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A Blueprint for Reorienting Canadian Drug Policy

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and Andrew Chai

FRONTIER CENTRE FOR PUBLIC POLICY

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Executive Summary

"'I think what everyone believes and agrees with, and to be frank myself, is that the current approach is not working, but it is not clear what we should do,'" said Prime Minister Stephen Harper after a 2012 meeting with leaders of governments from the Americas.[1] The topic of discussion was the War on Drugs that has ravaged South America for decades. After offering that candid response, Harper was quick to distance himself from advocates of drug liberalization.

> *"There is a willingness to look at the various measures that can be taken to combat that phenomenon, but just in terms of simple answers like legalization or criminalization, let me remind you of why these drugs are illegal.*
>
> *They're illegal because they quickly and totally, with many of the drugs, destroy people's lives and people are willing to make lots of money out of selling those products."* [2]

He was correct on both points. The War on Drugs is not working, and drugs can destroy lives. The fact that drugs are bad does not mean that prohibition cannot be worse. After all, few would dispute that alcohol can be extremely harmful, yet no one seriously thinks that prohibition is a reasonable alternative.

Many politicians are reluctant to take steps toward liberalizing drug policy, fearing that it would be like opening Pandora's Box. Legalize marijuana, and eventually the government will legalize heroin, goes that line of thinking. The notion that marijuana is a gateway drug that leads to use of stronger drugs underpins that mentality. Others think that marijuana is harmful in and of itself.

The difficulty with the public discourse on drug policy is that it often ignores the trade-offs inherent in regulating substances. For instance, legalizing marijuana would ease pressure on the criminal justice system. On the other side, liberalization advocates attempt to gloss over the social cost of drugs. There seems to be reluctance on their part to acknowledge that there are legitimate grounds for restricting access to some substances.

This paper lays out a more nuanced approach to drug policy. Soft drugs such as alcohol and marijuana should be regulated and taxed. Drugs that are more likely to have a deleterious health effect should not necessarily be legalized, as there can be a strong case for dissuading production. Instead, they should be decriminalized. Production and trafficking would remain criminal activities. Harder drugs that are more addictive, and more likely to lead to destructive behaviour, such as crystal meth, should remain illegal.

Some will argue that governments should legalize all drugs in order to combat gang violence. However, there are trade-offs. While it is difficult to justify incarcerations and gang violence associated with the prohibition of marijuana, some amount of gang activity and cost to the justice system are warranted in order to restrict access to the most destructive illegal drugs on the market.

Liberalizing soft drugs would have several positive effects. First, it would allow governments to tax sales and production and deprive gangs of revenue. Second, it would allow governments to concentrate their resources on keeping the most dangerous drugs off the street. Third, it would reduce the stress on the criminal justice system as well as the harmful results of inflated incarceration levels. Fourth, allowing soft-drug users to purchase these products legally would mean they would no longer have to buy from dealers who are keen to up-sell more expensive, more dangerous drugs.

Some might claim that this approach would be an abdication of the War on Drugs. This would be a misconception. It would be more useful to think of it as conceding weak territory in order to strengthen the army's defences. Sometimes one has to consolidate one's forces in order to win the battle. This paper does not advocate ending the War on Drugs. Rather, it provides a strategy for winning the war on the most harmful drugs (insofar as that is possible).

Liberalizing soft drugs would have several positive effects ... it would allow governments to tax sales and production and deprive gangs of revenue.

Context

Given the plausibility of marijuana legalization, a full analysis of the potential impact is warranted. A 2013 poll conducted by Forum Research found that 70 per cent of Canadians support either legalizing (36 per cent) or decriminalizing (34 per cent) marijuana, including majorities in all regions and demographic groups.[3] Moreover, 66 per cent of respondents in another poll expected it to be legalized within 10 years.[4] With marijuana legal in Washington State and Colorado and medical marijuana legal in 16 other states, old arguments about trade repercussions from legalization are falling by the wayside. Uruguay is even set to become the first country in the world to create a state-run marijuana industry.

This study will focus primarily on marijuana, since it is the drug most likely to be legalized or decriminalized in Canada. For this reason, it is also the most researched, meaning that there is a wealth of evidence available. Recommendations that have implications for other drugs will be made though no specific research will be provided to support or oppose changing the legal status of those drugs.

This study includes a proposal to change the legal status of certain categories of drugs, based on their social impact. One might argue whether the drugs used in the examples fit the categories, though that is outside the scope of this paper. Laying out categories has more to do with illustrating how to judge what the legal status of drugs ought to be rather than determining which particular drug fits into which category (with the exception of marijuana).

With marijuana legal in Washington State and Colorado and medical marijuana legal in 16 other states, old arguments about trade repercussions from legalization are falling by the wayside.

Marijuana is not intrinsically a gateway drug

Marijuana is often referred to as a gateway drug that leads to the use of stronger drugs. This is a misunderstanding. While some studies purport to support the gateway theory, a closer look at the literature shows that it does not hold up.

The first in-depth study into the effects of marijuana took place in 1944. New York Mayor Fiorello La Guardia commissioned the New York Academy of Science to study the effects of marijuana smoking in the United States. The Academy found that marijuana did not lead to significant addiction in the medical sense of the word. It did not find any evidence that marijuana leads to morphine, heroin or cocaine addiction.[5]

In 1970, Dr. Roger Egeberg, U.S. Assistant Secretary of Health, recommended that marijuana be listed as a Schedule 1 drug. This was not due to any research into the effects of marijuana.

> *"Since there is still a considerable void in our knowledge of the plant and effects of the active drug contained in it, our recommendation is that marijuana be retained within schedule 1 at least until the completion of certain studies now underway to resolve the issue."* [6]

Lack of evidence should not be sufficient grounds for criminalizing a substance. But one can excuse lawmakers for having made this decision in ignorance. Today, a wealth of studies has demonstrated that marijuana is nowhere near as harmful as once feared.

