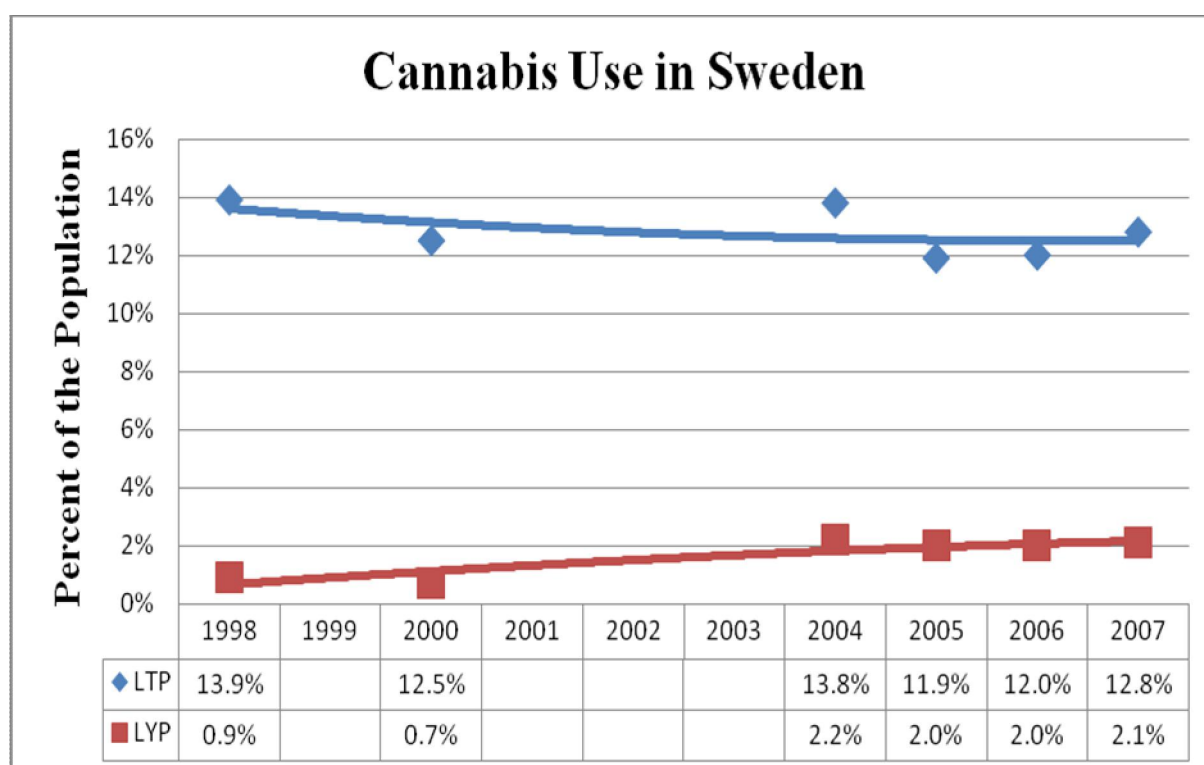
¹⁸¹ Figure compiled from data published in *Substance Abuse and Mental Health Statistics*. Office of Applied Sciences, n.d. Web. 10 Nov. 2010.

¹⁸² Figure compiled from data published in *Substance Abuse and Mental Health Statistics*. Office of Applied Sciences, n.d. Web. 10 Nov. 2010.

3.3.2 Sweden

Sweden has been able to maintain a very low prevalence of drug use with an LTP of cannabis use among adults currently at 12.8% (E.U. range of 1.5%-38.6%).¹⁸³ The prevalence of cocaine is one of the lowest in the E.U. as well, with a usage rate that is almost negligible. These overall low percentages compared to the E.U. ranges even prompted the U.N. to laud their efforts in a special report from 2007 entitled *Sweden's Successful Drug Policy*.¹⁸⁴ It is interesting to note, however, that these prevalence rates are quite comparable to Portugal (LTP of cannabis 11.7%) who utilizes a model of decriminalization.¹⁸⁵

Figure 4: Cannabis Use in Sweden¹⁸⁶



¹⁸³ "Data Sheet: Sweden." *EMCDDA: European Monitoring Centre for Drugs and Drug Addiction*. 28 Jul. 2009. Web. 20 Apr. 2010.

¹⁸⁴ U.N. Office on Drugs and Crime. *Sweden's Successful Drug Policy*, op. cit. 146.

