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The Strange Career of the Transnational Legal Order of Cannabis Prohibition

By Ely Aaronson*

There is a crack in everything — that's how the light gets in

Leonard Cohen, Anthem

In an era often characterized as one of growing convergence of the laws governing criminal activities in different countries, the issue-area of cannabis policy undergoes processes of fragmentation and polarization. Some countries continue to criminalize all forms of medical and recreational uses of cannabis. Others have sought to “separate the market” for cannabis from that of other drugs by decriminalizing the possession of small amounts of marijuana, authorizing its use for medical purposes, and establishing administrative measures for taxing and regulating the commercial sale of the drug. This Article explores the causes and consequences of the decline of the transnational legal order of cannabis prohibition. It shows how the erosion of the regulatory capacities of this transnational legal order reflects deep-seated political conflicts over the legitimacy of prohibition norms in this field. It analyzes the ways in which conflicting regulatory approaches become institutionalized as a consequence of the structural mismatch between the actors framing the meaning of cannabis prohibition norms at the international level and the actors implementing these norms in national and local contexts. Finally, the Article shows how this transnational legal order has created path-dependent trajectories of legal change that continue to shape domestic drug policies.

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INTRODUCTION

With its roots in international treaties signed during the League of Nations Era, the transnational legal order (TLO) of cannabis prohibition represents one of the most sustained efforts to develop internationally applicable standards for governing illicit markets.¹ The vast majority of United Nations (UN) member states are now parties to the three major international drug conventions, which require criminalizing the production, distribution, and use of cannabis. Over the past decades, the cannabis prohibition TLO has come to encompass an extensive array of legal instruments for monitoring implementation efforts,² disseminating information on the activities of drug trafficking networks,³ and facilitating cooperation among national police forces.⁴ However, despite the extensive institutionalization of this TLO, cannabis remains the most widely used illegal drug in the world. The 2018 World Drug Report estimates that at least 192 million people aged 15–64 had used cannabis in the preceding year.⁵ With the percentage of adults reporting cannabis use in North American and European countries far exceeding the international average, cannabis use has become integrated into mainstream culture in a large number of countries.⁶

In an era that is often characterized as one of a growing isomorphism of the laws and procedures governing criminal activities in different countries,⁷ the issue-area of cannabis policy undergoes processes of fragmentation and polarization.⁸ Some countries continue to criminalize all forms of medical and recreational uses of cannabis. Others have sought to “separate the market” for cannabis from that of other drugs by decriminalizing the possession of small amounts of marijuana,

1. PETER ANDREAS & ETHAN NADELMANN, *POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATION* 3 (2006).

2. RICHARD H. FRIMAN, *Behind the Curtain: Naming and Shaming in International Drug Control*, in *THE POLITICS OF LEVERAGE IN INTERNATIONAL RELATIONS: NAME, SHAME, AND SANCTION* 143 (Richard H. Friman ed., 2015).

3. BEN BOWLING, *POLICING THE CARIBBEAN: TRANSNATIONAL SECURITY COOPERATION IN PRACTICE* 118–20 (2010).

4. JORG FRIEDRICH, *FIGHTING TERRORISM AND DRUGS: EUROPE AND INTERNATIONAL POLICE COOPERATION* (2008).

5. U.N. Office on Drugs and Crime, *World Drug Report 2018: Analysis of Drug Markets* 43, U.N. Sales No. E.18.XI.9 (2018), https://www.unodc.org/wdr2018/prelaunch/WDR18_Booklet_3_DRUG_MARKETS.pdf.

6. HOWARD PARKER ET AL., *ILLEGAL LEISURE: THE NORMALIZATION OF ADOLESCENT RECREATIONAL DRUG USE* (1998).

7. ANJA JAKOBI, *COMMON GOODS AND EVILS? THE FORMATION OF GLOBAL CRIME GOVERNANCE* (2013).

8. DAVID BEWLEY-TAYLOR, *INTERNATIONAL DRUG CONTROL: CONSENSUS FRACTURED* (2012); Caroline Chatwin, *UNGASS 2016: Insights from Europe on the Development of Global Cannabis Policy and the Need for Reform of the Global Drug Policy Regime*, 49 *INT’L J. DRUG POL’Y* 80 (2017).

authorizing its use for medical purposes, and establishing administrative measures for taxing and regulating the commercial sale of the drug.⁹ These reforms have gained international momentum despite resistance from key actors in the international drug control system, including the International Narcotic Control Board (INCB) and the US federal government.¹⁰ The proliferation of cannabis-liberalization reform is frequently depicted as a historical step toward the collapse not only of this TLO but of the entire edifice of the international narcotic control system of which it forms a part.¹¹

How deep is the current crisis of the cannabis prohibition TLO? What are its causes and consequences? What does this case study reveal about the conditions under which criminal justice TLOs rise and fall? In this Article, I explore these questions to demonstrate the complex ways in which the cannabis prohibition TLO has served as a battleground between competing conceptions of the role of criminal law in addressing social and medical harms. Drawing on TLO theory,¹² the Article shows that the capacity of the cannabis prohibition TLO to regulate the practices of legal actors at the international, national, and local levels has been eroded as a result of effective contestations of the *input* and *output* legitimacy of its governance endeavors. The rapid and widespread diffusion of new models of decriminalization, depenalization, and legalization has relied on the operation of mechanisms of recursive transnational lawmaking. These mechanisms originate from the indeterminacy of drug prohibition norms, the ideological contradictions between competing interpretations of their meaning, the impact of diagnostic struggles over the social issues that the international drug control system should address, and the mismatch between the actors shaping formal prohibition norms at the international level and those implementing these norms in national and local contexts. However, our analysis also shows that the cannabis prohibition TLO creates path-dependent trajectories that constrain the development of non-punitive strategies for regulating cannabis markets. In this context, the Article explains why it is too early to sound the death knell for the prohibitionist agenda of cannabis control. The dense array of UN treaties, transnational and regional monitoring schemes, national laws, and local enforcement arrangements put in place throughout the institutionalization of the cannabis prohibition TLO impede efforts to initiate more progressive regulatory innovations in this field.