In 2002, a study by the RAND Corporation investigated whether marijuana use resulted in the subsequent use of harder drugs. The report found that the marijuana gateway effect is not the best explanation for the link between marijuana use and the use of harder drugs.[7] The results of this study indicate that the evidence used to support the gateway theory is also consistent with a simpler and more plausible common factor model. This theory states that people who use drugs may have an underlying propensity to do so that is not specific to any one drug. One reason the risk factor for drug use in marijuana users is higher is that few people try hard drugs prior to trying marijuana. Marijuana use precedes hard-drug use simply because opportunities to use marijuana come earlier in life than do opportunities to use hard drugs.[8]

A 2004 study of twins by researchers at Virginia Commonwealth University found that while marijuana was strongly predictive of use and abuse and/or dependence on other illegal drugs in the future, the main contributors to this effect were the shared environmental and genetic risk for all substances. However, there was "persisting evidence for some causal influences" of marijuana in the development of other drug dependencies, indicating that the gateway theory could have some effect, although it is not the main cause of the association.[9]

A 2006 study from the University of Pittsburgh published in *The American Journal of Psychiatry* concluded that adolescents who used marijuana prior to alcohol or tobacco were no more likely to develop a substance-use disorder than were those who followed the traditional succession of alcohol and tobacco before illegal drugs. In other words, no gateway effect was established, since rearranging the order of the alleged stepping stones did not change the outcomes. Instead, they found that environmental factors (e.g., a greater exposure to illegal drugs in their neighbourhoods) as well as a person's "proneness to deviancy" were the two characteristics that most commonly predicted substance abuse. This evidence supports the common liability model, an emerging theory that states the likelihood that someone will transition to the use of illegal drugs is determined not by the preceding use of a particular drug but by the user's individual tendencies and environmental circumstances.[10]

In 2006, a study by the Karolinska Institute in Sweden found that juvenile rats exposed to THC, the active ingredient in marijuana, took 25 per cent more heroin as adults than did rats that were not exposed to it. Biochemical tests of the adult rats showed that their THC-doused brains had the same number of receptors that responded to THC as unexposed rat brains did, but their neurons had more receptors for heroin and a compound associated with reward behaviour. The THC altered the opioid system, which is associated with positive emotions. This lessens the effects of opiates on a rat's brain, reduces future sensitivity to opioids and thus causes them to use more heroin. However, the previously THC-exposed adult rats, despite their desensitization to heroin, took the same amount of time as the ones that were not exposed to THC to start taking heroin. This suggests that marijuana use does not start the path to hard-drug use. Since the THC-primed rats had increased intake of heroin throughout their lives compared with rats that were not exposed, it may mean that exposure to marijuana paves the way for increased use of hard drugs after that person has already started using the hard drugs.[11]

Lastly, a 2007 study by researchers in Victoria, Australia, found that use of amphetamines by young adults was strongly predicted by adolescent marijuana use and was robustly associated with other drug use (i.e., tobacco) and dependence in young adulthood. Adolescents in the study who were smoking marijuana at the age of 14 to 15 were as much as 15 times more likely to be using amphetamines in their early 20s.[12]

Overall, the use of marijuana by itself does not seem to lead to using stronger drugs. There is little evidence that there is a physiological reason for transitioning from marijuana to harder drugs. As the bulk of the scientific evidence suggests, environmental factors are the most influential in people transitioning from softer drugs to harder ones. To illustrate, once one is purchasing marijuana on the black market, it is not much of a step to start purchasing heroin, cocaine or ecstasy. Once one has decided to patronize a particular drug dealer, he or she will try up-selling. Marijuana is not intrinsically a gateway drug, but black market distribution turns it into one.

This sentiment was echoed in a report published by the Dutch government in 1995 titled "Drugs Policy in the Netherlands: Continuity and Change." According to the report, the underlying assumption made in the Netherlands with respect to marijuana is that people are more likely to make a transition from soft to hard drugs because of social factors rather than physiological ones. Separating the markets by allowing people to purchase soft drugs in a setting where they are not exposed to the criminal subculture surrounding hard drugs helps create a social barrier that prevents people from experimenting with drugs that are more dangerous.[13]

In the Netherlands, marijuana is effectively decriminalized. The possession of all scheduled drugs is an offence, but possession of a small quantity of soft drugs for personal use is a minor offence. Since the Netherlands pursues a policy of toleration, prosecutions rarely occur. Tolerating the sale of soft drugs within clearly defined limits while taking rigorous action against the sale of hard drugs keeps the markets for the two types of drugs separate. For example, the sale of marijuana in coffee shops is accepted in the Netherlands within prescribed limits. The idea behind this is that if marijuana users do not need to buy their soft drugs from a dealer operating illegally, then their chances of coming into contact with hard drugs decreases.[14]

Some argue that Amsterdam actually provides an argument against legalizing marijuana. They point out that tourists flock to the city to peruse the cafes in which marijuana is freely consumed. There is some validity to this concern. After all, having one specific area where marijuana is tolerated naturally concentrates related problems, much as the unusually large and permissive gambling sector in Las Vegas concentrates gambling-related problems. But this is actually another argument for legalization. Broader legalization would ensure that related problems are dispersed, much like alcohol- or tobacco-related problems.

"In the Netherlands... Tolerating the sale of soft drugs within clearly defined limits while taking rigorous action against the sale of hard drugs keeps the markets for the two types of drugs separate.

Legalizing marijuana would erode gang profitability

Estimates of what percentage of gang revenue comes from marijuana vary dramatically. A RAND Corporation study concluded that marijuana contributes between 15 per cent and 26 per cent of drug cartel revenue,[15] while the White House Office of National Drug Control Policy estimates that it is 60 per cent.[16] Even if the lowest approximation is correct, it does not tell the whole story. After all, illegal marijuana sales help drive sales of other drugs. Because of its illegality, marijuana buyers need to go through black market distribution channels to obtain the substance, which gives dealers an opportunity to sell them drugs that are more lucrative. This is the logic that leads retailers to advertise sales on select items to attract customers into the store in hopes that they will buy non-sale items: lure customers with cheap, lower quality items and up-sell more-expensive items.

