Cannabis Constitutionalism: Caveats, Courts, Commerce, and the Future of the International Drug Control System

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Abstract

The safeguard clauses, or constitutional caveats, in the nearly universally ratified international drug control treaties – the Single Convention 1961, Convention on Psychotropic Substances 1971, and Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 – permit states parties to depart from the strictures of the agreements where their provisions conflict with the architecture and features of the domestic constitutional order. Apex courts in the United States of America, Canada, Colombia, Mexico, Argentina, South Africa, and Georgia, for example, have determined that human rights and fundamental freedoms protections are part and parcel of the constitutional order. Rights to liberty, privacy, and autonomy, among others, have warranted judicial intervention in these jurisdictions and legislation criminalizing the possession of cannabis for personal consumption has been struck down and/or sent back to the legislature for amendment as a result. Liberal courts have been a key tool in minimizing the adverse impact of the War on Drugs on illicit consumers, but they are limited by the separation of powers and judicial politics and unlikely to remedy the international drug control system's (IDCS) structural defects. Courts in the United Kingdom, Germany, and Austria, among others, deny the nexus between drug consumption and rights and freedoms, a point of view consistent with the object and purpose of the drug control conventions. This thesis puts the IDCS and panoply of drug control-related judicial decisions into historical and political context and engages with the international and domestic law and policy implications of challenges to the regime.

Cannabis legalization has been framed in the language of rights and freedoms by litigants and advocates, creating a politics conducive to regulated markets in several jurisdictions in direct contravention of the drug control regime's obligation to limit the use of drugs to medical and scientific purposes alone. The dynamics of licit and illicit drugs markets and consumption are key drivers of drug law and policy reform, which are in turn deeply entangled with rights and freedoms concerns. As such, it is necessary to examine whether the IDCS can cope with the crafting of extensive constitutional exemptions from generally applicable drug control laws, psychedelic medicine, religious liberty, and the rise of "legal weed." Drawing on international law, national case law, comparative constitutional scholarship, and a country case study approach focused on innovative and conservative judicial decisions and policies, it argues that the purported flexibility of the IDCS cannot accommodate cannabis constitutionalism – i.e., law and policy reform undertaken in the name of rights and freedoms but exacted on behalf of privileged consumers vis-à-vis their preferred controlled substances, leaving out-groups and the drugs they consume subject to the punitive measures constituting the standard response to drug use – without leaving the international system in a state of fragmentation and undermining domestic constitutional commitments to the equal fulfilment of rights and freedoms. The ramifications of the failure to treat drug users equally were laid bare during the Covid-19 pandemic, when the bio- and necropolitics of drug control were on full display and differential treatment based on race, class, caste, and gender conditioned life and death for consumers. While cannabis users in several jurisdictions enjoyed their controlled substance of choice unbothered by the authorities those taking opioids suffered as supplies became adulterated and overdoses skyrocketed to record levels, revealing the double-standards and hypocrisy animating self-interested contemporary drug control reform efforts.

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While the IDCS's dissolution may not imminent its coherence is in serious jeopardy because of the reforms taking place in a growing number of states dissatisfied with the status quo of strict control, prohibition, suppression, and criminalization, which has failed to create a world free of illicit drugs, inadequately provided essential medicines to the sick, and served to justify the securitization of drug enforcement and carceralization of drug users around the globe. If the IDCS is to survive into the middle of the twenty-first century, the international community must reckon with its rights and freedoms problem.

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The logic of the rebel is to want to serve justice so as not to add to the injustice of the human condition, to insist on plain language so as not to increase universal falsehood, and to wager, in spite of human misery, for happiness.

Albert Camus, *The Rebel* (1951)

Introduction

The international drug control system (IDCS) has been constructed over a century and a half in response to events, from its nineteenth century origins in the Chinese Opium Wars to the impact of the Covid-19 pandemic on drug use in the twenty-first century. The modern regime, regulating the cultivation, production, distribution, and consumption of narcotic and psychotropic substances from cannabis to LSD, sets out the law and policy states must adhere to in their implementation of the Single Convention 1961, Convention on Psychotropic Substances 1971, and Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. Nearly universally ratified, these treaties distinguish between the medical and scientific use of drugs, which is permitted subject to stringent requirements, and non-medical or recreational use, which is to be strictly controlled, prohibited, suppressed, and criminalized. Challenges to the IDCS's hegemony are also nearly universal. Drug control reform has taken place at the local, regional, and national levels, from cannabis legalization in North and South America to the provision of harm reduction services for people who inject drugs in Europe and decriminalization of simple possession in jurisdictions around the globe. The mobilization of the language of human rights and fundamental freedoms time and again played a role in the success of these campaigns. While harm reduction and decriminalization policies have broadly been accepted as legitimate under the international regime, legal cannabis markets are immanently irreconcilable with the drug control conventions. But these debates have not and will not be settled by purely legal arguments. The politics of drug control, particularly the question of the legitimacy of moralistic legislation in liberal democracies, render such solutions elusive. As in the past, consensus and contestation have generated the institutions and principles governing the control of drugs and drug users and will continue to do so into the future.

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Development scholar Frances Cleaver calls such processes "institutional bricolage," whereby the design of organizations and values animating them are not the result of a top-down process but of "the constant renegotiation of norms, the reinvention of tradition, the importance of authority and the role of people themselves in shaping such arrangements."[1] A dialectical progression, the antagonisms generating stasis and adaptation within the IDCS give the appearance of accommodation and flexibility. But the outcomes of the conflict between law and policy at the international and domestic levels, frequent incompatibility of prohibition and criminalization with human rights and fundamental freedoms, and competing interests of the state, society, and market, indicate that change has been accepted only in the strictest of terms. This thesis examines the bricolage that is the IDCS, especially its local iterations. Putting national constitutional law and apex court jurisprudence at the center of the inquiry, it demonstrates that with each latitude granted under the regime new inequalities are (re-)produced, a natural outcome under the bricolage model.[2] Despite the inclusion of constitutional caveats, or safeguard clauses, in the drug control conventions, which license domestic courts to engage in law and policy bricolage via judicially crafted solutions to concrete legal issues,[3] this thesis argues that the IDCS's ideology and practice of strict control, prohibition, suppression, and criminalization is in direct opposition to international and constitutional human rights and fundamental freedoms. While no administrative system is perfect, drug control's institutions and agents are incapable of meeting the standards mandated by international and domestic law. Indeed, the IDCS exacerbates existing class and racial disparities and universalizes oppression of a normal, though complex, human behavior: the use of intoxicating substances.

[1] Frances Cleaver, *Development Through Bricolage: Rethinking Institutions for Natural Resource Management* (London: Routledge, 2012), i.
[2] Cleaver (2012), i.
[3] Single Convention, Articles 35 and 36; 1971 Convention, Article 22; 1988 Convention, Article 3(2).

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Part I of this thesis details the history, contents, and contemporary controversies of the IDCS. Chapter 1 surveys the origins and development of the regime from the Opium Wars in China to the United States of America's initiation of the War on Drugs and the IDCS's commanding treaties, focusing on its objective of limiting of the use of narcotic and psychotropic substances to medical and scientific purposes alone.[4] The roles of trade and morality in the formation of the modern drug control regime informs analysis of the international legal obligation to subject illicit drugs and drug users to strict control, prohibition, suppression, and criminalization. The incompatibility of the IDCS with international human rights law and the ineffectual responses of United Nations (UN) organizations and treaty bodies to human rights violations sets the stage for chapter 2, which probes recent efforts aimed at reforming drug control law and policy to mitigate the negative consequences of the IDCS. Reviewing and evaluating advances in areas including harm reduction, traditional and indigenous cultivation and use, the creation of self-contradictory legal cannabis markets, access to essential medicines, and scheduling reform, the chapter shows that reform and reinterpretation of the drug control conventions has occurred primarily at the domestic level and only grudgingly acquiesced to by the IDCS, which is unable and unwilling to forestall or block, directly or indirectly, independent law and policy backed by human rights considerations. The extent to which national legislatures and courts may exercise sovereign power is limited, however, by international human rights law, constitutions, governmental practice, and politics. The chapter then explores how and why the drug conventions and UN treaty bodies at once tolerate the principle of national sovereignty when it comes to states carrying out rights and freedoms violations and reject it when rights and freedoms are invoked by states departing from IDCS standards. Part I closes with an account of

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[4] Single Convention, Article 4(c).

the regime's inability to assimilate bottom-up innovation beyond the bounds of its basic design and procedural practice, a product of legal and institutional path dependency.

A comprehensive understanding of the workings and antagonisms characterizing the IDCS underscores the centrality of the state in instigating and entrenching reforms, particularly via judicial recognition of constitutional human rights and fundamental freedoms, which justifies overturning incongruent drug law and policy at the national level. Part II begins, in chapter 3, with an account of how the constitutional caveats-safeguard clauses in the drug control conventions, subjecting the treaties to national constitutional axioms, mediate domestic judicial adjudication's engagement with the IDCS. A sketching out what constitutions and constitutionalism entail from a comparative perspective prefaces engagement with individual examples, demonstrative of the scope of flexibility courts have afforded themselves in subjugating the requirements of the IDCS to constitutional rights and freedoms. To explore the potential of rights and freedoms dictums serving as an engine for innovation in drug law and policy requires an understanding of individual national constitutional cultures, including native conceptions of judicial power, constitutional interpretation, proportionality analysis, judicial supremacy, and jurisprudential cross-fertilization. From there, the potential for comparative constitutional law as theory and practice to stimulate transnational change is assessed through an analysis of apposite case law from Colombia, Argentina, Mexico, the United States of America, South Africa, Spain, Germany, Georgia, Austria, and Canada. Jurisdictions are clustered chiefly around the commensurability of legal systems and bills of rights, the arguments presented by litigants, and approximate historical and political affinities. The chapter reviews apex court decisions from these countries on the question of the rectitude of international and national drug law and policy's encroachment on rights to liberty, privacy, and autonomy, setting out the

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positive case for universalizing their defense while also recognizing the limits and specificities of text and context in the elaboration of human rights and fundamental freedoms protections.

Chapter 4 extends comparative constitutional analysis of drug law and policy to the fields of autonomy and self-determination in medical decision-making and the right to freedom of thought, conscience, and religion. The current entanglement of medicine and science, religion, and rights and freedoms in litigation and patterns of consumption arose during the US American counterculture as the "psychedelic dilemma"[5] and has continued to confound law and policy analysts into the present.[6] The twenty-first century revival of research into and interest in psychedelic-assisted therapy in particular has brought the issue back into the spotlight.[7] The role of gatekeepers, from bureaucratic institutions and regulatory frameworks to the medic-scientific establishment, and consumer trends, including psychedelic wellness retreats and microdosing, in the medicalization of controlled substances informs subsequent examination of the case law on drug control and healthcare decision-making in the United States and United Kingdom, two of the centers of the pharmaceutical and healthcare sectors. The barriers to overcoming the scheduling regime and drug approval process are significant, and rights and freedoms protections insufficient to trump the prerogatives of the administrative state. The second portion of chapter 4 investigates the intersection between the medical and scientific use of controlled substances and their ritualistic consumption in religious and spiritual settings. The shortcomings of religion's conventional legal definition vis-à-vis new, novel, idiosyncratic, and minority faiths and

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[5] Edward J. Weintraub, "Constitutional Law (Freedom of Religion) + (LSD) = (Psychedelic Dilemma)," *Temple Law Quarterly* 41, 1 (1967): 52-80.
[6] See J. Harold Ellens et al. (eds), *The Psychedelic Policy Quagmire: Health, Law, Freedom, and Society* (Santa Barbara: Praeger, 2015).
[7] I.e., the syncretic combination of indigenous spiritual rituals, modern psychotherapeutic and psychiatric practices, and chemically induced altered states of consciousness. See Donna Lu, "'Psychedelics renaissance': a new wave of research puts hallucinogens forward to treat mental health," *The Guardian*, 25 September 2021, https://www.theguardian.com/society/2021/sep/26/psychedelics-renaissance-new-wave-of-research-puts-hallucinogenics-forward-to-treat-mental-health.

spiritualities is scrutinized through an engagement with the secondary literature on law and religion and case law and jurisprudence from the United Nations Human Rights Committee, the Council of Europe's European Court of Human Rights, and apex courts in the UK, US, and South Africa. The investigation proceeds from the decisions of international tribunals before turning to domestic fora, homing in on cases involving well-known minority faiths and the chasm between the promise of religious liberty and its actual practice. Between the sacred and the profane, the sacramental use of controlled substances has only rarely been assimilated into the right to religious freedom. In both the medical and religious domains, human rights and fundamental freedoms arguments have been inadequate to persuade courts to expand access to controlled substances as of right in all but the narrowest of circumstances.

The gap between the promise of constitutional rights and freedoms and the confines of the IDCS played out to tragic effect throughout the Covid-19 pandemic and coeval opioid overdose crisis. In Canada and the United States, legal cannabis markets thrived as illegal street drugs, particularly opioids, became more toxic. Record-setting mortality rates for opioid users caught the attention of the media and governments in both jurisdictions belatedly responded with billions in public health spending to prevent further deaths. The existence of dual regimes for cannabis and opioids contradicts the Single Convention's equal treatment of the two substances, as both are to be used for medical and scientific purposes alone. Chapter 5 considers the disparate regulation of cannabis and opioids, and their users, during the coronavirus state of emergency from a critical theoretical perspective, bringing class, race, and caste politics to bear on the causes and consequences of reform and regression in drug law and policy. On one hand, market mechanisms, consumer preference, and the mobilization of interest groups have been instrumental in legitimating and normalizing cannabis. On the other, opioids remain stigmatized

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and suppressed by law enforcement and the administrative state despite the efforts of harm reduction proponents to humanize their control. Inequalities of health and wealth, color and class, and power and privilege help explain the generation of truth and objectivity in the market state, the meaning and content of constitutional rights and freedoms in liberal legal orders, and the place of regulation and responsibility in contemporary drug control. Dichotomies of good and bad, right and wrong, and health and harm inflect these debates, with laissez-faire change for the empowered and continued marginalization for the disfavored. But the issue is ultimately a matter of life and death, as the bio- and necropolitics of drug control law and policy structure how individuals fit into the social order as well as the conditions in which they depart it.

Domestically, states that put ideology and special interests above the common good risk undermining constitutional commitments to the equal fulfilment of human rights and fundamental freedoms. Internationally, the assimilation of cannabis into the licit economy, aside from its de facto illegality, poses a challenge to the uniform application of the IDCS. The future of the regime thus depends on whether powerful states and actors, public and private, recommit to pursuing the agenda set by the conventions, in line with most states parties to the IDCS, or admit flexibility beyond the black letter text of the treaties. As historian John Collins frames it, the debate is between "reform integrationists," who "conclude that the [IDCS] is ultimately a US-led prohibition regime and one irreconcilable with national-level policy reforms, such as cannabis legalisation," and so-called pluralists, like himself, who believe the system to be adaptable and accommodating to legal and policy innovation.[8] This thesis fits within the reform integrationist school. While pluralism certainly exists within the IDCS, it is not amenable to the changes taking place in a growing number of jurisdictions.

[8] John Collins, *Legalising the Drug Wars: A Regulatory History of UN Drug Control* (Cambridge: Cambridge University Press, 2021), 2-3 and 213-215.

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The extent to which states deviate from the regime's strict control, prohibition, suppression, and criminalization standard is ultimately circumscribed by local constitutional values, principles, and customs, formal and informal. Whether litigation succeeds in loosening the IDCS's fetters is to a great extent a crapshoot, even in liberal settings. In practice, successful attempts to assimilate rights and freedoms exemptions into national law and policy under the strictures of the IDCS have led to a paradoxical compromise position this thesis terms cannabis constitutionalism. That is, legal and policy reform undertaken in the name of constitutional commitments to liberal equality, human rights, and fundamental freedoms exacted on behalf of privileged consumers vis-à-vis their controlled substances of choice, cannabis specifically; a situation in which out-groups and the drugs they consume remain subject to the punitive measures that constitute the international community's main response to illicit drugs. The instrumentalization of rights and freedoms to the benefit of citizens is not objectionable per se. This is what such protections were devised to accomplish. What is objectionable is the maintenance of a hypocritical two-tiered approach to drug control whereby might makes right and the weak are left to suffer what they must.

The pluralism that is present in the IDCS cannot admit so-called "legal" cannabis markets, nor the legalization of other similarly classified controlled substances. But if this is what fidelity to rights and freedoms demands, as many lawmakers and judicial officers suggest, international drug control is materially inconsistent with liberal constitutionalism and the international human rights system. By the same token, the IDCS's toleration of "more strict and severe [punitive] measures" being imposed on drug traffickers and users by states parties to the conventions indicates it is inclined toward coercion and force as tools of first resort.[9] It is in the

[9] Single Convention, Article 39; 1971 Convention, Article 23; 1988 Convention, Article 24.

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dispensation of discipline and punishment and illiberal law and policy, therefore, that pluralism most effectively operates within the IDCS. In the end, domestic courts can only do so much to mitigate the human cost of the War on Drugs, limited as they are by their role in the political order as well as the politics of adjudication. To remedy the dissonance of the IDCS with human rights and fundamental freedoms it is necessary for international law and policymakers to account for and redress the harms wrought by the system through extensive treaty reform or the drafting of a new, rights and freedoms-compliant international legal framework. The regime's fissures and inconsistencies cannot persevere indefinitely. Nor can human rights and fundamental freedoms persist as the self-serving instruments of society's privileged classes. Regardless of whether concerted action takes place, domestic law and policymakers are going to continue turning away from the international toward the national to cope with the IDCS's failures and gaps, putting local interests over inter-state cooperation in the enforcement of the global regulatory regime on drugs.

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Chapter 1: The International Drug Control System

1.1 Drug Control's Universality

This chapter surveys the history of the international drug control system (IDCS) from the late nineteenth century to the present, focusing on the inception and content of the treaties at the core of the transnational legal regime regulating controlled substances: the Single Convention 1961 as amended by the 1972 Protocol, Convention on Psychotropic Substances 1971, and Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. As Catherine Carstairs outlined, each treaty corresponds to one of three stages of drug control in modern history. First, the Single Convention 1961 and its early twentieth century forerunners focused on supply reduction by targeting the production centers of narcotics and controlling international trade whilst introducing penalization into international drug control. Second, the Convention on Psychotropic Substances 1971 and homed in on demand control, treated addiction as a medical issue and, most significantly, the criminalization of individual drug users. Lastly, the Convention Against Illicit Traffic 1988 targeted organized crime and narco-terrorism as threats to international and national peace and security.[10] The conventions constitute a global prohibition regime aimed at total control of the trade in and use of narcotic and psychotropic substances via strict control of the licit, and suppression of the illicit, market.[11] From its beginnings in the late nineteenth century, the IDCS established Euro-American morals, norms, and prejudices as transnational baselines for control of the transnational drugs market, directly through intervention in non-Western jurisdictions and indirectly via the adoption of cosmopolitan

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[10] Catherine Carstairs, "The stages of the international drug control system," *Drug and Alcohol Review* 24 (2005): 57-65.
[11] Neil Boister, "Human Rights Protections in the Suppression Conventions," *Human Rights Law Review* 2, 2 (2002): 199-227.

standards of propriety by foreign elites.[12] Indeed, the near universal ratification of the treaties translates into strict control, prohibition, suppression, and criminalization comprising international and domestic law and policy worldwide, governing individual and group behavior in all four corners of the globe.[13] Even so, drug law and policy experts David Bewley-Taylor and Richard Lines point out that "despite this century old body of international law, and the widespread and substantive impact of drug control conventions on national law and policy, it has rarely been a focus for legal scholars" and "is almost completely absent from the leading textbooks on public international law."[14] This thesis aims to fill the gap, putting the IDCS into historical and political context and engaging with the international and domestic legal and political implications of the regime. The examination of current challenges to its coherence frames the presentation of the potential future(s) of drug control in the chapters that follow.

1.2 Opium and International Drug Control

Drugs are taken for a variety of reasons. Pain relief, physical stimulation, religious ritual, and recreation feature as constants in the history of their consumption. Drugs have also served as valuable commodities in the form of currencies and foodstuffs.[15] Their ubiquity accounts for why they have long been subject to extensive social control. The current IDCS is the most thorough set of limitations on drug use of all time. Before outlining the key instruments of the modern regime, it is instructive to study its precursors. Though the following history is cursory it elucidates the three main issues still facing regulators and the ideas underpinning the drug

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[12] Ethan Nadelmann, "Global Prohibition Regimes: The Evolution of Norms in International Society," *International Organization* 44, 4 (1990), 479-486, 502-513 and 524.
[13] Boister (2002), 199-200 and 227.
[14] David Bewley-Taylor and Rick Lines, "The UN Drug Control Treaties: Contemporary Challenges and Reform," *International Community Law Review* 20 (2018), 399.
[15] Julia Buxton, "The Historical Foundations of the Narcotic Control Regime," in Philip Keefer and Norman Loayza (eds), *Innocent Bystanders: Developing Countries and the War on Drugs* (Washington DC and Basingstoke: World Bank and Palgrave MacMillan, 2010), 62-65.

control as a legal system. First, the drugs market, licit and illicit, is lucrative. Second, the use of drugs is essential in medical practice. These factors necessitate a regulated market to meet commercial and healthcare demands.[16] Third, potent drugs pose a risk to public health, with the capacity to produce physical and psychological dependence and harm. Misuse can lead to addiction, considered a matter of moral failure entailing criminal culpability. There is thus a dichotomy between "legitimate" medical use and "illegitimate" recreational use.[17] These tenets were generated and became dominant in the crux of late nineteenth-century great power geopolitics. Before that time drug control failed to arise as an issue of serious international concern.[18] World opinion began to change as trade routes expanded. The rise of narcotics as global commodities at once enriched colonial powers and enslaved the populations producing and consuming them, spurring violent conflict from the United States and Colombia to Afghanistan and the Philippines and shifting perceptions on the need to control the drugs market.

Ntina Tzouvala has elaborated how Western civilizational discourse in nineteenth century international law synthesized historically situated logics of improvement and biology to fuel the expansion of capitalist modernity via imperialism and colonialism in the extra-European world. The logic of improvement held out political equality as a remote possibility for non-Europeans based on their acceptance and replication of capitalist modes of production, i.e., open markets and free labor, while simultaneously relegating them to an inferior status under international law. The latter was justified by the logical of biology, which ascribed negatively conceived and immutable characteristics like race and culture on subject peoples. Acquiescence to the rules of

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[16] Kettil Bruun, Lynn Pan and Ingemar Rexed, *The Gentlemen's Club: International Control of Drugs and Alcohol* (Chicago: University of Chicago Press, 1975), 38.
[17] William B. McAllister, *Drug Diplomacy in the Twentieth Century: An International History* (London: Routledge, 2000), 3.
[18] Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford: Oxford University Press, 2006), 37-38.

international law and the abandonment of pre-capitalist social and economic forms was deemed "both inevitable and historically as well as morally justifiable as the only path to modernity."[19] Civilization, understood as the logics of improvement and biology, shaped the unequal form and content of rights and duties under international law.[20] While some were able to effectively adapt to modernity, most states outside Europe were unable to compete with the West's superior military power, economic and fiscal clout, and ideological solidarity. Meiji Japan and a few smaller jurisdictions, for instance, used the language and tools of constitutionalism, human rights and fundamentals freedoms, and equality to secure their sovereignty and autonomy in response to imperialism and colonialism to varying degrees of success.[21] That differential treatment was a systemic feature of the expansion of capitalist markets and international law in the nineteenth century is confirmed by the history of drug control.

The ideology of free trade spurred British imperialism from the eighteenth century. Stimulants and narcotics including tea and opium, monopolized by the East India Company, greased the wheels of Empire. The triangular trade in these and other commodities between the United Kingdom, India, and China allowed the British to rebalance its trade deficit and laid the foundations for the first era of economic globalization.[22] While the sale of opium enriched its Western purveyors it wreaked havoc on consumers in the East. Gunboat diplomacy heeled recalcitrant populations. The protectionist Qing Dynasty in China was forced to open itself up to foreign commerce following the Opium Wars in 1838-1842 and 1856-1860, after which a flood

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[19] Ntina Tzouvala, *Capitalism as Civilization: A History of International Law* (Cambridge: Cambridge University Press, 2020), 29.
[20] Tzouvala (2020), 45-46 and 86.
[21] Linda Colley, *The Gun, The Ship, and the Pen: Warfare, Constitutions, and the Making of the Modern World* (London: Profile Books, 2021).
[22] Ken Faunce, *Heavy Traffic: The Global Drug Trade in Historical Perspective* (Oxford: Oxford University Press, 2021), 41-46; Weimin Zhong, "The Roles of Tea and Opium in Early Economic Globalization: A Perspective on China's Crisis in the 19th Century," *Frontiers of History in China* 5, 1 (2010): 86-105.

of Indian opium was unleashed on Chinese society by British merchants.[23] By 1890 there were 15 to 40 million opium smokers in the Middle Kingdom. Unequal treaties like those forcing the opium trade on China demonstrate the perils of failing to modernize along capitalist lines, i.e., opening markets to Western goods, as well as the inequality embedded in international law. Anti-opium activism arose as a response to this devastation and focused on the moral degradation, adverse health consequences, and intrinsic criminality of drug use. Indignation caught on locally and globally as reformers lobbied national governments to work together to outlaw the international opium trade.[24] At around the same time the international community moved to limit the trade in small arms into and between the extra-European world, for similarly ostensibly humanitarianism reasons. The resultant 1890 Brussels Act ordained prohibition as the dominant normative framework of the small arms trade. It established a system of import and export licensing aimed at maintaining the martial superiority of the colonial powers while simultaneously depriving colonial subjects of access to modern weaponry, which could be used to challenge the authority of the metropole. Arms control regulations, argues Neil Cooper, thus constituted a form of governmentality, "particular assemblages of norms, formal and informal practices, responses to evasions, and norm-derived conceptions of interest."[25] The prohibitions and permissions contained in small arms trade rules served the interests of empire as a technology of political, social, and economic control, contributing to a project aimed at refashioning the world order in the image of Western conceptions of sovereignty, free trade, development, and civilization and justifying the paternalistic subordination of societies deemed

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[23] Faunce (2021), 71-79.
[24] Steffen Rimner, *Opium's Long Shadow: From Asian Revolt to Global Drug Control* (Cambridge, MA: Harvard University Press, 2018), 6 and passim.
[25] Neil Cooper, "Race, Sovereignty, and Free Trade: Arms Trade Regulation and Humanitarian Arms Control in the Age of Empire," *Journal of Global Security Studies* 3, 4 (2018): 444-462 (quotation at 456).

racially inferior.[26] The international control of the trade in drugs, like that of arms, was central to the colonial civilizing mission, enhancing great power hegemony over trade and the moral economy to the detriment of non-European polities and peoples.

The UK was able to resist responding to anti-drug trade campaigns and continue business as usual for a time because of its firm foothold in East and Southeast Asia and the Royal Navy's control of the seas. Its dominance would not last long. The entrance of the United States into the imperial fray in the late nineteenth century transformed the opium trade. Americans were interested in both gaining access to the Chinese market and spreading their vision of a moral marketplace.[27] The persistent lobbying of anti-drug Christian missionaries in the opium-producing Philippines, a US territory following the 1898 Spanish-American War, compelled Washington to deal with the opium question.[28] The federal government established the Opium Commission in 1903 to determine how best to control what was viewed as a morally harmful enterprise. Its conclusion was that the opium problem had to be resolved through supply-side interventions. Put an end to cultivation and production and the elimination of consumption would follow. In short, prohibition and suppression were the solution.[29] The British Parliament committed to ending the opium trade in 1906, impelled to act in the name of humanitarian ethics.[30] The move coincided with a Chinese edict proscribing the drug that same year. A consensus of sorts was emerging.[31] With the three major powers – the US, UK, and China – agreed in principle on the necessity of eradicating the "evil" of opium the stage was set for the

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[26] Cooper (2018), 455-458.
[27] Bruun (1975), 9, 28 and 134.
[28] McAllister (2000), 27-28.
[29] Buxton (2010), 62 and 70-71; McAllister (2000), 31; Daniel Wertz, "Idealism, Imperialism, and Internationalism: Opium Politics in the Colonial Philippines, 1898-1925," *Modern Asian Studies* 47, 2 (2013): 467-499.
[30] Nadelmann (1990), 503-504.
[31] United Nations Office on Drugs and Crime, *A Century of Drug Control* (Vienna: UNODC, 2009), https://www.unodc.org/documents/data-and-analysis/Studies/100_Years_of_Drug_Control.pdf, 29-32.

internationally attended Shanghai Opium Commission in 1909. Participants included France, the Netherlands, Portugal, Germany, Austria-Hungary, Italy, Russia, Persia (Iran), Siam (Thailand), and Japan.[32] Disagreement centered on the scale and pace of implementing interdiction measures and the Commission ultimately negotiated a set of resolutions aimed at limiting opium's use to medical purposes alone and strictly regulating its import and export.[33] These were the first steps initiating truly international cooperation in drug control.

US American and German commercial and pharmaceutical interests similarly drove the development of coca economies and a new wave of imperialism in South America. By the turn of the twentieth century the US was the largest consumer of cocaine worldwide.[34] In light of new trends, The Hague hosted international delegations to fine tune what was agreed at Shanghai in 1912. In addition to opium the legal statuses of morphine, cocaine, and cannabis were also considered. With no consensus reached by participating states the interpretation and implementation of drug control was left to national governments to decide. What was clear was that drug control would be considered primarily a trade and commerce issue.[35] Moral claims were present in deliberations but not a central feature of the outcome document. The First World War interrupted the ratification process, so The Hague International Opium Convention was mostly adopted – and pressed upon the vanquished powers – following the 1919 Paris Peace Conference. Administered by the freshly minted League of Nations drug control became a central focus of the post-World War I international legal order.[36] The League's Advisory Committee on the Traffic in Opium and Other Dangerous Drugs, composed of states involved in

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[32] UNODC (2009), 33.
[33] Collins (2021), 13 and 19-20; Bruun (1975), 10-11 and 38.
[34] Faunce (2021), 53-58 and 81-82.
[35] Carstairs (2005), 58.
[36] McAllister (2000), 37.

the opium trade, served as the supervisors of the Convention. Over the next decade and a half, the foundations of international drug control were cemented.

The supply-side approach to drug control sidelined moral sentiment and medico-scientific fact in favor of "economic regulations, regulatory statutes, and enforcement measures."[37] The scope of drugs under control expanded as quantitative datasets were adopted as markers of progress. The 1925 International Opium Convention, held in Geneva, set out an institutional framework for narcotics control together with cannabis.[38] The 1931 Convention for Limiting the Manufacture and Regulating Distribution of Narcotic Drugs added the estimates system, whereby states reported the amount of opium required for domestic medical and scientific use.[39] Crucially, the 1931 Convention introduced schedules into the treaty regime, classifying controlled substances according to their medical utility, abuse potential, and addictiveness. Germany was able to negotiate special treatment for parts of its considerable pharmaceutical sector, entrenching privileges and exemptions for Western commercial interests into the treaty; freeing researchers and corporations of many of the constraints binding narcotic-producing states. It was agreed that drugs were to be used for medical and scientific purposes alone and that governments were to avoid surplus stocks. It was believed the latter would help avoid diversion and illicit consumption while also ensuring adequate access to essential and inexpensive medicines. At the same time, Western consumer states and Asian and South American producers wanted to ensure the market for narcotics remained as open as possible given the medical utility and commercial value of these commodities. The Great Depression's devastating impact on the economy was on the minds of the 1931 Convention's negotiators, many of whom wanted to

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[37] McAllister (2000), 49-50.
[38] Signed and ratified by 56 countries. UNODC (2009), 52.
[39] Signed and ratified by 67 countries. UNODC (2009), 55.

ensure the lucrative trade continued.[40] A regulated market with an international administrative apparatus would manage the commanding heights of the narcotic economy.

Independent monitoring organizations including the Permanent Central Narcotics Board and Drug Supervisory Body were developed to manage the system. The compilation of statistics was at the core of their work. The licit market became more regulated and at the same time illicit trade and consumption flourished. In response the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs urged strong penal sanctions against traffickers.[41] Even if the League of Nations was perceived as weak and ineffective it could at least boast about its drug control successes. Global opium production more than halved from 1907 to 1934 and sales declined by 65 percent across Southeast Asia.[42] The League also demonstrated that international cooperation could effectively work in pursuit of common goals. By the end of the 1930s the IDCS's basic infrastructure and regulatory environment had divided the drugs market into separate licit and illicit streams. It established supply-side control and the prohibition and suppression of the non-medical use of "traditional drugs of abuse" – opium, cocaine, and cannabis – as givens in the drug law and policy arena.[43] These features persisted even as the ideology and infrastructure of the regime changed.

Failure to prevent the Second World War, among other hostilities, proved the death knell for the League. The IDCS's control of the drugs market was subsequently put under immense pressure. According to William B. McAllister: "The war had stimulated agricultural production

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[40] William B. McAllister, "The global political economy of scheduling: the international-historical context of the Controlled Substances Act," *Drug and Alcohol Dependence* 76, 1 (2004), 3-6.
[41] Bruun (1975), 11-15. Further treaties included the Agreement concerning the Manufacture of Internal Trade in, and Use of Prepared Opium (1926) and Agreement for the Control of Opium Smoking in the Far East (1937). Buxton (2010), Table 2.1 and 73-77.
[42] Buxton (2010), 77-78.
[43] William B. McAllister, "Foundations of the international drug control regime: nineteenth century to the Second World War," in David R. Bewley-Taylor and Khalid Tinasti (eds), *Research Handbook on International Drug Policy* (Cheltenham, UK: Edward Elgar, 2020), 2-18.

and pharmaceutical manufacture [of synthetic narcotics], providing an ample reserve for the clandestine market."[44] The challenges were great, and the system metamorphosed largely in the image of the US, which had hosted League institutions during the war. The US leveraged its wartime power to sway European powers away from regulatory moderation towards prohibitionism.[45] The subsequent founding of the United Nations (UN) in 1945 brought changes to the structures and instruments of drug control, most of which survive to this day. The UN General Assembly (UNGA), the international community's principal decision-making body representing all states at the UN, sets the long-term drug control policy agenda. It may, for instance, issue non-binding recommendations regarding treaty interpretation and implementation and organize plenary UNGA Special Sessions, such as those on the World Drug Problem.[46] The UN Economic and Social Council (ECOSOC) is made up of states parties to the UNGA and administers the system inherited from the League era, advised by the policy-making Commission on Narcotic Drugs (CND). The World Health Organization (WHO), established in 1948, assesses the necessity of scheduling substances based on their dependence-producing qualities among other roles. The 1948 Paris Protocol significantly expanded the scope of drug control by permitting any drug considered harmful to be scheduled, including previously excluded synthetic substances produced in the West.[47] There were old challenges too. The 1953 Opium Protocol, for example, sought a balance between the strict regulation of the supply-side of the opium trade and ensuring adequate access to the narcotic to meet demand for medical use, though it failed to receive the requisite number of ratifications to enter into force before the Single Convention

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[44] McAllister (2000), 156.
[45] Collins (2021), esp. chapter 2.
[46] Daniel Wisehart, *Drug Control and International Law* (New York: Routledge, 2019), 11-16.
[47] Bruun (1975), 39.

superseded it.[48] In this way, the form, content, and disputes characteristic of the modern IDCS were in place by the 1950s. Reform, innovation, and the strengthening of existing norms was to come in the form of comprehensive treaties bringing criminalization into the fold of drug control.

1.3 The United States and the War on Drugs: Exporting Domestic Policy to the World

The history of the contemporary IDCS is one of empire, markets, and the birth of the modern international legal order. It is also a US American story. Developments in the United States are key to understanding the dynamics of drug control because it has been at the forefront of the push to eradicate the illicit drugs trade at home and abroad. Indeed, US law and policy has been transplanted into many jurisdictions, both voluntarily and at the hegemon's insistence, making it the premier player in the globalization of the War on Drugs. A combination of a paucity of effective opposition to the project abroad and common sentiments on the need to regulate intoxicants as taboos paved the way for prohibition's integration into local law and custom.[49] The strict control, prohibition, suppression, and criminalization of drugs and drug users has become one of the country's most successful law and policy exports, contributing to the capture of the drugs market by organized crime, proliferation of public sector corruption, growth in property crime to fuel illicit consumption, diversion of workers from an "honest living" toward black market activities, increased potency and dangerousness of drugs via the "iron law of prohibition," enticement of the curious to taste the "forbidden fruit" of illicit drugs, decreased access to scheduled drugs for medical purposes, stigmatization and criminalization of consumption which dissuades individuals from seeking health services, mass incarceration, undermining of law's authority as drug laws are ignored and disrespected by not insignificant

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[48] Buxton (2010), 83-84. On the diplomatic wrangling between producer and consumer states at the CND see Collins (2021), 152-156.
[49] Andreas and Nadelmann (2006); Nadelmann (1990), 509-511.

numbers of the population, dis- and misinformation vis-à-vis the consequences of drug use, discrimination against the impoverished and people of color, internationalization of the War on Drugs, diminution and violation of constitutional rights and freedoms, and criminalization of millions of otherwise law-abiding citizens.[50] These themes, addressed in this and subsequent chapters, are characteristic of the effects of the IDCS and its implementation the world over.

At the end of the nineteenth century the US cooperated with the Great Powers in their effort to control the opium trade via import restrictions.[51] This produced a backlash at home. To lawmakers and public figures drug control was about more than trade. It was about preserving a way of life. Motivated in large measure by prejudice, whether based on race, ethnicity, or class, America's paternal set advocated for the protection of morals through the prevention of undesirable social conduct, from violence to drug use to economic unproductivity, in society's lower strata.[52] More pragmatically, campaigns against the dangers of unregulated patent medicines and pressure from the medico-scientific and pharmaceutical establishments, keen to monopolize access to controlled substances, influenced the course of public health policy.[53] The US began to vocally oppose international efforts to implement a market-centered regulatory approach to opium. Congress passed the Harrison Narcotic Act in 1914, making domestic drug control a matter of criminal law by limiting opium use to medical purposes alone. But morality was not the most pressing concern for states interested in reorganizing the rules of the drugs trade. This was demonstrated when American representatives failed to convince their peers at the 1925 Geneva Conference "to limit [the] consumption of drugs to medical and scientific

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[50] Douglas N. Husak, *Drugs and Rights* (Cambridge: Cambridge University Press, 1992), 51-59.
[51] Andreas and Nadelmann (2006), 123.
[52] Andreas and Nadelmann (2006), 40-41 and 44.
[53] Nadelmann (1990), 505.

purposes" only, after which they walked out of the meetings.[54] Regardless of the lack of international support for its position, the US continued pushing for stricter control. The picture began to change in the 1930s when Henry Anslinger, the first Commissioner of the Federal Bureau of Narcotics, was able to raise the profile of the prohibitionist, suppressionist line by pushing a tough law and order approach to combatting illicit drug use.[55] His efforts were successful. The manufacturing controls included in the 1931 Limitation Convention reflected "many features of…American legislation" and the 1936 Convention promoted the "strengthening of criminal penalties."[56] The US was then able to argue that prohibition and suppression were a matter of "international obligations" and many jurisdictions, from Canada to Hong Kong, followed the American lead by passing their own criminal legislation.[57] Imperial state power and private commercial and pharmaceutical interests converged from the 1940s to the 1960s, too, exercising influence over the US's South American neighbours to submit the coca economy to the logic of drug control with its division between licit and illicit production.[58] In these ways the US had successfully exported prohibition and suppression to the world.

The groundwork for the War on Drugs had been laid well before the end of World Word II. Postwar American lawmakers, Democrat and Republican alike, had used the politics of "law and order" to address white fears related to rising crime rates and the changing place of African Americans within the social order during and after the civil rights era, laying the foundations for

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[54] Neil Boister, "The Interrelationship between the Development of Domestic and International Drug Control Law," 7 *African Journal of International & Comparative Law* 906 (1995), 907-909.
[55] Andreas and Nadelmann (2006), 42 and 128; Alexandra Chasin, *Assassin of Youth: A Kaleidoscopic History of Harry J. Anslinger's War on Drugs* (Chicago: University of Chicago Press, 2016).
[56] Though the US did not itself sign or ratify the Convention. Boister (1995), 909.
[57] Bertil Renborg, "International Control of Narcotics," *Law and Contemporary Problems* 22, 1 (1957), 139 (note 28) cited in Boister (1995), 909-911.
[58] Suzanna Reiss, *We Well Drugs: The Alchemy of US Empire* (Oakland: University of California Press, 2014), 1-2 and 10-11.

the carceral state and mass incarceration.[59] But it was President Richard Nixon who inaugurated the militarization of law and policy when he announced drugs to be "public enemy number one" in 1971.[60] Congress had passed the Controlled Substances Act (CSA) in 1970, regulating "the lawful production, possession, and distribution of controlled substances" with five schedules classifying drugs based on their "medical use, potential for abuse, and safety or dependence liability."[61] All but five US states and the District of Columbia passed the Uniform Controlled Substances Act into state law in the years that followed.[62] The federal Drug Enforcement Administration (DEA) was established in 1973 and was responsible for the "street-level enforcement" of the CSA throughout the United States. The message was clear: Illicit consumption was no longer tolerated. A popular mandate grew throughout the 1970s as Americans became more and more concerned about the rise in drug use and violent crime.[63] The targets of Nixon's "law and order" approach to drug control at home were largely pot-smoking youth rebelling against the Vietnam War and protesting for civil rights, unpopular groups among conservative Republicans. Though there was pushback at the state level, with Oregon decriminalizing cannabis in 1973 and 11 states following suit by 1978, reform efforts were short-lived.[64] After a brief flirtation with the idea of federal decriminalization of cannabis by President Jimmy Carter, his administration embraced zero-tolerance policies and a crime control model of

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[59] Heather Ann Thompson, "Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History," *Journal of American History* 97, 3 (2010): 703-734.
[60] Kathleen J. Frydl, *The Drug Wars in America, 1940-1973* (Cambridge: Cambridge University Press, 2013). For a detailed account of drug policy in the Nixon years see David F. Musto and Pamela Korsmeyer, *The Quest for Drug Control: Politics and Federal Policy in a Period of Increasing Substance Abuse, 1963-1981* (New Haven: Yale University Press, 2002), chapters 2-4. See also Andreas and Nadelmann (1996), 5.
[61] 21 USCA, § 812(b). See Brian T. Yeh, "The Controlled Substances Act: Regulatory Requirements," Congressional Research Service (13 December 2012), https://sgp.fas.org/crs/misc/RL34635.pdf, 1.
[62] Husak (1992), 27-28.
[63] Don Stemen, "Beyond the War: The Evolving Nature of the U.S. Approach to Drugs," *Harvard Law & Policy Review* 11, 2 (2017), 384.
[64] Emily Dufton, *Grass Roots: The Rise and Fall and Rise of Marijuana in America* (New York: Basic Books, 2017), chapter 4.

enforcement directed at minority urban areas and middle-class suburban youth.[65] The US was committed to strict control, prohibition, suppression, and criminalization.

Law and policy were not crafted in a simple top-down process. In the 1980s civil society organizations lobbied President Ronald Reagan to crack down on drugs and First Lady Nancy Reagan's iconic "Just Say No" campaign conveyed the message that abstinence was the only choice for young, clean-cut (white) Americans.[66] Indulging in drug use was not only immoral and criminal; it was the source of just about all of 1980s America's woes. Legal developments reflected politicians' and voters' desire to punish offenders.[67] Federal mandatory minimum sentences for drug-related offenses under the Anti-Drug Abuse Act 1986, amended in 1988, institutionalized the over-policing and mass incarceration of young black men.[68] The sentencing disparity between crack and powder cocaine is the most striking example of racial bias in US drug enforcement, whereby possession of 5 grams of crack cocaine, the more common form of cocaine used in the black community, is treated the same as possession of 500 grams of powder cocaine, consumed predominantly by white Americans.[69] Crack and power cocaine are chemically the same substance. Even so, these double standards continued through the 1990s despite growing recognition of the systemic racism and oppression involved.

Rhetorical overtures to remedying these issues followed in the 2000s and 2010s, as President George W. Bush emphasized treatment and rehabilitation and President Barack Obama

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[65] Matthew D. Lassiter, "Impossible Criminals: The Suburban Imperatives of America's War on Drugs," *Journal of American History* 102, 1 (2015): 126-140.
[66] Lassiter (2015). On the influence of parent group activism on US drug policy see Dufton (2017), chapters 8-10.
[67] Arthur Benavie, *How the Drug War Ruins American Lives* (Santa Barbara: Praeger, 2016), xii.
[68] David F. Musto, *The American Disease: Origins of Narcotic Control, Third Edition* (Oxford University Press, 1999), 273-280; Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge, MA: Harvard University Press, 2016), chapter 9.
[69] See American Civil Liberties Union, *Cracks in the System: Twenty Years of Unjust Federal Crack Cocaine Law* (October 2006); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010); Benavie (2016), chapter 7.

spoke of the racial impact of the War on Drugs.[70] President Obama signed the Fair Sentencing Act into law in 2010, replacing the 100:1 sentencing differential between crack and powder cocaine with a still egregious 18 to 1 ratio.[71] The human and fiscal costs of mass incarceration, questions regarding the regime's proportionality, increased acceptance and legalization of cannabis for therapeutic and recreational purposes at the state level, and the opioid epidemic have inspired policy change at the federal and state levels.[72] But the conflict between federal and state law has prevented lasting change from being implemented and continues to hamstring reform. For instance, the federal government can intervene in the intrastate market in cannabis under the Constitution's Commerce Clause power because intrastate production affects supply and demand not only within individual states, but across the country.[73] Pushback from Drug Warriors, including those within the Trump Administration, also foiled legal and policy changes in the latter half of the 2010s.[74] As a matter of course, for every progressive action in US drug control there has been a greater or equal regressive reaction.

While the United States played a pivotal role in the development of the IDCS from the turn of the twentieth century it was its post-World War II political and economic hegemony that allowed it to set the global agenda in the fight against illicit drugs and export its methods abroad.[75] In its early phase US extraterritorial engagement focused on interdicting Mexican cannabis and Turkish opium before it arrived in the US for domestic consumption.[76] It could not

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[70] Stemen (2017), 375-380.
[71] Fair Sentencing Act of 2010 (Public Law 111-220).
[72] Stemen (2017), 412-413.
[73] *Gonzales v Raich*, 542 U.S. 1 (2005).
[74] Eric L. Jensen et al., "Progress at the State Level Versus Recent Regress at the Federal Level: Changes in the Social Consequences of the U.S. War on Drugs," *Contemporary Drug Problems* 46, 2 (2019): 139-164.
[75] Neil Boister, *Penal Aspects of the UN Drug Conventions* (The Hague: Kluwer Law International, 2001), 67; Andreas and Nadelmann (2006), 10.
[76] Andrew B. Whitford and Jeff Yates, *Presidential Rhetoric and the Public Agenda: Constructing the War on Drugs* (Baltimore: Johns Hopkins University Press, 2009), 39-49. On Turkish opium see Musto (1999), 250-252 and on Turkish opium and Mexican cannabis see Musto and Korsmeyer (2002), 45-48 and 62-67.

succeed alone. Narcotics policing occasioned the militarization and internationalization of American law enforcement, beginning in the 1950s. The DEA and other federal agencies provided technical assistance to cooperating states throughout the Nixon years, a practice that took on a new urgency during the Reagan administration.[77] As the threat of international communism subsided from the 1980s the US constructed the "narco-terrorist" and "drug trafficker" as the new national security threat in need of containment.[78] Washington pivoted toward a foreign policy of counternarcotic aid, direct military intervention, and legal assistance targeting the supply of narcotics in source countries,[79] with the DEA in particular pushing for the global adoption of the American model of drug control.[80] It ratcheted up military involvement abroad in the 1980s and 90s, with forays across Europe and into Mexico, Honduras, Panama, Colombia, Peru, Bolivia, as well as Afghanistan after 9/11.[81] The US has been the enforcer of the IDCS.[82] It has shaped transnational drugs markets and imposed the Washington consensus – free trade, privatization, and deregulation – on collaborating governments to remake the world in its image: free markets buttressed by the national security state.[83] Aggressive racial policing and

[77] Stuart Schrader, *Badges Without Borders: How Global Counterinsurgency Transformed American Policing* (Oakland: University of California Press, 2019), 261-262; Whitford and Yates (2009), 49.
[78] Robin Room and Angela Paglia, "The international drug control system in the post-Cold War era. Managing markets or fighting a war?" *Drug and Alcohol Review* 18 (1999), 311 and 313.
[79] "The United States decertification procedure," Geiß and Wisehart argue, "is illustrative in this regard. Its applicability is reserved to 'major transit…or major drug producing countries' and requires the US President – except if he determines that national security interests are at stake – to suspend United States assistance in cases where such a country has 'failed demonstrably…to adhere to its obligations under international counternarcotics agreements." Robin Geiß and Daniel Wisehart, "'Concerned with the Health and Welfare of Mankind…' The UN Drug Conventions – A Suitable Legal Framework for the 21st Century?" *Max Planck Yearbook of United Nations Law Online* 18, 1 (2015), 389 citing the Foreign Relations Authorization Act, FY 2003 (Public Law 107-228), §706(1).
[80] Andreas and Nadelmann (2006), 128-131.
[81] Waltraud Queiser Morales, "The War on Drugs: A New US National Security Doctrine?" *Third World Quarterly* 11, 3 (1989): 147-169; Andreas and Nadelmann (2006), 128-131 and 163-165; Daniel Patten, "The Mass Incarceration of Nations and the Global War on Drugs: Comparing the United States' Domestic and Foreign Drug Policies," *Social Justice* 43, 1 (2016): 86-105.
[82] Boister (2001), 516; Andreas and Nadelmann (2006), 154-155 and 241.
[83] Brittany Edmoundson, "Drug Control in the Age of Neoliberalism," *Diplomatic History* (2021), https://doi.org/10.1093/dh/dhab046, 1-4.

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carceralization are corollaries of this imperial project, enacted first across the US and then implemented overseas under the influence and with the guidance of the federal government.[84] The attendant death and destruction wrought in the developing world by crop eradication, paramilitary forces, and armed conflict is well-documented.[85] The use of force is often now the first resort in the campaign to eradicate the world trade in and consumption of illicit drugs. The Philippines' President Rodrigo Duterte, in office from 2016 to 2022, employed extrajudicial killings on a mass scale to suppress drug trafficking and use.[86] The notion that the War on Drugs can be waged in conformity with human rights standards seems far-fetched, but that has not prevented international organizations from paying lip-service to the idea.

The IDCS was recrafted and implemented across the globe in the Post-World War II era. More than a regulatory regime, the international community fashioned "a managed economy on a global scale" for the sale of narcotic and psychotropic substances.[87] This went against the Post-Cold War consensus regarding "freedom of markets and trade" and "consumer sovereignty," famously called, along with the purported hegemony of democracy, the End of History by political scientist Francis Fukuyama.[88] But so far as drug control was concerned, it really did seem like the "end of history"; at least from the perspective of law and policy. Indeed, if anything demonstrates that the US "behaves as an imperial power," it is that it "very much

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[84] Schrader (2019).

[85] See Philip Keefer and Norman Loayza (eds), *Innocent Bystanders: Developing Countries and the War on Drugs* (Washington DC and Basingstoke: World Bank and Palgrave MacMillan, 2010); Neil Carrier and Gernot Klantschnig, *Africa and the War on Drugs* (London: Zed Books, 2012); J. Michael Blackwell, "The Costs and Consequences of US Drug Prohibition for the Peoples of Developing Nations," *Indiana International & Comparative Law Review* 24, 3 (2014): 665-692; Antony Loewenstein, *Pills, Power, and Smoke: Inside the Bloody War on Drugs* (Melbourne & London: Scribe, 2019); Christopher M. White, *The War on Drugs in the Americas* (New York: Routledge, 2019); Horace A. Bartilow, *Drug War Pathologies: Embedded Corporatism and U.S. Drug Enforcement in the Americas* (Chapel Hill: University of North Carolina Press, 2019).

[86] David T. Johnson and Jon Fernquest, "Governing through Killing: The War on Drugs in the Philippines," *Asian Journal of Law and Society* 5 (2018): 359-390.

[87] Room and Paglia (1999), 309.

[88] Room and Paglia (1999), 313; Francis Fukuyama, *The End of History and the Last Man* (London: Penguin, 1992).

follows the historical pattern of exporting criminal justice norms, law enforcement priorities, and policing practices" across the globe, "with the objective of territorial access" as its main prerogative.[89] The near universal ratification of the modern treaty regime speaks to the US's success. But like the imperial endeavors that precluded it, the US-led international drug control regime is riddled with endemic problems. Indeed, the regime has been, and is, widely regarded as a failure by individuals and organizations across the political spectrum, from libertarians to liberals and former world leaders.[90] Its future has come into question. This thesis focuses on the failures of the international drug control regime to adequately recognize and accommodate the constitutional commitments of UN Member States to protect fundamental freedoms and human rights at the domestic level.

Distinguishing policy success from failure is not simply a matter of assessing objective facts and figures, nor is it a mere exercise in subjective partisanship. Political scientist Allan McConnell's spectrum of policy success and failure bridges the gap between simple quantitative and qualitative measures, separating policy into three constituent parts: process, programs, and politics. Process denotes how policy is developed and formulated. Programs are the translation of ideas into positive policy. Politics entail the real-world consequences of policy, reputational and electoral, on decisionmakers.[91] This division makes for a more holistic evaluation of results. As

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[89] Andreas and Nadelmann (2006), 8-10.
[90] Room and Paglia (1999), 313; Christopher J. Coyne and Abigail R. Hall, "Four Decades and Counting: The Continued Failure of the War on Drugs," Cato Institute Policy Analysis 811 (12 April 2017), accessed 24 February 2020, https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-811-updated.pdf; George P. Shultz and Pedro Aspe, "The Failed War on Drugs," *New York Times*, 31 December 2017, accessed 24 February 2020, https://www.nytimes.com/2017/12/31/opinion/failed-war-on-drugs.html; Global Commission on Drug Policy, "The War on Drugs: Report of the Global Commission on Drug Policy," June 2011, accessed 24 February 2020, https://www.globalcommissionondrugs.org/wp-content/uploads/2017/10/GCDP_WaronDrugs_EN.pdf; Global Commission on Drug Policy, "Regulation: The Responsible Control of Drugs," 2018, accessed 24 February 2020, https://www.globalcommissionondrugs.org/wp-content/uploads/2018/09/ENG-2018_Regulation_Report_WEB-FINAL.pdf.
[91] Allan McConnell, "Policy Success, Policy Failure and Grey Areas In-Between," *Journal of Public Policy* 30, 3 (2010), 349-350.

McConnell formulates it: "A policy is successful if it achieves the goals that proponents set out to achieve and attracts no criticism of any significance and/or support is virtually universal."[92] By contrast: "A policy fails if it does not achieve the goals that proponents set out to achieve, and opposition is great and/or support is virtually non-existent."[93] The IDCS has without doubt been successful so far as process is concerned. The US's prohibition and suppression approach, too, is a success. The Single, Psychotropic, and 1988 conventions are nearly universally ratified and domesticated at the national level. Their programs, however, particularly their dual purpose of (1) ensuring adequate access to controlled substances and essential medicines and (2) restricting their use to exclusively medical and scientific purposes, have largely failed. Essential medicines are widely available in the Global North and inaccessible in most of the rest of the world. And the illicit consumption of drugs has not been curtailed. If anything, it has grown significantly in the recent past. At the same time prohibition and suppression have directly and indirectly caused myriad human rights abuses. Politically, law and order and prohibitionist policies have been leveraged to great success by politicians of all stripes. Indeed, drugs have been the "ideal scapegoat" for many of the US's failures, a problem confronted in lieu of actually tackling complex social and economic issues.[94] Likewise has drug reform, particularly cannabis legalization in North and South America, been a political success. McConnell notes that there are policy domains where "government may win the battle (process) and lose the war (program)."[95] The law and policy of the IDCS is, in that regard, a successful failure. Law and policymakers continue to pursue its goals as a result of path dependency, discussed in detail in chapter 2. Additionally, they cannot be seen to be doing nothing. This is because drug trafficking and

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[92] McConnell (2010), 351.
[93] McConnell (2010), 357.
[94] Husak (1992), 16-18.
[95] McConnell (2010), 358.

consumption is a "wicked issue" with "multiple causes and no clear solutions…it is often easier for governments to deal with symptoms rather than tackle underlying social causes."[96] The IDCS is not fit for purpose according to its own metrics, a contention substantiated in the text that follows.

The roots of contemporary conflicts within the IDCS are grounded in the firmament of international trade law and Western moral entrepreneurism. The former is self-explanatory. The regime resolves to control and regulate the international market in narcotic and psychotropic substances. Western moral entrepreneurism, however, the "aggressive[] exporting [of] favored prohibition norms and…determin[ation of] the content and intensity of international crime control campaigns,"[97] colors what appears at first blush to be an uncomplicated history of bringing uniformity to a patchwork of trade treaties and domestic legal principles and practices. Positive law in the form of drug control obfuscates these ideological dynamics, lending particularistic moral values an air of universalism, which justifies criminalization.[98] The interplay of rules, resistance, and resolution between the practical and moral imperatives of drug control institutions, and the individuals, groups, and states that have challenged them, has played out at the national and international levels from the inception of the IDCS. Before examining these issues, though, it is necessary to survey the three international drug control conventions in detail.

1.4 The Modern Treaty Regime

The modern IDCS treaties – the Single Convention 1961, Convention on Psychotropic Substances 1971, and 1988 Convention – have three main goals: limiting access to controlled

[96] McConnell (2010), 358.
[97] Andreas and Nadelmann (2006), 224.
[98] See Husak (1992), 59-70.

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substances to medical and scientific purposes alone via a penal regime, regulating the trade in controlled substances, and ensuring access to essential controlled medicines.[99] The regime's substantive core reflects the international community's commitment to criminalizing the illicit traffic of narcotic and psychotropic substances along the supply chain, from producer to consumer. Offenses and penalties are instituted at the national level but must meet the minimum threshold set by the conventions. This "top-down process" gives states some latitude to pursue the object and purpose of the treaties in their own way.[100] That said, states have generally toed the IDCS line and implemented criminal laws in conformity with the conventions.[101] A uniform, universal approach to drugs and their proper and improper use has prevailed across most of the globe. This weltanschauung was represented at the 1998 UN General Assembly Special Session on the World Drug Problem, a meeting identified as "confirming prohibition as the sole paradigm for addressing global drug use."[102] As such, the IDCS fits the description of what Martti Koskenniemi calls a hegemonic regime, "engaged in universalisation strategies, trying to make their special knowledge and interest appear as general interest, a commonplace consciousness."[103] And to a great extent the treaties and treaty bodies still command obedience and compliance from states, but this consensus is under stress in a number of jurisdictions.

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[99] Robin Room, "The United Nations Drug Conventions: Evidence on Effects and Impact," in Nady el-Guebaly et al. (eds), *Textbook on Addiction Treatment: International Perspectives*, Second Edition (Cham: Springer, 2021), 802-804.
[100] Boister (2001), 71-72.
[101] Boister (2001), 530.
[102] Khalid Tinasti, "Toward the End of the Global War on Drugs," *Brown Journal of World Affairs* 25, 2 (Spring/Summer, 2019), 111-112. See United Nations General Assembly, "Resolution Adopted by the General Assembly: Political Declaration," 21 October 1998, A/RES/S-20/2, accessed 9 December 2019, https://www.unodc.org/documents/commissions/CND/Political_Declaration/Political_Declaration_1998/1998-Political-Declaration_A-RES-S-20-2.pdf.
[103] Martti Koskenniemi, "Hegemonic Regimes," in Margaret A. Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012), 315.

The consequences are apparent in revisionist discourses taking place within the highest organs of the IDCS. The strict control, prohibitionist, suppressionist, and criminal ethos that dominate law and policy was revisited in 2009 when states parties to the regime began questioning its fitness for purpose directly. That year the CND released a Political Declaration showing growing tension between states over hotly contested issues like the inflexibility of the treaties, harm reduction policies, the inadequacy of resources available to states combatting drug trafficking, and cost of the War on Drugs; for example, the severe social, economic, and health consequences of crop eradication policies.[104] These points of contention evidence a divergence between the purported "core values" and purposes of the UN, which include "promoting and encouraging respect for human rights and for fundamental freedoms" under Article 1(3) of the Charter,[105] and the reality of the detrimental effects of the IDCS on individuals and communities affected by its policies.[106] Public pronouncements noting the presence of disagreement among states, however, do not change the substantive character and effects of the conventions.

The focus of analysis here is simple possession of narcotic and psychotropic substances for personal consumption within the general framework of the drug control conventions. Non-medical, recreational use was and continues to be a key driver of international drug control law and policy.[107] This makes drug control largely a matter for law enforcement, bringing producers, suppliers, and users within the fold of the criminal justice system. For this reason, as Neil Boister points out and the UNDP advised states parties to the IDCS, the treaties implicate constitutional

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[104] Tinasti (2019), 112. See United Nations Office on Drugs and Crime, "Political Declaration and Plan of Action on International Cooperation Towards Integrated and Balanced Strategy to Counter the World Drug Problem," 11-12 March 2009 (New York: United Nations, 2009), accessed 9 December 2019, https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_52/Political-Declaration2009_V0984963_E.pdf.
[105] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 1(3).
[106] David R. Bewley-Taylor, "Emerging policy contradictions between the United Nations drug control system and the core values of the United Nations," *International Journal of Drug Policy* 16 (2005), 425.
[107] Wisehart (2019), 6.

human rights and fundamental freedoms to liberty, privacy, due process, and religious freedom among others, though there is no provision for their protection in the conventions.[108] The inclusion of constitutional caveats, or safeguard clauses, in the conventions does leave room to domestic courts to subject international legal obligations to the requirements of constitutional law. The conventions also, however, permit states to be stricter than the regime requires in their implementation of the IDCS. There is thus no inherent progressive or regressive impulse in the treaties. Much of the interpretation of specific rights and freedoms depends on national conceptions thereof, which may derive from "entirely different kinds of normative foundations, or…simply diverge in their conceptions of the right" compared to international human rights law and other jurisdictions,[109] with potentially "indefensible" consequences, like the dilution of certain protections for those on the receiving end of the IDCS's penal provisions.[110] Strict control, prohibition, suppression, and criminalization are immanent features of the IDCS's treaties. The next sections outline the key features of these instruments with an eye to contextualizing the political and constitutional conflicts discussed in ensuing chapters.

1.5 Single Convention 1961 as amended by the 1972 Protocol

The Single Convention consolidated existing international drug control treaties into one instrument, maintaining key features of previous conventions like the indirect supervision of states' execution of treaty obligations, limited enforcement mechanisms, and a focus on reducing supply rather than combatting demand.[111] It departed from previous agreements in a radical way,

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[108] Boister (2001), 524; United Nations Development Programme et al. (2019).
[109] Gerald L. Neuman, "Human Rights and Constitutional Rights: Harmony and Dissonance," *Stanford Law Review* 55, 5 (2003), 1876.
[110] Neuman (2003), 1879.
[111] David Bewley-Taylor and Martin Jelsma, "Regime change: Re-visiting the 1961 Single Convention on Narcotic Drugs," *International Journal of Drug Policy* 23 (2012a), 75 and 80; Constanza Sánchez-Avilés and Ondrej Ditrych, "The evolution of international drug control under the United Nations," in David R. Bewley-Taylor and Khalid Tinasti (eds), *Research Handbook on International Drug Policy* (Cheltenham, UK: Edward Elgar, 2020), 22.

moving from a vision of drug control as control of a marketplace to "a more prohibitive ethos"[112] that sought to "eliminate non-medical and non-scientific drug use"[113] by introducing "penal obligations for signatory states to criminalise, under their domestic law, unlicensed production and trade."[114] The Single Convention's limitation of the trade and consumption of narcotics to medical and scientific purposes and strictly controlled regulatory framework now constitute "the standard régime" of drug control.[115] The paradigm facilitates the agenda and global hegemony of consuming states in the developed world, the US especially, and its desire to control the drugs market by eradicating the illicit cultivation and production of raw narcotics in supplier states in the developing world.[116] The approach also reflects the ideals of the states that drafted the treaty, including their concern for the promotion of "the health and welfare of mankind," recognition of the indispensability of narcotics to medicine, and conviction that addiction was a "serious evil."[117] Despite referencing "the health and welfare of mankind"[118] the trajectory set by the Single Convention aimed primarily at eliminating the so-called "world drug problem" via "prohibition oriented and supply-side dominated measures."[119] A political theology of "evil" is manifest in the Single Convention, argues Kojo Koram, informed by Postwar perceptions of the advance of civilization, Christian human rights, and racial panics.[120] The treaty accordingly

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[112] Bewley-Taylor and Jelsma (2012a), 73.
[113] Bewley-Taylor and Jelsma (2012a), 75.
[114] Bewley-Taylor and Jelsma (2012a), 80; Sánchez-Avilés and Ditrych (2020), 21-23.
[115] Single Convention, Article 2(1); United Nations, *Commentary on the Single Convention on Narcotic Drugs, 1961* (New York, 1973), 51-52, para 1.
[116] Boister (2001), 45; Bewley-Taylor and Jelsma (2012a), 78; Collins (2021), 187.
[117] Single Convention, preamble.
[118] Geiß and Wisehart (2015).
[119] David R. Bewley-Taylor and Malgosia Fitzmaurice, "The Evolution and Modernisation of Treaty Regimes: The Contrasting Cases of International Drug Control and Environmental Regulation," *International Community Law Review* 20 (2018), 409-410.
[120] Kojo Koram, "Drug Prohibition and the End of Human Rights: Race, 'Evil,' and the United Nations Single Convention on Narcotic Drugs, 1961," in Susannah Wilson (ed), *Prohibitions and Psychoactive Substances in History, Culture and Theory* (New York: Routledge, 2019).

monitors and polices the market, medicine, and morality.[121] There is space within the regime for states to adapt it to local constitutional requirements, but these cannot encroach upon the boundaries set by the treaty's central provisions and the treaty bodies monitoring their execution.

The International Narcotics Control Board (INCB) oversees the treaty-based licit market in narcotic drugs and psychotropic substances. It is comprised of 13 independent experts who liaise with national authorities to limit the supply and use of scheduled drugs to medical and scientific purposes and prevent and interdict illicit trafficking and use.[122] To this end, the INCB estimates the annual world requirements of narcotics for medical use based on statistical data submitted by states.[123] These projections, according to the INCB, carry "legal value" as they set a ceiling on "the maximum quantity of drugs that a State may acquire."[124] States exceeding their national estimate and/or engaging in other non-compliant behavior may be reprimanded. The INCB has formal investigatory powers under all three treaties and can, in the last instance, call for a drugs-trade embargo under the Single and 1971 conventions.[125] In practice, the INCB's primary enforcement mechanisms include "persuasion, exposure, and criticism," as it possesses "no formal powers of enforcement" nor are its treaty interpretations or decisions binding.[126] The INCB has, however, implemented measures enabling it to track manufacturers, traders, and distributors of narcotics through mandatory licensing and import and export certification regulations.[127] Despite these powers the estimates system has not facilitated all states fulfilling

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[121] See Boister (2001), 532-536.
[122] Single Convention, Article 9(4).
[123] Single Convention, Articles 18 and 19.
[124] International Narcotics Control Board, "Estimated World Requirements of Narcotics for 2021," n.d., accessed 31 May 2021, https://www.incb.org/incb/en/narcotic-drugs/estimates/narcotic-drugs-estimates.html.
[125] Single Convention, Article 14 and 1971 Convention, Article 19 cited in Wisehart (2019), 22-23; Boister (2001), 486-490.
[126] Thomas Babor et al., *Drug Policy and the Public Good* (Oxford: Oxford University Press, 2010), 212-213; Wisehart (2019), 23-24.
[127] McAllister (2000), 208.

their obligation to ensure the availability of and access to controlled medicines, belying the over and underabundance problems in the West and developing world respectively. Opioids, for example, are much more available and accessible in the West – for example, the US, Canada, Western Europe, Australia, and New Zealand – while shortages and inaccessibility characterize the situation in the Global South and post-socialist states.[128] The statistics collated by the INCB serve an important purpose in highlighting the inequalities of the IDCS itself and the world economy.

Article 4(c) is a sort of basic law of the Single Convention and the IDCS. It requires that states parties to the treaty "take all such legislative measures…to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, and possession of drugs."[129] The meaning of "medical purposes" is not fixed by the Single Convention. Rather, it "must depend on the stage of medical science at the particular time in question" and not discount "legitimate systems of indigenous medicine" as found in countries like China and India.[130] This uncertainty provides a space in which to argue for an expanded definition of both medical purposes and health. At any rate, the overarching "utilitarian object and purpose" of the Single Convention – and the 1971 and 1988 Conventions discussed below – is to limit access to narcotics for medical and scientific purposes alone.[131] This is the central tenet of the IDCS.

The Single Convention obliges states to prohibit the non-medical use of scheduled narcotic substances. These are classified according to their medical use, potential for abuse, and

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[128] Allyn L. Taylor, "Addressing the Global Tragedy of Needless Pain: Rethinking the United Nations Single Convention on Narcotic Drugs," *Journal of Law, Medicine & Ethics* 35, 4 (2007): 557-570.
[129] Single Convention, Article 4(c).
[130] *Commentary on the Single Convention* (1973), 111, para 12.
[131] Richard Lines, *Drug Control and Human Rights in International Law* (Cambridge: Cambridge University Press, 2017), 121.

safety or dependence liability. The drugs named in Schedules I and IV are deemed dependence-producing with no medical value. Drugs in Schedules II and III are considered as having less dependence-producing qualities and some medical utility.[132] Schedule I substances include, inter alia, cannabis, coca leaf, cocaine, fentanyl, heroin, methadone, morphine, opium, and oxycodone.[133] The raw plants and synthetic derivatives deemed narcotic and included in the Single Convention's Schedules do not reflect a scientific consensus as to their relative utility and harmfulness. Rather, the treaty's drafters proceeded with their classifications "on the assumption that all narcotic drugs were equally dangerous until proven otherwise."[134] The Schedules, however, are not intractable obstacles to reform as they may be added to, subtracted from, and amended by the CND on the recommendation of the WHO Expert Committee on Drug Dependence and WHO Director General.[135] Such scheduling decisions bind states, though they do have an opportunity to request a review of proposed alterations before they come into effect.[136] The Single Convention countenances changes to its Schedules, but it is not ordered in a way that puts science before politics and moralism.

Generating a scientific evidence base persuasive enough to convince international administrations to adjust the Schedules is an onerous undertaking. Article 2(5)(b) requires that states "prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug except for amounts which may be necessary for medical and scientific research only, including clinical trials therewith to be conducted under or subject to the direct supervision

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[132] Buxton (2010), 85.
[133] Among many others. See International Narcotics Control Board, "List of Narcotic Drugs Under International Control," Annex to Forms A, B and C, 57th edition, August 2018, accessed 27 May 2019, https://www.incb.org/documents/Narcotic-Drugs/Yellow_List/57th_edition/57th_edition_YL_ENG.pdf.
[134] Sánchez-Avilés and Ditrych (2020), 22-23.
[135] Single Convention, Article 3; Wisehart (2019), 25-27.
[136] Single Convention, Article 2(7) cited in Wisehart (2019), 20 and 120-121.

and control of the Party."[137] Clinical trials, as the Commentary indicates, include "the use of the drugs on human beings."[138] Researchers, however, are not to be left to their own devices. The state must not only "exercise an influence" over clinical trials but "take measures of 'control'" by way of "general regulations or particular instructions."[139] Such extensive oversight is both burdensome and interferes with academic freedom and scientific integrity. While personnel with the United Nations Office on Drugs and Crime have responded to such criticisms by stating that clinical trials are not precluded by the IDCS, which they deem sufficiently flexible,[140] the formal mechanisms through which states may permit scientific research and clinical trials under the Single Convention are stringent and costly.[141] Medicine, science, and research are obviously priorities for the IDCS and its treaties, but they remain secondary to the Single Convention's core practical aim: the strict control, prohibition, suppression, and criminalization of the drugs trade and drug users.