The Article is organized as follows: Section I briefly introduces the historical formation of the international legal framework governing cannabis regulations. It

9. For an assessment of different models of cannabis liberalization reform, see ROBIN ROOM ET AL., *CANNABIS POLICY: MOVING BEYOND STALEMATE* (2010).

10. Bewley-Taylor, *supra* note 8, at 219–78.

11. ADAM BLACKWELL, *IF THE WAR ON DRUGS IS OVER. . . NOW WHAT?* (2015); Wayne Hall, *The Future of the International Drug Control System and National Drug Prohibitions*, 113 *ADDICTION* 1210 (2018).

12. GREGORY SHAFFER, *TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE* (2013); TERENCE HALLIDAY & GREGORY SHAFFER, *TRANSNATIONAL LEGAL ORDERS* (2015); Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 *ANN. REV. L. SOC. SCI.* 231 (2016).

also identifies the inherent ambiguities giving rise to interpretive disagreements regarding the scope of application of cannabis prohibition norms. Section II examines the debates that evolved during the 1960s–70s regarding the criminological logic of drug prohibition policies and the cannabis liberalization reforms shaped by these debates. It then considers the processes leading to the reversal of these liberalizing trends and the extensive institutionalization of new measures reinforcing strict interpretations of the prohibition norms enshrined in the international treaties. Section III discusses the causes and consequences of the legitimization crisis that the cannabis prohibition TLO has experienced since the mid-1990s as well as the global wave of depenalization, decriminalization, and legalization reforms precipitated by this crisis. Section IV considers the extent to which this wave of cannabis liberalization reform lessens the impact of the prohibitionist approach on the development of cannabis regulations at the international, national, and local levels.

I. CANNABIS PROHIBITIONS IN INTERNATIONAL LAW

Cannabis prohibition laws were initially established in the late nineteenth and early twentieth centuries through disparate national drug control initiatives.¹³ Over the course of the nineteenth century, cannabis medical uses were regulated in a patchwork manner as part of wider legal frameworks governing the production and sale of pharmaceuticals. In the US, cannabis use began to be perceived as a social problem that should be a subject of criminal regulation during the Progressive Era.¹⁴ This criminalization campaign was inspired by the legislative inroads made by the temperance movement during that period and by awakening nativist sentiments toward incoming Mexican migrants, whose habits of marijuana smoking became major objects of media attention and public anxiety.¹⁵ In 1915, California introduced the nation's first anti-marijuana criminal prohibition. Three decades later, such prohibitions appeared in the statute books of forty-six states and a series of marijuana-related federal offenses were included in the Marijuana Tax Act of 1937.¹⁶

The transnational legal ordering of cannabis regulations originated during the League of Nations era.¹⁷ An earlier international drug convention, signed at The Hague in 1912, focused on regulating opium, morphine, and cocaine and did not include implementation mechanisms. Under the League's auspices, new requirements concerning the regulation of medical and non-medical uses of cannabis were introduced at the 1925 International Opium Convention. However,

13. Toby Seddon, *Inventing Drugs: A Genealogy of a Regulatory Concept*, 43 J. L. & SOC'Y 393 (2016).

14. PETER ANDREAS, SMUGGLER NATION: HOW ILLICIT TRADE MADE AMERICA 253–62 (2013); DAVID MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL (1973).

15. Steven Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689 (2016).

16. ANDREAS, *supra* note 14, at 268.

17. Paul Knepper, *Dreams and Nightmares: Drug Trafficking and the History of International Crime*, in THE OXFORD HANDBOOK OF THE HISTORY OF CRIME AND CRIMINAL JUSTICE 208 (2016).

the pre-UN frameworks of international drug control did not place emphasis on the use of punitive measures to regulate cannabis or other psychoactive substances. Although the US had strongly advocated the introduction of a strict prohibitionist approach, this position was met with resistance from European colonial powers that had significant financial interests in the production of opium and coca and the manufacturing of their derivatives.¹⁸ In the absence of an international consensus regarding the need to strengthen the criminal regulation of illicit drug use, the pre-UN drug control framework focused on the development of administrative measures to govern cross-border commodity flows and to encourage a more effective domestic regulation of local drug markets.¹⁹

Following WWII, the growing capacity of the US to shape the rules and institutions of the international drug control system facilitated the move of the prohibitionist approach from the periphery to the center of the policy agenda.²⁰ To a considerable extent, the institutionalization of the cannabis prohibition TLO provides a paradigmatic example of what has been usefully conceptualized as “globalized localism”²¹—a process by which policy models that originated in the distinctive cultural and institutional contexts of a powerful country come to be perceived as global standards due to their inclusion in treaties, diagnostic indicators, interpretive guidelines, and other instruments of transnational legal diffusion. The introduction of the Single Convention on Narcotic Drugs in 1961 served as an important milestone in this process.²² The Convention frames the issue of drug use as a moral problem, stating in its preamble that “addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind.” In line with this moralizing framing, the Convention requires signatory countries to criminalize a wide range of drug-related activities. For example, Article 36 of the Single Conventions reads:

Subject to its constitutional limitations, each party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention . . . shall be punishable offences when committed intentionally

The two subsequent UN drug conventions adopted in 1971 and 1988 sought to extend the application of the prohibitionist approach to new contexts of drug

18. WILLIAM McALLISTER, *DRUG DIPLOMACY IN THE TWENTY CENTURY: AN INTERNATIONAL HISTORY* (2002).

19. Danilo Ballotta et al., *Cannabis Control in Europe*, in *A CANNABIS READER: GLOBAL ISSUES AND LOCAL EXPERIENCES* 97 (Paul Griffiths ed., 2008).