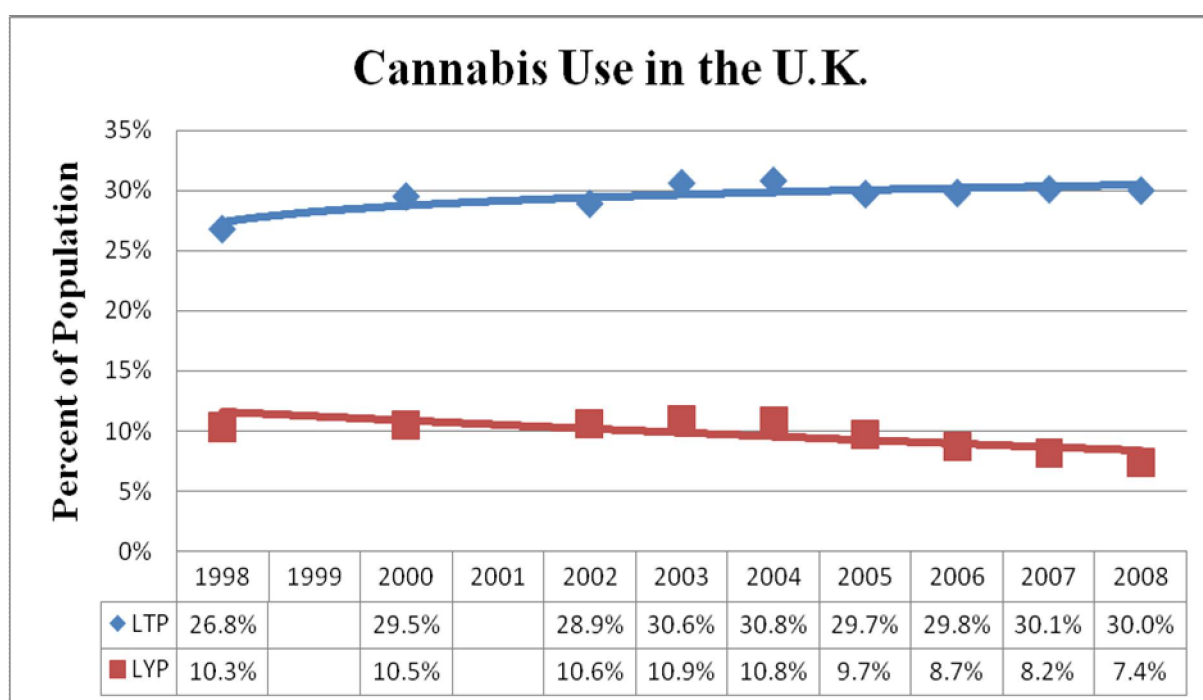
¹⁸⁵ Hallam, Christopher. "What can we learn from Sweden's Drug Policy Experience?" *International Drug Policy Consortium*. The Beckley Foundation Drug Policy Programme, Jan. 2010. Web. 24 Apr. 2010. Page 7.

¹⁸⁶ Figure compiled from data published in "Statistical bulletin 2009." *EMCDDA: European Monitoring Centre for Drugs and Drug Addiction*. 9 Dec. 2009. Web. 28 Apr. 2010.

3.3.3 The United Kingdom

The U.K. was included in this paper not just as an example of another prohibitive criminalizing drug policy, but also because they have some of the highest key indicators in the E.U. The LTP of cannabis use among adults is one of the highest in the E.U. at 30% (E.U. range of 1.5%-38.6%).¹⁸⁷ The LTP of cocaine use among adults is also one of the highest in the E.U. at 7.6% (E.U. range of 0.1%-8.3%).¹⁸⁸ The LTP of stimulant use among adults is currently 11.7%, which is actually higher than the U.S.'s current LTP of 8.7%.

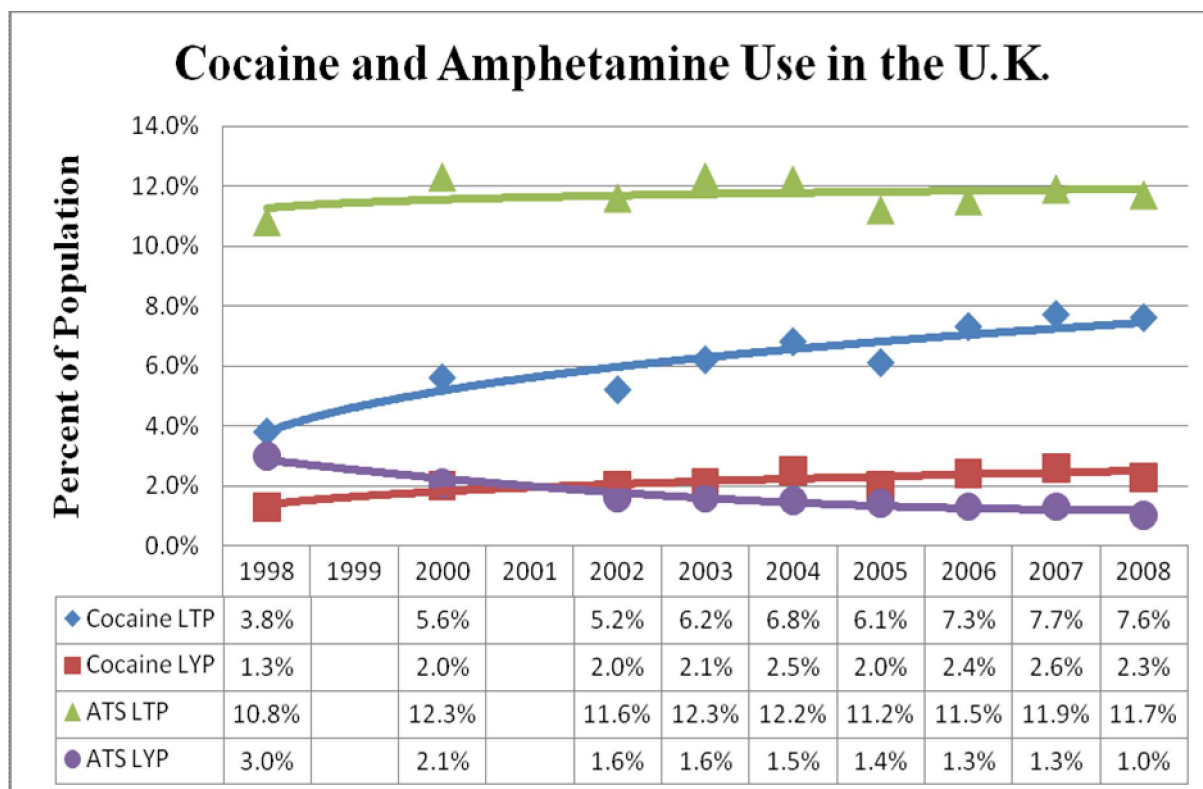
Figure 5: Cannabis Use in the U.K.¹⁸⁹



¹⁸⁷ "Data Sheet: United Kingdom." Op. cit.

¹⁸⁸ "Data Sheet: United Kingdom." Op. cit..