The demand side of the illicit trade in narcotics is attended to in Article 36 of the Single Convention, which sets out the Penal Provisions for the possession and distribution of narcotics. This section marks "the first time that penal provisions were included within…a widely accepted international drug control treaty."[142] Article 36 enjoins states parties to adopt "measures as will ensure that [the] cultivation, production, manufacture…possession" and trade in drugs "shall be punishable offences…and that serious offences shall be liable to adequate punishment particularly by imprisonment."[143] Unlawful acts are "defined, prosecuted and punished in

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[137] Single Convention, Article 2(5)(b).
[138] *Commentary on the Single Convention* (1973), 68, para 12.
[139] *Commentary on the Single Convention* (1973), 68, para 13(c).
[140] Chloé Carpentier et al., "Commentaries: The International Drug Conventions Continue to Provide a Flexible Framework to Address the Drug Problem," *Addiction* 113 (2018): 1228-1229.
[141] David J. Nutt et al., "Perspectives: Effects of Schedule I drug laws on neuroscience research and treatment innovation," *Nature Reviews Neuroscience* 14 (2013): 577-585.
[142] Bewley-Taylor and Jelsma (2012a), 76.
[143] Single Convention, Article 36(1)(a).

conformity with the domestic law of a Party,"[144] but domestic measures must comply with the object and purpose of the treaty; i.e., limiting the use of narcotics to medical and scientific purposes as per Article 4(c). Legal scholars Piet Hein van Kempen and Masha Federova thus conclude that while "possession for personal consumption may be decriminalized…it still cannot be legalized or permitted."[145] And the Single Convention sets the minimum requirements for states parties. Article 39 grants them explicit latitude to "[adopt] measures of control more strict or severe than those provided by" the treaty.[146] A differentiation between ordinary and "serious offences" indicates greater and lesser levels of criminal culpability. Indeed, there is no duty to criminalize the "use" of drugs by "addicts" in Article 36, leaving it "to the discretion of each Party to decide whether to penalize the non-medical consumption of narcotic drugs."[147] This is because the Single Convention was designed to combat the illicit traffic in narcotics, not the "unauthorized consumption of drugs by addicts."[148] The association of illicit consumption with criminality and addiction colors the views of states in their implementation of the IDCS.

There are two important caveats as regards Article 36. First, safeguard clauses hold that penal provisions are subject to domestic "constitutional limitations."[149] Article 35 similarly requires that action against illicit trafficking takes "due regard [of states'] constitutional, legal and administrative systems."[150] Constitutional human rights and fundamental freedoms must be accepted as legitimate checks on the IDCS as they are part and parcel of the constitutional order. Second, in lieu of traditional punishment so-called "abusers of drugs" can be required to

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[144] Single Convention, Article 36(4).
[145] Piet Hein van Kempen and Masha Federova, *International Law and Cannabis I: Regulation of Cannabis Cultivation for Recreational Use under the UN Narcotic Drugs Conventions and the EU Legal Instruments in Anti-Drugs Policy* (Cambridge: Intersentia, 2019a), 25-26 and 96.
[146] Single Convention, Article 39.
[147] *Commentary on the Single Convention* (1973), 111, para 15.
[148] *Commentary on the Single Convention* (1973), 428, para 7.
[149] Single Convention, Article 36(1)(a).
[150] Single Convention, Article 35.

"undergo measures of treatment, education, after-care, rehabilitation and social reintegration" under Article 36(1)(b). Such measures must, however, be in conformity with Article 38, which emphasizes that drug abuse prevention is the only acceptable objective of these alternatives.[151] Abstinence-based programs fit best with this attitude as services tolerant of illicit consumption can be said to indirectly encourage drug use. The flexibilities built into Article 36 circumscribe the degree to which a state's values and institutional priorities can be assimilated into domestic drug enforcement while maintaining treaty compliance.

Regarding the first caveat, the Commentary on the Single Convention suggests: "The Secretariat of the United Nations is not aware of any constitutional limitations which would prevent a Party to the Single Convention from implementing Article 36[(1)] by national or local legislation."[152] Federalism issues are an insufficient reason to not enact criminal laws. In cases where states or provinces have the criminal law power under the constitution the federal government "is…bound to obtain the necessary action" from lower levels of government.[153] Implicit in this conclusion is that constitutional limitations refer only to division of powers issues, focused as they are on the power to create law by different levels of government. The Single Convention mandates that criminalization is implemented domestically. Even so, national laws inspired by treaties do not escape the oversight of the judiciary and its enforcement of constitutional rights and freedoms protections.

The Commentary does not expound the extent to which constitutional limitations imposed on states by human rights and fundamental freedoms provisions can override treaty obligations. Do they trump the Single Convention? Perhaps. Richard Lines notes that there is a

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[151] Single Convention, Articles 36(1)(b) and 38.
[152] *Commentary on the Single Convention* (1973), 429, para 13.
[153] *Commentary on the Single Convention* (1973), 429, para 12.

place for domestic constitutional courts to intervene with a "dynamic human rights-based interpretation of international drug control law."[154] First because states parties to the treaties exercise indirect control of the IDCS via local "administrative, control and enforcement practices" subject to "national legislation and domestic court oversight."[155] Second because of the presence of constitutional caveats, or safeguard clauses, which permit deviation from the IDCS where domestic constitutional constraints arise.[156] These are strong indications that constitutional law writ large limits the applicability of the ODCS and is not limited to division of powers issues.[157] Of course, there's no guarantee proportionality analysis will liberalize drug laws.[158] Constitutional courts may give greater force to international obligations than to human rights and fundamental freedoms concerns.[159] If a constitutional court were to find domestic drug control laws, mandated by the international regime, unconstitutional a conflict would arise between the state concerned and UN institutions as well as other states parties to the treaties.[160] For example, a state's wholesale refusal to prosecute individuals for drug crimes as required under Article 36 would be "untenable" under the safeguard clause. Without reference to a specific constitutional issue precluding compliance with the Single Convention states cannot renege on their treaty obligations.[161] It remains an open question whether a refusal to prosecute drugs crimes stemming from a determination that to institute legal action would violate human

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[154] Lines (2017), 151.
[155] Lines (2017), 151-152.
[156] Lines (2017), 151-152.
[157] Boister (2001), 76-77.
[158] On proportionality analysis in constitutional human rights and fundamental freedoms adjudication see chapter 3.
[159] Lines, (2017), 152-153.
[160] David R. Bewley-Taylor, *International Drug Control: Consensus Fractured* (Cambridge: Cambridge University Press, 2012), 314.
[161] Neil Boister, "Waltzing on the Vienna Consensus on Drug Control? Tensions in the International System for the Control of Drugs," *Leiden Journal of International Law* 29 (2016), 406-407.

rights or fundamental freedoms is enough to satisfy the constitutional limitations provisions in Article 36.

At drafting there was a lack of agreement among participants as to whether both possession for personal consumption and possession with intent to distribute should be criminalized.[162] The Commentary notes that: "If Governments choose not to punish possession for personal consumption…their legislation could very usefully provide for a legal presumption that any quantity exceeding a specified small amount is intended for distribution."[163] But refraining from prosecuting individuals for the personal consumption of drugs does not mean states are released from their responsibility to "prevent possession of drugs for other than medical or scientific purposes."[164] Indeed, Article 33 states that: "Parties shall not permit the possession of drugs except under legal authority."[165] In other words states may not tolerate the possession of narcotics for anything other than medical and scientific purposes.[166] Drugs possessed without legal authority must be confiscated.[167] Because consumption is not possible without possession "the article is clearly intended to prevent/deter the non-medical and non-scientific use of listed substances."[168] In criminalizing the possession of scheduled narcotics the Single Convention pursues the elimination of illicit consumption.

The possibility of using "treatment, education, after-care, rehabilitation and social reintegration" as alternatives to penal sanctions, the second caveat in the treaty, also addresses the demand-side of drug control. The Commentary holds that states parties "are bound to

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[162] *Commentary on the Single Convention* (1973), 112, para 18.
[163] *Commentary on the Single Convention* (1973), 113, para 21.
[164] *Commentary on the Single Convention* (1973), 113, para 22.
[165] Single Convention, Article 33.
[166] *Commentary on the Single Convention* (1973), 113-114, para 25. See also Van Kempen and Federova (2019a), 22-24.
[167] Single Convention, Article 37; *Commentary on the Single Convention* (1973), 113, para 24.
[168] Bewley-Taylor and Jelsma (2012a), 76.

prosecute…all offences covered by [Article 36(a)]" but may "determine whether substitution of measures of treatment for conviction or punishment would be appropriate" during criminal proceedings.[169] These situations are limited to situations where "it can reasonably be hoped that the drug-dependent offender would not only be cured of his dependence, but would also not again commit a serious drug offence."[170] This view of rehabilitation fits with the zero-tolerance thrust of the Single Convention. Anything less than abstinence is insufficient to deviate from criminalization. In this way, as David Bewley-Taylor makes clear, the treaty established a "prohibition-oriented approach."[171] The Single Convention therefore inaugurated the worldwide implementation of the crime control model in domestic drug law and policy. But it did so only for narcotics. Another treaty, the international community concluded, was needed to tackle the growing number psychotropic substances being developed in laboratories and harvested from nature.

1.6 Convention on Psychotropic Substances 1971

The pharmaceutical industry grew substantially from the turn of the twentieth century to the end of the Second World War. A great number of psychotropic substances including a variety of amphetamines, barbiturates, tranquilizers, antidepressants, and hallucinogens entered the market. Many were applied in medicine, psychiatry in particular, but were cause for concern among drug control advocates.[172] Amphetamine use was growing in Western states and LSD captured the imaginations of prohibitionists and suppressionists at various international fora throughout the

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[169] United Nations, *Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961* (New York, 1976), 77, para 5.
[170] *Commentary on the Protocol* (1976), 77, para 7.
[171] Bewley-Taylor (2012), 5-6.
[172] Bruun (1975), 23-24; McAllister (2000), 201-202 and 226-227.

1960s.[173] As consumption of these drugs grew so too did calls for their strict control,[174] particularly from narcotic-producing states wanting to rebalance the drugs market following the Single Convention's privileging of Western interests.[175] A separate regime from the Single Convention for psychotropics was in the end pursued, however, for "ease of access [to controlled substances] for pharmaceutical purposes and [was] not based on scientific classification."[176] The 1971 Convention took shape because, as Buxton, Bewley-Taylor, and Hallam put it: "European [and US] pharmaceutical interests were effective in delimiting controls over research and manufacture of derivative and synthetic drugs" and able to prevent the encroachment of regulators as had been done with narcotics under the Single Convention.[177] Additionally, psychotropic substances avoided the severe limitations imposed by the Single Convention because of the legacy of pre-UN drug control imperatives, which focused on the regulation of raw narcotics produced in the Global South.[178] Under the 1971 Convention the West's pharmaceutical industry would continue to be treated differently.

Like the Single Convention the 1971 Convention aims to promote the "public health and welfare of mankind," restrict access to psychotropic substances to "legitimate purposes" while acknowledging "that [their] use…for medical and scientific purposes is indispensable and that their availability for such purposes should not be unduly restricted," and "to prevent and combat abuse" and illicit trafficking.[179] According to Carstairs these provisions marked a departure from

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[173] Bruun (1975), 245-246; UNODC (2009), 63-64. On LSD under the 1971 Convention see United Nations, *Commentary on the Convention on Psychotropic Substances* (New York, 1976), 51-52, paras 19-20.
[174] Boister (2001), 97.
[175] McAllister (2004), 6.
[176] Tinasti (2019), 111.
[177] Julia Buxton, Dave Bewley-Taylor and Christopher Hallam, "Dealing with Synthetics: Time to Reframe the Narrative," Policy Report 6 (Swansea: GDPO, 2017), 22 and 24; Carstairs (2005), 59-60.
[178] Buxton et al. (2017), 22.
[179] 1971 Convention, preamble. See also Article 20 Measures Against the Abuse of Psychotropic Substances and Article 21 Action Against the Illicit Traffic.

previous drug control efforts that targeted supply reduction, shifting towards "demand control…directed at the individual user of drugs and includes the treatment and criminalization of individual users."[180] The emphasis on treatment reflected changes in medical attitudes towards addiction with criminalization designed to act as a deterrent.[181] The most significant change from past practice, however, was the exclusion of an estimates system projecting the quantity of psychotropics needed for medical use. As McAllister points out, estimates are required if states are to "determine excess production, trade, or consumption."[182] With its emphasis on demand control and a less restrictive regulatory environment the 1971 Convention reflects longstanding imbalances in international law and the drugs trade. Even the language used to classify the drugs at issue changed. Northern psychotropics are not the "serious evil" Southern narcotics are deemed to be.[183] Less explicitly moralistic, the 1971 Convention all the same displays the politics and preferences of hegemonic states who also happen to be the largest consumers of both narcotic and psychotropic substances.

The initial scheduling decisions of the 1971 Convention's drafters were adopted by most states parties without modification, lacking as most did the infrastructure and expertise required to challenge the findings of the Western medico-scientific establishment.[184] The objectivity of the schedules is problematized by the fact that "psychotropic" is neither a term of art nor a scientific classification. On the contrary it is "essentially an administrative, functional term with little if any pharmacological reference."[185] As such the 1971 Convention subjects all manner of psychedelics and synthetic substances to strict control. These include the Schedule I compounds

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[180] Carstairs (2005), 60.
[181] Carstairs (2005), 60-61.
[182] McAllister (2004), 7.
[183] Sánchez-Avilés and Ditrych (2020), 23-25.
[184] McAllister (2004), 7.
[185] Buxton et al. (2017), 24.

DMT, LSD, MDMA, psilocybin, and cannabis' psychoactive compound THC.[186] The schedules can be modified to address new problems and revisit old solutions. States and the WHO are responsible for alerting the Secretary-General when substances are added to and transferred or removed from the schedules.[187] However the WHO Expert Committee on Drug Dependence is ultimately responsible for decision-making "as to medical and scientific matters."[188] The Expert Committee looks at several factors when making scheduling determinations, including whether:

> (a) …the substance has the capacity to produce:
>   i. (1) A state of dependence, and
>   (2) Central nervous system stimulation or depression, resulting in hallucinations or disturbances in motor function or thinking or behaviours or perception or mood, or
>   ii. Similar abuse and similar ill effects as a substance in Schedule I, II, III or IV, and
>
> (b) That there is sufficient evidence that the substance is being or is likely to be abused so as to constitute a public health and social problem[.][189]

Supplemental criteria assessed include "the extent or likelihood of abuse, the degree of seriousness of the public health and social problem and the degree of usefulness of the substance in medical therapy."[190] The WHO Expert Committee is also to balance a substance's "potential beneficial effects" against "its dangerous properties."[191] As the WHO is the international community's expert on health matters it "has very wide discretion in making its [scheduling] recommendations."[192] That said, the final decision rests with the CND.[193] The initial scheduling decisions adopted in the 1971 Convention are mutable only with great effort and expense and

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[186] International Narcotics Control Board, "List of Psychotropic Substances under International Control," Annex to the annual statistical report on psychotropic substances (form P), 29th Edition, 2018, accessed 30 May 2019, https://www.incb.org/documents/Psychotropics/greenlist/Green_list_ENG_V18-02416.pdf.
[187] 1971 Convention, Article 2(1).
[188] 1971 Convention, Article 2(5).
[189] 1971 Convention, Article 2(4).
[190] 1971 Convention, Article 2(4)(b).
[191] *Commentary on the Convention on Psychotropic Substances* (1976), 59-60, para 44.
[192] *Commentary on the Convention on Psychotropic Substances* (1976), 61, para 48.
[193] 1971 Convention, Article 2(5).

there is no certainty that medicine and science will persuade treaty bodies of the merit of revision.

As stated in Article 7(a) the use of Schedule I substances is prohibited “except for scientific and very limited medical purposes by duly authorized persons, in medical or scientific establishments which are directly under the control of their Government or…approved by them.”[194] Formally states have “a considerable measure of discretion in adopting…the required strict rules regarding authorization of the users of substances in Schedule I” according to domestic law, public health policy, and “sound medical principles,”[195] but Article 7(a) is far from laissez-faire. Scientists and physicians, however “duly authorized” they are to engage in research and practice, must obtain government authorization to experiment with Schedule I substances.[196] A licensing system is obligatory to regulate “manufacture, trade, distribution and possession”[197] and all acts carried out as under the auspices of Article 7(a) and (b) are to be subject to “close supervision.”[198] Research institutions must be “directly under the control” of government authorities and any research, such as clinical trials, “approved” rather than merely “authorized.”[199] An individually tailored dispensation from the requisite domestic government authority is needed for a physician to issue a prescription for a Schedule I drug to a patient. Few physicians are in practice able to prescribe these substances for “therapeutic purposes” because of the “very limited medical” use recognized in Article 7(a).[200] An indication of how strict the control regime was intended to be is enumerated in the Commentary, which states that “the administration of substances in Schedule I by doctors on house calls could never be

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[194] 1971 Convention, Articles 5(1) and 7(a).
[195] *Commentary on the Convention on Psychotropic Substances* (1976), 147, para 3.
[196] *Commentary on the Convention on Psychotropic Substances* (1976), 147-148, para 4.
[197] 1971 Convention, Article 7(b).
[198] 1971 Convention, Article 7(c).
[199] *Commentary on the Convention on Psychotropic Substances* (1976), 149-153, paras 7-20.
[200] *Commentary on the Convention on Psychotropic Substances* (1976), 148, paras 4-5.

authorized."[201] But if the state of medico-scientific knowledge changed this would not be so. The next sentence in the Commentary suggests "that theoretically this could in the future be in the way of adequate medical treatment, since it cannot be excluded that a substance in Schedule I might be found to have important therapeutic advantages in urgent cases."[202] A shift toward medicalization would require extensive research and evidence, difficult to undertake and produce given that Schedule I drugs are subject to rigorous state supervision.

This is because the 1971 Convention's drafters assumed Schedule I substances possessed "very little if any therapeutic value."[203] The Commentary nonetheless suggests that "it cannot have been the intention of the 1971 Conference to prohibit or unduly impede any medically justified therapeutic use of substances in Schedule I."[204] It would accordingly be possible to maintain the treaty's integrity while permitting access to strictly controlled psychotropics that "in the future [may] be found to be very useful in the treatment of frequently occurring diseases."[205] That said, where conventional therapies that "have substantially the same therapeutic advantages" as Schedule I drugs are already available states "should not authorize [their use]."[206] Yet there remains a modicum of discretion regarding the interpretation of what constitutes an appropriate balance between therapeutic advantage and risk of harm. States can "follow different rules in implementing their obligation to permit only a very medical limited use" and apply them "in the light of the particular problems of an individual patient."[207] While this is a contestable position it may not be inconsistent with the 1971 Convention's obligations.[208] The treaty's ability

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[201] *Commentary on the Convention on Psychotropic Substances* (1976), 149, para 8.
[202] *Commentary on the Convention on Psychotropic Substances* (1976), 149, para 8.
[203] *Commentary on the Convention on Psychotropic Substances* (1976), 138, para 2.
[204] *Commentary on the Convention on Psychotropic Substances* (1976), 138, para 3.
[205] *Commentary on the Convention on Psychotropic Substances* (1976), 138, para 3.
[206] *Commentary on the Convention on Psychotropic Substances* (1976), 139, para 5.
[207] *Commentary on the Convention on Psychotropic Substances* (1976), 139, para 6.
[208] *Commentary on the Convention on Psychotropic Substances* (1976), 139-140, para 7.

to accommodate therapeutic access is in the main hamstrung by adverse medico-scientific presuppositions as to the utility and suitability of the use of Schedule I psychotropics in all but the narrowest and questionable of circumstances.

Less stringent restrictions govern Schedule II, III, and IV drugs. A state may adopt "such measures as it considers appropriate" to limit "to medical and scientific purposes" "the manufacture, export, import, distribution and stocks of, trade in, and use and possession of" these psychotropics.[209] The 1971 Convention deems it "desirable" to require that Schedule II, III, and IV substances be possessed only "under legal authority."[210] A medical prescription regime based on "sound medical practice and subject to such regulation…as will protect the public health and welfare" would satisfy the latter exhortation.[211] As with the Single Convention the meaning of "medical purposes" is not considered static and "may change in accordance with the evolution of medical science."[212] Schedule II, III, and IV psychotropics are thus regulated and accessible much like conventional medicalized pharmaceutical substances.

Unlike the Single Convention, which tasks the INCB with overseeing an estimates system obligating states to project the quantity of narcotics required for medical and scientific purposes for the year ahead and report on the actual amount consumed the previous year, the 1971 Convention requires that states submit "annual statistical reports" recording the quantity of psychotropics they have manufactured, exported, and imported to the INCB.[213] The Secretary-General and CND are to be informed of national law and policy changes and "[s]ignificant developments in the abuse of and the illicit traffic in psychotropic substances within [states']

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[209] 1971 Convention, Article 5(2).
[210] 1971 Convention, Article 5(3).
[211] 1971 Convention, Article 9(1) and (2).
[212] *Commentary on the Convention on Psychotropic Substances* (1976), 141, para 3.
[213] 1971 Convention, Article 16(4) cited in Wisehart (2019), 148.

territories."[214] Subjects of interest include novel chemical formulations, significant seizures, new trade flows, and the latest trafficking methods.[215] The emphasis on maximizing the licit trade is detectable in the absence of any ceiling on legitimate medical and scientific use. Narcotics are not given such liberal treatment. This has not gone unnoticed. For its part, the INCB has nudged states parties toward "voluntary assessment[s] of their domestic requirements for psychotropic substances" via soft law instruments, which it purports to be a manageable, if not compulsory, reporting standard.[216] This anemic response does little to equalize the treatment of the narcotics and psychotropics markets. When it comes to punishing illicit use, however, there is a greater degree of alignment between the Single Convention and 1971 Convention.

Article 22 sets out the character of the Penal Provisions to be instituted in compliance with the 1971 Convention:

> Subject to [a state's] constitutional limitations, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty.[217]

The treaty clearly distinguishes between minor and severe crimes. Self-harm is not considered a weighty offense. By contrast "serious offences" that cause, "directly or indirectly, damage to the health of people other than the offender" warrant punishment, "particularly by imprisonment."[218] Significantly, these criminal laws are to target "the supplier and not…the consumer."[219] The 1971 Convention aims to combat illicit traffickers. The possession of Schedule I psychotropics

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[214] 1971 Convention, Article 16(1)(b).
[215] 1971 Convention, Article 16(3).
[216] Wisehart (2019), 148.
[217] 1971 Convention, Article 22(1)(a). As with the Single Convention "constitutional limitations" seem to refer to division of powers issues. See *Commentary on the Convention on Psychotropic Substances* (1976), 352-353, para 23.
[218] 1971 Convention, Article 22(1)(a); *Commentary on the Convention on Psychotropic Substances* (1976), 348, para 4.
[219] *Commentary on the Convention on Psychotropic Substances* (1976), 349, para 8.

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for personal consumption, for example, “would not be a punishable offence in the meaning of” Article 22(1)(a) unless “possession” constitutes an “action contrary to a law or regulation adopted in pursuance of its obligations under [the] Convention,” which is contested.[220] If a state determines possession for personal consumption is an “action” then it falls within the scope of Article 22(1)(a) and would constitute a punishable offense. In any case, possession for personal consumption is not serious enough an offense to warrant imprisonment. Less severe punishment, such as a fine, would do.[221] As under the Single Convention a constitutional challenge to the criminalization of simple possession is likely the only ground on which litigants could challenge prohibition and suppression.[222] Strategic litigation has its limitations as the 1971 Convention is not a simple crime control regime punishing drug takers for their morally repugnant actions. It also conceives of (ab)users of Schedule I psychotropics as in need of treatment, giving states the flexibility to argue alternatives to penal sanctions balance out the detrimental effects of criminalization.

The 1971 Convention is also more lenient when it comes to drugs classified as less harmful. Individuals possessing Schedule II, III, and IV psychotropics “without legal authority need not be punished as offenders under” Article 22(1)(a) “[n]or made to undergo measures of treatment pursuant to subparagraph (b).”[223] But these are only minimum standards. Like the Single Convention states “may adopt more strict or severe measures of control than those provided by [the] Convention if…such measures are desirable or necessary for the protection of public health and welfare.”[224] The consistent language of strict control, prohibition, suppression,

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[220] *Commentary on the Convention on Psychotropic Substances* (1976), 350, paras 9 and 11-12. On the definition of “possession” see idem, 350-351, para 14.
[221] *Commentary on the Convention on Psychotropic Substances* (1976), 351, para 15.
[222] Boister (2001), 92 (note 88).
[223] *Commentary on the Convention on Psychotropic Substances* (1976), 350, para 10.
[224] 1971 Convention, Article 23.

and criminalization make for a baseline of disciplining and punishing illicit traffic and use. Provisions purporting to offer states a range of less punitive options when executing their obligations under the 1971 Convention reinforce the view that illicit use is never tolerable. Alternatives to traditional punishments like custodial sentences are regarded as acceptable where "drug abusers undergo measures of treatment, education, after-care, rehabilitation and social reintegration."[225] But resort to this provision is to be limited "to those who abuse [psychotropics] frequently," and only for minor offenses such as possession for personal consumption and the selling of drugs to finance dependence.[226] The process is not as liberal as it seems because criminal prosecution is required before leniency is granted.[227] And only where there's a prospect "that the abuser will not only be cured of his dependence, but also will not commit a serious penal offence again" can Article 22(1)(b) be exercised.[228] The inclusion of substitutes for criminalization included in the 1971 Convention, like paradoxical mandatory voluntary treatment, usually entail a loss of freedom if not outright criminal punishment.

The Single Convention had ill-prepared the international community to deal with the growth of the synthetic drugs market in the Postwar era, and the measures agreed upon by states parties to the 1971 Convention did not live up to expectations. Strict control, prohibition, suppression, and criminalization substantially failed to curtail the illicit trade in and use of psychotropic substances. Parallel shortcomings in the Single Convention and its implementation encouraged the international community to assemble yet again to design a new treaty that would put an end to drug trafficking and abuse once and for all.

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[225] 1971 Convention, Article 22(1)(b).
[226] *Commentary on the Convention on Psychotropic Substances* (1976), 353, paras 1-2.
[227] *Commentary on the Convention on Psychotropic Substances* (1976), 353, para 3.
[228] *Commentary on the Convention on Psychotropic Substances* (1976), 354, para 5.

1.7 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988

The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 was intended to address "the entire range of the drug problem" from supply to demand.[229] The ineffectiveness of a supply-focused enforcement regime was evident in the global proliferation of armed conflict, narcotrafficking, and unlawful consumption, all of which had raised the visibility of the War on Drugs in the buildup to the treaty's drafting. In response, and for the first time, demand control was put at the center of the international community's juridical efforts. The 1988 Convention expanded on the precedent set in the 1971 Convention by mandating the comprehensive criminalization of simple possession,[230] entrenching the crime control model as the de facto and de jure approach to drug control.[231] While flexibility and accommodation vis-à-vis national law and policy are built into the 1988 Convention's architecture its standpoint is clear: narcotic drugs and psychotropic substances "pose a serious threat to the health and welfare of human beings and adversely affect the economic, cultural and political foundations of society."[232] The moral language animating the text frame the non-medical, non-scientific use of narcotic and psychotropic drugs as more than a criminal offense; it constitutes a threat to the entire social order.

The inclusion of constitutional caveats, or safeguard clauses, throughout the 1988 Convention, discussed in greater detail in chapter 3, was designed to ensure its widespread ratification.[233] These in no way imply that states may implement and execute the Convention as

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[229] United Nations, *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* (New York, 1998), 14, para 0.6.
[230] Carstairs (2005), 61-62.
[231] Sánchez-Avilés and Ditrych (2020), 25-26.
[232] 1988 Convention, preamble.
[233] *Commentary on the United Nations Convention Against Illicit Traffic* (1998), 40, para 2.1.

they please. Indeed, they are obligated to take "legislative and administrative measures, in conformity with the fundamental provisions of their…domestic legislative systems" to ensure the treaty's effectiveness.[234] Articles 3(1)(a) and (b) set out the supply-related acts for which states must establish criminal offenses in domestic law. They include, among others:

> The production, manufacture, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention[.][235]

The handling of illicit drugs in any way is essentially criminalized. There is no constitutional caveat or safeguard clause for Article 3(1) subparagraphs (a) and (b). Only offenses under Article 3(1)(c) are subject to a constitutional caveat-safeguard clause, which relates, inter alia, to "[t]he acquisition, possession or use of property…derived from an offence…established in accordance with subparagraph (a)," inciting others to participate in trafficking, and conspiracy to traffic.[236] States are also, as with the Single Convention and 1971 Convention, given the discretion to "adopt more strict or severe measures than those provided in this Convention if…such measures are desirable or necessary for the prevention or suppression of illicit traffic."[237] For supply-side crimes there is a floor set as to penal sanctions, but no ceiling.

Pressure from supplier states at last propelled consumer states to take the demand issue seriously.[238] Article 3(2) mandates the criminalization of illicit possession of narcotics and psychotropics for personal consumption.[239] It does not, however, "require drug consumption as

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[234] 1988 Convention, Article 2(1); *Commentary on the United Nations Convention Against Illicit Traffic* (1998), 43, para 2.8.
[235] 1988 Convention, Article 3(1)(a)(i).
[236] 1988 Convention, Article 3(1)(c).
[237] 1988 Convention, Article 24.
[238] Boister (2001), 123-125.
[239] Van Kempen and Federova (2019a), 53-55.

such to be established as a criminal offence."[240] Rather, it targets "non-medical consumption indirectly by referring to the intentional possession, purchase or cultivation of controlled substances for personal consumption."[241] Article 3(2) also contains a constitutional caveat-safeguard clause:

> Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law…the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention…or the 1971 Convention.[242]

Bewley-Taylor, among others, suggests the text gives states "considerable flexibility" to refrain entirely from applying the criminal law in cases of illicit possession of drugs for personal consumption.[243] Of course, Article 3(4)(d) of the 1988 Convention, like Article 36(1)(b) of the Single Convention and Article 22(1)(b) of the 1971 Convention, permits alternatives to penal sanctions. This does not change the fact that criminal laws must be on the books and individuals in illicit possession of narcotics or psychotropics for personal consumption are to be disciplined, whether in custodial detention or at a treatment center. Article 3(2) refers to acts "contrary to the provisions" in the Single Convention and 1971 Convention. This signals that "the schedules of controlled substances as well as the distinction under those conventions between licit and illicit consumption" must be enforced.[244] Prosecutorial discretion at the domestic level, for instance, is to be "exercised to maximize the effectiveness of law enforcement measures…and with due regard to the need to deter" others from offending.[245] Deprioritizing the prosecution of drug possession for personal consumption charges comes across as falling foul of the duty to bring

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[240] Italics added. *Commentary on the United Nations Convention Against Illicit Traffic* (1998), 82-83, para 3.95.
[241] *Commentary on the United Nations Convention Against Illicit Traffic* (1998), 82-83, para 3.95.
[242] 1988 Convention, Article 3(2).
[243] Bewley-Taylor (2012), 49-50; Geiß and Wisehart (2015), 386.
[244] *Commentary on the United Nations Convention Against Illicit Traffic* (1998), 81, para 3.92.
[245] 1988 Convention, Article 3(6).

action against offenders. Such a policy decision neither maximizes enforcement measures nor deters other from offending. It could very well be read as encouraging illicit consumption, given the lax consequences. So, only where the establishment of a criminal offense violates the "constitutional principles and the basic concepts of its legal system" can a state opt not to take punitive measures against drug possession for personal consumption. Domestic courts may find the criminalization of drug possession for personal consumption unconstitutional and, at the same time, allow the state to remain faithful to its treaty obligations.[246] The INCB itself accepted as much in 2004 when it stated "the practice of exempting small quantities of drugs from criminal prosecution" was consistent with the drug control conventions.[247] That said, it is unclear whether legislation permitting drug possession for personal consumption, i.e., decriminalization, would be consistent with the treaty.[248] The overall effect of the demand control exemptions countenanced in the 1988 Convention is a more indulgent, or at least less draconian, enforcement regime for the consumers of narcotic and psychotropics substances.

Special consideration for consumers is conspicuous in the permissible penalties and alternative measures detailed in Article 3(4). As a general matter, provision of "treatment, education, aftercare, rehabilitation or social reintegration" is to be used as an alternative to penal sanctions only in cases of a "minor nature."[249] For more serious offenses they may only be offered "in addition to conviction or punishment."[250] Drug possession for personal consumption is treated separately, as under Article 3(2), and permits remedial measures "either as an

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[246] Boister (2001), 125; Boister (2002), 208-209.
[247] Despite this concession the INCB continues to focus on limiting access to controlled substances as per its mandate. International Narcotic Control Board, Report of the International Narcotic Control Board for 2004 (New York: United Nations, 2005), 80, para 538, cited in Boister (2016), 394.
[248] Boister (2001), 125-129.
[249] 1988 Convention, Article 3(4)(c).
[250] 1988 Convention, Article 3(4)(b).

alternative to conviction or punishment."[251] The Commentary specifically mentions "methadone maintenance" as an example of "treatment" but notes that "drug-free programmes" should be the default response to illicit use.[252] Psychiatric or psychological counselling are considered a key facet of "aftercare" for those who have ceased abusing drugs and those weaning themselves off of them in a maintenance program.[253] The average illicit consumer of narcotics and psychotropics may benefit from a lenient approach to demand control so long as they publicly commit to abstain from drug use in the future. This is not to suggest the regime is liberal. Boister notes that Article 3(4) was "an afterthought…to a law enforcement convention" that reflects a "conservative interpretation" of previous treaties more than a progressive attempt at reform.[254] The Commentary makes clear that "treatment" and the like does not mean what liberal-minded readers would like it to mean: "Such [alternative] measures are…not necessarily more lenient than imprisonment or much different in concept from punishment."[255] Strict control, prohibition, suppression, and criminalization remain the IDCS's dominant norms. Demand reduction measures that soften this approach must therefore be consistent with the overall goal of creating a "drug free world."

There are also practical reasons why alternatives to penal sanctions have not been more fully integrated into the IDCS. Boister highlights several such difficulties, including insufficient data on and tracking of the utilization of alternatives to traditional punishment and their results, inadequate financial resources and medico-scientific capacity to design and provide effective treatment programs in developing countries, and the lack of a uniform socio-cultural

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[251] 1988 Convention, Article 3(4)(d).
[252] *Commentary on the United Nations Convention Against Illicit Traffic* (1998), 87-88, para 3.109.
[253] *Commentary on the United Nations Convention Against Illicit Traffic* (1998), 88, para 3.110.
[254] Boister (2001), 181-182.
[255] *Commentary on the United Nations Convention Against Illicit Traffic* (1998), 87-88, para 3.109.

understanding of what constitutes health-oriented intervention. In addition, law enforcement agencies have a pecuniary interest in maintaining a regime that increases their budgets and operational capacities, as well as the prestige and recognition their heightened involvement brings. These factors contributed to the lack of "binding international law" on demand reduction measures.[256] Overall, alternatives to penal sanctions are unambiguously exceptions to the prioritization of the criminalization of individual drug users in the IDCS. The features of the 1988 Convention that moderate the sharpness of the crime control model it embodies are meager compared to its overarching ambition to eradicate the illicit supply and demand for drugs. But its dictates are not absolute.

States parties to the 1988 Convention have jurisdiction over the recognition and scope of legal defenses that apply to criminal drugs charges. Article 3(11) determines that: "the description of the offences [in Article 3] and of legal defences thereto is reserved to the domestic law of a Party and…such offences shall be prosecuted and punished in conformity with that law."[257] So, while the 1988 Convention delineates the criminal offenses that must be established in law they remain "creatures of the national legal system" subject to its checks and balances.[258] The other international drug control treaties contain similar provisions, but Article 3(11) is unique in its explicit acceptance of the legitimacy of domestic "legal defences" to criminal drugs charges.[259] For example, the defense of medical necessity in common law systems, whereby one's mortal survival depended upon employing an unlawful treatment, could excuse otherwise criminal conduct and preclude conviction. As the case law reviewed in chapter 4 demonstrates, the use of defenses of this sort in the adjudication of drugs charges is limited to extraordinary

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[256] Boister (2001), 190-191.
[257] 1988 Convention, Article 3(11).
[258] *Commentary on the United Nations Convention Against Illicit Traffic* (1998), 97, para 3.131.
[259] *Commentary on the United Nations Convention Against Illicit Traffic* (1998), 97, para 3.131.

circumstances. The conceptual generosity of Article 3(11) is betrayed by the reality that the illicit consumption of narcotic and psychotropic substances is basically indefensible. Again, the framing of drug use as an existential threat to the social order tempers purported flexibilities.

The 1988 Convention marked the end of the UN-sanctioned IDCS's transition from a trade regime regulating the supply chain of a set of commodities into a moral framework imposing penal sanctions as the solution to controlling the supply of and demand for drugs.[260] The criminal law measures mandated by the IDCS's three conventions have "led to the criminalization and imprisonment of tens of millions of people around the world, with racial minorities and other vulnerable communities suffering disproportionate impacts from repressive enforcement."[261] States bear responsibility for the domestic law and policy choices that have brought about these consequences. As Antonia Eliason and Robert Howse point out: "there is a clear contrast between the unequivocal obligations that relate directly and indirectly to the aim of preventing trafficking and the requirements that concern a state's control of the illicit use and abuse of drugs by its own nationals."[262] States parties to the drug control conventions have the latitude to craft law and policy consistent with domestic constitutional considerations, including "significant discretion to determine the precise nature of criminal offenses and any defenses…to those offenses."[263] While this is certainly the case, it is incontestable that the conventions set the broad parameters under which domestic law and policy is composed. To deviate from the objects and purposes of the treaties, which includes the strict control, prohibition, suppression, and criminalization of the trade in and use of illicit narcotic and psychotropic substances, is

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[260] Sánchez-Avilés and Ditrych (2020), 34.
[261] John Walsh and Martin Jelsma, "Regulating Drugs: Resolving Conflicts with the UN Drug Control Treaty System," *Journal of Illicit Economies and Development* 1, 3 (2019), 266-267.
[262] Antonia Eliason and Robert Howse, "A Higher Authority: Canada's Cannabis Legalization in the Context of International Law," 40 *Michigan Journal of International Law* 327 (2019), 341-342.
[263] Eliason and Howse (2019), 342.

inconsistent with the general duty to comply in good faith with one's international legal obligations. The law enforcement-centered approach to drug control universalized by the IDCS puts drug users on the front lines of the War on Drugs, raising acute human rights issues. The next section juxtaposes the rules of the IDCS against the UN's commitment to universal human rights, pointing to the incompatibility of the former with the latter.

1.8 International Human Rights Norms and Drug Control

Founded in 1997 and re-constituted in 2002, the United Nations Office on Drugs and Crime (UNODC) and its 2,400 personnel provide practical and technical assistance to states parties to the IDCS from its Vienna headquarters and 115 field offices throughout the developing world.[264] An organ of the executive UN Secretariat, the UNODC's efforts are focused on combatting the illicit drugs market, organized crime, corruption, and terrorism through the provision of technical support. In broad strokes the organization supports Member States "in implementing a balanced, comprehensive and evidence-based approach to the WORLD DRUG PROBLEM that addresses both supply and demand."[265] It does this, in its own words:

> By helping Member States implement the three major international drug control treaties, and develop policies consistent with them; implementing drug use prevention strategies with Member States; supporting drug dependence treatment, support, and rehabilitation; ensuring access to controlled substances for medical purposes; [supporting sustainable rural development; and] analyzing and reporting data…to increase knowledge and promote evidence-based programming.[266]

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[264] United Nations Office on Drugs and Crime, UNODC Field Offices, n.d., accessed 6 April 2022, https://www.unodc.org/unodc/en/field-offices.html.
[265] United Nations Office on Drugs and Crime, Annual Report Covering activities during 2018 (Vienna: UNODC, 2019), https://www.unodc.org/unodc/en/about-unodc/annual-report.html?ref=menutop, 6-7.
[266] United Nations Office on Drugs and Crime (2019), 6-7.

This mission is pursued with human rights, peace and security, and development obligations in mind, as these are "pillars of the United Nations enshrined in the [UN] Charter."[267] Article 103 of the latter is of particular importance, holding that the "Charter shall prevail" "in the event of a conflict between" it and "any other international agreement."[268] Human rights obligations, routinely engaged in the execution of the three drug control conventions, must therefore be secured and protected to comply with the Charter and the IDCS. Problematically, the meaning of human rights from the perspective of many national governments and UN drug control bodies often includes eradication of the World Drug Problem as tantamount to a human right.[269] This point of view is routinely deployed to justify a law enforcement-first approach to drug control, which effectively undermines human rights commitments and exacerbates their violation. Chapter 2 contends such issues constitute fundamental, irresolvable tensions. It details the proposed remedies to these conflicts as well as their deficiencies, setting the stage for chapter 3 where a comparative constitutional human rights and fundamental freedoms framework, permitted under the treaties' constitutional caveats-safeguard clauses, makes the case for a bold revision of the IDCS's strict control, prohibition, suppression, and criminalization of drugs and their users. First, this subsection presents the contradiction that is enforcement of the IDCS and compliance with international human rights obligations.

The disinterested bureaucratic tone of official UNODC documents disguises the reality that practical and technical assistance, data collection, and policy dissemination have been used

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[267] United Nations Office on Drugs and Crime, UNODC and the Promotion and Protections of Human Rights: Position Paper (2012), https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Human_rights_position_paper_2012.pdf, 2.
[268] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 103. On the "Special Status of the UN Charter" and Article 103's implications for the enforcement of human rights law see Erika De Wet, "The Constitutionalization of Public International Law," in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), 1225-1228.
[269] See, e.g., the framing of human rights vis-à-vis drug control efforts in Tom Obokata, "Illicit Cycle of Narcotics from a Human Rights Perspective," *Netherlands Quarterly of Human Rights* 25, 2 (2007): 159-187.

as “political tools to enforce drug control and to justify political choices.”[270] With its global reach, the UNODC establishes many of the techniques of statistical production, shapes their deployment as scientific fact, and constructs the normative framework through which they are interpreted. This influence allows the states that fund the treaty body to dominate the IDCS’s agenda, many of which emphasize prohibition like Sweden, Japan, and the United States. The upshot is the prioritization of the regime’s law enforcement and criminal justice strategies over human rights concerns and responsibilities.[271]

The drug control conventions simply do not include meaningful human rights protections. The only explicit mention of human rights is found in Article 14(2) of the 1988 Convention, which declares that crop eradication “measures…shall respect fundamental human rights.”[272] But as Boister argues, even though the rights to health, work, and property are implicated in the carrying out of crop eradication measures their restraining effects “are easily limited by overriding social interests” in preventing illicit crop production.[273] Invocations of rights and freedoms by treaty bodies are also subverted by the regime’s explicit extension of permission to states to go beyond what the treaties require vis-à-vis the use of force and coercion to suppress the illicit drugs markets and eliminate non-medical consumption. Article 24 of the 1988 Convention in particular permits states to “adopt more strict or severe measures than those provided in this Convention if…such measures are desirable or necessary for the prevention or suppression of illicit traffic.”[274] The United Nations Development Programme’s (UNDP) International Guidelines on Human Rights and Drug Policy has attempted to temper the force of

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[270] Sánchez-Avilés and Ditrych (2020), 19.
[271] Sánchez-Avilés and Ditrych (2020), 29.
[272] 1988 Convention, Article 14(2).
[273] Boister (2002), 210-211.
[274] 1988 Convention, Article 24.

the "more strict or severe measures" provisions by recommending states adhere to international human rights law standards in exceeding the penal provisions contained in the conventions.[275] But the latitude to go above and beyond the minimum standards established by the IDCS only aggravates drug control's basic human rights problem. While transnational criminal law as a whole has a human rights issue, the "human rights gap…is particularly wide in the case of drug control."[276] Nonetheless, in 2016 the Outcome Document of the UN General Assembly Special Session (UNGASS) on the World Drug Problem stated the international community's "unwavering commitment to ensuring all aspects of demand reduction and…supply reduction…are addressed in full conformity with the purposes and principles of the Charter of the [UN], international law and the Universal Declaration of Human Rights."[277] This is the most robust human rights resolution to come out of IDCS fora to date, but strongly worded statements have yet to translate into real safeguards. In a systematic review of UN literature on human rights and drug control from the 1990s to the present Julia Hannah and Rick Lines conclude that both states and drug control bodies remain committed to the core tenets of the IDCS: prohibition and suppression.[278] Rhetorical overtures to human rights are a weak substitute for promoting and

[275] United Nations Development Programme et al., "International Guidelines on Human Rights and Drug Policy," March 2019, https://www.humanrights-drugpolicy.org/site/assets/files/1640/hrdp_guidelines_2020_english.pdf, 23.
[276] Wisehart (2019), 166-168 (quotation at 168).
[277] United Nations General Assembly, "Our joint commitment to effectively addressing and countering the world drug problem," 19 April 2016, A/RES/S-30/1, accessed 4 October 2019, https://www.unodc.org/documents/postungass2016/outcome/V1603301-E.pdf, 2. See also the 2019 comments of the Zaved Mahmood, Human Rights and Drug Policy Advisor to the Office of the High Commissioner for Human Rights, on the importance of human rights in drug control. United Nations Office of the High Commissioner for Human Rights, Statement delivered by Zaved Mahmood, Human Rights and Drug Policy Advisor to the Office of the High Commissioner for Human Rights, Item No. 3: General Debate 15 March 2019, 62nd Session of the Commission on Narcotic Drugs 14 to 22 March 2019, Vienna International Centre, accessed 25 September 2020, https://www.unodc.org/documents/commissions/CND/2019/2019_MINISTERIAL_SEGMENT/17March/OHCHR.pdf, cited in Melissa L. Bone, *Human Rights and Drug Control: A New Perspective* (Abingdon: Routledge, 2020), 86.
[278] Julie Hannah and Rick Lines, "Drug control and human rights: parallel universes, universal parallels," in David R. Bewley-Taylor and Khalid Tinasti (eds), *Research Handbook on International Drug Policy* (Cheltenham, UK: Edward Elgar, 2020), 227-249.

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implementing law and policy that ranks rights and freedoms ahead of the prerogatives of disciplining and punishing the people involved in the illicit drugs market.

Drug control bodies emphasize the importance of human rights within the IDCS and deny there is a conflict between the normative frameworks of the human rights and drug control regimes. The INCB insists that when the drug conventions are read in conjunction with human rights treaties “there is convergence rather than a divergence in human rights norms” as both “employ the same language and rationale.”[279] Statements like this, employing the idioms of international law and human rights, are best read as attempts to “shift the regime’s normative focus” away from the negative impact of drug control.[280] Indeed, through resolutions, political declarations, and decisions, treaty bodies shape the IDCS’s “normative tone and character.”[281] Paul Hunt, the former United Nations Special rapporteur on the right to the highest attainable standard of health – a right codified in Article 12 of the UN International Covenant on Economic, Cultural and Social Rights[282] – has concluded that: “If human rights are to become part of the culture of agencies, funds, programs, and other UN bodies [including the CND, UNODC, and INCB], human rights have to be ‘owned’ and internalized by each organization.”[283] This is a necessary part of the mainstreaming of human rights in drug control, but depending on normative tone and value internalization at the international level is an insufficient plan of action in the face of widespread and ongoing human rights abuses carried out

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[279] International Narcotics Control Board, “Respect for human rights as an integral part of a balanced approach to addressing the world drug problem,” June 2018, E/INCB/2018/Alert.5, accessed 4 October 2019, https://www.incb.org/documents/News/Alerts/Alert5_on_Convention_Implementation_June_2018.pdf, para 3. See also Walsh and Jelsma (2019), 267.
[280] Bewley-Taylor and Fitzmaurice (2018), 415.
[281] Bewley-Taylor and Fitzmaurice (2018), 415.
[282] United Nations General Assembly, International Covenant on Economic, Cultural and Social Rights, 16 December 1966, UN Treaty Series, Vol. 993.
[283] Paul Hunt, “Configuring the UN Human Rights System in the ‘Era of Implementation’: Mainland and Archipelago,” *Human Rights Quarterly* 39, 3 (2017), 514 and 528.

in the name of the IDCS's mission. Words and thoughts fail where engagement and action are needed. The core of the issue is that there is no alternative approach to drug control outside of the IDCS and a systemic "lack of realistic structural modalities for formal revision of the regime."[284] The only option available to states parties to the conventions is to take matters into their own hands by pursuing "more innovative," though often tendentious, strategies to dynamically reshape drug control law to suit evolving local preferences and practices, "advances in scientific knowledge and international human rights law that often underpins policy shifts at the national level."[285] Assuming sovereign autonomy over drug law and policy is a controversial position under the IDCS and its obligations, but it may be the only course of action consistent with international human rights commitments.

The violence characteristic of the law enforcement approach to drug control has led several scholars to question whether the legal apparatus structuring the War on Drugs is inherently incompatible with international human rights standards.[286] This thesis suggests it is, a contention disputed by the regime and its defenders. For example, scholar and former Drug Control Officer Saul Takahashi posits that there is no necessary connection between the drug control regime and human rights violations. Rather, the latter are "features of law enforcement in those countries" where abuses take place.[287] The INCB's leadership concurs, admitting in 2019 that "many gross human rights violations have been committed in the name of or under the guise of drug control" but purporting that these "occurred not because of the drug control conventions

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[284] Bewley-Taylor and Fitzmaurice (2018), 416.
[285] Bewley-Taylor and Fitzmaurice (2018), 408 and 430.
[286] Sita Legac, "The Negative Impacts of the Global War on Drugs: Can International Drug Enforcement Be Successful Without Infringing on Human Rights?" 3 *Albany Government Law Review* 823 (2010): 823-841; Daniel Heilmann, "The International Control of Illegal Drugs and the U.N. Treaty Regime: Preventing or Causing Human Rights Violations?" 19 *Cardozo Journal of International & Comparative Law* 237 (2011): 237-290; Lines (2017), chapter 1.
[287] Saul Takahashi, *Human Rights and Drug Control: The False Dichotomy* (Oxford: Hart Publishing, 2016), 91-92.

but in spite of them."[288] In other words, human rights violations would occur in these states with or without an international obligation to subject drug trafficking and use to strict control, prohibition, suppression, and criminalization. This could be true, but it remains the case that the IDCS mandates the universalization of the crime control model of enforcement. It is within the realm of possibility that states would not treat the illicit trade in and use of drugs as serious crimes in the absence of the regime's punitive standards. Equally, if states had the latitude to pursue more independent drug policies it is not necessarily the case that they would implement more liberal control schemes. But a baseline of strict control, prohibition, suppression, and criminalization gives law enforcement primacy of place in drug control. It is under this paradigm that the human rights violations mentioned by Takahashi and UN treaty bodies take place.

In its 2021 celebration of the anniversaries of the Single and 1971 conventions the INCB evaded responsibility for human rights violations occurring under the auspices of the INDCS:

> [T]he choice of policy, legislative and administrative measures to implement them is left to the discretion of Governments within the limits set by the conventions, which do not specify what precise procedure or process each party should follow, or what penalty, sanction or alternative to apply to an offender in a particular case.[289]

Managing and maintaining the regime at the international level is seen as a case apart from the domestic execution of binding treaty obligations. But even as it denounced human rights violations as incompatible with the IDCS and reminded states that law enforcement and criminal justice approaches to drug control must be proportionate, the INCB reiterated the flexibility of the treaties vis-à-vis stricter national responses to the world drug problem.[290] As the INCB

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[288] International Narcotics Control Board, "Statement by Dr. Viroj Sumyai, President of the International Narcotics Control Board at the fifth intersessional meeting of the sixty-second session of the Commission of Narcotic Drugs," Vienna, 7 November 2018, accessed 4 October 2019, https://www.incb.org/documents/Speeches/Speeches2018/INCB_President_5th_intersessional_CND.pdf, 3.
[289] International Narcotics Control Board, Celebrating 60 Years of the Single Convention on Narcotic Drugs of 1961 '... a generally acceptable international convention ...' and 50 Years of the Convention on Psychotropic Substances of 1971 '... an international convention is necessary ...' (Vienna: United Nations, 2021a), para 87.
[290] INCB (2021a), paras 85-97.

reminded readers, Article 24 of the 1988 Convention explicitly permits countries to enact “more strict or severe measures” than those contained in the treaties where they “consider[] them desirable or necessary for the protection of public health and welfare or for the prevention and suppression of illicit traffic.”[291] States are indirectly encouraged to be harsher in their drug control law and policy than the floor set in the treaties. At the same time, human rights violations are blamed solely on national states; states pursuing the objects and purposes stipulated in the treaties and championed by treaty bodies. For the INCB to claim there is no connection between the IDCS and domestic human rights violations is, at the very least, insincere.[292] At worst, the UN could be said to be aiding and abetting human rights violations in exhorting states to do what is necessary to eradicate the illicit trade in and use of drugs.

1.9 Conclusion

This chapter surveyed the origins and development of the IDCS and its commanding treaties: the Single Convention 1961 as amended by the 1972 Protocol, Convention on Psychotropic Substances 1971, and Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. The principles and provisions enumerated in these instruments animate the implementation and execution of drug law and policy in almost every nation around the globe. Human rights are not a central tenet of the IDCS. Even so, UN organizations and treaty bodies from the UNGA to the UNODC and INCB indicate there is a place for human rights within drug control but that they can do little to ensure their protection domestically other than draw attention to unsavory practices. States parties to the drug control conventions openly pursue policies detrimental to and in violation of human rights standards with few repercussions. This is because

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[291] INCB (2021a), para 87.
[292] Boister (2002), 220-222.

dedication to eradicating the “serious evil” of drug abuse and winning a “drug free world” have remained powerful moral justifications underlying the strict control, prohibition, suppression, and criminalization of the illicit trade in and use of drugs.[293] The intransigence of the IDCS’s legal architecture and ideological superstructure is alarming and inconsistent with the international community’s human rights commitments. For states aiming to better comply with the latter through legal and policy innovation the status quo is untenable. Several have decided to act outside the bounds of acceptability under the IDCS, deviating from its strictures in pursuit of more human rights-based approaches to dealing with the World Drug Problem. Jurisdictions in the Americas, Europe, and Africa have been experimenting with new approaches to drug control, raising serious questions about the IDCS’s legitimacy and future.[294] As explored in chapter 2, attempts to assimilate novel law and policy solutions into the regime suggest challenges to its integrity can be contained but not without sacrificing its coherence.

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[293] Steve Rolles, “The rise and fall of the ‘drug free world’ narrative,” in David R. Bewley-Taylor and Khalid Tinasti (eds), *Research Handbook on International Drug Policy* (Cheltenham, UK: Edward Elgar, 2020), 208-226.
[294] Axel Klein and Blaine Stothard, “Introduction,” in Axel Klein and Blaine Stothard (eds), *Collapse of the Global Order on Drugs: From UNGASS 2016 to Review 2019* (Bingley, UK: Emerald Publishing, 2018), 1-19.

Chapter 2: Drug Control, Human Rights, and International Treaty Reform

2.1 New Directions in Drug Law and Policy

The international drug control system (IDCS) is part of the body of law known as transnational criminal law. Treaties in this field are labelled "suppression conventions" and have three distinctive features: (1) "the penalization of a criminal activity with transnational effects"; (2) suppressed acts are "carried out by private groups or individuals"; and (3) rules are effectuated "by domestic provisions taken in order to comply with treaty-based international obligations."[295] Recall that states parties to the drug control conventions indirectly implement and administer the regime and bear primary responsibility for its enforcement.[296] Without uniform definitions, general principles, coherent policies, or standard procedures, the IDCS's treaties force states "to flesh out the skeleton provisions of the conventions" for themselves.[297] John Collins reads flexibility into this framework of loose definitions and legal gaps, suggesting orthodox interpretations of the treaties misconstrue a system that does not mandate prohibition nor act as a de jure or de facto impediment to policy experimentation in relation to cannabis reform. It is individual states, after all, that are responsible for the IDCS's execution.[298] What is lost in this conceptualization is the network within which the regime operates. Law, policy, history, ideology, and power politics shape and constrain interpretation and practice, including human rights considerations. As is the case with other areas of transnational criminal law, the IDCS has a human rights problem: "there are no safeguards for those individuals that will eventually be the

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[295] Wisehart (2019), 162 citing Neil Boister, "Transnational Criminal Law?" *European Journal of International Law* 14, 5 (2003): 953-976.
[296] Wisehart (2019), 163.
[297] Boister (2002), 220.
[298] John Collins, "A Brief History of Cannabis and the Drug Conventions," *AJIL Unbound* 114 (2020): 279-284.

object of…penalization and prosecution."[299] Without concrete guidance on how to address human rights issues in the enforcement of the IDCS there is little to no incentive for states to do so on their own. This predicament is untenable and cannot persist indefinitely. It is evident that international and constitutional human rights and fundamental freedoms need to be not only promoted and protected but prioritized if the IDCS is to survive in its current, nearly-universally accepted form. Prohibition and suppression without concession to rights and freedoms principles is no formula for ensuring long-term international cooperation vis-à-vis drug control.

Drug law and policy reform is possible and necessary at the municipal, regional, national, transnational, and international levels. Chapter 2 focuses in on national, transnational, and international efforts at refashioning the IDCS to meet contemporary challenges and admit political, social, and cultural diversity in drug enforcement. International organizations, states parties to the regime, and reform advocates regularly employ human rights discourse, arguments, and instruments in (re)framing the narrative on drugs. Central to this endeavor are efforts to initiate a "human rights-based approach" to drug control, "a very controversial position," wherein United Nations treaty bodies and national governments make "a commitment to placing a priority on human rights over drug policy objectives."[300] The demand for international guidelines to enable states parties to the IDCS to comply with international human rights standards in their execution of the drug control conventions was answered in 2019.[301] That year the UNDP issued its non-binding Guidelines on Human Rights and Drug Policy on the human rights principles, obligations, and objects fundamental to a just drug policy under the IDCS and

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[299] Wisehart (2019), 165-166.
[300] Damon Barrett, Julie Hannah, and Rick Lines, "What Does it Mean to Adopt a Human Rights-based Approach to Drug Policy?" *Health and Human Rights Journal* 22, 1 (2020): 355-357.
[301] Rick Lines et al., "The Case for International Guidelines on Human Rights and Drug Control," *Health and Human Rights* 19, 1 (2017): 231-236.

informed by the Sustainable Development Goals. Covering civil, political, social, and economic rights, the Guidelines emphasize that the IDCS's rules should be interpreted to ensure harmonization and simultaneous compliance between international human rights law and the conventions.[302] More concretely, non-government organizations have elucidated strategies aimed at limiting the adverse impacts of drug control. To this end the Global Commission on Drug Policy (GCDP), comprised of former heads of state and representatives of international organizations working to deal with the effects and deficiencies of the IDCS, has identified five "evidence-based, pragmatic, and people-centered pathways for the international community to redirect future drug policies."[303] Short of (1) legally regulated drugs markets, which would require "the end of prohibition and a complete paradigm shift,"[304] states may, the GCDP posits, use "policy elasticities" under the current regime to: (2) "prioritize public health" through harm reduction; (3) "ensure equitable access to controlled medicines for pain relief"; (4) "decriminalize drug use and possession,"; and (5) "focus on reducing the violence and insecurity that result from…state repression."[305] This chapter engages several of these debates, exploring the ways in which human rights are implicated in each area of "policy elasticity."

Richard Lines, following Damon Barrett's lead, has detailed how tensions between the drug control conventions and human rights law are not so much about conflict between "explicit treaty obligation[s] in the drug conventions but rather results from the manner in which a State or other body interprets that obligation within domestic practice."[306] According to this line of argument it is the strict interpretation of the treaties and its ramifications that creates fertile

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[302] United Nations Development Programme et al. (2019), 23.
[303] Tinasti (2019), 115-117.
[304] Tinasti (2019), 117.
[305] Tinasti (2019), 115-117.
[306] Lines (2017), 82; Damon Barrett, "Intersecting between the International Legal Regimes for Drug Control and Human Rights," Human Rights and Drugs Conference, Human Rights Centre, University of Essex (8 February 2014).

ground for human rights abuses rather than "what is codified in the drug conventions" that is to blame for violations.[307] A direct conflict between the treaties and human rights law, by contrast, would entail that "fulfilling the obligation of one would necessarily cause a breach of the other."[308] With strict control, prohibition, suppression, and criminalization of the drugs trade and users as de minimus requirements of the IDCS it is problematic to attribute violations to interpretation alone. The structure and ideology of drug control at the international level indelibly colors national law and policy. That said, if the severity of the regime's application is just a matter of interpretation then there is room for "'soft defecting' states…to deviate from the prohibitive ethos of the conventions whilst remaining within what they deem to be the confines of their treaty commitments."[309] Concerted efforts to address shortcomings vis-à-vis harm reduction services, cultural and religious use, and cannabis legalization and decriminalization schemes have been identified as particularly ripe areas for reform.[310] Where these law and policy changes take hold, however, states push the limits of the purported flexibilities of the treaties.

The dissonance generated by duelling obligations under international law can lead to "ideational fragmentation," wherein distinct regime "objectives and values" create normative conflict between differing legal obligations.[311] International human rights law comes up against the IDCS in several ways, causing friction between rights to life, health, and various liberty interests and the demand for the strict control, prohibition, suppression, and criminalization of the drugs trade and use. Where conflicts of this sort transpire, suggests Anne Peters, they "should

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[307] Lines (2017), 86. See also George Jotham Kondowe, "Drug control and human rights in national jurisdictions," *Commonwealth Law Bulletin* 46, 4 (2020): 579-594.
[308] Lines (2017), 101-102.
[309] David R. Bewley-Taylor, "Towards revision of the UN drug control conventions: Harnessing like-mindedness," *International Journal of Drug Policy* 24 (2013), 60.
[310] Bewley-Taylor (2013), 60-61 and 64-66.
[311] Anne Peters, "The refinement of international law: From fragmentation to regime interaction and politicization," *International Journal of Constitutional Law* 15, 3 (2017), 675.

be resolved 'politically' (by the global lawmakers which are still mainly states) and not 'technically' (by international courts and tribunals)."[312] In the present context, the resolution of antinomies between human rights and drug control should therefore be left to individual states parties to the IDCS and organizations like the CND, UNODC, and INCB. Fragmentation and dialogue on reform measures could at once preserve the integrity of the treaty regime while accommodating innovative interpretations and applications of the law.[313] It could also delay, obfuscate, moderate, or nullify programs attempting to reconfigure the IDCS to better assimilate human rights and fundamental freedoms in the name of upholding the restrictive core of contemporary drug control.

In 2006 the International Law Commission (ILC) tackled the issue of fragmentation in international law. The phenomenon alludes to the "emergence of regimes of international law that have their basis in multilateral treaties and acts of international organizations, specialized treaties and customary patterns that are tailored to the needs and interests of each network but rarely take account of the outside world."[314] The outside world all the same has a direct effect on the meaning of international law. The (re)construction of international rules "by domestic courts," for example, "can affect the understanding and operation of some international legal regimes within [and outside] the state."[315] The ILC observed that this is not a wholly negative process: "Even as international law's diversification may threaten its coherence, it does this by increasing its responsiveness to the regulatory context."[316] Instead of seeing the contestation of

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[312] Peters (2017), 701.
[313] See Collins (2021), 215-218.
[314] United Nations General Assembly, International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, A/CN.4/L.682, 13 April 2006, para 482.
[315] Cheryl Saunders, "International Regimes and Domestic Arrangements: A View from Inside Out," in Margaret A. Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012), 73 and 79.
[316] United Nations General Assembly, International Law Commission (2006), para 492.

the IDCS by human rights law, whether at the international or domestic level, in the negative as tending toward legal fragmentation,[317] conflict and contestation can be framed as means by which individual states contribute to the "refinement of international law" through dialogue and engagement with fellow states and international institutional actors.[318] Rather than expanding the gap between drug control and human rights, the politicization of the treaties and their regime promotes legal pluralism and "the legitimacy of international law and its application."[319] Bringing human rights law to bear on the IDCS by "seeking to achieve the objectives of [the] treaties" in a human rights-compliant manner[320] could also more effectively mainstream human rights into the drug control field.[321] The examples that follow pick up on these ideas and demonstrate the extent to which the IDCS can and has accommodated and resisted contestation.[322] Whether fragmentation is seen in a positive or negative light is beside the point, for resistance to the hegemony of the regime is occurring as a matter of fact.

There are significant cracks in the IDCS's edifice of strict control, prohibition, suppression, and criminalization. The push for harm reduction over the criminalization and stigmatization of drug users, Bolivia's unilateral action to protect the traditional cultivation and

[317] At the normative level, fragmentation refers to "a process and the result of that process, namely a (relatively) fragmented state of the law. The diagnosis refers to the dynamic growth of new and specialized sub-fields of international law after 1989." There is a worry these instances of conflict damage the coherence and legitimacy of international law. Anne Peters, "Fragmentation and Constitutionalization," in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016), 1013-1016.
[318] Peters (2017), 701-703; De Wet (2012), 1228-1230.
[319] Peters (2017), 681-682. On pluralism see Peters (2016), 1023.
[320] Peters (2016), 1024-1025.
[321] On the pervasiveness of human rights in international law see Peters (2017), 689. The mainstreaming of human rights norms within United Nations bodies is "a project for seizing institutional power" through "empowering particular types of expertise, systems of knowledge and value, institutional preference and bias" to fully implement and comply with international human rights law. Martti Koskenniemi, "Human Rights Mainstreaming as a Strategy for Institutional Power," *Humanity* 1,1 (2010), 47 and 51; Hunt (2017), 501-502, 510, 529, and passim. Ideally, mainstreaming human rights entails UN bodies engage in (1) "human rights standard-setting," (2) "further[ing] the realization of human rights" in programming and capacity building among Member States to fulfil their treaty obligations, and (3) providing institutional leadership and structural support in the implementation of human rights initiatives across the UN system. Hunt (2017), 532-535.
[322] The choice of examples derives from Boister (2016).

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use of coca leaves, and legalization of cannabis from California to Uruguay, Canada, and South Africa point towards the inability of the regime to adapt to twenty-first century law and policy prerogatives. The ability and willingness of the IDCS to cope with these challenges is analyzed in the subsections that follow. The conventions can be read to justify a modicum of flexibility and pluralism, but they must be read in ways that promote the aim of improving the "the health and welfare of mankind"[323] and protecting and securing human rights and fundamental freedoms. The limitations of this approach, however, are compelling and raise serious questions regarding the viability of piecemeal change.

2.2.a The Harm Reduction Debate

In his capacity as United Nations Special rapporteur on the right to the highest attainable standard of health from 2002-2008, Paul Hunt highlighted the daily human rights abuses inflicted on drug users: the denial of medical treatment, police harassment, forced detoxification and rehabilitation, and refusal to provide needle exchange or safe injection services to name a few.[324] From a harm reduction perspective these actions are violative of the right to health among others. But for officials, international and national, a "zero tolerance" law enforcement-oriented agenda remains the only appropriate policy response to drug use.[325] This drug control strategy is inconsistent with the requirements of international human rights law. And respecting the latter, Hunt noted, "is not an option. It is a legal requirement."[326] But organizations, from the CND to the UNODC and INCB, and states, including the US, seem operate in a "parallel universe" where human rights take a back seat to the pursuit of a "drug free world."[327] There is a fundamental

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[323] Single Convention, preamble.
[324] Paul Hunt, "Human Rights and Harm Reduction: States' amnesia and parallel universes," Harm Reduction 2008: IHRA's 19th International Conference Barcelona (11 May 2008), 3.
[325] Geiß and Wisehart (2015), 391-393.
[326] Hunt (2008), 9.
[327] Hunt (2008), 9.

epistemic dissonance between human rights advocates and institutional actors as to the legality and appropriateness of harm reduction measures under the IDCS.

Harm reduction services promote evidence-based, non-discriminatory health interventions and treatment for people who use drugs delivered in a non-judgmental, human rights-compliant environment.[328] Many harm reduction techniques, including opioid substitution therapy (OST), needle exchange programs, and supervised injection sites, are widely accepted practices in addiction medicine. Evidence-based and voluntary drug dependence treatment is considered an obligation under human rights standards.[329] Additionally, according to scholar and former Drug Control Officer Saul Takahashi, harm reduction "signifies measures taken to reduce the harm caused by the abuse of drugs, as opposed to measures aimed at eliminating the abuse itself."[330] This attribute of harm reduction is certainly accurate, but it evinces the perspective of the INCB. From this point of view, what is objectionable about initiatives designed to mitigate the adverse consequences of illicit drug use is that they are seen to be "condoning and facilitating drug use" contrary to the provisions of the drug control conventions.[331] Takahashi and the INCB's "overly restrictive" understanding of the treaties, as per lawyers Robin Geiß and Daniel Wisehart, present harm reduction as an obstacle to the regime's efficient administration.[332] The IDCS's object and purpose is to eliminate the illicit use of controlled substances, not encourage it. This interpretation has significant repercussions for harm reduction initiatives and drug users, especially people who inject drugs (PWID).

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[328] Hunt (2008), 11.
[329] United Nations Development Programme et al. (2019), 8.
[330] Saul Takahashi, "Drug Control, Human Rights, and the Right to the Highest Attainable Standard of Health," *Human Rights Quarterly* 31, 3 (2009), 764. For a critique of Takahashi's point of view and a defense of harm reduction see Simon Flacks, "Drug Control, Human Rights, and the Right to the Highest Attainable Standard of Health: A Reply to Saul Takahashi," *Human Rights Quarterly* 33, 3 (2011): 856-877.
[331] Takahashi (2009), 767. See also Lines (2017), 96-101.
[332] On the "Legality of Harm Reduction Measures" under the conventions see Geiß and Wisehart (2015), 387-391.

This debate played out in Canada in 2011 after the federal Minister of Health decided not to renew an exemption from criminal prosecution under the Controlled Drugs and Substances Act (CDSA) to Insite, a Vancouver-based supervised injection site.[333] Under section 56 of the CDSA the Minister may exempt "any person or class of persons" from the Act where doing so is consistent with "medical and scientific purposes or is otherwise in the public interest."[334] Reviewing the Minister's decision, the Supreme Court of Canada (SCC) held that withholding an extension of the exemption, entailing the closure of Insite, infringed upon the staff and patrons' section 7 "right to life, liberty and security of the person" as guaranteed by the Charter of Rights and Freedoms.[335] Ministerial discretion must be exercised in line with Charter requirements.[336] For this reason, the SCC determined that the Minister's decision was "grossly disproportionate to any benefit that Canada might derive" from the uniform application of the CDSA.[337] The advantages of harm reduction over criminalization were evident to the Court: "Insite saves lives. Its benefits have been proven."[338] The verdict irked the Conservative federal government,[339] international treaty bodies,[340] and one scholar even described it as "intense judicial activism."[341] These reactions were somewhat histrionic. Indeed, the Court's determination did not set a precedent permitting the opening of supervised injection sites across Canada. Its holding was

[333] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134.
[334] Controlled Drugs and Substances Act, SC 1996 c 19, s 56(1).
[335] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[336] Peter W. Hogg, *Constitutional Law of Canada, 2013 Student Edition* (Toronto: Carswell, 2013), 18-11. That said, the CDSA in and of itself did not violate the Charter. See Rahool P. Agarwal, "Canada (Attorney General) v PHS Community Services Society," 20 *Constitutional Forum* 41 (2011): 41-48.
[337] *PHS Community Services*, para 132.
[338] *PHS Community Services*, para 132.
[339] In 2015, the Conservatives attempted to fetter the discretion of future ministers by amending the legislation, especially s 56 of the CDSA, to include criteria that must be met before it may be exercised. See Cylas Martell-Crawford, "Safe Injection Facilities: A Path to Legitimacy," 11 *Albany Government Law Review* 124 (2017), 138-139.
[340] Lines (2017), 100-101.
[341] Dwight Newman, "The PHS Case and Federalism-Based Alternatives to Charter Activism," 22 *Constitutional Forum* 85 (2013): 85-92.