One might argue that gangs would simply make up lost profits by trying to sell more hard drugs. This is certainly what they would try to do. However, legalized marijuana would disrupt the entire black market. Since gangs would no longer be able to lure customers by selling marijuana, only to later up-sell them, they would have a much more difficult time engaging customers to begin with. Moreover, current users of illegal drugs could substitute marijuana for some of the drugs that remain illegal. While marijuana use may increase, gang profits would decrease and other drug use would also decrease.

Clayton Christensen, professor of Business Administration at Harvard, articulates the reason this business model would fail. In his book *The Innovator's Dilemma,* he argues that there are two types of innovation: sustaining innovation and disruptive innovation.[17] A sustaining innovation is one that existing players in a market adopt, and it does not fundamentally alter the market, while a disruptive innovation destroys the market.

In Christensen's words, sustaining innovations...

> *"...help leading, or incumbent, organizations make better products or services that can often be sold for better profits to their best customers. They serve existing customers according to the original definition of performance – that is, according to the way the market has historically defined what's good."* [18]

In contrast, disruptive innovations...

> *"...do not try to bring better products to existing customers in established markets. Instead, they offer a new definition of what's good – typically they are simpler, more convenient, and less expensive products that appeal to new or less demanding customers. Over time, they improve enough to intersect with the needs of more demanding customers, thereby transforming a sector."* [19]

Christensen uses the example of steel mills to illustrate his theory of disruptive innovation. Large steel mills once dominated U.S. markets. The introduction of

mini mills by non-incumbent companies changed this. Since they were less capital intensive and their steel production was cheaper, they were able to decimate the once-dominant large mills. Those mills tried to fend off the mini mills by competing on quality, but customers were satisfied with slightly lower quality steel from the mini mills at a lower price.

Within the current drug business model, an example of sustaining innovation is hydroponics, which has allowed marijuana growers to produce more-potent strains of marijuana. Another sustaining innovation is the move by Mexican cartels to increase their cultivation of marijuana on public lands in the United States, which "gives the cartels direct access to U.S. markets, avoids the risk of seizure at the border and reduces transportation costs."[20]

Legalizing marijuana would be a disruptive innovation, since it would render the current marijuana black market virtually irrelevant. After all, most customers will settle for marijuana that is just good enough rather than incur the costs of dealing with the black market to get slightly more-potent strains.

When confronted with disruptive innovation, companies tend to abandon downstream markets in favour of higher-profit niche products upstream, since they cannot compete on cost at the low end of the market. In the context of the drug market, the downstream product would be mainstream soft drugs such as marijuana, and upstream product would be harder drugs such as heroin. If soft drugs were legalized, dealers would be forced to focus on harder drugs or exit the market. But like companies that focus upstream, they would be bound to fail.[21]

If the gangs were to sell more hard drugs to make up for their lost profits, the result would actually be a steep reduction in drug prices and a further reduction in profits. In Portugal, after the decriminalizing of all drugs, there were significant reductions in the prices of most drugs from 2001 levels. For example, the average price of one gram of heroin decreased from $50.27 in 2001 to $33.25 in 2008, and the average price of an ecstasy tablet fell from $6.86 in 2001 to $2.80 in 2008.[22]

Counter-intuitively, legalizing marijuana could reduce the use of other drugs. After all, marijuana is a gateway drug precisely because the black market controls it. Once people begin purchasing substances through illegal channels, the seller attempts to sell other products to them. It is not that marijuana intrinsically pushes people toward other drugs. The distribution mechanism into which marijuana purchasers are funnelled does. Legalization would cripple the sellers' business model, thus reducing their ability to market harder drugs.

Another concern is that gangs could simply move into other more dangerous criminal activities such as prostitution and human smuggling to make up for lost drug profits. However, there is no evidence to suggest that marijuana prohibition protects Canadians from crime and violence by somehow diverting gangs from engaging in other criminal activities. Organized crime has gravitated to the marijuana trade because it is the most profitable illegal business in the country, and it easily evades law enforcement. This is the reason it is a $19- to $21-billion a year industry in Canada.[23]