20. DAVID BEWLEY-TAYLOR, *THE UNITED STATES AND INTERNATIONAL DRUG CONTROL 1909-1997*, at 118–20 (2002).

21. BOAVENTURA DE SANTOS, *TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN PARADIGMATIC TRANSITIONS* (1995).

22. NEIL BOISTER, *PENAL ASPECTS OF THE UN DRUG CONVENTIONS* 67 (2001).

regulation. Responding to the increasing production and use of synthetic drugs as part of the rise of the counter-cultural movements of the late 1960s, the 1971 Psychotropic Drug Treaty applied these policy principles to synthetic psychoactive drugs, such as opioids and amphetamine-type stimulants. The 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention) further expanded the array of criminal justice enforcement measures states are required to adopt. Importantly, however, the mandatory criminalization norms established by the UN drug conventions are defined in a manner that leaves two major sources of textual ambiguity regarding their scope of application. First, the conventions deliberately refrain from providing a definition of what constitutes medical and scientific uses of drugs. Second, they clarify that countries should implement the duty to criminalize drug-related activities in accordance with their domestic constitutional principles. As is often the case, these two provisions are products of efforts to paper over divergent policy preferences. During the negotiations of the Single Convention, several countries objected to banning certain drugs that have traditional and quasi-medical uses among indigenous populations. India, for example, expressed concerns regarding the implied need to criminalize traditional uses of *bhang*, which is made from cannabis leaves with a low Tetrahydrocannabinol (TOC) content.²³ Other countries emphasized the need to retain interpretive flexibility in light of the possibility that future research would reveal new medical benefits. The resulting compromise encouraged countries that would not have otherwise supported the prohibitionist principles set by the treaties to come on board. However, this compromise also sowed the seeds of later controversies regarding the ways in which cannabis prohibition norms should be applied. As the following discussion shows, these controversies will set recursive processes of transnational legal change in motion, leading to the settling and unsettling of specific interpretations of the scope and meaning of these norms.²⁴

II. INSTITUTIONALIZATION AND ITS DISCONTENTS: THE EARLY CRISIS OF THE CANNABIS PROHIBITION TLO

It is an irony of history that the first decade following the entry into force of the Single Convention experienced a marked increase in the prevalence of cannabis use in Western countries. When the Single Convention was signed in 1961, cannabis use was particularly prevalent in developing countries where the plant was traditionally cultivated, while it had little impact on mainstream culture in North America and Europe. By the end of the decade, the drug acquired unprecedented political salience not only in light of objective increases in the prevalence of its use but also due to its symbolic association with emerging countercultures and the perceived threat they putatively posed to public morality. These dramatic changes

23. BEWLEY-TAYLOR, *supra* note 8, at 190.

24. See Halliday & Shaffer, *supra* note 12, at 37–42.

intensified the enforcement of cannabis offenses, but they also attracted heightened public attention to the negative consequences of such enforcement efforts.

In the late 1960s, there was an historical increase in the rates of arrests, prosecutions, and convictions of cannabis users in various Western countries. The magnitude of this change was most remarkable in the US. In California, for example, the number of people arrested for marijuana offenses increased from about 5,000 in 1960 to 37,514 in 1967.²⁵ Arrests for cannabis possession became increasingly common in countries such as Germany, the Netherlands, and Canada as well.²⁶ The civil rights implications of these increased levels of drug law enforcement generated vigorous public debate on the justifications of treating cannabis on par with other psychoactive substances that are widely perceived to be more dangerous and harmful.²⁷ Disagreements regarding whether cannabis should be classified under the strictest schedules of the UN drug control treaties were already evident during the Plenipotentiary Conference, which drafted the Single Convention. However, it was only as a result of the increased enforcement of cannabis prohibitions that such disagreements precipitated domestic forms of political and legal resistance. Due to increasing public criticism, national governments in several countries appointed public committees to consider the effectiveness of the existing laws. These committees directed strong criticism towards the criminological and medical underpinnings of the prohibitionist approach and sided with proponents of the decriminalization of mild forms of cannabis use.

In Great Britain, the Advisory Committee on Drugs Dependence (Wootton Report), published in 1969, concluded:

[The] long term consumption of cannabis in *moderate* doses has no harmful effects . . . There is no evidence that this activity is causing violent crime, or is producing in otherwise normal people conditions of dependence or psychosis requiring medical treatment . . . there are indications that (cannabis) may become a functional equivalent of alcohol . . . possession of a small amount of cannabis should not normally be regarded as a serious crime to be punished by imprisonment (Home Office 1968).²⁸

Broadly similar conclusions were reached by other committees operating in the Netherlands (The Baan Commission, 1970 and Hulsman Commission, 1971), Canada (The Commission of Inquiry into the Nonmedical Use of Drugs, commonly referred to as the Le Dain Commission, 1973), and Australia (Senate Social Committee on Social Welfare, 1977).²⁹ In the US, the public debate that followed

25. EMILY DUFTON, GRASS ROOTS: THE RISE AND FALL AND RISE OF MARIJUANA IN AMERICA 7 (2017).

26. DANILO BALLOTTA ET AL., *supra* note 19, at 101; Tim Van Solinge, *The Dutch Model of Cannabis Decriminalization and Tolerated Retail*, in DUAL MARKETS: COMPARATIVE APPROACHES TO REGULATION 145, 147 (Ernesto Savona et al. eds., 2017).

27. KATHLEEN FRYDL, THE DRUG WAR IN AMERICA, 1940–1973, at 350 (2013).

28. ADVISORY COMMITTEE ON DRUG DEPENDENCE, CANNABIS: REPORT BY THE ADVISORY COMMITTEE ON DRUG DEPENDENCE (1968).

29. DANILO BALLOTTA ET AL., *supra* note 19, at 112.

President Nixon's famous identification of drug abuse as "America's public enemy number one" led to the nomination of the National Commission on Marihuana and Drug Abuse (the Shafer Commission). To the surprise of many, the Commission's 1972 Report, entitled *Marihuana: A Signal of Misunderstanding*, concurred with the liberal approach endorsed by other national investigation committees. While the Commission emphasized that cannabis was not a harmless substance, it stressed that its dangers had often been overstated. It advocated repealing the criminal prohibitions on the possession of small amounts of marijuana and establishing alternative measures to address the public health concerns associated with cannabis use. Such reforms, the Commission stated, are needed to relieve "the law enforcement community of the responsibility for enforcing a law of questionable utility, and one which they cannot fully enforce."³⁰ These recommendations were repudiated by the Nixon administration, but they inspired grassroots activists to mobilize cannabis liberalization reforms at the state and local levels. In 1973, Oregon became the first state that decriminalized the possession of small amounts (28.35 grams) of marijuana. Eleven states followed suit during the next half of the decade.³¹