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limited to the situation at hand.[342] But, as Alana Klein details, “the Court also developed section 7 of the Charter in a manner that favours harm reduction’s methodological commitment to empirical effects on health over moral or ideological considerations.”[343] The SCC recognized that evidence-based interventions to manage addiction and dependence work. The Insite case also demonstrates the effectiveness of domestic constitutional adjudication and judicial review as a check on strict control, prohibition, suppression, and criminalization. There is no such bulwark at the international level.

Attempts to implement harm reduction initiatives in South Africa, including OST, needle exchange programs, and safe injection sites, funded by international donors and delivered by civil society and non-governmental organizations, have been thwarted by domestic and international politics and a reliance on criminalization to deal with the country’s pervasive social and economic shortcomings. Its Drug Master Plans, policy outlines authored by the Central Drug Authority, the most recent of which spans 2019-2024, commit South Africa to a drug control strategy that prioritizes “human rights, scientific evidence, ‘intersectionality’, person-centered approaches, and the inclusion of people who use drugs.”[344] But in practice the government has publicly rejected this orientation by shutting down needle exchange programs in cities like Durban, whose project opened in 2015, closed in 2018, and restarted in 2020, not supporting international human rights declarations pertaining to drug users, allying with prohibitionists like the US and Russia which has increased the securitization of its drugs policing, and repeatedly announcing its commitment to eradicating drug use at intergovernmental fora. Even in the most

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[342] Agarwal (2011), 45-46.
[343] Alana Klein, “Criminal Law and the Counter-Hegemonic Potential of Harm Reduction,” *Dalhousie Law Journal* 38, 2 (2015), 460.
[344] Andrew Scheibe, Shaun Shelly and Anna Versfeld, “Prohibitionist Drug Policy in South Africa—Reasons and Effects,” in Julia Buxton, Mary Chinery-Hesse and Khalid Tinasti (eds), *Drug Policies and Development: Conflict and Coexistence* (Leiden: Brill Nijhoff, 2020), 283.

developed African nation the prospects for a harm reduction approach to drug use and users is limited.[345] South Africa's Drug Master Plans are unlikely to alter its prohibitionist paradigm for, as Shaun Shelly and Simon Howell put it, "in South Africa (and especially in relation to drugs and drug use), policy means little unless it is captured in law."[346] As long as strict control, prohibition, suppression, and criminalization dominate domestic statutory instruments there is minimal prospect for harm reduction to gain traction in South Africa. The lack of pre-existing harm reduction infrastructure and insufficient financial resources allocated to addiction medicine mean there is reason to fear a surge in opioid overdose fatalities.[347]

Harm reduction measures are evidence-based medical interventions addressing problematic drug use that comply with human rights standards. Recognition of their place within the drug control paradigm has been slow but real progress has been made in recent decades as a variety of actors, from national governments to NGOs, have pushed for and implemented harm reduction policies despite recalcitrance at the international level, due mostly to the moralistic paternalism that inheres in the IDCS and resistance from prohibition-committed states.[348] There is no guarantee that law and science will win out in the long run, but harm reduction must become a central tenet of drug control if the IDCS is to survive into the twenty-first century as a legitimate, semi-coherent part of the UN system. But assimilation is not without its risks. Problematically, as legal scholar Melissa Bone deduced, harm reduction "could be compatible with a prohibitionist regime by failing to question the overarching goal or ideology of

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[345] Scheibe, Shelly and Versfeld (2020).
[346] Shaun Shelly and Simon Howell, "South Africa's National Drug Master Plan: Influenced and Ignored," Working Paper No. 4 (Swansea: GDPO, 2018), 6.
[347] M.-J. Stowe, Andrew Scheibe, Shaun Shelly and Monique Marks, "Correspondence: COVID-19 restrictions and increased risk of overdose for street-based people with opioid dependence," *South African Medical Journal* 110, 6 (2020), https://journals.co.za/doi/pdf/10.7196/SAMJ.2020.v110i6.14832.
[348] Rolles (2020); Jennifer Hasselgard-Rowe, Naomi Burke-Shyne and Ann Forham, "Public health and international drug control: harm reduction and access to controlled medicines," in David R. Bewley-Taylor and Khalid Tinasti (eds), *Research Handbook on International Drug Policy* (Cheltenham, UK: Edward Elgar, 2020), 250-266.

prohibition; to reduce or eliminate drug use."[349] The IDCS's dedication to abstinence has retarded the proliferation and normalization of harm reduction in drug control law and policy.

2.2.b Coca in Bolivia

Indigenous peoples in the Andes have used the coca leaf for cultural and religious purposes from time immemorial in the management of altitude sickness and religious ritual among other purposes.[350] Its treatment as a harmful narcotic is a recent development. The drug control conventions require that states strictly control the coca plant, grown solely in South America, because it "serves as the raw material from which cocaine is produced."[351] But powder cocaine, with its huge market in North America and Europe, is not the only form of coca that was mandated to be banned. At the drafting of the Single Convention, international actors and representatives of producer nations agreed that the chewing of coca leaves would also have to be eliminated. Knowing that it could not be eradicated overnight given its prevalence, they compromised in agreeing that the Single Convention would give states 25 years to bring an end to coca's traditional use.[352] A quarter-century, however, was insufficient to accomplish this goal. Bolivia's subsequent coca conflict with the IDCS in the early 2010s highlights the inadequacy of the current strict control, prohibitionist, suppressionist, criminalization model when faced with uncompromising resistance.

While the treaties mandate the abolition of the trade in and use of coca in all its forms, international human rights law, including the International Labour Organization's Convention No. 169 and United Nations Declaration on the Rights of Indigenous Peoples, simultaneously

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[349] Bone (2020), 7.
[350] Richard Lines has succinctly set out and analyzed the conflict between the international drug control treaties and the traditional use of coca in Lines (2017), 102-104.
[351] 1988 Convention, Article 14(2) and Lines (2017), 102.
[352] 1961 Convention, Article 49(2)(e) and Lines (2017), 102.

"obligates States to protect the traditional practices of indigenous peoples."[353] The conflict between these dual obligations made it difficult for indigenous peoples to make the case for coca, especially as US-backed crop eradication and substitution efforts – routinely tied to further development aid – dominated the region. Bolivia's Law 1008 of 1988, for example, was drafted with not insignificant input from the US, which reiterated the legitimacy of coca's traditional "uso en la medicina y rituals de los pueblos andinos" in Article 2 while also restricting and curtailing its licit production.[354] Use without production was a formula designed to end traditional use. Bolivian coca farmers refused to kowtow to their US-supported leaders and, in the early 2000s, began resisting in earnest. Evo Morales, himself a coca industry trade-unionist and founder of the Movimiento al Socialismo party, challenged strict control, prohibition, suppression, and criminalization at home with a presidential campaign slogan declaring "Coca Yes, Cocaine No." After winning the Presidency in 2006 Morales took the fight to the international stage.[355] Bolivia's amended Constitution of 2009 enshrined traditional coca production and use as a fundamental part of the country's heritage. Article 384 holds that: "The State protects the native and ancestral coca as cultural patrimony…and as a factor of social unity. In its natural state coca is not a narcotic. The revaluation, production, sale and industrialization of coca shall be governed by law."[356] With international human rights and constitutional law as justification, officially denounced the Single Convention and re-acceded to the treaty with a

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[353] Lines (2017), 103; Sven Pfeiffer, "Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing," *Goettingen Journal of International Law* 5 (2013), 292-295 and 313-318.
[354] Ley del Regimen de la Coca y Sustancias Controladas, Ley 1008 (19 Julio 1988), accessed 12 October 2019, http://www.cicad.oas.org/ fortalecimiento_institucional/ legislations/ PDF/BO/ley_1008.pdf; Brian Riedel, "I'd Like to Make a Reservation: Bolivian Coca Control and Why the United Nations Should Amend the Single Convention on Narcotic Drugs," 49 *George Washington International Law Review* 711 (2017), 726-728; Melanie R. Hallums, "Bolivia and Coca: Law, Policy, and Drug Control," 30 *Vanderbilt Journal Transnational Law* 817 (1997): 817-862.
[355] Riedel (2017), 711-715, 729-731 and 739.
[356] Bolivia (Plurinational State of)'s Constitution of 2009, *Constitute*, accessed 8 October 2019, https://www.constituteproject.org/constitution/Bolivia_2009.pdf, Article 384.

reservation concerning the traditional use of coca in 2013.[357] Criticism of this move from fellow states parties to the regime and treaty bodies was robust, but it failed to dissuade Morales.

The INCB President commented in 2011 that "while the denunciation itself may be technically permitted under the [Single] Convention, it is contrary to the fundamental object and spirit of the Convention."[358] The INCB's accusation that Bolivia compromised the IDCS via its actions was betrayed by the fact that numerous reservations to the drug control conventions had previously been registered and accepted.[359] Of course, the inability of the INCB and objecting states to correct Bolivia's independent course is a result of the IDCS's structure. States parties to the regime are responsible for the implementation and execution of the treaties. As such, little could be done to get Bolivia to change tack. That it got away with denouncing the Single Convention and re-acceding with a reservation could set an important precedent for other dissenting states. To ardent supporters of the IDCS, however, it represents a compromise of the regime's uniform application across the globe.[360] That said, even members of the Obama Administration in the US put forward that flexibility within the drug control conventions gave leeway to states to tailor domestic law and policy to local circumstances.[361] Bolivia effectively

[357] "Bolivia already had a similar reservation to a similar article [14(2)] on traditional uses of coca in the 1988 drug convention." See Lines (2017), 103-104; Robert C. Zitt, "Should I Stay or Should I Go: Why Bolivian Tactics and U.S. Flexibility Undermine the Single Convention on Narcotic Drugs," 42 *Brooklyn Journal of International Law* 525 (2016), 526.

[358] International Narcotics Control Board, Report of the International Narcotics Control Board for 2011 (New York: United Nations, 2012), v.

[359] In 2012 there were "45 current reservations to the 1961 treaty or its 1972 protocol, 44 to the 1971 treaty, and 73 to the 1988 treaty." Robin Room, "Reform by subtraction: The path of denunciation of international drug treaties and reaccession with reservations," *International Journal of Drug Policy* 23 (2012), 403.

[360] Zitt (2016), 543-544 and 554-555; Abraham Kim, "The Plight of Bolivian Coca Leaves: Bolivia's Quest for Decriminalization in the Face of Inconsistent International Legislation," 13 *Washington University Global Studies Law Review* 559 (2014), 581-583; Pfeiffer (2013), 323.

[361] On applying this logic to the contradiction of state-level legalization of cannabis within the US while it remains prohibited by the federal government and at the same time scolding Bolivia for its actions see Zitt (2016), 547-551 and 564. On the implications of Bolivia's move for the US cannabis question see Cody T. Mason, "Coca Leaves and Colorado: International Law and the Shifting Landscape of Drug Reform," 29 *Maryland Journal of International Law* 238 (2014): 238-268.

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deployed this logic, subordinating the IDCS to the legal norms established in international human rights and constitutional law.

Bolivia's action arose and prevailed, to the extent it did, due to a confluence of factors. First, the expiration of the 25-year exemption from the application of the Single Convention vis-à-vis the traditional use of coca. Second, the entrenchment of indigenous rights as legal rights in international treaties and national constitutions. Third, the growth in support from state and non-state actors – Latin American nations, international organizations, and advocacy groups – for a more pluralist approach to drug control over the US-led prohibitionist paradigm.[362] Whether such countervailing action can be replicated elsewhere with equal success is an open question.[363] Bolivia showed that unilateral action can attract enough support to triumph and, even when hegemonic players remain hostile to such maneuvers, lead to changes to the IDCS. While Morales's platform did succeed in moderating the negative effects of repressive drug control law and policy and demonstrated how illicit production can be assimilated into the general economy, it also attracted intense international attention and pressure. And Bolivia's 2019 political crisis has put the future of its coca reforms in doubt.[364] As such, its refusal to submit to the IDCS may have been a transitory period in the history of drug control. Regardless, the regime is unable and unwilling to forestall or block, directly or indirectly, independent law and policy backed by human rights considerations because of its design. Without the intervention of the US and other like-minded enforcers of prohibition and suppression the IDCS is toothless.

2.2.c Soft Defection and the Legalization of Cannabis

[362] Sassan Gholiagha, Anna Holzscheiter and Andrea Liese, "Activating norm collisions: Interface conflicts in international drug control," *Global Constitutionalism* 9, 2 (2020), 308-311.
[363] See, e.g., the Colombian case discussed in section 2.5.
[364] Susan Brewer-Osorio, "Turning Over a New Leaf: A Subnational Analysis of 'Coca Yes, Cocaine No' in Bolivia," *Journal of Latin American Studies* 53, 3 (2021): 573-600.

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The conflict between legal cannabis markets and the drug control conventions has been described as an "unprecedented crisis."[365] Attitudes toward cannabis have dramatically shifted since the turn of the twenty-first century. Its medical and recreational use has been normalized in a growing number of jurisdictions with law and policy reflecting this transformation. David Bewley-Taylor argues that "the realization that traditional zero-tolerance cannabis policies…had little impact on reducing the scale of the illicit market," the negative effects of the criminalization of "non-problematic users," and cost of maintaining a law enforcement-centered approach to drug control, combined with the relative harmlessness of cannabis use compared to alcohol and tobacco consumption, has inspired law and policy reform.[366] In the 2010s, Uruguay, Canada, and several US states created legal cannabis markets for recreational users in clear violation of their treaty obligations, as stated by the INCB in its Report for 2020.[367] A popular, democratic mandate does little to remedy the non-compliance entailed by liberal measures regulating cannabis. States in this position face the choice of denouncing the treaties and re-acceding with reservations in the Bolivian manner, breaching the conventions and facing the consequences dispensed by the international community, or reversing course and returning to a prohibitionist, suppressionist line.[368] In the meantime, legal cannabis markets continue to grow and proliferate.

An alternative to the Bolivian path is what is known as "soft defection," where "states have chosen to deviate from [the regime's] prohibition norm…creat[ing] policy space at the national level while allowing the parties to technically remain within the legal boundaries of the

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[365] Bewley-Taylor and Fitzmaurice (2018), 405.
[366] Bewley-Taylor (2012), 191.
[367] International Narcotics Control Board, Report of the International Narcotics Control Board for 2020 (Vienna: United Nations, 2021b), 110.
[368] Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009), 333.

Conventions."[369] Bewley-Taylor posits that decriminalization, depenalization, and the de facto or de jure legalization of cannabis for therapeutic purposes, i.e., medical marijuana, are "examples of defection from and hence a weakening of the" IDCS.[370] He argues that "the softening of punitive cannabis policies" in Uruguay, Canada, several US states, parts of Australia, Spain, Portugal, and the Netherlands among others, largely "took place within the legal parameters of the conventions."[371] Recall, however, that while Article 36 of the Single Convention permits medical and scientific use and the decriminalization of possession for personal consumption it forbids the legalization and regulation of Scheduled drugs for recreational use.[372] Additionally, soft defection and flexibility vis-à-vis simple possession and use must be contrasted with the fact that "there is no such room for manoeuvre on the production [i.e., supply] side."[373] In the Netherlands, for example, cannabis retailers in "coffee shops" source their cannabis from illicit suppliers as the Dutch government has not found a way to reconcile its treaty obligations with a quasi-legal domestic market.[374] The basic international legal rule of good faith treaty implementation and execution stands in the way of further law and policy change.[375] In addition, arguments for soft defection based on the requirements of "internal law [i.e., constitutional law] as justification for [a state's] failure to perform a treaty" are precluded by Article 27 of the Vienna Convention on the Law of Treaties (VCLT).[376] The constitutional caveats-safeguard clauses in the drug control conventions are the most viable justification for contravening these rules, discussed in greater detail in chapter 3. So, while soft defection can be used to ease the

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[369] Bewley-Taylor and Fitzmaurice (2018), 416.
[370] Bewley-Taylor (2012), chapter 4, esp. 152-153 and 162.
[371] Bewley-Taylor (2012), 217.
[372] Van Kempen and Federova (2019a), 25-26 and 96.
[373] Bewley-Taylor (2012), 194.
[374] Room (2021), 806.
[375] Vienna Convention on the Law of Treaties, 23 May 1969, UNTS 1155, Article 26 [VCLT].
[376] Wisehart (2019), 78.

burden of drug control on the demand side, the paradox of tolerating use while continuing to suppress and criminalize illicit supply carries on. These are just some of the factors limiting the prospect of soft defection winning widespread political legitimacy and legal recognition. Legalization is fast catching up as a workable alternative to soft defection, avoiding the latter's logical inconsistency and confronting the IDCS head on.

How, then, do states parties justify the conflict between the drug control conventions and divergent domestic law and policy? The case of the United States is instructive. In 2013, during President Obama's second term in the White House, US Department of Justice Deputy Attorney General James Cole issued a memorandum to federal prosecutors entitled "Guidance Regarding Marijuana Enforcement."[377] The Cole Memo, as it is known, essentially de-prioritized enforcement of the federal Controlled Substances Act in states that had legalized cannabis so long as the "jurisdictions that have enacted laws legalizing marijuana…have also implemented strong and effective regulatory and enforcement systems."[378] Departures from federal law by US states took hold and persisted as a product of constitutional design and the division of powers, which allows both federal and state levels of government to legislate criminal laws. Restraint in the enforcement of federal drug laws within states was thus an exercise in executive discretion. The US Department of State further challenged the hegemony of the drug control conventions when William Brownfield, Assistant Secretary in the Bureau of International Narcotics and Law Enforcement Affairs, issued what became known as the Brownfield Doctrine. It outlined "four pillars" of US policy: (1) maintaining the "integrity of the existing UN Drug Control Conventions"; (2) "flexible interpretation of those Conventions"; (3) toleration of "different

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[377] United States Department of Justice, James M. Cole, Office of the Deputy Attorney General, "Memorandum for All United States Attorneys: Guidance on Marijuana Enforcement," 29 August 2013, Washington D.C.
[378] Cole Memo (2013), 3.

national drug policies" including the possibility that some "countries will legalize entire categories of drugs"; and (4) ensuring law enforcement targets illicit trafficking and organized crime rather than individual users.[379] The Brownfield Doctrine emphasized treaty flexibility so as to preclude conflict between state-level cannabis legalization, United States federal law, and the IDCS's treaties. The CND and INCB rejected the US's attempts to bend the regime to fit its changing priorities as did states like Russia, the new "foremost proponent of prohibition" at the CND.[380] Republican politicians vociferously disapproved of Obama's overtures toward drug control reform. President Donald Trump's Attorney General Jeff Sessions rescinded the Cole Memo shortly after taking office, marking a return to the uniform application of the Controlled Substances Act.[381] The Democratic Party's failure to entrench liberal reforms into United States drug law and policy speaks to the enduring appeal of the strict control, prohibition, suppression, and criminalization it championed at home and abroad for so long. The Trump Administration leveraged this sentiment in tandem with a strict interpretation of the drug control conventions to stymie regulatory reforms initiated under Obama to expand access to cannabis for research purposes, despite popular backing to do so.[382] The reprimands of drug control's international treaty bodies, international and domestic politics, and the persistence of the ideology of prohibition and suppression constrain even the most powerful of actors in the push for reform.

Less powerful states, however, have successfully enacted drug control reforms and stuck to them despite calls to cease and desist. Uruguay, which legalized cannabis in 2013, claimed

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[379] United States Department of State, William R. Brownfield, Assistant Secretary, Bureau of International Narcotics and Law Enforcement Affairs, "Trends in Global Drug Policy, 9 October 2014, New York, NY, accessed 14 April 2020, https://2009-2017-fpc.state.gov/232813.htm.
[380] Tinasti (2019), 113-114.
[381] United States Department of Justice, Jefferson B. Sessions III, Office of the Attorney General, "Memorandum for All United States Attorneys: Marijuana Enforcement," 4 January 2018, Washington D.C.
[382] Robert A. Mikos, "Using One Dying Regime to Save Another: The Influence of International Drug Conventions on United States' Cannabis Research Policy," *AJIL Unbound* 114 (2020): 296-300.

that international human rights law including the UN Charter both trumped the drug control conventions and better addressed the need for "the protection of the health and welfare of mankind."[383] The INCB was not receptive to this argument, reiterating in 2018 that the "legalization of [the] non-medical use of cannabis contravenes the international drug control treaties"[384] and compromises the IDCS by "encourage[ing] other States parties to follow their example."[385] In its follow up 2019 Report, the INCB cited the Mexican Senate's justification for hearings "on the design of plans to legalize and regulate the non-medical use of cannabis…the purpose [of which] is to approach cannabis regulation…along lines similar to the changes in cannabis policy and legislation in countries such as Canada and Uruguay."[386] The INCB's fear that more states will defect or explore alternatives to strict control, prohibition, suppression, and criminalization of narcotics and psychotropics was confirmed. Protestations from the IDCS's treaty bodies were insufficient to convince jurisdictions like Uruguay that the prerogatives of drug control can or should prevail over human rights principles.

In a 2017 report, the University of Ottawa's Global Health Law Clinic assessed several arguments the Canadian government could employ to legitimize the legalization of cannabis in light of the IDCS's treaty obligations.[387] Dismissing the submission of a reservation vis-à-vis Article 4(c) of the Single Convention, constitutional amendment, human rights legislation, and a constitutional caveat-based exemption as less than ideal options, the report recommends the

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[383] Bewley-Taylor and Fitzmaurice (2018), 419.
[384] International Narcotics Control Board, Report of the International Narcotics Control Board for 2018 (Vienna: United Nations, 2019a), 11, para 61.
[385] Canada and the many US states that have legalized cannabis were also noted as reneging on their treaty commitments. INCB (2019a), 11, para 61.
[386] International Narcotics Control Board, Report of the International Narcotics Control Board for 2019 (Vienna: United Nations, 2020), 74, para 516.
[387] Megan Fultz et al., "Reconciling Canada's Legalization of Non-Medical Cannabis with the UN Drug Control Treaties," in Steven J. Hoffman (ed), *Global Health Law Clinic Publication Series* (Ottawa: Global Strategies Lab, University of Ottawa, 2017).

Single Convention's scientific purposes exemption in Article 2(5)(b), permitting clinical trials and monitored research, as the most promising justification for the Cannabis Act.[388] Canada would have to satisfy a number of criteria to invoke the scientific purposes exemption, the most important of which are to "(1) identify a stated scientific research objective and (2) evaluate the reasonableness of the design and implementation of a research program in relation to that identified objective."[389] Framing legalization as a social experiment aiming at improved public health and harm reduction, the Global Health Law Clinic paper suggests, "is consistent with the aims of the Conventions."[390] Roojin Habibi and Steven Hoffman submit that "Canada should withdraw from the…treaties in the short term" to maintain the integrity of the IDCS.[391] Thereafter, the country can try to remedy the incompatibility of its legal cannabis market with international law via treaty reform, denunciation and reaccession with reservation, inter se modification of the conventions in concert with like-minded state, and re- or de-scheduling cannabis in concert with the WHO and drug control bodies.[392] These courses of action to reconcile the Cannabis Act with the IDCS are highly speculative. The INCB characterized Canada's "legalization and regulation of cannabis for non-medical, non-scientific purposes" as a clear violation of the "medical and scientific purposes" clause in Article 4(c) of the Single Convention.[393] On top of this, the INCB believed the legal cannabis market "undermines the international drug control framework and constitutes a dangerous precedent for the respect of the

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[388] Cannabis Act, SC 2018, c 16.
[389] Fultz et al. (2017), 20.
[390] Eliason and Howse (2019), 343-344.
[391] Roojin Habibi and Steven J. Hoffman, "Legalizing Cannabis Violates the UN Drug Control Treaties, but Progressive Countries Like Canada Have Options," *Ottawa Law Review* 49, 2 (2018), 435 and 460.
[392] Habibi And Hoffman (2018).
[393] INCB (2019a), 25, para 169. Scholars contest the INCB's characterization of Article 4(c) of the Single Convention as a peremptory norm from which no derogation is permitted. See Eliason and Howse (2019), 338 and 348-349.

rules-based international order."[394] This being the case, Canada and Uruguay may simply have to wait for more states to legalize cannabis before attempting to gain recognition of the legitimacy of their legislative schemes. Such a fait accompli would be much more persuasive than the post hoc legal arguments put forward to this point.

The problem with the legal arguments used by soft defecting states is that they do nothing to remedy the incompatibility of legal cannabis markets with the drug control conventions. In addition to this, working within the system via "soft defection actually helps to sustain the existing operating structures" of the IDCS.[395] The latter's legal and institutional paradigm of strict control, prohibition, suppression, and criminalization has been a serious bar to reform. The rigidity of the conventions and recalcitrance of its organs seem to preclude a change in tack on the cannabis question. Even so, legal cannabis markets for recreational users are in operation in several jurisdictions. A resolution to this conflict remains to be found. The US case indicates that temporary policy changes are easily overturned and are no substitute for legislative action. Uruguay's experience shows that human rights narratives can motivate and sustain such initiatives, even in the absence of great power status. Canadian events corroborate that view that the consequences of going beyond soft defection to legalization are minimal and bearable. The restructuring of cannabis markets, in the Americas in particular, to redress the IDCS's human rights, public health, and political economic failures are gaining momentum. The IDCS "may soon face an existential question" regarding its viability if, but more likely as, cannabis legalization continues to spread.[396]

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394 INCB (2019a), 25-26, para 173.
395 Bewley-Taylor and Fitzmaurice (2018), 417.
396 Álvaro Santos, "Drug Policy Reform in the Americas: A Welcome Challenge to International Law," *AJIL Unbound* 114 (2020): 301-306 (quotation at 306).

2.3 Reinterpreting and Reforming the Drug Control Conventions

International human rights law, in the words of the late scholar and former Principal Legal Secretary of the International Court of Justice Hugh Thirlway, can be incorporated and insinuated into the United Nations system through the "inclusion in legal texts of positive rules or more subtly through the reinterpretation or reorientation of existing international law norms to accord with overarching human rights protection imperatives" and realize their objectives.[397] Because the IDCS is a mature treaty regime it is fair to surmise that revolutionary new legal texts resituating human rights as a priority within drug control are unlikely to emerge. By contrast, reform initiatives by states working alone and in concert can generate enough momentum to reinterpret and reorient the IDCS towards more human rights-friendly principles and practices. Questions regarding the future viability of the regime are inevitable in the face of the myriad challenges posed by drug reform measures grounded in the language of human rights.[398] As detailed above, harm reduction, denunciation and reaccession with reservations, and legal cannabis markets pose serious threats to the IDCS as harbingers of a new stage in drug control beyond strict control, prohibition, suppression, and criminalization.[399] The novel approaches to treaty reform surveyed in the paragraphs that follow complement these domestic innovations and offer further avenues to bring international drug control law and policy in line with human rights law, broadly conceived.

Public international law determines the framework through which transformation must take place to satisfy requirements of legality and legitimacy. Article 38 of the Statute of the International Court of Justice enumerates the sources of international law upon which reformers

[397] Hugh Thirlway, *The Sources of International Law, Second Edition* (Oxford: Oxford University Press, 2019), 197-198.
[398] Zitt (2016), 564.
[399] Carstairs (2005), 62-63; Lines (2017), chapter 8.

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can draw. Primary sources include international conventions, custom, and general principles of law. Additionally, "as a subsidiary means for the determination of rules of law," international and domestic judicial decisions and legal scholarship may be consulted to clarify ambiguous notions.[400] The general rules of treaty interpretation are stated in Article 31 of the Vienna Convention on the Law of Treaties (VCLT). Texts must be read in "good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose."[401] Context here indicates specific documents, from a treaty's preamble and any annexes to supplementary interpretive aids like travaux préparatoires.[402] Importantly, subsequent interpretation and practice agreed upon by states parties to comport with the letter and spirit of an instrument also inform its meaning.[403] While law and policy innovation in drug control must be formulated in accordance with these rules and principles they also leave room for a degree of flexibility, formally at least.

Pragmatically, the prospects for successful reinterpretation and reorientation are rather limited. The IDCS and its organs have been described as "Jurassic" and "frozen in time" in comparison to other treaty regimes.[404] Bodies like the CND, for instance, are dominated by power politics and a compliant bureaucracy. Policy is formulated intergovernmentally, so change cannot occur without consensus.[405] Inter-state disagreement over the meaning and implications of drug control has thus created an order in which collective decisions reflect the "lowest

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[400] United Nations, Statute of the International Court of Justice, 18 April 1946, Article 38.
[401] VCLT, Article 31(1).
[402] VCLT, Article 31(2) and 32.
[403] VCLT, Article 31(3)(a)-(b).
[404] Bewley-Taylor and Fitzmaurice (2018), 406-407.
[405] Cindy Fazey described the drug control bureaucracy in less generous terms: "competence, knowledge and efficiency are not necessarily [its] most highly prized qualities." Cindy S.J. Fazey, "The Commission on Narcotic Drugs and the United Nations International Drug Control Programme: politics, policies and prospect for change," *International Journal of Drug Policy* 14 (2003), 164.

common denominator" so as to offend as few states as possible.[406] It is to this baseline that states parties to the conventions bind themselves. The principle of pacta sunt servanda, that "every treaty is binding upon the parties to it and must be performed by them in good faith," is a foundational tenet of international treaty law.[407] As Thirlway described it: "The whole point of making a binding agreement is that each of the parties should be able to rely on performance of the treaty by the other party or parties, even when such performance may have become onerous or unwelcome to such other party or parties."[408] The treaties can certainly be amended or modified through the procedures set out therein. The schedules can also be altered to accommodate changing priorities. These official mechanisms "generate the impression of evolutionary capacity," but as David Bewley-Taylor and Malgosia Fitzmaurice argue the "reality [is that] substantive change is difficult to achieve" for political and procedural reasons, specifically resistance from prohibition-minded states.[409] On the surface there are options to pursue drug control reform at the international level, but the details governing treaty reinterpretation and reorientation, necessity of consensus-based decision-making, and character of the regime itself make change impracticable.

Neil Boister and Martin Jelsma assert that inter se modification of the drug control conventions is a practical means by which to accommodate independent national law and policy within the strictures of the IDCS. Permitted under Article 41 of the VCLT, inter se modification involves two or more states parties to a treaty agreeing to adhere to a set of rules outside the scope of its fundamental provisions. This separate agreement only applies as between signatories, must not affect the rights of other states parties to the treaty, and must be compatible

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[406] Fazey (2003), 159 and passim.
[407] VCLT, Article 36.
[408] Thirlway (2019), 37.
[409] Bewley-Taylor and Fitzmaurice (2018), 410-415.

with the treaty's object and purpose. In the case of the drug control conventions and cannabis reform, for example, legalizing states would at a minimum need to create bilateral agreements between themselves setting out the rules and regulations administering the trade, enact safeguards to preclude diversion to states implementing the standard regime, and ensure liberal measures honor the object and purpose of the conventions: concern for the "health and welfare of mankind" and limiting the use of controlled substances to medical and scientific purposes alone.[410] Inter se modification, Boister and Jelsma declare, "balance[s]" the fact of a "rapidly changing drug policy landscape" where "breaches…are already happening in practice" with the interests of prohibition and suppression-oriented states in maintaining the "stability" of the IDCS.[411] With an increasing number of states legalizing cannabis inter se modification could serve as a gesture toward the IDCS and its defenders that, while they may be reneging on their obligations vis-à-vis cannabis, wayward states intend on adhering as much as possible to the regime.

When combined with authority of international human rights law the argument for inter se modification makes a viable case for "legalizing cannabis cultivation and trade for recreational use within the framework of international public law."[412] This is because, as Piet Hein Van Kempen and Masha Fedorova submit, human rights "have a special status" and "weight on the basis of substantive criteria in relation to other international norms," constituting a lex superior.[413] The argument fits with the understanding that human rights, as a fundamental

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[410] United Nations General Assembly, International Law Commission (2006), paras 295-323; Neil Boister and Martin Jelsma, "*Inter se* Modification of the UN Drug Control Conventions: An Exploration of its Applicability to Legitimise the Legal Regulation of Cannabis Markets," *International Community Law Review* 20 (2018), 467-470.
[411] Boister and Jelsma (2018), 489 and 491.
[412] Piet Hein van Kempen and Masha Fedorova, "Regulated Legalization of Cannabis through Positive Human Rights Obligations and *Inter se* Treaty Modification," *International Community Law Review* 20 (2018), 495.
[413] Van Kempen and Fedorova (2018), 506-511.

pillar of the United Nations system, supersede treaty law in the event of conflict.[414] So, the implementation and execution of the drug control conventions needs to be consonant with human rights obligations. It does not take a lot of imagination to frame the strict control, prohibition, suppression, and criminalization of cannabis and its users as infringing on rights and freedoms. States can reasonably claim that "regulation ensures a better protection of [human] rights than a prohibitive drug policy as prescribed by the drugs conventions."[415] But they would also need to prove that human rights are relevant to the issue of drug control, the decision to regulate is "based on people's participation and democratic-decision making", the rights of other states parties to the treaties are respected, and a public health-approach focused on "discouragement, limitation and public awareness of the risks associated with recreational use" is pursued.[416] This was the argument put forward by Uruguay to justify its decision to legalize and regulate cannabis for non-medical, non-scientific use.[417] For individual states this could be a compelling legal strategy, but it is unlikely to persuade the IDCS's treaty bodies and states parties committed to its ideals to acquiesce to such a sea change in priorities. Their objections and opposition are not, however, intractable obstacles to reform.

Formally acknowledging conflict and refusing to remedy it may be a solution to the problem. In her account of noncompliance in the evolution of international legal norms, Heather Haase suggests there is a place for disobeying the law "when neither strict compliance nor changing the law is possible."[418] In practice, noncompliance involves "taking action to bridge an

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[414] UN Charter, Article 103.
[415] Van Kempen and Fedorova (2018), 495, 500 and 522.
[416] Van Kempen and Fedorova (2018), 504-505. See also Piet Hein van Kempen and Masha Fedorova, *International Law and Cannabis II: Regulation of Cannabis Cultivation and Trade for Recreational Use: Positive Human Rights Obligations versus UN Narcotic Drugs Conventions* (Cambridge: Intersentia, 2019b).
[417] Heather J. Haase, "Principled Non-Compliance: Paving the Way for Cannabis Regulation under the International Drug Control Regime," *International Community Law Review* 21 (2019), 113; Walsh and Jelsma (2019), 267-269.
[418] Haase (2019), 107.

operational gap, where the norm espoused by the regime has fallen out of step with the cultural reality."[419] Put otherwise, social mores change. Where the law clashes with the popular sentiments of a state party to a treaty, as has occurred vis-à-vis cannabis prohibition in several jurisdictions, the decision to forge a new path and stick to it despite its official interdiction may be the only feasible option available.[420] Haase argues that the creation of legal cannabis markets can be defended on legal grounds as "principled noncompliance," which entails satisfying several criteria to warrant disobeying the law. First, noncompliance must be "a very last resort." Second, there is no alternative to be found in "multilateral negotiations or any other legal method." Third, the action must better "protect the general health and welfare of a country's own people" and that of the "global community as a whole." Fourth, states must have "exhausted all other methods…before resorting to non-compliant acts." Fifth, they must "be open and transparent about [their] reasons for noncompliance and its intentions." Finally, noncompliance should be "temporary, with the aim of ensuring the realignment of the country's new domestic laws and practice with its treaty obligations in the future."[421] Whether these criteria can be satisfied to rationalize legal cannabis markets is an open question as it has not yet been tried. And whether such justification would convince treaty bodies and the international community of noncompliance's validity is too. The near universal ratification of the drug control conventions and vociferous resistance from prohibitionist suppression-oriented states indicates actions like Uruguay and Canada's may come to be seen as "noncompliance as lawmaking" if other states follow their lead.[422] Time, and the official responses of reforming states to criticism, will tell.

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[419] Haase (2019), 114.
[420] Haase (2019), 95.
[421] Haase (2019), 118-119.
[422] Haase (2019), 118.

As one experienced former UN Drug Control Programme official described efforts to reinterpret and reform the IDCS, states "interpreting the Conventions in light of their own needs" will have to be "willing to ignore the hubris of [the] INCB and the policies of the USA."[423] This is a basic fact of modern drug control. While inter se modification, human rights, and noncompliance each have their merits, resorting to "extraordinary legal procedures" and "unconvincing legal argumentation" is not an effective strategy for broader reform of the IDCS.[424] As reform strategies they are stop gap measures. Strict control, prohibition, suppression, and criminalization would continue to direct drug law and policy. Removing cannabis from the list of controlled substances and legalizing its sale is a step toward less injustice under the IDCS, but for real change, particularly as regards the Single Convention, the treaties need to be amended or abolished and replaced. As the case of legal cannabis markets makes clear, the purported flexibility of the regime is often overstated, as it is "in effect is very limited."[425] The next sections of this chapter look at more attempts to ameliorate the IDCS's human rights deficit, with a focus on access to essential medicines, scheduling reform, and the cultural and religious use of narcotic and psychotropic substances by indigenous peoples.

2.4 North-South Inequalities: Essential Medicines vs. Scheduling Reform

The drug control conventions have two broad, sometimes conflicting aims: (1) to ensure adequate access to controlled substances and essential medicines; and (2) to restrict their use to exclusively medical and scientific purposes. David Herzberg and Jeremy Greene have untangled the moral dichotomy underlying these dual purposes, which divide drugs, markets, and users into

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[423] Fazey (2003), 167.
[424] Bewley-Taylor and Fitzmaurice (2018), 417 and 433.
[425] Wisehart (2019), 204; David R. Bewley-Taylor, "Politics and Finite Flexibilities: The UN Drug Control Conventions and their Future Development," *AJIL Unbound* 114 (2020): 285-290.

the licit and illicit. Essential medicines here are those controlled substances prescribed for "legitimate medical need" as defined by rational experts in the medico-scientific establishment. Developed and produced by research institutions and pharmaceutical companies in North America and Europe, they are sold in regulated, licit markets around the globe. By contrast, non-medical, non-scientific consumption is depicted as causing "irrational" addiction. The unregulated, illicit market in recreational drugs, especially in North America and Europe, is presented as being perpetuated by producers and traffickers from the Global South, who are to be suppressed and criminalized. The definitions of these concepts directly and indirectly guide the flow of licit and illicit drugs. The IDCS's emphasis on strict control, prohibition, suppression, and criminalization has led to the inadequate and inequitable provision of licit essential medicines to states in the Global South, particularly for pain management, and systemic failures of enforcement efforts aimed at limiting access to illicit narcotics and psychotropics in North America and Europe, with insufficient provision of treatment options available to treat addiction and ever-increasing recreational use.[426] The IDCS's dual purposes are a dual debacle.

The resultant "public health deficit" implicates human rights, especially the rights to health and freedom from torture and cruel, inhuman, and degrading treatment, as people are substantively deprived of the material benefits of modern medicine and pharmaceutical science in the pursuit of the elimination of non-medical, non-scientific consumption.[427] The IDCS's treaty bodies and states parties to the regime know they have a responsibility to provide access to essential medicines. From the 1980s, the UNGA, ECOSOC, CND, and INCB all encouraged developed and developing states "to comply with [this duty as part of] their obligations under

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[426] David Herzberg and Jeremy A. Greene, "Stuck in Traffic: Conflicting Regimes of Global Drug Control," *Diplomatic History* 45, 5 (2021): 940-953.
[427] Marie Elske C. Gispen, "A human rights view on access to controlled substances for medical purposes under the international drug control framework," *European Journal of Pharmacology* 719 (2013): 16-24.

human rights law."[428] The UNDP reiterated the point in 2019, stating that "[a]ccess to controlled medicines without discrimination is a key element of the right to health."[429] But however much this discourse has contributed to the conversation on adequate and equitable access to essential medicines it has yet to shift the IDCS toward even-handedness. The political persuasion approach to human rights and drug control is no substitute for adherence to legal principle. An expansive reading of preambular references in the Single and 1971 conventions to the importance of ensuring access to essential medicines, for example, relies on an overbroad characterization of the treaty regime's more precise object and purpose: limiting the use of controlled substances to medical and scientific purposes.[430] The IDCS is only tangentially committed to ensuring states protect human rights and provide access to essential medicines. Its primary raison d'être is to eliminate illicit consumption, but this goal is only effective where resistance is wanting.

The strength of the argument from human rights, when compared to the weakness of claims supporting the legalization of recreational drugs, evidence the depth of the IDCS's power imbalance. Lines and Barrett point out the inadequacy of "expanded and novel" interpretations of the treaties, especially those deployed by advocates of "legally regulated markets in recreational cannabis."[431] They argue that characterizing legalization as a "policy experiment" consistent with the requirement that the use of narcotic and psychotropic substances is limited to "medical and scientific purposes" is unconvincing in light of the VCLT's rules of interpretation.[432] According to Wisehart, the idea of re- or de-scheduling cannabis so as to permit legal cannabis markets is

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[428] Gispen (2013), 21-22; Wisehart (2019), 151-160 and 204-205.
[429] United Nations Development Programme et al. (2019), 9.
[430] Wisehart (2019), 146-149.
[431] Rick Lines and Damon Barrett, "Cannabis Reform, 'Medical and Scientific Purposes' and the Vienna Convention on the Law of Treaties," *International Community Law Review* 20 (2018), 438-439.
[432] See Articles 31 and 32 of the VCLT and their application in Lines and Barrett (2018), 445-455.

similarly far-fetched. Cannabis was included in the Single Convention's initial schedules and from the start "no provisions were foreseen allowing subsequent exemption of [plant-based narcotic] substances from its scope of control."[433] The Single Convention limits cannabis use exclusively to medical and scientific purposes, meaning that only derivative substances producing "cannabis-like effects" may be added or subtracted from the schedules.[434] Nor would removing cannabis from Schedule IV of the Single Convention remedy its Schedule I classification.[435] Recall that the WHO and its Expert Committee on Drug Dependence (ECDD) is not competent to remove cannabis from Schedule I on its own initiative.[436] But the ECDD can issue recommendations. This it did in 2019, recommending the rescheduling of cannabis while suggesting that cannabidiol (CBD), a non-psychoactive cannabinoid with potential therapeutic applications, should not be subject to international drug control measures.[437] In line with this suggestion, the CND voted to remove CBD from Schedule IV in December 2020.[438] This move may be aimed at accommodating the reality of legal cannabis markets in the US, Canada, Uruguay, etc., but support for a minor change to the scheduling of one cannabinoid is far from consensus-based treaty reform, whose prospects are severely curtailed under the current regime.[439] Cannabis remains a Schedule I substance.

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[433] Wisehart (2019), 128.
[434] Wisehart (2019), 128.
[435] John Walsh, "A Tale of Two Cannabis Votes," *Washington Office on Latin America*, 1 December 2020, accessed 19 January 2021, https://www.wola.org/analysis/tale-of-two-cannabis-votes/.
[436] Single Convention, Articles 3(3)(iii) and 3(6)(b), cited in Wisehart (2019), 125-127, set out the normative framework under which WHO recommendations are made.
[437] World Health Organization, WHO Expert Committee on Drug Dependence: forty-first report, WHO Technical Report Series, No. 1018 (Geneva: WHO, 2019), accessed 28 September 2020, https://apps.who.int/iris/bitstream/handle/10665/325073/9789241210270-eng.pdf, cited in Bone (2020), 8.
[438] United Nations Office on Drugs and Crime, "CND Votes on Recommendations for Cannabis and Cannabis-Related Substances," n.d., accessed 19 January 2021, https://www.unodc.org/unodc/frontpage/2020/December/cnd-votes-on-recommendations-for-cannabis-and-cannabis-related-substances.html.
[439] Wisehart (2019), 126.

Scheduling is not an administrative process executed by disinterested arbiters deciding based on the advice of medical and scientific experts. It is a political process. The IDCS, its treaties and treaty bodies, is restrictive by design and greatly limits the potential for scheduling reform. First, it has a normative deficit. The WHO's ECDD has no objective evaluative criteria by which to balance the public health merits of scheduling decisions against potential risks and costs, i.e., vis-à-vis ensuring adequate access to essential medicines. Second, is the regime's democratic deficit. The Commission on Narcotic Drugs' scheduling decisions are passed by a simple majority vote under the Single Convention, i.e., 27 members states of 53, and two-thirds majority under the 1971 Convention, i.e., 36 member states of 53. A small minority of UN member states make decisions binding on nearly all the other 193; and states are unable to opt out of enforcing them.[440] Like-minded states can work in concert to bypass serious consideration of medico-scientific facts and possible socioeconomic effects to push through or forestall more nakedly political resolutions, with few repercussions. The change that has been enacted on cannabis at the international level, for one, is a product of affluent nations using the language of rights and freedoms to obviate agreements that have become inconvenient.

Text, context, and politics restrict the potential for treaty-compliant reform around access to essential medicines and scheduling alterations. On these issues human rights rhetoric has remained just that: rhetoric. It has yet to make a substantial impact on the harmful North-South dynamics of the IDCS. The moral and market imperatives of the regime privilege the North America and Europe over the Global South. The upshot is that prosperous states feel entitled to ignore their legal obligations and pursue independent law and policy, as with recent

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[440] Diederik Lohman and Damon Barrett, "Scheduling medicines as controlled substances: addressing normative and democratic gaps through human rights-based analysis," *BMC International Health and Human Rights* 20, 10 (2020): 1-9.

developments vis-à-vis cannabis legalization, with negligible repercussions. And illicit consumption continues to grow. Meanwhile, Southern nations are stuck between the duplicity of their Northern neighbours and the law and policy exacted on them through the IDCS. Even with the force of human rights law the Global South cannot force the regime and its acolytes to take its dual purposes seriously. This imbalance is inherent to the system and has dire consequences: corporate profit, abundant (over)access to essential medicines, and global police power accrue in the North while economic hardship, poor access to essential medicines, and foreign intervention abound in the South.[441] The division between licit and illicit thus appears to be a convenient cover for what are, at base, power politics. Essential medicines will remain scarce in the developing world and the hypocrisy of the War on Some Drugs will continue until states parties to the IDCS rework the ideology animating its market dynamics and put an end to its dual purpose's double standards.

2.5 Culture, Religion, and Indigenous Peoples

The cultural and religious practices of indigenous peoples are protected under several international legal instruments. Article 15(1)(a) of the International Covenant on Economic, Cultural and Social Rights (ICESCR) covers the right "[t]o take part in cultural life"; Article 27 of the International Covenant on Civil and Politics Rights (ICCPR) holds that "ethnic, religious or linguistic minorities…shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language;"[442] Article 2(2)(b) of the International Labour Organization (ILO) Convention No. 169 requires states parties to promote and respect the "social and cultural identity…customs

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[441] Herzberg and Greene (2021), 12.
[442] United Nations General Assembly, International Covenant on Civil and Politics Rights, 16 December 1966, UN Treaty Series, Vol. 999.

and traditions and…institutions" of indigenous peoples;[443] Article 11(1) of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) holds that "[i]ndigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as…ceremonies"; Article 12(1) of UNDRIP states that "Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies"; Article 24 of UNDRIP extends the protection of cultural and religious traditions to "traditional medicines and…health practices, including…medicinal plants" while Article 31 recognizes the right of indigenous peoples to "maintain, control, protect and develop their cultural heritage, [and] traditional knowledge" which includes "seeds, medicines, [and] knowledge of the properties of fauna and flora."[444] The plenitude of indigenous peoples' rights protections is out of step with the inability and unwillingness of states with significant indigenous populations to secure them. Indeed, the low number of ratifications of the ILO Convention No. 169, non-binding declaratory nature of UNDRIP, and lack of recognition by human rights bodies enforcing the ICESCR (United Nations Committee on Economic, Social and Cultural Rights) and ICCPR (United Nations Human Rights Committee) of arguments based on their substantive provisions suggest there is little prospect for greater recognition of indigenous peoples rights vis-à-vis the use of narcotic and psychotropic substances in traditional, cultural, and religious contexts.[445] As such, endeavors to win the right to use controlled

[443] International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989.
[444] United Nations General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, resolution adopted by the General Assembly, 2 October 2007, A/RES/61/1295.
[445] For a review of the literature and international case law on indigenous peoples' rights and drug control see Wisehart (2019), 104-111.

substances for these purposes have worked around rather than through the IDCS, with a modicum of success.

The Bolivian coca precedent demonstrates how controversial maneuvers can lead to the acquiescence from the international community. But the prospect of expanding access to drugs based on indigenous, traditional, cultural, and religious arguments is unlikely. The Single Convention was designed to eliminate the cultural and religious cultivation, production, possession, and use of opium, coca, cannabis, and their derivatives. That said, at the domestic level these exemptions have been given a second lease on life. In 2011, the Constitutional Court of Colombia recognized the right of indigenous peoples to use the coca leaf for traditional purposes.[446] Such use, the Court elaborated, neither constitutes a threat to public health as a cause of addiction nor contributes to illicit trafficking.[447] Further, the rights of indigenous peoples are not subject to legal, perhaps even constitutional, norms to the same degree as non-indigenous persons.[448] But crucially, Article 246 of the Constitution, at the center of the discussion, recognizes indigenous rights to culture and self-governance.[449] For this reason, the autonomy and ethnic and cultural integrity of indigenous peoples can be limited only where it is intended "to realize a value of greater importance than the principle of respect and protection of ethnic and cultural diversity."[450] The pursuit of the elimination of consumption is not a value or end that warrants permitting the state to evade its obligations vis-à-vis indigenous peoples. The Court therefore rendered coca's prohibition unconstitutional and inapplicable as against such groups. Where constitutional provisions extend to indigenous peoples' rights to autonomy and

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[446] Constitutional Court of Colombia, Judgment of 23 November 2011, Sentencia C-882/11.
[447] Sentencia C-882/11, 2.8.4.1-2.8.4.2.
[448] Sentencia C-882/11, 2.8.3.3.
[449] Colombia's Constitution of 1991 with Amendments through 2015, *Constitute*, accessed 22 February 2021, https://www.constituteproject.org/constitution/Colombia_2015.pdf?lang=en.
[450] Sentencia C-882/11, 2.8.3.3.

self-determination, the requirement to eradicate traditional use within not more than a few decades has much less persuasive power. By contrast, attempts to accommodate traditional use under the guise of the Single Convention's "other legitimate purposes" clause have failed.[451] Bolivia and Colombia demonstrate the practical use of international and constitutional law and executive and judicial acts in securing recognition of and legal protection for the traditional use of coca.

Several states supported including protections for indigenous peoples in the 1971 Convention. For this reason, it explicitly recognized the "use of psychotropic substances…by legitimate systems of indigenous medicine" in China and India.[452] Even the normally uncompromising United States stood up for the sacramental use of peyote (mescaline) by the Native American Church during the drafting process. Mexico, too, highlighted how unjust it would be to circumscribe the traditional use of peyote (mescaline) by an already oppressed people and emphasized the Mexican Constitution's protection of religious freedom as a barrier to implementing strict control, prohibition, suppression, and criminalization of the drug.[453] Under Article 32(4) of the 1971 Convention, states that have "plants growing wild which contain psychotropic substances…and which are traditionally used by certain small, clearly determined groups in magical or religious rights, may… make reservations concerning these plants in respect of the provisions of article 7." The latter limits the use of psychotropic substances to "[s]cientific and very limited medical purposes." This includes Schedule I substances like mescaline (peyote) DMT (ayahuasca). Canada registered a reservation to the 1971 Convention apropos the traditional use of mescaline (peyote) even though it "grow[s] in North America but not in

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[451] Bewley-Taylor and Jelsma (2012a), 76-78.
[452] *Commentary on the Convention on Psychotropic Substances*, 141, para 3.
[453] Bewley-Taylor and Jelsma (2012a), 79.

Canada."[454] The implication that a Schedule I substance may be traded internationally, however, "goes beyond the permitted scope of reservations."[455] Even so, Canada has seemingly extended its reservation to include other substances. In 2017, Health Canada granted an exemption to Centro Espírita Beneficente União do Vegetal believers, a Brazil-based religious organization, permitting them to legally import the plants that make up ayahuasca (DMT) into the country for sacramental use.[456] The UNDP's recent Guidelines on Human Rights and Drug Policy even recommend that states "[r]epeal, amend, or discontinue laws, policies, and practices that inhibit indigenous peoples' access to controlled psychoactive substances for the purposes of maintain or increasing the overall health and well-being of their communities," whether for cultural, religious, or traditional medical purposes, including via decriminalization of "indigenous peoples' possession, purchase, or cultivation…for personal consumption."[457] The traditional use of psychotropics by indigenous peoples can be accommodated within the 1971 Convention, though it requires states push the boundaries of the conventions to grant anything beyond Lilliputian official recognition and toleration.

Once again, the appearance of flexibility in drug control conventions confines reform and innovation to narrow, pre-defined ends. This is a natural part of treaty law, setting standards to which states parties agree to adhere. But indigenous peoples constitute a special case, as evidenced by the extensive catalogue of international and domestic human rights and fundamental freedoms addressing their interests. Formally, at least, there seems to be adequate

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[454] United Nations, Treaty Series, Vol. 1019, p. 175, "Chapter VI: Narcotic Drugs and Psychotropic Substances; 16. Convention on psychotropic substances," Vienna, 21 February 1971, accessed 11 October 2019, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20VI/VI-16.en.pdf.
[455] Room (2012), 404.
[456] Madrinha Jessica Rochester, "The Legalization Process," *CÉU do Montréal*, accessed 10 December 2018, http://santodaime.ca/legalization/.
[457] United Nations Development Programme et al. (2019), 21.

room for states to accommodate indigeneity within the IDCS.[458] The regime acknowledges indigenous peoples' traditions and customs, from coca chewing to peyote rituals. Actual protection of these practices, however, has required extensive constitutional litigation and the tendering of contentious treaty reservations to win realization. Indigenous peoples must not only exist within a state's territory, but they must also have a documented history of consumption and fight for official approval to justify an exemption from the drug control conventions' imperative to eradicate non-medical, non-scientific use. The promise of rights lags far behind the reality of subordination.

2.6 Sovereignty and the International Drug Control System

The slow pace of change and lack of recourse to address the evolving needs and preferences of states parties to the regime pose serious problems for the continued viability of the international drug control system, which has proved insufficiently flexible to accommodate the rapid pace of medical, scientific, legal, and socio-cultural change driving reforms in ever more national jurisdictions.[459] The CND, UNODC, and INCB are not bound by a global administrative law subjecting their regulatory decision-making processes and decisions to uniform standards of review. Though states parties are constrained by the rules and determinations of international organizations and treaty bodies, whose decisions they have agreed to abide by and help formulate, domestic institutions applying national constitutions, law, and policy, embodying a variety of distinct normative commitments, still bear primary responsibility for holding

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[458] Bone (2020), 89 and 179.

[459] As evidenced, e.g., by the inability of states to adequately control the growing market in novel, designer, and derivative drugs, or New Psychoactive Substances (NPS). See John Collins, "Regulation as Global Governance: How New Is the NPS Phenomenon?" in Ornella Corazza and Andres Roman-Urrestarazu (eds), *Novel Psychoactive Substances: Policy, Economics and Drug Regulation* (Cham: Springer, 2017), 38-39.

international principles and actors to account.[460] In fact, law and policymakers are turning away from the international toward the national to cope with the failures of and gaps in the IDCS, prioritizing domestic interests over inter-state cooperation in the enforcement of the global regulatory regime on drugs.

Sovereignty, internal vis-à-vis citizens and external as against other states, is about who or what political entity or entities possesses the legitimacy and capacity to make final decisions and take action within the legal order.[461] The closer the decision-maker, or sovereign, is to the community, as per the principle of subsidiarity, the more democratic and legitimate its decisions and actions are said to be.[462] Conversely, the further away the decision-maker is from the community, the less democratic and legitimate its decisions and actions can be said to be. So, when the government exercises national sovereignty it in theory furthers the autonomy and self-determination of the people it represents, two of the core values underlying democracy. For these reasons, as Professor N.W. Barber observes: "for the vast majority of people today…sovereignty mediated through the state, is of significant value."[463] While internationalism and transnational cooperation are ideals maintained in principle by the member states of the United Nations, in practice each state individually retains the prerogative to decide on its course of action independently.

There is a vast literature professing the "constitutionalization" of international law, including human rights law, into a coherent body of rules and institutions governing international

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[460] Benedict Kingsbury, Nico Krisch and Richard B. Stewart, "The Emergence of Global Administrative Law," *Law and Contemporary Problems* 68, 3/4 (2005), 25-26 and 31-34.
[461] N.W. Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018), 26-29. See too the description in Johan D. Van Der Vyer, "Sovereignty," in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013), 382-383.
[462] Barber (2018), 35, 39 and chapter 7.
[463] Barber (2018), 22.

and national affairs.[464] Proponents of this view often suggest that state sovereignty, including domestic constitutions, are becoming less important in an increasingly networked, globalized world.[465] While the interdependence of the world is undeniable, domestic constitutional law continues to engage with and fundamentally shape international legal norms. As Peters put it:

> …the constitutionalization of international law is accompanied and co-constituted by the internationalization (or globalization) of state constitutions consisting in the (re-) importation of international precepts (such as human rights) standards into national constitutional texts and case law, which simultaneously brings about a 'horizontal' convergence of national constitutional law.[466]

In this framing, domestic constitutional law takes on the characteristics of a "global constitutional law," expounding "fundamental norms which serve a constitutional function for the international legal system at large."[467] State sovereignty, domestic constitutional law, and international law thus need not be seen as inherently at odds. They develop together, are part and parcel of the legal whole, and can be understood to "compensate for each other's deficiencies,"[468] particularly regarding the disproportionate influence and hegemony of "agenda-setting states" over the content and form of international agreements and democratic deficit immanent to international bureaucratic regimes.[469] Domestic courts routinely resolve conflicts between national and international law and "may provide effective judicial checks and balances

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[464] The idea that a global "constitutional order" is arising/has arisen with many of the features of domestic constitutional orders. As Klabbers details: "A constitutional order…is one which helps create public authorities, but at the same time limits the powers of public authorities and sets out proper procedures for the institutions of governance to follow. Thus, constitutions, typically will have rules on how laws ought to be made, how disputes ought to be settled, and which institutions shall exist, and will also have rules on the sort of basic values…that no official action may encroach upon." Klabbers, Peters and Ulfstein (2009), 9.

[465] See Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009); Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford: Oxford University Press, 2010); Jean L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge: Cambridge University Press, 2012), esp. introduction and chapter 1; Surendra Bhandari, *Global Constitutionalism and the Path of International Law: Transformation of Law and State in the Globalized World* (Leiden: Brill Nijhoff, 2016), xviii.

[466] Peters (2016), 1016-1017.

[467] Peters (2016), 1016-1017.

[468] Peters (2016), 1019.

[469] Peters (2016), 1015 and 1027-1029.

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with transnational decision-making authorities in the course of their adjudication."[470] Reverting to arguments from sovereignty to better secure and protect human rights and fundamental freedoms at home is thus a promising, if contested, legal strategy. But it may be a necessary one for states reforming local drug control law and policy, and deviating from the IDCS, in the name of greater respect for constitutional commitments to individual liberty and equality, values that are themselves sacred within the UN system.

The actual practice of the international legal order must be considered before accepting ideas purporting the decline of the nation state. It remains the case that states alone decide the extent to which international law is adopted, implemented, and effective within their borders, aside from customary international law and jus cogens norms.[471] Sovereignty is further recognized in Article 19(c) of the VCLT, which permits states to ignore certain treaty provisions so long as they do not contravene the treaty's object and purpose by adding "reservations, understandings, and declarations (RUDs) to their instruments of ratification."[472] In sum, states must consent to a treaty regime for it to have binding force. But even after having consented to a treaty binding it to a set of legal obligations a state may renege on its commitments as of right.[473] This was demonstrated by Bolivia's 2013 denunciation from, and reaccession with reservation to, the Single Convention. While actions of this nature may provoke a backlash from the

[470] Bodies like the CND, UNODC, and INCB. Wen-Chen Chang and Jiunn-Rong Yeh, "Internationalization of Constitutional Law," in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), 1182.
[471] See Weimar-era jurist Hermann Heller's take on sovereignty: "Any limitation on a universal territorial decision-making unit is only possible by treaty…Any decision-making institution brought into being by treaty…possesses clear limits drawn by the sovereignty of the delegating states. If a state has not subjected itself by treaty to any decision-making institutions, it is solely itself that decides on the limits of its activity, within the bounds of fundamental legal principles." Hermann Heller and David Dyzenhaus (ed), *Sovereignty: A Contribution to the Theory of Public and International Law* (Oxford: Oxford University Press, 2019), 172.
[472] Van Der Vyer (2013), 395.
[473] "Within their own [state] constitutional structures, their sovereign nature implies that there is no high authority outside of the constitution that can compel them to honour the undertakings they have given." Barber (2018), 40-41 and 47.

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international community, they are legal. For better or worse as far as the uniformity of international law is concerned, "state sovereignty has remained the basic norm of international law and international relations."[474] When lawmakers and judges alter the applicability of the drug control conventions by "exploring the latitude[s] within the current treaty system" or compel it to accord with domestic constitutional law they are exercising sovereign power.[475] Add to this the legal and normative force of human rights interests and the case for drug control schemes diverging from IDCS standards is sustainable.

The IDCS's tolerance of illiberal practices raise well-grounded concerns about its effectiveness in securing, protecting, and respecting human rights. In particular, the use of the "more severe measures" clauses in the treaties has legitimated, by omission, the use of the death penalty in drug offense cases.[476] How is it that flexibility is permitted for extreme human rights violations but less restrictive alternatives to the strict control, prohibition, suppression, and criminalization of controlled substances, such as the legalization of drugs like cannabis, are deemed beyond the pale? Sovereignty is not only resorted to as a justification for the frustration of international law and institutions. It can be used to validate a "dynamic, human-rights based approach" to drug control law and policy.[477] Uruguay and Canada's legalization of cannabis, for example, can be argued to better secure, protect, and respect human rights than the IDCS's punitive model, avoiding as it does the criminalization and incarceration of users.[478] In such a case it is possible to say that deviation from the IDCS is necessary to secure, protect, and respect human rights.

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[474] Van Der Vyer (2013), 395.
[475] Bewley-Taylor (2005), 424-425.
[476] Lines (2017), 104-107.
[477] See Lines on Canada's Supreme Court "playing a positive role in mitigating the negative human rights impacts of drug laws." Lines (2017), 180-181.
[478] Eliason and Howse (2019), 351-358, esp. 356.

When arguments from sovereignty and the status of international law vis-à-vis national law are combined with the space accorded human rights in the drug control conventions[479] and its institutions[480] there is a compelling argument to be made that constitutional law is the most efficient, effective, and legitimate mechanism to reform drug control law and policy in line with human rights and fundamental freedoms. That there is little prospect for change at the international level, as evidenced in the analysis above, strengthens the claim that national legislatures and courts have the legal authority and moral obligation to stray from strict control, prohibition, suppression, and criminalization where they conflict with constitutional rights and freedoms. Discussing the interaction between international and domestic law in the human rights context, scholar and jurist David Feldman suggests that it is not "equally legitimate" for the latter "to affect the content of the former. When deference to local opinion is extended to the content of the rights themselves…it threatens to deprive the right of any substance whatever."[481] This presumption reflects the view that interpretations straying from near-universally adopted legal norms will detract from human rights protections rather than enhance them. That said, there is nothing stopping "a state [from] adopt[ing] a more liberal interpretation of a right than is enforced in international law."[482] The case law discussed in chapter 3 demonstrates that expansive constructions of human rights and fundamental freedoms in apex courts from North to South America and Europe are valid, integral parts of the effort to revise the IDCS in the pursuit of justice: political, legal, social, racial, and economic.

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[479] E.g., 1988 Convention, Article 14(2).
[480] E.g., UNGA (2016) and INCB (June 2018).
[481] David Feldman, "Monism, Dualism and Constitutional Legitimacy," 20 *Australian Yearbook of International Law* 105 (1999), 125.
[482] Feldman (1999), 126.

Reform and reinterpretation of the drug control conventions, though possible, is an improbable outcome of the current national challenges to the regime and would present their own set of drawbacks. Bewley-Taylor warns that arguments based "solely in terms of national sovereignty and/or a diminution of the importance of international law" could have unintended negative consequences.[483] But working within the framework of strict control, prohibition, suppression, and criminalization generates "changes in rather than changes of regime [that] actually sustain larger structures of harm."[484] Flexibility implies limits, which are a product of political compromise. The law and policy conflicts that have arisen between reforming states and the IDCS, as with other domestic-international legal clashes, "reveal international law as contingent upon, or instrumental to politics, and legal doctrine's inability to transcend these features of international law."[485] The preferences of agenda-setting states set the parameters of the debate in international law and international relations, delimiting the degree to which international drug control reform is legitimately achievable and the pathways thereto: "innovative and specific moves have to be validated by linking them back to general ideas of interpretation, processes and forms associated with the international legal system."[486] Arguments invoking rules and principles beyond these parameters, however persuasive on their own, are not well suited to the theory, practice, and realpolitik of international legal reform. Justifying non-compliance with the IDCS based on the argument from national sovereignty and human rights considerations is therefore a plausible and effective tactic in a field of law dedicated to the strict control, prohibition, suppression, and criminalization of drugs and drug users.

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[483] Bewley-Taylor (2013), 66.
[484] Bewley-Taylor (2013), 61 and Bewley-Taylor and Fitzmaurice (2018), 408.
[485] Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (Cambridge: Cambridge University Press, 2014), 3.
[486] Ranganathan (2014), 367.

2.7 Path Dependency

Normative hierarchies compete for hegemony within the international legal order's institutions and networks. The IDCS and international and domestic human rights law are two such normative systems.[487] Treaty bodies including the CND, UNODC, and INCB pursue their mandate as described in their constitutive conventions. Their goals are, inter alia, ensuring adequate access to essential medicines, the limitation of controlled substances to medical and scientific purposes alone, and combatting the illicit trade and use of narcotic and psychotropic substances (through suppression and criminalization). When these ends conflict with human rights law "the functional paradigm (or bias) of the network in question [i.e., the IDCS] would make it increasingly difficult for domestic actors within that network to safeguard domestic legal principles (whether of a domestic constitutional nature or otherwise) from overriding the influence of the international norms."[488] In the case at hand, the narrowing of law and policy choice in drug control at the national level is a consequence of the IDCS's successful normative entrepreneurship and the engineering of shared jurisdiction and responsibility for implementing and executing the regime. Its black letter flexibility and substantive inflexibility is a result of the mechanics of path dependency.

Path dependency theory posits that organizations and institutions operate as "self-reinforcing processes" fixed by past choices and events. These well-beaten paths tend to "narrow[] the scope of action" available to decision-makers, "restrain future choices," and may "even amount to an imperative for the future course of action so that ultimately no further choice

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[487] On drug control as a normative system see Wisehart (2019), 4.
[488] De Wet (2012), 1222-1223.

is left."[489] This can generate "a state of persistence or inertia" wherein administrators make decisions in a manner akin to painting by numbers.[490] Path dependence does not characterize most organizations and institutions ab initio. Rather, it comes about in three phases. First is "the Preformation Phase…[which] can be characterized by a broad scope of action, where choices taken cannot be predicted by prior events or initial conditions."[491] Pre-Single Convention events, treaties, organizations, and institutions from the nineteenth century to 1961 can be said to comprise the Preformation Phase of the IDCS. Second is "the Formation Phase…[wherein] the range of options increasingly narrows and it becomes progressively difficult to reverse the initial choice."[492] The Single Convention consolidated previous international law and policy into one treaty regime, setting the IDCS on the path of strict control, prohibition, suppression, and criminalization of supply-side regulatory efforts.[493] Third is "the Lock-in Phase…[whereby] the dominant pattern gets fixed and gains a quasi-deterministic character."[494] The contemporary IDCS has been locked-in. With near-universal ratification the organizations and institutions of the UN, from the CND to the UNODC and INCB, follow the script as set out in the Single, 1971, and 1988 conventions as well as UN rules, resolutions, and reports. The inflexibility of the standard regime speaks to the rigidity of their "self-reinforcing processes."

Legal systems are also constrained by path dependency, writes scholar John Bell, as history, tradition, and practice become "entrenched within the [them]."[495] Judicial precedent, for example, sets the terms by which new legal issues are adjudged; in common law jurisdictions

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[489] Georg Schreyögg and Jörg Sydow, "Understanding Institutional and Organizational Path Dependencies," in Jörg Sydow and Georg Schreyögg (eds), *Dynamics of Path Dependence: Institutions and Organizations* (Basingstoke: Palgrave Macmillan, 2010), 4-5.
[490] Schreyögg and Sydow (2010), 4.
[491] Schreyögg and Sydow (2010), 5.
[492] Schreyögg and Sydow (2010), 5-7.
[493] Collins (2021), 189.
[494] Schreyögg and Sydow (2010), 7-8.
[495] John Bell, "Path Dependence and Legal Development," *Tulane Law Review* 87, 4 (2013), 793-794.

especially, but also in constitutional adjudication more broadly.[496] This can create barriers to innovation as "less-than-desirable solution[s]…to which [the legal system has] grown accustomed" persist in line with convention.[497] Instead of tackling new issues head-on, lawyers, judges, courts, and all manner of legal organizations and institutions choose to "play it safe" and follow the lead of their predecessors.[498] But while initial choices might limit the "range of options from which a legal system might deal with new problems, there remains a significant scope for conscious choice."[499] Change is most likely to come about when the costs of continuing along a given path outweigh the benefits.[500] Novel arguments and "[n]ew concepts," Bell suggests, "may well work best as a bypass around the established conceptual framework";[501] though the magnitude of the embeddedness of "legal rules, concepts, and institutions" limits the scope for change, which most often "occurs through adjustment rather than revolution."[502] The modification of law and policy via a bricolage of legislation and case law is an immanent feature of liberal democratic orders. Drug control reform strategies must adhere to its language, rules, and customs to impel decisions-makers to act in the interests of human rights and fundamental freedoms.

2.8 Conclusion

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[496] This has led to an increasingly "juridified" form of politics and policymaking in the US. See Gordon Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (Cambridge: Cambridge University Press, 2009), chapter 3, esp. 65 and 70. The extent to which precedent "locks-in" a particular legal or policy path is contested in Charles Epp, "*Law's Allure* and the Power of Path-Dependent Legal Ideas," *Law and Social Inquiry* 35, 4 (2010): 1041-1051.
[497] Bell (2013), 787-788 and 790-791.
[498] Bell (2013), 791. This is because "[p]ath dependence will also affect the *expectations of what law will do*." Bell (2013), 797.
[499] Bell (2013), 794.
[500] Bell (2013), 794-795.
[501] Bell (2013), 810.
[502] Bell (2013), 799.

The IDCS and domestic legal systems that implement and execute its directives follow distinctive but intertwining paths. Each is dependent on deep structures and ingrained habits that must be acknowledged and addressed in the pursuit of reform. These dynamics have both inhibited and enabled revision of the IDCS in the areas of harm reduction, traditional and indigenous cultivation and use, the creation of legal cannabis markets, and scheduling reform. Though states intimate that alternative law and policy is compatible with the regime, it is geopolitical power and sovereignty that has truly underwritten innovation. And while independent courses of action explicitly follow the logic of domestic political and legal imperatives, they routinely invoke adherence to international obligations to balance national autonomy with treaty compliance. As such, the next chapters focus on changes in and through the IDCS via the interaction of the drug control conventions with domestic constitutional human rights and fundamental freedoms. It raises questions as to the continued viability of prohibition and suppression: Is there room for flexibility in applying international law in domestic courts? Is unilateral judicial action an acceptable path for modifying the status quo? On what bases can deviations from international norms be justified? Medical and scientific purposes? Religion? Answering these questions will aid in determining whether the IDCS can weather the growing storm of discontent with its dictates or will be forced to innovate on the model of its detractors.