¹⁸⁹ Figure compiled from data published in "Statistical bulletin 2009." *EMCDDA: European Monitoring Centre for Drugs and Drug Addiction*. 9 Dec. 2009. Web. 28 Apr. 2010.

Figure 6: Cocaine and Amphetamine Use in the U.K.¹⁹⁰

Notice that as their policies towards cannabis have become more lax over the last decade, a slight decrease in prevalence is also observable across the board. This can be juxtaposed with the classification of cocaine as a Class A substance (mandating strict proscription), where prevalence has actually shown a steady increase over the last decade. Another shocking point is the high rate of stimulant use; but the dropping LYP shows that usage of stimulants is trending downwards.

3.3.4 The Netherlands

Proponents of drug prohibition might be inclined to guess that the Netherlands has the highest prevalence of cannabis use due to the tolerance of soft drugs by law enforcement, but they would be mistaken in assuming as much. Although the LTP of cannabis use in adults is

¹⁹⁰ Figure compiled from data published in "Statistical bulletin 2009." EMCDDA: European Monitoring Centre for Drugs and Drug Addiction. 9 Dec. 2009. Web. 28 Apr. 2010.

currently 22.6%, this is still almost 10% lower than the U.K. and is only considered moderately high in Europe (E.U. range of 1.5%-38.6%).¹⁹¹ The LTP of cocaine use in the Netherlands is currently at 3.4% which represents the European average (E.U. range of 0.1%-8.3%).¹⁹² The LTP of stimulant use is 2.1% which is also significantly lower than the U.K. by almost 10%.

Considering the Dutch policies of toleration and non-enforcement towards drug usage, it may be a surprise to learn that they have lower usage rates than the U.K. and actually maintain prevalence rates close to the median of the E.U. ranges. The only statistic that shows increased usage is the LTP of cocaine, but since the LYP is fairly static and shows no increase, this may just be a statistical aberration. Despite lax policies of drug use and even allowing for soft drugs to be sold commercially in some circumstances, usage rates are not abnormally high.

¹⁹¹ "Data Sheet: the Netherlands." Op. cit.

¹⁹² "Data Sheet: the Netherlands." Op. cit..

Figure 7: Cannabis Use in the Netherlands¹⁹³

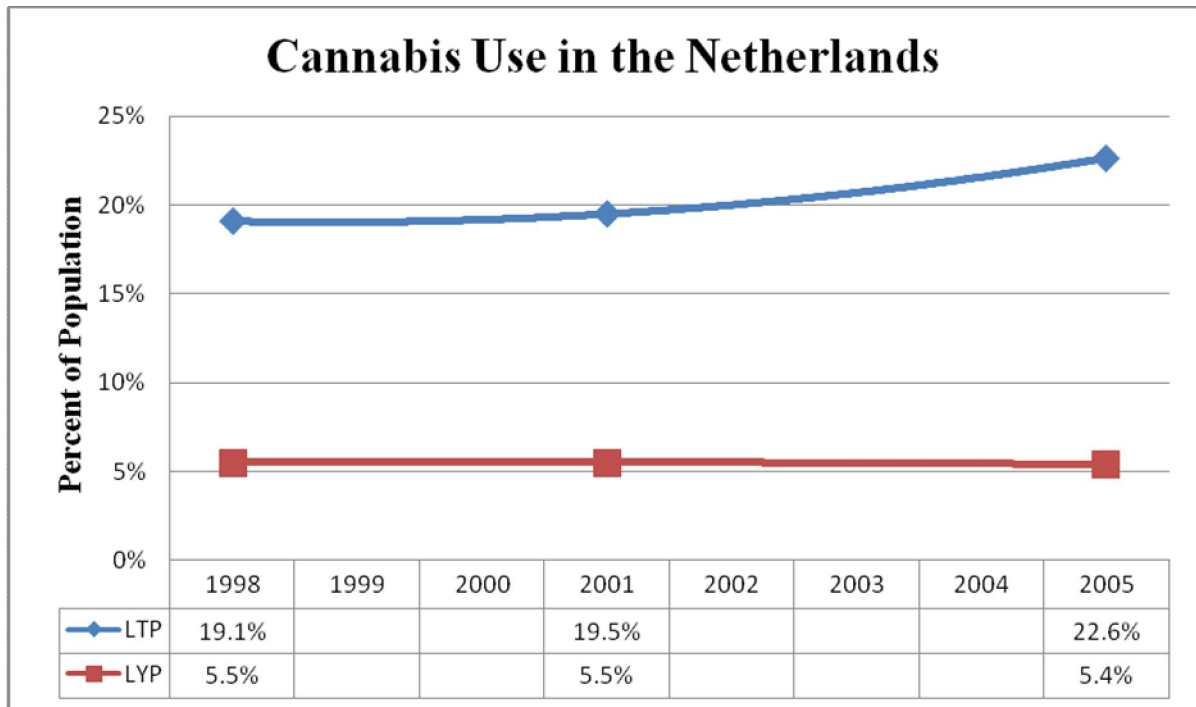
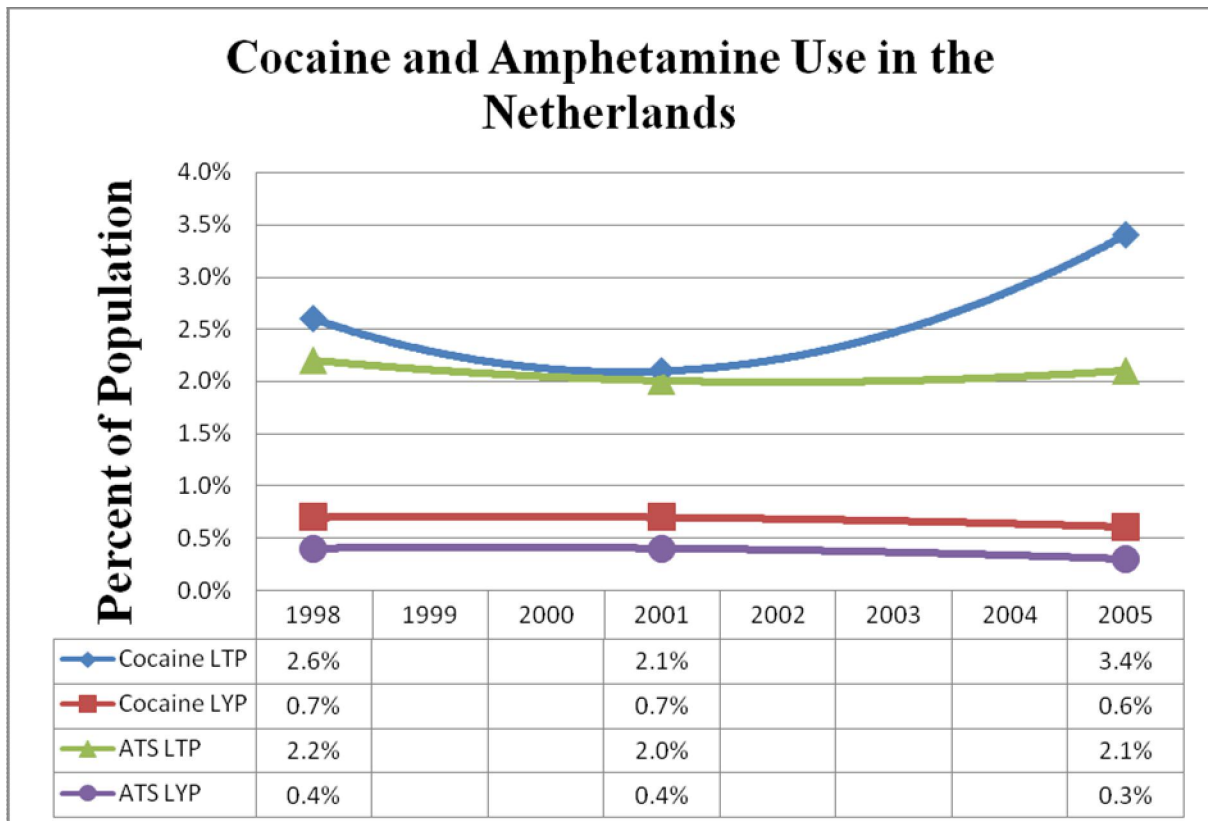