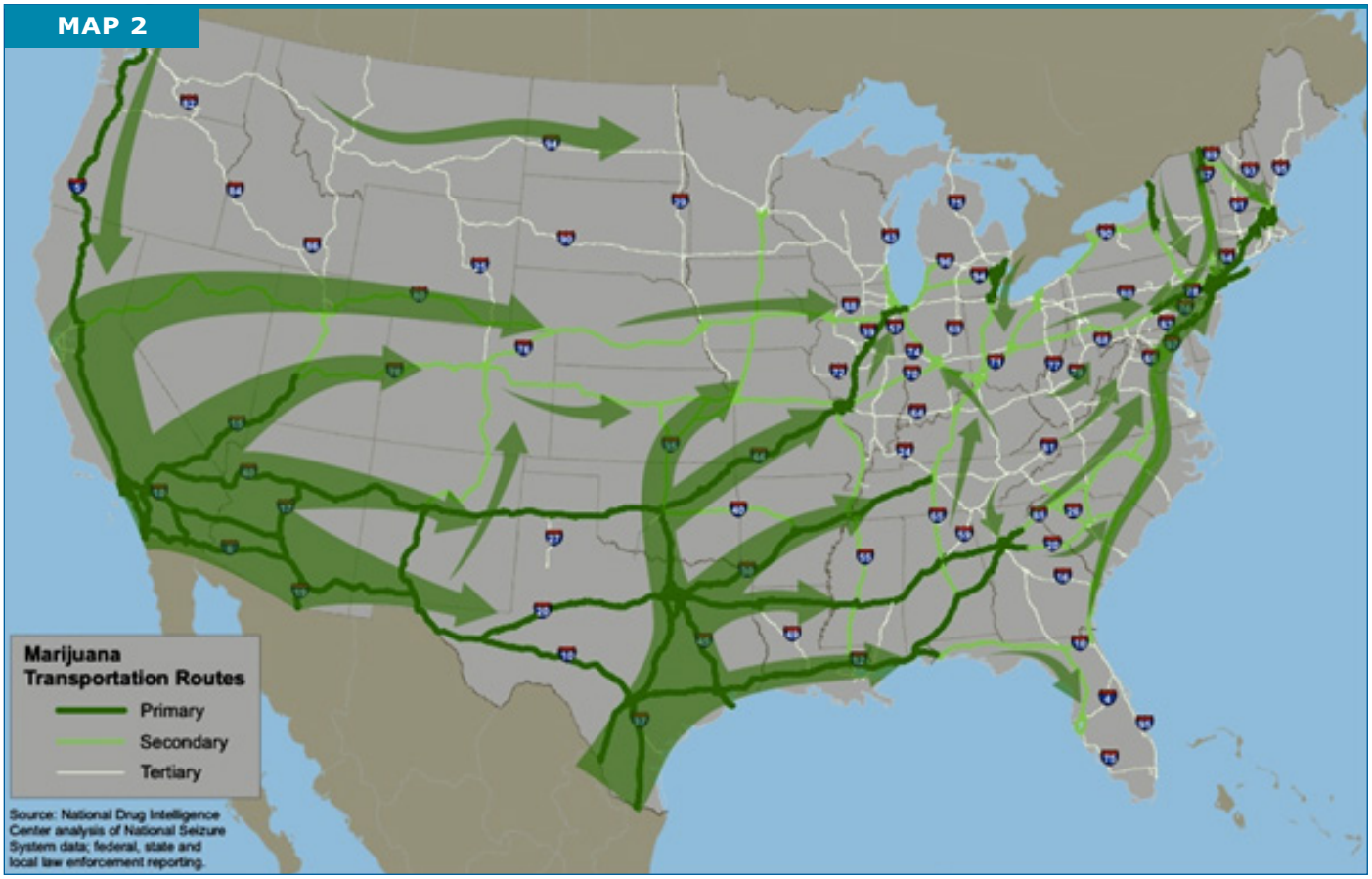
MAP 1

Furthermore, according to the RCMP, rather than protecting Canadians, marijuana prohibition provides a key revenue stream for gangs that allows them to finance other illegal activities. For instance, the RCMP has noted that British Columbia marijuana is taken to the United States and traded for cocaine that is subsequently sold in Canada.[24] The prohibition of marijuana may actually increase the supply of hard drugs.

One might argue that gangs would follow Christensen's prescription in *The Innovator's Solution.* He argues that companies faced with disruptive innovation can adapt by creating autonomous business units to compete with disruptive technology.[25] Indeed, that is something gangs have done in response to the legalization of alcohol. Gangs such as the Hell's Angels own many bars and strip clubs. Even so, the percentage of alcohol sales accruing to gangs is minimal, particularly compared with their revenue during Prohibition. Additionally, marijuana would primarily be sold for home consumption, much like tobacco, rather than for consumption on the premises. Large firms that can take advantage of economies of scale and tight supply chains to keep pre-tax prices low are likely to dominate this business model.

A legalized and regulated marijuana market would reduce this market for organized crime and make those who choose to remain in drug gangs less able to finance other criminal activities (e.g., cocaine importation), hence eroding the profitability of many gangs.[26]

MAP 2



While this model may seem purely hypothetical, there is preliminary evidence that the drug market is reacting to marijuana legalization in Colorado and Washington in accordance with this model. Reports suggest that Mexican farmers are growing less marijuana for the American market as prices plummet and are moving towards growing poppies for heroin using the same transportation routes.[27/28] While that may be worrisome, it will likely lead (as discussed above) to lower prices, which will reduce the incentive to grow. Lower heroin prices might lead to a slight increase in demand, but the spread of legalized marijuana will erode their distribution channels. These early developments suggest that the model is plausible.

A legalized and regulated marijuana market would reduce this market for organized crime...

Legalizing marijuana would curb gang violence

Rather than curbing drug markets, drug enforcement has actually been shown to escalate drug-trade violence. A tough on crime approach to crime assumes that more enforcement will eliminate the problem of gang violence. But as a comprehensive review by the International Centre for Science in Drug Policy states: "[C]ontrary to the conventional wisdom that increasing drug law enforcement will reduce violence, the existing scientific evidence strongly suggests that drug prohibition likely contributes to drug market violence and higher homicide rates."[29]

"Rather than reducing the supply of drugs, prohibition abandons the responsibility for regulating drug markets to organized crime groups." "Just as with alcohol prohibition in the early 20th century, the profits flow untaxed into the hands of unregulated and often violent criminal profiteers." And...

> *"...[b]ecause of the lack of formal regulation normally used in the legitimate economy, violence can be the default regulatory mechanism in the illicit drug trade. It occurs through enforcing payment of debts, through rival criminals and organizations fighting to protect or expand their market share and profits, and through conflict with drug law enforcers."* [30]

The demand for drugs is such that as soon as one dealer is removed, others are there to step in, and those involved in the higher levels of drug selling and production remain largely untouched. Even law enforcement interventions that succeed in "removing key players appear to have the perverse effect of making it more profitable for new suppliers to get involved in the illegal drug market." This is because of the laws of supply and demand—any successful effort to reduce the supply of marijuana will have the perverse effect of increasing the value of the remaining supply, which gives new players an incentive to begin marijuana production and distribution. "This may explain why both marijuana source countries bordering the US (i.e., Canada and Mexico) are experiencing increasing violence between groups that supply cannabis to the US market, despite increased drug law enforcement."[31]

In Canada, gang violence has resulted from turf wars over control of illegal drug markets. This is particularly evident in British Columbia, which has seen marijuana prohibition contribute to the enrichment and entrenchment of powerful organized crime groups whose modes of control are increasingly characterized by violent turf wars over the sizable profits created by the prohibition. Gang-related homicides have steadily increased in British Columbia from 25 reported in 1997 to 43 in 2009. Similarly, the proportion of all homicides in British Columbia attributable to gangs also increased from 21 per cent in 1997 to 34 per cent in 2009. Over the span of a decade (1998-2008), this has left a body count of 415.[32] Among the most high-profile and violent episodes was the drug war between Lower Mainland gangs in 2009, which resulted in more than 20 murders and 40 wounded by the end of the April that year. Gang violence has not abated since then. For instance, on December

12, 2010, 10 people were shot in a gang shooting on Oak Street.[33]