The failure of the US national administration to secure the compliance of state governments with the prohibitionist norms it sought to propagate internationally provided a clear indication of the decline of the cannabis prohibition TLO. However, rather than precipitating the global circulation of new models of cannabis-liberalization reform, this early crisis stimulated new cycles of recursive transnational lawmaking, leading to the entrenchment of the prohibitionist approach. In the US, calls to reintroduce tougher drug laws resonated with the wider conservative offensive against the putative "soft on crime" inclinations of liberal policymakers in the post-civil rights era.³² Opponents of legalization sought to challenge the *public health frame* that gained increasing influence in the wake of the Shafer Commission's Report and to contextualize the issue of cannabis use as yet another symptom of a putative law and order crisis in American cities. The proliferation of grassroots parents' movements lobbying for the stricter regulation of marijuana provided considerable political momentum for the introduction of tougher penalties for trafficking and possession offenses.³³

The process by which cannabis prohibition norms again became settled at the national level in the US provided facilitative conditions for the increasing involvement of the federal government in exporting its drug policies to other countries. This effort became increasingly consequential in an historical moment in which the US came to perceive itself "not just as a powerful state operating in a

30. NAT'L COMM'N ON MARIHUANA & DRUG ABUSE, *MARIHUANA: A SIGNAL OF MISUNDERSTANDING* 150 (1972).

31. DUFTON, *supra* note 25, at 69–70.

32. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A PUBLIC OF FEAR* (2007).

33. DUFTON, *supra* note 25, at ch. 8.

world of anarchy” but as “a producer of world order.”³⁴ With the end of the Cold War, new discourses of “securitization” emerged as part of the search for a new way of grounding America’s internationalist engagement.³⁵ Drug policy became increasingly aligned with national security issues pertaining to the activities of insurgent and terrorist groups in Latin American countries and to the risks posed by these groups to the democratic stability and peace in the region.³⁶ This new frame of diagnosing the implications of the illegal drug trade led to the development of new modes of defining the goals of US counternarcotic policies as well as the strategies through which such goals should be pursued. These new strategies have sought to reduce drug production at the source, to combat drug trafficking *en route* to US borders, to dismantle international illicit drug networks, to reduce drug demand at home and abroad, and to incentivize foreign governments to cooperate with US counternarcotic goals. The institutionalization of these strategies necessitated strengthening the capacity of the US government to influence the drug policies of other countries and to dominate the transnational agenda of cannabis control.

From the mid-1980s onwards, the US government institutionalized an array of multilateral, bilateral, and unilateral measures intended to coerce, induce, and socialize other countries to cooperate with its counternarcotic strategies.³⁷ Its multilateral efforts have largely been based on the extensive funding and support of international and regional organizations that are committed to the prohibitionist approach. In this context, the US has consistently pushed for an expansion of the International Narcotic Control Board’s monitoring authority and has served as a staunchest defender of its prohibitionist policies.³⁸ Building on and expanding the scope of the international obligations enshrined in the Vienna Convention and the INCB recommendations, the US has made extensive use of bilateral treaties to create an issue-linkage between states’ willingness to adopt zero-tolerance models of drug policy and their eligibility for foreign aid. Over the next decades, such bilateral agreements provided a basis for the operation of extensive cooperation and capacity-building projects in countries as diverse as Afghanistan, Colombia, Mexico, Nigeria, Peru, Ghana, Thailand, and many others.

Along with these multilateral and bilateral instruments used to influence the drug policies of other countries, the US government has had an extensive reliance on unilateral tools of imposing economic and reputational sanctions on noncompliant states. In 1986, Congress introduced the Omnibus Drug Enforcement, Education, and Control Act, which created a certification process for

34. G. John Ikenberry, *Power and Liberal Order: America’s Postwar World Order in Transition*, 5 INT’L. REL. ASIA-PACIFIC 133, 133 (2005).

35. Allegra M. McLeod, *Exporting U.S. Criminal Justice*, 29 YALE L. & POL’Y REV. 83, 102–07 (2010).

36. DOUG STOKES, AMERICA’S OTHER WAR: TERRORIZING COLOMBIA (2005).

37. McLeod, *supra* note 35, at 108–31.

38. BEWLEY-TAYLOR, *supra* note 8, at 272.

drug-producing and drug-transit countries.³⁹ The certification process requires the president to withdraw financial assistance and support in multilateral lending institutions from countries that fail to comply with requisite benchmarks of anti-drug policy. To enable congressional deliberations over such sanctions, the US Department of State submits an annual International Narcotic Control Strategy Report (INCSR) that identifies the major illicit drug-producing and drug-transit countries and evaluates the extent to which their domestic policies are in compliance with the US counternarcotic agenda. The INCSR narrative explores a wide range of countries (e.g., 70 countries in the 2018 report). The certification process is applied to countries included in what came to be known as the Majors List (which included 22 countries in 2018).⁴⁰

The success of the US to coerce and to induce dozens of countries to adopt its preferred models of implementing cannabis prohibitions promoted convergence of drug laws across jurisdictions and thus increased the degree of concordance between the transnational and the national levels of this TLO. However, the global diffusion of tougher cannabis laws cannot be sufficiently explained by focusing on the coercive mechanisms employed by the US alone. This diffusion was also a product of broader social transformations stimulating increasing political mobilization around law and order issues during the final decades of the twentieth century.⁴¹ Illustrating Durkheim's observation that societies have a functional need to construct categories of deviance,⁴² the instigation of moral panics concerning drug abuse epidemics provide a useful tool of identifying "suitable enemies" and scoring political points.⁴³ In an era during which a broader shift from welfare-oriented to punitive-focused approaches to governing social marginality took place,⁴⁴ strengthening state capacities to condemn and to penalize drug dealers and users proved to be a far more attractive project for politicians than undertaking to address the public health implications of drug use.