Figure 8: Cocaine and Amphetamine Use in the Netherlands¹⁹⁴



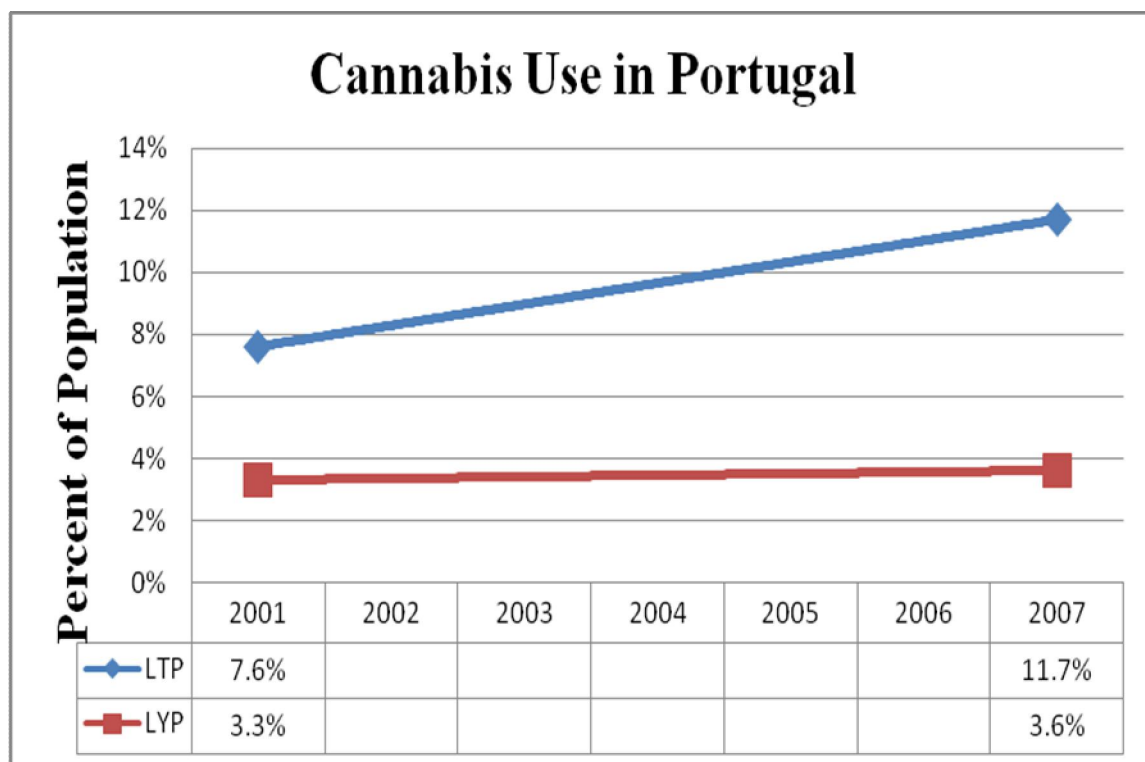
¹⁹³ Figure compiled from data published in "Statistical bulletin 2009." EMCDDA: European Monitoring Centre for Drugs and Drug Addiction. 9 Dec. 2009. Web. 28 Apr. 2010.