However, these statistics do not reveal the whole picture. They actually underestimate the overall levels of violence, which in many cases do not result in homicide. For instance, according to the RCMP, there were 276 incidents of drive-by shootings in 2009. The RCMP further describes this violence in British Columbia as including kidnappings, vicious ordered assaults, extortion and arson.[34] The RCMP has said that drug gangs are expanding their violent networks into more-rural areas across British Columbia, because drug turf takeovers have been, on the whole, remarkably successful with only several rather short-lived clashes with resident gangs.[35]

In other parts of the world, the violence that has resulted from the drug trade has destabilized entire countries, including Colombia, Mexico and Afghanistan.[36] As noted above, the 2008 to 2009 war between drug gangs in Greater Vancouver was only part of a long-term pattern of rising violence among drug gangs in British Columbia. The violence surrounding the marijuana trade is simply a function of its profitability for drug gangs. Afghanistan, for instance, is the globe's largest producer of marijuana resin. In Mexico, where profits from the trafficking of marijuana by drug cartels to the United States may be worth up to US$2-billion annually, a war on drugs launched in 2006 by then president Felipe Calderón has led to more than 34,000 deaths.[37]

Legalizing marijuana would bring it back into the realm of legitimate markets and allow for formal regulation rather than the often-violent methods used by rival gangs to protect and expand their market share and profits. A legalized and regulated marijuana market would also force those who choose to continue illegal behaviour into activities that are less profitable and more visible to law enforcement. Eliminating the profit incentive created by marijuana prohibition will also deter people from getting involved in the illegal marijuana trade in the first place.[38]

"The violence surrounding the marijuana trade is simply a function of its profitability for drug gangs.

Legalizing marijuana would channel resources used on prohibition enforcement into better uses

Decriminalization would also free up considerable resources used for policing and prosecuting drug offences that could instead be channelled into treatment and other harm-reduction programs.

The government of Canada has allocated $527.8-million to the National Anti-drug Strategy (NADS) for 2012 to 2017, mostly on enforcement-related activities (70 per cent), while prevention (4 per cent), treatment (17 per cent) and harm reduction (2 per cent) combined continue to receive less than a quarter of the overall funding.[39] "This strategy only accounts for a portion of government spending on drug control." It does not account for the myriad of other enforcement activities that go on at the municipal, provincial and federal levels. "Common drug enforcement activities such as drug interdiction, border services, use of military personnel in international drug control efforts and costs of prison expansion are not included in the NADS."[40] According to the Canadian Centre on Substance Abuse, Canadians spend up to $1.3-billion policing and prosecuting Canada's marijuana industry.[41]

In the United States, the annual overall budget for the federal Office of National

Drug Control Policy increased from approximately US$1.5-billion in 1981 to more than US$18-billion in 2002 (adjusted for inflation)."[42] While the entire budget did not go toward programs specific to marijuana prohibition, according to the U.S. Bureau of Justice Statistics, this increase in funding nevertheless coincided with a 160 per cent increase in arrests for marijuana possession, sale or production and a 420 per cent increase in marijuana-related seizures between 1990 and 2009. The estimated government expenditure for enforcing the prohibition of marijuana in the United States amounts to US$12.9-billion, with between $200-million and $1.9-billion of that spent each year in California alone.[43]

It has been argued that rates of marijuana use would be higher if such law enforcement measures were not in place. However, available scientific evidence indicates that patterns of drug law enforcement do not strongly correlate with rates of marijuana use. Furthermore, this position is inconsistent with the government surveillance data and with recent international evidence. This evidence includes a World Health Organization report indicating that country-level rates of drug law enforcement and patterns of drug use do not appear to correlate. Indeed, despite an estimated US$1-trillion spent on the War on Drugs in the last 40 years, the United States is tied with New Zealand for the highest lifetime incidence of marijuana use, higher than of any of the other countries surveyed in the report. At 42 per cent, the percentage of Americans who have used marijuana exceeds the rates in countries such as Colombia, Mexico, Belgium, France, Germany, Italy, Netherlands, Spain, Ukraine, Israel, Lebanon, Nigeria, South Africa, Japan, and the People's Republic of China.[44]

Decriminalization would remove the fear of criminal sanctions for those wishing to seek treatment.[45] Evidence from other countries suggests that the stigma and fear of arrest deters people from seeking treatment.[46]

After Portugal decriminalized all drugs in 2001, drug possession for personal use and drug use remained legally prohibited, but violations of these prohibitions are deemed to be exclusively administrative violations and have been completely removed from the realm of criminal law.[47] Since then, funding for treatment programs in Portugal has increased substantially, and users have demonstrated an increased willingness to seek help. "For example, the number of people in substitution treatment leapt from 6,040 in 1999 to 14,877 in 2003, an increase of 147%."[48]

An increased focus on treatment and rehabilitation would also decrease the number of drug users and the demand for drugs. According to Glenn Greenwald, "Since Portugal enacted decriminalization, drug use in many categories has actually decreased in absolute terms." Drug use rates in many categories are now among the lowest in the European Union, particularly when compared with states with stringent criminalization regimes.[49]

Another obvious benefit of the increase in treatment enrollment is the substantial reduction in drug-related deaths. While proponents of criminalization sometimes interpret an increase in the number of individuals seeking treatment as a sign of worsening drug problems, empirical evidence suggests that the opposite is almost certainly true. In Portugal, the total number of drug-related deaths decreased from nearly 400 in 1999 before decriminalization to 290 in 2006.[50] This is at least partially because people no longer feared to seek help.

"An increased focus on treatment and rehabilitation would also decrease the number of drug users and the demand for drugs.