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Chapter 3: Constitutional Rights and Freedoms and Drug Control

3.1 Balancing International Legal Obligations with Constitutional Law

The previous chapters examined the history and structure of the international drug control system (IDCS) and addressed several points of contention that have tested the drug control conventions, United Nations treaty bodies, and international politics. What follows is the case for a comparative constitutional law approach to drug control law and policy. The constitutional caveats-safeguard clauses in the drug control conventions provide a space for domestic judicial intervention and institutional interaction between the international and national legal and administrative spheres. Filling in the regime's gaps, courts must ensure an appropriate balance is struck between the strictures of the treaty regime and the local requirements of the constitutional bill of rights. Thoughtful juridical engagement is necessary to ensure human rights and fundamental freedoms are not sacrificed in the name of a legal positivism that puts the objects of a prohibitionist, suppression-oriented drug control above the liberty of citizens.

The normative hegemony of UN treaty bodies from the CND to the UNODC and INCB and states like the US and Russia marginalizes dissenting points of view. National courts are fora for these dissenters, allowing both individuals and groups to field direct and specific challenges to the strict control, prohibition, suppression, and criminalization of drugs based on their incompatibility with constitutional human rights and fundamental freedoms.[503] The domestic enforcement of these protections "place[s] legal restrictions on the exercise of public power on the international level…to provide meaningful legal protection to individuals in situations where international obligations have eroded such protection."[504] Apex courts have proved to be capable and effective institutions in adjudicating conflicts between the IDCS and constitutional

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[503] Barrett et al. (2020).
[504] De Wet (2012), 1212-1214 and 1224.

commitments, promoting and protecting rights and freedoms and the interests of the public, and mitigating the disadvantages of drug control related to, inter alia, individual liberty, public health, limits on access to essential medicines, and the cultural and religious use of psychoactive substances. This is not to say they have a liberal, reformist bent as a matter of course. Many courts have declined to upend the IDCS's implementation at home, even where rights and freedoms are concerned. Some even support punitive drug law and policy. Nevertheless, in a global environment where the "judicialization" of governance has given the judiciary a leading role in decision-making via judicial review, the prospective impact of rights and freedoms adjudication on the coherence and uniform application of the IDCS calls for close examination.[505]

Whether constitutional rights and freedoms jurisprudence might secure a right to possess and use narcotic and psychotropic substances for recreational, medical and scientific, and traditional and religious purposes despite the limits imposed by the drug control conventions is examined in this chapter. Using a comparative constitutional law perspective and drawing on case law from apex courts and constitutional theory, chapter 3 asks what it would mean to transpose progressive jurisprudential ideas and rationales across jurisdictions via legal transplants and judicial borrowing to combat the systemic abuses and violations of constitutional rights and freedoms caused by the internationally sanctioned criminalization of drugs and drug users. Limits to this approach are apparent from the fore. Even an optimistic, liberal reading of the constitutional caveats-safeguard clauses in the drug control conventions joined with an open approach to comparative constitutional law offers finite prospects for preventing rights and

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[505] David S. Law, "Constitutions," in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010), 385-387. This inquiry is essential in determining "the conditions under which large-c constitutionalism succeeds, in the sense of either defining actual practice or improving social welfare." Law (2010), 384.

freedoms violations and abuses.[506] The constitutional caveats-safeguard clauses are a promising avenue for reforming drug control at the level of the individual, but they are an insufficient mechanism by which to pursue structural change. What is needed is substantive national and international action that addresses inequities between North and South, white and black, and rich and poor conditioning how the war on the drugs trade and its users is prosecuted. Treaty reform, legislative change, and social and economic interventions aimed at improving the lot of the most vulnerable is fundamental to formulating a just drug control model. There is also a robust case to be made for pushing the purported flexibilities of the IDCS through the constitutional caveats-safeguarded clauses and comparative constitutional law. The question is whether the IDCS can bend to these challenges or whether it is doomed to break in the face of broad, yet haphazard, transnational recognition of drug control's unacceptable human rights and fundamental freedoms record.

3.2 Constitutional Caveats-Safeguard Clauses and the International Drug Control System

The drug control conventions' constitutional caveats-safeguard clauses – Articles 35 and 36 of the Single Convention; Article 22 in the 1971 Convention; and the 1988 Convention's Article 3(2) – subject significant provisions enumerated therein to "constitutional limitations" and other features of the domestic legal order. Constitutional bills of rights and the apex courts that interpret, expound, and enforce them, such as Canada's Charter of Rights and Freedoms and the Supreme Court of Canada (SCC), are elementary features of the "constitutional principles and basic concepts of [states parties'] legal systems."[507] For this reason the Ontario Court of Appeal,

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[506] Delineating "the possible limits of comparative law" is itself an object of comparative legal scholarship. Mathias Siems, "The Power of Comparative Law: What Types of Units Can Comparative Law Compare?" *American Journal of Comparative Law* 67, 4 (2019), 885.
[507] Eliason and Howse (2019), 345.

the highest court in the Canadian province of Ontario, was able to rely on the treaties' constitutional caveats-safeguard clauses to craft an exemption from prosecution for those unlawfully in possession of cannabis for therapeutic purposes (CTP) in 2000. The impugned law was found to violate the complainant's right to "life, liberty, and security of the person" as per Article 7 of the Charter.[508] Canadian scholars have argued that "[h]ad the [SCC] found that [the] criminalization of the simple possession of cannabis breached" the Charter of Rights and Freedoms, a "legalization scheme may have been justified under the treaty clauses deferring to the constitutional or basic principles of the Party's legal system."[509] This despite the fact that, as the subsection on soft defection above indicated, there is limited room to interpret the drug control conventions as being amenable to legal, regulated cannabis markets. Be that as it may, the constitutional caveats helped legitimate the Ontario court's rights and freedoms-based decision and arguably set Canada on its path toward legalization in 2018.

The recognition of a narrow right to simple possession and consumption of certain narcotics and psychotropics implies sourcing illicit substances from somewhere, i.e., the black market, which entails further conflict with the IDCS. Recall the VCLT rule that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[510] So, what at first appears clear, that the constitutional caveats-safeguard clauses legitimate judicially crafted human rights and fundamental freedoms exemptions to the crime control model universalized in the treaties, is complicated by downstream effects; that court intervention in drug control leads to the fragmentation of the regime and is incompatible with the conventions' object and purpose. Constitutional caveats-safeguard clauses and the domestic expansion of

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[508] *R v Parker*, (2000) 49 OR (3d) 481 (CA) cited in Bone (2020), 121.
[509] Commentators point out that there is no case law to support such a finding. Habibi and Hoffman (2018), 449; Eliason and Howse (2019), 345-351.
[510] VCLT, Article 27.

constitutional rights and freedoms by courts thus give the IDCS an appearance of flexibility but foreclose substantive reform. The cases presented in the following subsections demonstrate, first, the IDCS's structural rigidity and practical inflexibility and, second, that the conventions, treaty bodies, and the many states parties thereto will continue to frustrate moves to fulfil and promote of rights and freedoms.

While the arguments supporting a liberal formulation of the regime are academically persuasive, the strictures of international and constitutional law bind judges in ways that preclude them from redrafting drug control law and policy from the bench. But if we take the constitutional caveats-safeguard clauses at face value the case can convincingly be made that states may depart from convention rules, at least when it comes to the decriminalization and perhaps even legalization of possession of controlled substances for personal consumption.[511] The United Nations Common Position on Drug Control, embraced by the UN System Chief Executives Board for Coordination and released in November 2018 ahead of the 2019 meeting of the CND, partly supports this position, encouraging "alternatives to conviction and punishment in appropriate cases, including the decriminalization of drug possession for personal use."[512] The problem with this proposal is that it does nothing to address the supply-side of the equation, making the illicit market the only source of controlled substances for consumers, fueling drug trafficking and organized crime, and increasing demand in direct opposition to the object and purpose of the IDCS.[513] While the legal grounds on which decisions to deviate from treaty norms are heavily contested their results are compelling, opening the door to significant, litigation-

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[511] Dave Bewley-Taylor and Martin Jelsma, "The UN drug conventions: The Limits of Latitude," *Transnational Institute Drug Law Reform Series* 18 (2012b), 6-7.
[512] United Nations System Chief Executives Board for Coordination, United Nations system common position supporting the implementation of the international drug control policy through effective inter-agency collaboration, Annex I, CEB/2018/2, https://fileserver.idpc.net/library/CEB-2018-2-SoD_Common-position.pdf.
[513] Niamh Eastwood, "Cannabis decriminalization policies across the globe," in Tom Decorte, Simon Lenton and Chris Wilkins (eds), *Legalizing Cannabis: Experiences, Lessons and Scenarios* (London: Routledge, 2020), 145.

driven reform in drug law and policy in a variety of jurisdictions, in the Americas and Europe in particular.[514]

Where conflict arises between the international obligation to limit the use of narcotic and psychotropic substances exclusively to medical and scientific purposes and domestic constitutional human rights and fundamental freedoms the latter may trump the former. And even if "the constitutional safeguard clauses *only* apply to activities relating to personal consumption" there is room under this matrix for judicially crafted rights and freedoms-based exemptions from generally applicable drug control laws.[515] This is by design to a certain extent, as adopting "flexibility in agreement language" helps international negotiators build consensus and get to yes; but flexibility also "shapes compliance."[516] Since compliance and noncompliance are contestable, caveats-safeguards and other such exemptions "can have large and unintended consequences…[and] induce states to move in the opposite direction from what an agreement's drafters intended."[517] It is no surprise, then, that constitutional caveats-safeguard clauses are "quite rare in international law," as they offer a means by which states parties to a treaty regime may renege, with justification, on binding treaty commitments.[518] How far states may deviate from the IDCS's norms consequently depends upon local value choices. For present purposes, the value selected as most important is the maximal protection of human rights and fundamental freedoms as conceived by domestic apex courts. Several arguments support the contention that international law is subordinate to domestic law and policy in the rights and freedoms field.

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[514] Eastwood (2020), 138.
[515] Italics added. Bone (2020), 110, 135, 168 and 179.
[516] Katerina Linos and Tom Pegram, "The Language of Compromise in International Agreements," *International Organization* 70, 3 (2016), 587 and 591-592.
[517] Linos and Pegram (2016), 588.
[518] Bone (2020), 149.

The European Union's (EU) concept of subsidiarity, the idea that "decisions are [best] taken at the lowest possible administrative level, closest to those affected by them,"[519] is useful in framing the case for greater state autonomy under the IDCS. So, as regards the drug control regime subsidiarity implies that the conventions and treaty bodies monitoring their implementation are subsidiary to national authorities, who represent and are responsible to the public. Responsiveness of this sort is a hallmark of democracy, permitting the "will of the people," or at least their representatives, to prevail over competing values like treaty compliance. To explicitly endorse subsidiarity, former Chief of Demand Reduction at the UN Drug Control Programme Cindy Fazey claims, would "repatriate" drug law and policy from the international to the domestic sphere."[520] Within the EU, by way of illustration, drug law and policy innovation has largely developed subnationally and locally. But as Portugal, Spain, Belgium, the Netherlands, Luxembourg, Germany, Malta, and Czechia shift toward varying degrees of de jure and de facto decriminalization, legalization, and regulation of cannabis, for instance, supranational political and institutional pressure is building to develop an EU-wide common position to contain increasing supply and demand.[521] Be that as it may, subsidiarity's persuasive power is strengthened when supplemented by the margin of appreciation doctrine.

In European Court of Human Rights jurisprudence the margin of appreciation doctrine "recognizes that there may be a range of different but justified interpretations of international human rights law depending on the domestic context."[522] For this reason "the Court should defer to the judgment of domestic authorities that are better placed to decide what these [different but

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[519] Fazey (2003), 167.
[520] Fazey (2003), 167.
[521] Constanza Sánchez-Avilés, "Cannabis Policy Innovations and the Challenges for EU Coordination in Drug Policy," *AJIL Unbound* 114 (2020): 307-311.
[522] Samantha Besson, "Subsidiarity in International Human Rights Law - What Is Subsidiary about Human Rights," *American Journal of Jurisprudence* 61, 1 (2016), 81-82.

justified interpretations] are."[523] Deference is especially warranted in cases where (1) there is no European consensus vis-à-vis the legal issue at hand and when (2) moral and political questions are concerned.[524] In the present case, there is no European consensus regarding drug control – e.g., the liberal Portuguese model vs. the prohibitionist Swedish one – and morals and politics pervade drug control law and policy – e.g., the moralization and responsibilization of drug users and use of "tough on crime" rhetoric in anti-drug campaigns. Adapting the margin of appreciation doctrine to drug control would entail that IDCS treaty bodies act more deferentially toward national governments and their apex courts in the delineation of law and policy, enabling domestic law and policymakers the freedom to reform the regime so that it is less incompatible with constitutional human rights and fundamental freedoms; and more responsive to changing public attitudes and new, if controversial, regulatory models. But liberal outcomes are never guaranteed, as demonstrated by the fact that, in the Council of Europe context, "the States most averse to the [ECtHR's] intervention in their domestic [human rights] affairs, like Russia [and] the United Kingdom," have been keen to endorse the margin of appreciation's emphasis on interpretive latitude.[525] So, while there is ample opportunity for states to deviate from treaty norms to better secure constitutional rights and freedoms under the margin of appreciation doctrine, there are numerous counterexamples showing the pendulum can swing the other way, with many states and apex courts being unable or unwilling to expand the scope of legal protections so as to minimize the detrimental impact of drug control laws on their subjects.

Combined with the discussions on Article 103 of the UN Charter and human rights as prevailing over conflicting international legal norms and state sovereignty and the primacy of

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[523] Besson (2016), 81-82.
[524] Besson (2016), 80-82.
[525] Besson (2016), 70-72.

human rights in democratic countries, tendered in chapter 2, the argument for subsidiarity and a greater margin of appreciation in national drug law and policymaking constitute a persuasive line of legal reasoning beyond the text of the drug control conventions. Again, this contention could also be used to justify non-human rights compliant illiberal practices, but these are already tolerated to a great extent under the "more strict or severe measures" clauses of the conventions. Illiberal flexibility is built into the treaties. Liberal law and policy, by contrast, must go above and beyond the strict wording of these texts to legitimate its place within the IDCS.

Litigants and apex court judges may therefore justify departing from convention standards to protect constitutionally recognized individual and group interests. Decisions to do so must be framed within the confines of local law and tradition. But, to extend the logic of SCOTUS Justice Louis Brandeis' famous dissenting judgment on legislative experimentalism to the international sphere: "It is one of the happy incidents of the federal [or international] system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country [or world]."[526] Approaching drug control in this way is not only lawful under the treaty framework. It is necessary to ensure the IDCS ceases to cause and exacerbate the violation of international and constitutional rights and freedoms. From the perspective of the international system's managerial class, most "problems of global governance can be resolved by economic or technical means."[527] Not every conflict can be settled by bureaucrats, however, as "[g]lobal governance is about the contestable use of global power; regimes are political projects and expert vocabularies manifestoes."[528] By contrast, extant and aspiring liberal democracies engage in "novel social and

[526] *New State Ice Co. v Liebmann*, 285 U.S. 262 (1932), 311.
[527] Koskenniemi (2012), 324.
[528] Koskenniemi (2012), 324.

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economic experiments" to one degree or another with great frequency, which sometimes requires diverging from generally prevailing international legal norms. Constitutional courts have played an active role in setting the legal parameters of such regulatory experiments, including with controlled substances via judicial adjudication of human rights and fundament freedoms issues.

The INCB and academic commentators agree that the drug control conventions do not and cannot admit a "right" to possess or consume narcotic or psychotropic substances for anything other than medical and or scientific purposes;[529] despite, Daniel Wisehart stresses, regular invocations of their respect for "[u]niversal human rights such as the right to privacy and the right to religion."[530] This may be true prima facie, but Wisehart also notes the positive potential of relying on the conventions' constitutional caveats-safeguard clauses to remedy the IDCS's human rights deficit. Of course, the sheer variety of constitutions and attendant construction of rights and freedoms makes it imprudent to suggest a one-size-fits-all solution to resolving drug control's shortcomings. One thing is for sure, and that is that the constitutional caveats-safeguard clauses in the drug control conventions deserve more attention than one paragraph.[531] The case law covered in the next two chapters demonstrates how the rights to liberty, privacy, health, and have led to the carving out exemptions from the uniform implementation of national drug control laws and by extension the IDCS. The emergence of evidence-based psychedelic medicine, for example, will play an increasing role in delineating the limits imposed on drug control by constitutional rights and freedoms as conceptualized by legislators and judges alike, building on the precedents set in cannabis-related jurisprudence. Indeed, the judiciary has taken a leading role in narrowing the scope of application of several key

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[529] International Narcotics Control Board, Report of the International Narcotics Control Board for 2008 (New York: United Nations, 2009), para 31; Wisehart (2019), 115.
[530] Wisehart (2019), 115.
[531] Wisehart (2019), 168.

tenets of the IDCS, particularly as regards the possession of controlled substances for personal consumption. The cases discussed below show how constitutional rights and freedoms can and have been used to litigate and win the right to possess and use narcotic and psychoactive drugs, as well as how comparative constitutional law impacts legal innovation in national drug control.

The subsections that follow also show that in practice the transplantation of legal thinking across borders and jurisprudential cross-fertilization are complex processes with as many limitations as possibilities for challenging drug control law and policy. Judges enforcing human rights and fundamental freedoms provisions must work with the analytic and institutional tools available to them. Politics and legal constraints can make it difficult or impossible for judges to intervene from the bench, but as the experience of a diverse array of apex courts demonstrates there is much that can be done about drug control and its disadvantageous implications via the administration of constitutional law and bills of rights. Courts have significantly impacted not only how the possession and consumption of controlled substances is policed, but how the politics of drugs are framed. Decreasingly seen as a proportionate means by which to rein in anti-social or deviant behavior, punitive drug laws are regularly framed, at least in liberal democratic states, as disproportionate measures enforcing conformism if not outright tools of oppression. The mainstreaming of human rights and fundamental freedoms into drug enforcement, especially at the constitutional level, i.e., federal, state, and local, has largely undermined the moral arguments in favor of strict control, prohibition, suppression, and criminalization. If anything stands in the way of reform it is path dependence, covered above, and the utility of crime control politics, a subject taken up in chapter 5. Comparative constitutional case law on drug control shows that judicially, where there is a will to protect and expand rights and freedoms there is a principled way in which to accomplish it.

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3.3.a Conceptualizing Constitutions and Comparative Constitutionalism

Constitutions embody the primary formal and informal rules, as well as secondary rules restraining rulemaking, that set out the institutions, processes, and substance of political organization and the execution of governmental power while providing mechanisms for the resolution of conflict between competing political factions. Human rights and fundamental freedoms, along with the separation of powers doctrine, are basic parts of liberal constitutionalism's structure, aimed at limiting government's ability to interfere in the lives of citizens (i.e., negative or civil and political rights); a higher law against which ordinary legislation and executive and judicial acts are measured.[532] The distinction between formal and informal constitutional rules is a useful one, as neither their configuration nor content tells us everything there is to know about a particular legal order. David S. Law writes that:

> A large-c constitution is a legal document, or set of documents, that (1) proclaims its own status as supreme or fundamental law, (2) purports to dictate the structure, contours, and powers of the state, and (3) may also be formally entrenched…A small-c constitution, by contrast, consists of the body of rules, practices, and understandings, written or unwritten, that actually determines who holds what kind of power, under what conditions, and subject to what limits.[533]

Black letter law and custom can differ, with implications for legal interpretation and process. Constitutions matter, but their ability to secure and protect human rights and fundamental freedoms depends on myriad external factors, from "resource constraints…and small c-constitutional factors (such as stable electoral processes, the existence of a large middle class, a healthy civil society, and a developed market economy characterized by high levels of investment in science, education, and health care)"[534] to "the existence of judicial review by

[532] Barber (2018), 2-3; Robert Schütze, "Constitutionalism(s)," in Roger Masterson and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge: Cambridge University Press, 2020), 40-66.
[533] Law (2010), 378.
[534] Law (2010), 382.

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independent courts…and a legal profession organized in a manner that encourages and sustains rights advocacy."[535] Extrinsic factors loom large in the capacity of courts to intervene on questions of law and policy. In constitutional adjudication, the "large-c constitution" confers upon the courts the authority to settle legal issues while the "small-c constitution" of history, tradition, convention, judicial precedent, legal philosophy, and the spirit of the times color the judiciary's elaboration and application of the text. It is in the "small-c constitution" of case law and jurisprudence that the potential for constitutional human rights and fundamental freedoms to reform the field of drug control beyond national borders is to be elaborated.

Courts are a viable avenue for challenging the strict control, prohibition, suppression, and criminalization of the possession of controlled substances for personal consumption. But they can be relied upon to protect human rights and fundamental freedoms only to the extent that it is consistent with prevailing majoritarian politico-ideological beliefs and sentiments. Courts, as part of the legal system, are embedded in a greater network of social and economic relations. Likewise, "constitutions may be intended to structure political, social, and economic arrangements, but they are also the products of the very arrangements that they are supposed to shape."[536] Exploring the scale to which national judiciaries might play a role in the reform of the IDCS thus requires a comprehensive understanding of constitutionalism as both an abstract concept and concrete instrument in specific conditions.

This chapter employs country case studies and qualitative comparative constitutional scholarship and approaches to the field of drug control and human rights and fundamental freedoms.[537] The method, based on the work of Professor Bruce Ackerman, entails:

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[535] Law (2010), 383-384.
[536] Law (2010), 389.
[537] The "case study approach" used here, "wherein the research explores a single instance of a phenomenon in depth or compares a small number of such instances," aids in "building theories and developing explanations of empirical

"identify[ing] (a) one or another common problem confronting different 'constitutional courts,' and then follow[ing] up by specifying (b) different coping strategies these courts have adopted as they have tried to solve the problems…for deeper insight into the comparative value of competing coping strategies."[538] Constitutional scholar Vicki Jackson has described this technique as "conceptual functionalism," whereby:

> scholars hypothesize about why and how constitutional institutions or doctrines function as they do, and what categories or criteria capture and explain these functions, drawing examples from some discrete number of systems to conceptualize in ways that generate comparative insights or working hypotheses that can be tested by other methods.[539]

At the international level, Richard Lines has examined the potential for a new stage in drug control based on a dynamic, human rights-based interpretation of the drug control conventions and treaty body determinations.[540] He concluded that progress "remains far from being achieved" within the UN system, especially considering the reluctance of the INCB to acknowledge the human rights aspects of drug control.[541] There is, however, "[e]vidence of a dynamic…interpretive approach…found at [the] domestic level" where apex and national and supranational courts have "play[ed] a positive role in mitigating the negative human rights impacts of drug laws."[542] Understanding the extent to which such successes can be replicated requires a contextualized functional analysis of the jurisdiction wherefrom a ruling originates and the context to which it may be transferred. That is, individual courts must be understood based on the text and context of the constitution, the history and tradition of the jurisdiction, and the

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relationships." Law (2010), 390. It addresses Melissa Bone's call for "[a] more detailed exploration of a [each] jurisdiction's legal, socio-political, economic and cultural context" to better "contextualise the viability of [legal] arguments in different jurisdictions and for different substances." Bone (2020), 184-185.

[538] Bruce Ackerman, "The Rise of World Constitutionalism," 83 *Virginia Law Review* 771 (1997), 794.

[539] Vicki C. Jackson, "Comparative Constitutional Law: Methodologies," in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), 64.

[540] Lines (2017), chapters 6-8.

[541] Lines (2017), 173.

[542] Lines (2017), 180-186.

convention and practice of the political order.[543] Only then can comparative constitutional lessons be drawn.

As political scientist Ran Hirschl posited, contriving the "constitutional voyages" of individual jurisdictions is not an apolitical endeavor. The project reflects institutional and scholarly designs to preserve the counter-majoritarian constitutional identity of liberal democratic courts and polities, explore "new constitutional settings and develop novel concepts, arguments, and ideas," and is, at base, "driven by a desire to advance a concrete political agenda or ideological outlook."[544] The universalist thrust of the IDCS has challenged constitutional adjudicators to square the circle of strict control, prohibition, suppression, and criminalization with equally universalist human rights and fundamental freedoms principles. This duel makes for a compelling case study on the potential and pitfalls of relying on courts to craft compromises between competing visions of the good society.[545] These considerations surface in different guises when jurists analogize, accommodate, and adopt foreign ideas and practices to the particularity of their local context. In a comparative frame, the divergent application of, and engagement with, arguments from external jurisprudential sources can shed light on how jurisdictions cope with, contest, and reconfigure the requirements of the IDCS.

The metaethical foundations of constitutional reasoning serve an important function in jurisprudence, as stated by Bosko Tripkovic, at once substantiating and grounding the deductions of apex courts in the language of (1) the common sentiments of "we the people," (2) universal reason, and (3) constitutional identity. These ideal types represent an accessible, normative, and value-based approach to constitutional adjudication that can be applied to domestic texts and

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[543] Jackson (2012), 73.
[544] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014), 7.
[545] Jackson (2012), 61-63 and 71.

contexts the world over.[546] The constitutional cases surveyed in this chapter invoke one or more of these principles in justification of the verdict. Common sentiment "looks at existing moral feelings, internal dispositions and psychological tendencies to discover solutions to moral problems."[547] Universal reason "assumes that moral requirements are attainable through reason, and are not dictated by emotions; instead of sentiments, it uses the language of reflection, reason, and argument."[548] Constitutional identity "locates the source of value in a set of deep and self-identifying evaluative commitments that develop in a society in virtue of the fact that it has a constitution."[549] Understanding and classifying case law according to its metaethical bases is key to framing the role constitutional rights and freedoms play as a bulwark against the excesses of the prohibitionist, suppressionist drug control regime as well as the limits of such thinking in situ and between and across jurisdictions. Why? Because laws regulating behavior – for example, the criminalization of non-medical, non-scientific narcotic and psychotropic use – are based on moral assessments, and "moral judgments arise from the interplay between identity, sentiments, and reason."[550] The self-reinforcing logic of the metaethical foundations of constitutional adjudication underwrites judicial reasoning.

Complementing Tripkovic's framework is an accounting of the fissures generated by the opposition between constitutional assurances and the adverse consequences of prohibitionist, suppressionist law and policy. Alejandro Madrazo and Antonio Barreto suggest the resolution of such conflicts impose "constitutional costs" on domestic orders in order to sustain the IDCS: i.e., the latter are "rules or counter-principles that undermine a constitutional commitment of a polity

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[546] Bosko Tripkovic, *The Metaethics of Constitutional Adjudication* (Oxford: Oxford University Press, 2018), 224.
[547] Tripkovic (2018), 59.
[548] Tripkovic (2018), 97.
[549] Tripkovic (2018), 13.
[550] Tripkovic (2018), 220.

without revising or rejecting the affected constitutional commitment."[551] Constitutional commitments are supposed to be "the most cherished principle[s] of a legal order."[552] But rights and freedoms protections can and are diluted to prevent non-compliance with the drug control conventions. Setting drug control law and policy choices against a state's constitutional commitments demonstrates how the latter, "foundational to a political community," are undermined in the pursuit of a "drug-free society."[553] The strict control, prohibition, suppression, and criminalization of drugs, traffickers, and their users was meant to be "transitory, as a policy is meant to address a public problem and then retract it when it is solved."[554] Instead, the securitization of domestic drug control regimes has become a permanent fixture of law and policy in nearly all jurisdictions, eroding key constitutional commitments to human rights and fundamental freedoms.[555] Constitutional principles and rights and freedoms protections must be upheld and enforced to render them a substantive, rather than formal, shield against the excessive exercise of executive and legislative power in the quest to eliminate non-medical, non-scientific use of narcotic and psychotropics substances.

3.3.b Judicial Power and the Legitimacy of Judicial Intervention

While a variety of constitutional jurisprudence is explored in this chapter, the rules and principles of courts in the United Kingdom, United States of America, and South Africa serve to illustrate the general meaning and practice of liberal constitutionalism. These polities continue to

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[551] Alejandro Madrazo and Antonio Barreto, "Undermining Constitutionalism in the Name of Policy: The Constitutional Costs of the War on Drugs," 21 *NYU Journal of Legislation & Public Policy* 671 (2018), 682. See also Alejandro Madrazo Lajous, "The Constitutional Costs of the 'War on Drugs,'" in John Collins (ed), *Ending the War on Drugs: Report of the LSE Expert Group on the Economics of Drug Policy* (May 2014), https://bit.ly/3moBdEw.
[552] Madrazo and Barreto (2018), 681.
[553] Madrazo and Barreto (2018), 686-687.
[554] Madrazo and Barreto (2018), 683.
[555] And the division of powers. Madrazo and Barreto (2018), 682; Madrazo Lajous (2014).

develop and receive the common law, judge-made rules that crystallize into legal precedent over time, under the direction of Westminster and republican-style political institutions. In Commonwealth and Anglophone jurisdictions, a common language, the dialogic character of inter-court engagement, and universal thrust of common law rules make for a transnational culture of legal reception and adaptation.[556] The rulings of foreign courts may not be binding for domestic courts, but they do provide normative persuasive power that can tip the scales one way or another in analogous cases.[557] For all of the real differences that exist between these legal orders, the common law context is nonetheless ripe for principled comparative constitutional study.[558] Civil law jurisdictions, based on Roman law and the codification of statutory rules and principles, have also enumerated legal and human rights doctrines suitable for jurisprudential borrowing, for example, the right to free development of personality. Courts in Colombia, Argentina, Mexico, Spain, Germany, and Georgia have elaborated, and precluded, substantive constitutional protections of individual autonomy against state intervention in the field of drug control. According to Justice Luís Roberto Barroso of Brazil's Supreme Federal Court, in contemporary practice judges in both common and civil law jurisdictions have taken up the role of "coparticipant in the process of creating the law."[559] The differences between common and civil law systems, for so long treated as distinct legal families, can be overstated in a globalized legal environment; particularly when it comes to a near-universally ratified international treaty regime's implementation at the domestic level. As such, it is constitutional reasoning and its

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[556] Han-Ru Zhou, "A contextual defense of 'comparative constitutional common law,'" *International Journal of Constitutional Law* 12, 4 (2014), 1041-1046.
[557] Zhou (2014), 1053 and passim.
[558] "[T]he least controversial use of comparative law is generally between common-law-based systems." Zhou (2014), 1037.
[559] Luís Roberto Barroso, "Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies," *American Journal of Comparative Law* 67, 1 (2019), 117. See also Barber (2018), 62.

conclusions as units of comparison that matter.[560] The differences between the two legal systems will therefore not be treated as a barrier to intellectual cross-fertilization.

An apex court's ability to subject legislative, administrative, and executive power and action to judicial review, including the determinations of lower tribunals, and whether such a body can render law and policy unconstitutional rests on the specific nature of judicial supremacy in each constitutional context.[561] The primacy of the constitution within the domestic order, whether it is paramount over ordinary legislation or has the status of a constitutional statute akin to ordinary legislation, is central to whether laws and acts may be rendered void by the judiciary.[562] Overall, such "decisional supremacy" generally rests on the two legs of "traditional judicial review."[563] That is, the competence to make "(1) a judicial determination that the challenged law conflicts with the governing constitution or bill or rights; and (2) [mandate] a judicial disapplication of the law against which the political institutions are legally powerless to act directly within the existing constitution or bill of rights."[564] Article VI of the US Constitution, for example, makes the Constitution "the supreme law of the land"[565] and the US Supreme Court established for itself the authority "to say what the law is" where constitutional conflicts arise.[566] South Africa's Constitution, too, is positioned as that country's "supreme law," and "law or conduct inconsistent with it is invalid."[567] These jurisdictions have what is known as

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[560] Siems (2019), 865.
[561] "Judicial supremacy variously refers to the authoritativeness of interpretations of constitutional provisions by courts on the other branches of governments and of judicial decisions on the continuing validity of challenged statutes, the attitude of courts and judges in exercising judicial review, and the political power of courts relatives to the other branches on constitutional issues." Stephen Gardbaum, "What is judicial supremacy?" in Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory* (Cheltenham, UK: Edward Elgar, 2018), 43.
[562] This is not only a matter of constitutional text, but history and legal tradition as well. See Graziella Romeo, "The Conceptualization of Constitutional Supremacy: Global Discourse and Legal Tradition," *German Law Journal* 21 (2020): 904-923.
[563] Gardbaum (2018), 26.
[564] Gardbaum (2018), 26.
[565] The "Supremacy Clause." United States Constitution, Article VI, Clause 2.
[566] *Marbury v Madison*, 5 U.S. 137 (1803).
[567] Constitution of the Republic of South Africa, 1996, section 2.

strong-form judicial review: Courts have final say as to the conformity of ordinary law and governmental acts vis-à-vis the constitution and may strike down laws and remedy acts inconsistent therewith.

By contrast, weak-form judicial review does not enable courts to nullify laws held incompatible with the constitution.[568] In the United Kingdom, for instance, section 4(2) of the Human Rights Act 1998 (HRA), which domesticated the Council of Europe's European Convention on Human Rights (ECHR) "to give further effect to [the] rights and freedoms guaranteed" therein,[569] empowers British courts to issue a "declaration of incompatibility" for laws violative of human rights standards.[570] Then, following the logic of parliamentary supremacy, it is up to the government minister overseeing the legislative scheme, in conjunction with the legislature itself (i.e., the governing majority), to decide whether to remedy defective statutory provisions to make them comply with the HRA.[571] Alternatively, the minister may choose to "set aside" a negative judgment and continue pursuing a HRA incompatible legislative agenda. Judicial review, therefore, is not a sufficient mechanism to inhibit government prerogatives and only rarely do "compatibility concerns necessarily constrain government or play a substantial role in parliamentary scrutiny of the merits of government's legislative agenda."[572] Judges themselves are subject to an explicit interpretive limitation under the HRA: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the [ECHR]."[573] In short, whether an apex court

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[568] Gardbaum (2018), 28.
[569] Human Rights Act 1998 (c 42), introduction.
[570] Human Rights Act 1998 (c 42), §4(2).
[571] Human Rights Act 1998 (c 42), §10.
[572] Janet L. Hiebert, "Parliamentary bills of rights: have they altered the norms for legislative decision-making?" in Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory* (Cheltenham, UK: Edward Elgar, 2018), 126, 131-133, 137-138 and 140-141.
[573] Human Rights Act 1998, §3(1).

possesses decisional supremacy, i.e., the capacity to render final, legally binding judgments, depends on where along the spectrum of strong and weak-form judicial review power and practice, as a matter of design and convention, it falls.

In jurisdictions with "unwritten" constitutions, like the United Kingdom, constitutional rights and fundamental freedoms are protected via "[j]udicial review of administrative action" as opposed to "big 'C' constitutional" judicial review, which tests "the facial invalidity of legislation."[574] The "common law 'principle of legality'" nevertheless demands that UK tribunals adjudicate rights and freedoms claims under the rubric of proportionality analysis, discussed below.[575] Rather than permitting the courts to strike down legislation based on its unconstitutionality, the HRA acts as a "less coercive" check on government.[576] This is not an uncontroversial rendering of judicial review in the UK. The form of legal constitutionalism just described is in opposition to political constitutionalism, whose proponents disagree that the HRA, for example, constitutes "higher order" legislation akin to a constitutional bill of rights.[577] But in acceding to the ECHR and bringing rights home via the HRA the UK agreed that it "shall secure to everyone within their jurisdiction the rights and freedoms in…[the] Convention."[578] It also accepted that it must "undertake to abide by the final judgment of the [European] Court [of Human Rights] [ECtHR] in any case to which they are parties."[579] This is a check on parliament and the state, but constitutional rights and freedoms are not, as some on the political right would have it, a threat to the sovereignty of parliament or the state. The HRA may even strengthen

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[574] Administrative law being "constitutional law's ugly cousin," however much the two areas overlap and inform one another. See Janet McLean, "The unwritten constitution," in Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory* (Cheltenham, UK: Edward Elgar, 2018), 405.
[575] This method is termed "common law constitutionalism." McLean (2018), 405-407.
[576] McLean (2018), 405-407.
[577] McLean (2018), 395 and 408-410.
[578] European Convention on Human Rights, Article 1.
[579] European Convention on Human Rights, Article 46.

political constitutionalism and the power of the legislature.[580] Both the principle of subsidiarity and margin of appreciation doctrine act as counterweights to the purported encroachment of the ECtHR into matters best left to national authorities, addressing concerns of a democratic deficit in the Council of Europe system.[581] In the UK, then, there is a greater level of legislative discretion to abide by, or ignore, the musings of its, and Europe's, highest courts.

The scope of protection afforded by the HRA and ECHR was both expanded and restricted in 2010 when Lord Neuberger spelled out his vision of the dialogic nature of the relationship between UK courts and the ECtHR. In *Manchester City Council v Pinnock*, he held that the Supreme Court of the United Kingdom and inferior courts "[are] not bound to respect every decision of the [ECtHR]."[582] While UK judges "should usually follow a clear and constant line of decisions" and "'take into account' [ECtHR]" case law, Neuberger believed it "would destroy the ability of the [UKSC] to engage in…constructive dialogue with the [ECtHR]" to uncritically adhere to Strasbourg's rulings.[583] This gives "UK judges an element of freedom to develop their own unique case law,"[584] based on principles from common law tradition for example. It also gives the courts, and the politicians crafting the law and policy judges review, the latitude to distinguish British jurisprudence from ECtHR precedent in ways that undermine the protections afforded by the HRA and ECHR; such as the denial of the right to vote to prisoners, which was called out by the ECtHR in 2005 and met with fierce resistance from the UK government for more than a decade.[585] Many of those incarcerated in the UK are held on

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[580] See Richard Bellamy, "Political constitutionalism and the Human Rights Act," *International Journal of Constitutional Law* 9, 1 (2011): 86-111.
[581] Bone (2020), 74.
[582] *Manchester City Council v Pinnock*, [2010] UKSC 45, 2010 WL 4276038, para 48 cited in Bone (2020), 76.
[583] *Pinnock*, para 48.
[584] Bone (2020), 76.
[585] On the often-fractious nature of relations between UK lawmakers and courts and the ECtHR see chapter 8, "The Mirror and the Dialogue: The Common Law, Strasbourg and Human Rights," in Adam Gearey, Wayne Morrison

drugs convictions, a disproportionate number of whom are people of color, indicating that its law and policy implementing strict control, prohibition, suppression, and criminalization amounts to a pipeline for rights and freedoms violations and exacerbates social and racial inequality.[586] Whether Brexit and anti-European sentiment will lead the British legal establishment to stray from the standards set by the Council of Europe's ECHR framework as embodied in the HRA, turning toward a watered down British Bill of Rights and nationalist human rights jurisprudence, remains to be seen.[587] Human rights protections are in any event just as transient as drug policy in general in the UK. The combination of weak-form judicial review and an unwritten constitution limit the ability of courts to moderate governmental authority.

The United Kingdom, so influential in establishing liberal democratic values and institutions, is now somewhat of an outlier from a separation of powers perspective. By the early 2010s, some "83 [percent] of the world's constitutions had given courts the power…to set aside legislation for constitutional incompatibility."[588] Constitutional courts are powerful, influential bodies, but they must also play by the domestic rules of constitutional adjudication. And while there are broad meta-ethical principles guiding constitutional adjudicators,[589] a significant amount of jurisprudence's heavy lifting is done by the politics and ideology animating judges and judicial systems. These, however, are bounded by questions related to the legitimacy of

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and Robert Jago, *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions* (London: Routledge, 2013).

[586] See Niamh Eastwood, Michael Shiner and Daniel Bear, *The Numbers in Black and White: Ethnic Disparities in the Policing and Prosecution of Drug Offences in England and Wales* (London: Release, 2013), https://www.release.org.uk/sites/default/files/pdf/publications/Release%20-%20Race%20Disparity%20Report%20final%20version.pdf.

[587] For an optimistic prognosis see Merris Amos, "The Future of Human Rights Law in the United Kingdom," *Journal of International and Comparative Law* 6, 1 (2019): 87-116.

[588] Tom Ginsburg and Mila Versteeg, "Why Do Countries Adopt Constitutional Review," *Journal of Law, Economics, and Organization* 30, 3 (2013), 587.

[589] Tripkovic (2018).

judicial intervention, the principles of constitutional interpretation and proportionality, and extent to which constitutional ideas migrate across jurisdictions.

Whether the exercise of judicial review is legitimate in liberal constitutional democracies is a preeminent, and open, question that warrants closer inspection. If comparative constitutional law is to serve as means to reform the IDCS it must be both lawful and legitimate. In his classic study "The Core of the Case Against Judicial Review," legal philosopher Jeremy Waldron claims that the practice subverts the will of the majority and can therefore be seen as illegitimate.[590] Known as the countermajoritarian difficulty, the idea is that there is a major democratic deficit and legitimacy problem where unelected officials like judges have the power to override law and policy enacted by the legislature on behalf of "the people" in the interests of protecting minorities.[591] Waldron states that such strong-form judicial review, of legislation in particular, leads to abstraction, as courts focus their attention on trying to legitimate their intervention by reference to constitutional text and tradition rather than thoroughly engaging with the moral issues arising in the cases before them.[592] The claim is thus also that judicial review is simply not conducive to settling disagreements about rights.

Liberal-democratic legislatures,[593] by contrast, produce generative debate and deliberation by elected representatives in an open, democratic dialogue that is more conducive to working out rights disputes. Politicians "are regularly accountable to their constituents" and must

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[590] Jeremy Waldron, "The Core of the Case Against Judicial Review," *Yale Law Journal* 115, 6 (2006), 1355.
[591] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, CT: Yale University Press, 1986), 16-23. For a review of the critiques of US countermajoritarianism and the general acceptance of the practice in other English-speaking and European jurisdictions see David Robertson, "The counter-majoritarian thesis," in Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory* (Cheltenham, UK: Edward Elgar, 2018).
[592] Waldron (2006), 1380-1386.
[593] The liberal-democratic order Waldron describes is understood to have representative political institutions, a functioning judiciary, a broad social commitment to rights protection, and "persisting, substantial, and good faith disagreement about rights." Waldron (2006), 1360ff.

act in the interests of their voters and the political community, unlike appointed, tenured judicial officers.[594] In Waldron's view, the arguments for judicial review do not remedy its political illegitimacy.[595] Though partisans may like the outcomes associated with judicial review its processes are so lacking in transparency and a democratic mandate that it cannot credibly constitute the primary means by which disagreements over rights are resolved.[596] And while some might see this as the "tyranny of the majority," Waldron counters that individuals "do not necessarily have the rights they think they have."[597] Additionally, "the majority may be right."[598] To vest final decision-making power in courts by giving them judicial supremacy over the other branches of government risks replacing the rule of law with the rule of judges, to the detriment of democracy and the legitimacy of the judiciary.[599] This is a dangerous state of affairs. In recent times, for example, majoritarianism and the politicization of the Supreme Court of the Unites States (SCOTUS),[600] reflected in the ideological divide between conservative and liberal jurisprudence, has bred widespread distrust of US courts and judicial review among

[594] Waldron (2006), 1391.
[595] Waldron summarizes these arguments as follows: (1) The constitution is an expression of the sovereign will of the people; (2) Judges merely enforce the constitutional commitments of the people against the government; (3) Legislators may amend the constitution is they disagree with the court's ruling; (4) Judges are nominated by elected representatives of the people and therefore do have a democratic mandate; and (5) Judicial review is "an additional mode of access for citizen input into the political system." Waldron (2006), 1393-1395.
[596] In contrasting the legislature and the courts as alternative "decision-procedures" for settling rights claims Waldron differentiates "outcome-related reasons" from "process-related reasons" for preferring one method over the other. The former "are reasons for designing the decision-procedure in a wat that will ensure the appropriate outcome" while the latter "are reasons for insisting that some person make, or participate in making a given decision that stand independently of considerations about the appropriate outcome." Waldron (2006), 1372-1373. Waldron does admit, however, that judicial review may legitimately be employed where the rights of "discrete and insular minorities" are concerned. Waldron (2006), 1403.
[597] Waldron (2006), 1398.
[598] Waldron (2006), 1398.
[599] Jeremy Waldron, "The rule of law and the courts," *Global Constitutionalism* 10, 1 (2021): 91-105.
[600] Dan McLaughlin, "Supreme Court Fights Are What Republican Majorities Are For," *National Review*, 23 September 2020, access 25 September 2020, https://www.nationalreview.com/2020/09/supreme-court-fights-are-what-republican-majorities-are-for/.

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progressives.[601] The overturning of *Roe v Wade*'s[602] federal protection of the right to abortion in *Dobbs v Jackson Women's Health Organization*[603] in 2022 has exacerbated the public's lack of faith in the US judiciary. To retain its legitimacy the SCOTUS, like other apex courts, must remain above the fray of party politics as far as possible. It is one thing for judges to defer to majoritarian preferences, quite another to engage in prejudiced review of legislative and administrative acts.

Accepting several premises put forward by Waldron, Richard Fallon argues that judicial review nonetheless functions as a means to "minimiz[e] the number of cases in which [the] underenforcement [of rights] occurs," which may actually enhance the state's political legitimacy when exercised deferentially.[604] This is partly because "courts have a distinctive perspective that makes them more likely than legislatures to apprehend the serious risks of rights violations in some cases."[605] Judges are regarded as experts on the deleterious implications of weak rights and freedoms enforcement. In modern liberal democracies, argues former President of the Israeli Supreme Court Aharon Barak, it is the distinct role of the judicial branch "to bridge the gap between law and society and to protect the constitution"[606] and "increase the protection of democracy and human rights."[607] Judging is thus not an apolitical endeavor. Justice Barroso of Brazil's Supreme Federal Court notes that constitutional courts cannot avoid adjudicating cases

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[601] Jamelle Bouie, "Down with Judicial Supremacy!" *New York Times*, 22 September 2020, accessed 25 September 2020, https://www.nytimes.com/2020/09/22/opinion/down-with-judicial-supremacy.html; Keeanga-Yamahtta Taylor, "The Case to End the Supreme Court as We Know It," *New Yorker*, 25 September 2020, accessed 25 September 2020, https://www.newyorker.com/news/our-columnists/the-case-to-end-the-supreme-court-as-we-know-it.
[602] 410 U.S. 113 (1973).
[603] 597 U.S. ___ (2022).
[604] Richard H. Fallon, Jr., "The Core of an Uneasy Case *for* Judicial Review," *Harvard Law Review* 121, 7 (2008), 1700 and passim.
[605] Fallon, Jr. (2008), 1700 and 1710.
[606] Aharon Barak, "On judging," in Martin Scheinin, Helle Krunke and Marina Aksenova (eds), *Judges as Guardians of Constitutional Human Rights* (Cheltenham, UK: Edward Elgar, 2016), 49 and 31-35.
[607] Barak (2016), 32-33.

lying between law and politics in the era of global constitutionalism. So many areas of life have been judicialized, a result of both politics and institutional design, that many "relevant political, social, or moral issues are being decided, ultimately, by the judiciary…as substitutes for the conventional political process."[608] Judges must therefore decide the cases and controversies put before them in a principled manner to avoid charges of excessive partisanship or activism, or risk admonishment from the body politic and its representatives.

Constitutional courts in liberal democracies, Barros asserts, can and do act as a "forum of principle," putting constitutional values ahead of political ones, and "public reason," elaborating "arguments that can be accepted by all those involved in the debate…[as] decisions must provide normative and rational arguments to support them."[609] Judicial intervention, stripped of its negative association with partisanship and activism, is little more than a form of "broader and more intense participation of the judiciary in the accomplishment of constitutional values and purposes, with greater interference in the…other two branches [of government]."[610] Judges should, however, be aware of when and in what circumstances self-imposed judicial restraint is the prudent choice and show "substantial deference to [legislative and executive] actions and omissions."[611] But because the protection of human rights and fundamental freedoms is one of the primary features of liberal democracy, judges on apex courts can and should set definite boundaries vis-à-vis the exercise of legislative, executive, and judicial power.[612] Barroso sees judges as fulfilling three roles when they do so:

> [1] countermajoritarian, when they invalidate acts of other branches of government; [2] representative, when they meet social demands not satisfied by the elected branches; and

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[608] Barroso (2019), 113-114.
[609] Barroso (2019), 127-128.
[610] Barroso (2019), 115.
[611] Barroso (2019), 116.
[612] Barroso (2019), 118-119, 125-126 and 127.

> [3] enlightened, when they promote certain social advances that have not yet gained majority acceptance, but are requirements of the civilizing process.[613]

This approach does not give apex courts nor judges as wide a berth to craft law and policy as initially appears. Recall the jurisprudential rules they must respect in the decision-making process, from interpretive limits to proportionality analysis, for their holdings to survive. These factors, among others, are part of the reason why so few laws and administrative acts are declared unconstitutional.[614] The bar is high for courts to strike down legislative and administrative acts because of the constraints, practical and theoretical, on constitutional adjudication. Principled and self-restrained, judges in liberal democracies can and should play a fundamental role in ensuring constitutional commitments to rights and freedoms are upheld, whether accepted by the political majority or not.

3.3.c Constitutional Interpretation(s)

In the age of global constitutionalism, observes Justice Barroso, constitutional interpretation has converged toward elaborating "a common heritage of values, concepts, and institutions that bring [liberal] democratic countries closer together, creating a standard grammar, semantics, and set of purposes for constitutional democracies."[615] These commonalities, of course, obfuscate the real difficulties encountered in the interpretive endeavor. When constitutions or their provisions are vague, unclear, or contested, apex courts are tasked with expounding the intent, content, and scope of the law. Judges use several aides in this regard, including:

> the words of the constitutional text, understood in the context of related provisions; other evidence of the intentions, understandings, or purposes of the founders; presumptions favouring broad, or purposive, interpretations; so-called 'structural' principles regarded as underlying particular provisions, groups of provisions or the constitution as a whole; precedent and judicial doctrine developed from it; and considerations of justice,

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[613] Barroso (2019), 110.
[614] Barroso (2019), 124.
[615] Barroso (2019), 142.

> practicality, and public policy. Other considerations include…counselling deference to long-standing practice or the elected branches of government, international and comparative law and academic opinion.[616]

Interpretive philosophies generally fall along a spectrum of legalist/positivist/originalist and normative/moralist/activist threads, the former grouping showing greater judicial restraint and the latter a tendency toward reworking the law to meet the requirements of the present.[617] The latter approach is routinely attacked as unwarranted intervention, a form of "judicial activism," that violates principles of judicial discretion and self-restraint. Whether a particular interpretation is justified to a great extent depends on one's interpretive stance. The situation in the United States illustrates the contentious politics of constitutional interpretation.

Partly out of fear of the expansion of the federal government's powers and suspicion of liberal "judicial activism," conservative approaches to constitutional interpretation in the US tend toward originalism. By looking to the framers' or Founding Fathers' original intentions, the original public meaning of words and phrases, and the ratifying public's understanding thereof, originalist judges seek to determine the "core meaning" of the Constitution and decide cases in accordance therewith, preferring deference to past choices over innovation.[618] Liberals, though not exclusively liberals, generally read the Constitution as a living document to be constructed in a way that adequately addresses contemporary issues. Terrence Sandalow highlighted the pitfalls of originalism in his classic study on constitutional interpretation, concluding that history, including the framers' views, legal principles, and contemporary values have a role to play in giving substantive meaning to the Constitution: "Constitutional law thus emerges not as

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[616] This methodology reflects practice, with a notable variety of weight given to any one source based on context, in Australia, Canada, Germany, India, South Africa, and the United States. See Jeffrey Goldsworthy, "Constitutional Interpretation," in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), 696-697.
[617] See Goldsworthy (2012).
[618] Ilan Wurman, *A Debt Against the Living: An Introduction to Originalism* (Cambridge: Cambridge University Press, 2017), 3-4 and chapter 5.

exegesis, but as a process by which each generation gives formal expression to the values it holds fundamental in the operations of government."[619] Liberals are, as such, often associated with the legal pragmatist school and see constitutional adjudication "as a way of achieving the best answer possible in a given context in order to advance certain social goals."[620] Methods will vary from case to case because of a pragmatic belief in "law [as] open-textured and contextual; the best answer will often depend on empirical or social scientific data suggesting how a given decision will feed back on social and political environments."[621] Critiques of legal pragmatism have focused on its purported vagueness, questions of judicial competence to engage in extra-legal analysis, its tendency toward judicial activism, and a lack of legitimacy as too problematic to warrant its use.[622] Text and context matter and the sources championed by textualists and originalists are important in fleshing out the meaning of the Constitution. But they should not, as Sandalow pointed out, be taken as determinative. Nor should precedent be treated as above the practicalities of solving material problems.[623] Courts and judges should reflect on the wider context in which law is produced, institutionalized, and applied. For this and other reasons, legal pragmatism, which makes use of "every tool that comes to hand," is the most sensible approach to reading, evaluating, and producing case law,[624] in opposition to a more closed, ideologically driven construction of constitutions and ordinary legislation.

The degree to which courts and judges are willing to do this depends, of course, on the local politics of constitutional adjudication. The US is just one example of the complex issues

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[619] Terrence Sandalow, "Constitutional Interpretation," *Michigan Law Review* 79 (1981), 1068.
[620] David Landau, "Legal pragmatism and comparative constitutional law," in Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory* (Cheltenham, UK: Edward Elgar, 2018), 208; Daniel A. Farber, "Legal Pragmatism and the Constitution," *Minnesota Law Review* 72 (1988): 1331-1378.
[621] Landau (2018), 208.
[622] Landau (2018), 214-218.
[623] Farber (1988), 1353.
[624] Farber (1988), 1332.

faced in the interpretation and construction of constitutional law. Every jurisdiction has its own dynamics, but the example of US American jurisprudence is representative of greater contemporary political and constitutional cleavages playing out across the globe, such as the illiberal challenge. Constitutional text, in any event, binds the judiciary, at least in liberal democratic contexts and if only formally. Alleged politically motivated judicial decisions may be poorly reasoned, but in addition to following judicial precedent, or stare decisis, officers of the court must at least ground their interpretation and construction in the language of the constitutional order. These, and other, important limits prevent the judiciary from overstepping its role as arbiter of the law and transforming judges into legislators and/or policymakers from the bench. In human rights and fundamental freedoms jurisprudence proportionality review serves as a key concept and analytical tool through which checks may be imposed not only on the delimitation of government acts and laws, as rights and freedoms are intended to, but on judicial intervention as well.[625] Proportionality is where judicial decision-makers interpret and assess the specific facts of concrete cases, considering and applying broad, sometimes controlling, theoretical legal precepts.

3.3.d The Proportionality Principle

The Postwar proliferation of proportionality analysis around the globe has created a legal "culture of justification" in established and aspiring liberal constitutional democracies.[626] Its worldwide migration and diffusion "has provided a stable methodological framework, promoting structured, transparent decisions even about closely contested constitutional values," allowing

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[625] See Michel Rosenfeld, "Judicial Politics versus Ordinary Politics: Is the Constitutional Judge Caught in the Middle," in Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge: Cambridge University Press, 2019).
[626] Moshe Cohen-Eliya and Iddo Porat, "Proportionality and the Culture of Justification," *American Journal of Comparative Law* 59, 2 (2011): 463-490; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012a), 2.

domestic apex courts to adjudicate with an eye to constitutional justice, normative consistency, and a more robust protection of rights and freedoms.[627] That said, proportionality is rarely mandated by constitutions themselves.[628] This has not stopped its general principles from being accepted as standard in rights and freedoms cases. As such, legislative and administrative acts may be challenged in court where an individual, usually, alleges their constitutional rights and freedoms have been directly, unduly limited or violated. The government must answer such claims with substantive arguments "grounded in public reason."[629]

Where law and policy conflict with constitutional norms, or impair the enjoyment of rights and freedoms, judges are to assess the proportionality of the conflict or limitation by (1) "comparing weighing, and balancing the conflicting interests or rights" at stake, or (2) "with an inquiry into the goal or end of the contested measure or action, whether that goal or end is legitimate, and whether the measure or action is a helpful and necessary means for achieving that goal or end."[630] The first question a judge is to ask is "whether a constitutional right is limited by a sub-constitutional norm."[631] If yes, they must then determine "whether the limitation of the constitutional right is proportional."[632] Having answered these preliminary inquiries adjudicators move on to substantive proportionality analysis, which entails assessing the constitutionality of the legal conflict or right's impairment based on whether: (1) the law or policy has a proper purpose and legitimate aim; (2) there is a rational connection between the purpose or aim pursued and the law or policy at issue; and (3) the means chosen to pursue the stated purpose or

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[627] Vicki C. Jackson, "Constitutional Law in an Age of Proportionality," *Yale Law Journal* 124, 8 (2015), 3094.
[628] Victor Ferreres Comella, "Beyond the principle of proportionality," in Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory* (Cheltenham, UK: Edward Elgar, 2018), 229-230.
[629] Aharon Barak, "Proportionality (2)," in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012b), 750; Comella (2018), 231 and 243.
[630] Bernhard Schlink, "Proportionality (1)," in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), 723.
[631] The burden of proof lies with "the party asserting the limitation." Barak (2012b), 739-740.
[632] The burden of proof then shifts to "the party asserting proportionality." Barak (2012b), 739-740.

aim is proportional in the circumstances, though the means need not be an ideal solution. This latter issue also referred to as balancing.[633] Balancing involves weighing the competing interests of the state against those of the citizen in a sort of cost-benefit analysis rooted in the constitutional order's substantive rights theory and practice. The lens through which conflict is resolved is thus highly contextual.[634] The universal thrust of proportionality analysis obfuscates the finer, more problematic points of constitutional adjudication, most of which stem from the ins and outs of the domestic legal regime. The South African, UK, and US regimes illustrate the point.

Section 36 of South Africa's Constitution explicitly details the contents of proportionality analysis. The Constitutional Court of South Africa (CC) is tasked with ensuring that, where an abridgment of a constitutional right or freedom is found, the "limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."[635] The onus is on the state to prove that legislation and the limits it may impose meet these standards. The factors the CC are to take into account include consideration of: "(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) [the practicability of using] less restrictive means to achieve the purpose."[636] The CC, however, must ground its

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[633] "The *first* element of proportionality requires that a law has a proper purpose. This is a threshold requirement….It is generally acknowledged that a limitation on a constitutional right is constitutional if it is intended to protect other rights (constitutional or sub-constitutional)…The *second* component of proportionality is that the means adopted must be capable of advancing the realization of its proper purpose…The *third* component of proportionality requires that the proper purpose is not attainable by some other means less restrictive of the constitutional right…When the purpose can be attained by means less restrictive of constitutional rights that means should be selected, and there is no necessity for the law under review. But while over-inclusiveness should be avoided, it becomes necessary when it is impossible to separate the narrower measures needed to realize the law's purposes from those that are over-inclusive…The *fourth* element of proportionality requires a proper relationship between the social benefit of realizing the proper purpose and the social benefit of avoiding the limitation of the constitutional rights." Barak (2012b), 744-747. See also Comella (2018), 229.
[634] Comella (2018), 231 and 241-243.
[635] Constitution of the Republic of South Africa, 1996, section 36(1).
[636] Constitution of the Republic of South Africa, 1996, section 36(1).

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reasoning in the constitutional text: "because the text itself provides the normative principles to guide the task of interpretation, judicial reasoning must display substantive engagement with those principles."[637] So, while the structure and content of proportionality analysis in section 36 reflects the "culture of justification" prevailing in liberal democratic jurisprudence, it is tied to local assumptions. In addition, the Constitution was designed to be transformative, to expand the scope of human rights and fundamental freedoms protections to the majority of South Africans who, before its transition to democracy in 1994, were subject to the racist, violent apartheid regime.[638] South Africa's Bill of Rights, and the country's future, was to be a distinctive break from the past.

In the UK, proportionality is applied in cases involving alleged human rights and fundamental freedoms infringements under the Human Rights Act 1998 (HRA), which domesticated the Council of Europe's European Convention on Human Rights (ECHR) and its standards.[639] British courts are required to assess whether qualified rights and freedoms – Articles 8-11 of the ECHR, protecting privacy and family life (8), thought, conscience, and religion (9), expression (10), and freedom of assembly and association (11) – may justifiably be encroached upon through legislative and administrative acts in specific conditions.[640] To meet challenges claiming violations of rights and freedoms, proportionality analysis in its British

[637] Kate O'Regan, "Text Matters: Some Reflections on the Forging of a New Constitutional Jurisprudence in South Africa," *Modern Law Review* 75, 1 (2012), 32.
[638] Eric Kibet and Charles Fombad, "Transformative constitutionalism and the adjudication of constitutional rights in Africa," *African Human Rights Law Journal* 17 (2017): 340-366.
[639] And, before Brexit, it was used in the context of European Union law. That said, "proportionality-type review existed in the UK from the seventeenth century onwards, and it was most commonly applied [by the courts] in non-rights based cases." It "was [also] a common feature of much economic and social regulatory legislation." While different from "the three-part test associated with the modern conception of proportionality. There is nonetheless a linkage between the older and more modern conceptions, insofar as both have in common the idea that regulatory burdens should not be excessive, and that they should be objectively justified." Paul Craig, "Proportionality and Judicial Review: A UK Historical Perspective," in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Oxford: Hart Publishing, 2017), epub.
[640] See Andrew Le Sueur, Maurice Sunkin and Jo Eric Khushal Murkens, *Public Law: Text, Cases, and Materials*, Third Edition (Oxford: Oxford University Press, 2016), 724-727.

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iteration requires that the state demonstrate it is (1) pursuing a legitimate objective or aim of significant importance, such that impinging on rights and freedoms may be permissible. Then, the courts determine whether (2) the means chosen in pursuit of the objective or aim is rationally connected or suitable to it and (3) necessary to accomplish the state's objective, i.e., whether there are less invasive alternatives available to meet the objective. Lastly, (4) judges are to assess whether, on balance, the state has acted reasonably, considering the interests at stake.[641] In non-rights cases the customary standards of judicial review are reasonableness[642] and rationality or suitability, both of which contain features intrinsic to modern understandings of proportionality.[643] There is thus a robust tradition of proportionality analysis in UK judicial review, and the HRA, in "bringing home" the ECHR and its protections, further entrenched the concept as a guiding principle in rights and freedoms adjudication.

The United States stands a bit of an outlier compared to jurisdictions employing conventional proportionality analysis, at least as far as terminology goes, with its "categories of constitutional rights" and associated levels of "constitutional scrutiny."[644] "Fundamental rights" issues – including matters related to free expression, assembly, religion, movement, and voting – are examined under the highest level of review: strict scrutiny.[645] In US Supreme Court jurisprudence impugned legislation subjected to the strict scrutiny test must meet three criteria to endure. First, the law or policy at issue must engender a "compelling government interest."

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[641] *R v Secretary of State for the Home Department, ex parte Daly*, [2001] UKHL 26, paras 26-28.

[642] Referred to as *Wednesbury* unreasonableness, i.e., when a decision "is so unreasonable that no reasonable authority could ever have come to it." An exacting standard of review meant to be resorted to in the absence of conventional alternative measures. See *Associated Provincial Picture Houses Ltd. v Wednesbury Corp.* [1948] 1 KB 223, 234.

[643] On the distinctions between (and ambiguities of) the reasonableness and rationality (or suitability) standards, as well as their connection to proportionality analysis, see Yossi Nehushtan, "The True Meaning of Rationality as a Distinct Ground of Judicial Review in United Kingdom Public Law," *Israel Law Review* 53, 1 (2020): 135-158.

[644] Barak (2012b), 753-754.

[645] Barak (2012b), 754.

Second, the law or policy must be "narrowly tailored" to meet its stated legislative ends. Third, the law or policy must be the "least restrictive" mechanism by which the government can achieve its goal(s).[646] This heightened standard of scrutiny applies in particular to cases involving "discrete and insular minorities."[647] Non-fundamental rights, social and economic rights among others, are assessed with either intermediate scrutiny, requiring that impugned legislation has an "important government objective" and there is a "substantial relation between the purpose and the means used for its realization," or minimal scrutiny, where challenged laws need only pursue a "legitimate government purpose" and have a "rational basis."[648] US American categories of scrutiny, as should be apparent, employ much of the language and elements of proportionality analysis, including assessment of the government's objective, its rationality, and necessity.[649] Indeed, proportionality is entrenched in the nation's republican constitutional law and theory, it being a Union of States federated via social contract and committed to representative democracy and limited government.[650] Even so, proportionality as a general, systematic method of constitutional adjudication has not gained widespread recognition.[651] The implications of this US American exceptionalism for, and amenability to, comparative constitutional law is discussed below.

Whether classified as proportionality or a level of scrutiny, the basic point is that the judiciary is tasked with evaluating the commensurability of government ends with constitutional rights and freedoms. Rights and freedoms can be limited, but not without warrant. This, of

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[646] Barak (2012b), 754; Comella (2018), 230-231.
[647] *U.S. v Carolene Products Co.*, 304 U.S. 144 (1938), 153 (note 4).
[648] Barak (2012a), 511-512.
[649] E.g., their correspondence to Canadian proportionality analysis. Jackson (2015), 3099 and 3110-3121.
[650] Jackson (2015), 3106-3109.
[651] For a variety of reasons, many of which are conditioned by the US Constitution's history and text; and how they've been interpreted since the Founding era. See Jackson (2015), passim.

course, varies according to the right or freedom at issue.[652] In general, the state must have a "compelling [or legitimate] interest" to warrant infringing on constitutional rights and freedoms.[653] The benefits of the proportionality approach are manifold, including that it "provides a structured and transparent mode of reason-giving that produces justifications likely to be meaningful,"[654] acts as "a bridge between decision making in courts and decision making by the people, legislatures, and public officials,"[655] permits courts to "bring the demands of justice into greater harmony with the law of constitutional rights,"[656] and shines a light on "[a] wider range of process failures [that] might be signaled by disproportionalities in the application of the law."[657] This does not mean courts will, or should, actually exercise their powers of judicial review in a given case. Nor that, if proportionality analysis were applied, its use would or should block legislative or administrative acts to robustly protect rights and freedoms. Even where a court of law has determined the state has violated constitutional rights and freedoms, mechanisms obtain permitting the legislature to continue with a law or policy despite its incompatibility with the constitution, legitimately citing a democratic mandate to pursue its vision of the "public interest."[658] Proportionality analysis is thus a promising avenue by which the judiciary can check the other branches of government, but it is not necessarily decisive in curbing alleged breaches of constitutional rights and freedoms. In the end, laws, policies, and actions courts find inconsistent with the constitution are passed by the democratic representatives of the political order who stand for "the people."

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[652] Comella (2018), 238-241.
[653] Comella (2018), 239.
[654] Jackson (2015), 3142.
[655] Jackson (2015), 3144.
[656] Jackson (2015), 3147.
[657] Jackson (2015), 3151.
[658] Comella (2018), 231 and 239.

Proportionality and the culture of justification it instantiates has been integrated into international law and policy by UN organizations and drug control treaty bodies themselves. The UNDP's non-binding Guidelines on Human Rights and Drug Policy, for example, counsels that rights and freedoms may only be limited for reasons of public health, safety, and order, subject to proportionality review.[659] In its 2007 Annual Report, the INCB devoted its thematic introductory chapter to proportionality analysis in the context of domestic drug enforcement.[660] In the INCB's presentation, the principle "permits punishment as an acceptable response to crime, provided that it is not disproportionate to the seriousness of the crime."[661] The treaty body then highlighted the fact of the drug control conventions' near universal ratification as prima facie "evidence that those binding legal instruments represent a proportionate response to global drug problems."[662] Determining whether drug law or policy is proportionate, according to the Report, requires an assessment of its necessity and legitimacy as regards scope, the relationship between the legislation or policy's stated aims and its effects, and its comportment with the rule of law.[663] Yet proportionality, the INCB acknowledged, is ultimately "enshrined in States' constitutions, with specific rules set out in more detailed national law."[664] For this reason, proportionality analysis must be grounded in the domestic constitutional order and assessed using local criteria. It is in the specifics of text and context that answers to questions related to the necessity and legitimacy of the criminal law are found, not in platitudes issues by intergovernmental administrative organs.

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[659] United Nations Development Programme et al. (2019), 23.
[660] International Narcotics Control Board, Report of the International Narcotics Control Board for 2007 (New York: United Nations, 2008). See also International Narcotics Control Board, Report of the International Narcotics Control Board for 2016 (New York: United Nations, 2017), 104; INCB (2019a), 75 and 110.
[661] INCB (2008), 2.
[662] INCB (2008), 3.
[663] INCB (2008), 2.
[664] INCB (2008), 2.

3.3.e Constitutional Ideas In Transit

Apex courts may, depending on constitutional text and convention, refer to and engage with the opinions of sister courts abroad to color their understanding of common judicial problems. Article 39 of South Africa's Constitution explicitly permits the judiciary to consult foreign law in adjudicating constitutional issues.[665] In general, however, the legitimacy of domestic constitutional courts informing their decisions by reference to non-binding foreign law remains controversial. The United States sees itself as exceptional and not in need of any guidance, whether binding or persuasive, to reach decisions. Postwar liberal constitutional courts, by contrast, have been more willing to look abroad in settling constitutional issues, including in cases concerning human rights and fundamental freedoms.[666] There are different schools of thought on this subject, with some scholars arguing in a universalist pitch that consulting foreign law leads to constitutional "convergence," claiming it is both legitimate and laudable to reference overseas jurisdictions. Others take a comparative approach, highlighting differences and similarities in the search for practical solutions to common constitutional problems.[667] Conversely, critical examinations of the literature on constitutional borrowing, transplantation, and migration[668] paint the invocation of foreign decisions "as an inherently unprincipled tool that can be used strategically" by judges aiming at reaching a preferred, potentially legally unfounded outcome rather than following the local constitutional script to reach a decision based on the history and tradition of a particular people; i.e., there is no democratic mandate for relying on

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[665] Constitution of the Republic of South Africa, 1996, section 39(1)(c).
[666] See Gábor Halmai, "The Use of Foreign Law in Constitutional Interpretation," in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), esp. 1334-1337.
[667] Halmai (2012), 1332.
[668] The object of such critiques usually includes the writings in, and inspired by, Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2010).

external constitutional doctrine.[669] This is particularly true of conservative jurists in the US, though countervailing views more open towards considering foreign law exist.[670] From the former perspective, the idea that "similar-sounding concepts share an identical meaning" obfuscates the incommensurability of principles and rules across time, space, and language.[671] Foreign law should be treated with care in domestic constitutional interpretation. It should not be trusted absolutely nor dismissed out of hand. A measured approach is apt to bridge the gap between uncritical reliance and disproportionate skepticism.