¹⁹⁴ Figure compiled from data published in "Statistical bulletin 2009." EMCDDA: European Monitoring Centre for Drugs and Drug Addiction. 9 Dec. 2009. Web. 28 Apr. 2010.

3.3.5 Portugal

The Portuguese model of decriminalization has resulted in some interesting findings regarding prevalence rates. Since 2001, “drug usage in many categories has actually decreased when measured in absolute terms, whereas usage in other categories has increased only slightly or mildly.”¹⁹⁵ Prevalence of students between the ages of 13-15 has decreased from 14.1% in 2001 to 10.6% in 2006.¹⁹⁶ The LTP of cannabis use among adults is 11.7% which is lower than the European median (E.U. range of 1.5%-38.6%).¹⁹⁷ The LTP of cocaine use among adults is 1.9% which is much lower than the U.K. and even marginally lower than the Netherlands (E.U. range of 0.1%-8.3%).¹⁹⁸

Figure 9: Cannabis Use in Portugal¹⁹⁹



¹⁹⁵ Glen Greenwald, "Drug Decriminalization in Portugal", Op. cit. p. 11.

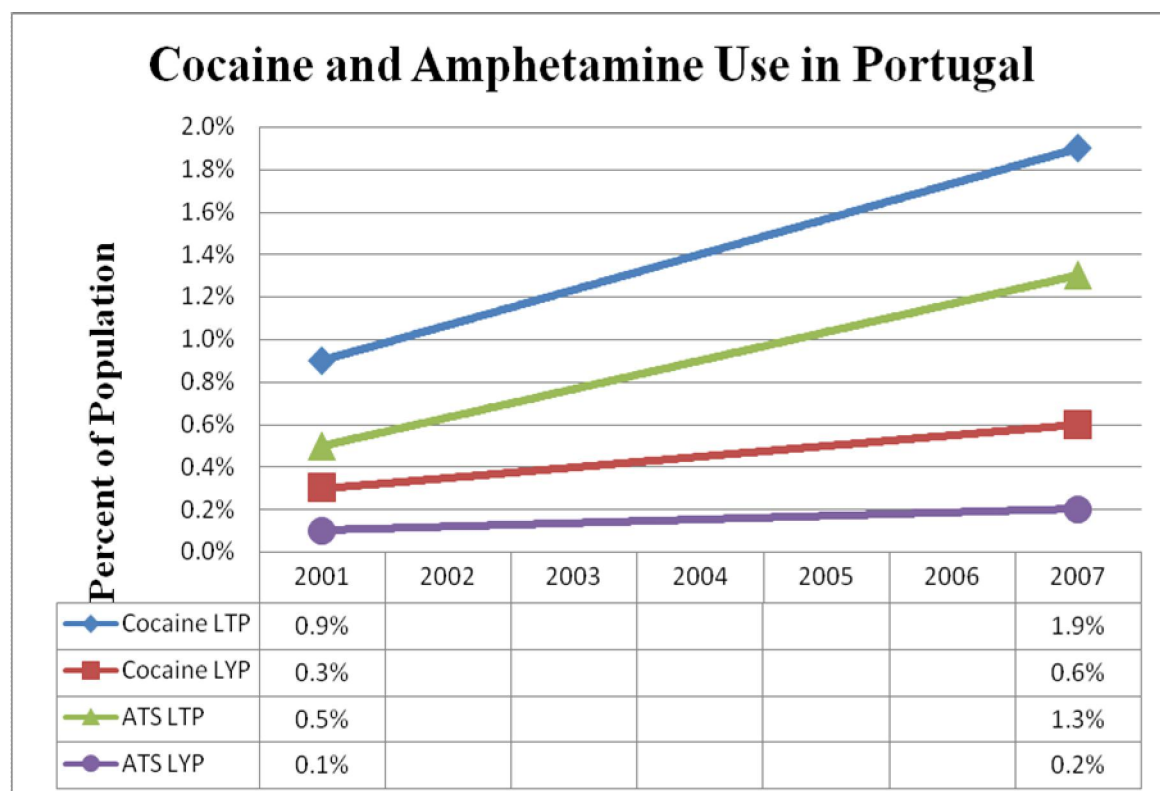
¹⁹⁶ Glen Greenwald, "Drug Decriminalization in Portugal", Op. cit. p. 11..

¹⁹⁷ "Data Sheet: Portugal." *EMCDDA: European Monitoring Centre for Drugs and Drug Addiction*. 28 Jul. 2009. Web. 20 Apr. 2010.

¹⁹⁸ "Data Sheet: Portugal", Op. cit.

¹⁹⁹ Figure compiled from data published in "Statistical bulletin 2009." *EMCDDA: European Monitoring Centre for Drugs and Drug Addiction*. 9 Dec. 2009. Web. 28 Apr. 2010.

Figure 10: Cocaine and Amphetamine Use in Portugal²⁰⁰



Although an overall increase in the prevalence of cannabis and cocaine can be observed, these levels still are at the low end of the E.U. range. As noted previously, the LTP of cannabis use by adults is actually lower than Sweden (11.7% versus 12.8%), and the LTP of cocaine use is even lower than the Netherlands. These facts beg the question of whether criminalization is an effective means of decreasing drug use.