As the primary international organization responsible for monitoring the implementation of the UN drug conventions, the INCB played an important role in facilitating the concordance between the transnational and national levels of the cannabis prohibition TLO. In its annual reports, the INCB has repeatedly supported the "gateway drug thesis," according to which the use of cannabis serves as a risk factor in increasing the user's probability of using harder illicit substances, such as

39. FRIMAN, *supra* note 2.

40. U.S. DEPT. OF STATE, BUREAU FOR INT'L NARCOTICS AND LAW ENFORCEMENT AFF., INTERNATIONAL NARCOTIC CONTROL STRATEGY REPORT 2–5 (2018).

41. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (1st ed. 2001).

42. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* ch. 2 (Steven Lukes ed., W.D. Hall trans., Simon & Schuster, 2d ed. 1997) (1893); Robert Reiner, *Crime, Law and Deviance: The Durkheimian Legacy*, in *DURKHEIM AND MODERN SOCIOLOGY* 175 (Steve Penton ed., 1984).

43. Nils Christie, *Suitable Enemies*, in *ABOLITIONISM: TOWARD A NON-REPRESSIVE APPROACH TO CRIME* 34 (Herman Bianchi & Rene von Swaaningen eds., 1986).

44. LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009).

amphetamine, cocaine, or heroin. Based on this thesis (whose scientific validity was and remains controversial),⁴⁵ the Board's 1983 Report criticized those "circles in certain countries" that "apparently assume that to permit unrestricted use of some drug, regarded by them as less harmful, would permit better control of other drugs which they deem more perilous to health."⁴⁶ This criticism was leveled at supporters of the *separation of markets* strategy, which came to be endorsed by Dutch policymakers at the time.⁴⁷ In its later reports throughout the 1980s and 90s, the Board adopted an increasingly critical stance toward the Dutch attempts to depenalize cannabis usage. In its 1997 Report, the selling of cannabis in coffee shops was depicted as "an activity that might be described as indirect incitement."⁴⁸ The focus on the Netherlands and its singling out for disapprobation reflects the rarity of open contestations of the prohibitionist imperatives enforced by the Board during that period.

III. THE LEGITIMATION CRISIS AND ITS CONSEQUENCES

The extensive institutionalization of the cannabis prohibition TLO throughout the 1980s and 1990s facilitated the international spread of tougher laws, severer penalties, and more aggressive policing strategies. However, the very success of this TLO to propagate its policy models highlighted its failure to deliver on its own promise to reduce the prevalence of cannabis use and to eliminate its illicit supply chains. The intensification of enforcement activities also brought into focus the adverse human rights impacts of implementing the prohibitionist cannabis policies. The increasing criticisms of the failures and boomerang effects of the cannabis prohibition TLO prompted both internal and external processes that eroded its legitimacy and compromised its ability to continue guiding the practices of legal actors at the national and local levels.

From the early stages of the institutionalization of the cannabis prohibition TLO, it became vulnerable to criticism of its inherent *input legitimacy* deficiencies. As discussed earlier, the central role played by the US in shaping the goals and strategies of this TLO has largely depended on the exercise of unilateral measures of coercion and inducement. The degree to which the certification process has realized basic standards of transparency, inclusiveness, and accountability is obviously limited. The procedures by which the INCB defines and applies its compliance criteria seem conspicuously insulated from ongoing public debates regarding the impact of cannabis prohibition laws on marginalized populations. These legitimacy deficits are conveniently set aside by proponents of the war on drugs, who tend to focus more

45. JULIA BUXTON, *THE POLITICAL ECONOMY OF NARCOTICS: PRODUCTION, CONSUMPTION, AND GLOBAL MARKETS* 110–11 (2006).

46. INT'L NARCOTIC CONTROL BD., *REPORT OF THE INTERNATIONAL NARCOTIC CONTROL BOARD FOR 1983*, U.N. Doc. E/INCB/1983/1, U.N. Sales No. E.83.XL6 (1984).

47. Henk Jan Van Vliet, *Separation of Drug Markets and the Normalization of Drug Problems in the Netherlands: An Example for Other Nations?*, 20 J. DRUG ISSUES 463 (1990).

48. Int'l Narcotic Control Bd., *Report of the International Narcotic Control Board for 1997*, at 6.

on the ability of these measures to promote global public goods than on the quality of the processes through which these measures are created. As Niko Krisch observes, such tendency to prioritize *output legitimacy* considerations is pronounced in various contexts of global governance and often produces pressure to move toward more informal and hierarchical modes of transnational governance in these issue-areas.⁴⁹ However, this view is becoming increasingly difficult to maintain in the issue-area of cannabis policy given the mounting evidence on the failure of this TLO to achieve its regulatory goals. Despite billions of dollars of investment and extensive law enforcement resources, a sizable body of scholarship has documented the growing availability of the drug during the 1990s, the widespread prevalence of its usage among adolescents, and the increasingly tolerant attitudes toward cannabis consumption among both users and non-users.⁵⁰

Drawing analogies to the failure of the “Noble Experiment” of the alcohol prohibition period,⁵¹ criminologists developed thorough critiques of the underlying assumptions of the cannabis prohibition TLO. The assumption that the availability of cannabis can be meaningfully reduced by the deployment of militarized policing strategies (such as the aerial spraying of crops) has been criticized for overlooking the resilience of cannabis markets and their high levels of adaptability to changes in their regulatory environments. Studies have shown that rather than eliminating supply chains, such interventions served to disperse, displace, and fragment supply sources and distribution routes.⁵² In turn, such interventions precipitated a spillover of armed violence to new geographical areas and exposed otherwise uninvolved indigenous populations to new risks and insecurities. The inherent flaws of this dimension of the cannabis prohibition TLO are often illustrated by referencing the “balloon effect” metaphor, depicting the ways in which efforts to suppress the cultivation of cannabis in one geographical area causes a convenient shift of its production elsewhere.

The legitimacy of the cannabis prohibition TLO has also been damaged by evidence regarding the immense human rights violations that the implementation of war on drugs policies has entailed. Advocacy networks led by prominent transnational NGOs, such as Amnesty International and Human Rights Watch, have exposed the disproportionate punishments imposed under the banner of the war on drugs in various countries. In the US, such criticism focused on the contribution of marijuana prohibitions to the nation’s internationally unparalleled

49. Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT’L L. 1 (2014).