Constitutional courts can and should cite and refer to foreign law not to arrive at definitive answers based on the reasoning of apex courts abroad, but "to look for good persuasive ideas in other national jurisprudence, which could help solve similar constitutional problems through interpretation."[672] Vicki Jackson described such transnational engagement as aiding local "constitutional self-definition."[673] This proposition sounds uncontroversial but, as noted above, a major issue confronting advocates of this approach is the idea that it lacks a convincing theoretical foundation. How does one go about consulting foreign law in a principled manner? Responding to the problem, Heinz Klug has developed a theory of what he calls "cross-national jurisprudence."[674] Apex constitutional courts, according to this method, can and should justify references to foreign law where they are not inconsistent with the local context, including its

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[669] Vlad Perju, "Constitutional Transplants, Borrowing, and Migrations," in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), 1322-1326; Halmai (2012), 1332; Siems (2019), 879.
[670] Halmai (2012), 1334-1337.
[671] Perju (2012), 1326-1327.
[672] Halmai (2012), 1333; Barroso (2019), 110.
[673] Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2010), 256 cited in Heinz Klug, "Reception, context and identity: a theory of cross-national jurisprudence," in Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory* (Cheltenham, UK: Edward Elgar, 2018), 280.
[674] On what differentiates this approach from its predecessors see Klug (2018), 272.

history, tradition, and constitutional identity.[675] The particularity of the domestic constitutional order necessarily shapes the lens through which foreign ideas are assessed and assimilated.[676] Constitutional identity is particularly important, as it represents the grand principles and commitments underlying the political, legal, and social order. Such characteristics are certainly contested, but the way conflict is resolved is itself part of a state's constitutional identity. Crucially, its content is not static. It is always becoming and in development.[677] Put this way, Jackson's characterization of engagement as part of "constitutional self-definition" holds water. Foreign law can and should act as an interpretive foil from which models and anti-models of constitutional logic and reasoning might be gleaned.[678] It can be used to both preserve and transform constitutional law at home.[679] Of course, litigants must convince judges that arguments derived from foreign law are legally persuasive. It is then up to "domestic courts [to] translate, apply[,] and hybridize cross-national jurisprudence."[680] This framing of constitutional borrowing, transplantation, and migration indicates that it is a modest enterprise with no inherent tendency toward partisanship or activism. Certainly, recourse to foreign law can be used to justify both liberal and illiberal constitutional interpretations. It should, as such, be treated as neither panacea nor poison, but an aid in the construction of principled judicial decisions.

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[675] For an example of what this scholarship might look like see the analysis of the South African case in Klug (2018), 284-291.
[676] Klug (2018), 291.
[677] Klug (2018), 280-284. See also Gary Jeffrey Jacobsohn, *Constitutional Identity* (Cambridge, MA: Harvard University Press, 2010).
[678] Heinz Klug, "Model and Anti-Model: The United States Constitution and the Rise of World Constitutionalism," *Wisconsin Law Review* 3 (2000): 597-616.
[679] Klug (2018), 281-282.
[680] Klug (2018), 291.

3.4 The Right to Liberty

Constitutional jurisprudence on the right to liberty is rooted in both liberal political theory and global recognition of the right's importance in constitutional democracy. Constitutions enumerate the right to liberty in several ways, but at its core this fundamental freedom is based on an appeal to universal reason.[681] But, as the cases discussed below demonstrate, the ins and outs of constitutional adjudication vis-à-vis the right to liberty varies to a not insignificant degree in each legal context. To explore the potential of this freedom in the expansion of the right to possess and use controlled drugs like cannabis, and several psychedelics to which the same logic might apply, this section focuses on case law from a range of jurisdictions, tracing the recent use and future of comparative constitutional law as a path to reducing the adverse human rights and fundamental freedoms impacts of the IDCS. Before addressing landmark court decisions, however, it is necessary to delineate the meaning of liberty.

Political philosopher Isaiah Berlin succinctly described two basic conceptions of liberty, the first negative, the second positive, in a 1958 lecture on the nature of freedom. Negative liberty, he noted, obtains in the absence of external coercion over the individual will:

> I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others. If I am prevented by other from doing what I could otherwise do, I am to that degree unfree…The 'positive' sense of the word 'liberty' derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces whatever. I wish to be the instrument of my own, not of other men's, acts of will.[682]

Berlin was influenced by liberal thinker John Stuart Mill, who famously elucidated the contours of freedom in his 1859 work On Liberty. The essay focuses on the relationship between society

[681] Tripkovic (2018), 97.
[682] Isaiah Berlin, "Two Concepts of Liberty," in Isaiah Berlin and Henry Hardy (ed), *Liberty: Incorporating Four Essays on Liberty* (Oxford: Oxford University Press, 2002), 169 and 178.

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and the individual and the limits of public control over citizens, "whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion."[683] Mill claimed that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[684] This is known as the harm principle. As such, compelling people to do things for their "own good, either physical or moral, is not a sufficient warrant" for interfering with their life choices.[685] Summing up, Mill declared that: "Over himself, over his own body and mind, the individual is sovereign."[686] This "ethic of autonomy" empowers the individual and animates social life by encouraging pluralism while at the same time guarding against the imposition of majoritarian values on minorities and dissenters.[687] Liberalism has, however, tended to deviate from its principles in the theory and practice of drug control, imposing a singular vision of rectitude and propriety on the majority of individuals for the sake of protecting those vulnerable to the potential harms of drug use.[688] Mill's influence surfaces in the case law discussed below, focused as it is on the proper measure of freedom to be accorded illicit consumers, in spite of clear legislative and administrative orders to execute law and policy in line with the IDCS's paradigm of strict control, prohibition, suppression, and criminalization.

Moral sentiments vis-à-vis drug use have changed significantly since the dawn of the twentieth century, though still vary greatly from nation to nation, inspiring a variety of

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[683] John Stuart Mill, *On Liberty*, (eds) David Bromwich and George Kateb (New Haven, CT: Yale University Press, 2003), 80.
[684] Mill (2003), 80.
[685] Mill (2003), 80.
[686] Mill (2003), 81.
[687] Bone (2020), 52-53 and 59. On Mill's notion of egalitarianism and anti-majoritarianism see Matt McManus, "Was John Stuart Mill a Socialist?" *Jacobin*, 30 May 2021, https://www.jacobinmag.com/2021/05/john-stewart-js-mill-liberal-socialism-locke-madison.
[688] See Andrew Koppelman, "Drug Policy and the Liberal Self," *Northwestern University Law Review* 100, 1 (2006): 279-293.

constitutional and normative orders not all of which are open to accommodating greater access to controlled substances. The IDCS, however, propagates the reactionary idea that "drug abuse," that is, the use of controlled substances for anything other than medical and scientific purposes, constitutes a "serious evil."[689] This fosters a climate of hostility towards drugs and their users, resulting in stigmatization, marginalization, and criminalization. Courts and civil society, particularly harm reduction initiatives, have mitigated some of the damage done by the strict enforcement of drug control-informed criminal law but there remains significant distrust and disapproval of people who use drugs around the world. The moral opprobrium at the root of drug control is a major, though not insurmountable, obstacle to drug control reform. Demands for liberty must contend with the social, cultural, and moral objections to change to persuade stalwarts of the status quo of its necessity under the law and feasibility as policy.

Criminal laws generally reflect the prevailing values of "the people" and evolve as societies develop, reflecting social, cultural, moral, and religious totems, taboos, and prohibitions. Penal sanctions (e.g., prison time, financial penalties) and social censure (e.g., a criminal record, popular condemnation) await those who transgress the normative standards contained in positive criminal law.[690] What unites the diversity of local totems and taboos is the general sense of wrongfulness attached to their violation; their doing is seen as "socially harmful conduct."[691] In a more formal sense, then, "criminal punishment…must be a response to wrongdoing."[692] The ability to correct bad behavior is a primary function of power. Indeed, the

[689] Single Convention, preamble.
[690] Markus Böckenförde, "Overcoming Discriminatory Taboos in Societies: What the German Experience Can Teach Us About Ideas of (Re)designing Justice Abroad," in Katayoun Alidadi, Marie-Claire Foblets and Diminik Müller (eds), *Redesigning Justice for Plural Societies: Case Studies of Minority Accommodation from Around the Globe* (New York: Routledge, 2022).
[691] Malcolm Thorburn, "Criminal Punishment and the Right to Rule," *University of Toronto Law Journal* 70, 1 (2020), 51.
[692] Thorburn (2020), 45.

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legitimate use of coercive power in the form of criminal punishment to enforce public norms is constitutive of the state's right to rule its subjects and represents its most basic claim to authority.[693] As Max Weber famously put it: "we must say that the state is the form of human community that (successfully) lays claim to the monopoly of legitimate physical violence within a particular territory."[694] That authority can wane, as totems and taboos are not set in stone. Like criminal laws, they change. What was once accepted as convention can become "morally dumbfounding" as "an increased openness to a different understanding [of] the social norm is difficult to justify against fundamental rights, and a change of emotions in society."[695] Böckenförde discusses the ways in which sexual taboos were and were not assimilated as acceptable normative behavior through violence, contestation, dialogue, and persuasion in modern Germany. His case study indicates that reason and evidence are not always conducive to a society overcoming legally entrenched proscriptions.[696] This is very much the case vis-à-vis drug control law. While universal taboos are rare,[697] the near universal stigmatization, marginalization, and criminalization of drugs and drug users speaks to the international community's formal consensus as to the immorality of illicit consumption; and the power of the Anglo-American world order in establishing crime control, with strict control, prohibition, and suppression, as the de facto model of managing drugs and their consumers.[698] In this way, the criminal punishment of the possession and consumption of illicit narcotic and psychotropic

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[693] Thorburn (2020), 46.
[694] Max Weber, "Politics as Vocation," in David Owen and Tracy B. Strong (eds), Rodney Livingstone (trans), *Max Weber: The Vocation Lectures* (Indianapolis: Hackett Publishing Company, 2004), 33.
[695] Böckenförde (2022).
[696] Böckenförde (2022).
[697] Böckenförde (2022).
[698] Andreas and Nadelmann (2006), 17-22.

substances, and cultivation, production, and trafficking,[699] is part of "the very idea of legal order," domestically and internationally.[700] To let these acts go unpunished undermines the state's right to rule and authority.

The principal limit on the state's right to rule and monopoly over coercive power is the doctrine that for every right there must be a legal remedy;[701] constitutional human rights and fundamental freedoms in the case at hand. Such limits are, however, self-imposed, for "the state and only the state is entitled to exercise normative powers to change the basic rights and duties, powers, and liabilities of subjects within the jurisdiction."[702] The contemporary praxis of criminal punishment indicates that retribution and the maintenance of social order are the primary purposes of most modern justice systems, consolidating for those in power the right to rule. Anthropologist Didier Fassin argues that the repressive turn of the last few decades reflects not an increase in criminality, but a policy choice to contain and control disenfranchised groups. What is punished is just as important as who is punished. Drug offences are conspicuous in this regard, with significant disparities in enforcement and punishment between ethno-racial minorities and majority populations, as with stop and frisk police tactics and mass incarceration, despite roughly equivalent levels of illicit possession and use. The power relations that produce the meaning and practice of punishment therefore also (re)produce notions of deviance and criminality, de-socialize individuals, de-structure families and communities, and precipitate inequality within discrete segments of the population.[703] These dynamics have not gone

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[699] These crimes are treated as *malum in se*: "Where an individual intentionally sets out to engage in conduct that is prohibited by law for whatever reason (whether this is because it is per se morally wrong or because it is inconsistent with some regulatory regime), this conduct can properly be called a 'true crime.'" Thorburn (2020), 59.
[700] Thorburn (2020), 51 and 62.
[701] Thorburn (2020), 48.
[702] Thorburn (2020), 54.
[703] Didier Fassin, "Critique of Punitive Reason," in Marie-Claire Foblets et al. (eds), *The Oxford Handbook of Law and Anthropology* (Oxford: Oxford University Press, 2022).

unchallenged and will be explored more in chapter 5. The concepts and cases subsequently discussed speak to the contested nature of citizen-state relations and the very idea of individual freedom's relation to governmental authority.

Reviewing the political-philosophical underpinnings of liberty as concept and right in US American law and tradition, Michael S. Moore outlined how: "One's basic right to liberty is to do those actions whose moral wrongness is sufficiently minimal that the good of its prevention/punishment is outweighed by the goods standing behind the presumption in favor of liberty."[704] Mill's influence is apparent in this rendering. The precise meaning and scope of liberty, though, is open to interpretation, and minute differences in understanding, within and across borders, have serious consequences vis-à-vis judicial outcomes. For the purposes of space and time, the US serves as an example of the pains of spelling out the practical effects of a constitutional commitment to liberty; a special case given the text's, and nation's, longevity, but an instructive one because of the thought and ink spilt over its proper formulation in jurisprudence and scholarship.

The Fifth and Fourteenth Amendments of the US Constitution, applying to federal and state authorities respectively, preclude government from depriving "any person of life, liberty, or property, without due process of law."[705] Known as substantive due process, and controversial from its beginnings, the amendments may be invoked by litigants to challenge the constitutionality of legislation and executive and judicial action directly affecting them.[706] Aimed at preventing the arbitrary, unreasonable, and majoritarian exercise of power, substantive due

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[704] Michael S. Moore, "Liberty and the Constitution," *Legal Theory* 21 (2015), 202.
[705] The same language animates both clauses. United States Constitution, Fifth Amendment and Fourteenth Amendment, §1.
[706] On the complex history of substantive due process and its contested meaning see Hon. Timothy M. Tymkovich, Joshua Dos Santos and Joshua Craddock, "A Workable Substantive Due Process," *Notre Dame Law Review* 95, 5 (2020): 1961-2011; E. Thomas Sullivan and Toni M. Massaro, *The Arc of Due Process in American Constitutional Law* (Oxford: Oxford University Press, 2013), 159.

process goes beyond mere procedural rights in enunciating the contours and content of what it means to be free in a democratic society.[707] "The legislative process," as such, "does not constitute the process 'that is due'…when it infringes a fundamental right without a compelling reason, or when it enacts unfair procedures."[708] Encroachments on fundamental rights backed by the force of law must be "narrowly tailored" to achieving a compelling state interest to withstand judicial scrutiny. This is not an objective test. Substantive due process requires that judges set out the degree to which the freedom of action at issue is "implicit in the concept of ordered liberty" and worthy of constitutional protection.[709] Consequentially, liberty generates a set of enumerated and unenumerated constitutional rights. The list is non-exhaustive and may evolve via legislation or, more controversially, judicial intervention.[710] A risk inherent in this approach is that judges may insinuate their subjective personal views into the enumeration of liberty.[711] This fear is not unfounded, as the SCOTUS has failed to "provide[] a useable [objective] test to identify a fundamental right."[712] Members of the judiciary have offered guidance and principled approaches to substantive due process fundamental rights claims, though ideological partiality might be said to color methodologies.

In his dissent in *McDonald v City of Chicago*, for example, Justice John Paul Stephens determined that the substantive protection afforded by the Due Process Clause of the Fourteenth Amendment "is fundamentally a matter of personal liberty."[713] But there are limits: "[Liberty] claims," he continued, "that are inseparable from the customs that prevail in a certain region, the

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[707] Tymkovich, Dos Santos and Craddock (2020), 1973-1977.
[708] Tymkovich, Dos Santos and Craddock (2020), 1984. The "shocks the conscience" standard has also been applied in the substantive due process jurisprudence. Tymkovich, Dos Santos and Craddock (2020), 1989-1998.
[709] Tymkovich, Dos Santos and Craddock (2020), 1989-1998 and 2000.
[710] Sullivan and Massaro (2013), 124 and 128-129.
[711] Tymkovich, Dos Santos and Craddock (2020), 2005.
[712] Tymkovich, Dos Santos and Craddock (2020), 1985. See also Sullivan and Massaro (2013), chapter 4.
[713] 561 U.S. 742 (2010) in Geoffrey R. Stone et al. (eds), *Constitutional Law: Eighth Edition* (New York: Wolters Kluwer, 2018), 743.

idiosyncratic expectations of a certain group, or the personal preferences of their champions, may be valid claims in some sense; but they are not of constitutional stature."[714] Elucidating the meaning of a concept like liberty, as with all constitutional interpretation, requires a serious review of numerous materials:

> [Historical] and empirical data of various kinds ground the analysis. Textual commitments laid down elsewhere in the Constitution, judicial precedents, English common law, legislative and social facts, scientific and professional developments, practices of other civilized societies, and, above all else, the 'traditions and conscience of our people'.[715]

This conception of the role of the judiciary in enumerating the substantive content of liberty, though, offers little by way of a structured approach or methodological model to answering concrete cases. Stephens admits as much.[716] He was clear that a more open-ended approach to enumerating the content of liberty is consonant with the spirit of the Fourteenth Amendment. The courts must give meaning to the values and principles inhering in the idea of liberty in defiance of "not only slavery but also the subjugation of women and other rank forms of discrimination [that] are part of [US] history."[717] The SCOTUS, Stephens wrote, has a "distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes…is judicial abdication in the guise of modesty."[718] Judges must therefore take their guardianship of liberty seriously and strike down legislation, preclude administrative actions, and indemnify individuals where constitutional rights and freedoms are breached. Only "especially significant personal interests," however, "may qualify for especially

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[714] *McDonald v City of Chicago* in Stone (2018), 743.
[715] *McDonald v City of Chicago* in Stone (2018), 743. Justice Alito, writing for the plurality, held that an unenumerated fundamental (liberty) right may exist where it is "deeply rooted in the nation's history and tradition." Sullivan and Massaro (2013), 136.
[716] *McDonald v City of Chicago* in Stone (2018), 746.
[717] *McDonald v City of Chicago* in Stone (2018), 744.
[718] *McDonald v City of Chicago* in Stone (2018), 744.

heightened protection" under substantive due process analysis.[719] Weighty personal interests include decisional autonomy, "[s]elf-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity[,] and respect,"[720] all "central values implicit in the concept of ordered liberty."[721] The sheer breadth covered by these interests necessitates the prudent exercise of judicial discretion. But exercising judgment is part and parcel of constitutional adjudication, and as society changes so too will the content of liberty.[722] Identifying iterations of constitutionally protected freedom and conduct "implicit in the concept of ordered liberty" is by no means straightforward.

Privacy, as a component of liberty, has featured as a particularly robust fundamental right in the second half of the twentieth century. The right to privacy protects, directly through the constitutional text and indirectly via judicial interpretation, two aspects of private life: personal information and autonomous decision-making. The former entails "the idea of preserving a reserved sphere from the view or knowledge of others and the restriction of access to and circulation of personal information pertaining to an individual."[723] The latter "protects the autonomy of individuals to make choices with regard to the construction of their own identities and ways of life."[724] Information-related protections relate to a more traditional understanding of privacy, i.e., the negative "right to be left alone," while autonomous decision-making, also known as the right to free development of personality, is safeguarded in various jurisdictions as "a mostly positive right that espouses an individual's continuous construction of their own identity and way of life which obliges the state to create proper conditions and remove obstacles

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[719] *McDonald v City of Chicago* in Stone (2018), 744.
[720] *McDonald v City of Chicago* in Stone (2018), 744.
[721] *McDonald v City of Chicago* in Stone (2018), 744.
[722] *McDonald v City of Chicago* in Stone (2018), 746.
[723] Manuel José Cepeda Espinosa, "Privacy," in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), 970-971.
[724] Espinosa (2012), 970-971. See also Sullivan and Massaro (2013), 167.

for this autonomous shaping of individual identity."[725] It is this substantive protection of privacy that is of interest here, the argument being that it should be up to individuals to decide whether to consume narcotic and psychotropic drugs.

Whether liberty entails a right to possess and use controlled substances for non-medical, non-scientific purposes is a question that has been confronted in several apex courts in the Americas and Europe. A common problem, solutions have varied but tended towards acceptance of a minimal right not to have one's privacy encroached upon to enforce strict control, prohibition, suppression, and criminalization, at least for small amounts of cannabis. Possession for personal consumption, countenanced to a degree under the drug control conventions, is the maximum extent to which the judiciary will interfere with domestic drug control prerogatives. The wider implications of reform sparked by judicial decisions, from decriminalization to legalization, have more to do with constitutional design and the politics of law and policy than fidelity to the requirements of rights and freedoms. Regardless, case law has made a significant contribution to drug reform efforts, reframing drugs and their users as rights-bearing individuals worthy of protection and recognition rather than deviant criminals, a view perpetuated by the IDCS. A comparative constitutional law perspective illuminates the convergence taking place in liberal democratic jurisdictions toward a more laissez-faire approach to drug control, mandated by constitutional commitments to freedom in an open society and the metaethics of constitutional adjudication.

The idea that drug use is a private matter the authorities have no business policing reflects an expansive and evolutionary character of the right to liberty, privacy, and autonomy.[726]

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[725] Espinosa (2012), 971 and 976. On the "protected interests conception" of autonomy see Kai Möller, "Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights," *Oxford Journal of Legal Studies* 29, 4 (2009), 771-784.

[726] Espinosa (2012).

These concepts are identified as the top contenders "which can challenge prohibitionist drug laws to the greatest degree," as they shift the burden of proof onto the state to justify intervening in the private lives and autonomous decision-making capacity of citizens.[727] In the US, the government would have to meet the compelling state interest test and narrowly tailor any encroachment on fundamental rights to pass constitutional muster. This involves a degree of balancing.[728] Elsewhere, as the case law presented below details, similar legal tests, proportionality most prominently, are used to determine the extent to which the state may interfere with an individual's choice to illicitly consume controlled substances.

3.5.a Colombia, Argentina, Mexico

In 1994, Colombia's Constitutional Court assessed the constitutionality of the criminalization of the possession of small amounts of cannabis (20 grams) and cocaine (1 gram) for personal use in light of the constitutional protection of dignity and autonomy,[729] the right to the development of personality in Article 16 in particular.[730] The Court held that persuasion through education, rather than coercion via penalization, is the appropriate, and constitutional, approach to controlling drug use.[731] In the absence of harm to third parties there is no basis upon which the state may encroach upon individual liberty. A life of hedonism, just like one of asceticism, is protected by Colombia's Constitution. Making such choices, the Court determined, is at the core of the right to free development of personality. Paternalistic law and policy violate individual rights and freedoms protections where they unduly interfere with citizen self-government.[732] The

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[727] Bone (2020), 128-129.
[728] Sullivan and Massaro (2013), 137.
[729] Constitutional Court of Colombia, Judgement of 5 May 1994, Sentencia C-221/1994 (Justice Carlos Gaviria Díaz) in Manuel José Cepeda Espinosa and David Landau, *Colombian Constitutional Law: Leading Cases* (Oxford: Oxford University Press, 2017), 52-56.
[730] Which follows Article 15 on the right to privacy. See Colombia's Constitution of 1991.
[731] Sentencia C-221/1994 in Espinosa and Landau (2017), 52-56.
[732] Sentencia C-221/1994 in Espinosa and Landau (2017), 52-56.

Court's effective decriminalization of possession for personal consumption rested on appeals to constitutional identity, commitments to dignity and autonomy, and universal reason, especially the harm principle. The ruling upset both opponents and proponents of reform. Successive Colombian governments pushed referenda and constitutional amendments to overturn the Court's decision, while litigation challenged the constitutionality of the purported limited scope of decriminalization. In the end, Colombia permits the possession of small amounts of cannabis and cocaine for personal consumption while continuing to combat trafficking as is consistent with the 1988 Convention.[733] The Constitutional Court recognized the asymmetry between the promise of constitutional rights and freedoms and the reality of drug control law and policy nearly 30 years ago, but domestic efforts to institute long-term reforms to enable the personal consumption of controlled substances have failed to successfully build on the judicial precedent.

A bill proposed by two Colombia Senators in 2020, for instance, the Proyecto de Ley No. 236, aimed at legalizing and regulating cocaine for personal consumption by anonymously registered adults. After passing its first reading in Congress in 2021 the law was soon shelved by the country's conservative legislature. Ley No. 236 included plans for an evidence-based, "three-tiered, risk proportional system" with "[a] commercial retail model for low risk, whole coca leaf products," "[a] state-control model for medium risk products" like cocaine, and "[a] treatment approach for high risk products (i.e.[,] smoked and injectable formulations of cocaine and people sufferings from substance use disorders (SUDs)."[734] It also incorporated indigenous peoples' interests and oversight into the scheme's design. Politicians and policymakers saw the bill as an opportunity to redress the injustices of the War on Drugs, fight organized crime and

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[733] Espinosa and Landau (2017), 56-59.
[734] David Restrepo, "Daring to Regulate Coca and Cocaine: Lessons from Colombia's Drug War Trenches," Documento Temático 27 (Bogotá: Centro de Estudios sobre Seguridad y Drogas, 2022), https://cesed.uniandes.edu.co/wp-content/uploads/2022/05/Daring-to-Regulate-Coca-Cocaine-Final.pdf, 2-6.

narcotrafficking, and bring peace and development to rural Colombians.[735] Leftist President Gustavo Petro's administration outlined a similar policy proposal after coming to power in 2022. The potential creation of a legal, regulated market in cocaine for recreational purposes just to its south troubled the many US officials and agencies that had engaged in counternarcotics efforts in the region over the past four decades.[736] It bears pointing out, however, that the principles and values guiding Colombian legislators – e.g., human and indigenous rights, public health, and social justice – are consistent with the UN's own Sustainable Development Goals, discussed in chapter 2. It is the IDCS and US-led strict control, prohibition, suppression, and criminalization model of drug enforcement that these reform proposals fall foul of. The judicial case for a drug control regime that respects human rights and fundamental freedoms could not, however, be contained by politics. The Constitutional Court did not only transform Colombian drug law and policy. It inspired apex courts in South and Central America to use the jurisprudential tools at their disposal to do the same.

The Supreme Court of Argentina affirmed the general principles of the right to privacy in 2009's Arriola, Sebastián y Otros, where it revisited rulings declaring the criminalization of the possession of narcotics for personal consumption constitutional, cannabis specifically.[737] Argentina's Constitution includes robust privacy provisions. Article 18 declares that one's "residence is inviolable," but for searches and seizures prescribed by law, while Article 19 holds that: "The private actions of men that in no way offend public order or morality, nor injure a

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[735] Restrepo (2022).
[736] Samantha Schmidt and Diana Durán, "Colombia, largest cocaine supplier to U.S., considers decriminalizing," *Washington Post* 20 August 2022, https://www.washingtonpost.com/world/2022/08/20/colombia-cocaine-decriminalize-petro/.
[737] *Arriola, Sebastián y Otros*, Core Suprema de Justicia de la Nación, 25 August 2009, Fallos de Justicia de la Nación (2009-332-1965) (Arg).

third party…are exempt from the authority of magistrates."[738] Against this standard, the Supreme Court determined that so long as the possession of narcotics for personal consumption meets Article 19 requirements, which it did here, it constitutes private action and falls within the scope of the Constitution's protection of privacy.[739] The value placed on human dignity, individual autonomy, and self-determination render rights-bearers "sovereign in their actions, their thinking and in their feeling" within the private sphere.[740] The state cannot impose majoritarian morality on the public.[741] Nor can the IDCS. The drug control conventions not only do not require the criminalization of personal possession for personal consumption, noted the Supreme Court, they explicitly submit their provisions to the requirements of the domestic constitutional order. This is clear in the constitutional caveats-safeguard clauses in Articles 35 and 36 of the Single Convention, Article 22 of the 1971 Convention, and Article 3(2) of the 1988 Convention.[742] The Supreme Court could thus invoke constitutional identity, universal reason, and the treaties themselves as sufficient grounds to justify deviation from the IDCS.

Mexico's Supreme Court of Justice of the Nation (SCJN) ruled on the constitutionality of the prohibition and suppression of cannabis possession in landmark cases in 2015[743] and 2018.[744] Individual rights cases in Mexico generally "only generate rights upon the plaintiffs involved," but after the SCJN has ruled on the same issue in "five consecutive cases" a holding becomes generally binding precedent.[745] In the 2015 case members of a cannabis social club challenged

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[738] Argentina's Constitution of 1853, reinstated in 1983, with Amendments through 1994, *Constitute*, accessed 29 July 2020, https://www.constituteproject.org/constitution/Argentina_1994.pdf?lang=en.
[739] The alleged harm to third parties legislators ascribed to the possession of narcotics for personal consumption was too abstract and remote to justify an infringement of the right to privacy. *Arriola, Sebastián y Otros*, 32-33.
[740] *Arriola, Sebastián y Otros*, 27 and 51-52.
[741] *Arriola, Sebastián y Otros*, 63.
[742] *Arriola, Sebastián y Otros*, 37.
[743] SCJN 2015, Amparo 237/2014.
[744] SCJN 2018, Amparo 548/2018.
[745] Bone (2020), 129-130.

the criminalization of the cultivation and possession of cannabis for personal consumption on the basis that it infringed their constitutional rights to liberty, privacy, autonomy, self-determination, the free development of personality, dignity, and right to health.[746] The SCJN honed in on the right to privacy and free development of personality argument in precluding state intervention in the "personal sphere" aimed at interdicting illicit cannabis use.[747] Within this sphere, according to the Court, individuals are free "to determine the meaning of their existence according to '[their] own values, ideas, expectations, tastes[,] etc."[748] At the proportionality stage of analysis the SCJN employed Mill's notion of autonomy and the harm principle in finding the strict control, prohibition, suppression, and criminalization of cannabis possession, while legitimately aimed at protecting public health and order, unduly encroached upon the individual right to the free development of personality. Legislators could address public health and order concerns by alternative, less invasive means.[749] The 2018 decision that followed was the fifth consecutive case to address the cannabis question, reiterating much of the reasoning found in the 2015 case and highlighting how "prejudice" and majoritarian morality, rather than scientific fact, underlie cannabis' strict control, prohibition, suppression, and criminalization.[750] Aware of the repercussions of the decision, the SCJN invoked the constitutional caveat-safeguard in Article 3(2) of the 1988 Convention to legitimate departing from drug control convention standards.[751] As a result of these cases, Mexico's Congress is slated to legalize cannabis.[752] Senate Leader

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[746] SCJN 2015, para 2 cited in Bone (2020), 130. See also José Mauricio Ojeda Echeverria, "The Human Rights Approach to Marijuana Control in Mexico – A Study of Amparo 237/2014," *Forum of International Development Studies* 53, 3 (2019): 1-19.
[747] SCJN 2015, para 33 cited in Bone (2020), 130.
[748] SCJN 2015, para 32 cited in Bone (2020), 130.
[749] SCJN 2015, para 48 and 74 cited in Bone (2020), 131-132.
[750] SCJN 2018, para 5 cited in Bone (2020), 123-133.
[751] SCJN 2018, cited in Bone (2020), 133.
[752] Oscar Lopez, "Mexico Set to Legalize Marijuana, Becoming World's Largest Market," *New York Times*, 10 March 2021, https://www.nytimes.com/2021/03/10/world/americas/mexico-cannabis-bill.html.

Ricardo Monreal commented in late 2020 that it was time to "knock down this decades old taboo."[753] The SCJN's determination that the criminalization of the possession of cannabis for personal consumption was unconstitutional, violating the right to free development of personality, forced the legislature's hand.

Even so, as a matter of common sentiment some 60 percent of Mexicans remain opposed to cannabis legalization.[754] The issue's divisiveness, a product of the violence and dislocation caused by the War on Drugs, helps explain why the legalization process has stalled. In June 2021 the Supreme Court intervened again, decriminalizing the recreational use of cannabis.[755] Constitutional identity and universal reason overrode negative feelings towards cannabis and were the prime rationales motivating the SCJN to protect the rights and freedoms of cannabis users. The Court's constitutional commitment to human dignity and the right to free development of personality were deemed stronger than the policy preferences of the IDCS, the Mexican government, and "we the people."

The lack of direct constitutional borrowing, transplantation, and migration and absence of ideational cross-fertilization in these decisions is inconsequential compared to the latent universal reason underlying their constitutional commitment to the right to liberty and its derivatives. There is a general thrust to American jurisprudence on the drugs question, at least when it comes to the demand side of the issue. And Colombian, Argentinian, and Mexican apex courts are not outliers in their interpretation of the right to privacy nor of the IDCS. Tribunals in

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[753] Marissa J. Lang, "Mexico is poised to legalize marijuana, but advocates don't like the details," *Washington Post*, 8 November 2020, https://www.washingtonpost.com/world/the_americas/mexico-marijuana-legalize/2020/11/07/27a5fa6c-1925-11eb-82db-60b15c874105_story.html.
[754] Lang (2020).
[755] "Mexico marijuana: Top court decriminalizes recreational use of cannabis," *BBC News*, 29 June 2021, https://www.bbc.com/news/world-latin-america-57645016.

the United States and South Africa have used similar arguments in their assessment of their own drug control law and policy's compatibility with constitutional rights and freedoms.

3.5.b United States of America and South Africa

In 1975's *Ravin v State* the Supreme Court of Alaska (SCA) held that adult Alaskans had a right to possess and consume cannabis in the privacy of their home.[756] The SCA did not recognize a freestanding right to possess or consume cannabis.[757] Public possession and use remained illegal, as did supply-related and commercial activity.[758] Rather, the Court carved out an exception to the general applicability of drug control laws. The Ravin Doctrine, as it is known, "was the first, and remains the only, reported judicial opinion to announce a privacy interest that covers marijuana use."[759] Why? Because the home attracts "special protection" within the matrix of constitutionally protected privacy rights.[760] Alaskans, wrote SCA Chief Justice Rabinowitz, were even more committed to privacy than other US states. The State's constitutional identity and commitment to this principle was evidenced both by its history and tradition and the State Constitution, which explicitly enumerates a right to privacy. Culture mattered too:

> Such a reading is consonant with the character of life in Alaska. Our…state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states. [761]

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[756] *Ravin v State*, 537 P.2d 494 (Ak. 1975).
[757] *Ravin*, 502.
[758] The SCA also highlighted the danger posed by driving under the influence of cannabis, which very clearly has "the potential for serious harm to the health and safety of the general public." *Ravin*, 510-511.
[759] Jason Brandeis, "Ravin Revisited: Alaska's Historic Common Law Marijuana Rule at the Dawn of Legalization," 31 *Alaska Law Review* 309 (2015), 312-314, esp. 313.
[760] The SCA here invoked *Stanley v Georgia*, 394 U.S. 557 (1969) on the possession and use of obscene materials (i.e., pornography) in the home. *Ravin*, 503.
[761] *Ravin*, 503-504.

The SCA's decision hinged upon the State Constitution and SCOTUS caselaw, *Griswold v Connecticut*[762] in particular, which established for Americans protected individual "zones of privacy" free from unwarranted government interference, like the home, a principle derived from the "penumbras, formed by emanations" of "specific guarantees in the Bill of Rights."[763] Encroachments into these "zones of privacy" are permitted only where the state has a legitimate state interest in doing so; for example, in order to protect the rights of others, public health and safety, or the "general welfare."[764] Rejecting both the strict scrutiny and reasonable basis standards of review, the Court determined that: "If governmental restrictions interfere with the individual's right to privacy, we will require that the relationship between means and ends be not merely reasonable but close and substantial."[765] Generalities would not make the case for upholding the prohibition on private cannabis possession and use. The scientific evidence the State proffered on the harms of cannabis to the individual user was deemed insufficient to justify intrusion into citizens' homes. As such, there was no "need based on proof that the public health or welfare will suffer if the controls were not applied."[766] *Ravin*, however, was about much more than the sanctity of Alaskan domiciles.

Autonomy also plays a central role in the US conception of privacy. This was made clear in *Roe v Wade*,[767] which protected "personal rights which can be deemed 'fundamental' or

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[762] *Griswold v Connecticut*, 381 U.S. 479 (1965).
[763] *Ravin*, 498-499. The rights wherefrom the right to privacy derives include the First (right of association), Third (prohibition of quartering soldiers in private residences without consent during peacetime), Fourth (freedom from unreasonable search and seizure), Fifth (right not to self-incriminate), and Ninth ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people") Amendments. See *Griswold*, 1681-1682.
[764] *Ravin*, 509.
[765] *Ravin*, 498.
[766] *Ravin*, 511. The Court adopted a deferential view: "There is a presumption in favor of public health measures; when there is substantial doubt as to the safety of a given substance or situation for the public health, controls intended to obviate the danger will usually be upheld." *Ravin* 510.
[767] *Roe v Wade*, 410 U.S. 113 (1973).

‘implicit in the concept of ordered liberty’…more particularly, a right of personal autonomy in relation to choices affecting an individual’s personal life.”[768] Chief Justice Rabinowitz elaborated on the nature of autonomy by reference to Levinson J’s dissent in the Supreme Court of Hawaii’s *State v Kantner*.[769] Justice Levinson maintained the right to privacy “guarantees to the individual the full measure of control over his own personality consistent with the security of himself and others.”[770] Cannabis-induced experiences, in his view, were “among the most personal and private experiences possible.”[771] For this reason, “the right to privacy protects the individual’s conduct designed to affect these inner areas of the personality.”[772] It would be unthinkable, he claimed, for the government to intrude upon the solitary introspection occasioned by the “private, personal use of marijuana.”[773] But as the SCA noted, such arguments have not led to the creation of a “right to become intoxicated”[774] nor an “absolute protection to ‘the ingestion of food, beverages or other substances’.”[775] They do, however, support the broader principle, expressed in *Roe v Wade*, that: “The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals.”[776] That may be so, but the right to privacy is not an absolute right. The state may have a legitimate interest in prohibiting such conduct for the protection of the rights of others, public health and safety, or the “general welfare.” When otherwise illicit activities take place in the privacy of the home, though, they attract a higher, intermediate level of constitutional

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[768] *Ravin*, 500.
[769] *State v Kantner*, 53 Haw. 327, 493 P.2d 306 (1972).
[770] Cited in *Ravin*, 501.
[771] *Ravin*, 501.
[772] *Ravin*, 501.
[773] *Ravin*, 501.
[774] *Ravin*, 502.
[775] *Ravin*, 501.
[776] *Ravin*, 509. The SCA itself was opposed to the use of “psychoactive drugs,” but reiterated that individuals bear the responsibility of making such determinations for themselves. *Ravin*, 509-510.

protection.[777] The nexus between the home and autonomy enunciated in *Ravin*, however remote from the present the case seems in space and time, has had a real and substantial impact on the development of the right to privacy.

A near half-century later the Constitutional Court of South Africa (CC) contended with the question of the constitutionality of laws criminalizing the possession of cannabis for personal consumption in 2018's *Minister of Justice and Constitutional Development and Others v Prince*.[778] Like the Supreme Court of Alaska, the CC rendered invalid provisions of South Africa's Drugs and Drug Trafficking Act of 1992 and Medicines and Related Substances and Control Act of 1965 insofar as they infringed on the right to privacy enshrined in section 14 of the Constitution.[779] Section 14 ensures: "Everyone has the right to privacy which includes the right not to have – (a) their person or home searched." The meaning and scope of this provision had previously been expounded in *Bernstein v Bester*,[780] wherein the CC relied on European, Canadian, and US conceptions of privacy in elucidating the domestic contours of the right.[781] The CC's analysis focused on autonomy, the special status of the home, and citizens' "reasonable expectation[s] of privacy."[782] Again, privacy is not an absolute right and may be limited.[783] But the closer one is to the "intimate core of privacy" the greater the protection will

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[777] Husak (1992), 38.
[778] *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Action* (CCT108/17) [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC) (18 September 2018).
[779] *Prince* (2018), para 129(10)-(11).
[780] *Bernstein and Others v Bester and Others* (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (27 March 1996).
[781] *Prince* (2018), para 43ff.
[782] "The 'reasonable expectation of privacy test' comprises two questions. First, there must at least be a subjective expectation of privacy and, secondly, the expectation must be recognised as reasonable by society." *Bernstein*, para 76 cited in *Prince* (2018), para46.
[783] Not everything is permitted, as Langa J pointed out regarding the possession and use of obscene materials (i.e., pornography) in the home in *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others* (CCT20/95, CCT21/95) [1996] ZACC 7; 1996 (3) SA 617; 1996 (5) BCLR 608 (9 May 1996), para 99 cited in *Prince* (2018), para53.

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be.[784] This “intimate core is [to be] narrowly construed,”[785] however, because as they move into the public sphere “the individual’s activities then acquire a social dimension.”[786] Possessing cannabis for personal consumption in the home is more closely connected to the “intimate core of privacy” than, say, public consumption which implicates the community. In the former circumstance, the individual, as stated in the 1969 US obscenity case *Stanley v Georgia*, possesses “the right to satisfy his intellectual and emotional needs in the privacy of his own house.”[787] In South Africa, too, the home is near sacrosanct, a refuge insulated against the outside world.

Before the CC applied the law to the facts before it it noted the case’s similarity to *Ravin*, drawing attention to both the level of scrutiny and holding adopted by the Supreme Court of Alaska (SCA) in 1975.[788] In many ways the CC’s reasoning tacked closely to that of the SCA. Invoking the SCA’s conclusion in *Ravin* “that no adequate justification for the state’s intrusion into the citizen’s right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown,”[789] the CC agreed that the state should not impose its vision of the good life on citizens while they are in the privacy of their own home.[790] Though foreign law played a significant role in shaping the CC’s privacy jurisprudence the standards by which it adjudicated the constitutional claim at issue reflected South African principles and practices.

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[784] “A very high level of protection is given to the individual’s intimate personal sphere of life” according to the CC in *Bernstein*, para 75 cited in *Prince* (2018), para 48.
[785] *Bernstein*, para 75 cited in *Prince* (2018), para 48.
[786] *Bernstein*, para 75 cited in *Prince* (2018), para 48.
[787] *Stanley v Georgia*, 565 cited in *Prince* (2018), para 54.
[788] *Prince* (2018), paras 55-57.
[789] *Ravin*, 511 cited in *Prince* (2018), para 72.
[790] *Ravin*, 509 cited in *Prince* (2018), para 75.

The issue before the CC was in essence whether the "limitation [on the right to privacy] is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account the factors listed in section 36(1) of the Constitution."[791] Having established that the criminalization of the possession of cannabis for personal consumption limits the right to privacy, the CC moved on to review the state's justifications for the infringement. Health and safety concerns and the IDCS's legal obligations featured as the state's main justifications for strict control, prohibition, suppression, and criminalization.[792] But the state ultimately failed to prove the impugned provisions were necessary. First, its evidence and expert witnesses contradicted or ignored the widely accepted facts and findings of the WHO and South African Central Drug Authority regarding the relative harms of cannabis, alcohol, and tobacco.[793] Second, the CC made clear:

> that South Africa's international obligations are subject to South Africa's constitutional obligations. The Constitution is the supreme law of the Republic and, in entering into international agreements, South Africa must ensure that its obligations in terms of those agreements are not in breach of its constitutional obligations. This Court cannot be precluded by an international agreement to which South Africa may be a signatory from declaring a statutory provision to be inconsistent with the Constitution.[794]

Furthermore, at the time the decision was written 33 jurisdictions, "democratic societies based on freedom, equality and human dignity," had decriminalized or legalized cannabis.[795] Less restrictive means were available to control cannabis, especially in the case of possession for personal consumption.[796] This was contemplated in the 1988 Convention, for example, which differentiates between possession for personal consumption and trafficking or drug dealing,

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[791] *Prince* (2018), para 40.
[792] *Prince* (2018), paras 63-65.
[793] *Prince* (2018), paras 67-82.
[794] Though "an interpretation that allows South Africa to comply with its international obligations would be preferred to one that does not." *Prince* (2018), para 82.
[795] *Prince* (2018), para 79.
[796] On the High Court of the Western Cape's analysis of less restrictive means see *Prince* (2018), paras 31-34.

which is characterized as a more "serious" offense.[797] So, while the CC could invalidate the impugned provisions in the context of possession for personal consumption they could not do the same for trafficking or dealing.[798] For these reasons the state failed to convince the CC the measures were "reasonable and justifiable" under section 36 analysis.[799] The criminalization of the possession of cannabis for personal consumption was unconstitutional, rendered invalid, and South Africa's Parliament given 24 months to change the law in accordance with the CC's judgment.[800]

Minister of Justice and Constitutional Development and Others v Prince went further than the foreign law underlying its reasoning. The CC expanded the meaning of possession and use "at home" to include possession and use "in private" more broadly, as "there are places other than a person's home or a private dwelling" protected by section 14 of the Constitution.[801] The Court also offered its advice vis-à-vis the continued enforcement of South Africa's drug control laws. It suggested distinguishing between cannabis possession for personal consumption from possession for the purpose of trafficking or dealing was relatively straightforward. Where a police officer has a reasonable suspicion possession is for the purpose of trafficking or dealing and the individual concerned cannot provide a satisfactory account of their possession that person may be suspect and arrested. The police already assess whether a driver has driven negligently, or alcohol is possessed for the purpose of personal consumption or sale on a regular basis. There was no indication such laws are not enforceable. Common sense and proper procedure are sufficient safeguards to maintain the rule of law.[802] The CC had already dealt with

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[797] In Articles 3(2) and 3(1) respectively. *Prince* (2018), para 36.
[798] *Prince* (2018), para 88.
[799] *Prince* (2018), para 94.
[800] *Prince* (2018), para 129.
[801] *Prince* (2018), para 108.
[802] *Prince* (2018), paras 113-127, esp. para 123.

a similar issue, declaring a statutory presumption of intent to deal in cannabis in cases involving the possession of more than 115 grams unconstitutional in 1995 because it violated the presumption of innocence and right to a fair trial.[803] Most interestingly, the CC invoked constitutional supremacy. The Constitution states that the courts "must consider international law" when interpreting the Bill of Rights, but it does not suggest the former trumps the latter.[804] The CC might have avoided purported conflict by expanding its consideration of the 1988 Convention, noting that the state may depart from any treaty as of right not only because it is incompatible with the Bill of Rights but because the constitutional caveats-safeguard clauses in the conventions permit it.[805] The CC's message was clear: in the event of incompatibility human rights and fundamental freedoms prevail over ordinary law and policy, no matter their provenance.

South African constitutional theory and practice allowed the CC to breathe new life into an obscure precedent from the Supreme Court of Alaska. It bears keeping in mind that Alaska has been an innovator in cannabis law and policy since the 1970s, diverging from most other US states.[806] It is far from representative of US American drugs jurisprudence. This is not to undercut *Ravin*, which was the first time the SCA had "to meaningfully define the scope of the Alaska Constitution's right to privacy."[807] Indeed, the case became a "cornerstone of Alaska [privacy] jurisprudence" and survived multiple challenges from legislators and litigators.[808] *Ravin* was well-reasoned, suggesting as it did that the possession of cannabis for personal

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[803] *S v Bhulwana, S v Gwadiso* (CCT12/95, CCT11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 (29 November 1995).
[804] Constitution of the Republic of South Africa, 1996, section 39(1)(b).
[805] Emma Charlene Lubaale and Simangele Daisy Mavundla, "Decriminalisation of cannabis for personal use in South Africa," *African Journal of Human Rights Law* 19 (2019), 839-842.
[806] Brandeis (2015), 346.
[807] Jason Brandeis, "The Continuing Vitality of *Ravin v. State*: Alaskans Still Have a Constitutional Rights to Possess Marijuana in the Privacy of Their Homes," 29 *Alaska Law Review* 175 (2012), 181.
[808] Brandeis (2012), 181 and 216.

consumption was akin to the possession of obscene materials in the home. If the latter was protected as harmless private activity why shouldn't the same logic apply to cannabis possession and use?

Prince has been criticized for its inadequate grounding in South Africa's privacy jurisprudence and failure to consider the wider implications of the continued prohibition of cannabis, particularly its cultivation and sale.[809] While the decision made "South Africa the first…African country to make provision for the personal consumption of cannabis in private,"[810] "[t]he use of cannabis…remains illegal. The decision does no more than create a defence for an individual using cannabis."[811] While instigating a shift in South African drug law and policy, the CC's decriminalization of cannabis consumption does little to address the inequities wrought by more than a century of prohibition, pursued by South African governments from colonial times through Apartheid to the present. Government ministers and public health authorities continue to promote and pursue the IDCS's goal of eradicating illicit supply and use. Mitigating drug control's adverse consequences has been an imperfect, incremental process leaving significant questions unanswered and damaging law and policy in place. At any rate, commentators recognize the importance of human rights litigation in the battle for a more humane and constitutionally compliant approach to drug control in South Africa.[812]

Finding similar precedents in its own jurisprudence, the CC substantiated and built on the *Ravin* analogy. If *Ravin* did not serve as a roadmap to reaching the decision in *Minister of Justice and Constitutional Development and Others v Prince* it can at least be said to have had

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[809] Nabeelah Mia, "The Problems with Prince: A Critical Analysis of *Minister of Justice and Constitutional Development v Prince*," *Constitutional Court Review* 10 (2020): 401-424.
[810] Lubaale and Mavundla (2019), 821.
[811] Lubaale and Mavundla (2019), 841.
[812] Scheibe, Shelly and Versfeld (2020).

significant persuasive power for the CC. South African privacy jurisprudence and cannabis law and policy were shaped to a great extent by US law, in broad strokes, with Alaskan thought filling in many of the details on the specific question of cannabis possession and use. This was done out of convenience – the SCA had already done much of the legwork in thinking its way through some of the toughest issues – and the ease of translatability of American caselaw, as the CC is fluent in common law and constitutional rights and freedoms discourse in the English-speaking world. *Ravin* also happened to be the case most akin to the situation presented to the CC. Alaska in the 1970s and South Africa in the 2010s might seem worlds apart, but comparative constitutional law sometimes makes for strange bedfellows. In both contexts the constitutional cost of drug control, permitting the state's intrusion into the privacy of the home to enforce the strict control, prohibition, suppression, and criminalization of illicit drugs, was too much for the Court to tolerate and constituted an unlawful infringement on the constitutional right to privacy.

Relaxing the law on cannabis possession for personal consumption is mandated in some jurisdictions due to the constitutional rights and freedoms implications of its criminalization. If such arguments can be made for cannabis, might they also be deployed in advocating for a right to possess and use for personal consumption equally (un)harmful controlled substances? In Alaska, at least, *Ravin*-based privacy arguments failed to convince local courts to extend protection to substances other than cannabis, such as cocaine, alcohol, and tobacco.[813] But with the right scenario it is possible. Privacy could serve as the basis upon which individuals insulate their otherwise illegal possession of drugs for personal consumption from legal sanction, as happened in both *Ravin* and *Minister of Justice and Constitutional Development and Others v*

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[813] Brandeis (2012), 222-224.

Prince.[814] Constitutional identity was a great motivator in these decisions, but it also limited the extent to which notions of liberty impose themselves on generally applicable law and policy. It is possible to move beyond strict liberal notions of privacy and individual autonomy and cover a greater conception of freedom under the umbrella of constitutional protection.

US American and South African drug control jurisprudence demonstrates the power of bills of rights when constitutional commitments to liberty are prioritized in adjudication. However, matters of principle are often less persuasive than procedural and technical requirements in the judicial resolution of drug law and policy issues. Sometimes human rights and fundamental freedoms are simply not identified as relevant by parties to a dispute or have only a tangential relationship to the concrete facts of a case. The Supreme Court of the State of Washington, for example, examined a law criminalizing the simple possession of controlled substances as a strict liability offense and felony, with a penalty of up to 5 years in prison and a fine of $10,000, in 2021's *State v Blake*.[815] Strict liability offenses do not require the state to prove the accused intended to commit a crime. The doing of the act itself establishes guilt. In common law jurisdictions, *mens rea*, or intent, is one part of establishing beyond a reasonable doubt the accused's culpability, the other being the wrongful act, or *actus reus*. The burden of proof in criminal law normally rests with the state, but the statute at issue in Blake shifted the onus onto accused persons to disprove the state's prima facie case. If you had drugs on your person, unwittingly or unknowingly, you had committed the offense. Washington's law was the last of its kind in the US.

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[814] Privacy having "eliminated the barriers that seemed insurmountable" in other challenges to the criminalization of the possession and use of cannabis based on religious freedom, equality, and dignity. Lubaale and Mavundla (2019), 822.
[815] *State v Blake*, 481 P.3d 521 (2021), No. 96873-0.

The Court held in a 5-4 ruling that the law violated the Due Process Clauses of both the federal and state constitutions, which "generally bar state legislatures from taking innocent and passive conduct with no criminal intent at all and punishing it as a serious crime."[816] Rather than read-in a *mens rea* requirement and remedy the statutory defect, which the Court said was the legislature's job,[817] Gordon McCloud J. and the majority determined that the statute exceeded the state's constitutional police power, which allows it to regulate behavior and activities in the public interest. So long as there is a "reasonable and substantial relation" between a law's object and the means chosen to pursue it, it is not "arbitrary, unreasonable, or capricious" and does not violate the constitution.[818] Carrying drugs without knowing it, the majority deduced, is the kind of innocent, passive conduct the Due Process Clause was meant to protect. Drug trafficking, by contrast, is not.[819] The law criminalizing simple possession as a strict liability offense was therefore found to be unconstitutional.[820]

The fundamentals underlying the decision were found wanting by Stephens J., whose partly concurring, partly dissenting opinion suggested the Supreme Court of the State of Washington's past interpretations and holdings vis-à-vis the law in question were unprincipled and incorrect.[821] The Court, in her view, should have read a *mens rea* element into the statute long ago; not only is this remedy consistent with the common law tradition, it was necessary to ensure the uniform interpretation and application of a statute common to states across the US.[822] The majority had instead determined that stare decisis precluded the Court from overturning precedent and reading-in the *mens rea* requirement. Decades of case law controlling lower courts

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[816] *Blake* (2021), Gordon McCloud J. majority, 2.
[817] *Blake* (2021), Gordon McCloud J. majority, 3 and 21.
[818] *Blake* (2021), Gordon McCloud J. majority, 7-14.
[819] *Blake* (2021), Gordon McCloud J. majority, 15.
[820] *Blake* (2021), Gordon McCloud J. majority, 21 and 30-31.
[821] Particularly Washington's *Bradshaw* and *Cleppe* decisions.
[822] *Blake* (2021), Stephens J. concurring in part, dissenting in part, 3-8.

and “the legislature’s lengthy acquiescence” had, for them, made it “impossible to avoid the constitutional problem now.”[823] Stephens rejected this rationalization, positing that the Court should have stuck by the constitutional avoidance doctrine, whereby judges are to resolve statutory issues without resorting to constitutional arguments whenever possible. It was unnecessary to rely on the Due Process Clause, she believed, because the law and decisions upholding it were void *ab initio*.[824] This conclusion is also more consistent with the defendant, Blake’s, own argument, which focused on statutory rather than constitutional issues.[825] Stephens welcomed the majority’s verdict but disagreed with its reasoning, going so far as to suggest the Court had cherry-picked judicial precedent to get to the answer it wanted.[826] Her opinion makes clear that there is no need to resort to constitutional law to settle every legal question, and not every dispute between the state and the individual implicates human rights and fundamental freedoms.

The majority and concurring opinions in Blake, with opposing justifications, felt compelled to remedy the legal wrong of treating the simple possession of controlled substances as a strict liability offense.[827] But it was facts, not law, that united them in voting to strike down the law, as both were persuaded its disparate impact on racialized minorities demanded intervention.[828] Recognition of the injustices perpetrated in the name of drug control affected the outcome in Blake, but any reform that follows is out of the judiciary’s hands. The judgment simply requires that the legislature revisit the statute and rectify its defect. The overturning of

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[823] *Blake* (2021), Gordon McCloud J. majority, 27.
[824] *Blake* (2021), Stephens J. concurring in part, dissenting in part, 3 and 9-19.
[825] *Blake* (2021), Stephens J. concurring in part, dissenting in part, 9.
[826] *Blake* (2021), Stephens J. concurring in part, dissenting in part, 24.
[827] Johnson J.’s brief dissenting judgment discerned nothing wrong with the legislature using strict liability offenses to enforce the drug control regime, as these are a long-recognized and legitimate criminal law device, and would have upheld the law.
[828] *Blake* (2021), Gordon McCloud J. majority, 26; *Blake* (2021), Stephens J. concurring in part, dissenting in part, 18.

possession laws in Washington will have huge implications, from revisiting to vacating the convictions of those criminalized under the law (thousands) to the reimbursement of fines and financial penalties paid to the state (millions). Indeed, the repercussions will be felt throughout Washington's criminal justice system, which, like its fellow 49 states in the Union, is based largely around the suppression of drugs and criminalization of drug users.[829] The human rights and fundamental freedoms implications of Blake, ill-founded or not, forced a rethink of drug control laws in Washington State. Whether it, and decisions like it, trigger systemic reform and make a real difference in the lives of those on the enforcement end of drug control is up to the other branches of government to decide.

The migration of ideas animating a US state supreme court judgment from 1975 to South Africa's Constitutional Court in 2018 is a compelling example of comparative constitutional law in practice, demonstrating the potential for constitutional rights and freedoms jurisprudence to contribute to drug law and policy reform across borders. Several factors made this case possible, however, particularly the South African judiciary's ability to consider to foreign precedent and the presence of express constitutional commitments to protecting privacy in both jurisdictions. With identifiable affinities between the two legal systems and the facts at issue the CC was able to make a principled decision informed by comparative case law. The Washington State court's findings are not so easily assimilable or adaptable as the legal issue involved was more technical than abstract. Intracourt disagreement over the relevance of rights and freedoms to the case also militates against the straightforward adoption of the Washington Court's reasoning outside the US American context. The examples discussed in this subsection show that while courts can play

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[829] On Blake's fallout see David Kroman, "Court's drug possession ruling upends WA's criminal justice system," *Crosscut*, 12 March 2021, accessed 31 March 2021, https://crosscut.com/news/2021/03/courts-drug-possession-ruling-upends-was-criminal-justice-system.

an active part in effecting system-wide reform of drug law and policy, the practical and theoretical bases for their doing so are unpredictable. But when constitutional ideas do migrate they must be commensurable to the law, facts, and conditions of the locality to which they travel. The apex court decisions that follow prove that domestic solutions to universal drug control problems are often sui generis compromises between the judiciary and the state. The extent to which rights and freedoms are expanded in this equation depends to a significant degree on constitutional text and popular sentiment toward drugs.

3.5.c Spain, Germany, Georgia, Austria

In Spain, recognition of groups of individuals having a collective right to produce, supply, and consume cannabis has led to an expansion of traditional liberal ideas of what privacy means. Spain passed legislation implementing the Single Convention in 1967 and criminalized drug trafficking in 1971. Shortly thereafter, however, the Spanish Tribunal Supremo (TS), or supreme court, interpreted the law prohibiting the illicit trade in cannabis as inapplicable to its personal consumption in private, which was ruled not to be a significant threat to public health. Cannabis use was lawful, or at least not unlawful, though its cultivation and supply still constituted drug trafficking. An update to the criminal code in the early 1980s by the socialist government entrenched the judicially constructed exemption, which caused a conservative backlash. The government relied on Article 3(2) of the 1988 Convention to justify its legislation, as the latter does not mandate the criminalization of consumption, but this failed to appease critics of Spain's liberal enforcement of demand controls. Pre-empting a potential crackdown, cannabis users came together to create cannabis clubs, formal legal entities, under the auspices of the right to assembly, first in Madrid in 1987, then in Barcelona in 1991, to cultivate cannabis and ensure continued access to a reliable, secure, and, in their view, licit source of supply for collective

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consumption.[830] The movement extended the sphere of privacy to encompass interpersonal relations. Then, in the 1990s, the TS broadened the concept of personal consumption to encompass shared consumption because, just as with individual use, there is not significant harm done to third parties during communal, consensual cannabis use. The court deemed its intervention necessary to prevent what it saw as a disproportionate and overbroad application of the law on drug trafficking.[831] The latter prohibition remained in force, however, and in 1997 the TS upheld a set of convictions for drug trafficking "on the basis that any unauthorized cultivation of cannabis necessarily endangered public health."[832] Supply-side issues hampered the expansion of relaxed demand controls.

The cannabis clubs, some now with hundreds of members, prevailed in the end and, after relative détente between cannabis clubs and the authorities from 1999 to 2015, the state began an anti-drug campaign against them in the mid-2010s.[833] The public prosecutor appealed three provincial court acquittals of cannabis club members charged with drug trafficking. The cases were taken up by the TS in 2015.[834] According to Amber Marks, the sticking points in these and previous Spanish cases were: (1) the legal distinction between personal consumption and drug trafficking; and (2) the appropriate balance to be struck between two legal goods, both meriting protection. Public health, on the one hand, and the right to assembly, Section 22 of the Constitution, in the form of cannabis clubs operating for members' personal and shared consumption in the pursuit of individual health, on the other.[835] Essentially, the issue was how to

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[830] Amber Marks, "Defining 'Personal Consumption' in Drug Legislation and Spanish Cannabis Clubs," *International & Comparative Law Quarterly* 68, 1 (2019), 193 and 201-204.
[831] Marks (2019), 204-205.
[832] Emphasis added. Note, however, that the case at issue did not constitute "binding precedent and was largely ignored by lower courts." Marks (2019), 207-208.
[833] Marks (2019), 209 and 211.
[834] For details on these cases see Marks (2019), 211-213.
[835] Marks (2019), 195-197.

separately regulate supply and demand to limit cultivation while tolerating individual and shared use. The TS, unable to bridge the gap, held that the cannabis club members in the 2015 cases should have been convicted of drug trafficking by lower-level courts. This is because, in Marks' summation:

> any permanent structure established for the distribution of successive cultivations to an open-ended number of members would likely be in breach of [the prohibition in] Article 368 [of the criminal code] and that the outcome of each case would depend upon its particular facts…A criminal offence will be committed when a system of cultivation, harvesting or acquisition of drugs is put in place with the objective of distributing it to third parties."[836]

Cannabis clubs are public associations that have the potential to draw in non-users. And while there are things that can be done to prevent the drug's increased visibility and consumption, as highlighted by a group of dissenters in one of the three judgements, Ebers,[837] Spanish jurisprudence indicates that "small is beautiful" when it comes to the limited exemption from prosecution for individuals engaged in the private personal and shared consumption of cannabis. It is unlawful for a cannabis club facilitating personal and shared consumption in private to devolve into a de facto open cannabis market, which violates Spain's treaty obligations.

Germany's Federal Constitutional Court (FCC) considered the constitutionality of the criminalization of the cannabis trade in 1994. It found that there was no "right to be intoxicated"[838] under Article 2 of the Basic Law, which protects the free development of personality, right to life, and physical integrity.[839] Its analysis centered on the proportionality of the legislation, the Intoxicating Substances Act. Among other factors, the possibility of an

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[836] Marks (2019), 212.
[837] "In the minority's opinion, public health endangerment would be avoided when membership is restricted to adult and habitual consumers (in full possession of their self-governing faculties and already dedicated cannabis consumers) including approximately 30 people (in order to ensure that they are known to each other and fixed in number), and their conduct takes place on private premises (to avoid encouraging others)." Marks (2019), 213.
[838] BVerfGE 90, 145 (9 March 1994), accessed 23 February 2021, https://germanlawarchive.iuscomp.org/?p=85.
[839] Basic Law for the Federal Republic of Germany, 23 May 1949.

exemption from prosecution for those caught with insubstantial quantities of cannabis, applying only to "personal consumption and…personal use," and the deference due the legislature on questions of criminal law policy persuaded the FCC to uphold the law. Added to this were Germany's international legal obligations under the 1988 Convention, which require the state to combat the trade in controlled substances and consumer demand and via penal measures. Article 2 does not insulate citizens from the implications of the state's duty to carry out this mission as the conduct in question, cannabis dealing, contributes to the proliferation of trafficking and demand in violation of the drug conventions; to say nothing of drug use's adverse public health impact and effects on the rights of others. With safeguards built into the legislation and a strong state interest in adhering to international law the FCC determined that the strict control, prohibition, suppression, and criminalization of cannabis trading is constitutional. The legislature, it suggested, might consider alternatives to the status quo, but the burden placed on fundamental rights in this instance was deemed proportionate considering the aims pursued.[840] Had the case involved simple possession the outcome may have been different, but the supply of controlled substances is generally treated as a more serious offense and violation of the law than consumption; a conclusion consistent with the drug control conventions.

Since the FCC's decision German prosecutors have continued to exercise discretion regarding consumers in possession of small amounts of cannabis and access to cannabis for therapeutic purposes was legalized and expanded through legislative and judicial intervention in the mid-2010s.[841] The non-medical and non-scientific, or recreational, production, sale, and purchase, however, remain prohibited. Several legalization bills proposed in the 2010s failed to

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[840] BVerfGE 90, 145.
[841] Stefanie Kemme, Kristin Pfeffer and Luise von Rodbertus, "Cannabis policy reform in Germany: Political and constitutional discourses on decriminalization and regulation strategies," *Bergen Journal of Criminal Law & Criminal Justice* 9, 1 (2021), 12-17.

win majority backing at the federal level and further constitutional litigation requires a material change of fact for the FCC to revisit the cannabis question.[842] Chancellor Olaf Scholz's coalition government agreed to work towards creating a legal cannabis market in Germany following its 2021 election victory, holdings public hearings on the issue in the summer of 2022 and aiming to table legislation within a year or two.[843] The Spanish and German cases demonstrate the difficulties involved in squaring the circle of law and policy that depenalizes or decriminalizes demand while at the same time upholding the strict control, prohibition, suppression, and criminalization of supply, as mandated by the IDCS. That the law of supply and demand applies to the drugs trade is no revelation. It is a fair construction of illicit market dynamics to suggest progressive toleration of demand will influence supply and vice versa, increasing demand, supply, and consumption. The effect on public health and the community cannot be ignored. But this does not mean that criminal and policy is consistent with the requirements of constitutional human rights and fundamental freedoms, nor that the arguments in favor of adherence to the strictures of the IDCS are convincing.

The Constitutional Court of Georgia (CCG) reviewed a number of rights and freedoms challenges to the criminalization of the personal possession of cannabis through the mid-to-late 2010s. In 2015's *Tsikarishvili v Georgia* the claimant posited that the sanctions for the personal possession and purchase of large quantities of cannabis violated their rights to dignity and freedom from cruel and unusual punishment. When the case first arose, the punishment was imprisonment for between 7 and 15 years under the Criminal Code. The legislature amended this to 5 to 8 years as the case made its way to the CCG, but the law's normative content remained

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[842] Kemme et al. (2021), 34-38.
[843] Philip Oltermann, "Germany's move to legalise cannabis expected to create 'domino effect,'" *The Guardian*, 1 July 2022, https://www.theguardian.com/world/2022/jul/01/germanys-move-to-legalise-cannabis-expected-to-create-domino-effect.

the same.[844] Tsikarishvili is thus not about decriminalizing or legalizing cannabis, but the constitutionality of the specific provisions imposing jail time on its users.[845] As such, the Court detailed the substantive meaning of human dignity, emphasizing its inviolability and focusing in on its relationship to liberty and other rights and freedoms: individualism, the rule of law, and democracy.[846] "Dignity," it elaborated, "is the foundation of human individuality and [an] equal guarantee to be different from others…based on [one's] own skills, opportunities, taste and individually chosen way of development."[847] And freedom from cruel and unusual punishment is an inviolable right: "there is no legitimate aim sufficiently compelling (territorial integrity, protection of state sovereignty, fight against terrorism, state security, etc.) for achievement of which interference in this right might be justifiable."[848] Combined, the CCG surmised, dignity and freedom from cruel and unusual punishment entail that: "[t]he right to personal inviolability is very important for human liberty – free development, effective and comprehensive exercise of the rights by individual[s]…human liberty does not have an equivalent, there is no value which can counterweight or entirely replace it."[849] This principle is not only based in universal reason.

As a matter of constitutional design and identity, the Court pointed out, Georgia gives primacy of place to rights and freedoms as "supreme and eternal human values."[850] To flesh out the substantive content of these values, the CCG is to look to "historical experience, [the] culture

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[844] *Citizen of Georgia Beka Tsikarishvili v the Parliament of Georgia*, Judgment N1/4/592, I Chamber (24 October 2015), Part II, paras 1-10 and 21. Under Article 17 at the time, now Article 9 after revisions in 2018. See Georgia's Constitution of 1995 with Amendments through 2018, *Constitute*, accessed 8 June 2021, https://constituteproject.org/constitution/Georgia_2018.pdf?lang=en.
[845] *Tsikarishvili* (2015), Part II, para 62.
[846] *Tsikarishvili* (2015), Part II, paras 11-12 and 20.
[847] *Tsikarishvili* (2015), Part II, para 11.
[848] *Tsikarishvili* (2015), Part II, para 19.
[849] *Tsikarishvili* (2015), Part II, para 28.
[850] *Tsikarishvili* (2015), Part II, paras 15-16. Under Article 7 at the time, now Article 4 after revisions in 2018. See Georgia's Constitution of 1995.

of the state, [and] values and legal sentiment of society."[851] The upshot for modern criminal law adjudication is that the state should make punishments amenable to advancing restorative justice, preventing further offenses and recidivism, and reintegrating offenders into society.[852] Judges should mete out sanctions on a case-by-case basis and consider individual characteristics and circumstances at sentencing.[853] People should not be punished or threatened with punishment simply as a means to deter others from committing proscribed acts.[854] The principle of proportionality applies to the exercise of the state's criminal law power. On this basis, and for the first time, the CCG assessed the "constitutionality of certain measures of punishment."[855] While the margin of appreciation regarding criminal law is wide, permitting the state to protect public health, maintain order and security, and secure the rights of others, it "should not be excessive [or] disproportionate."[856] Sovereignty is bounded by the rule of law and the checks and balances imposed by the separation of powers doctrine.

The legitimate aims of drug control, according to the state, include the pursuit of public health "from the dangers derived from narcotics as well as the prevention of drug addiction in the society," among youth especially.[857] The state, citing the Single Convention, argued that it was obligated to prohibit access to cannabis and that imprisonment was an effective means to prevent the possession and use of this widely consumed substance. Not only that, criminalization was considered an effective policy.[858] In the opinion of the Deputy Head of Public International Law at Georgia's Department of Justice, cannabis is "one of the most dangerous narcotic

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[851] *Tsikarishvili* (2015), Part II, para 33.
[852] *Tsikarishvili* (2015), Part II, paras 41 and 45ff.
[853] *Tsikarishvili* (2015), Part II, para 45ff.
[854] *Tsikarishvili* (2015), Part II, paras 52-54.
[855] *Tsikarishvili* (2015), Part II, para 31.
[856] *Tsikarishvili* (2015), Part II, para 32.
[857] *Tsikarishvili* (2015), Part II, para 67.
[858] *Tsikarishvili* (2015), Part II, para 68. See also *Tsikarishvili* (2015), Part I, para 49.

substance[s]" and the Single Convention "requires the State to introduce [the] strictest form of control in relation to [it], which precludes possession and…use on the state territory."[859] The Court responded that for any punishment to be proportionate it "should be determined based on the potential damage the certain substance is capable to incur on [the] health and wellbeing of the society."[860] The expert legal and medico-scientific evidence tendered by the state was inadequate to establish that moderate individual cannabis consumption has a significant direct deleterious impact on the health of the individual, let alone society.[861] The dangers posed by cannabis, the use of which is harmful to the self alone, does not warrant a custodial sentence. As a result, the impugned provision criminalizing users infringed on their constitutional rights and freedoms.[862] That said, "when [the] quantity of narcotic substance is so high that it objectively creates real danger…the state is authorised to set criminal responsibility for it."[863] This pertains only to large quantities intended for trafficking and distribution, which, of course, was not the subject of the case at hand.[864] The Court noted that possession of 50 to 70 grams of cannabis, as per the state's estimation, "does not constitute a quantity which, with high probability, would indicate" intent to participate in the black market.[865] The key to adjudicating borderline situations is case-by-case assessment. The set and setting of the crime and individual character and circumstances of the perpetrator are important factors in deciding the appropriate punishment. The prudent exercise of

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[859] The same individual cited the 1988 Convention as the mandate for the criminalization of possession and trafficking and distribution. *Tsikarishvili* (2015), Part I, para 42. Another state agent submitted that the Convention on Psychotropic Substances precluded Georgia from "us[ing] less strict controlling measures" than those on the books and reiterated the requirement that access to cannabis and other controlled substances was limited to medical and scientific purposes. See *Tsikarishvili* (2015), Part I, paras 39-40.
[860] *Tsikarishvili* (2015), Part II, para 69.
[861] *Tsikarishvili* (2015), Part II, paras 76-88.
[862] *Tsikarishvili* (2015), Part II, para 84.
[863] *Tsikarishvili* (2015), Part II, para 89.
[864] *Tsikarishvili* (2015), Part II, para 89.
[865] *Tsikarishvili* (2015), Part II, paras 92 and 95.

discretion is a necessary part of the judge's role.[866] Blanket prohibitions and the absence of any distinction between personal possession and trafficking and distribution in the legislation makes for "disproportionate punishment."[867] The threshold for holding a law in violation of the constitution and the rights to dignity and freedom from cruel and unusual punishment is "a very high level of intensity," and this was an instance of a "clearly, severely disproportionate" response to the issue at hand.[868] Imprisoning individual cannabis users for harming themselves alone, the CCG held, is a cruel and unusual punishment that instrumentalizes people for the purpose of making an example of them, a violation of the right to dignity.[869]

Judge Terava penned a lone dissent, arguing that a penalty of imprisonment for possession of 70 grams of cannabis is not disproportionate to the crime and therefore not a violation of the rights to dignity or freedom from cruel and unusual punishment, as was found in the German FCC's 1994 decision. The drug trade's dangers, particularly its detrimental effects regarding public health and organized crime, made the criminalization of all its stages, including personal possession, proportionate. It is well within the power of the legislator to choose such a policy. In Terava's view the Court should have limited itself to appraising the question in light of the precise quantity of cannabis in possession in the case before it, rather than authoring a general judgment regarding the purchase and possession of cannabis for personal use.[870] Why the majority did not touch on the congruities between the facts before it and the German judgment is a question only they can answer, but the divergence in outcome is partly explained by Georgia's

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[866] *Tsikarishvili* (2015), Part II, paras 96-97.
[867] *Tsikarishvili* (2015), Part II, paras 98-99.
[868] *Tsikarishvili* (2015), Part II, para 104.
[869] *Tsikarishvili* (2015), Part II, para 105.
[870] *Tsikarishvili* (2015), dissenting opinion.

constitutional commitment, as noted, to rights as a supreme value and matter of constitutional design and identity.