3.4 PROBLEMATIC USAGE AND DRUG-RELATED DEATHS

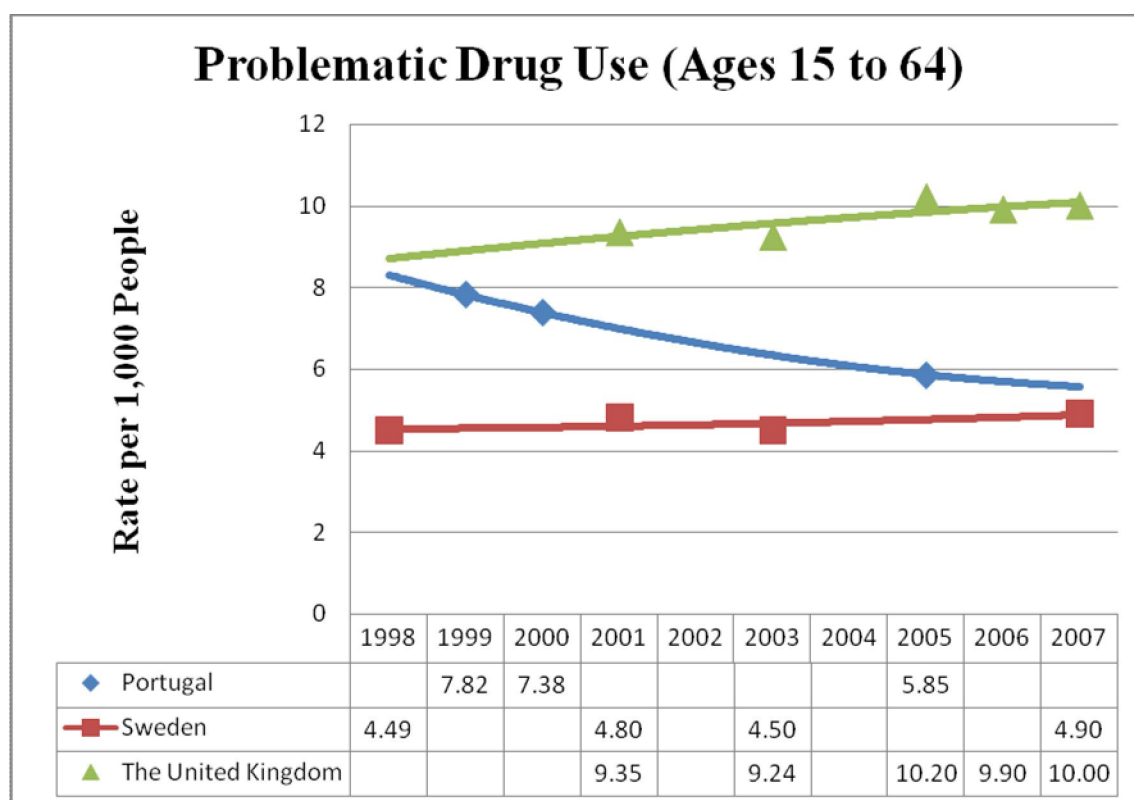
Problematic drug use (PDU) is defined as “injecting drug use or long-duration/regular use of opioids, cocaine and/or amphetamines.”²⁰¹ Examination of PDU is a key indicator of whether a state is making progress towards alleviating the most dangerous kinds of drug use. A country that lowers their PDU may imply that their policy model is effective because there

²⁰⁰ Figure compiled from data published in “Statistical bulletin 2009.” EMCDDA: European Monitoring Centre for Drugs and Drug Addiction. 9 Dec. 2009. Web. 28 Apr. 2010.

²⁰¹ “Problem Drug Use”. EMCDDA: European Monitoring Centre for Drugs and Drug Addiction. 15 Dec. 2009. Web. 28 Nov. 2010.

are fewer users who are becoming seriously addicted and those who are addicted find help through treatment and rehabilitation. Unfortunately, the U.S. and the Netherlands do not record this statistic so it is not available for this comparison. Drug-related deaths (DRD) are defined as “deaths directly caused by illegal drugs.”²⁰²

Figure 11: Problematic Drug Use (ages 15 to 64)²⁰³



The most striking observation from this figure is that Portugal’s PDU rate has actually lowered since decriminalization went into effect 10 years ago. The number of PDUs in Portugal has decreased from 7.82 in 1999 to 5.85 in 2005.²⁰⁴ This is most likely due to the enacting of harm reduction measures such as opiate replacement therapy. Combined with decriminalization and the role of the Commission for Dissuasion of Drug Addiction in evaluating the needs of addicts, problematic users feel less social stigma and seek treatment on their own terms. By allowing addicts to enter treatment voluntarily and providing

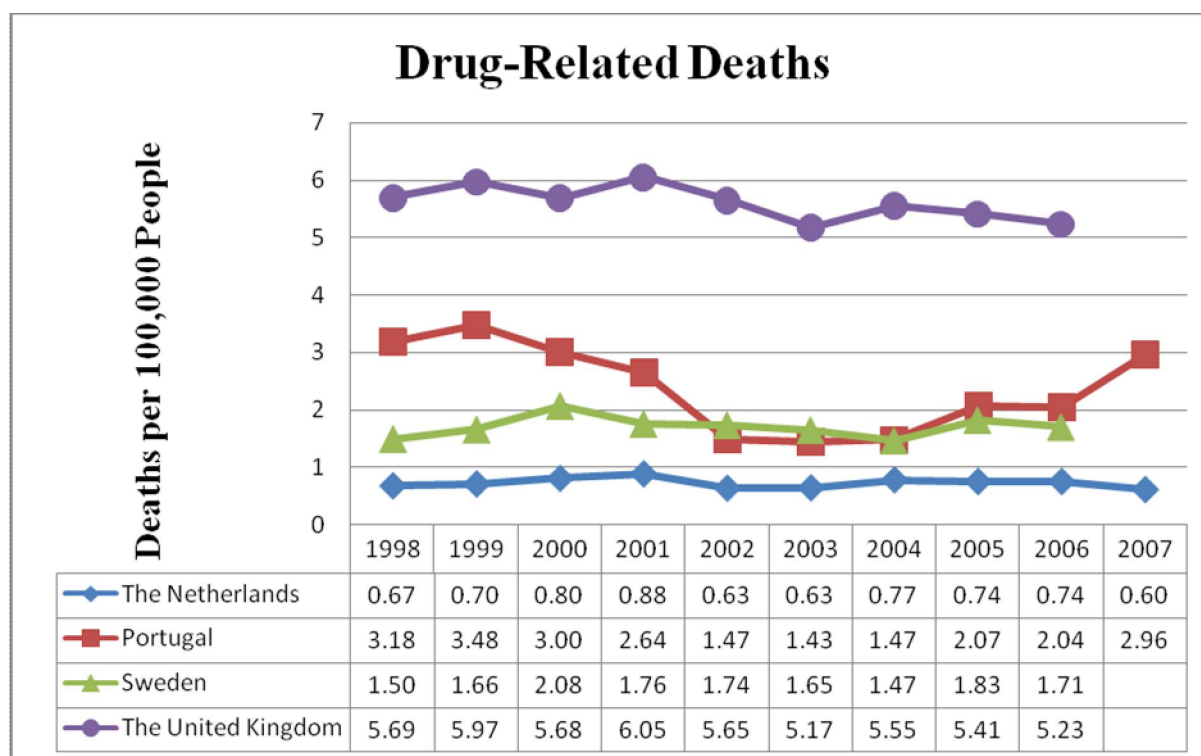
²⁰² “Drug-Related Deaths and Mortality (DRD)”. *EMCDDA: European Monitoring Centre for Drugs and Drug Addiction*. 16 Jun. 2010. Web. 28 Nov. 2010.