Legalizing marijuana would solve issues regarding incarceration

Convicting people of drug-related offences has not reduced the problems associated with drug use nor do these sentences deter crime. In 2011, nearly 80,000 Canadians were arrested for marijuana-related offences out of more than 113,100 drug arrests.[51] In the United States, there were 1.5 million drug arrests nationwide in 2011, and out of these arrests, roughly 750,000, or just under half, were for marijuana.[52] As of April 2011, 21 per cent of Canadian federal offenders were serving a sentence for a drug crime. And 55 per cent of people incarcerated in federal prisons have problems with substance use.[53]

The Canadian government's own Department of Justice 2002 review of the evidence concluded that mandatory minimum sentences are "least effective in relation to drug offences" and that "drug consumption and drug-related crime seem to be unaffected, in any measurable way, by severe [mandatory minimum sentences.]"[54]

> *"Putting people in prison does not reduce levels of harmful drug use or the supply of drugs. If it did, the United States—with the highest rates of incarceration in the world, the largest proportion of which is attributable to drug offenses—would have one of the lowest levels of drug use and availability. In fact, it has one of the highest levels of use and a vast and increasing supply of illegal drugs."* [55]

The effects of mandatory minimum sentences include increases in the prison population in already overcrowded prisons, increases in the costs to the criminal justice system, the removal of judicial discretion and a number of well-documented consequences for already marginalized populations.[56] A 2004 study of incarceration in Canada found that visible minority offenders are incarcerated more often for drug-related offences than are white offenders despite having less extensive criminal histories than white offenders have.[57]

A prominent example of this is Aboriginals, who are vastly over-represented in this country's prison system. In 2011, 21.5 per cent of the federally incarcerated population was Aboriginal even though they represented only 4 per cent of the population. Since June 2006, there has been a 43 per cent increase in the Aboriginal inmate population, with one in three federally sentenced women being Aboriginal. In the Prairies, Aboriginals make up more than 55 per cent of the total prison population in the Saskatchewan Penitentiary and 60 per cent in Stony Mountain Penitentiary in Manitoba. Provincial rates are even worse—81 per cent of people in provincial custody in Saskatchewan were Aboriginal in 2005.[58] Unfortunately, this is only going to get worse. A 2013 report by the Provincial Health Officer of British Columbia warns that recent changes to sentencing and other justice practices brought about by the enactment of the federal *Safe Streets and Communities Act* will put Aboriginals at an even greater risk of incarceration and the resulting consequences of incarceration, including lack of access to culturally safe services that support

healing and reintegration.[59]

Similarly, in the United States, ethnic minority communities are generally the ones most adversely affected by the marijuana laws. African-Americans and Latinos are far more likely to be arrested and imprisoned for drug law violations than Caucasians are despite comparable rates of drug use and selling across racial and ethnic lines. Some government studies suggest that African-Americans use marijuana at lower rates than Caucasians do.[60] Yet, according to a recent report, the marijuana-possession arrest rate for African-Americans in Los Angeles County is more than 300 per cent higher than it is for whites.[61]

A more recent study published in the *Canadian Medical Association Journal* in 2012 warns that mandatory minimum sentences have the potential to increase the number of people in prison.[62] Canada's federal prison system is already severely overcrowded. In the two-year period between March 2010 and March 2012, the federal prison population increased by almost 1,000 inmates, or 6.8 per cent, which is the equivalent of two large medium security institutions for men. As of April 2012, more than 17 per cent of people in Canada's prisons were double-bunked.[63] This increase occurred before the imposition of mandatory minimum sentences, and these sentences will stress Canada's prison system even further. To accommodate increases in Canada's prison population, the federal government plans to add 2,700 cells to 30 existing facilities at a cost of $630-million. It also plans to close three federal facilities as part of its budget-reduction plan. These closures also mean relocating 1,000 inmates, including 140 from the recently closed Ontario Regional Treatment Centre.[64]

In addition, incarceration is costly and the introduction of mandatory minimum sentences only serves to increase these costs. Even very cautious estimates suggest that changes associated with the *Safe Streets and Communities Act,* including the imposition of mandatory minimum sentences, will cost the Canadian federal government approximately $8-million and the provinces another $137-million.[65] A study by the Quebec Institute for Socio-economic Research and Information suggests that the cost to the provinces will be much higher due to increases in the prison population—$2.222-billion every year, compared to $1.616-billion for the federal government.[66] Since 2005-2006, expenditures on federal corrections have already increased to $2.375-billion in 2010-2011, a 43.9 per cent increase. The annual average cost of keeping a federal inmate behind bars has increased from $88,000 in 2005-2006 to more than $113,000 in 2009-2010. In contrast, the daily average cost to keep an offender in the community is $80.82, or $29,499 a year.[67]

> ***...in the United States, ethnic minority communities are generally the ones most adversely affected by the marijuana laws.***

In the United States where mandatory minimum sentences have been instituted, the results have been disastrous. Following the passing of the *Anti-Drug Abuse Act of 1986,*[68] the number of people incarcerated has nearly tripled, increasing from 581,609 in 1987 to 1,571,013 in 2012.[69] U.S. federal prisons are operating at nearly 40 per cent above capacity.[70] Furthermore, if the U.S. experience has shown us anything, it is that the brunt of mandatory minimum sentences will be borne by people who are drug dependent and not by those involved in the higher levels of sales and production. Indeed, individuals who sell drugs at the street level are more often than not involved in tasks such as carrying drugs and steering buyers toward dealers. "[R]eal profiteers in the drug market distance themselves from visible drug-trafficking activities and are rarely captured by law-enforcement efforts."[71]

Also costly are the effects of incarceration on employment and, by extension, the labour market and economy. A review of the empirical evidence suggests that incarceration reduces lifetime employment and earnings of offenders. Incarceration has negative effects on employment for a number of reasons. Clearly, incarceration will directly reduce employment during the period of imprisonment by preventing the offender from working. Once released, the ability of ex-prisoners to find work might be reduced for a variety of supply-based reasons such as the fact that their job skills or human capital erode over time, their knowledge of the job market weakens and their social capital or work networks atrophy.