Then, in 2017's *Shanidze v Georgia*, the Criminal Code's provision on the criminalization of the consumption of cannabis, as opposed to personal possession, was challenged as violative of the right to the free development of personality.[871] Shanidze argued that punishing those who use cannabis, which harms the user alone, is unsuited – suitability being an indispensable part of proportionality – to the pursuit of securing public health and public order; the state having purported and presented studies suggesting that cannabis use increases crime rates. Rejecting the evidence submitted by the state as unpersuasive, the CCG posited that while the personal consumption of cannabis is predicated upon the trafficking and distribution thereof, its prohibition is both overly paternalistic and incompatible with a society dedicated to liberty. Self-directed harm does not pose a risk to public health or order at large, and its criminalization unconstitutionally interferes with the right to the free development of personality.[872] The latter entails a right to autonomy in the choice of one's leisure activities, including cannabis consumption.[873]

The CCG restated these findings and principles in *Japaridze and Megrelishvili v Georgia* the following year.[874] At issue was the constitutionality of the prohibition of the purchase, personal possession, and consumption of small quantities of cannabis without a doctor's prescription in light of then Article 16 of the Constitution.[875] The Court held that while the state

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[871] *Citizen of Georgia Givi Shanidze v the Parliament of Georgia*, Judgment N1/13/732, I Chamber (30 November 2017). Article 16 at the time, now Article 12 after revisions in 2018. See Georgia's Constitution of 1995.
[872] *Shanidze* (2017), Part II, paras 18, 37, 48 and 51. For a summary of the decision in English see Constitutional Court of Georgia, "*Citizen of Georgia Givi Shanidze v The Parliament of Georgia*: Abstract," 30 November 2017, https://www.constcourt.ge/en/judicial-acts?legal=1265.
[873] *Shanidze* (2017), Part II, para 12.
[874] *Citizens of Georgia Zurab Japaridze and Vakhtang Megrelishvili v the Parliament of Georgia*, Judgment N1/5/1282, I Chamber (30 July 2018), Part II, para 30 and passim.
[875] *Japaridze and Megrelishvili* (2018), Part I, paras 3-5.

has the right to regulate the drugs trade it must do so proportionately in order to mitigate the health and safety dangers posed by consumption.[876] Concern for youth, increased demand, and an expanded black market notwithstanding,[877] the CCG determined "that [the] absolute and blanket prohibition of Marijuana consumption regardless [of] the circumstances, is not necessary for [the] protection of other individuals or public order."[878] In the explicit language of "living tree constitution constitutionalism," the Court concluded the decision by emphasizing the Constitution and its rights and freedoms commitments as evolutive, always becoming, and based on the exigencies of the present. And while it may be questionable whether liberty entails a right to consume cannabis, "in order to minimize [the] possibility of arbitrary and unjustified interference of the State…in dubio pro libertate (every doubt shall be decided in favour of liberty)."[879] In the age of individualism, autonomy and the right to the free development of personality are at the center of the liberal constitutional order. The law must therefore be flexible enough to accommodate the practice of activities that, though perhaps controversial, pose little to no harm to third parties or the public at large. This principle, the Court declared, is a basic tenet of modern democracy.[880] At the very least, respect for individual freedom has been given exceptional expression in Georgian rights and freedoms jurisprudence.

Other European courts have demonstrated less of a willingness to countenance liberty claims implicating non-medical, non-scientific access to controlled substances. In 2022, Austria's Constitutional Court (CC) decided not to consider an application asserting that the prohibition of cannabis violated rights to private and family life, equality, personal freedom, and

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[876] *Japaridze and Megrelishvili* (2018), Part II, para 13.
[877] *Japaridze and Megrelishvili* (2018), Part II, paras 18-19 and 35.
[878] *Japaridze and Megrelishvili* (2018), Part II, para 36.
[879] *Japaridze and Megrelishvili* (2018), Part II, para 40.
[880] *Japaridze and Megrelishvili* (2018), Part II, para 40.

self-determination because it had no "reasonable chance of success."[881] First, the CC stated, it is up to the discretion of the legislature to choose how to regulate and limit the consumption of "addictive" narcotic and psychotropic substances in pursuit of fulfilling IDCS obligations.[882] Second, the government is not required to control all "equally harmful drugs" in the same way.[883] The Court's adherence to both the separation of powers doctrine and international agreements precluded consideration of the case's merits. Under the Austrian constitutional rights and freedoms paradigm, then, there is no legally compelling connection between individual liberty and access to controlled substances, an assumption consistent with standard interpretations of the drug control treaties. The Court's ruling similarly represents a mainstream understanding of liberal constitutionalism, e.g., that it is not the role of the court to legislate from the bench. Such conventional views are present in the decisions of the CC's apex court peers, further proof that recognition of a nexus between freedom and drugs is a minority position. A Canadian example from nearly 20 years earlier speaks to the paternalism informing the conviction that the legislature may, as of right, pass laws regulating morality.

3.6 A Canadian Conclusion

The Supreme Court of Canada's (SCC) 2003 *R v Malmo-Levine; R v Caine* decision reflected the views of courts in several jurisdictions when it held that Mill's harm principle is not a legal principle.[884] The state may limit the right to liberty and attendant freedoms including privacy and autonomy in the name of, inter alia, protecting public health and securing public order. The criminalization of the possession of controlled substances is within the power of the legislature to

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[881] VfGH G 323/2021-11, V 252-253/2021/11 (1. Juli 2022).
[882] Specifically Single Convention, Article 36, 1971 Convention, Article 5, and 1988 Convention, Article 3(2).
[883] VfGH G 323/2021-11, V 252-253/2021/11 (1. Juli 2022).
[884] *R v Malmo-Levine; R v Caine*, 2003 SCC 74, [2003] 3 SCR 572, paras 102-167.

enact as it is legitimately aimed at preventing the "evil or injurious or undesirable" physical and mental effects caused by their consumption.[885] Even the "absence of proven harm" is insufficient to warrant overturning prohibitionist legislation.[886] "Morality," the SCC recalled, "has traditionally been identified as a legitimate concern of the criminal law…although today this does not include mere 'conventional standards of propriety' but must be understood as referring to societal values beyond the simply prurient or prudish."[887] Even the responsible use of illicit drugs, which constitutes the majority of consumption and has a minimal direct effect on the rights of others, has long offended traditional majoritarian sensibilities. Be that as it may, illicit consumption's association with anti-social behavior, delinquency, and criminality is not conjured out of thin air. Persons, property, and society are routinely harmed as a result of the illicit drugs trade.[888] Nonetheless, opined one of the litigants, altered states of consciousness induced by psychoactive drugs are fun and pleasurable, an end in and of itself, and "analogous to the decision by an individual…whether or not to eat fatty foods."[889] While not a legal argument, statements like this point to the pervasive moral policing that inheres in the justifications for strict control, prohibition, suppression, and criminalization in drug control law and policy. But the language of "evil" that has permeated the framing of drug consumption at the domestic level, a reflection of the standard set by the IDCS, has in recent times been successfully combatted in jurisdictions across the Americas and Europe and South Africa. Constitutional rights and freedoms, and the metaethics of constitutional adjudication underlying their application, can be leveraged in liberal democratic orders to reduce the adverse consequences of the hegemonic and

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[885] *R v Malmo-Levine; R v Caine* (2003), para 73.
[886] *R v Malmo-Levine; R v Caine* (2003), para 115.
[887] *R v Malmo-Levine; R v Caine* (2003), para 77.
[888] See Husak (1992), chapter 3.
[889] *R v Malmo-Levine; R v Caine* (2003), para 84.

punitive drug control regime, but their effect is reformist, not revolutionary. While law and policy has softened vis-à-vis demand because of judicial intervention, supply-side issues preclude more fundamental changes to domestic law and policy.

The frequency with which courts accept the strictures of the drug control conventions speaks to a widespread discounting of the rights and freedoms of people on the receiving end of strict control, prohibition, suppression, and criminalization. Indeed, the selection of cases presented here are outliers. This subsection set out to show the importance of constitutional context and local judicial politics in limiting the extent to which jurisprudence can be adapted to the benefit of drug control reform. It also detailed the importance of individual judges and their legal philosophies in persuading their peers to recognize that the right to liberty, privacy, and autonomy extends to the possession and consumption of cannabis particularly and, potentially, several psychedelic substances; if, that is, the same reasoning is accepted to include their use within the fold of protected private acts. The domestic rules of adjudication can enable broad incorporations of specific foreign legal reasoning, as in South Africa, but courts can also appeal to abstract political theories to support a liberal construction of the right to liberty, privacy, and autonomy, as in Mexico. They can also disregard sister courts and political thought and find that criminalization is a proportionate means to pursue the object of drug control, as in the German, Austrian, and Canadian cases. Or, as with Spain and Georgia, courts can produce innovative readings of the law to expand the scope and meaning of liberty. In any event, references to comparative constitutional law in the decisions discussed above demonstrate the necessity of selective reading and creative application in the borrowing of concepts, analogies, and reasoning from abroad. Domestic constitutional constellations and the politico-ideological constraints of individual societies and cultures preclude a simple transplanting of the jurisprudence on drug

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possession and liberty to broaden the protection of users. Only appeals to universal reason, as construed by liberal thought, seem to cross borders seamlessly and without cross-referencing. The changes that have been made in the jurisdictions discussed in this chapter has depended on largely intrinsic factors. Liberty has no one meaning when it comes to deciding whether the illicit possession and consumption of controlled substances is a matter of individual right.

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Chapter 4: Rights, Freedoms, and the Medical and Religious Use of Drugs

4.1 The Same as it Ever Was

An appraisal of the legal and social implications of the regulation of "Hallucinogens" in the United States appeared in a 1968 edition of the Columbia Law Review. Its exposition of the history of drug control laws in the US focused on how race, class, and "historical accident" created a two-tiered regime of unequal enforcement: one for black, brown, and poor people vis-à-vis cannabis, another for white middle-class hallucinogenic, or psychedelic, users.[890] The federal Drug Abuse Control Amendments Act of 1965 had recently allowed the government to subject psilocybin, LSD, mescaline, and DMT, among other drugs, to prohibition based on their potential for abuse. The criminalization of the possession of hallucinogens, however, was largely undertaken at the state level. But unlike the statutory provisions restricting narcotics and cannabis, the legislation didn't frame strict control as an "all-out war on a criminal class."[891] Race and class prejudices colored the law and its application in such a way as to make the marginalized a "'criminal type,' not likely to get the sympathy from judge or jury that even a shaved and bathed hippie may arouse."[892] Differential treatment of this sort betrayed the Bill of Rights' promise of liberty and equality for all, leading the Columbia Law Review article to ponder whether a better system of regulation is not only required under the Constitution but more effective than prohibition, "a system of control," the unnamed author or authors suggested, that "is fairly clearly a failure."[893] These problems have persisted to today, despite the significant changes in law and policy that have occurred in the last fifty-plus years.

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[890] "Hallucinogens," *Columbia Law Review* 68, 3 (1968), 521-523 and 557-560 (quotation at 539).
[891] "Hallucinogens" (1968), 544-546 (quotation at 545).
[892] "Hallucinogens" (1968), 547.
[893] "Hallucinogens" (1968), 547-548.

This chapter picks up on two themes presented in the 1968 review: (1) religion and spirituality and (2) health, safety, and medical autonomy. On both fronts, the question is whether an exemption from the uniform application of drug control law is mandated by constitutional rights and freedoms. Case law on the religious use of drugs protected the Native American Church's (NAC) sacramental consumption of peyote (mescaline) in California from the mid-1960s.[894] A federal court declined to extend the same freedom to take mind-altering substances to individual spiritual users.[895] Limitations on the Free Exercise Clause of the US Constitution's First Amendment, covering manifestations of religious devotion, may be accepted where there is a compelling state interest in doing so, such as a legitimate concern for public health and safety. These justifications are to be assessed objectively, for it cannot be left to the courts "to decide which faith receives a stamp of approval."[896] However, judges do, in practice, accept certain creeds while dismissing others, as indicated by US American recognition of the NAC's rituals and rejection of New Age spirituality's. Similar conflicts have arisen in other jurisdictions, forcing judges to balance competing interests not always amenable to compromise. The legal principles and cases discussed below demonstrate that a pragmatic solution to the religious use of drugs question remains elusive.

The medical use of controlled narcotic and psychotropic substances has similarly been a live issue from the late 1960s. How far the government should be permitted to go in preventing harm and securing the public's health is at the center of the debate on access to psychedelics for therapeutic purposes. Are competent adults entitled to make their own healthcare decisions without undue government intrusion or excessive regulation? John Stuart Mill returns here as a

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[894] *People v Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal Rptr. 69 (1964).
[895] *Leary v United States*, 383 F.2d 851 (5th Cir. 1967).
[896] "Hallucinogens" (1968), 549-551 (quotation at 549).

retort to those invoking health and safety to justify barring access to medicalized hallucinogens. Indeed, the moral paternalism inherent to drugs legislation, that the prevention of harm and protection of public health override individual liberty and autonomy, fails as a justification for prohibition in the context of medical use, especially so in the case of last resort and end-of-life use. Harm to self in these circumstances is largely inconsequential, as there is no viable alternative treatment available to the patient and any harm that would be done would not change their prognosis.[897] As the subsection that follows shows, the international and domestic regulatory environments have not been conducive to medico-scientific research into the safety and efficacy of Scheduled psychedelic drugs. The upshot has been decades of restricted access to possibly lifesaving and life-enhancing substances, despite the paucity of evidence to warrant their strict control, prohibition, suppression, and criminalization. Litigation, activism, and indefatigable compliance with byzantine bureaucratic requirements has changed the picture to a great extent, as has the persistent demand for and market in chemicals inducing altered states of consciousness.

Constitutional rights and freedoms have played a critical role in challenging the international drug control system's (IDCS) model of strict control, prohibition, suppression, and criminalization, but the results of test litigation and legal action have been mixed. Melissa Bone contends that the scope of human rights protections in drug control are limited to a narrow construction of religion, the medical model of disease, and the exemption of vulnerable, clearly defined groups from generally applicable laws to the exclusion of most of the public. [898] Regardless, the situation is rapidly changing in response to sociocultural change and medico-

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[897] On the law, morality, and harm debate see "Hallucinogens" (1968), 554-557. See also Joel Feinberg, *The Limits of the Criminal Law, Volume 3: Harm to Self* (Oxford: Oxford University Press, 1989), esp. 127-134.
[898] Bone (2020), 160.

scientific innovation. This chapter will detail the impediments to, and possibilities for, drug law and policy reform in the fields of religious and medical consumption. It outlines how the unequal treatment of certain races and classes remains a salient feature of drug control regimes and that the changes now unfolding reflect their continued relevance for the future. Before turning to the efforts of religious individuals and groups to secure constitutional insulation from the criminalization of drug consumption, however, the centrality of medicalization and commodification in legitimizing the taking of controlled substances is presented.

4.2 Psychedelics, Regulation, and the Path to Medicalization

A period of investigation into the chemical properties and medical utility of psychedelic drugs flourished in the Postwar era.[899] In the 1950s and 1960s, scientific optimism declined as negative political and popular associations of psychedelics with the counterculture proliferated, inspiring a backlash exemplified by US President Richard Nixon's declaration of the War on Drugs in 1971. These developments are reflected in international and domestic law, as access to psychedelics, including psilocybin (mushrooms), LSD (acid), MDMA (ecstasy), mescaline (peyote), and DMT (ayahuasca), remains severely curtailed under the United Nations' drug control treaties. From the 1970s to the 1990s, institutional research into the therapeutic potential of psychedelics was significantly hampered. The founding of private not-for-profit charitable organizations like the Multidisciplinary Association for Psychedelic Studies (MAPS) in the US in the late 1980s and the Beckley Foundation in the UK in the late 1990s brought renewed attention and funding to psychedelic therapy studies and drug policy reform.[900] Beginning in the 2000s and picking up

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[899] Ben Sessa, "A Brief History of Psychedelics in Medical Practices: Psychedelic Medical History 'Before the Hiatus,'" in J. Harold Ellens et al. (eds), *The Psychedelic Policy Quagmire: Health, Law, Freedom, and Society* (Santa Barbara: Praeger, 2015).

[900] Ben Sessa, "Continuing History of Psychedelic in Medical Practices: The Renaissance of Psychedelic Medical Research," in J. Harold Ellens et al. (eds), *The Psychedelic Policy Quagmire: Health, Law, Freedom, and Society* (Santa Barbara: Praeger, 2015).

momentum in the 2010s, psychedelic medicine, the therapeutic use of psychotropic substances in the treatment of serious mental health conditions like addiction and post-traumatic stress disorder as well as in palliative care, is now experiencing a "renaissance" in funding, research, and public awareness.[901] Clinical trials of psychedelic drugs are possible and have occurred in several jurisdictions despite notable regulatory barriers.[902] Recall that "the manufacture, export, import, distribution…trade in, and use and possession of" psychedelics is restricted "to medical and scientific purposes" alone under Article 5 of the Convention on Psychotropic Substances. These include well-regarded institutions like the Centre for Psychedelic Research at Imperial College London, the Center for Psychedelic Medicine at New York University, the Johns Hopkins Center for Psychedelic and Consciousness Research at Johns Hopkins University, the Human Behavioral Pharmacology Lab at the University of Chicago, and the Transdisciplinary Center for Research in Psychoactive Substances at the University of Wisconsin-Madison's School of Pharmacy. But the re-emergence and rise of psychedelic science and medicine has not been the primary driver of legal and policy reform. Instead, demand for effective mental health treatment has. State power and political constraints fetter such innovation and play a central role in delineating the realm of what is legally permissible and possible.

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[901] See Kenneth W. Tupper et al., "Psychedelic medicine: a re-emerging therapeutic paradigm," *Canadian Medical Association Journal* 187, 14 (October 6, 2015): 1054-1059; Ben Sessa, *The Psychedelic Renaissance: Reassessing the Role of Psychedelic Drugs in 21st Century Psychiatry and Society*, Second Edition (London: Muswell Hill Press, 2017); Michael Pollan, *How to Change Your Mind: What the New Science of Psychedelics Teaches Us About Consciousness, Dying, Addiction, Depression, and Transcendence* (New York: Penguin, 2018); Michael Winkelman and Ben Sessa (eds), *Advances in Psychedelic Medicine: State-of-the-Art Therapeutic Applications* (Santa Barbara: Praeger, 2019).

[902] See Mason Marks, "Psychedelic Medicine for Mental Illness and Substance Use Disorders: Overcoming Social and Legal Obstacles," 21 *NYU Journal of Legislation & Public Policy* 69 (2018): 69-140; Jonathan Perry, "Mending Invisible Wounds: The Efficacy and Legality of MDMA-Assisted Psychotherapy in United States' Veterans Suffering with Post-Traumatic Stress Disorder," 29 *Journal of Law & Health* 272 (2016): 272-301; Kathryn L. Tucker, "Psychedelic Medicine: Galvanizing Changes in Law and Policy to Allow Access for Patients Suffering Anxiety Associated with Terminal Illness," 21 *Quinnipiac Health Law Journal* 239 (2018): 239-258.

As Naomi Burke-Shyne and others argue, highlighting contemporary research on the therapeutic potential of MDMA, cannabis, and LSD and the legal barriers imposed thereon by the IDCS, public health and human rights are better served by an emphasis on research and development rather than the current system of strict control, prohibition, suppression, and criminalization.[903] As it stands, and as with the Single Convention, the 1971 Convention interferes with the right to health, the right to access essential medicines, and the right to enjoy the benefits of scientific progress through its near-universal domestic legislative bases and concomitant regulatory structures.[904] The right to enjoy the benefits of scientific progress can only be realized where freedom of scientific inquiry and research prevails. Though not an absolute right, it compels states to aim for the creation of a legal and policy environment conducive to producing social benefits and improved public health, to be accessible and enjoyed by all.[905] For the notion of "medical and scientific purposes" to evolve there must be law and policy in place that enables the medico-scientific community to freely pursue queries and produce knowledge, particularly through clinical research with human subjects. The IDCS inhibits the evolution of medical science and frustrates the ability of states to permit experiments with innovative treatments and therapies using psychotropic substances. A state's willingness to allow psychedelic-assisted medicine certainly plays a pivotal role in limiting such projects, but the stringent fundamentals of the treaty regime ultimately delimit the horizon of what national law and policymakers deem possible.

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[903] Naomi Burke-Shyne et al., "How Drug Control Policy and Practice Undermine Access to Controlled Medicines," *Health and Human Rights* 19, 1 (2017): 237-252. See also Ben Sessa and David Nutt, "Editorial: Making a medicine out of MDMA," *British Journal of Psychiatry* 206 (2015): 4-6.
[904] Burke-Shyne et al. (2017).
[905] United Nations Development Programme et al. (2019), 10; Audrey R. Chapman, "Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications," *Journal of Human Rights* 8, 1 (2009): 1-36.

When administered in a therapeutic setting psychedelics like psilocybin and DMT, among others, have shown promise in treating a wide range of "spiritual, physical, psychological, and social maladies," including, inter alia, treatment-resistant depression, cluster headaches, obsessive-compulsive disorder, alcoholism, addiction, PTSD, end-of-life anxiety, wasting syndrome, and Parkinson's disease.[906] Psychedelics are also "likely to play an important therapeutic role for certain conditions in post-COVID-19 clinical psychiatry."[907] The chemical, physiological, and neuroscientific mechanisms by which these substances effect change vis-à-vis each disease or disorder are beyond the scope of this project, but in broad strokes psychedelics are said to encourage psychointegration via their "effects on neural, sensory, emotional, and cognitive processes [that] enhance consciousness through integrating normally unconscious emotional and self-formation into the frontal cortex and consciousness."[908] Put otherwise, psychedelics interrupt and alter the functioning of the brain's regular neural pathways and receptors, like the default mode network and frontoparietal task control network, allowing new and novel connections to be established by breaking up problematic thought patterns, giving patients the opportunity to refashion the way they view and understand themselves.[909] Researchers emphasize the importance of set and setting in the clinical context, i.e., the patient's mindset and their social and physical surroundings, which requires a trained psychotherapist guiding each session under close medical supervision, among other elements.[910] Delivered in a

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[906] Michael J. Winkelman, "Psychedelic Medicines," in J. Harold Ellens et al. (eds), *The Psychedelic Policy Quagmire: Health, Law, Freedom, and Society* (Santa Barbara: Praeger, 2015), 93 and 103-110; Mitch Earlywine and Mallory Loflin, "Therapeutic Hallucinogens: Altered State Laws for Altered States," in J. Harold Ellens et al. (eds), *The Psychedelic Policy Quagmire: Health, Law, Freedom, and Society* (Santa Barbara: Praeger, 2015), 330-334.
[907] J.R. Kelly et al., "Psychedelic science in post-COVID-19 psychiatry," *Irish Journal of Psychological Medicine* 38 (2021), 95.
[908] Winkelman (2015), 109.
[909] For the technical details see Kelly et al. (2021).
[910] Winkelman (2015), 109-114.

structured manner under a well-thought-out regulatory environment and fully vetted for safety and efficacy, psychedelic-assisted therapy possesses great potential for the future of psychiatry and psychotherapy. Its future, however, is not up to science and medicine to work out on their own.

Whether drugs are controlled via the logic of public health, market principles, or criminal law is often more a matter of socio-cultural norms and ideology rather than the hard, evolving facts of medicine and science. As such, the distinction between therapeutic and recreational drug use is vehemently contested. The legal status and regulation of access to individual narcotic and psychotropic substances is often left to the political process and litigation to tease out, with the result that consumers, as rational actors in the market for mental health treatment, are routinely left to navigate the ins and outs of psychopharmacology on their own. The convergence of purchasing power and political voice, however, gives interest groups the ability to mobilize their preferences in the political-legal arena to reframe the debate on what constitutes licit and illicit consumption, changing social and cultural mores as well as the administrative apparatus.[911] There are, of course, objective criteria that must be met to alter the regime governing controlled substances, which can lead to the transformation and medicalization of the formerly illicit into the licit.

Under the United States of America's Controlled Substances Act (CSA) the federal Attorney General (AG) has the power to add, transfer, and remove controlled substances from the legislation's five classificatory Schedules, which constitute a sliding scale indicating a drug's risk to benefit differential and determine the extent to which it is accessible for medical use.[912]

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[911] Kimani Paul-Emile, "Making Sense of Drug Regulation: A Theory of Law for Drug Control Policy," *Cornell Journal of Law and Public Policy* 19, 3 (2010): 691-740.
[912] 21 USCA, § 811(a)(1) and (2).

Schedule I substances are subject to strict control, i.e., prohibition, because they have "(A)…a high potential for abuse. (B)…no accepted medical use in treatment in the United States. (C)…[and] a lack of accepted safety for use…under medical supervision."[913] Schedule V substances, by contrast, have "(A)…a low potential for abuse relative to the other drugs…(B)…a currently accepted medical use treatment in the United States. (C)…[and] limited [potential for] physical dependence or psychological dependence[.]"[914] So, before making a scheduling decision the AG must carefully consider and weigh eight factors:

(1) [The substance's] actual or relative potential for abuse.
(2) Scientific evidence of its pharmacological effect, if known.
(3) The state of current scientific knowledge regarding the drug or other substance.
(4) Its history and current pattern of abuse.
(5) The scope, duration, and significance of abuse.
(6) What if any, risk there is to the public health.
(7) Its psychic or physiological dependence liability.
(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.[915]

The Schedules and attributes considered in the classification process give the process the appearance of impartiality, but abuse potential, accepted medical use, and safety are scientifically and linguistically contestable concepts.[916] They are also not the only things determining a drug's categorization. Political calculus and moral perspectives, too, condition the perception of whole classes of drugs, like psychedelics, as well as individual substances, like cannabis.

The Drug Enforcement Administration (DEA) is the US federal agency responsible for overseeing and enforcing the CSA. It has significant discretion in determining whether substances in Schedules III, IV, and V have an accepted medical use and may be prescribed by

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[913] 21 USCA, § 812(b)(1).
[914] 21 USCA, § 812(b)(5).
[915] 21 USCA, § 811(c).
[916] See Husak (1992), 28-37.

physicians. The DEA can carry out reviews of Scheduled substances on its own initiative and accepts petitions for review from third parties, including pharmaceutical companies, NGOs, and individuals, "to add, delete, or change the schedule of a drug or substance," after which it carries out an investigation in consultation with the Department of Health and Human Services, the FDA, and the National Institute on Drug Abuse before making a final determination on the medical and scientific merits of the case.[917] To have an accepted medical use controlled substances must have a clearly defined chemistry, be demonstrably safe and effective (as substantiated by randomized controlled trials), their use must have support among experts within the medico-scientific community, and the evidentiary basis upon which it has been determined to be safe and effective must be publicly accessible.[918] Psychedelics and their brethren would therefore first have to be removed from Schedules I and II to have a chance at becoming legitimized by the DEA. Even if this were done, however, does not mean the agency would necessarily be disposed toward accepting the evidence tendered by applicants or litigants in support of medical use. The DEA is the legitimate gatekeeper of accepted medical use and, where ambiguity arises as to the meaning of a term or phrase like accepted medical use, it has broad discretionary authority to interpret its statutory and regulatory mandate and, by extension, execute such an understanding in its decision-making capacity, so long as its interpretations and decisions are reasonable.[919] This power does not always satisfy litigants. The Administration's long-time intransigence regarding recognizing the use of cannabis for therapeutic purposes as

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[917] Drug Policy Alliance and the Multidisciplinary Association for Psychedelic Studies, "The DEA: Four Decades of Impeding and Rejecting Science," in J. Harold Ellens et al. (eds), *The Psychedelic Policy Quagmire: Health, Law, Freedom, and Society* (Santa Barbara: Praeger, 2015), 359-362 (quotation at 361).
[918] 21 USCA, § 812(b)(3)-(5) cited in *Americans for Safe Access v Drug Enforcement Admin*, 706 F.3d 438 (D.C. Cir. 2013), 441.
[919] This judicial standard is known as Chevron Deference in administrative law. *Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Administrative agencies also have discretion in interpreting their in-house regulations as per the Auer Deference doctrine. *Auer v Robbins*, 519 U.S. 452 (1997).

legitimate medical use, for instance,[920] demonstrates to critics the weakness of facts, evidence, and litigation in the face of bureaucratic power.[921] As the Drug Policy Alliance and Multidisciplinary Association for Psychedelic Studies (MAPS) argue, two organizations familiar with the agency's intransigence, the DEA is quick to ban substances and will exert all of the administrative might it can muster to counter attempts to move its hand and reclassify drugs it considers dangerous and of no medical utility, as it did with MDMA in the 1980s.[922]

The Food and Drug Administration (FDA), the US federal agency in charge of approving and regulating controlled substances for medical use, assesses the efficacy and safety of drugs before they go to market. One of the most powerful regulatory-administrative organizations in the United States, the FDA's model of drug control has been exported to jurisdictions around the world: "no other sector of global regulation…has witnessed so great an emulation of U.S. organizational structure, procedures, and standards as has the realm of global pharmaceuticals."[923] Balancing the encouragement of innovation with the protection of public health, the FDA is the gatekeeper of the licit-illicit and medical-recreational divide, with "the power to sculpt medical and scientific concepts, and ultimately the power to influence the lives and deaths of citizens."[924] It polices this boundary largely via the randomized control trial (RCT), considered the "gold standard" of evidence-based medicine. In RCT experiments, patients are divided into treatment and control groups. The former receives the substance under investigation,

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[920] See the SCOTUS's rejection of an attempt to force the DEA to review and reschedule cannabis in *Americans for Safe Access* (2013).
[921] Regarding cannabis see Jasen B. Talise, "Take the Gatekeepers to Court: How Marijuana Research under a Biased Federal Monopoly Obstructs the Science-Based Path to Legalization," *Southwestern Law Review* 47, 2 (2018): 449-470.
[922] Drug Policy Alliance and the Multidisciplinary Association for Psychedelic Studies (2015), 362-365.
[923] Daniel Carpenter, *Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA* (Princeton: Princeton University Press, 2014), 22-23.
[924] Carpenter (2014), 1 and 15-19; Anna B. Laakman, "Collapsing the Distinction Between Experimentation and Treatment in the Regulation of New Drugs," *Alabama Law Review* 62, 2 (2011): 305-350.

the latter a placebo. In this way, RCTs are designed to prevent unscientific, subjective feelings from obfuscating objective results. Medical researchers and psychopharmacologists rely on the rigor of RCTs to produce and reproduce experimental findings, which ultimately inform evidence-based drug policy. Though not devoid of ideological foundations, relying as they do on the power of the state and medico-scientific establishment to the exclusion of participants' "internal" perspectives,[925] RCTs are crucial in substantiating the claims of researchers and corporations indicating controlled substances have safe and effective medical applications. The FDA's culture of bureaucratic conservatism, however, makes it averse to approving any drug that might pose a threat to users, which inadvertently means that many potentially safe and effective substances are rejected in an overabundance of caution.[926] On top of a culture of institutional intransigence are the administrative and regulatory burdens imposed on scientific researchers, including gaining a license from the authorities to clinically administer Schedule I substances, finding a legal source for the drug to be studied in a strictly controlled supply chain, onerous and expensive record-keeping requirements, and winning funding to carry out clinical trials in an academic environment made hostile to the mere idea of dispensing psychedelic drugs. It takes a substantial amount of time and money to clear these hurdles. As a result, a feedback loop has arisen whereby the negative reputation attributed to psychedelics makes it difficult to establish whether they are harmful or safe and effective mental health medical interventions.[927]

The United Kingdom's Misuse of Drugs Act 1971 (MDA) and Misuse of Drugs Regulations 2001 similarly established a set of harm-based schedules governing access to controlled substances; Classes A, B, and C in the former, Schedules 1 through 5 in the latter. The

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[925] Bone (2020), 116 and 181; Laakman (2011).
[926] Laakmann (2011), 319-321.
[927] Nutt et al. (2013); James J.H. Rucker, Jonathan Iliff and David J. Nutt, "Psychiatry & the psychedelic drugs. Past, present & future," *Neuropharmacology* 142 (2018): 200-218.

system is professed to have incorporated "a [more] flexible, organic" approach to scheduling whereby drugs "could move up and down its classification scale, according to scientific evidence as it emerged."[928] Under the MDA, the expert Advisory Council on the Misuse of Drugs is vested with assessing whether a drug is "likely to be misused," that such misuse "is having or appears to them capable of having harmful effects sufficient to constitute a social problem," and may recommend to the government measures to be taken to mitigate the risk associated with it.[929] By an Order in Council, i.e., executive order, the government may then add, transfer, or remove a drug from the schedules.[930] The relative straightforwardness of the process and discretionary powers granted to the minister responsible for overseeing the legislation's implementation[931] belie the fact that the tenor of the law is to prevent "misuse" rather than enable access and use of any sort. With the passage of the Psychoactive Substances Act 2016 (PSA), aimed at interdicting psychoactive substances[932] that "produce[] a psychoactive effect in a person if, by stimulating or depressing the person's central nervous system, it affects the person's mental functioning or emotional state"[933] and elude existing drug control laws and regulations under the MDA, the UK positioned itself as an innovator in the struggle for a "permanently disintoxicated society."[934] The PSA allows the authorities to swiftly prohibit any substance that induces an altered state of consciousness, directly or indirectly, without providing a medical

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[928] Bone (2020), 91 and 98.
[929] Misuse of Drugs Act (c 38), §1(2).
[930] MDA, §2(2).
[931] E.g., MDA, §7 (Authorisation of activities otherwise unlawful under fore-going provisions) and §22 (Further powers to make regulations).
[932] Also known as "legal highs" or novel psychoactive substances (NPS).
[933] Psychoactive Substances Act 2016 (c 2), §2(2).
[934] See Stuart Walton, "Honor'd in the Breach: Contravention and Consensus in the History of Substance Prohibition," in Susannah Wilson (ed), *Prohibitions and Psychoactive Substances in History, Culture and Theory* (New York: Routledge, 2019).

benefit.[935] The scope for drug reform based on medical and scientific evidence has markedly contracted in the UK. This is not a law and policy aberration, however, as the PSA aligns with the IDCS's mission of creating a "drug free world" through the elimination of the "evil" of drug (ab)use.

In practice then, the scheduling decisions made by the US AG, the analyses undertaken by the DEA, and the FDA's review process constitute less than science-first approaches to policymaking. The UK's regulatory scheme likewise asserts a manifest commitment to neutrality, but recent legislation betrays a not-so-latent bias against insobriety. Objectivity, in medicine, science, law, and policy, is not value-free. The strict control of Schedule I substances in the 1971 Convention and national legislation in the US and UK, among others, has made it almost "impossible" for researchers to assess the therapeutic potential of substances like psilocybin, LSD, MDMA, mescaline, DMT, and cannabis.[936] While administrative decisionmakers have formal rules governing the regulation of controlled substances that ostensibly put science first, the reality is there is a transnational institutional presumption against access to them, even for medical and scientific purposes.[937] Reform efforts via regulatory review, which could lead to the medicalization and acceptance of psychedelic-assisted therapy in mental health treatment, must therefore engage with the power, politics, and culture behind bureaucratic regulatory organizations to have a chance at persuading decisionmakers on medical and scientific

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[935] On the possession and supply of nitrous oxide for non-scientific, non-medical purposes and its unsuccessful framing as a "medicinal product" exempted from the scope of the PSA see *R v Chapman*, [2017] EWCA Crim 1743; Rudi Fortson, "The Psychoactive Substances Act 2016, the 'medicinal product' exemption and proving psychoactivity," *Criminal Law Review* 2 (2018): 228-240. On direct vs. indirect psychoactive effects see *R v Rochester*, [2018] EWCA Crim 1936.
[936] Nutt et al. (2013).
[937] See Alex Kreit, "Controlled Substances, Uncontrolled Law," 6 *Albany Government Law Review* 101 (2013): 332-358.

grounds. These are significant barriers, to say the least, implicating as they do the structure of government and nature of the regulatory state in liberal democratic orders.

Susan Rose-Ackerman has recounted how "the regulatory state emerged over the course of the twentieth century, [while] administrative law helped to mediate the exercise of public power."[938] Regulatory agencies make rules, set standards, and render and enforce decisions in accordance with the powers delegated to them by the legislative and executive branches of government. Policymaking authority can be limited by judicial review in instances where constitutional human rights and fundamental freedoms are implicated in the exercise of delegated power, but review of "the merits of broad policy choices" are generally beyond the judiciary's remit.[939] Insulating regulatory agencies from overreach by the judiciary is designed to ensure "neutral professionals with the time and technical knowledge…make competent, apolitical choices."[940] Judges and administrative decision-makers are, after all, often unqualified to intervene in areas requiring extra-legal expertise. To restrain the urge to intercede administrative bodies are bound by natural justice, or the internal morality of administrative law, which imposes substantive limits and procedural safeguards on the exercise of executive power to secure the rule of law.[941] For example, the rationale behind a rule, regulation, or decision can't be arbitrary, vague, or detrimental to its subject's reliance.[942] The courts are empowered to ensure these limits and procedures are respected.[943] When refereeing constitutional disputes the courts must not simply accept the findings of regulatory agencies as controlling. Nor are they to assume a wholly

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[938] Susan Rose Ackerman, "The Regulatory State," in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), 685.
[939] Ackerman (2012), 679-681.
[940] With accountability mechanisms built into the "statutory scheme" under which regulatory agencies operate. Ackerman (2012), 677.
[941] Cass R. Sunstein and Adrian Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Cambridge, MA: Harvard University Press, 2020), 8-9, 117-118 and passim.
[942] Sunstein and Vermeule (2020), 72-73.
[943] For an account and defense of the modern regulatory state see Sunstein and Vermeule (2020).

deferential stance toward the evidentiary record produced during the "legislative fact-finding" process. The court's role is to assess the compatibility of regulatory and legislative decision-making with constitutional rights and freedoms and, as such, carry out a "searching review" of what is presented by litigants.[944] When up against the Bill of Rights in the US, the AG, DEA, and FDA, depending on the nature of the case, must satisfy the legal tests established for adjudicating the contestation of their decisions in light of human rights and fundamental freedoms. Judicial presumptions of bureaucratic rectitude and wide discretion mean rights and freedoms are far from guaranteed to prevail over administrative power.

The relative harms of drug use must be assessed by law and policymakers, regulators, and adjudicators in an open, evidence-based procedural context. Though expert opinion alone should not dictate drug control programs. Neuropharmacologist David Nutt, for instance, has proposed an alternative regulatory framework to conventional scheduling by which laypersons can assess the individual and social impact of controlled substances to make informed decisions for themselves, at once limiting the power of government regulators and better securing constitutional rights and freedoms.[945] Medicine and science should be at the center of such analyses, but not to the detriment of other factors favoring increased access to narcotic and psychotropic drugs, such as rights to autonomy and voluntariness. How health is framed and understood is a key component in a fair assessment of what makes for legitimate medical use. The WHO, for one, defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[946] This is a relatively broad conception whose content is open to debate. A narrow interpretation of health, however, disregards

[944] *City of Boerne v Flores*, 521 U.S. 507 (1997), 519-520 and 536 cited in Brandeis (2012), 220.
[945] David Nutt et al., "Drug harms in the UK: A multicriteria decision analysis," *Lancet* 376 (2010): 1558-1565.
[946] Constitution of the World Health Organization, https://www.who.int/governance/eb/who_constitution_en.pdf, preamble.

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individual lived experience and the reality of numerous un- and under-addressed contemporary mental health crises. As neuroscientist Carl L. Hart put it, "[t]here are no cures in psychiatric medicine…We merely have medications and therapies that treat symptoms, and this allows patients to function better, despite their illnesses."[947] This being the case, it is essential that novel pharmacological options are explored to treat, or at least mitigate, the effects of mental health disorders. Based on past studies and more recent findings, Schedule I psychedelics "may offer better treatment options than those that currently exist and pose potentially the same or even less risk than do legal psychoactive…and nonpsychoactive…substances."[948] The current scheduling paradigm restricts this potentiality and in so doing deprives individuals of control over their health and quality of life. Given the absence of a clear distinction between "medical use" and "drug abuse," even in the US's comprehensive Controlled Substances Act, it is arbitrary to maintain prohibition for its own sake in the absence of compelling evidence vis-à-vis its necessity.[949] The strict regime governing psychedelics remains an impediment to research into their safety, efficacy, and use as medicine, which in turn deprives patients of access to treatment that may lead to a state of well-being consistent with the WHO's definition of health and their constitutional rights and freedoms.

The line distinguishing legitimate therapeutic intervention, deemed medically necessary, from what are commonly referred to as biotechnological enhancements, used to voluntarily alter or modify one's identity, is particularly problematic in this regard. Why is it that those with diagnosed mental health disorders are considered suitable candidates for psychedelic-assisted therapy while those seeking an altered, expanded, or improved mental state are foreclosed from

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[947] Carl L. Hart, *Drug Use for Grown-Ups: Chasing Liberty in the Land of Fear* (New York: Penguin, 2021), epub.
[948] Kenneth V. Iserson, "'Go Ask Alice': The Case for Researching Schedule I Drugs," *Cambridge Quarterly of Healthcare Ethics* 28 (2019), 168.
[949] Matt Lamkin, "Legitimate Medicine in the Age of the Consumer," *UCD Law Review* 53, 1 (2019), 392-394.

doing so? Are social problems not apt to be treated in a similar manner? Are diagnostics determinative? Regulators, as noted above, are to ensure the safety and efficacy of drugs to protect public health. While this is paternalistic, done for the society's "own good," there are sound public health reasons, e.g., harm prevention, to preclude a free-for-all in the medical marketplace. That said, the division between therapy and enhancement is often made on moral grounds, instrumentalized as a form of social control to police deviance and ensure conformity. Individuals are not trusted to make decisions regarding who or what they are or want to become through medical intervention.[950] These justifications are combined with arguments regarding the fact that substances like cannabis do not fit the medical model employed by the medico-scientific community and its governmental overseers. As such, it and other controlled substances, the argument runs, should not be accessible and ought to remain subject to the restrictions imposed on Schedule I drugs.[951] This and the moralization of drugs and drug use, evidenced in previous chapters as part and parcel of the institutional and legal edifice at the international and national levels, makes it so that those seeking access to controlled substances like psychedelics must reframe their desire to take them as medically necessary: "identity-modifying interventions" are thus transformed into "treatments for illnesses."[952] Rather than regarding quotidian behaviours as reasonable responses to social and environmental stimuli, medicalization pathologizes the "normal" as a disease or disorder requiring medical treatment.[953] The idea here is that the ailment is manufactured to warrant the remedy, which renders it illegitimate and medically unnecessary.

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[950] Matt Lamkin, "Regulatory Identity: Medical Regulation as Social Control," *BYU Law Review* 501 (2016), 503-506.
[951] Claire Frezza, "Medical Marijuana: A Drug Without a Medical Model," *Georgetown Law Journal* 101 (2013): 1117-1145.
[952] Lamkin (2016), 554 and 560.
[953] Jessica Flanigan, *Pharmaceutical Freedom: Why Patients Have a Right to Self-Medicate* (Oxford: Oxford University Press, 2017), 97-98.

The medicalization, or pharmaceuticalization, of psychedelics in the treatment of mental health disorders reflects the "mainstreaming of psychedelics" in white middle-class liberal society, which prioritizes safety, efficacy, and the potential for profit over equity and fairness in drug enforcement. As a corollary, the contrast between "illicit" and "mis-" use remains the dominant paradigm differentiating "good" users from "bad." This may lead to the creation of "bifurcated [drug control] schedules" wherein a privileged class of consumer is permitted to take psychedelics for medical purposes while non-sanctioned consumption remains criminalized, reproducing the inequalities already built into the drug control system instead of transforming and overcoming them.[954] In early 2022, for instance, Health Canada decided to expand its special access program to authorize the use of psilocybin and MDMA for "emergency medical treatment," exempting these substances from certain strictures of the Controlled Drugs and Substances Act while preserving the general prohibition on non-medical use.[955] The Biden Administration and Congress are also aiming to pass legislation enabling psychedelic-assisted therapy with MDMA and psilocybin by the end of his term in 2024. As a matter of policy, the planned expansion of access to controlled substances for therapeutic purposes in the US is a response to the severe mental health crisis facing its military veterans.[956]

In 2016 the US Department of Veterans Affairs' National Center for PTSD recorded that 1 in 5 of the 4.2 million personnel that served in Operation Enduring Freedom in Afghanistan and Operation Iraqi Freedom suffered from PTSD.[957] Between 2001 and 2016 the suicide rate for

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[954] Tehseen Noorani, "Making psychedelics into medicines: The politics and paradoxes of medicalization," *Journal of Psychedelic Studies* 4, 1 (2019): 34-39.
[955] Government of Canada, "Subsection 56(1) class exemption for practitioners, agents, pharmacists, persons in charge of a hospital, hospital employees, and licensed dealers to conduct activities with psilocybin and MDMA in relation to a special access program authorization," *Health Canada*, 5 January 2022, https://bit.ly/3Kq8b41.
[956] Mattha Busby, "Biden Administration Plans for Legal Psychedelic Therapies Within Two Years," *The Intercept*, 26 July 2022, https://theintercept.com/2022/07/26/mdma-psilocybin-fda-ptsd/.
[957] U.S. Department of Veterans Affairs, National Center for PTSD, "How Common Is PTSD?" 3 October 2016, https://www.ptsd.va.gov/public/PTSD-overview/basics/how-common-is-ptsd.asp; U.S. Department of Veterans

veterans increased by 35% overall. For female veterans the suicide rate rose by 85%.[958] The number of veterans who sought mental health treatment did grow from the start of the War on Terror to the American withdrawal from Iraq in 2011, but "approximately 6 of every 10 soldiers meeting self-reported criteria for PTSD [and] MDD [major depressive disorder]," determined one study, "are not utilizing mental health services."[959] And of the returning veterans who have sought support, according to the Substance Abuse and Mental Health Services Administration, only half received "adequate care."[960] New means are needed to address the emergency. MDMA, among other psychedelics, has been highlighted as an innovative option for those servicemen and women for whom conventional treatment options have failed, necessitating a change in the Scheduling regime and professional attitudes towards the application of psychedelic substances in medicine.[961] Desperate to combat the psychological consequences of their service to the United States individual veterans have not waited for law and policy change, turning to indigenous ceremonies in South America and small clinical trials stateside for access to these strictly controlled substances.[962] If there is one group in the US that garners near-universal admiration and respect it is the military. As President Donald Trump stated before an announced expansion of mental health services for veterans in 2018: "We will not rest until all of America's

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Affairs, National Center for Veterans Analysis and Statistics, "Profile of Post-9/11 Veterans: 2016," March 2018, https://www.va.gov/vetdata/docs/SpecialReports/Post_911_Veterans_Profile_2016.pdf, 2.

[958] Dave Philipps, "Suicide Rate Among Veterans Has Risen Sharply Since 2001," *The New York Times*, 8 July 2016, 12. For full statistics see U.S. Department of Veterans Affairs, Office of Suicide Prevention, "Suicide Among Veterans and Other Americans 2001-2014," 3 August 2016, updated August 2017, https://www.mentalhealth.va.gov/docs/2016suicidedatareport.pdf.

[959] Phillip J. Quartana et al., "Trends in Mental Health Services Utilization and Stigma in US Soldiers from 2002 to 2011," *American Journal Public Health* 104, 9 (2014), 1678.

[960] U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, "Veterans and Military Families," 15 September 2017, https://www.samhsa.gov/veterans-military-families.

[961] Perry (2016).

[962] See veterans' accounts in Ryan Dube, "Is Peru's Psychedelic Potion a Cure or a Curse?" *The Wall Street Journal*, 29 April 2016, https://www.wsj.com/articles/is-perus-psychedelic-potion-a-cure-or-a-curse-1461944415; Virgil Huston, "The Veteran: Psychedelics for PTSD: What a Long Strange Trip It's Been," *MAPS*, 2 June 2016, https://maps.org/news/media/6230-the-veteran-psychedelics-for-ptsd-what-a-long-strange-trip-it-s-been.

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great veterans receive the care they have earned through their incredible service and sacrifice to our country."[963] Veterans cannot but be seen as legitimate users of psychedelic substances in this context, paving the way for greater access for medical and scientific purposes for the civilian population.

Academics, lawyers, and litigants have been pushed to construct elaborate arguments related to liberty and autonomy to advocate for limited access to strictly controlled substances for medical and scientific purposes, resulting in their medicalization.[964] In effect, only recovered and recovering addicted persons, sick users, and professional middle-class and white-collar consumers generally fit the criteria required to access Scheduled drugs for medical purposes. The "happy drug user," using in the name of self-medication and pleasure, is silenced under the regime, as are many stigmatized individuals and groups based on their race, class, caste, and gender among other categories.[965] Complicating this dynamic between law and medicine is that in the mental health field there is significant disagreement among psychiatrists as to what constitutes mental illness.[966] This leaves the field open for previously banned controlled substances and mental and social problems to be recast as strict medical issues requiring strict and uniform control by government. In this way, moral and normative issues can be pushed aside in the bid to structure successful litigation strategies, paving the way for the decriminalization or legalization of controlled substances like cannabis for all purposes, not just medical, under the

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[963] Quil Lawrence, "Trump Executive Order Aims to Expand Veteran Mental Health Care," *NPR*, 10 January 2018, https://www.npr.org/2018/01/10/576976684/trump-executive-order-aims-to-expand-veteran-mental-health-care?t=1539269421057ctober 2018.
[964] Susan Reid, "Sex, Drugs, and American Jurisprudence: The Medicalization of Pleasure," *Vermont Law Review* 37 (2012), 49-51.
[965] Anna Ross, "Drug Users as Stakeholders in Drug Policy: Questions of Legitimacy and the Silencing of the Happy Drug User," in Julia Buxton, Giavana Marho and Lona Burger (eds), *The Impact of Global Drug Policy on Women: Shifting the Needle* (Bigley, UK: Emerald Publishing, 2021), 238-239 and 241-246.
[966] Lamkin (2016), 557.

guise of medicinal necessity.[967] Counter-majoritarian constitutional rights and freedoms are a useful tool to protect those who act against the mainstream of moral sentiment, particularly vis-à-vis "deeply personal decisions involving modifying one's own body or mind" safeguarded by rights to self-determination and bodily integrity,[968] but their track record in practice has not led to a rebalancing of power relations between regulators and patient-consumers.

US case law concerning access to controlled substances is generally deferential to Congress and executive administrative bodies. The SCOTUS has held that individuals, the terminally ill included, have no right to access experimental, potentially life-saving drug treatments in the absence of FDA approval.[969] While the law at issue in *US v Rutherford* was the Federal Food, Drug and Cosmetic Act, which regulates non-Scheduled drugs, the Court's statements on the necessity of safety and efficacy in cancer treatments rings true for Scheduled substances. "Since the turn of the [twentieth] century," the Court stated, "resourceful entrepreneurs have advertised a wide variety of purportedly simple and painless cures for cancer."[970] Congress has an obligation to protect the ill, vulnerable to trying all manner of quack remedy out of desperation, from untested drugs no matter the severity of the illness,[971] whether it is cancer or a mental health disorder. This precedent was elaborated upon in *Abigail Alliance v Von Eschenbach*, where the Court stated that:

> prior to distribution of a drug outside of controlled studies, the Government has a rational basis for ensuring there is a scientifically and medically acceptable level of knowledge about the risks of…a drug. We therefore hold that the FDA's policy of limiting access to investigational drugs is rationally related to the legitimate state interest of protecting patients…from potentially unsafe drugs with unknown therapeutic effects.[972]

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[967] Reid (2012), 102-104 and 108-109.
[968] Lamkin (2016), 564.
[969] *U.S. v Rutherford*, 442 U.S. 544 (1979).
[970] *Rutherford* (1979), 2478.
[971] *Rutherford* (1979), 2478.
[972] *Abigail Alliance, Better Access v Von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007), 713.

A stricter standard of scrutiny was rejected by the Court because no fundamental right or liberty interest was at stake in the case at bar. This is because there is no established right to unhindered access to untested drugs found in US "history and tradition," such that rational basis review was deemed sufficient to settle the matter.[973] Common law doctrines of "self-defense, necessity, and interference with rescue," presented by the Alliance,[974] were not apposite to demonstrating a fundamental right because of clear Congressional intent to limit access to experimental drugs.[975] In short, in the US there is no constitutional right to access experimental or controlled substances for therapeutic purposes under the Due Process Clause of the Fifth and Fourteenth Amendments.[976] Extended to the mental health field, the severity of the disease, whether treatment-resistant depression or PTSD, is of no concern when it comes to the enforcement of the CSA and related legislation by executive administrative bodies. All drugs must go through the administrative process and win approval to get to market.

The passage of the Right to Try Act of 2017 created some space for terminally ill patients to access and use unapproved experimental drugs in the US. The Act's definition of "experimental drug" limits exemptions from enforcement of the CSA to substances that have "successfully completed a phase 1 clinical investigation," "remain[] under investigation in a clinical trial approved by the [FDA]," and are not approved to go to market.[977] Experimental drugs must also be prescribed by a physician.[978] So, novel substances must still go through the initial stages of scientific vetting and the regulatory approval processes to get to patients in need. Legislative intervention of this sort is therefore unlikely to affect access to psychedelic

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[973] *Abigail Alliance* (2007), 712.
[974] *Abigail Alliance* (2007), 703
[975] *Abigail Alliance* (2007), 708.
[976] Sullivan and Massaro (2013), 149.
[977] Right to Try Act of 2017, §2(c)(3)(A)-(C).
[978] Right to Try Act of 2017, §2(a)(2).

substances, given their Schedule I status and a long history of prohibition. But there is room for psychedelic-type substances, whether new, novel, or synthetic, to meet the Act's technical criteria and obtain exceptional approval.

Across the Atlantic, Article 8 of the European Convention on Human Rights (ECHR) and Human Rights Act 1998 (HRA) protect the right to private and family life, which includes the right to healthcare and medical treatment. Personal autonomy and physical and mental integrity are attributes of these rights, though under the Council of Europe and UK human rights framework individuals are not accorded an unqualified "right to treatment." States have significant latitude under the margin of appreciation doctrine to allocate healthcare funding and provide services as they deem necessary.[979] While states do have a negative obligation to refrain from exacting inhuman and degrading treatment on their subjects, this does not mean public health bodies have a positive obligation to offer all possible medical interventions to patients regardless of their legal and regulatory status. A refusal to permit the use of a controlled substance or offer experimental treatment, for example, constitutes neither a violation of the right to life under Article 2 of the ECHR,[980] nor inhuman and degrading treatment under Article 3 of the ECHR; despite the acknowledged "mental suffering" arising in response to a refusal of treatment and even where the treatment is available in other jurisdictions.[981] There is thus no right to cannabis for therapeutic purposes under the Article 3 of the HRA.[982] Nor is there an English common law right to treatment. All the state is obligated to do when making administrative decisions is act in conformity with the requirements of natural justice,[983] assessed,

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[979] Bone (2020), 116; William B. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press, 2015), 371-372.
[980] Regarding a refusal to provide experimental cancer treatment to the terminally ill see *Case of Hristozov and Others v Bulgaria*, (App. Nos. 47039/11 and 358/12) ECtHR Fourth Section (29 April 2013), paras 108-109.
[981] *Hristozov* (2013), paras 113 and 115.
[982] *R v Altham*, [2006] EWCA Crim 7, [2006] 1 WLR, paras 14, 21 and 25.
[983] Bone (2020), 119.

as noted above, against a reasonableness standard of review. The common law defense of medical necessity has been brought up in the context of the Misuse of Drugs Act's prohibitions and rejected. The Court of Appeal of England and Wales held, in 2005's Quayle, that "its role cannot be to legitimise conduct contrary to the clear legislative policy and scheme" of the Act, no matter the health-centered motivation behind the breaking of the law.[984] There is, however, case law suggesting that in certain circumstances courts should at least consider evidence related to whether a genuine subjective belief in the therapeutic value of cannabis is relevant vis-à-vis the possession of large quantities of the substance.[985] In addition, the presence of "a serious medical condition that requires urgent, intensive or long-term treatment" was added as a mitigating factor in drug supply and possession cases in England and Wales in the 2012 sentencing guidelines.[986] The revision represents the extent to which the UK accommodates self-medication with the use of prohibited drugs.

The case law reviewed in this subsection is representative of a legal formalism that has led judges to undervalue rights and freedoms in the balancing of public prerogatives over individual interests in drug control jurisprudence.[987] While there is no right to experimental medical treatment and only limited recognition of the medical necessity defense in the adjudication of disputes between government and citizen over access to controlled substances, compelling reasons remain for courts to expand access to new and novel drugs in bounded circumstances. This requires broadening the scope of the arguments presented in the cases discussed above. Instead of advocating for a specific right to use controlled substances, the focus

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[984] *Quayle and Ors v R*, [2005] EWCA Crim 1415 (27 May 2005), para 67. See also *Altham* (2006), para 29.
[985] *R v Dale*, [2011] EWCA Crim 1675, 2011 WL 2582674; *R v Burke*, [2012] EWCA Crim 2025, 2012 WL 4050274.
[986] Zena Smith and Judith Gowland, "Drug sentencing: what's the deal? The new sentencing regime for drug offences," *Journal of Criminal Law* 76, 5 (2012), 393-395.
[987] See also Melissa Bone and Toby Seddon, "Human rights, public health and medicinal cannabis use," *Critical Public Health* 26, 1 (2016): 51-61.

shifts to a more general liberty argument. As part of the right to liberty in US jurisprudence, individuals have rights to life, death with dignity, the avoidance of pain and suffering, autonomy, and self-definition. In pursuit of these liberty interests, as a last resort and where conventional treatments have failed, patients ought to have a fundamental right to make decisions, in consultation with their physician, regarding their course of treatment.[988] Courts should assess the conflict between patients and the state using a heightened standard of review; the strict scrutiny test in the US and like examinations elsewhere. The substantial burden imposed on the sick cannot be ignored in deference to a regulatory regime where rights and freedoms are implicated.[989] Those suffering from treatment resistant depression, for instance, can argue the state's refusal to grant access to psychedelic-assisted therapy with psilocybin or MDMA unduly infringes on their right to liberty, to live a healthy life, to avoid mental anguish, and to decide who it is they want to be, given the failure of mainstream medical interventions. There is no guarantee such a framing will convince courts to overturn judicial precedent and carve out an exemption from drug control laws. The presence or absence of judicially sanctioned access to controlled substances is almost a moot point, however, as individuals are turning toward psychedelics to ameliorate their mental condition no matter the legal ramifications, putting their life and liberty on the line to remedy psychogenic, spiritual, and social ills.

4.3 Mental Health, Consumerism, and Responsibilization

Medical paternalism imposes the views of experts in the medico-scientific community and government on patients and consumers, limiting choice in healthcare and restricting individual liberty and autonomy. In drug control, however, medical paternalism acts as a moral standard of

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[988] "Last Resorts and Fundamental Rights: The Substantive Due Process Implications of Prohibitions on Medical Marijuana," *Harvard Law Review* 118, 6 (2005), 1995-1997.
[989] "Last Resorts and Fundamental Rights" (2005).

pharmaceutical propriety compelled upon the population via threats of force and coercion, i.e., criminal sanction.[990] Opposed to this ideology are advocates of greater individual control over healthcare, who emphasize personal responsibility, self-care, and an ethic of autonomy and self-sufficiency as an alternative to the paternalistic state.[991] As political theorist Jessica Flanigan argues: “public officials should not prohibit competent adults from purchasing prescription-grade drugs without authorization from a physician.”[992] What Flanigan calls the right to self-medication makes patients and consumers prima inter pares vis-à-vis government, regulators, and experts. The decision to assume any and all risk and take a pharmaceutical product, whether for medical or non-medical reasons, ought to rest with the competent, informed, and consenting individual.[993] The rules of the marketplace and a de minimus regulatory framework, from this point of view, are more or less sufficient to address public health and safety concerns while meeting patient-consumer demand for medication. And though reasoning from caveat emptor shirks pointed questions related to liability and accountability, the market model does do away with the proven damage brought about by the criminalization of unsanctioned drug use.

Connected to the ethic of autonomy and self-sufficiency is the contemporary creed of consumer capitalism, in which the commercial preferences of the individual constitute the greatest form of self-expression and means of identity formation; an essential part of our modern sense of being and well-being. Where the market can satiate our needs and desires, the state is generally thought to have no place preventing free exchanges and transactions from taking place. Where the state believes itself to be acting paternally in good faith, protecting us from our basest and most irrational instincts via legal and regulatory mechanisms, there is never a shortage of

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[990] Flanigan (2017), xi, 3-4, 107 and chapter 2.
[991] Bone (2020), 57-58 and 126.
[992] Flanigan (2017), 67.
[993] Flanigan (2017), xv and chapters 1 and 2.

black-marketeers ready to step in, assume risk, and sell the public what it wants, even in the face of possible criminal sanction. Drugs, along with all manner of vice, are representative of the persistent tendency of the market to gratify consumers regardless of the consequences. Medical treatment itself "has increasingly become a consumer product," no longer necessarily seen as an intervention to treat or prevent illness, but rather "using biomedical technology to help patients satisfy goal beyond health, narrowly construed."[994] This thin conception of medicine, shorn of thicker ethical obligations, has "reconceptualiz[ed] social and emotional problems as medical conditions,"[995] leading to a world, at least in much of the West, wherein individuals see life itself as a kind of condition susceptible to improvement via medical intervention, surgical and chemical.[996] Responsible for our own healthcare, we are increasingly regarded as sovereign patient-consumers making use of finite public goods and services. We are no longer helplessly subject to the authority of medical-professional gatekeepers. Working with the latter, the patient-consumer controls the interventions undertaken. Physicians advise us on how to become who it is we want to be, acting within the scope of professional ethics, rather than tell us who or how we should be.

Given this state of affairs, lawyer Matt Lamkin suggests that drug control law and policy should move away from the current strict regulatory environment to one in which physicians, pharmacists, and therapists more freely dispense controlled substances to specific patients exhibiting certain indications for use in defined spaces.[997] The alternative to lawful regulation is the illicit market and the unsupervised consumption of drugs that, despite the concerted effort of governments, continue to be sought by the sick and curious. When patient-consumers want

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994 Lamkin (2019), 405-406.
995 Lamkin (2019), 414.
996 Lamkin (2019), 413-425.
997 Lamkin (2019), 441-444.

access to a controlled substance, for medical and non-medical purposes alike, they usually get it, reframing law-breaking behaviour as patient-driven drug development, civil disobedience, protest, activism, and individual empowerment.[998] Legal barriers create legal resistance, and individuals and society either directly challenge the law or resort to extra-legal agitation. Corporations, too, take part in setting the terms of the debate. Historian David Herzberg chronicled the rise of tranquilizer and anti-depressant use in the Postwar United States, when the pharmaceutical industry combined medical science, commerce, and culture to market a series of profitable "blockbuster" mind-altering drugs to a generation beset by chronic anxiety and depression. With the help of a doctor's prescription individuals could take control of their brain chemistry and metamorphose into better, "more authentic" versions of themselves. In contrast to the self-transformation preached by the cotemporaneous psychedelic counterculture and its "illegal 'street' drugs," Big Pharma appealed to "white middle-class culture" by commodifying science and medicine and an idealized image of what the "good middle-class life—happiness itself—ought to be like."[999] Similarly, post-9/11, post-2007-08 Global Financial Crisis, post-Covid-19 America is plagued by myriad cultural anxieties, from the implications of the Black Lives Matter movement to the aftermath of the January 6, 2021 Capitol attack and the increasing number of deaths of despair resulting from the opioid epidemic, chronicled in chapter 5. Psychedelic-assisted therapy and the wellness industry are poised to challenge the strict division between medical and recreational drug use within the US drug control system, with implications far beyond its borders. So far, and like the tranquilizers and anti-depressants marketed to the "white-collar world" before them, psychedelics are conceived as having a "cultural connection to

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[998] Flanigan (2017), chapter 5.
[999] David Herzberg, *Happy Pills in America: From Miltown to Prozac* (Baltimore: Johns Hopkins University Press, 2009), 1-5.

science, progress, and health," allowing researchers, activists, and users to "distinguish their medicines from the street drugs associated with nonwhite or marginal populations."[1000] The cultural normalization and scientific medicalization of psychedelic drug use is under way in the United States, with the same actors reprising their roles to the detriment of racial and class equality.

From late 2019, cities including Washington D.C., Denver, and Oakland have exercised their local police powers to deprioritize the enforcement of the CSA vis-à-vis psychedelics, including psilocybin (mushrooms) and ayahuasca. These measures in essence permit individuals to possess and use, for medical and non-medical purposes, otherwise prohibited controlled substances. Policy choices like this are usually the result of successful ballot initiative measures, or referenda, put forward by interest groups, and colored by identity politics, as was the case with the cannabis vote in California in the 1990s.[1001] The arduous process of winning regulatory approval via the courts cannot compete with the political pressure brought to bear on local and regional government. For example, a 2020 Phase III study on MDMA's potential in treating PTSD at Johns Hopkins University, the first of its kind, showed serious promise in combatting and in some cases eradicating PTSD symptoms when combined with traditional talk therapy among its 90 participants; 67 percent of those who received MDMA, compared to 32 percent of those who got a placebo, did not meet the criteria to be diagnosed with PTSD after their treatments. Over two decades in the making, the DEA added MDMA to Schedule I of the CSA in 1985, MDMA's increasing therapeutic use remains contingent on further clinical trials replicating these findings; standard as far as the bureaucracy of drug approval goes. The soonest

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[1000] Herzberg (2009), 193.
[1001] See Dustin Marlan, "Beyond Cannabis: Psychedelic Decriminalization and Social Justice," *Lewis & Clark Law Review* 23, 3 (2019): 851-892.

MDMA might come to market is sometime in 2023. Not ages, but certainly not fast enough for those with serious continuing mental health issues. That MDMA and psychedelic-assisted therapy may yield similar results for those suffering from "other difficult-to-treat mental health conditions, including substance abuse, obsessive compulsive disorder, phobias, eating disorders, depression, end-of-life anxiety and social anxiety in autistic adults" with few side effects, most of which are experienced immediately during supervised use, the rapidity with which its positive effects are felt, after only 2 or 3 sessions, along with its long-lasting impact, an improved mental state for months and even years, make its approval or rejection a matter of life and death for certain patients.[1002] Many are not willing to wait for science and bureaucracy to approve what they see as essential to living a full life. Politics and market participation are a surer means to gaining access to controlled substances than is compliance with the rigors of the administrative state.

Seekers of psychedelic-assisted therapy, whether for medical or non-medical purposes, are turning toward psychedelic wellness retreats for experiences otherwise only available to clinical trial subjects. In US cities where psychedelics have been decriminalized and jurisdictions with a more laissez-faire attitude toward enforcement or a tradition of shamanic ritualism like Jamaica, Mexico, Costa Rica, and Peru, participants take psilocybin and plant-derived psychedelic brews like ayahuasca and ibogaine to alter their consciousness. Either un- or underregulated and often undertaken with minimal medical supervision, wellness retreats offering psychedelic-therapeutic services sell transformative experiences to the mentally unwell and spiritual seekers alike. Distinguishing these "enlightened" customers from negatively perceived recreational drug tourists is difficult, as participants consider their pursuit of altered

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[1002] Rachel Nuwer, "A Psychedelic Drug Passes a Big Test for PTSD Treatment," *New York Times*, 3 May 2021, https://www.nytimes.com/2021/05/03/health/mdma-approval.html.

states of consciousness as a case apart, i.e., genuine and benign.[1003] Stories of individuals being cured of their ailments and seeing the world anew abound, but so too do reports of bad trips with permanent mental health repercussions like psychosis as well as robbery, sexual assault, and murder. Researchers at NYU and Johns Hopkins and the American Psychiatric Association have warned prospective participants of the risks of psychedelic-assisted therapy and caution against it outside a closely supervised clinical setting. Professional cautions notwithstanding, the "global wellness industry" is already big business and projected to be worth $1.2 trillion by 2027. Psychedelics are part and parcel of this patient-consumer revolution in mental health care.[1004]

Microdosing, taking small quantities of a psychedelic substance, or about 10 percent of a full dose, over several weeks or more has become a trendy mental health "hack" said to produce the benefits of psychedelic-assisted therapy without a powerful, or worse "bad," trip. Early studies on the self-reported effects of microdosing suggest it may ameliorate all manner of medical issues, from treatment resistant depression to traumatic brain injury, and improve work performance and life satisfaction.[1005] And though low doses of LSD are "well tolerated (in healthy volunteers) and have no-to-minimal effects on physiological measures," researchers call for "placebo-controlled clinical trials" to determine whether microdosing psychedelics has verifiable therapeutic value.[1006] In other words, the scientific evidence in support of microdosing remains thin. Experts warn of the known and unknown side effects of its practice, though this has

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[1003] Girish Prayag et al., "Drug or spirituality seekers? Consuming ayahuasca," *Annals of Tourism Research* 52 (2015): 175-177.
[1004] Debra Kamin, "The Rise of Psychedelic Retreats," *New York Times*, 25 November 2021, https://www.nytimes.com/2021/11/25/travel/psychedelic-retreat-ayahuasca.html.
[1005] James Fadiman and Sophia Korb, "Might Microdosing Psychedelics Be Safe and Beneficial? An Initial Exploration," *Journal of Psychoactive Drugs* 51, 2 (2019): 118-122. For a first-person account of microdosing by a Harvard Law School alum see Ayelet Waldman, *A Really Good Day: How Microdosing Made a Difference in My Mood, My Marriage, and My Life* (New York: Alfred A. Knopf, 2017).
[1006] Kim P.C. Kuypers, "The therapeutic potential of microdosing psychedelics in depression," *Therapeutic Advances in Psychopharmacology* (2020): https://doi.org/10.1177/2045125320950567.

not stopped its proliferation.[1007] The illegal status of psychedelics doesn't deter users, many of whom contrast their "traditional middle-class values" and medical use, broadly conceived, with lower class recreational drug (ab)use.[1008] Relying on the subjective perception of microdosers as a measure of safety and efficacy is unlikely to meet the objective requirements of regulatory statutes. However, politics, special interest groups, and the framing of consumption may prove enough to loosen rules and regulations.[1009]

Psychedelic wellness retreats and microdosing are part of a growing trend of mind-altering activities that broadly fit the description of what is known as cognitive enhancement: the non-medical, non-scientific alteration of the brain's biochemistry and physiology through pharmacological intervention to reshape neurocognitive processes. Advocates of a right to cognitive enhancement invoke rights to liberty and autonomy, for example the US Constitution's Fifth Amendment Due Process Clause and First Amendment right to freedom of speech, thought, and expression, in their defense of the idea that the state should not interfere with the individual pursuit of self-transformation via drugs but for where health and safety concerns warrant it to do so. If this is the case, limits on access to psychedelic and psychotropic substances would need to be adjudged by the courts at a heightened standard of review as fundamental rights and freedoms are implicated. Traditional jurisprudence may not countenance such an approach, but an expanded view of liberty and freedom of speech, thought and expression that includes a more nuanced notion of the mind-body connection militates against restrictive drug control law and

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[1007] Kat Eschner, "The Promises and Perils of Psychedelic Health Care," *New York Times*, 5 January 2022, https://www.nytimes.com/2022/01/05/well/psychedelic-drugs-mental-health-therapy.html.
[1008] Megan Webb, Heith Copes and Peter S. Hendricks, "Narrative identity, rationality, and microdosing," *International Journal of Drug Policy* 70 (2019): 33-39; Dimitrios Liokaftos, "Sociological investigations of human enhancement drugs: The case of microdosing psychedelics," *International Journal of Drug Policy* 95 (2021): 103099.
[1009] See, e.g., the Beckley Foundation's funding and research agenda. Beckley Foundation, "Microdosing," accessed 27 February 2022, https://www.beckleyfoundation.org/microdosing/.

policy and in favor of consumer responsibility in a taxed and regulated yet free, or at least less unfree, market.[1010] By extending the conventional definition of freedom of speech, thought, and expression to entail cognitive liberty, this line of argument shifts the focus away from the alleged harms of drug use to the benefits accrued by self-exploration of one's consciousness and the pleasure of an artificially induced transcendental experience.[1011]

Cognitive enhancement for its own sake in part reflects the self-improvement tendency of contemporary capitalist culture. The offensive use of stimulants to improve work performance, efficiency, and competitiveness, as well as the defensive use of psychedelics to transcend the imperatives of the economy for a more enlightened, spiritual, and detached relation thereto are forms of conspicuous consumption signalling one's commitment to individual excellence. The medical profession and regulatory state are no obstacles to those with the financial means and racial and class privilege needed to explore their consciousness with psychedelic experiences, whether at home or private wellness retreats. As such, the market in cognitive enhancement poses a real threat to the traditional gatekeepers of pharmaceuticals and their therapeutic paradigms; though the dispensers of controlled substances themselves have a not-entirely clean record of over- and off-label prescribing, as the opioid epidemic demonstrates.[1012] The question is thus one of whether experts and regulators stand a chance against the siren call of the market

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[1010] Marc Jonathan Blitz, "Freedom of Thought for the Extended Mind: Cognitive Enhancement and the Constitution," *Wisconsin Law Review* 4 (2010): 1049-1117; Jan-Christoph Bublitz, "Drugs, Enhancements and Rights: Ten Points for Lawmakers to Consider," in Fabrice Jotterand and Veljko Dubljevic (eds), *Cognitive Enhancement: Ethical and Policy Implications in International Perspectives* (Oxford: Oxford University Press, 2016): 309-328; Wayne Hall and John Strang, "Challenges in regulating the use of stimulant drugs for cognitive enhancement in normal individuals," in Ruud ter Meulen, Ahmed Mohammed and Wayne Hall (eds), *Rethinking Cognitive Enhancement* (Oxford: Oxford University Press, 2017): 292-301.
[1011] Charlotte Walsh, "Psychedelics and cognitive liberty: Reimagining drug policy through the prism of human rights," *International Journal of Drug Policy* 29 (2016): 80-87.
[1012] On the use of stimulants as cognitive enhancement and the risks attendant thereto see Katherine Drabiak-Syed, "Reining in the Pharmacological Enhancement Train: We Should Remain Vigilant about Regulatory Standards for Prescribing Controlled Substances," *Journal of Law, Medicine & Ethics* 39, 2 (2011): 272-279.

and consumer preference. With no ideal solution at hand, governments should consider reclassifying psychedelic substances as medicines to ensure they are properly regulated as a defensive measure, at least until more scientific evidence establishes their safety and efficacy. In this way, physicians and pharmacists might control the supply of psychedelics and limit their use to strictly therapeutic purposes. That said, those seeking these substances will look to the illicit market if they cannot obtain the requisite prescription to lawfully take them. The alternative to regulation is to turn a blind eye to current trends and pretend the IDCS and its national iterations are in control of the drug trade.