50. Peter Reuter, *The Political Economy of Drug Smuggling*, in THE POLITICAL ECONOMY OF THE DRUG INDUSTRY: LATIN AMERICA AND THE INTERNATIONAL SYSTEM 128 (Menno Vellinga ed., 2003).

51. Harry Levine & Craig Reinerman, *Alcohol Prohibition and Drug Prohibition: Lessons from Alcohol Policy for Drug Policy*, in DRUGS AND SOCIETY: U.S. PUBLIC POLICY (Jefferson Fish, ed. 2006).

52. BOWLING, *supra* note 3, at 118–20.

incarceration rates and its distinctive patterns of racially-skewed law enforcement.⁵³ A recent ACLU report using data extracted from the FBI's Uniform Crime Reporting Program indicates that between 2001 and 2010, there were over eight million marijuana arrests in the US, of which 88% were for marijuana possession.⁵⁴ In 2010, there were more than 20,000 people incarcerated for the sole charge of cannabis possession. Outside of the US, human rights activists focused on the increasing use of capital punishments for drug offenses from the late 1980s onward, as part of the broader escalation of enforcement efforts during the war on drugs era.⁵⁵ The exportation and importation of illegal drugs constitute capital offenses in more than 30 countries. In China, Saudi Arabia, and the Philippines, the death penalty is exercised regularly for cannabis trafficking offenses.

By the mid-1990s, the criticism leveled at the cannabis prohibition TLO began to stimulate increasing advocacy activity in favor of reform. These activities failed to change the direction of drug policymaking at the international level. Indeed, the "outcome document" issued in the wake of the 2016 UN General Assembly Special Session on drugs kept in place the existing framework of cannabis prohibition and did not endorse the calls to reclassify cannabis as a less dangerous drug. However, the criticism of the prohibitionist approach had a considerable transformative impact on the development of drug policies at the national and subnational levels. Before long, the diffusion of liberal cannabis policies across national borders began to jeopardize the normative settlements institutionalized by the cannabis prohibition TLO in previous decades.

The efforts to liberalize cannabis regulations have focused on three distinct models of reform: depenalization, decriminalization, and legalization. Under formal depenalization regimes, the possession of cannabis is still formally prohibited; however, such prohibitions are enforced through intermediate justice measures rather than through conventional penal sanctions such as incarceration. The Netherlands pioneered the experimentation with depenalization strategies in 1976 when it formalized the use of the *expediency principle* to guide the enforcement of drug prohibitions. Based on this principle, Dutch prosecutors are instructed not to bring charges when cannabis use offenses take place within the user's home or within the so-called *coffee shops*, where cannabis can be openly consumed and purchased.⁵⁶ From the 1990s onward, many national and subnational jurisdictions introduced *cautioning* and *diversion schemes* to deal with drug use offenses.⁵⁷ Cautioning schemes authorize police officers to avoid arresting suspected drug offenders under certain circumstances. Instead, the cautioning schemes require them to issue a written

53. MICHELE ALEXANDER, *THE NEW JIM CROW* (2012); DORIS MARIE PROVINE, *UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS* (2007).

54. ACLU, *THE WAR ON MARIJUANA IN BLACK AND WHITE 4* (2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf.

55. RICHARD LINES, *DRUG CONTROL AND HUMAN RIGHTS IN INTERNATIONAL LAW* 87 (2017).

56. VAN SOLINGE, *supra* note 26, at 516.

57. BEWLEY-TAYLOR, *supra* note 8, at 167–73.

warning of the possible consequences of the illegal behavior. Diversion schemes, which may operate at the pre-trial, pre-sentence, or post-conviction stages of the legal process, are intended to shift offenders from the criminal justice system and its carceral institutions to other channels of legal intervention. When applied before the sentencing stage, such measures may require the offender to participate in certain treatment and education programs as part of the bail conditions. After the sentencing stage, diversion measures may subject a convicted offender to community-based or rehabilitative measures (e.g., community service and therapeutic programs).

The widespread transnational diffusion of depenalization regimes is enabled by the structural mismatch between the actors shaping the formal rules of the international drug control system and those implementing these rules in national and local contexts.⁵⁸ The diffusion of these regimes was not initiated by international organizations or powerful countries. Rather, it has evolved through uncoordinated processes of institutional isomorphism, reflecting converging professional concerns regarding the complexities of implementing criminal prohibitions that are extensively violated by ordinary citizens and that do not reflect widespread social disapprobation of the targeted activity. From the perspectives of ground-level enforcement officials and more senior bureaucratic elites, the implementation of cannabis prohibitions raised pragmatic concerns regarding the limited effectiveness of conventional penal measures and the immense costs that such efforts entailed.

In democratic systems committed to the principle of legalism, it seems natural to expect that schemes of depenalization would translate into *de jure* changes in the statutory definitions governing processes of criminalization. The international drug conventions place constraints on the ability of national legislatures to introduce such reforms. However, the treaties also contain textual ambiguities that provide leeway for negotiating the scope and ambit of such prohibitions. The rise of the medical cannabis movement illustrates the unfolding of such processes of normative contestation. The movement began to gain ground in the early 1990s, focusing its efforts on promoting ballot initiatives at the municipal and state levels in the US.⁵⁹ Within the next two decades, it effectively initiated the enactment of laws decriminalizing the medical use of marijuana in thirty-one states across the US and inspired norm entrepreneurs in dozens of other countries to campaign for the adoption of similar models. Countries adopting medical cannabis laws utilize the latitude allowed by the UN drug conventions regarding the definition of the term “medical and scientific purposes.” Importantly, they challenge the powerful view (which has long been defended by the US federal government and the INCB) that marijuana has no demonstrated medical use. In this regard, the medical cannabis movement has demonstrated the effectiveness of bottom-up legal mobilization

58. Terence C. Halliday, *Recursivity of Global Lawmaking: A Sociolegal Agenda*, 5 ANN. REV. L. & SOC. SCI. 263 (2009).

59. DUFTON, *supra* note 25, at ch. 12.

strategies operating at the subnational level to contest authoritative interpretations of transnational prohibition norms produced by powerful global actors.