> *"Studies of individual workers using survey data imply … reduced earnings and employment for those who have been incarcerated. … Studies using micro-level administrative data are more mixed, in terms of results. … [M]ore aggregated data at the state level show that incarceration reduces subsequent employment among young black men broadly, including those who have not been incarcerated themselves."* [72]

The net effects of incarceration on an employer's demand for labour are also negative. The stigma associated with incarceration discourages employers from hiring those with criminal records. Employers might be unwilling to hire ex-criminals for many reasons including "the risk of legal liability if a previous offender harms a customer or co-worker, the risk of financial liability if the offender engages in theft, fears of personal violence and the negative signals that a period of incarceration sends about their general skills or trustworthiness." The many state and federal laws that prohibit the hiring or licensing of those with criminal records in various occupations clearly reinforces these tendencies.[73]

Employer surveys and audit studies of employers show strong employer aversion to hiring men with criminal records. In the surveys, roughly 40 per cent of employers would "definitely" or "probably" hire applicants with criminal records, whereas much higher percentages (i.e., 80 per cent to 90 per cent) would hire former welfare recipients, workers with little recent work experience or lengthy unemployment and other stigmatizing characteristics.[74]

> *"Furthermore, the negative effects of incarceration on labor demand are not necessarily limited to those who have actually been incarcerated. Because job*

applicants have little incentive to directly inform prospective employers about their criminal histories; and because many employers do not check criminal background …; employers generally do not have perfect knowledge about which applicants have or do not have criminal records. In such a situation, employers might well engage in a form of statistical discrimination, in which personal characteristics that are statistically correlated with offender status – such as being a less-educated black male – are used by employers to predict such status in the absence of the direct individual information. In these cases, they might tend to avoid hiring from some broader demographic groups (like black men), simply to avoid hiring ex-offenders inadvertently." [75]

A recent paper by Holzer, Offner and Sorensen (2005) tests this notion. "[T]hey analyze[d] the effects of incarceration rates of black men … by state and year on the employment and labor force activity of all young black men (aged 16-24 and 25-34) with high school or less education."

"The results clearly showed that previous incarceration was associated with large declines in employment and labor force participation among young black men. Indeed, for every percentage point rise in the overall incarceration rate of black men, employment and labor force participation in the noninstitutional population declined by a percentage point or more. …

Since each percentage point of current incarceration of black men translates into 5-6 points of previous incarceration for young black men, the estimates imply that each additional percentage of previous offender status reduces employment by about .17-.30 percentage points for black men, and that the overall levels of earlier incarceration inferred for this population reduce employment activity by 4-9 percentage points. … They also imply that the increases in incarceration since 1980 have reduced young black male labour force activity by 3-5 percentage points. [76]

There is also important variation in hiring behavior according to the race of the job applicant. The audit studies find that black offenders and non-offenders both receive many fewer offers than their white counterparts in each category; indeed white offenders generally receive as many offers as black non-offenders. The authors of these studies interpret this as evidence that racial discrimination is at least as large a barrier to hiring as is offender status. [77]

These findings undermine the 'tough on crime' approach touted by those in favour of mandatory minimum sentencing. In fact, recognizing the high financial and social costs of mandatory minimum sentences, as well as their widespread failure, the states of New York, Michigan, Massachusetts and Connecticut have repealed these sentences for non-violent drug crimes, with other U.S. jurisdictions set to follow." [78]

Taxing legalized marijuana could create revenue for the government rather than for gangs

As long as marijuana remains illegal, the potential financial benefits of marijuana as a regulated and taxable product remain completely unavailable to the federal and provincial treasuries. A recent report from the Fraser Institute estimates the value of the illegal marijuana industry in British Columbia alone to be as high as $7-billion annually—most of which (95 per cent) is due to exports to the United States. Annual retail expenditures on marijuana by British Columbians are thought to be approximately $357-million per year.[79] According to a November 2012 research paper from Simon Fraser University, legalizing marijuana in British Columbia could generate $2.5-billion in government tax and licensing revenue over five years—based on a domestic provincial market of over 400,000 consumers annually.[80] Moreover, based on projections by the State of Washington—363,000 consumers equals $565-million annual revenue—and in light of similar consumption and price trends in Canada, annual government revenue in Canada from legalized marijuana based on three million consumers annually would likely exceed $4-billion per year.[81]

Opponents of the decriminalization law in Portugal who insisted that the proposed change in law would make Portugal a centre of drug tourism shared this concern. Paulo Portas, leader of the conservative Popular Party, said, "There will be planeloads of students heading for [Portugal] to smoke marijuana and take a lot worse, knowing we won't put them in jail."[82] Such fears have turned out to be completely unfounded. None of the nightmare scenarios predicted by pre-enactment decriminalization opponents such as the transformation of Lisbon into a haven for drug tourists has occurred. Approximately 95 per cent of people cited for drug offenses every year since decriminalization are Portuguese.[83]

> ***...legalizing marijuana in British Columbia could generate $2.5-billion in government tax and licensing revenue over five years...***

Legalizing marijuana would allow effective regulation of the market

Despite falling behind in terms of drug policy, Canada has contributed some of the best thinking in the world when it comes to offering alternatives to prohibition. Several groups have proposed a regulated market model for marijuana control. Since 1998, the Health Officers Council of British Columbia has created a series of discussion papers that have called for an end to prohibition and its replacement with a regulated market for all substances based on the reduction of public health harms, which include the drug-related violence and homicides that are currently attributable to marijuana prohibition. The latest of these papers describes how public health-oriented regulation of alcohol, tobacco, prescription drugs and illegal substances can better reduce the harm that results both from substance use and substance regulation than current approaches do.[84]

Obviously, one of the goals of our current laws is to reduce young people's access to marijuana. But, we cannot do this effectively as long as marijuana remains illegal. It is also arguable that marijuana prohibition itself contributes to the glamour of marijuana use among youth. Under the present marijuana prohibition, no effective regulatory controls, such as age restrictions, are in place to prevent marijuana sales to minors. As a result, young people in Canada use marijuana extensively (depending upon the province, 30 per cent to 53 per cent of Grade 12 students reported using marijuana).[85]

The "2009 Canadian Alcohol and Drug Use Monitoring Survey" reported that 27 per cent of youth aged 15 to 24 in British Columbia used marijuana at least once in the previous year.[86] Data collected by the "Ontario Student Drug Use and Health Survey" demonstrate that the prevalence of annual marijuana use among Ontario high school students doubled since the early 1990s, from less than 10 per cent in 1991 to more than 20 per cent in 2009. As well, the level of annual use among Grade 11 students increased from 23 per cent at the start of 1990 to 39 per cent in 2009.[87] In fact, a recent report from UNICEF suggests that Canada has the highest rate of youth marijuana use among developed countries but one of the lowest rates of tobacco use, which is due to the regulatory controls on tobacco. Yet, there are no regulatory controls such as age restrictions on marijuana.[88]