The first step in a drug reform programme enabling medical use requires the rescheduling of psychedelics as therapeutic psychoactive substances in tandem with the decriminalization of simple possession. Next would be the creation of a legal, not "free," market subject to an administrative apparatus with broad supervisory and enforcement powers to control it.[1013] Law enforcement and medical and pharmaceutical regulatory bodies already possess the expertise and organization necessary to carry out such oversight functions. A prescription system is the natural corollary to medicalization, with concerns regarding "the potential negative effect of…medical use on non-medical use patterns" assuaged via training, licensing, and reporting schemes for healthcare professionals prescribing, dispensing, and engaging in clinical psychedelic-assisted therapy.[1014] A medicalized regime for psychedelics would still call for policing, public health education, and harm reduction initiatives to minimize diversion, misuse, and abuse. And while criminality and problematic consumption would not disappear under a medical framework it

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[1013] See the Beckley Foundation's "Roadmaps to Regulation" series of policy papers for a more detailed outline of regulatory alternatives to prohibition. Beckley Foundation, "Roadmaps to Regulation: Cannabis, Psychedelics, MDMA, and NPS," accessed 27 February 2022, https://www.beckleyfoundation.org/resource/roadmaps-to-regulation-cannabis-psychedelics-mdma-and-nps/.
[1014] Rick Doblin, "Regulation of the Prescription Use of Psychedelics," in J. Harold Ellens et al. (eds), *The Psychedelic Policy Quagmire: Health, Law, Freedom, and Society* (Santa Barbara: Praeger, 2015), 365-367.

would minimize many of the harms exacted in the name of strict control, prohibition, suppression, and criminalization. It would also comply with the drug control treaties' limitation on the use of controlled substances to medical and scientific purposes alone.

A more radical reform programme entails the creation of legal markets sans medicalization, involving the re- or de-scheduling of psychedelic substances and full-scale legalization of simple possession. Treated as a consumer product sold through licensed vendors, psychedelics would be subject to health, safety, and consumer protection standards monitoring purity, potency, and quality, as are other regulated substances like alcohol and tobacco. This solution avoids some of the contradictions present in decriminalization models, which leave it to illicit producers to manufacture and supply psychedelics, perpetuating black markets and supporting organized crime. As law and policymakers in a variety of jurisdictions have determined regarding cannabis, drug users take controlled substances no matter their strict control and prohibition. Suppression and criminalization impose significant costs on individuals, communities, and society, a deprivation of freedom of choice and the personal responsibility it demands, while denying the state a potential windfall in taxes to spend on publicly beneficial projects. Add to this the blatant ineffectiveness of domestic regimes implementing the law and policy of the IDCS and there are many reasons to favor legalization.[1015] A softer regulatory approach to drug control would more realistically address the fact of widespread non-medical consumption while limiting the concrete and potential harms of use.

The creation of legal, regulated markets in psychedelics and other psychotropic substances would oblige the state to craft risk mitigation strategies to diminish the impact of the

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[1015] Tamar Todd, "The Benefits of Marijuana Legalization and Regulation," *Berkeley Journal of Criminal Law* 23, 1 (2018), 111-115; Donald A. Dripps, "Recreational Drug Regulation: A Plea for Responsibility," *Utah Law Review* 1 (2009), 148-152.

known and potential negative downstream effects of legalization. The "nudge" theory of regulation, also called libertarian paternalism, is a strong candidate, advanced by Richard Thaler and Cass Sunstein as a corrective to the inadequacies of the rational actor ideal from neoclassical economics. The technique, informed by behavioural and empirical science, leaves it to individuals to make autonomous decisions free of direct government interference while simultaneously indirectly influencing or nudging them "to make their lives longer, healthier, and better." Policymakers, or "choice architects" in nudge theory parlance, in both the public and private sectors thus design non-intrusive incentives to help individuals make good decisions and avoid harm without punishing them for making mistakes.[1016] These include soft paternalist "choice-preserving" practices like providing the public with accurate information and priming individuals to think about an issue in a particular way to subtly change behaviour.[1017] On the harder end of the paternalist spectrum are criminal and civil fines, which shape behaviour without dictating it by imposing a cost, or tax, on actions that are detrimental to individual health and social welfare.[1018] Applied to a legal market in psychedelics, a mix of both soft and hard paternalism could convince consumers to abstain from or limit their intake of drugs for their own good while also granting them the liberty to experiment with altered states of consciousness without disproportionate government intrusion.

Replacing the traditional "command-and-control mechanisms" of coercion, bans, authorizations, and financial incentives with regulatory nudges that manipulate the "human decision-making process" still implicates rights and freedoms to expression, privacy, autonomy,

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[1016] Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven, CT: Yale University Press, 2008), 4-6 and 72.
[1017] Thaler and Sunstein (2008), chapter 3. See also Husak (1992), 130-138.
[1018] Cass R. Sunstein, *Why Nudge? The Politics of Libertarian Paternalism* (New Haven, CT: Yale University Press, 2014), 55-61. See also Husak (1992), 138-140.

and self-determination.[1019] Sunstein, for one, does not endorse the harm principle, arguing "that in certain contexts, people are prone to error, and paternalistic interventions would make their lives go better." In such cases he believes there is a "moral argument on behalf of paternalism."[1020] The question of addiction is a prime example of the issue. Are addicted persons acting voluntarily and autonomously when they consume drugs, to be left to their own devices no matter the consequences? Or are they acting under duress because of a loss of volition, enslaved by their dependence and in need of paternal intervention to do what's in their best interests?[1021] There are no easy answers to these queries. But "choice architects" are often convinced they know what is best for individuals and society, framing the imposition of top-down decisions as based on compelling theoretical premises and empirical data when they are, at base, moral judgments. Nudge-like interventions must therefore be subjected to administrative legal doctrines, including the principles of legality and impartiality, and undergo judicial review to ensure law and policy meet reasonableness and evidentiary standards.[1022] Without independent oversight the purported softness of libertarian paternalism might easily reproduce the same problems stemming from the IDCS's treaties and treaty bodies and their domestic iterations, including their moralism and default resort to the use of the state's legal and coercive powers. A more balanced account of the risks and rewards of drug use combined with checked and balanced nudge policies could provide for a fairer, less costly, more effective – or at least less ineffective – drug control regime based on science and individual choice rather than force.[1023]

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[1019] Alberto Alemanno and Alessandro Spina, "Nudging legally: On the checks and balances of behavioral regulation," *International Journal of Constitutional Law* 12, 2 (2014), 430-431.
[1020] Sunstein (2014), 4-5.
[1021] Husak (1992), 100-129.
[1022] Alemanno and Spina (2014), 448-452.
[1023] Alemanno and Spina (2014), 455.

Legislators and regulators may be hesitant to move toward a more laissez-faire market in psychedelic substances and psychedelic-assisted therapy for extra-legal, non-scientific reasons. The economic interests of the pharmaceutical industry, or Big Pharma, in maintaining their hegemony over the medical marketplace in mental health treatment is a major factor. Indeed, naturally occurring psychedelics like psilocybin and DMT are not patentable[1024] and represent a competitive alternative to the profitable medicines traditionally prescribed by the psychiatric establishment.[1025] The paternalism of the latter is, of course, sanctioned by the state, which has delegated the power to determine pharmacological legitimacy to bureaucrats, businesses, and psychiatrists. Regulation is certainly necessary, but a history of disseminating inaccurate information vis-à-vis the safety and effects of psychedelics has arguably undermined the authority of science and the law, as many see the strict control, prohibition, suppression, and criminalization of these relatively harmless substances as a form of unwarranted moralistic social control. Responsible citizens, in this line of thinking, should be the final arbiters of what risks are acceptable. The pecuniary interests of powerful actors and institutions should not be controlling in health matters.[1026] Nor should the interests of individuals and society, however opaque and multifarious, be wholly subordinated to the prerogatives of the state and the market. Freedom of choice and personal responsibility, however, may be equally burdensome for individuals and society in the context of the current neoliberal politico-economic order.

Individual decision-making power enlightened by administrative nudges may enhance the enjoyment of constitutional rights and freedoms, but the call to responsibilization implicates

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[1024] This has not prevented companies and investors from trying to patent synthetic derivatives of naturally occurring controlled substances. See Mason Marks and I. Glenn Cohen, “Patents on Psychedelics: The Next Legal Battlefront of Drug Development,” 135 *Harvard Law Review Forum* 212 (2022): 212-235.
[1025] Marks (2018), 104-106.
[1026] E.J. Mishan, “Psychedelics: A Test Case for the Libertarian,” *The Political Quarterly* 52, 2 (1981): 225-238.

other systemic issues. Responsibilization of the individual is a consequence of the unwinding of the welfare state, begun in the late 1970s, which accompanied the relinquishment of command and control over the economy to private entities in pursuit of efficiency and a reduction in public expenditure, a process associated with neoliberal thought. Individuals, not the state or its agents, became paragons of governance, tasked with engaging in self-government, "self-management[,] and self-regulation of social risks" on matters beyond their experience and expertise. On the open market such independence elicits palpable hazards, as businesses, however well-regulated by administrative bodies, are left to "assume socio-moral obligations" vis-à-vis consumers, known as corporate social responsibility.[1027] If the opioid saga discussed in chapter 5 is any indication, pharmaceutical companies and supporting industries cannot be given the benefit of the doubt to act in the public interest. Neither medicalization nor legalization would insulate even the most responsible of citizens from the manipulations and predations of profit-oriented enterprises acting in bad faith. When the gatekeeper function is taken away from medico-scientific, legal, and policy experts, or even just weakened, the opportunities for exploitation increase.[1028] The state and its regulatory power is thus a necessary, though by no means sufficient, mechanism checking partial private interests in drug control.

It is beyond the scope of this thesis to propose a regulatory scheme that adequately balances public and private concerns. Medicalization and legalization schemes both have their advantages and disadvantages. What is certain is that law and policy reforms must account for the role of the market in deciding how to minimize harm, maximizing the enjoyment of rights

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[1027] Ronen Shamir, "The age of responsibilization: on market-embedded morality," *Economy and Society* 37, 1 (2008), 7-10.
[1028] On the changing nature of the doctor-patient relationship and responsibilization see Mike Dent, "Patient choice and medicine in health care: Responsibilization, governance and proto-professionalization," *Public Management Review* 8, 3 (2006): 449-462.

and freedoms, and defining and pursuing the common good. Courts periodically mediate the conflict between governmental, individual, and commercial interests, but in many cases constitutional separation of powers concerns preclude or dissuade judges from altering the choices of the legislative and executive branches of government. Additional legal principles stand in the way of courts expanding access to controlled substances, as the case law on medical exemptions from generally applicable drug laws demonstrates. Overall, exceptions to regulatory uniformity pose a threat to the coherence and authority of the IDCS and its national transplants. Challenges to the regime have been and are sufficiently contained by the administrative, institutional, and professional rules, regulations, and processes that maintain the strict control, prohibition, suppression, and criminalization of drugs and drug users. In the long term, however, the IDCS can only succeed in affecting the drugs market. It cannot eliminate the traffic in and consumption of drugs, as these acts:

> require limited and readily available resources and no particular expertise to commit…are easily concealed…are unlikely to be reported to the authorities, and…consumer demand is substantial, resilient, and not readily substituted for by alternative activities or products.[1029]

If current tendencies toward medicalization, responsibilization, and commodification continue, which they are on track to do, drug control law and policymakers will be forced to confront the fact of drug use's increasing acceptance and normalization, at least in liberal democratic countries. They must either accommodate new trends in medical and non-medical consumption in line with demand or carry on down the path laid out by the IDCS, risking conflict with influential international actors and domestic political constituents, and potentially triggering the fragmentation and disintegration of the regime's universality.

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[1029] Nadelmann (1990), 486, 512-513 and 525-526.

Similar issues surface in cases involving religious rights and freedoms claims. The secular exceptions principle, for instance, insisting that exemptions granted on the basis of nonreligious factors necessitate equivalent exemptions for the religious on the basis that to do otherwise would be underinclusive, also arguably undermines the legislative and executive branches of government by undercutting the uniform application of law and policy.[1030] Though not widely accepted in American law and practice as of yet, the principle points to the problem of granting exemptions for one individual or group to the exclusion of others. While claims to this effect vis-à-vis access to controlled substances have been rejected in US court,[1031] the clear double standards involved in accommodating one category of persons and not another is problematic from the standpoint of law and logic. If a medical exemption is granted, fairness and equal treatment dictate that a religious one be granted too, and vice versa. Again, how can the IDCS maintain its integrity if there is an exemption accommodating nearly every motive for non-medical consumption? The following section picks up on many of the themes that arise in the context of the consumption of controlled substances for medical purposes, but with the addition of the divine.

4.4 Rights and the Religious Use of Psychedelics

Despite their growing medicalization and commodification, psychedelic substances are loaded with cultural significance and a close affiliation with traditional religion and New Age spirituality. Faith is a particularly salient point of reference in the drugs debate due to the protection of religious freedom in international and constitutional law. Exemptions from generally applicable criminal laws have been granted to individuals and organizations that use

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[1030] Colin A. Devine, "A Critique of the Secular Exceptions Approach to Religious Exemptions," 62 *UCLA Law Review* 1348 (2015), 1376-1377.
[1031] Devine (2015), 1380-1382.

psychedelic drugs for religious purposes, allowing them to consume otherwise illicit substances in the context of worship.[1032] But the differential treatment of secular and religious drug users in law rests upon arbitrary, and biased, foundations. In both language and practice, the features of psychedelic medicine bear more than a family resemblance to the religious use of drugs. Indeed, reports of altered states of consciousness (ASCs) indicate comparable experiences for both spiritual and secular consumers.[1033] What justifies the distinction between religious "enlightenment" and mental health or "wellness" when both are induced by the same chemical? While the motives behind psychedelic drug use may vary between individual users there is more that unites the "'objectivity of science' and the 'subjectivity of culture'" than the current legal paradigm suggests.[1034] This section draws on constitutional case law to explore the conflicts, contradictions, and convergences present in religious freedom and drug law and policy jurisprudence. In so doing it demonstrates that (1) the distinction between the religious and recreational use of psychedelics is problematic from a practical perspective given their historical and practical entanglement, and (2) it is discriminatory in that it privileges devotees of established religions to the exclusion of others with equally compelling legal interests at stake: namely liberty, autonomy, and self-determination. These latter rights and freedoms are the most

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[1032] In the United States' *Gonzales v O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006) the Supreme Court granted an exemption to the UDV Church to use DMT (ayahuasca). Canadian authorities, too, have granted an exemption to Santo Daime believers to use DMT (ayahuasca), see Madrinha Jessica Rochester, "The Legalization Process," CÉU do Montréal, accessed 10 December 2018, http://santodaime.ca/legalization/. For a survey of the situation in several European jurisdictions see Beatriz Caiuby Labate and Henrik Jungaberle (eds), *The Internationalization of Ayahuasca* (Zurich: Lit, 2011).
[1033] Compare early studies like Walter N. Pahnke and William A. Richards, "Implications of LSD and Experimental Mysticism," *Journal of Religion and Health* 5, 3 (1966): 175-208 to more recent ones such as Tara C. Malone et al., "Individual Experiences in Four Cancer Patients Following Psilocybin-Assisted Therapy," *Frontiers in Pharmacology* 9, 256 (2018): 1-6.
[1034] On "questioning the conventional distinction between the 'objectivity of science' and the 'subjectivity of culture'" see Julia Kristeva et al., "Cultural crossings of care: An appeal to the medical humanities," *Medical Humanities* 44, 1 (2018): 55-58.

legally compelling justifications for doing away with religion's special status in drug control law and policy and creating a more neutral framework regulating access to controlled substances.

Article 18 of both the United Nations' Universal Declaration of Human Rights and International Covenant on Civil and Politics Rights (ICCPR) protects freedom of religion internationally.[1035] Religion is not defined in international law, nor in most supranational and national bills of rights.[1036] This lack of common understanding of what religion means has its positives. A content-based definition that includes necessary criteria against which religious individuals and groups, and their attendant beliefs and practices, are adjudged risks both essentializing and devaluing marginalized minority peoples and traditions and excluding them from legal recognition and protection.[1037] Religion, in this line of thinking, is a set of ideas and practices beyond simple classification. General Comment No. 22, expounding the application of the ICCPR's Article 18, explains that "theistic, non-theistic and atheistic beliefs" are covered under "freedom of thought…personal conviction and the commitment to religion or belief, whether manifested individually or in community with others."[1038] Article 18 "is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices," so "newly established" creeds cannot be discriminated against because they lack an extensive history and tradition.[1039] T. James Gunn argues from a more functionalist perspective that underinclusivity and injustice can be avoided by examining the sincerity of a claimant's beliefs and convictions, their identity as a devotee and member of a community, and engagement

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[1035] Universal Declaration of Human Rights (1948), Article 18; International Covenant on Civil and Politics Rights (1966), Article 18.
[1036] T. Jeremy Gunn, "The Complexity of Religion and the Definition of Religion in International Law," *Harvard Human Rights Journal* 16 (2003), 189-190.
[1037] Gunn (2003), 193-197.
[1038] Office of the High Commissioner for Human Rights, General Comment No. 22: The right to freedom of thought conscience and religion (Art. 18), CCPR/C/21/Rev.1/Add.4 (30/07/93), paras 1-2.
[1039] General Comment No. 22, para 2.

in the "actions, rituals, customs, and traditions" that mark "religion as a way of life."[1040] Focusing exclusively on form ignores the substance animating spirituality. Judges should thus look beyond majoritarian conceptions of religion to ensure minoritarian groups are not deprived of their right to hold and perform idiosyncratic beliefs and practices.

Before the United Nations Human Rights Committee (HRC), the independent treaty body tasked with adjudicating human rights claims under the ICCPR's First Optional Protocol, Article 18 suits disputing the criminalization of the possession of controlled substances for religious purposes have fared poorly. A communication brought by the Canada-based and "newly established" Assembly of the Church of the Universe, which professedly used cannabis as a sacrament, was deemed inadmissible for several material technical reasons. Regardless, the Committee was suspicious of the Church's submission and stated that "a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug cannot conceivably be brought with the scope of Article 18 of the Covenant."[1041] Gareth Prince's petition against South Africa, avowing that the latter's refusal to grant an exemption from the general prohibition of the possession of cannabis for sacramental use by Rastafari violated Article 18, was found to be admissible but did not convince the Committee prohibition was violative of the right to religious liberty. South Africa's cannabis ban was accepted as a proportionate and necessary response to the legitimate aim of "protect[ing] public safety, order, health, morals or the fundamental rights and freedoms of others, based on the harmful effects of cannabis."[1042] An exemption could plausibly undermine these ends and pose a serious diversion issue. The state thus had no positive obligation to devise a scheme to accommodate Rastafari as the right to freedom of religion "is

[1040] Gunn (2003), 200-205 (quotation at 204).
[1041] *M.A.B., W.A.T. and J.-A.Y.T. v Canada*, Communication No. 570/1993, UN Doc CCPR/C/50/D/570/1993 (1994), para 4.2.
[1042] *Prince v South Africa*, Communication No. 1474/2006, UN Doc CCPR/C/91/D/1474/2006 (2007), para 7.3.

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not absolute and may be subject to limitations."[1043] When drug control has met religion at the Human Rights Committee, the prerogatives of the IDCS have overridden the legal rights claimed by religious minorities.

In domestic and supranational constitutional adjudication, at least in liberal democratic contexts, the right to religious freedom commonly requires that the state treat religious beliefs and institutions neutrally and non-discriminatorily, avoiding forcing the religious to choose between adhering to secular law and betraying their convictions.[1044] In seeking to protect the free expression of religious beliefs, however, as András Sajó and Renáta Uitz articulate: "Courts cannot become arbiters of religious teachings and truth…nor can they pass judgment on the legitimacy, value, or utility of religious teachings for the state or society."[1045] Judges are to assess the subjective sincerity of individual religious belief, not deconstruct and interrogate its objective content.[1046] While the state cannot coerce individuals to hold or express a belief or no belief at all, it may impose limits on the manifestation of belief. Limitations are usually subject to proportionality analysis, balancing or weighing the importance of the right against the legitimate public interests that support upholding impugned legislation. Public morality, for instance, is broadly accepted by judges as a matter for the political branches to determine. The upshot of such deference is the curtailment of religious liberty.[1047] Given that majoritarian sentiments regularly inform judicial decision-making: "minority religious practices are not immune to limitations when the majority understands them as being without any spiritual significance and thus falling under the scope of general secular rules."[1048] In short, religious

[1043] *Prince* (2007), paras 7.2-7.3.
[1044] Gunn (2003), 213-215.
[1045] András Sajó and Renáta Uitz, "Freedom of Religion," in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), 917.
[1046] Sajó and Uitz (2012), 917.
[1047] Frank B. Cross, *Constitutions and Religious Freedom* (Cambridge: Cambridge University Press, 2015), 154-156.
[1048] Sajó and Uitz (2012), 917-919.

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freedom claims do not trump the uniform application of the law. And the entanglement of popular perceptions of minority religions with the separation of powers doctrine makes it difficult for insular groups and individuals to win recognition of their rights through the courts.

Judges may bridge the gap between the uniform application of the law and religious freedom claims vis-à-vis accommodation. Accommodation as a matter of law entails the extent "to which religion-dictated behavior must be exempted (accommodated) from generally applicable rules in everyday life."[1049] In practice, courts have hesitated to accommodate unorthodox practices like the use of controlled substances in religious ritual.[1050] This is because exemptions to drug control laws and policies are thought to compromise the integrity of domestic statutes and the IDCS. Prima facie, of course, they do. At the same time, the inclusion of constitutional caveats-safeguard clauses in the conventions and the supremacy of constitutional rights and freedoms over international treaty obligations offer courts a path to accommodate those with claims based on religion.[1051] The UNDP's Guidelines on Human Rights and Drug Policy go even further, suggesting that "[c]ertain rights protections cannot be limited at any time, for any reason," including "the right to freedom of thought, conscience, and religion."[1052] The lack of judicial resort to accommodation as a means to resolving disputes between drug control law and policy and rights and freedoms claims indicates the extent to which norms of strict control, prohibition, suppression, and criminalization are embedded nationally and supranationally.

4.4.a Council of Europe and United Kingdom

[1049] Sajó and Uitz (2012), 920.
[1050] Bone (2020), 144; Peter W. Edge, "Religious drug use in England, South Africa and the United States of America," *Religion and Human Rights* 1, 2 (2006): 165-177.
[1051] Gabrielle Raemy Charest, "The Visionary Vine: When Domestic Religious Freedom and International Law Conflict," 12 *Tulane Journal of International & Comparative Law* 435 (2004), 436-437 and 450-451.
[1052] United Nations Development Programme et al. (2019), 23.

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In Europe, including Britain, Article 9 of the Council of Europe's European Convention on Human Rights (ECHR) protects freedom of thought, conscience, and religion. An individual and group right, Article 9 covers public and private beliefs and acts, including the right "to manifest [one's] religion or belief, in worship, teaching, practice and observance."[1053] Under the ECHR, courts have taken to looking at the substantive content of religious claims and reasoning by analogy vis-à-vis conventional faiths in determining whether a belief system warrants judicial protection. Hallmarks of genuine belief systems include transcendentalism, the pondering of first causes and the meaning of life, and faith in redemption through devotion. Secular traditions, too, may benefit from Article 9 safeguards, but recognition of bona fides does not mean claims will succeed.[1054] State imposed limits on the free exercise of belief and religion are permissible so long as they "are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."[1055] The extensive suite of justifications available to governments to curb Article 9 liberties is common to the non-absolute, non-inviolable rights set out in the ECHR.

The European Court of Human Rights (ECtHR) considered the religious consumption of psychedelic drugs in a 2014 case involving a Dutch national and the Santo Daime Church, a Brazilian religious organization whose adherents imbibe ayahuasca (DMT) sacramentally. After the police confiscated her supply of ayahuasca during a lawful search and seizure, the applicant attempted to have it returned on the basis that the forfeiture violated her right to freedom of

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[1053] ECHR, Article 9(1).
[1054] Celia G. Kenny, "Law and the Art of Defining Religion," *Ecclesiastical Law Journal* 16 (2014), 23-25.
[1055] ECHR, Article 9(2). For a comprehensive review of the European Court of Human Rights case law on limitations of the right to religious worship, teaching, practice, and observance see Schabas (2015), 431-440.

religion under Article 9 of the ECHR.[1056] The Court recognized that "denying the possession for use of ayahuasca in [the applicant's] rites interfered with their right to manifest their religion as 'worship', as guaranteed by Article 9."[1057] The interference, however, was prescribed by law in the Dutch Opium Act, which prohibited possession of DMT, pursued a legitimate aim in seeking to preserve public order and protect public health, and was "necessary in a democratic society" in that it prevented harm to public health.[1058] Two further points should be stressed. First, the ECtHR noted that the right to freedom of religion does not excuse one from observing generally applicable laws.[1059] Second, the Convention on Psychotropic Substances 1971 and domestic Opium Act restricts access to DMT to medical and scientific purposes alone.[1060] For these reasons, the Netherlands satisfied Article 9's limitations test. The ECtHR held that the complaint was "manifestly ill-founded" and dismissed the case.[1061] The strong rejection of the Article 9 claim by the Court indicates that the IDCS and its implementation in Europe are entrenched to such a degree that human rights and fundamental freedoms challenges are unlikely to overturn law and policy at the supranational level.

In the UK, as elucidated in *R(Williamson) v Secretary of State for Education and Employment*, manifestations of religious belief "must be consistent with basic standards of human dignity or integrity…must relate to matters more than trivial…must possess an adequate degree of seriousness or importance… [and] must be a belief on a fundamental problem" to gain legal protection under the Human Rights Act 1998 (HRA) and ECHR.[1062] Beliefs need not be

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[1056] *Case of Alida Maria Fränklin-Beentjes and CEFLU-Luz da Floresta v the Netherlands*, (App. No. 28167/07) ECtHR Third Section (6 May 2014).
[1057] *Case of Alida Maria Fränklin-Beentjes* (2014), para 36.
[1058] *Case of Alida Maria Fränklin-Beentjes* (2014), paras 37-50.
[1059] *Case of Alida Maria Fränklin-Beentjes* (2014), para 46.
[1060] *Case of Alida Maria Fränklin-Beentjes* (2014), paras 26-28 and 49.
[1061] *Case of Alida Maria Fränklin-Beentjes* (2014), para 50.
[1062] *R (Williamson) v Secretary of State for Education and Employment*, [2005] UKHL 15, [2005] 2 A.C. 246, para 23 cited in Bone (2020), 139. The House of Lords' approach was confirmed by the ECtHR in *Case of Eweida and*

objectively true, only "coherent and capable of being understood. But…too much should not be demanded in this regard."[1063] Religion, after all, "is not always susceptible to lucid exposition or, still less, rational exposition."[1064] Even individual beliefs need not be "fixed and static" or consistent, as beliefs "are prone to change over [one's] lifetime."[1065] Lastly, the assessment of minority manifestations of religious belief "should not be set at a level that would deprive [them] of the protection they are intended to have under the [HRA and ECHR]."[1066] The UK Supreme Court has further explained that "[t]here has never been a universal legal definition of religion in English law" and the concept should be "interpreted in accordance with contemporary understanding[s]" so as not to exclude the new or novel.[1067] The ECtHR added to these qualifications in holding that manifestations of religious belief must have "a sufficiently close and direct nexus between the act and the underlying belief [and] must be determined on the facts of each case."[1068] These multifarious considerations straddle content-based and functionalist understandings of religion, with case-by-case adjudication and a "you'll know it when you see it" stance toward separating legitimate religions from insincere faiths. British case law on the religious use of drugs has not engaged with the test in depth, however, looking instead to international legal obligations and separation of powers issues to justify continued adherence to IDCS norms.

In *R v Taylor*,[1069] the Court of Appeal of England and Wales (EWCA) held that the criminalization of the non-medical possession and supply of cannabis was a necessary,

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Others v The United Kingdom, (App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10) ECtHR Fourth Section (27 May 2013), para 81 cited in Bone (2020), 139.

[1063] *R (Williamson)* (2005), para 23.

[1064] *R (Williamson)* (2005), para 23.

[1065] *R (Williamson)* (2005), para 23.

[1066] *R (Williamson)* (2005), para 23.

[1067] *R (Hodkin & Anor) v Registrar General of Births, Deaths and Marriages*, [2013] UKSC 77, para 34.

[1068] *Eweida* (2013), para 83.

[1069] *R v Taylor*, [2001] EWCA Crim 2263.

proportionate response to the problem of illicit trafficking. The case concerned Paul Taylor, a Rasta, arrested en route to his local temple with 90 grams of cannabis in his possession, intended for sacramental use by himself and his coreligionists. The EWCA, upholding the lower Crown Court's determinations, deferred to the drug control treaties' requirement to prohibit possession and supply, Article 36 of the Single Convention and Article 3 of the 1988 Convention, in declining to recognize an exceptional right to use cannabis for religious purposes under Article 9 of the HRA and ECHR. The protection of public health and safety concerns, especially the dangers of smoking cannabis, were deemed sufficient to justify overriding the claimed human rights considerations.[1070] Charlotte Walsh has argued that Taylor, a brief decision, missed two salient points. First, the ECHR takes precedence over the three drug conventions because the former is directly incorporated into domestic law as the HRA while the latter are not. Second, the constitutional caveats-safeguard clauses in the treaties permit exceptions to the general prohibition of possession for personal consumption.[1071] The Court ultimately decided not to interfere with the Misuse of Drugs Act 1971, a statutory scheme of general application, because carving out an exemption, as Crown counsel suggested, is "the province of Parliament not the courts."[1072] Given the quantity of cannabis involved and evidence of intent to supply, the EWCA determined that changes to the statutory scheme entailing the accommodation of possession and supply of cannabis for religious purposes were for the legislature to implement.

Taylor was settled without consideration of the heightened scrutiny most human rights and fundamental freedoms claims are subjected to. In form, the limitations test was applied. In substance, though, the invocation of public health was accepted by the Court almost without

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[1070] *R v Taylor* (2001), paras 1 and 7-32.
[1071] Walsh (2015), 314-315.
[1072] *R v Taylor* (2001), para 27.

question. Melissa Bone suggests Rastas have not been extended a religious exemption from the general prohibition of cannabis because "cannabis is a highly marketable commodity," unlike the more niche peyote cactus (mescaline) used in the liturgy of the Native American Church in the United States.[1073] The plant's illicit ubiquity, however, does not preclude a narrowly tailored exemption from drug law and policy for Rastas. It is possible to carve out an exception to the MDA for possession and use of cannabis by identifiable Rastas while retaining the criminalization of supply via, inter alia, licensing, government control of production and distribution, record keeping, a limit on the quantity available to individuals, and regulations on where private and communal consumption is permitted.[1074] Such alternatives have not been considered by UK courts in the name of judicial deference to the legislature, leaving religious minorities like Rastas subject to norms of strict control, prohibition, suppression, and criminalization for their adherence to a non-majoritarian creed. This dilemma, forcing individuals to choose between adhering to secular law and betraying their religious convictions, is precisely what the right to religious freedom is supposed to avoid.

The EWCA likewise dismissed a leave to appeal request from an ayahuasca-dispensing shaman in 2012's *R v Aziz*. Counsel for Aziz challenged the lower court's decision denying his claim that Article 9 shielded his DMT-fuelled ceremonies from the purview of the MDA and that ayahuasca did not constitute a "preparation" under the Act. The Article 9 argument failed on the grounds that the prohibition of the preparation, supply, and possession of a Class A substance is a generally applicable law that cannot be excused by a claim to religious freedom, even where the religion is recognized as legitimate.[1075] The question of whether ayahuasca constituted a

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[1073] Bone (2020), 156.
[1074] Matthew Gibson, "Rastafari and Cannabis: Framing a Criminal Law Exemption," *Ecclesiastical Law Journal* 12, 3 (2010): 324-344.
[1075] *R v Aziz*, [2012] EWCA Crim 1063.

"preparation" was a more complicated issue. A quirk of the criminal law prohibiting the possession of controlled substances in England and Wales holds that any "preparation" or "product" of drugs listed under Schedule 2, Part 1, paragraph 5 of the MDA is to be treated as a Class A substance. The absence of any definition of the terms has caused confusion in the courts as to whether natural raw narcotics and psychotropics, not named in the MDA, are criminalized as well as their processed derivatives, which are named in the MDA. The two plants that when combined create DMT-containing ayahuasca, Banisteriopsis caapi and Psychotria viridis, are not covered by the MDA.[1076] Nonetheless, the lower court determined that it was evident "in any ordinary language…and in law" that ayahuasca was a "preparation" covered by the MDA.[1077] This important technical matter aside, the repudiation of the religious freedom argument in Aziz is based on the English judiciary's broad view that "all drugs within a given class are equally harmful," a contention that would benefit from "a clearer evidence-based position."[1078] Such a development seems implausible. The passage of the Psychoactive Substances Act 2016, Walsh points out, gives the government carte blanche to prohibit any vegetation it believes poses a threat to public health, whether there is a scientific basis for doing so or not. As such, the Act sidelines legitimate claims to religious freedom under Article 9 of the HRA and ECHR in the name of moral paternalism masquerading as sound public health policy.[1079] In the criminal law context, UK courts have shown an aversion to deviating from the legislature's drug law and

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[1076] Another example is magic mushrooms, which are not named in the MDA, and psilocin, which is. Walsh (2015), 302-312. As a result of this confusion, prosecutors started to "us[e] a charge of incitement to commit a drug offence—a crime under section 19 of the MDA—to prosecute those involved with plant psychedelics." Walsh (2015), 317. On the "preparation" issue see also Rudi Fortson, "R. v Aziz: producing and supplying controlled drugs - Misuse of Drugs Act 1971 s.28 - whether art.9 of the European Convention on Human Rights could read down s.28 so as to provide a defence of religious belief," *Criminal Law Review* 10 (2012): 801-805.
[1077] *Aziz* (2012), 4 cited in Forston (2012), 801-802.
[1078] Forston (2012), 804.
[1079] Charlotte Walsh, "Caught in the crossfire: Plant medicines and the Psychoactive Substances Act 2016," *Journal of Psychedelic Studies* 1, 2 (2017): 41-49.

policy directives, holding that the religious use of controlled substances cannot be accommodated via rights and freedoms protections.

Religious arguments have also failed to persuade administrative decision-makers to change tack. In 2017, the British branch of the Brazil-based União do Vegetal Church (UDV) appealed a Home Office decision declining their application for an exemption from the application of the MDA to the High Court. The proposed exemption would have allowed the UDV to import the constituent parts of ayahuasca for ceremonial use. The UDV alleged that the Home Office's refusal infringed on the Church's Article 9 right to freedom of religion. Addressing the grounds for the application's denial, counsel for the UDV argued that the decision was "unnecessary and disproportionate" given the unlikelihood of ayahuasca's diversion due to "the unpleasant taste of the tea" and paucity of evidence to substantiate the government's claim that it posed a serious health risk. In response, the High Court noted that Article 9(2) of the HRA and ECHR permits limitations and accepted the Home Office's reasons for rejecting the application as falling within the "wide margin of appreciation" granted states under the Council of Europe human rights system. First, Class A drugs constitute a social and public health danger. Second, the Home Office's concern that an exemption would potentially violate its obligations under the Convention on Psychotropic Substances 1971 was regarded as valid. The High Court dismissed allusions to exemptions granted to the UDV in the US, Canada, Brazil, and Peru, as well as the INCB's own admission that the plants from which ayahuasca (DMT) is concocted are not covered by the 1971 Convention.[1080] In UK administrative law, too, judicial deference to IDCS prerogatives precludes court intervention and innovation on rights and freedoms grounds.

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[1080] *Beneficent Spiritist Center Uniao Do Vegetal v Secretary of State for the Home Department*, [2017] EWHC 1963 (Admin), 2017 WL 03174586.

The cases coming out of the UK denote a firm commitment to the prohibitive ethos of the IDCS and lacklustre dedication to the requirements of human rights and fundamental freedoms protections. Indeed, there is judicial resistance to even considering whether an alternative to strict control, prohibition, suppression, and criminalization is possible, or required, under the HRA and ECHR. Some may disagree that deference to the legislature, with its "overtones of servility, or perhaps gracious concession," is the apt term "to describe what is happening" when UK judges decide what the law is.[1081] In drug control law and policy adjudication, however, where the courts are tasked with balancing individual liberties against majoritarian preferences, deference appears to be the controlling feature of judicial reasoning. This is not an inherently problematic situation, maintaining as it does the separation of powers. That said, declining to seriously engage with rights and freedoms claims is an abdication of the justice system's responsibility to act as the arbiter of what is lawful. This is a choice. Courts in the Netherlands, for example, have recognized ayahuasca ceremonies as core manifestations of shamanic religion and exempted practitioners from criminal prosecution based on Article 9 of the ECHR, despite the public health interests cited by the government in support of its control regime.[1082] Similar factors and mechanisms obtain in the UK, but its political and legal culture conditions judges to abstain from intervening in the law and policymaking process, even where it may be warranted.

4.4.b United States of America

The First Amendment in the United States Constitution's Bill of Rights declares that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." It is not the province of government to officially sanction or support religious

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[1081] On deference see *R (Pro Life Alliance) v BBC*, [2003] UKHL 23, paras 74-77 (quotation at para 75).
[1082] *Fijneman*, District Court of Amsterdam, Case no. 13/067455-99, 21 May 2001 cited in Walsh (2015), 314; *Ondrej Valousek*, District Court of Haarlem, 26 March 2009 cited in Fortson (2012), 802.

organizations, nor preclude adherents from worshipping in their own way. Legislation that interferes with the latter, the Free Exercise Clause, is subjected to a heightened standard of judicial review known as strict scrutiny. The right to freedom of religion is, of course, a qualified right and may be limited by the state. In cases where individuals seek a religious exemption from a generally applicable law, like drug control statutes criminalizing simple possession for example, evidence of group membership, communal activity, and sincerity of belief establishes bona fides.

So, the use of a controlled substance must be "essential or very important" in "standard worship services" to be recognized as a legitimate, constitutionally protected sacramental rite.[1083] This appears to be a relatively objective criterion, but the test, argues Varun Soni, is discriminatory in that it sidelines non-majoritarian religions. Measuring the essentiality and import of minority practices betrays the judiciary's privileging of the Christian tradition as the moral baseline against which all other creeds are appraised, as well as the history of racism and persecution that characterizes the history of drug enforcement in the US.[1084] Attempts to redress this imbalance date to the post-counterculture era. An extensive 1978 Note in the Harvard Law Review, for one, advocated for a functionalist, phenomenological definition of religion to accommodate the wide range of new religious movements that arose in the 1960s and 1970s, from self-improvement societies to LSD churches.[1085] Since that time, US case law has developed in ways that expand the scope of the Free Exercise Clause. The judiciary's skepticism

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[1083] Kent Greenawalt, *Religion and the Constitution, Volume 1: Free Exercise and Fairness* (Princeton: Princeton University Press, 2009), 71-74 (quotation at 74).
[1084] Varun Soni, "Freedom from Subordination: Race, Religion, and the Struggle for Sacrament," 15 *Temple Political & Civil Rights Law Review* 33 (2005): 33-64.
[1085] "Toward a Constitutional Definition of Religion," *Harvard Law Review* 91, 5 (1978), 1069-1072. On expanding the legal definition of religion to accommodate alternative belief systems while simultaneously narrowing it to religious rather than secular creeds see Eduardo Peñalver, "The Concept of Religion," *Yale Law Journal* 107, 3 (1997): 791-822.

of unorthodox customs, however, has persevered. Direct experience of the sacred, divine, etc. occasioned by the consumption of psychedelics must be mediated and supervised by a recognized religious organization, shutting out many unconventional, non-conformist, and minority persons and groups from manifesting their faith and treating them as criminals should they transgress the general prohibition on the use of controlled substances for non-medical, non-scientific purposes.[1086] But in the absence of clear evidence of discriminatory intent, neutrally framed laws impinging on the right to religious freedom are difficult to overcome.[1087]

The Native American Church (NAC) and its syncretic mix of indigenous and Christian traditions arose in what is now largely Oklahoma as a response to the physical, mental, and spiritual destruction wrought by the community's forced dislocation and resettlement by the US government in the late nineteenth century. NAC ceremony involves the communal consumption of peyote-infused tea under the supervision of a spiritual guide and takes place over the course of several hours.[1088] Congress enacted the American Indian Religious Freedom Act in 1978, a law designed to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian…and the freedom to worship through ceremonials and traditional rites."[1089] Three years later Congress granted an exemption from enforcement of the Controlled Substances Act (CSA) to the NAC on the basis that the Church constituted a religion under the First Amendment, there was a long history of

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[1086] Martin W. Ball, "Entheogenic Experience as a Human Right," in J. Harold Ellens et al. (eds), *The Psychedelic Policy Quagmire: Health, Law, Freedom, and Society* (Santa Barbara: Praeger, 2015), 267-268 and passim.

[1087] "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Church of the Lukumi Babalu Aye v City of Hialeah*, 508 U.S. 520 (1993), 546.

[1088] Mike Jay, *Mescaline: A Global History of the First Psychedelic* (New Haven, CT: Yale University Press, 2019); Michael Pollan, *This Is Your Mind on Plants* (New York: Penguin, 2021b), epub.

[1089] The Act was amended in 1996 to better protect Indian Sacred Sites. See Protection and Preservation of Traditional Religions of Native Americans, 42 U.S.C.A. § 1996.

peyote's sacramental use, and its consumption is central to the religion.[1090] Peyote nevertheless remained a Schedule I substance under the CSA and its use conflicted with state drug laws. The NAC's sacred peyote ritual faced the profane world of law and politics anew in the 1990s. The Church looked to the SCOTUS and Congress to buttress their hard-won rights, with lopsided results.

In *Employment Division, Department of Human Resources of Oregon v Smith*,[1091] the SCOTUS considered the First Amendment claim of a pair of NAC members fired from their work for taking part in the sacramental use of peyote and subsequently denied unemployment benefits by the state. Justice Antonin Scalia penned the majority judgment, holding that the Free Exercise Clause of the First Amendment does not insulate individuals from having to observe generally applicable laws like criminal statutes. The precedents set in *Sherbert v Verner*[1092] and *Wisconsin v Yoder*,[1093] that there must be a "compelling state interest" to warrant imposing a "substantial burden" on the Free Exercise of religion and no alternative but to do so available for the state to attain its object, were rejected in this instance because to legitimize the applicant's drug use would undermine the integrity of state drug laws, constitutionally sound instruments with clear public policy objectives, i.e., limiting conduct deemed socially harmful. In Scalia's view, NAC members should have taken their case to the legislature, not the courts, to vindicate their religious practice, as it is not within the purview of the judiciary to decide what is and is not central to a particular faith's doctrine and practice and extend legal recognition and protection thereto.[1094] Dissenting, Justice Harry Blackmun, joined by Justices Brennan and Marshall,

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[1090] United States Department of Justice, Office of Legal Counsel, Peyote Exemption for Native American Church, 5 U.S. Op. Off. Legal Counsel 403, 1981 WL 30929 (22 December 1981).
[1091] *Employment Division, Department of Human Resources of Oregon v Smith*, 494 U.S. 872 (1990).
[1092] *Sherbert v Verner*, 374 U.S. 398 (1963).
[1093] *Wisconsin v Yoder*, 406 U.S. 205 (1972).
[1094] *Employment Division v Smith* (1990), 1597-1606.

argued that peyote's Schedule I status and prohibition was not sufficient to warrant interference with a fundamental right, that the state's equation of sacramental use of a controlled substance with drug abuse was disingenuous, and that diversion of peyote was a non-issue, making it possible for Oregon to implement and manage a judicially crafted exemption from the law.[1095] Congress agreed with Blackmun and, overturning the SCOTUS majority, passed the Religious Freedom Restoration Act 1993 (RFRA)[1096] to address the rights gap created by *Employment Division v Smith* and bring the "compelling state interest" and "substantial burden" test back into play in Free Exercise adjudication.

RFRA's application as against the states was overturned in 1997's *City of Boerne v Flores*,[1097] but it continues to pertain to the federal government and several states have implemented RFRA legislation of their own.[1098] The NAC, however, remains a special case because it involves American Indians who have a special relationship with the federal government. New religious organizations, like Indiana's First Church of Cannabis, purporting to use cannabis as a sacrament have attempted to secure an exemption from the plant's criminal prohibition under state RFRA legislation and failed.[1099] A similar claim by the Church of Cognizance was rejected by Judge Neil Gorsuch at the US Court of Appeals in 2010, predating his 2017 appointment to the SCOTUS, as an insincere attempt to obviate the law by a couple more interested in profiting from the drug trade than spreading spiritual enlightenment.[1100] The Oklevueha Native American Church, too, was unable to leverage RFRA and the First

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[1095] *Employment Division v Smith* (1990), 1615-1623.
[1096] Religious Freedom Restoration Act 1993, 42 U.S.C.A. §2000bb-1.
[1097] 521 U.S. 507 (1997).
[1098] On the RFRA saga see Whitney K. Novak, "The Religious Freedom Restoration Act: A Primer," Congressional Research Service (3 April 2020), https://crsreports.congress.gov/product/pdf/IF/IF11490.
[1099] Lauren Hill, "The First Church of Cannabis and Its Questionable Claim for Religious Freedom," *Rutgers Journal of Law and Religion* 19, 1 (2018): 100-119.
[1100] *U.S. v Quaintance*, 608 F.3d 717 (10th Cir. 2010).

Amendment, among other protections, to convince a federal court its cannabis use should be exempted from the purview of criminal law because the they admitted peyote, already exempted, was an acceptable sacramental substitute. Therefore, there was no "substantial burden" imposed on its members in the exercise of their beliefs.[1101] The peyote exemption is a narrowly tailored answer to the specific question of Native American religious freedom. It is not, however, the only compromise in the conflict between the CSA and religious freedom.

Revisiting the issues presented in *Employment Division v Smith* and the history of RFRA, the SCOTUS addressed a claim to the sacramental use of ayahuasca[1102] (DMT) by the US branch of the União do Vegetal Church in 2006.[1103] The Court declared that Congress had indicated its amenability to exemptions from the uniform application of the Controlled Substance Act in its passage of the NAC's 1981 Peyote Exemption, RFRA's explicit allowance of judicially crafted exemptions, and the CSA's provision for exemptions where public health and safety are not compromised. Further, the Court held that the 1971 Convention's inclusion of ayahuasca (DMT) in its Schedules does not necessitate the rejection of claims to religious freedom under the Free Exercise Clause of the First Amendment. Where conflicts between such laws and rights and freedoms arise, courts are to assess them on a case-by-case basis, balancing the state's interests against those of the individual. Concluding that diversion to the illicit market was not a serious problem vis-à-vis ayahuasca, the Court determined there was no "compelling state interest" in prohibiting the Church's legitimate religious use of it. A narrowly tailored exemption does not compromise the legislative scheme's effectiveness writ large.[1104]

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[1101] *Oklevueha Native American Church v Lynch*, 828 F.3d 1012 (9th Cir. 2016).
[1102] Referred to as "hoasca" in the text.
[1103] *Gonzales v O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006).
[1104] *Gonzales v O Centro Espírita Beneficente União do Vegetal* (2006).

After decades of legislative and judicial action, two discrete and insular minorities in the US, the NCA and UDV, have won the constitutional right and freedom to manifest their religion using psychedelic substances, despite powerful drug law norms of strict control, prohibition, suppression, and criminalization. In these exceptional cases, the legal status of indigenous peoples vis-à-vis the federal government and content-based understandings of religion played meaningful roles in justifying the granting of exemptions. Individuals and groups fitting the less formal functional definition of religion have so far failed to persuade US courts that their possession and supply of illicit drugs is a legitimate manifestation of religious belief.

4.4.c South Africa

Freedom of religion is protected as an individual and group right under South Africa's Constitution. Section 15(1) grants "Everyone…the right to freedom of conscience, religion, thought, belief and opinion." Section 31(1) expresses that "Persons belonging to a cultural, religious or linguistic community may not be denied the right…(a) to enjoy their culture, practise their religion and use their language." Though Section 15 does not explicitly affirm a right to manifest, or exercise, one's beliefs, the Constitutional Court of South Africa (CC) has recognized that both holding and acting on one's convictions are inherent to the right to freedom of religion.[1105] While direct and indirect governmental coercion of the religious is forbidden by the Bill of Rights, facially neutral laws that impinge on religious beliefs and acts are permissible.[1106] In determining whether a law infringes on individual or group rights, the courts assess the sincerity of the beliefs involved, asking whether the belief is, in fact, sincerely held and whether the impugned legislation imposes a sufficient burden on the claimant such that it is

[1105] Paul Farlam, "Freedom of Religion, Belief and Opinion," in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa: Second Edition, Volume 3* (Cape Town: Juta, 2014), 41-12-41-15.
[1106] Farlam (2014), 41-18-41-23.

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unconstitutional or, in the alternative, reasonable and justifiable. Section 36, as detailed in chapter 3, sets the parameters against which limitations are appraised. Fundamentally, religious practices must be central to one's faith to win protection, but in making this determination the courts are not to interrogate "the validity, merits or truths of religious beliefs…to avoid doctrinal entanglement."[1107] Judges must also weigh the price of securing religious liberty with the cost of interfering with the state's legitimate and compelling law and policy aims. If a less restrictive means are available to the state to attain its objectives, it should pursue its goals in a way that accommodates religion. Individuals and groups cannot be forced to choose between religious obligations and adhering to the letter of the law. This is especially true for post-Apartheid South Africa, since non-Christian beliefs were suppressed, and their believers oppressed, throughout the previous regime's racist rule.[1108] The country's history makes religious freedom foundational to its transformative constitutional project.

The extent to which Christianity maintained its hegemony under the new constitution was tested in 1997's *S v Lawrence, S v Negal, S v Solberg*.[1109] The appellants had challenged the Liquor Act, which prohibited the sale of alcohol on Sundays, on the grounds that it violated their rights to religious freedom and economic activity by imposing Christian beliefs and practices on the rest of society.[1110] There was disagreement on the CC as to whether the law actually endorsed one set of religious tenets to the exclusion of all others. Justice Arthur Chaskalson's plurality judgment determined that Sundays had, over time, been thoroughly secularized, "being the most common day of the week on which people do not work."[1111] The state was therefore not

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[1107] Farlam (2014), 41-30-41-44 (quotation at 41-40).
[1108] Waheeda Amien, "South Africa," in Sir James Dingemans et al. (eds), *The Protection for Religious Rights: Law and Practice* (Oxford: Oxford University Press, 2013), 250-256.
[1109] (CCT38/96, CCT39/96, CCT/40/96) [1997] ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176 (6 October 1997).
[1110] *Lawrence* (1997), para 7.
[1111] *Lawrence* (1997), para 95.

endorsing the Christian religion in the Liquor Act. In the absence of evidence proving the appellants were coerced into modifying their beliefs, Chaskalson ruled the law was constitutional.[1112] Justice Kate O'Regan, by contrast, invoked the new constitutional order's rejection of favourable treatment for Christianity and highlighted the explicitly religious language of the statutory scheme in finding the impugned provisions of the Act violated the right to freedom of religion. Equity and fairness are the lodestars of religious liberty in the new South Africa. The problematic passage, O'Regan declared, should therefore be severed from the legislation.[1113] While Justice Albie Sachs thought the Act infringed on the right to freedom of religion, and that there was no place for a hierarchy of beliefs under the constitution, he believed it "[did] so in an indirect and marginal way…in respect of a matter of slight sectarian import."[1114] For these and other reasons, the CC upheld the Liquor Act. The Lawrence decision speaks to the entrenchment of Christian norms in secular South African law. Alcohol regulation, like Sunday closing laws, appears neutral in a society where sacramental wine and recreational drinking are considered normal. Religious pluralism is tolerated under South Africa's constitutional order, but not to the extent that tradition is cast aside to accommodate minority faiths and rituals.

Gareth Prince tested South Africa's freedom of religion protections vis-à-vis its drug control laws in 2002, a decade and a half before his successful 2018 challenge of the prohibition of cannabis possession based on its infringement of the right to privacy. Before the Constitutional Court, he argued that provisions of the Drugs and Drug Trafficking Act of 1992 and Medicines and Related Substances and Control Act of 1965 were overbroad and violated his

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[1112] *Lawrence* (1997), paras 97 and 104.
[1113] *Lawrence* (1997), paras 123-127 and 133.
[1114] *Lawrence* (1997), para 174.

Section 15 right to freedom of religion as a practicing Rasta.[1115] The authorities did not dispute Rastafarianism's status as a religion and recognized the consumption of cannabis as a genuinely sacramental act.[1116] The state openly acknowledged that strict control, prohibition, suppression, and criminalization limited Prince's right to religious liberty, but convinced the lower courts this was justified and necessary based on South Africa's international legal obligations under the IDCS. In addition, the CC accepted that preventing the harms attendant to drug abuse required a blanket ban, as a system of exemptions for Rastas alone would be "impossible to enforce."[1117] The Court split 5-4 in rejecting Prince's appeal.

Chief Justice Chaskalson's majority framed the issue before the CC as follows: whether the prohibition of cannabis was consistent with the right to religious freedom considering the absence of a statutory exemption accommodating ritual use.[1118] The majority reiterated Rastafarianism's status as a religion and that "legislation prohibiting the possession and use of cannabis trenches upon the religious practices of Rastafari."[1119] "[I]t is clear," they continued, "that its use both as an individual and communal activity…is regarded by most Rastafari as an essential part of the religion," though, it was noted, "the use of cannabis is apparently not obligatory."[1120] The state, defending the impugned legislation, argued that preventing the harms associated with drug abuse was both a legitimate aim and an international treaty obligation subject only to the strictures of the constitution. It was not a relic of the racist Apartheid past.[1121] While Sections 15 and 31 of the Bill of Rights were implicated by the laws at issue, the focus of

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[1115] *Prince v President of the Law Society of the Cape of Good Hope* (CCT36/00) [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (25 January 2002), paras 31-36.
[1116] *Prince* (2002), paras 15-21 and 40-44.
[1117] *Prince* (2002), paras 29-30.
[1118] *Prince* (2002), paras 94, 96 and 109.
[1119] *Prince* (2002), para 97.
[1120] *Prince* (2002), para 103.
[1121] *Prince* (2002), paras 104-105.

the case is on whether the limitations imposed on Rastas was justified under Section 36.[1122] As a matter of proportionality, Chaskalson and his fellow Justices agreed that prohibition imposed a "substantial limitation" on Rasta religious practice, but it simultaneously pursued "an important government purpose in the war on drugs."[1123] The majority then turned to CC precedent in *Christian Education South Africa v Minister of Education*[1124] to structure their weighing of Rastafarianism's sacred values with secular liberal democratic ones, asking to what extent the state should permit "religious communities to define for themselves which laws they will obey and which not[?]"[1125] In a democracy, the Court answered:

> society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intense burdensome choices off either being true to their faith or else respectful of the law.[1126]

The right to religious freedom is not absolute. Foreign case law, like the SCOTUS's *Employment Division v Smith*, supports the idea that limits on this right are appropriate given the state's legitimate interest in preventing harm and suppressing the trade in illicit controlled substances, both of which are required by the drug control conventions.[1127] That said, legal principles and policy objectives were not the only factors precluding acceptance of Prince's claim.

At a practical level, the Chaskalson majority concluded: "There is no objective way in which a law enforcement official could distinguish between the use of cannabis for religious purposes and the use of cannabis for recreation."[1128] In other words, to require an exemption from the criminal law for Rastas would open the floodgates to spurious claims of religious

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[1122] *Prince* (2002), para 111.
[1123] *Prince* (2002), para 114.
[1124] (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000).
[1125] *Christian Education*, para 35 cited in *Prince* (2002), para 115.
[1126] *Christian Education*, para 35 cited in *Prince* (2002), para 115.
[1127] *Prince* (2002), paras 119-127.
[1128] *Prince* (2002), para 130.

devotion to enable the skirting of prohibition. A permit system “allowing bona fide Rastafari to possess cannabis for religious purposes” would not remedy the situation, as Rastafarianism is not distinctly organized.[1129] The financial cost of maintaining a bureaucracy to oversee a control scheme, and the fact that regulated use is permitted under domestic legislation and the drug control conventions for medical and scientific purposes alone, further convinced the majority that a government-controlled market in cannabis for religious users was an infeasible alternative to prohibition.[1130] From a public health perspective, they surmised that harm prevention “would depend entirely upon the self-discipline of the holder [of a permit] and would not be amenable to state monitoring or control.”[1131] The majority also accepted that the private production and distribution of cannabis, an obvious corollary of regulated religious use, could lead to diversion to the illicit market.[1132] For these reasons, “[t]he use made of cannabis by Rastafari cannot in the circumstances be sanctioned without impairing the state’s ability to enforce its legislation in the interests of the public at large and to honour its international obligations to do so.”[1133] Chaskalson and his fellow justices dismissed Prince’s appeal, holding that an exemption from the uniform application of the law on controlled substances would “interfere[] materially with the ability of the state to enforce its legislation.”[1134]

This was a closely split decision, however, and the majority’s determinations did not go unchallenged. Justice Ngcobo’s minority judgment[1135] homed in on whether the state’s refusal to provide a religious exemption from the uniform application of the criminal law prohibiting

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[1129] *Prince* (2002), paras 133 and 135-137 (quotation at para 133).
[1130] *Prince* (2002), paras 133-134.
[1131] *Prince* (2002), paras 138 and 142 (quotation at para 138).
[1132] *Prince* (2002), para 138.
[1133] *Prince* (2002), para 139.
[1134] *Prince* (2002), paras 142-144 (quotation at 142).
[1135] Joined by Mokgoro and Sachs JJ and Malanga AJ.

cannabis possession was necessary to preserve the integrity of the legislative scheme.[1136] Its Section 15 analysis begins by characterizing the nature of the right involved, stating that "[t]he right to freedom of religion is probably one of the most important of all human rights."[1137] South Africa's prioritization of "human dignity, equality and freedom" in the transformative constitutional order and its defense of diversity in pursuit of a "free and open society" were, Ngcobo and others believed, undermined as a result of cannabis' prohibition, which criminalized, stigmatized, degraded, and devalued Rastas as members of a minority religion.[1138] The rationale behind the limitation imposed in this case was certainly important. Combatting drug abuse and trafficking was also necessary considering the state's treaty commitments; but these are "subject," of course, "to [its] Constitution."[1139] On one hand, that controlled substances may be used for medical and scientific purposes indicated that drugs like cannabis are not harmful in all circumstances and a total ban unnecessary.[1140] On the other, the medical evidence presented to the Court suggested that "uncontrolled consumption" was harmful and insufficient information was available to determine a "safe" level of use.[1141] It is ultimately the prerogative of the legislature to regulate and control the drugs market, but this does not mean it can do so without regard to the rights of citizens. Accommodating the religious use of cannabis, Ngcobo and others suggested, would neither threaten the integrity of the legislative scheme as a whole nor undermine the Single or 1988 conventions, both of which countenance exemptions based on constitutional principles. An exemption scheme for Rastas would therefore be lawful and workable.[1142] On the question of proportionality, Ngcobo accepted that smoking was an

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[1136] *Prince* (2002), para 47.
[1137] *Prince* (2002), para 48.
[1138] *Prince* (2002), paras 49-51.
[1139] *Prince* (2002), paras 52-53.
[1140] *Prince* (2002), para 54.
[1141] *Prince* (2002), para 61.
[1142] *Prince* (2002), paras 63-73.

unequivocal harm, but recalled that it is not the only way Rastas consume cannabis. To treat all modes of use, such as the plant's burning as incense, as equally harmful was an intolerant and overbroad application of the law. This is because "[t]he prevention and control of the risk of harm caused by abuse of dependence-producing drugs to society and the individual must be made the primary objective of anti-drug policy."[1143] As such, the minority regarded the impugned provisions constitutionally invalid. A narrowly tailored exemption for Rastas was required by the constitution, but given the complexity of the issue, and out of respect for the separation of powers, it should be up to Parliament to remedy the legislative defect.[1144]

Justices Sachs and Mokgoro authored a third opinion in concurrence with the minority but went further than Ngcobo in recognizing the religious rights of Rastas. Sachs and Mokgoro focused on the minority status of the Rastafarian religion and extensive history of oppression of South African cannabis users. In their view, this was a group and activity that was meant to be protected from majoritarian prejudices by the new constitutional order. The conflict "imposes a clear duty on the courts to intervene so as to guarantee the Rastafari a reasonable and manageable measure of space within which to exercise their individual and associational rights."[1145] And from the perspective of international law, the limited decriminalization of cannabis use for religious purposes appeared to be in line with the IDCS's treaty obligations.[1146] Neither this nor South Africa's transformative constitution, a matter of constitutional identity, convinced the CC majority to find in Prince's favor. The practical impediments to granting an

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[1143] *Prince* (2002), paras 77-82 (quotation at para 78).
[1144] *Prince* (2002), paras 83-90.
[1145] *Prince* (2002), paras 145-163 (quotation at para 163).
[1146] Sachs and Mokgoro J cite Article 14 of the 1988 Convention requiring that crop eradication efforts respect human rights and the INCB's 1992 report, which states that the treaties do not mandate the criminalization of consumption, to substantiate this contention. *Prince* (2002), para 164.

exemption to Rastas from the prohibition of cannabis made the regime necessary, as there was no feasible alternative.

In his comparative study of US and South African constitutional rights jurisprudence, Mark Kende comments that it was out of step with South Africa's transformative constitutional project for the CC to arrive at the same conclusion in 2002's Prince as the SCOTUS did in *Employment Division v Smith*. Both decisions sided with majoritarian sentiment in preserving the uniform application of the criminal law prohibiting the supply, possession, and use of illicit drugs over constitutional rights to freedom of religion.[1147] Differences in the degree to which international law was deemed controlling had little effect on the outcomes. South Africa's respect for international law, mandated by Section 39(1)(c) of the Constitution, informed the Prince majority's view that to overturn the impugned provisions of its domestic law would betray its binding treaty commitments, acceded to in good faith. The SCOTUS all but ignored its treaty commitments in deciding both *Employment Division v Smith* and *Gonzales v O Centro Espírita Beneficente União do Vegetal*, ordering an exemption in the latter instance but not the former. While it is difficult to discern principled legal arguments from universal reason in the jurisprudence on the religious use of drug control there are consistencies in the rulings from the UK, US, and South Africa. Courts in all have declined to intervene in conflicts between strict control, prohibition, suppression, and criminalization and constitutional rights and freedoms in large part due to a commitment to the separation of powers, leaving it to the legislative branch of government to craft exemptions from generally applicable drug control laws. Only in the US, with RFRA, did the legislature act to extend protections to drug-imbibing religious minorities.

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[1147] Mark S. Kende, *Constitutional Rights in Two Worlds: South Africa and the United* States (Cambridge: Cambridge University Press, 2009), 236.

Courts broadly accept the legitimacy of the war on drugs and preserve the status quo of strict control, prohibition, suppression, and criminalization even where religious freedom, purportedly one of the most important rights in the liberal democratic catalogue, is implicated. Indeed, it seems counterintuitive that South Africa's top court would reject a narrow exemption for Rastas to lawfully consume cannabis on grounds of religious freedom in 2002 only to effect full-scale cannabis decriminalization based on the right to privacy a decade-and-a-half later. Emma Lubaale and Simangele Mavundla suggest Prince's 2018 privacy argument succeeded where religion failed because of its general application and the ease with which legal change could be implemented. There is no need to distinguish genuine religious adherents from mere recreational users in extending the same right to all South Africans. By contrast, the religious freedom issue raised in 2002 asked the CC to exempt "certain categories of individuals" from the law.[1148] In short, the right to privacy lent itself to a more pragmatic solution to the cannabis question than did religion.

The problem of implementing an exemption scheme for Rastas, however, was not the main factor militating against Prince's religious freedom claim. Constitutional scholar Pierre de Vos, analyzing the Supreme Court of Appeals' (SCA) treatment of the case, explained the judiciary's refusal to grant constitutional protection to Rasta cannabis users as a manifestation of pre-democratic South Africa's moralistic "pharmaceutical Calvinism."[1149] Utility, not pleasure, was the only appropriate context in which drugs were to be taken under this paradigm. Colonial and Apartheid-era views of the individual and social harmfulness of cannabis use and recreational drug consumption more generally – but for alcohol and tobacco, of course, which

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[1148] Lubaale and Mavundla (2019), 829.
[1149] Pierre de Vos, "Freedom of religion v drug traffic control: The Rastafarian, the law, society and the right to smoke the 'holy weed,'" *Law, Democracy & Development* 5, 1 (2001), 98.

was widely accepted by whites – informed the SCA's assessment of a plant with a considerable history in the region. Rastas, in addition to forming a religious minority, were black and their consumption of cannabis was viewed as a threat to the regime's Eurocentric order. But instead of overturning these prejudices the SCA and CC reinforced the marginalization of a vulnerable group.[1150] Affording Rastafarianism's followers the right to manifest their beliefs would have required judges to not only call out bigotry, as they rightly did, but effect material legal change on an issue with weighty historical and cultural baggage. Leaving it to the legislative branch of government to do so was a dereliction of duty under the Bill of Rights.

4.4.d Religious Liberty for Some

The contested nature of religion and separation of powers concerns routinely act as brakes on courts, making judges err on the side of caution when deciding not to overturn or tweak political and legislative choices in the name of constitutional human rights and fundamental freedoms. Case law from the ECtHR, UK, USA, South Africa evidence that judicial responses to the religious use of controlled substances are as varied as religion itself.[1151] History and legal culture, among other factors, establish the contours of analysis and decision-making in each jurisdiction. What unites them is a consistent recognition of the legitimacy of individual and group beliefs in combination with moralistic platitudes regarding the harms of illicit consumption. Only in a few instances have religious worshippers been able to escape strict control, prohibition, suppression, and criminalization. Moving beyond formal acknowledgement of the importance of unorthodox minority beliefs to winning the substantive right and freedom to manifest one's beliefs through

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[1150] de Vos (2001).

[1151] See also the Italian decision Corte di Cassazione, Sez. II Penale – Sentenzia (19 Aprile 2012), n. 14876 – Pres. Cassuci. While the Corte judges legality rather than constitutionality, it nonetheless rejected the appeal of the public prosecutor in a case involving a self-identified Rasta in possession of 70 grams of cannabis whose religious liberty claim was accepted by the lower Appeal Court of Florence.

drug-induced experiences requires overcoming near-universal prejudices against insobriety and the law and policy meant to bring about a "drug free world." Given these obstacles, reformers would do well to contribute to revising the traditional meaning of religion in law to better reflect contemporary trends and accommodate the new and novel.

4.5 Secular Sacraments

The non-medical, non-scientific use of psychedelics associated with retreat-based therapy, for example – where drugs are administered in a secularized version of indigenous-inspired traditions – falls through the cracks of legal recognition. Jurisprudence on the right to freedom of religion has not recognized such rituals as worthy of constitutional protection, however important they may be to the pursuit of material transcendence. Private recreational consumption, too, can be argued to be a practice akin to religious use, entailing ceremonial rites, solitary contemplation, and other acts prevalent in organized religions.[1152] Whether done alone or in concert, the current vogue for using controlled substances as secular sacraments is in large part an outgrowth of the 1960s counterculture and its aftermath. This has resulted in the growth of the "spiritual but not religious" (SBNR) demographic in Western countries, people with idiosyncratic and syncretic belief systems and a loose or non-existent affiliation with organized religion. Jeremy Patrick thus calls the religion of the SBNR "à la carte spirituality." While it is difficult to evaluate the sincerity of such beliefs, which often lack an institutional foundation, have no canonical text or theology, are not systematic, and prone to change, it is to be recalled that judges are not to rule on the truth or falsity of any faith. So long as there is a sufficient nexus between beliefs and conduct the judiciary should be able to recognize bona fide claims and filter

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[1152] Michael Pollan, "How Should We Do Drugs Now?" *New York Times*, 11 August 2021a, https://www.nytimes.com/2021/07/09/opinion/sunday/drug-legalization-mdma-psilocybin.html.

out fraudulent ones. Limits are, of course, necessary to prevent each from becoming a "law unto themselves" under the banner of religious liberty. Nevertheless, meeting society's needs in the age of the individual, where consumption and lifestyle choices form part of one's identity, may require an updated notion of religion if it is to maintain its relevance into the future.[1153] Freedom of religion faces a key challenge in the postmodern West, fast-tracked to a great extent by the secular sacraments of psychedelic SBNRs.