²⁰³ Figure compiled from data published in “Statistical bulletin 2009.” *EMCDDA: European Monitoring Centre for Drugs and Drug Addiction*. 9 Dec. 2009. Web. 28 Apr. 2010.

²⁰⁴ “Statistical bulletin 2009.” Op. cit.

methods that ease withdrawal symptoms, Portugal has been able to achieve what Sweden and the U.K. have not in regards to PDU. DRDs in Portugal have also dropped by nearly half following the years directly after decriminalization.

Figure 12: Drug-Related Deaths²⁰⁵



Sweden is placed in an interesting position when we consider the statistics of PDU and DRD. Although they claim some of the lowest usage rates in the E.U., problematic use has risen alarmingly from 3.34 in 1992 to 4.9 in 2007.²⁰⁶ To put it in perspective, this means that “one in every six Swedish users is [a PDU], compared with one in every twelve in the U.K.”²⁰⁷ It could be inferred that this increase in PDU is due to lack of viable treatment options that appeal to users, such as substitution therapy. Also, the threat of compulsory treatment and an abstinence-based methodology in treatment leads to an environment of

²⁰⁵ Figure compiled from data published in “Statistical bulletin 2009.” *EMCDDA: European Monitoring Centre for Drugs and Drug Addiction*. 9 Dec. 2009. Web. 28 Apr. 2010.

²⁰⁶ “Statistical bulletin 2009.” *EMCDDA: European Monitoring Centre for Drugs and Drug Addiction*. 9 Dec. 2009. Web. 28 Apr. 2010.

²⁰⁷ Christopher Hallam, “What can we learn from Sweden’s Drug Policy Experience?”, *Op.cit.* p. 8. These numbers may seem erroneous at first, but the low prevalence rates of Sweden mean that a smaller sample of the population is using drugs than in the U.K.

hostility towards seeking treatment in PDUs. In light of this information, one can begin to question for themselves just how effective Sweden's "zero tolerance" approach to illicit drugs is if it forces those who need treatment the most underground. At first glance, Sweden's low usage rates indicate that they are successfully reducing drug use in their country, but stigmatizing users and denying them appealing treatment options has resulted in a rise in PDU. It should also be noted that Sweden's DRD rate is not too different from Portugal's and hovers between 1.5 and 2.

The PDU of the U.K. is actually the highest in the E.U. with a rate of 10 users per 1000 population, which as mentioned above, means that one in every twelve drug users is a PDU.²⁰⁸ The U.K. also has the highest rate of DRDs at 5.23 per 100,000, which is more than double any other country in the figure above. Clearly, the efficacy of the British drug policies should be called into question when one observes these ridiculous indicators of illicit drug use. The restrictive policies enacted by the U.K. have done very little to lessen the prevalence of drugs within their population and in fact, may have contributed to their nation having the highest key indicators of the illicit drug problem in the entire E.U.

These indicators, taken along with the prevalence rates discussed prior, seem to suggest that the Portuguese drug policy of decriminalization has been at least as effective as Sweden's and significantly more effective than the U.K.'s. We can look at usage rates in the U.S. and see that their "incarceration" model which dictates strict prohibition seemingly has no effect in reducing drug use. Another country that stresses prohibition and the country with the next highest usage rates, the U.K., also has some serious doubt cast upon its drug policy model. Prohibition in the U.K. has resulted in the highest prevalence rates in Europe as well as the highest problematic users and the highest rate of drug-related deaths. The

²⁰⁸ "Data Sheet: United Kingdom." op. cit.

Dutch model of prohibition with tolerance and non-enforcement has proven over the last 30 years that permitting drug use will not result in a dramatic rise in prevalence. Finally, it could be claimed that Portugal's model of decriminalization is the most effective of all the models analyzed because of its focus on public health and human rights. Although prevalence of drug use has increased slightly over the past decade, the Portuguese were able to significantly decrease the number of problematic users as well as demonstrate a decrease in drug-related deaths.

CONCLUSION AND FINDINGS

The era of modern prohibition started in the early 1900's with the enforcement of alcohol proscription in the United States. Up until 1914, it was possible to buy medication like laudanum (opium in liquid form) and cocaine-laced tonics (coca-cola) without a prescription from a doctor. After the experiment with alcohol prohibition was repealed in 1933 and deemed a failure, enforcement of prohibitive legislation on drug use remained fairly lax in the U.S. compared to today's standards. With the initiation of the "war on drugs" in the 1970's, these prohibitive policies began to be supported by a dramatic increase in enforcement and harsher sanctions. The world also responded to the growing threat of drugs by enacting international treaties that set global standards on drug legislation which enacted similar policies to those of U.S. prohibition.