Building on the successes of the medical marijuana reform movement, advocacy networks in various countries have campaigned for the enactment of more radical models of decriminalizing and even legalizing the recreational use of cannabis. The seeds of this development were sown in the 1990s when European countries increased the thresholds of the amounts of cannabis possession exempted from criminal responsibility. Portugal, for example, adopted threshold parameters based on “the quantity required for an average individual consumption during a period of ten days.”⁶⁰ Whereas Portugal adopted this policy as part of a comprehensive redesign of its drug laws on the basis of harm reduction principles,⁶¹ in other countries, these steps toward legalizing cannabis use were stimulated by court rulings reviewing the constitutionality of cannabis prohibitions. For example, in Argentina, a 2009 ruling by the Supreme Court struck down Article 14 of the country’s drug control legislation, which punished the possession of small amounts of cannabis with prison sentences ranging from one month to two years.⁶² The Court stated that the possession of cannabis is protected by Article 19 of Argentina’s Constitution, which states that “private actions that in no way offend public order or morality, nor are detrimental to a third party, are reserved for God and are beyond the authority of legislators.” Recent developments in Canada and nine US states signify the growing momentum of the trend toward the legalization of recreational uses of cannabis and the development of more complex regulatory models to govern legal cannabis markets.⁶³ In different ways, these jurisdictions grant licenses to professional farmers and pharmacies to produce and to sell cannabis commercially and exempt individuals from criminal responsibility for non-commercial uses.

The trend toward liberalizing cannabis prohibitions illustrates the recursive nature of transnational processes of legal change. The networks of actors participating in these processes—comprised of grassroots activists, legislatures, bureaucratic elites, criminal justice actors, scientists, journalists, and public health officials—created new regulatory models that gradually transformed the application of cannabis prohibition norms in various jurisdictions. These actors invoked the indeterminacy of treaty provisions, contested the framing of cannabis use as indicative of a moral malaise, and highlighted the diverse ways in which the enforcement of cannabis prohibitions produces social harms that are severer than those generated by cannabis use. They also utilized the space for norm-making provided by the mismatch between the institutions and actors that formulate global

60. BEWLEY-TAYLOR, *supra* note 8, at 157.

61. Catlin E. Hughes & Alex Stevens, *What Can We Learn from the Portuguese Decriminalization of Illicit Drugs*, 50 BRIT. J. CRIMINOLOGY 999 (2010).

62. Arriola, Sebastian y otros, 9080 (Supreme Court of Argentina, August 25, 2009).

63. Sam Kamin, *Marijuana Regulation in the United States*, in DUAL MARKETS: COMPARATIVE APPROACHES TO REGULATION 105, 115 (Ernesto U. Savona et al. eds., 2017).

norms and those assigned with the actual implementation of these norms in national and sub-national settings. The success of these campaigns warrants a reflection on the conditions under which (and the extent to which) local and national acts of contesting TLOs can reshape the agenda of global actors invested in preserving the current normative settlements. The following section focuses on this question.

IV. AFTER THE WAR ON DRUGS?

The rapid and widespread transnational diffusion of new models of decriminalizing, depenalizing or legalizing the use of marijuana serves as a product and a catalyst of the declining capacity of the cannabis prohibition TLO to shape the policy choices of criminal lawmakers and the routine practices of enforcement officials. However, to what extent do these reforms change the agendas of the global actors that play key roles in shaping and maintaining the normative and institutional structures of this TLO?

Faced with the global spread of cannabis liberalization reforms, the INCB has positioned itself as the most steadfast defender of the normative expectancies of the cannabis prohibition TLO.⁶⁴ In its annual reports, the Board contested the legitimacy of the legal interpretations underpinning states' engagement with decriminalization, depenalization, and legalization initiatives. The Board repeatedly expressed its concern that the introduction of civil sanctions for possession offenses was sending the wrong signal, downplaying the health risks of marijuana use. It criticized medical cannabis reforms and questioned the scientific basis on which they are premised. Most recently, the Board condemned Uruguay and Canada for adopting legalization schemes, stating that such reforms constituted clear breaches of the international conventions.

The literature examining the roles of naming and shaming mechanisms in international politics observes that most countries are inclined to bring their laws into formal compliance with international standards to avoid being stigmatized as "deviant states."⁶⁵ The efforts of the INCB to achieve such influence by condemning countries deviating from the prohibitionist expectancies of the international drug conventions failed to generate such adaptive responses.⁶⁶ Some countries have practically ignored the Board's proposed interpretation of the international obligations set by the conventions. Others have argued that the Board's interpretive approach was too narrow and relied on selective use of the available evidence-base concerning the medical uses of cannabis. Still others contended that the Board was exceeding its mandate when it adopted a hostile stance toward legitimate policy choices of sovereign states.⁶⁷ The limited impact of the Board's attempts to delegitimize the adoption of non-punitive models of

64. BEWLEY-TAYLOR, *supra* note 8, at 219; Friman, *supra* note 2, at 153.

65. Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110(5) AM. J. SOC. 1373, 1383 (2005).

66. Friman, *supra* note 2, at 157.

67. BEWLEY-TAYLOR, *supra* note 8, at 248.

cannabis regulation provides important insights into the conditions under which naming and shaming strategies can succeed.⁶⁸ One reason for this limited impact is that some of the central countries pioneering the experimentation with decriminalization and legalization schemes are not particularly vulnerable to economic and reputational pressures.⁶⁹ Supporters of cannabis liberalization reforms across Europe and North America justify these policies on the grounds that they are needed to reconcile drug policies with fundamental human rights values as well as with human development concerns.⁷⁰ In this polemical context, it is unsurprising that the INCB, which has long failed to restrain the human rights abuses inflicted in the name of the war on drugs, has not succeeded in harnessing transnational civil society actors to support its line of attack on the perceived departures from the settled interpretations of the international drug conventions.