According to the U.S. National Institute on Drug Abuse, over the last 30 years of marijuana prohibition in the United States, the drug has remained "almost universally available to American 12th graders," with approximately 80 per cent to 90 per cent saying the drug is "very easy" or "fairly easy" to obtain.[89]

When substances are prohibited rather than regulated, it becomes impossible to control their purity and strength. Illegally produced and supplied drugs are of unknown quality, which increases the risk of overdose, poisoning and infection. According to the University of Mississippi Marijuana Potency Monitoring Project, which is funded by the U.S. National Institutes of Health, scientific monitoring of

marijuana potency shows that the estimated delta-9-tetrahydrocannabinol (THC) content of U.S. marijuana has risen by approximately 145 per cent, from 3.5 per cent in 1990 to more than 8.5 per cent in 2007.[90]

Restrictions on bulk sales as employed in the Netherlands, where purchases are restricted to 5 grams, could help curtail diversion to minors. Additional regulatory alternatives worthy of consideration include restrictions such as those on alcohol and tobacco that limit the location and circumstances of use and allow for limited use in designated places. The Dutch coffee shop model is a good example of such regulations, which are designed to reduce usage that leads to public nuisance.

Since taxation has been shown to affect levels of alcohol and tobacco use, similar approaches could be taken to the pricing of marijuana to balance the need to limit use and avoid creating an illegal market for contraband.[91]

Additional regulatory alternatives worthy of consideration include restrictions such as those on alcohol and tobacco that limit the location and circumstances of use and allow for limited use in designated places.

Not all drugs should be legalized

One might argue from the above logic that beyond mere decriminalization for personal use, all drugs should be legalized in order to decimate gang profits. This would be simplistic. Some drugs may well pose such a threat to users, and those around users, that the trade-off of allowing gangs to profit from them by selling a small amount is preferable to legalizing them if legalization would lead to a marginal increase in use. The risks associated with some hard drugs may pose an unacceptable threat because users can become addicted, sustain brain damage, develop serious psychological problems and harm those around them.[92] Drugs such as crystal meth likely fall into this category, so should not necessarily be decriminalized. In order to take a true harm-reduction approach to drugs, we have to weigh both the cost of drug use and the cost of prohibition. Both can be quite substantial.

Additionally, unlike the large domestic market for marijuana, estimated at more than three million annual users, the market for heroin and cocaine in Canada is a fraction of that size.[93] Given that they are predominantly grown in specific regions, it is also easier to cut off the source than it is to prevent the proliferation of marijuana. Overall, we need a rational approach to making these calculations.

“The risks associated with some hard drugs may pose an unacceptable threat because users can become addicted, sustain brain damage, develop serious psychological problems and harm those around them.

Refocusing drug enforcement

One potential approach would be to create three drug categories. The first would be the milder substances that while demonstrably harmful are widely used. Hard liquors, cigarettes and marijuana are substances that would be in this category. The harm from the substances is less than the destruction resulting from prohibition. Though heavy use of marijuana can have negative health effects, the overall public health impact of marijuana use is low compared with other illegal drugs such as opioids, or with alcohol, especially given that the risk of overdose is very low.[94] These drugs should be restricted to adults and should probably carry specific excise taxes (as cigarettes and alcohol do, though the rates are excessive).

The second category would include drugs that can be very harmful to users but are rarely fatal and rarely cause significant external problems. One example is cocaine. It is the drug of choice for lawyers and other professionals, but the problems rarely extend beyond hurting the lives of the users and their families. These drugs should be decriminalized so that problem users can seek treatment without fear of legal repercussions.

The third category consists of drugs that are extremely harmful to the users and society as a whole. Drugs such as crystal meth likely should remain illegal. While they would continue to line the pockets of drug gangs, the harm from even a modest increase in usage would be substantial.

Gangs will always exist. Some things that they do, such as human trafficking and money laundering, should never be condoned. We should remove their revenue sources to the greatest extent possible without creating significant additional problems. We need to take a true harm-reduction approach to drugs.

Drug policy is often considered the domain of morality, but it should not be. Issues of personal morality should not be legislated. But when there is a legitimate public safety issue at stake, it can make sense to crack down on certain drugs. A utilitarian, harm-reduction approach to drug policy would be a vast improvement over our reckless, moralistic approach.

“Drugs such as crystal meth likely should remain illegal.

Conclusion

Public opinion on legalizing marijuana is rapidly shifting in North America. A majority of Americans and Canadians now favour doing so. From a policy perspective, the public is right. But rather than looking at liberalization as an inexorable descent into full-out drug legalization, we should view this as an opportunity to refocus drug policy to ensure that we are truly reducing harm. This means maintaining criminal sanctions for certain drugs.

The purpose of this paper is to offer a more nuanced approach to drug policy, whereby the legal status of drugs is tailored to their effects. Treating all currently illegal drugs the same way is harmful because not only does it fuel criminal organizations, but also because criminalizing drugs such as marijuana has created a more efficient pipeline through which harder drugs can find their way to consumers. Marijuana is not intrinsically a gateway drug: illegal marijuana is. This illustrates why enforcement should focus on only the most harmful drugs.

This paper does not suggest ending the War on Drugs. Rather, it provides a road map for succeeding in the war on the most harmful drugs. Drug enforcement should be focused on the substances that are so harmful as to warrant the unintended negative side effects from prohibition. Sometimes surrendering a hill is required to fortify one's defences.

...rather than looking at liberalization as an inexorable descent into full-out drug legalization, we should view this as an opportunity to refocus drug policy to ensure that we are truly reducing harm.

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Further Reading

June 2013

Time to End the Tax-and-Incarcerate Approach to Tobacco

Steve Lafleur

http://www.fcpp.org/posts/time-to-end-the-tax-and-incarcerate-approach-to-tobacco

October 2013

Counting Cost of Pot Laws

Steve Lafleur

http://www.fcpp.org/posts/counting-cost-of-pot-laws