An unfortunate consequence of this zealous enforcement of drug prohibition is that human rights have become a "casualty" of the war on drugs and even U.N. policies seem incompatible with internationally enforced human rights laws at times. In recognizing such problems, the current U.N. Secretary-General Ban Ki-Moon recently made the statement that "No one should be stigmatized or discriminated against because of their dependence on drugs."²⁰⁹ Although some progressive countries have also recognized the negative consequences of drug prohibition and have enacted more rights-friendly alternatives to criminalization, drug use is still met with criminal sanctions and a high degree of stigma in most countries. Hopefully the nations of the world will soon come to accept that policies of strict prohibition and criminalization are not the only responses available to reduce the harms of drug use in society. Hopefully the world will recognize the significant contribution to drug control that countries like the Netherlands and Portugal have made with their models of

²⁰⁹ U.N. Secretary-General Ban Ki-Moon. "Message on the International Day against Drug Abuse and Illicit Trafficking, 26 June 2008". Op. cit. 116.

tolerance, decriminalization, and harm reduction. If the rest of the world opens their eyes to the problems that strict prohibition causes, perhaps they might enact similar policies in an effort to be more rights-friendly, decrease violence, and improve public health.

This paper began the examination of criminal justice and the limits of criminal sanctions pertaining to self-regarding acts like drug use. Popular reasons for criminalization like paternalism and moralism have been explained and refuted in favor of more progressive views held by proponents of personal liberty and autonomy. Although Mill's harm principle is far from perfect, it has served as an excellent foundation for the debate on criminalization of drug use to begin. Feinberg's stance of soft paternalism seems to be the philosophy which lends individual liberty the highest degree of respect. This view can only barely be called paternalism, in fact, because it justifies interfering in a person's autonomy not to prevent harm, but to ensure that a standard of voluntariness is being met in their actions. This view of "liberal autonomy" may only be currently held by what Lord Devlin calls "educated men," but as society trends toward an existence that gives primacy to liberty and freedom, my hope is that legislators will recognize the value of this viewpoint and champion the cause.

Shifting from theoretical arguments on why drug use should be exempt from criminal sanctions, this paper examined some terrible consequences of current drug control policies by addressing some prevalent human rights violations. In reference to various U.N. human rights treaties, drug prohibition has resulted in violations of human dignity, the right to privacy, the right to not be arbitrarily deprived of life, the right to due process, the use of capital punishment on drug offenders, and the right to the highest attainable standard of health to name just a few. There are many other consequences of prohibition that are violations of human rights, including overcrowding of prisons, discrimination of drug users, and cruel and degrading treatment of drug offenders; but the few addressed earlier in this

paper should paint a clear enough picture that human rights are indeed “casualties” of the war on drugs.

Various models of drug policy have also been examined, ranging from the “incarceration model” of the United States to the more progressive “decriminalization model” of Portugal. Through Miron’s research, it is apparent that prohibitive policies which are supported with heightened enforcement are not only ineffective in reducing usage but also breed a culture of violence and crime. An analysis of illicit drug usage rates, drug-related deaths, and problematic usage rates suggest that the most oppressive policies are not any more effective in addressing the drug problem than liberal legislative models. However, research of other peripheral statistics of drug usage might be prudent to confirm this claim. Nonetheless, from the data examined in this paper, one might infer that policies of strict criminalization may exacerbate usage rates by keeping them at incredibly high levels and also create more problematic users and higher rates of drug-related death.

An admitted shortcoming of this research is that a more thorough examination of human rights violations was not presented. Another deficiency is the focus on just a few key indicators of drug use and I admit that other data like rates of treatment, rates of relapse for addicts post-treatment, and prevalence of infectious diseases among users might give a more holistic picture of the efficacy of national drug strategies. Finally, aside from harm reduction methods and decriminalization of drug use, no other suggestions for policy models have been examined. Harm reduction as a principle deserves much more research to highlight its effectiveness. I have purposely tried to focus the scope of this paper on the criminalization of drug use and not legalization because the term ‘legalization’ is often quickly dismissed when used in debates about drug control.

Finally, it should be noted that models of drug legalization, when paired with regulation similar to alcohol or prescription medication, might be the most effective means of reducing the harm of drug use and annulling the negative consequences of drug criminalization. Such a policy would be the most rights-friendly available and provide the highest degree of individual liberty in self-regarding acts. It would also effectively destroy the predominance of the black market in funding violence and terrorism throughout the world. Those interested in researching more about sustainable models of legalization should read Transform's publication *After the War on Drugs: a Blueprint for Regulation* which provides models ranging from prescriptions for drug use to unlicensed sales.²¹⁰

My sincere hope is that this paper has at least planted a seed in the mind of the reader that policies of prohibition against drug use are not as effective as our governments tell us. If you, the reader, walk away considering other models of drug control besides strict criminalization, then my goal in writing this paper has been achieved. I feel that being critical of policies that may have negative consequences is an important function of people in today's society because it allows us to evolve towards more practical and humanistic legal systems. In a society that values liberty and freedom, the obligation of every citizen should be to seek the most proficient means of contributing to the greater good, and this can only be accomplished under the right conditions. I hope this research has not been met with the "intolerance, indignation, and disgust" a society might express when confronted by controversial debates regarding morality, as my intention was not to offend. If you walk away with the notion that policies of prohibition on drug use might be more problematic than you first considered, then my efforts have not been in vain.

²¹⁰ Transform Drug Policy Foundation. *After the War on Drugs: A Blueprint for Regulation*. United Kingdom: Adam Shaw Associates, 2009. Print.

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