Whereas the INCB has remained unambiguously committed to the task of defending the normative settlements of the cannabis prohibition TLO, the approach taken by the US has been marked by ambivalence.⁷¹ President Barack Obama's administration adopted the ambiguous position of respecting the decisions of US states legalizing the medical and recreational use of marijuana while continuing to condemn steps toward legalization in Latin American and Caribbean countries. Responding to shifts in national public opinion, the administration set out lenient guidelines for the federal prosecution of marijuana users in states that had legalized its medical and recreational uses.⁷² It thereby allowed legalized drug markets to take roots in Colorado and Washington, and subsequently in other states. Like other national governments, the US federal government invoked its domestic constitutional principles (particularly the principles governing the distribution of legislative power within the US federal system) to argue that its policies are in compliance with the international standards. However, during the same period, the US continued to apply its strict punitive approach to evaluating the compliance of other countries with the UN drug conventions. The annual certification process continues to include assessments of the extent to which the seventeen countries currently identified as "drug majors" are willing to eradicate the cultivation of cannabis and to penalize its growers and sellers. With a majority of Americans supporting the legalization of marijuana (64% according to a 2017 Gallup Poll)⁷³ and a majority of US states already implementing decriminalization schemes for medical marijuana, lawmakers in the House and Senate are facing increasing

68. Friman, *supra* note 2, at 153.

69. Cf. Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT'L L.J. 3, 51 (2011).

70. Melissa Bone & Toby Seddon, *Human Rights, Public Health and Medicinal Cannabis Use*, 26 CRITICAL PUB. HEALTH 51, 51 (2016).

71. Sam Kamin, *Legal Cannabis in the U.S.: Not Whether but How?* 50 U.C. DAVIS L. REV. 617, 628 (2016).

72. Memorandum from James M. Cole, Deputy Att'y Gen. of the U.S. (Aug. 29, 2013).

73. JUSTIN MCCARTHY, RECORD-HIGH SUPPORT FOR LEGALIZING MARIJUANA USE IN U.S. (2017), https://news.gallup.com/poll/221018/record-high-support-legalizing-marijuana.aspx?g_source=MARIJUANA&g_medium=topic&g_campaign=tiles.

pressure to end the federal ban on cannabis. Despite efforts by Attorney General Jeff Sessions to revive the zero-tolerance approach of the federal government, President Donald J. Trump has recently expressed his intention to support such reforms. It is too early to predict whether and when such a change will take place or how it will impact the federal government's foreign policy stance on the issue of cannabis legalization. However, as long as the US adheres to this "do as I say, not as I do" message, its ambivalent posture enables further steps toward the unsettling of cannabis prohibition norms.

Nevertheless, it is important to note that despite its declining regulatory effectiveness, the cannabis prohibition TLO continues to exert considerable influence on the development of drug policies at the international, regional, national, and local levels. In this context, it is notable that countries that have liberalized their cannabis laws emphasize their commitment to remain bound by the confines of the current treaty regimes of the international drug control system. Remarkably, the extensive recognition of the severe failures and counterproductive effects of the cannabis prohibition TLO has not generated viable political efforts to amend the international treaties underpinning its operation. To a considerable extent, the reluctance to renegotiate the treaty norms governing cannabis policies stems from the notion that the cannabis prohibition TLO is embedded within the mega-TLO of the international narcotic control system.⁷⁴ This serves as a powerful mechanism of issue linkage, leading countries that support cannabis liberalization reforms to avoid initiating formal treaty amendments out of concern that such actions might destabilize the settled norms prevailing in other issue-areas of narcotic control (e.g. the norms governing the regulation of illicit markets of heroin, cocaine and synthetic opiates). The fact that the UN drug conventions regulate the global trade of both the illicit and licit uses of drugs, including substances on the World Health Organization's list of essential medicines, further escalates the stakes in renegotiating the terms of these treaties. In addition, the reputational costs of defecting from UN crime suppression treaties might be higher than those suffered by persistent objectors in other areas of public international law. The branding of countries as pariah states, or "narco-states," as it were, carries a stigma that resonates with the censuring functions performed by criminal labels in domestic contexts.⁷⁵

These factors help explain why current efforts to restructure the regulatory frameworks governing cannabis markets are contained within the narrow space of policy experimentalism created by the textual ambiguity of the current treaties. Under these circumstances, many of the inherent weaknesses of the prohibitionist approach resurface (though in a more attenuated form) in the new regulatory landscapes created by the decriminalization and depenalization of possession offenses. The involvement of criminal organizations in illicit drug markets remains significant given the illegality of supply-related activities. The growing formalization

74. For a discussion of mega-TLOs, see HALLIDAY & SHAFFER, *supra* note 12, at 495.

75. GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 308 (2004).

of intermediate sanctions has a net-widening effect, which expands the use of control measures against low-risk drug offenders.⁷⁶ Most fundamentally, the insistence on promoting drug liberalization reforms within the confines of the current system constrains the capacity of individual states and of the international community to imagine more effective and humane alternatives, such as those offered by harm-reduction and development-centered approaches.

CONCLUSION

Transnational legal orders both enable and constrain the development of new regulatory models. The enabling function of TLOs rests not only on the institutionalization of measures of negotiating, codifying and implementing legal norms with a global reach, but also on their tendency to generate dynamics of resistance and contestation which are conducive to the production of new norms and institutional forms.⁷⁷ This chapter analyzed the ways in which such acts of norm-making unfolded in the issue-area of cannabis prohibition, driven by recursive mechanisms such as legal indeterminacy, diagnostic struggles, actor mismatch, and ideological contradictions. The discussion has also demonstrated that even when they undergo processes of fragmentation and polarization, TLOs can constrain the capacity of these acts of contestation to generate new normative settlements. Mindful of Niels Bohr's advice that "prediction is very hard, particularly about the future," we conclude this chapter by hoping that a better understanding of how transnational legal orders facilitate and hinder recursive legal change can illuminate some of the possible trajectories for the future development of cannabis regulations.

76. Michael Shiner, *Drug Policy Reform and the Reclassification of Cannabis in England and Wales: A Cautionary Tale*, 26 INT'L J. DRUG POL'Y 696, 699 (2015).

77. Halliday & Shaffer, *supra* note 12, at 500–03.