The prime beneficiaries of the right to religious freedom in the Western tradition are "unpopular minority faiths."[1154] The doctrine secures for them the right to profess theological dogma and perform services and rites, often imperative "duties and responsibilities" of the faith, in the face of contrary or even hostile majoritarian values. This does not give the religious carte blanche to act without regard to the rest of society. The state may limit and even prohibit the exercise of individual and group beliefs where the rights and freedoms of others are infringed upon.[1155] The question of which religious creeds, organizations, and gestures are worthy of constitutional protection is problematic, however, because, as Ronald Dworkin wrote:

> it relies on the assumption that it lies within the power of government to choose among sincere convictions to decide which are worthy of special protection and which not. That assumption seems itself to contradict the basic principle that questions of fundamental value are a matter of individual, not collective, choice. We cannot assume that the convictions government chooses not to protect are insincere or otherwise not genuine.[1156]

Further, religious exemptions from the application of general laws and regulations set a double standard by privileging one set of beliefs over others. This is explicitly forbidden by constitutional provisions like the First Amendment of the US Constitution, whereby the state is

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[1153] Jeremy Patrick, "A la carte spirituality and the future of freedom of religion," in Paul T. Babie, Neville G. Rochow and Brett G. Scharffs (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Cheltenham, UK: Edward Elgar, 2020), 58-91.
[1154] Ronald Dworkin, *Religion Without God* (Cambridge, MA: Harvard University Press, 2013), 111.
[1155] Dworkin (2013), 113.
[1156] Dworkin (2013), 123.

prohibited from "giving special official recognition or protection" to religious organizations in the Establishment Clause.[1157] Why, for instance, recognize the rights of the Church of Jesus Christ of Latter-day Saints and its members and not Satanists? Ideally, there should be no differentiation between the two under a properly liberal separation of church and state. But the reality of the regulation of religious life has long borne the marks of preferential treatment for familiar traditions to the exclusion of the new and novel.

As an alternative to the contradictions of the classic right to religious freedom, Dworkin argued for what he termed "ethical independence," the claim "that government must never restrict freedom just because it assumes that one way for people to live their lives—one idea about what lives are most worth living just in themselves—is intrinsically better than another."[1158] A secularized notion of religious freedom, ethical independence adds the right to exercise one's beliefs to the more circumscribed right to freedom of thought while retaining the state's power to limit acts that infringe on the rights of others.[1159] Reminiscent of Millian liberty, Dworkin's is a conception of freedom that prizes individualism and autonomy as core values. Ethical independence, in his words, "gives religion all the protection appropriate" while not discriminating against nonbelievers and nonconformists.[1160] This big tent standard extends constitutional recognition to individuals and groups left out of traditional conceptions of religion. But in so doing it redefines religion. Indeed, treating theistic and atheistic creeds as equal under the law on religious freedom is a controversial position.

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[1157] Dworkin (2013), 124-125.
[1158] Dworkin (2013), 128-131 (quotation at 130).
[1159] Dworkin (2013), 128-131. See also Michael J. Perry, "The Right to Religious and Moral Freedom," in John Witte, Jr. and M. Christian Green (eds), *Religion and Human Rights: An Introduction* (Oxford: Oxford University Press, 2012), 269-280.
[1160] Dworkin (2013), 137.

New religious movements directly and indirectly challenge the Judeo-Christian values and norms underlying much of the contemporary Western legal order. From the 1960s on, the psychedelic substances imbibed by adherents of unconventional belief systems were portrayed as a threat to individual and public health and safety and the moral and social order writ large. While secular constitutionalism formally mandated the accommodation of non-mainstream worldviews, there was widespread concern that permitting antisocial behavior would undermine or even destroy the polity. The "psychedelic dilemma" remains unresolved.[1161] To endow every individual hypergood, ultimate end, urgent interest, or "identity-constituting attachment" with the special status of religion is something public authorities cannot feasibly do. Logically, if all are special, none are. Practically, it would be impossible to monitor the constantly evolving convictions of every citizen and grant exemptions to the laws and policies they object to. This is where the risk of each becoming a law unto themselves arises, as selfish desire masquerading as divine inspiration impinges on the state's right to rule. The granting of group rights to self-regulating organizations is the liberal compromise to unfettered religious liberty or ethical autonomy. The former can be controlled at arm's length. So, the state "can, at best, protect broad classes of ends that many people share. 'Religion' is such a class."[1162] How that class is defined inevitably leads to the exclusion of individuals and groups that do not meet the standards expected of the religious.

Scholars supporting the continued separation of freedom of religion from secularized notions of freedom of belief and conscience are often seeking to insulate faith communities from

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[1161] Weintraub (1967); Alan Watts, "Psychedelics and Religious Experience," *California Law Review* 56, 1 (1968): 74-85.
[1162] Andrew Koppelman, "What kind of a human right is religious liberty," in Rex Ahdar (ed), *Research Handbook on Law and Religion* (Cheltenham, UK: Edward Elgar, 2018), 104 and 118.

the imposition of liberal values.[1163] Stephen D. Smith argues that the egalitarian thrust of modern constructions of religious liberty divorce the right from its distinctly religious origins, negating religion as a category worthy of constitutional protection and subordinating it to equality as the supreme value.[1164] In objecting to the special status accorded to religious interests, Joel Harrison notes, Dworkin's ethical independence desacralizes religion and strips it of its theistic basis. The varieties of religious experience thus become commodities on the "market of spiritualities,"[1165] part of a wider consumer culture in which individual self-expression is the ultimate concern. As Harrison puts it: "Difference is flattened into a seemingly universal category—ethical freedom or, more critically, consumer choice."[1166] The weakness of these arguments is that religion is already seen as a choice, not only by consumers in the "market of spiritualities," but by religions themselves. Take Christianity and Islam, which both accept converts. What is voluntary conversion if not a decision to adhere to a new theology based on its appeal, for whatever reason, to individual preferences? But critiques of a broader understanding of religion make a convincing case that denuding belief of its religious undertones renders it meaningless as a sui generis constitutionally protected right. If every belief and practice can qualify as religious, what is left of religion?

Spiritually minded drug users constitute a broad category of persons united by little more than a belief in the transcendental power of psychoactive substances. Factors distinguishing religious groups like the Native American Church and Rastas from the average recreational user

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[1163] Rafael Domingo, "A right to religious and moral freedom?" *International Journal of Constitutional Law* 12, 1 (2014): 226-247.
[1164] Stephen D. Smith, "Equality, religion, and nihilism," in Rex Ahdar (ed), *Research Handbook on Law and Religion* (Cheltenham, UK: Edward Elgar, 2018), 37-52.
[1165] Joel Harrison, "Dworkin's religion and the end of religious liberty," in Rex Ahdar (ed), *Research Handbook on Law and Religion* (Cheltenham, UK: Edward Elgar, 2018), 90-91.
[1166] Harrison (2018), 100.

include the "origin, place, authenticity, and tradition" attached to their consumption.[1167] But the line between the traditional and non-traditional has blurred as a result of globalization, putting the "spiritual and therapeutic aspects [of drug use] in dialogue with traditional contexts."[1168] While it is undoubtedly true that minorities have been subjected to a disproportionate share of the discrimination and oppression meted out at drug users, the War on Drugs has adversely impacted the lives of all users. The special status accorded religion through constitutional rights and freedoms has been a useful tool aiding marginalized peoples in their fight for recognition and equality. A more universal liberty, such as Dworkin's ethical independence, would treat drug use as a mundane human behavior, severing ritualistic consumption from its religious roots. The commodification of religion is already underway. In liberal democratic contexts, particularly those moving toward post-religious societies, consumer protection law may be a better answer to the "psychedelic dilemma" than attempts at carving out narrow exemptions for the self-elected few. Author Michael Pollan argues that the government should regulate narcotic and psychotropic substances as it does other controlled drugs, including alcohol, tobacco, and caffeine. His position is based on expediency rather than principle. Social mores and the market, licit and illicit, are shaping the future of drug control. Law and policy can react to vicissitudes in taste and consumption,[1169] but as Immanuel Kant quipped: "Out of the crooked timber of humanity no straight thing was ever made."[1170] Pursuing the ideal of a "drug free world" against the grain of human nature is utopian. Isaiah Berlin, warning against such moral absolutism, added to Kant's observation that: "To force people into the neat uniforms demanded by

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[1167] Beatriz Caiuby Labate and Clancy Cavnar, "Controversies on the Regulation of Traditional Drug Use," in Beatriz Caiuby Labate and Clancy Cavnar (eds), *Prohibition, Religious Freedom, and Human Rights: Regulating Traditional Drug Use* (Heidelberg: Springer, 2014), ix.
[1168] Labate and Cavnar (2014), x.
[1169] Pollan (2021a).
[1170] Isaiah Berlin, "The Pursuit of the Ideal," in Isaiah Berlin and Henry Hardy (ed), *The Crooked Timber of Humanity: Chapters in the History of Ideas*, Second Edition (Princeton: Princeton University Press, 2013), 19.

dogmatically believed-in schemes is almost always the road to inhumanity."[1171] The modern regime of strict control, prohibition, suppression, and criminalization has failed to eradicate drug use and deprives religious individuals and groups of their rights. As an alternative, Pollan advocates for the inclusion of psychedelic "self-discovery or spiritual development" into the fold of religion to cover the human impulse to seek the transcendental.[1172] This would accommodate traditional faiths, SBNRs, and secular consumers as per Dworkin's ethical independence. It would also spell the end of the IDCS.

The lines between religion and medicine and spirituality and health, which are clearly demarcated by biomedicine and scientific reason, are not as clear cut to a not insignificant segment of the population. To those for whom conventional mental health treatments have proved inadequate, psychedelic-assisted therapy is an attractive unorthodox option. The care paradigm they encounter is a syncretization of the internationalization of medical pluralism that began in the 1960s, which promoted everything from alternative psychologies and healing to wellness practices, and new religious movements that proliferated in the 1980s and 90s, including the Brazil-based Santo Daime and União do Vegetal churches. The first purveyors of psychedelic-assisted techniques, mostly psychologists and psychiatrists, combined and recast the medico-scientific, socio-cultural, and religious aspects of Eastern and indigenous practices as a form of integrated or holistic medicine for consumption in Western healthcare markets. Psychedelic-assisted therapeutic ritualism translates traditional ceremonies into a language and process Westerners accustomed to biomedical models understand, with the additional allure of the exotic and mystical.[1173] The entanglement of religion and medicine in ayahuasca shamanism,

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[1171] Berlin (2013), 19-20.
[1172] Pollan (2021a).
[1173] Ismael Apud and Oriol Romaní, "Medicine, religion and ayahuasca in Catalonia. Considering ayahuasca networks from a medical anthropology perspective," *International Journal of Drug Policy* 39 (2017): 28-36; Lucas

for instance, problematizes its simple categorization as either lawful or unlawful. While accommodating the religious consumption of controlled substances is possible under the drug control conventions, the faintest trace of the secular raises the suspicion of public authorities, leading to the involvement of law enforcement and the courts to censure it.[1174] The case law from apex courts reviewed above indicates the judiciary is unable and unwilling to amend drug control laws on behalf of minority beliefs.

An expanded view of therapy is needed to accommodate psychedelic-assisted therapy's syncretic mix of the sacred and profane within the biomedical model. The trade-off for such mainstream acceptance is assimilation. This first requires that safety and efficacy is established via conventional means, like randomized control trials. Next, regulatory measures and oversight should be crafted in consultation with professional associations and the public, informed by best practices and evidence-based policy, for the protection of consumers. Religion still has a place in the equation. The sense of transcendence occasioned by psychedelic-assisted therapy can be preserved and reproduced even under the supervision of public authorities. Psychologist William A. Richards, a long-time psychedelic researcher at Johns Hopkins School of Medicine, posits that "mystical consciousness" can be facilitated as a matter of both art and science. He lists seven factors that "foster their occurrence":

> 1. unconditional trust, perhaps the most important factor of set [i.e., one's surroundings and/or environment] and a quality that must be supported in the interpersonal physical setting;
> 2. an attitude of openness, honesty, curiosity, a spirit of adventure that supersedes normative desires of the ego to censor, be cautious, and external control;
> 3. an affirmation of courage and a willingness to accept suffering as part of the process of growth;

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Richert and Matthew DeCloedt, "Supple Bodies, Healthy Minds: Yoga, Psychedelics, and American Mental Health," *Medical Humanities* 44, 3 (2018): 193-200. On the cultural history of drug use and its relationship to religion in the West see Christopher Partridge, *High Culture: Drugs, Mysticism, and Transcendence in the Modern World* (Oxford: Oxford University Pres, 2018).
[1174] Apud and Romaní (2017), 33-34.

4. being grounded in a trusting and respectful relationship with another person;
5. the knowledge and skills of the researchers or guides and application of safety guidelines;
6. an adequate, though not excessive dosage; and
7. the knowledgeable provision of nonverbal structure as afforded by music.[1175]

These characteristics mirror those found in more clinical, medico-scientific approaches to psychedelic-assisted therapy, which can be seen as a mere secularized iteration of what is, at base, a religious ritual and spiritual practice. This compromise position, the incorporation of a desacralized psychedelic mysticism into mental health services, might be as far as policymakers and the public can go to accommodate psychedelic drug use in a prohibitionist sociolegal order. Such a scheme is permitted under the drug control conventions, as use would be limited to medical and scientific purposes.

In jurisprudence religion is understood in narrow terms. Courts have been receptive to claims from indigenous and traditional individuals, but overall they have excluded creeds and rituals of recent vintage as cynical attempts at circumventing the law. An extended, pluralistic definition of religion would better encompass the variety of religious experience individuals and groups currently pursue. From the perspective of the IDCS and its domestic renderings an inclusive right to freedom of religion is a problem, for it would extend exemptions to just about all spiritually minded consumers and de facto legalize drug use. This line of thinking led Dworkin to object to the special status accorded the Native American Church. If peyote is harmful and there is a compelling state interest in prohibiting access to it, he opined, why would the government allow members of the Church to expose themselves to risk but not the general population?[1176] Drug control law and policy should be uniform and apply to all equally

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[1175] William A. Richards, "Understanding the Religious Import of Mystical States of Consciousness Facilitated by Psilocybin," in J. Harold Ellens et al. (eds), *The Psychedelic Policy Quagmire: Health, Law, Freedom, and Society* (Santa Barbara: Praeger, 2015), 140-141.
[1176] Dworkin (2013), 125-126 and 134-137.

regardless of identity. But without a constitutional right to freedom of religion there would even fewer grounds for challenging the regime's strict control, prohibition, suppression, and criminalization of drugs and drug users.

As things stand, differentiating bona fide religious claims from disingenuous attempts to evade criminal conviction is not a clear-cut matter. Ambiguity can, however, be minimized by comparing what individuals profess to believe with what they do. Take the case of Casey Hardison, originally from the US but tried and convicted of drugs charges in the UK, who maintained "he was a victim of society's war on drugs." In his opinion: "We all have an inalienable right to do with our bodies as we wish…that includes the right to alter our consciousness by taking drugs whose hallucinogenic qualities free the mind." To that end Hardison wanted to "enabl[e] members of the human race to expand their horizons by exploring the world through hallucinogenic drugs." Impassioned as they were, his autonomy arguments were dismissed at trial as "not a defence in law."[1177] The judge did accept that Hardison's "views on drugs were sincerely held."[1178] But Hardison's actions betrayed the argument that he acted based on conviction. Charged with producing, supplying, and possessing a variety of Class A drugs, from DMT to a number of novel psychoactive substances, and convicted of possession of 145,000 tabs of LSD with intent to supply,[1179] his home laboratory was "described by a forensic chemist…as the most complex he had ever encountered," with a "level of production so high that the forensic chemist had not been able to analyse all the items found, since that would have taken years to do."[1180] Hardison purchased approximately £70,000 worth of precursor chemicals in the two years before he was apprehended, had an offshore company in Belize but no UK bank

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[1177] *R v Hardison*, [2006] EWCA Crim 1502, [2007] 1 Cr. App. R. (S.) 37, para 9.
[1178] *Hardison* (2006), para 30.
[1179] *Hardison* (2006), paras 1-2.
[1180] *Hardison* (2006), para 4.

account, and possessed records suggesting he may have produced 800,000 to 2.5 million tabs of LSD since moving to England. He was sentenced to 20 years in prison for "producing Class A drugs on a large commercial scale."[1181] To put it mildly, Hardison's behavior was a far cry from that typical of those manifesting their right to freedom of religion.

Religious liberty, as protected by constitutional human rights and fundamental freedoms, fails to include a great number of unconventional beliefs and practices grounded in individual conscience, ethics, and spirituality. For the purposes of drug control reform, the traditional conception of religion has at once enabled and limited litigants in their attempts to excuse themselves from abiding by universally recognized standards of propriety. New and novel faiths have been particularly unsuccessful in framing their drug use as a genuine religious exercise. Broadening the scope of religion to include non-mainstream worldviews makes sense from a theoretical standpoint but it is impracticable, as evidenced by the judgments discussed in this subsection. Psychedelic-assisted therapy's mix of religion with medicine and consumerism, for instance, does not fit into any one category neatly, making its legal classification a complex endeavor. Ethical independence and religious syncretism similarly evade precise elucidation. By design and function, the right to religious freedom is ill suited to accommodating the brave new world of drug taking SBNRs.

4.6 Reform and The Limits of Constitutional Adjudication

Drug consumption is a universal human behaviour. Equally universal have been attempts to curb its ubiquity. In contemporary history, the IDCS and its domestic counterparts represent the impulse to eliminate what proponents see as excessive, anti-social, immoral conduct. Constitutional human rights and fundamental freedoms can act as a counterweight to this goal,

[1181] *Hardison* (2006), passim (quotation at para 29).

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offering substantive protection to those on the receiving end of the regime's strict control, prohibition, suppression, and criminalization of drugs and drug users. For litigants to succeed in court they must frame their use of narcotic and psychotropic substances as a personal matter insulated from state meddling. The necessity of presenting legal claims in this way means that liberty, privacy, autonomy, and religious freedom have become bound up with complex practices and traditions not easily amenable to judicial evaluation. But when they are successful, litigants can win a qualified, i.e., non-absolute, right to lawfully undertake controversial conduct. There thus is a credible case to be made that there is a general moral right to consume controlled substances.[1182] This is far from a legal right, but it does indicate that there is a nexus between rights and freedoms and drug use. While moral philosophy and a liberal interpretation of rights and freedoms substantiate such claims, the comparative constitutional law cases on drug control reviewed in this thesis demonstrate how technical and academic problems, rather than principles, often guide judicial decisionmakers.

Courts have the power and potential to upend the dynamics of the War on Drugs by expanding the scope of rights and freedoms protections. The technical matters and academic questions upon which constitutional adjudication is routinely settled, however, demonstrate that apex courts make unpredictable and unprincipled decisions as often as they make predictable and principled ones. The upshot, at best, is bricolage-style of reform that may or may not negate the detrimental consequences of the strict control, prohibition, suppression, and criminalization of drugs and drug users. The diversity of understandings and practices of constitutionalism and rights and freedoms safeguards also complicate any attempt to offer a comprehensive account of how to effect drug control reform through the courts. In non-, anti-, and illiberal jurisdictions,

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[1182] Husak (1992); Erik van Ree, "Drugs as a human right," *International Journal of Drug Policy* 10 (1999): 89-98.

where courts are not independent, there are few prospects for reform. And the liberal democracies in which the judiciary has instigated a revision of drug control laws are outliers in the grand scheme of the IDCS. While there are many reasons to regard drug use as part of the constellation of human rights and fundamental freedoms, the legal world is far from prepared to contrive a right to use drugs. And events are fast outpacing developments in drug control law and policy reform.

In emergency situations, like the opioid overdose crisis and Covid-19 pandemic, rights and freedoms considerations are outweighed by the immediate prerogatives of the state, society, and market. Such states of exception can reveal the extent to which so-called "normal" times are themselves dysfunctional. Indeed, the coronavirus lockdown demonstrated that two drug control regimes operate in Canada and many US states based not on adherence to the IDCS or constitutional commitments, but on consumer preference and political power. The next chapter addresses some of the structural social and economic factors, especially inequality, that have created this situation and the human cost of maintaining drug control. It shows that despite constitutional adjudication's potential to transform drug control law and policy in several jurisdictions, legal challenges are ultimately limited in their ability to effect systemic change. It also asks whether something more radical than reform may be needed to resolve the IDCS's conflicts and contradictions.

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Chapter 5: Drug Control and the Inequality Regime in North America: Rights, Pandemics, and the Limits of Reform

5.1 Political Economy, Rights, and Drug Control Reform

The Covid-19 pandemic has exacerbated tensions in the IDCS. The differential treatment of Canadian and US American cannabis users from people who inject drugs (PWID) during the quarantine lockdowns revealed deep inequalities of health and wealth. In a world turned upside down by a public health crisis and economic recession, drug users with means legally purchased cannabis while the impoverished and unemployed turned to the illicit market in opioids; even though the two substances are subject to the same strict regulation under the drug control conventions. This chapter inspects the human rights implications of the proliferation of cannabis legalization schemes in light of IDCS rules and recommendations. More narrowly, it outlines the extent to which neoliberal consumer capitalism drives drug control reform, leading to the shielding of certain social and racial groups from/with the law and the continued suppression of minorities and disfavored communities. The process at once reflects and reproduces what economist Thomas Piketty calls the inequality regime.[1183] Drawing on case law from apex courts in Canada and the United States, as well as comparative constitutional scholarship, this section explores how particular classes have won constitutional protection for their drug consumption while leaving the strict control, prohibition, suppression, and criminalization model of the IDCS intact. As a result, drug control and its consequences recreate biopolitics as what Achille Mbembe termed "necropolitics," the sociopolitical power of the state over life and death.[1184] Covid-19 brought into sharp relief how law shapes, and is shaped by, markets and mortality. It also illustrates that international and domestic drug control law and policy set the parameters

[1183] Thomas Piketty, *Capital and Ideology* (Cambridge, MA: Harvard University Press, 2020), 2.
[1184] Achille Mbembe, *Necropolitics* (Durham: Duke University Press, 2019).

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under which the value of drug users' lives are adjudged in the execution of the War on Drugs and how death is conditioned by politics. There is a need for structured critique of the IDCS and legal reform measures purporting to right drug control's wrongs, especially the creation of legal cannabis markets and the constitutional protection of personal consumption.

The bioconstitutional framework has allowed advocates and litigants to medicalize popular recreational drugs like cannabis, paving the way for legalization. Less socially acceptable controlled substances and marginalized users, by contrast, remain liable under the standard regime amid an ongoing overdose epidemic. National law and policymakers are thinking of new ways to respond to the drugs question, some of which are at odds with the conventions. As such, if the IDCS's treaties and treaty bodies are to endure as a legitimate and coherent whole through the 2020s and beyond, its institutions and agents must address and accommodate the social and biological fact of drug consumption based on human rights and equality principles, not class politics.

The hypocrisy of having dual regimes governing drugs and drug users in Canada and the United States during the Covid-19 pandemic is a telling example of the conflicts and contradictions within contemporary drug control. Canadian and US American legal cannabis sales soared during quarantine lockdowns. The cannabis industry was labeled an essential sector in several US states.[1185] There was even a "Joints for Jabs" event in Washington state in the summer of 2021 to encourage people to get vaccinated against the virus.[1186] These occurrences are proof of cannabis consumption's normalization and integration into the mainstream

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[1185] Dan Levin, "Is Marijuana an 'Essential' Like Milk or Bread? Some States Say Yes," *New York Times*, 10 April 2020, https://nyti.ms/34wxGx5.
[1186] Gloria Oladipo, "Washington state offers 'joints for jabs' to boost vaccination rates," *The Guardian*, 9 June 2021, https://www.theguardian.com/us-news/2021/jun/09/washington-state-joints-for-jabs-boost-vaccination-rates.

economy. It has become a “prestige commodity” of sorts.[1187] At the same time opioid overdoses skyrocketed in major centers in both countries. The Canadian province of British Columbia successfully petitioned the federal government to grant a three-year exemption to the CDSA, decriminalizing the possession of no more than 2.5 grams of illicit drugs to combat the marginalization of users, encourage drug testing, and reduce poisonings and overdoses, which will take effect on January 31, 2023. Researchers, NGOs, and users have said the reform does not go far enough.[1188] But the acute stigma attached to hard drug consumption and marginalization of users limits the plausibility of their becoming socially acceptable and assimilated into the legal vice market.[1189] The double standards in recent drug law and policy developments are the product of self-interested class and race-based politics, with inadequate attention dedicated to equality and justice. They are also controversial under the IDCS framework.

The themes reviewed in this chapter bring critical theoretical perspectives to bear on the consequences of North American drug control law and policy. First, it details how the Covid-19 pandemic exacerbated drug control’s human rights problem, and vice versa. Second, it maintains that an understanding of bio- and necropolitics and the social construction of drugs and drug users tells us more about the character of the IDCS than a focus on the formalities of the treaty regime. Third, it argues that political economy, class politics, and consumerism delimit the degree to which the IDCS can be reformed, not the purported flexibilities within the drug control conventions. And fourth, it claims that the purported flexibilities of the IDCS betray the fact that

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[1187] See Robin Room, “Stigma, social inequality and alcohol and drug use,” *Drug and Alcohol Review* 24 (2005): 143-155.
[1188] Government of Canada, “Federal actions on opioids to date,” June 2022, https://www.canada.ca/en/health-canada/services/opioids/federal-actions/overview.html; Michelle Ghoussoub, “B.C. will decriminalize up to 2.5 grams of hard drugs. Drug users say that threshold won’t decriminalize them,” *CBC News*, 3 June 2022, https://www.cbc.ca/news/canada/british-columbia/drug-decrim-threshold-1.6477327.
[1189] Room (2005).

reform is inadequate to redress the wrongs perpetrated in the name of strict control, prohibition, suppression, and criminalization. The system does not function as it should. Legal cannabis markets are thriving in contravention of the treaties. So too are illicit markets. At the same time, the rights and freedoms of most other drug users are routinely ignored and violated, even amid a global public health crisis and overdose epidemic. The experiences of Canada and the US during the Covid-19 pandemic demonstrate that a new vision of drug control is required to meet the challenges of the present.

5.2 Pick Your Poison: Right(s) and Wrong

With Covid-19 infections and mortality rising in the early spring of 2020, governments around the world began shutting down their economies, blocking international supply chains, and implementing quarantines and social distancing measures to contain the virus' spread. Sociologist Dylan Riley points out that "[i]solation is…an expression of the division of social labour and a class and racial phenomenon resting on specific material conditions: sufficient resources, security of income, independence of work."[1190] In Canada and the United States the upshot was work-from-home for blue- and white-collar workers who managed to keep their jobs and reliance on unemployment benefits and welfare services for those fortunate enough to qualify for public support. For some, isolation was an inconvenience. For many others, it turned into a matter of life and death. To cope with the stress and anxiety of quarantining, social distancing, and dramatic changes in life circumstances,[1191] many Canadians and Americans

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[1190] Dylan Riley, "Lockdown Limbo: March 2020-February 2021," *New Left Review* 127 (Jan/Feb 2021), 9.
[1191] Just two months into the pandemic an editorial in the *Canadian Medical Association Journal* noted that "social distancing is already unbearable for people without a home in which to shelter, those who may be exposed to harm at home and those who have lost their employment." Kirsten Patrick et al., "Social distancing to combat COVID-19: We are all on the front line," *Canadian Medical Association Journal* 192, 19 (11 May 2020), https://doi.org/10.1503/cmaj.200606.

turned to controlled substances, licit and illicit, for relief.[1192] This trend is not unprecedented, as "economic recessions and unemployment increase psychological stress, which increases illegal drug use."[1193] It is important to keep in mind that recreational drug use, i.e., non-scientific, non-medical consumption, is generally safe, with about 70 percent of regular users failing to meet the clinical criteria for addiction.[1194] That said, the surge in use caused considerably divergent mortality outcomes for users of different drugs, a consequence of law and policy priorities. Cannabis is regulated by health, safety, and consumer protection standards in Canada and the nearly 20 US states with legal recreational markets. By contrast, the quality of street drugs, from opioids to amphetamine-type stimulants, is unregulated, and the black market has been flooded with dangerous adulterated substances. User experiences during the pandemic expose the cost, in both lives and principles, of maintaining a drug control regime based on double standards.

Humanity has used drugs from ancient times to the present, mostly for pain relief but also for physical stimulation, in cultural and religious rites, as a foodstuff and commodity, and for relaxation, recreation, and experimentation.[1195] Chile's representative at the 1971 Vienna conference, which led to the creation of the Convention on Psychotropic Substances, reminded his fellow diplomats of the impetus behind various forms of drug consumption:

[1192] In Canada, cannabis consumption increased for Canadians aged 16-25 and stayed about the same for over-25s in 2021. Government of Canada, "Canadian Cannabis Survey 2021: Summary," *Health Canada*, 23 December 2021, https://bit.ly/3qCu47e. Regular US American cannabis users reported an increase in use during initial stages of the pandemic. Margriet W. van Laar et al., "Cannabis and COVID-19: Reasons for Concern," *Frontiers in Psychiatry* 11, 601653 (2020): 1-6.
[1193] Gera E. Nagelhout et al., "How economic recessions and unemployment affect illegal drug use: A systematic realist literature review," *International Journal of Drug Policy* 44 (2017), 81. "[D]emand for drugs may increase…for people who have become unemployed or furloughed (receiving government payments with no requirements to work or undertake other activities), or who are working from home, may consume more with increased leisure time. Demand for drugs that are typically used in private settings (e.g., cannabis, psychedelics) may increase while stay-at-home orders remain in place." Monica J. Barrat and Judith Aldridge, "No magic pocket: Buying and selling on drug cryptomarkets in response to the COVID-19 pandemic and social restrictions," *International Journal of Drug Policy* (2020), https://doi.org/10.1016/j.drugpo.2020.102894.
[1194] Hart (2021), epub.
[1195] Buxton (2010), 63-65.

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> Man had always used drugs to soothe pain, to reach beyond certain limits of perception, to speak with the gods or to be like the gods…The hippies and others who used drugs, connecting them with flowers and love, did not perhaps realize that they were the modern representatives of a long tradition…Since the abuse of drugs was thus an expression of man's yearning for the transcendental and of his frustrations in a godless society, it could not be fought against by repressive and prohibitory legislation alone…Those psychological, moral, social and spiritual factors would therefore have to be taken into account in any legislation or protocol for the regulation or prohibition of the use of psychotropic substances.[1196]

But neither the Convention on Psychotropic Substances, nor the other control treaties, regulate drugs in a holistic fashion. Indeed, narcotics and psychotropics carry significant sociocultural baggage reflected in international and national law and policy. The juxtaposition of legitimate medical and scientific use with illegitimate abuse exemplifies how drugs are conceived as pharmakon, in the Platonic sense of "a medication that acts at once as remedy and poison."[1197] Assuaging one's ailments with pharmakon therefore entails risk, both toxicological and sociolegal.

The hazard attendant to each drug's consumption is further compounded by its legal status, social acceptability, and availability. For licit and illicit users, cannabis ameliorated the boredom of sitting between the same four walls for months on end and dampened Covid-19-related anxiety with its mild psychoactive effects, though researchers did warn of a potential increase in cannabis use disorders as a result.[1198] Smoking, of course, is always ill-advised, but especially so when a deadly pathogen is floating around. Regardless, individuals were largely left to their own devices vis-à-vis cannabis throughout the pandemic, a sign of its mainstream

[1196] United Nations, United Nations Conference for the Adoption of a Protocol on Psychotropic Substances, *Official Records, Volume II: Summary Records of Plenary Meetings, Minutes of the Meetings of the General Committee and the Committee on Control Measures*, E/CONF.58/7/Add.1 (New York: United Nations, 1973), 11-12 cited in Bewley-Taylor and Jelsma (2012a), 79.

[1197] Mbembe (2019), 2 and 6. War, race, and colonialism constituted the *pharmakon* of modernity in Mbembe's conception of "necropolitics" (see below).

[1198] Lana Vedelago et al., "Getting high to cope with COVID-19: Modelling the associations between cannabis demand, coping, motives, and cannabis use and problems," *Addictive Behaviors* (2021): https://doi.org/10.1016/j.addbeh.2021.107092.

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toleration. Socioeconomic privilege and employment security allowed a class of persons to pass the time smoking mail-order cannabis[1199] in the privacy of their domicile unbothered by the authorities.[1200] Opiate and opioid use on the other hand remains stigmatized and criminalized with deadly consequences, particularly for people who inject drugs (PWID) and users of synthetic designer drugs, such as fentanyl and carfentanyl, and New Psychoactive Substances (NPS). When combined with alcohol and other sedatives or contaminated by harmful additives, unknown to the user, opioids are much more likely to be fatal than other controlled substances.[1201] Jobless, vagrant, and ignored by the authorities, those with pre-existing addiction issues were squeezed by the risk of contracting Covid-19, interruptions to harm reduction services, economic stagnation, social isolation, and contamination of the illicit drug supply due to border closures.[1202] One's pharmakon of choice, whether remedy or poison, is dependent to an extent on one's class position. The unequal treatment of people and the drugs they consumed during the pandemic thus indicates how inequality is written into and perpetuated by the IDCS.

Economist Thomas Piketty recently proposed the notion of inequality regimes to frame and understand the structure and dynamics of such inequality. "Inequality regimes," he declares, are the "set of discourses and institutional arrangements intended to justify and structure the

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[1199] The legal market aside, cannabis is "the most commonly sold drug[] on cryptomarkets." Barrat and Aldridge (2020). The European Union's European Monitoring Centre for Drugs and Drug Addiction projects that reliance on home delivery and cryptomarkets during the pandemic will likely "persist over the long term," particularly for cannabis. European demand for cannabis peaked at the beginning of the outbreak and returned to pre-Covid-19 levels thereafter. See European Monitoring Centre for Drugs and Drug Addiction and Europol, *EU Drug Markets: Impact of COVID-19* (Luxembourg: Publications Office of the European Union, 2020), 7, 8, 11 and 14.
[1200] Jessica Grose, "Mother's Little Helper is Back, and Daddy's Partaking Too," *New York Times*, 3 October 2020, https://nyti.ms/36v5Tzg. In general, "Wealthy areas went from most mobile before the pandemic to least mobile, while, for multiple reasons, the poorest areas went from least mobile to most." Joakim A. Weill et al., "Social distancing responses to COVID-19 emergency declarations strongly differentiated by income," *PNAS* 117, 33 (18 August 2020), 19658.
[1201] Hart (2021), epub.
[1202] Tyler S. Bartholomew, "Syringe services programs (SSP) operational changes during the COVID-19 global outbreak," *International Journal of Drug Policy* 83 (2020), https://doi.org/10.1016/j.drugpo.2020.102821.

economic, social, and political inequalities of a given society."[1203] To understand why it is that some are empowered, and others disempowered, when challenging the edifice of the IDCS it is essential to acknowledge the role of power – legal, financial, and rhetorical – in shaping drug reform efforts. Legal scholars Britton-Purdy, Grewal, Kapczynski, and Rahman set out how, in the US particularly, inequality got to the extreme state it is in in the twenty first century. They argue it is an outcome of the Twentieth-Century Synthesis of (1) the entrenchment of market efficiency as a value-neutral mode of socioeconomic organization and management in the public and private spheres, and (2) the depoliticization and dilution of public-constitutional law to protecting "narrowly defined differential treatment of individuals." The upshot is "a vision of constitutional equality and liberty that enshrines structural inequality and economic power" over human rights and fundamental freedoms.[1204] The Synthesis has succeeded by:

> encasing economic and other structural forms of inequality from answerability to the principle of equality; identifying liberty with certain forms of market participation; and assimilating the political activity of democracy to market paradigms, by turn celebrating a commercialized public sphere as a paragon of self-rule and denigrating the actions of actual government institutions as interest-group capture and entrenchment.[1205]

The rise and fall of certain drug control laws in the US and Canada follows this pattern. The recent history of cannabis liberalization in these jurisdictions is evidence of how "law creates, reproduces, and protects political economic power."[1206] Pushback from civil society and grassroots social movements against the carcel state and criminalization, like Black Lives Matters and the defund campaign against racialist policing practices and the prison-industrial

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[1203] Piketty, 2.
[1204] Jedidiah Britton-Purdy, David Singh Grewal, Amy Kapczynski and K. Sabeel Rahman, "Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis," *Yale Law Journal* 129, 6 (2020), 1790-1791.
[1205] Britton-Purdy et al. (2020), 1807.
[1206] Britton-Purdy et al. (2020), 1820.

complex,[1207] and calls for an end to the neoliberal privatization of the public sphere and commons,[1208] including a critique of the way cannabis legalization has by and large benefited big business, speak to a pervasive sense that: "We are living through a material and ideological crisis: people's basic needs are not being met – not by the state, and not by the market."[1209] Unless, that is, one is a member of the ruling majority.

The political economy of consumption, the politics of science, and the receptivity of domestic legal orders to middle-class activism all paved the way for legal cannabis markets, despite their incompatibility with the drug control conventions. At the same time, PWID and users of other illicit substances have been met with continued indifference from government and the people, at best, and oftentimes outright hostility. The Covid-19 pandemic, however, suspended the rhythms of ordinary life and emptied public spaces of all but the most disenfranchised individuals. The media reported the overdose epidemic unfolding on the streets and touched on some of the factors contributing to its aggravation, but the inequitable regime that led to the crisis went largely unquestioned. This is as much an indication of popular morality as it is an indictment of North American liberal democratic values. The gap between the promise of equal constitutional rights and freedoms and their unequal endowment vis-à-vis drug users demonstrates how cannabis constitutionalism, the leveraging of power to effect drug law and policy reform through the instrumentalization of bills of rights, unfairly privileges some drugs and their users over others, contrary to the clear wording of the drug control conventions, domestic law, and foundational principles of liberal constitutionalism.

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[1207] Amna A. Akbar, "Demands for a Democratic Political Economy," 134 *Harvard Law Review Forum* 90 (2020), 108-109.
[1208] Akbar (2020), 96-98.
[1209] Akbar (2020), 92.

The embedded social meanings and legal regulation of drugs and drug use reflect an historically conditioned ideological orientation. The distinction between licit and illicit substances, for instance, is "the product of a particular culture and history and politics…an artificial construct."[1210] Similarly, therapeutic drugs or medicines are seen to be "good" while those unrelated to health and wellbeing, i.e., those used in recreational consumption, are deemed "bad." Individual substances and their users – think cannabis – can be viewed as benign "angels" while others – such as opioids – are regarded as harmful "demons."[1211] In this way, twentieth century drug law and policy has been framed to enable the disciplining and punishment of consumers of "transgressive substances," many of whom are people of color. The paradigm imbued illicit drugs and drug users with racialist significance as "having the power to transform even the most rational, autonomous, enlightened and sovereign European 'man' into the lazy, violent depraved figure of the sub-human."[1212] Such distinctions are racist and arbitrary. They also obfuscate the fact that all drug consumption entails risk. But the dual regime has created a system where white and black market drugs are respectively under- and unregulated. For licit medicalized controlled substances, David Herzberg writes that: "The presumption of therapeutic intent, fiercely promoted by drug companies and health professions, has protected white markets from the robust regulation needed for such addictive, dangerous, and profitable products."[1213] Black market drugs by contrast, like illicit opiates, opioids, and their derivatives, are subject to Richard Cowan's Iron Law of Prohibition, which holds that: "Imposing substantial barriers and costs to the illicit drug supply chain creates direct pressure to minimise volume while

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[1210] Pollan (2021b), epub.
[1211] Richard DeGrandpre, *The Cult of Pharmacology: How America Became the World's Most Troubled Drug Culture* (Durham: Duke University Press, 2006).
[1212] Kojo Koram, "Introduction," in Kojo Koram (ed), *The War on Drugs and the Global Colour Line* (London: Pluto Press, 2019), epub.
[1213] David Herzberg, *White Market Drugs: Big Pharma and the Hidden History of Addiction in America* (Chicago: University of Chicago Press, 2020), epub.

maximising profit. More bulky products become more expensive relative to less bulky ones, incentivising increases in potency."[1214] So, on the demand side of the drugs trade the moralization of controlled substances has insulated a particular class of consumer from the reach of consumer protections designed to preserve public health, while others, usually the socioeconomically marginalized, are criminalized and targeted by law enforcement for the illicit consumption of ever-more-potent and dangerous drugs like fentanyl and carfentanyl. Ideas of "good" and "bad" related to drugs and drug users have much more to do with our judgments about people than with inert flora and the chemical compounds contained within or derived therefrom.

The distinction between legally regulated cannabis and illegal opiates and opioids is crucial here. Cannabis, opiates, and opioids, as well as psychedelics, are bound by the same drug control measures found in the IDCS conventions. But while Canada and the US have maintained policies of strict control over opiates and opioids, among others, they have simultaneously crafted regulatory frameworks for the lawful cultivation, production, and sale of cannabis in violation of the Single Convention. Article 4(c) of the latter requires that states parties "take all such legislative measures…to *limit exclusively to medical and scientific purposes* the production, manufacture, export, import, distribution of, trade in, and possession of drugs."[1215] Recreational use is plainly excluded as illegitimate in this formulation. So, the idea of legal cannabis market is a legal paradox. This conundrum has considerable human rights and fundamental freedoms implications, but few of the interests at stake may be protected under IDCS convention provisions affording states a degree of law and policy flexibility.

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[1214] Leo Beletsky and Corey S. Davis, "Today's fentanyl crisis: Prohibition's Iron Law, revisited," *International Journal of Drug Policy* 46 (2017), 157.
[1215] Italics added.

The constitutional caveats-safeguard clauses in the IDCS conventions – Articles 35 and 36 of the Single Convention, Article 22 of the 1971 Convention, and Article 3(2) 1988 Convention – subject the provisions enumerated therein to "constitutional limitations" and other foundational features of the domestic legal order. The United Nations Commentaries on the treaties do not explicitly mention the constitutional limitations imposed on states by human rights and fundamental freedoms provisions found in bills of rights. As Richard Lines contends, there is a place for domestic constitutional courts to intervene in drug law and policy cases with a "dynamic human rights-based interpretation of international drug control law."[1216] Two considerations substantiate this approach: firstly, states parties to the treaties exercise "indirect control" of the IDCS via local "administrative, control and enforcement practices" subject to "national legislation and domestic court oversight"; secondly, the presence of constitutional caveats-safeguard clauses in each of the treaties limit compliance therewith "to domestic or constitutional law."[1217] Of course, there is no guarantee the judiciary will liberalize drug law and policy. Courts may and often do, as the case law discussed in previous chapters indicates, give greater force to international obligations than to human rights and fundamental freedoms concerns.[1218] Indeed, into the 2000s "in practice many states [did] not generally recognise that human rights protections trump the obligations in the [IDCS] suppression conventions."[1219] So, when a constitutional court does find national drug control law and policy unconstitutional for human rights-related reasons conflict often arises between the state concerned and UN institutions as well as other states parties to the treaties, who demand the treaties are

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[1216] Lines (2017), 151.
[1217] Lines (2017), 151-152. See also Boister (2001), 76-77.
[1218] Lines, (2017), 152-153.
[1219] Boister (2002), 224.

implemented uniformly.[1220] Case law from Canada and the US speaks to the limits of the constitutional caveats-safeguard clauses approach to drug control reform. While constitutional human rights and fundamental freedoms have played a supporting role in recent law and policy changes, political campaigns and incessant illicit markets take center stage in the narrative. The real world effects of North America's lopsided liberalization initiatives uncover the mortal consequences of treating some drugs and drug users as worthy of legal protection and the rest as criminals to be suppressed.

5.3 Life and Death Under the International Drug Control System

Drug control reproduces a marginalized social class for whom moral concern and state support are conditioned upon conformity to the law, policy, and behavioural norms imposed by the IDCS conventions. And errant bodies, as Michel Foucault declared, must be disciplined and punished.[1221] Foucault's concept of governmentality connects specific institutions, techniques, and knowledges in modern penology to more widespread societal norms and conventions found in other public projects, e.g., healthcare and education, elucidating how power and its dynamics, originating in hierarchical social and economic relations, organize and rationalize the disciplining, punishment, and control of the body; an altogether repressive affair. This process enforces majoritarian morality and breeds useful, obedient citizens. The prison, Foucault posits, thus stands as a reminder to working people of the consequences of deviance and delinquency. In his rendering, a social order based on disciplined subjects is a prerequisite to liberal democratic

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[1220] Bewley-Taylor (2012), 314.
[1221] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (London: Penguin Books, 1991a).

constitutionalism and human rights and fundamental freedoms.[1222] The criminal realm is not the only area in which repression preconditions liberty.

Individuals are also subdued by biopower and biopolitics. That is, the "administration of bodies and calculated management of life"[1223] by "the great instruments of state, as institutions of power,"[1224] "operated within the sphere of economic processes…guaranteeing the relations of domination and effects of hegemony."[1225] In the case of drug control, the principal institutions of state are "the medicopharmaceutical industrial complex (the therapeutic state) and the drug-abuse-prison industrial complex (the prohibitionist state)."[1226] The social order and life itself is thus predicated on unbalanced power relations. Achille Mbembe elaborated on this line of thinking in developing necropolitics, detailing the fact and dynamics of the state's sovereign power over life and death.[1227] His necropolitics:

> or necropower, [accounts] for the various ways in which, in our contemporary world, weapons are deployed in the interest of maximally destroying persons and creating death-worlds, that is, new and unique forms of social existence in which vast populations are subjected to living conditions that confer upon them the status of the living dead.[1228]

The IDCS and its domestic iterations are institutions of power that have fashioned a death world for those on the receiving end of the moralistic, law enforcement-oriented regulatory paradigm. It is aimed not only at policing drugs but controlling bodies and behaviors.[1229] The War on Drugs is thus a War on People.[1230] It shapes the life and death drug users, their families, and the

[1222] David Garland, *Punishment and Modern Society: A Study in Social Theory* (Chicago: University of Chicago Press, 1990), chapters 6-7; Fassin (2022).
[1223] Michel Foucault, "Right of Death and Power over Life," in Paul Rabinow (ed), *The Foucault Reader: An Introduction to Foucault's Thought* (London: Penguin Books, 1991b), 262.
[1224] Foucault (1991b), 263.
[1225] Foucault (1991b), 263. See also Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-79* (New York: Palgrave Macmillan, 2008).
[1226] DeGrandpre (2006), 173.
[1227] Mbembe (2019), 7 and 67. See also Foucault (1991b), 258-267.
[1228] Mbembe (2019), 92.
[1229] See Ariadna Estévez, "Necropolitical wars," in Kojo Koram (ed), *The War on Drugs and the Global Colour Line* (London: Pluto Press, 2019), epub.
[1230] Husak (1992), 2.

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communities they inhabit, first and foremost the "zones of inhabitability" the addicted linger in as criminalized social outsiders.[1231] Attempts to bring human rights and fundamental freedoms to bear in the field of drug control, to prevent the annihilation of the ostracized, have had some positive results but are ultimately hampered by the IDCS's effectuation.

North America's overdose crisis was accelerated by the Covid-19 pandemic. The Canadian province of British Columbia (BC), for instance, first declared a public health emergency in response to rising overdose numbers in 2016. The situation has remained extreme, with nearly 5,000 deaths recorded since that time. In each of the first 5 months of the lockdown there were 100 overdose fatalities, with more than 170 per month in May, June, and July of 2020. Provincial public health officials determined illicit substances had become more toxic and therefore more lethal during the crisis because cross-border supply chains were disrupted. Harm reduction services were interrupted to the point of breakdown, unable to keep up with demand. As a result, many of those who overdosed in the first several months of Covid-19 did so alone.[1232] In the first 9 months of 2021 BC documented 1,534 overdose deaths, on track to overtake the 2020 record of 1,734 deaths.[1233] Across Canada there were 6,214 overdoses in 2020.[1234] Politicians and governments have been tracking the impact of Covid-19 on drug users and have, to an extent, adapted law and policy to meet immediate needs. But the longer-term impact of the virus on the opioid crisis is not yet understood. The only thing that seems clear is

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[1231] Jarrett Zigon, *A War on People: Drug User Politics and a New Ethics of Community* (Oakland: University of California Press, 2018), 55.
[1232] Rhianna Schmunk, "B.C. marks 3rd straight month with more than 170 overdose deaths," *CBC News*, 15 August 2020, https://bit.ly/3jes678.
[1233] CBC News, "More than 1,500 people have now died in 2021 due to B.C.'s illicit drug supply: coroner," *CBC News*, 9 November 2021, https://bit.ly/3rSdfHO.
[1234] Public Health Agency of Canada, *Apparent Opioid and Stimulant Toxicity Deaths: Surveillance of Opioid- and Stimulant-Related Harms in Canada, January 2016 to December 2020* (Ottawa: Public Health Agency of Canada, 2021), https://publications.gc.ca/collections/collection_2021/aspc-phac/HP33-3-2020-eng-3.pdf, 5.

who, or what, bears responsibility for the fallout and the channels to be used to meet the cost of enhanced addictions treatment and healthcare.

According to the American Medical Association over 40 US states have seen a rise "in opioid related deaths since the pandemic began."[1235] Vermont, whose Governor had declared "a full-blown heroin crisis" in 2014, saw a surge in opioid overdose deaths after some success combatting addiction-related fatalities, with "at least 8,960 residents – about 1.5 percent of the state's population" undergoing opioid substitution therapy (OST) "during the first quarter of [2020]."[1236] Family members and state officials identified unemployment, isolation, and fentanyl, combined with reduced harm reduction services during the state's Covid closure, as the drivers of this tragedy.[1237] These circumstances created an environment in which some 93,000 Americans would overdose on drugs throughout 2020.[1238] Opiates like heroin and opioids like fentanyl, which can be 100 times more potent than its non-synthetic counterparts, along with amphetamine-type-substances (ATS) significantly contributed to this, the greatest rise in overdose rates year-on-year ever recorded.[1239] From Vermont to British Columbia the pandemic has accelerated drug-related deaths, a result of material deprivation, social exclusion, and the consumption of adulterated substances. A key part of addressing such outcomes involves leaving the strict control, prohibition, suppression, and criminalization of drugs and drug users behind, at least for personal possession for private consumption. It also requires public provision of support

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[1235] Hilary Swift and Abby Goodnough, "'The Drug Became His Friend': Pandemic Drives Hike in Opioid Deaths," *New York Times*, 29 September 2020, https://nyti.ms/37XdTtq.
[1236] Swift and Goodnough (2020).
[1237] Swift and Goodnough (2020).
[1238] National Center for Statistics, "12 Month-ending Provisional Number of Drug Overdose Deaths," 14 July 2021, Centers for Disease Control, https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm.
[1239] Josh Katz and Margot Sanger-Katz, "'It's Huge, It's Historic, It's Unheard-of': Drug Overdose Deaths Spike," *New York Times*, 14 July 2021, https://www.nytimes.com/interactive/2021/07/14/upshot/drug-overdose-deaths.html; Sarah Maslin Nir, "Inside Fentanyl's Mounting Death Toll: 'This Is Poison,'" *New York Times*, 20 November 2021, https://www.nytimes.com/2021/11/20/nyregion/fentanyl-opioid-deaths.html.

services, i.e., food, shelter, healthcare, etc., to those affected by the vicissitudes of twenty-first century life.

A not insignificant number of opiate and opioid users started using after receiving Purdue Pharma's aggressively marketed prescription opioid Oxycontin from their physician.[1240] There has been serious malfeasance on the part of overprescribing physicians, several of whom were convicted of voluntary and involuntary manslaughter among other crimes.[1241] In the US, economists Anne Case and Angus Deaton recorded, "[o]pioids prescribed by physicians accounted for fully a third of all opioid deaths in 2017, and a quarter of the 70,237 drug overdose deaths that year. This overall number is greater than the peak annual number of deaths from HIV, from guns, or from automobile crashes."[1242] Corporations have had to pay for billions in profits generated by their legally sanctioned drug dealing. After the filing of a lawsuit in Massachusetts in 2018, the consulting firm McKinsey & Co. agreed to pay almost $600 million USD to 49 states, with a settlement in the works with Nevada, for its advising of Purdue Pharma in the hawkish marketing and sale of its opioid painkiller OxyContin, but without admitting wrongdoing on its part.[1243] In the National Prescriptions Opiate Litigation nearly 35,000 cities and counties across the US joined the multi-jurisdiction legal proceedings against Purdue Pharma[1244] and the corporate owners of pharmacies responsible for dispensing the pills, some of which became pill mills, in US District Court for the Northern District of Ohio.[1245] The plaintiffs

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[1240] Martin A. Makary, "Overprescribing is major contributor to opioid crisis," *BMJ* 359 (19 October 2017), j4792, https://doi.org/10.1136/bmj.j4792. On Purdue Pharma's role in the opioid epidemic see Patrick Radden Keefe, *Empire of Pain: The Secret History of the Sackler Dynasty* (New York: Double Day, 2021); Anne Case and Angus Deaton, *Deaths of Despair and the Future of Capitalism* (Princeton: Princeton University Press, 2020), 12-13.
[1241] E.g., *People v XuHui Li*, No. 4678, 4679, 5170/11, 67 N.Y.S.3d, 2017 N.Y. Slip Op. 08438, 2017 WL 5894068 (N.Y.A.D. 1 Dept., Nov. 20, 2017); *People v Tseng*, 30 Cal.App.5th 117 (Cal.App 2 Dist., 2018).
[1242] Case and Deaton (2020), 113.
[1243] Michael Forsythe and Walt Bogdanich, "McKinsey Settles for Nearly $600 Million Over Role in Opioid Crisis," *New York Times*, 3 February 2021, https://nyti.ms/356fhaJ.
[1244] See the Excel file "Cities and Counties" available at https://www.opioidsnegotiationclass.info/.
[1245] *In re National Prescriptions Opiate Litigation*, --- F.Supp.3d ---, 2020 WL 455040 (N.D.Ohio, 2020).

alleged pharmacy owners and distributors violated Ohio common law and the federal Controlled Substances Act by purveying the drug outside the strictures of the regulatory framework. The District Court in Ohio dismissed the suggestion the defendants were not responsible for their pharmacist-employees' overzealous dispensing of Oxycontin. It stated that the obligation to prevent the diversion of controlled drugs into the illicit market cannot be obviated by offloading responsibility onto workers. The major drug distributors agreed to pay a $26 billion USD settlement to the states in July 2021, a deal that at the time of writing has not been finalized but would release the companies from any further civil liability.[1246] In the end, the people and companies that set the crisis in motion will, in lieu of criminal prosecution, likely escape accountability with the writing of a check.

In a 2020 deal with the US Department of Justice Purdue Pharma pleaded guilty to federal criminal charges and was ordered to pay $8 billion USD in fines and penalties for its preeminent role in the opioid epidemic.[1247] Shortly thereafter the company filed for bankruptcy. Restructured, post-bankruptcy Purdue planned on producing treatments for opioid dependence and painkillers, with a fund to be put aside to compensate victims of its malpractice. The final civil settlement totalled $4.5 billion USD. The arrangement was also set to release the Sackler family from all future civil liability.[1248] The US District Court for the Southern District of New York rejected these terms in December 2021 on the grounds that the Sacklers could not be immunized from civil liability, as the bankruptcy code did not explicitly authorize such an

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[1246] The four companies are Johnson & Johnson, Cardinal Health, AmerisourceBergen, and McKesson. Jan Hoffman, "Drug Distributors and J.&J. Reach $26 Billion Deal to End Opioid Lawsuits," *New York Times*, 21 July 2021, https://www.nytimes.com/2021/07/21/health/opioids-distributors-settlement.html.
[1247] Jan Hoffman and Katie Benner, "Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales," *New York Times*, 21 October 2020, https://nyti.ms/3codpOn.
[1248] Sujeet Indap, "Purdue's bankruptcy deal shields Sackler family owners from future opioid liability," *Financial Times*, 8 August 2021, https://www.ft.com/content/f0d6f014-dfa1-4d93-a11b-d9ede668be11.

arrangement.[1249] A revised deal, yet to be finalized at the time of writing, has the Sacklers paying some $6 billion USD in damages to states, with $750 million USD earmarked for victims and survivors.[1250] The dollar figures pale in comparison to the 500,000 or so deaths attributed to Purdue and the Sackler's actions, avarice, and deceit. As one survivor told the US Bankruptcy Court: "You got rich off our dead bodies and told us it was our own fault for dying."[1251] The depredations of market actors are part and parcel of a necropolitical order that perpetuates inequality, punishes poverty, and puts profit over people.

Several Canadian provincial governments have followed the US lead and filed a claim against Purdue Pharma in US Bankruptcy Court, seeking $67.4 billion USD in damages.[1252] British Columbia, representing federal and provincial governments, reached a $116.5 million USD settlement with Purdue Pharma Canada in June 2022. The funds are to defray the public health costs shouldered by the state, with no admission of misconduct or responsibility from Purdue.[1253] Governments suing pharmaceutical corporations are right to identify and seek indemnification from wrongdoers, institutional and individual,[1254] but the state and its organs also bear responsibly for allowing the opioid crisis to develop in the first instance via lax and unenforced regulations. The legal action taken thus far has done little to reverse the course of the opioid epidemic, but governments can at least finally claim they are holding Purdue and others to

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[1249] Jan Hoffman, "Judge Overturns Purdue Pharma's Opioid Settlement," *New York Times*, 16 December 2021, https://www.nytimes.com/2021/12/16/health/purdue-pharma-opioid-settlement.html.
[1250] Jan Hoffman, "Sacklers and Purdue Pharma Reach New Deal with States Over Opioids," *New York Times*, 3 March 2022, https://www.nytimes.com/2022/03/03/health/sacklers-purdue-oxycontin-settlement.html.
[1251] Tom Hals and Dietrich Knauth, "'You got rich off our dead bodies' opioid victims tell Purdue's Sacklers," *Reuters*, 10 March 2022, https://reut.rs/3I1gNgT.
[1252] Yvette Brend, "Provinces pursue OxyContin maker for $67B US in costs associated with Canada's opioid crisis," *CBC News*, 12 November 2020, https://bit.ly/3sgsN5V.
[1253] Kanishka Singh, "British Columbia reaches $116 mln settlement with Purdue Pharma over opioid crisis," *Reuters*, 29 June 2022, https://reut.rs/3ytt1M6.
[1254] See also *City of Chicago v Purdue Pharma L.P.*, 2015 WL 2208423 (N.D.Ill., 2015); *City of San Francisco v Purdue Pharma L.P.*, --- F.Supp.3d ---, 2020 WL 5816488 (N.D.Cal., 2020).

account. Without a more comprehensive plan to tackle the root causes of drug use and addiction, however, largescale litigation constitutes little more than retribution against opioid manufacturers and distributors.[1255] It is also cynical because "American drug policy implicitly permits the capitalistic oversupply of the legal market for opioids, then stringently criminalizes illicit, non-pharmaceutical uses."[1256] The dance between private profit and public penalty is choreographed, and the performance of justice through civil litigation allows states to continue to obviate their obligations, legal and moral, to protect their citizens from harm.

States do have the option of prioritizing harm reduction in their execution of the IDCS. The Single Convention permits states parties to implement "treatment, education, after-care, rehabilitation and social reintegration" as alternatives to penal sanctions.[1257] The scope for deviating from suppression and criminalization is limited, however, as processes engaging law enforcement and the judicial system are mandatory under the IDCS. Article 36(1)(a) of the Single Convention requires states parties to adopt "measures as will ensure that cultivation, production, manufacture…possession" and trade in drugs "shall be punishable offences…and that serious offences shall be liable to adequate punishment particularly by imprisonment."[1258] The Single Convention's Commentary avers that states parties "are bound to prosecute…all offences covered by [Article 36(1)(a)]" but may "determine whether substitution of measures of treatment for conviction or punishment would be appropriate."[1259] The strict control, prohibition,

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[1255] Christine Minhee and Steve Calandrillo, "The Cure for America's Opioid Crisis: End the War on Drugs," *Harvard Journal of Law & Public Policy* 42, 2 (2019), 583-595, esp. 589; Abbe R. Gluck, Ashley Hall and Gregory Curfman, "Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis," *Journal of Law, Medicine & Ethics* 46 (2018), 351.
[1256] Minhee and Calandrillo (2019), 597.
[1257] Single Convention, Article 36(1)(b). Measures must be in conformity with Article 38's emphasis on drug abuse prevention.
[1258] Similarly, Article 3(2) of the 1988 Convention Against Illicit Traffic mandates the criminalization of illicit possession of narcotics and psychotropics for personal consumption.
[1259] *Commentary on the Protocol* (1976), 77, para 5.

suppression, and criminalization of drugs and drugs users, however, remains at the core of the IDCS's approach to non-medical, non-scientific consumption, dependence, and addiction. Lenient measures merely temper penalization. The Single Convention, after all, sets the minimum requirements for states parties to adhere to. They may "[adopt] measures of control more strict or severe than those provided by" the treaty.[1260] So, while alternatives to the crime control model are permissible in theory[1261] they are an exception to the general rule: discipline and punish drug users. The opioid epidemic saga is a case in point. Ordinary people battling a disease are left to die in correctional facilities and on the streets while corporate traffickers have gotten away with murder.

The privileging of the pharmaceutical industry under the IDCS unwrites a political economy of dispossession and death. The inability or unwillingness of Canadian and US authorities to cope with the surge in opioid overdoses during the Covid-19 crisis is a matter of prioritization and policy choice. The first several months of the pandemic demonstrated both the extent to which the necropolitics of drug control condition the individual's encounter with mortality and the serious social and human rights implications of the IDCS. Human rights and fundamental freedoms have served to protect some PWID, at places like Insite in Vancouver, British Columbia, but a comprehensive harm reduction program has yet to appear in Canada or the US. Even the INCB, initially resistant to harm reduction and OST policies, has called upon states parties to the IDCS to ensure access to essential medicines remains unhindered, including for "the treatment of drug use disorders."[1262] But decades of institutional resistance to harm

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[1260] Single Convention, Article 39.
[1261] See International Narcotics Control Board, "Flexibility of Treaty Provisions as Regards Harm Reduction Approaches (Decision 74/10)," E/INCB/2002/W.13/SS.5 (Vienna: 30 September 2002).
[1262] International Narcotics Control Board, "Message from the President of the INCB on the COVID-19 Pandemic" (n.d.), https://www.incb.org/incb/en/coronavirus.html.

reduction cannot be undone by a general insistence on providing healthcare and social services to drug users, particularly in the time of a state of emergency in which resources are stretched thin.

5.4 States of Emergency

Pandemics are biological, social, and economic phenomena. The public reaction to COVID-19, just as much as the public health response, led to the "shut[ting] down [of] daily life by overturning basic premises of sociality, economics, governance, discourse, and interaction—while also killing people."[1263] Transformational change often follows such a crisis and the upending of the quotidian will, for better or worse, usher in a "new normal."[1264] Jurist and political theorist Carl Schmitt criticized liberal democracy's, i.e., the German Weimar Republic's, reliance on the "economic-financial state of emergency" as justification for ineffective interventions aimed at taming the vicissitudes of capitalism.[1265] The provenance of such broad emergency powers, particularly executive power, to manage the economy had originated as "wartime emergency powers," which metamorphosed into "a more or less permanent features of political life in liberal democracies."[1266] The military analogy speaks to the fact that "dire economic crises do constitute a profound threat to political stability."[1267] Drug law and policy are similarly framed in military terms. International organizations and national governments have been waging the War on Drugs for over a half-century.[1268] From this perspective, controlled substances constitute an existential threat to liberal democratic political

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[1263] Jeremy A. Greene and Dora Vargha, "Ends of Epidemics," in Hal Brands and Francis J. Gavin (eds), *COVID-19 and World Order: The Future of Conflict, Competition, and Cooperation* (Baltimore: Johns Hopkins University Press, 2020), epub.
[1264] Green and Vargha (2020).
[1265] William E. Scheuerman, "The Economic State of Emergency," 21 *Cardozo Law Review* 1869 (2000), 1869-1870. See also William E. Scheuerman, "States of Emergency," in Jens Meierhenrich and Oliver Simons (eds), *The Oxford Handbook of Carl Schmitt* (Oxford: Oxford University Press, 2016), 547-569.
[1266] Scheuerman (2000), 1870.
[1267] Scheuerman (2000), 1887.
[1268] Scheuerman (2000), 1893 (note 75).

stability. But whereas governments swiftly implemented public health measures to contain the virus and were more than willing to inject billions into the economy to avert recession and combat inflation, there was reluctance bordering on indifference when it came to attending to the drugs emergency.

Liberal constitutional bills of rights aim at safeguarding core aspects of the person and personhood as against the state, though the latter may restrict rights and freedoms in drastic circumstances such as a pandemic. In these states of emergency, Mbembe posits, "liberal democracies…don the garb of the exception" and create enemies out of friends, outsiders out of citizens.[1269] This brings to the domestic sphere Schmitt's assertion that politics itself "can be understood only in the context of the ever present possibility of the friend-and-enemy grouping."[1270] Even if drug users are not considered enemies, they certainly do not qualify as friends. While concern and care for them was present in the response to Covid-19 they had also seemingly lost their humanity. In the face of such apathy Mbembe asks: "If…humanity exists only through being in and of the world, can we found a relation with others based on the reciprocal recognition of our common vulnerability and finitude?"[1271] It appears not in light of the pandemic. Mbembe, drawing on the history of postcolonial violence in Sub-Saharan Africa, observes that states of emergency enable:

> power to manufacture an entire crowd of people who specifically live at the edge of life, or even on its outer edge—people for whom living means continually standing up to death, and doing so under conditions in which death itself increasingly tends to become spectral…such death is something to which nobody feels any obligation to respond. Nobody even bears the slightest feelings of responsibility or justice toward this sort of life or, rather, death.[1272]

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[1269] Mbembe (2019), 2 and 117.
[1270] Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: Chicago University Press, 2007), 26-27 and 35 (quotation at 35).
[1271] Mbembe (2019), 2-3.
[1272] Mbembe (2019), 37-38.

In the African example, “racism is the drive of the necropolitical principle insofar as it stands for organized destruction…a generalized cheapening of the price of life and…a habituation to loss.”[1273] In the case of drug control, moral opprobrium and a law-enforcement-first approach drive a necropolitics indifferent to the suffering of the dispossessed and vulnerable, and hostile to what is deemed socially harmful non-conformist behavior. Race, class, caste, and gender dynamics factor into the necropolitics of drug control as well. While this politics was present before the pandemic it was exacerbated during the lockdown.

Mbembe reformulated the idea of “enclosure” to describe the “matrix of rules mostly designed for those human bodies deemed either excess, unwanted, illegal, dispensable, or superfluous.”[1274] Behind this matrix lies “the question of what to do with those whose very existence does not seem to be necessary for our reproduction, those whose mere existence or proximity is deemed to represent a physical or biological threat to our own life.”[1275] Who are these superfluous bodies, the living dead? Among others, the unemployed, socially marginalized, and illicit drug users. Non-essential workers and those precariously employed in the gig economy were least prepared to weather Covid-19. Without an income and having little to no savings the precariat class faced the prospect of “rent or mortgage arrears and homelessness.”[1276] When combined with other risk factors, including sex, gender, age, physical and mental health, social distancing and other public health control measures were a vector for “increase[d] health inequalities in the short and longer term.”[1277] The social determinants of health, “where people are born, live, learn, work, play, worship, and age,” have a direct impact on “health…and

[1273] Mbembe (2019), 39.
[1274] Mbembe (2019), 96.
[1275] Mbembe (2019), 97.
[1276] Margaret Douglas et al., “Mitigating the wider health effects of covid-19 pandemic response,” *BMJ* 369 (27 April 2020), m1557, https://doi.org/10.1136/bmj.m1557.
[1277] Douglas (2020).

quality-of-life outcomes and risks."[1278] In the US, where health insurance coverage is generally tied to employment status, the matrix of rules excludes large swathes of the population from protection based on their productive capacity. Inclusion in the labor market is a key indicator of proclivity to drug use, dependence, and addiction.

Socioeconomic drivers contributed to the rise in mortality among white middle-aged US American men and women from the 1990s,[1279] many a result of suicide, alcohol and drug dependence, and opioid addiction,[1280] in what Case and Deaton call "deaths of despair."[1281] A number of characteristics put members of the group at risk, including the absence of a college education, marital status, whether one lived in a two-parent home, the decline of religion, precarious employment and chronic under- and unemployment, and the concomitant loss of income and social status that comes with joblessness.[1282] Indeed, the cohort faces an economy and "a society that can no longer provide its members an environment in which they can live a meaningful life."[1283] While pharmaceutical corporations were the primary purveyors of opioids, creating the foundation for the overdose epidemic, American lawmakers and regulators must bear responsibility for how licit and illicit drugs are controlled and policed. The government must understand, too, that a significant cause of opioid-related deaths of despair is American capitalism: the source of geographic inequalities of employment, income, wealth, and access to education and healthcare, the root causes of deaths of despair.[1284] With little to no social safety

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[1278] United States Department of Health and Human Services, Office of Disease Prevention and Health Promotion, "Social Determinants of Health," Healthy People 2030 (n.d.), https://bit.ly/32601t4.
[1279] "Deaths of despair among white men and women aged forty-five to fifty-four rose from thirty per one hundred thousand in 1990 to ninety-two per one hundred thousand in 2017." Case and Deaton (2020), 40.
[1280] "Accidental drug overdoses are the largest and fastest growing of the three midlife deaths of despair… Opioids are implicated in 70 percent of drug deaths, either alone or in combination with other drugs." Case and Deaton (2020), 111.
[1281] Case and Deaton (2020), 37.
[1282] Case and Deaton (2020), 3-4, 6-8, 34 (Fig. 2.2).
[1283] Case and Deaton (2020), 94.
[1284] Case and Deaton (2020), 126-130, 59 (Fig. 4.3), 66 (Fig. 5.2), and chapters 10-15.

net to turn to and an all for oneself individualist mentality, drugs became pharmakon for the rejected and dejected.

Race, class, caste, and gender politics have played a fundamental role in shaping the crime control approach to policing opioids and their users and the War on Drugs writ large.[1285] Beginning in the 1970s, and before their white peers, black Americans were already experiencing the negative effects of deindustrialization and globalization, from chronic unemployment to social disintegration.[1286] Illicit drugs subsequently penetrated cities with large black populations and the crack epidemic led to an increase in black mortality in the 1980s.[1287] The criminalization and over-policing of black urban spaces via drug laws also transformed the nature of black citizenship, already a contentious concept in the US, as a grossly disproportionate number of blacks were (and are) imprisoned for drug crimes. The severe penalties attached to simple possession affected black Americans radically differently from white Americans, with the sentencing disparity between crack and powder cocaine, discussed above, being one of the clearest examples of racial bias in drug control.[1288] When and if they are released, ex-convicts and felons are excluded from the labor market, deprived of the right to vote, and stripped of access to welfare entitlements, impoverishing individual lives and entire communities. They legally become second-class citizens. Mass incarceration and the carceral state significantly impacted white Americans, too, as politicians successfully tied white rural development to the prison industrial complex. The use of cheap and politically powerless white labor in this industry, when combined with the effects of deindustrialization and globalization, contributed to

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[1285] Isabel Wilkerson, *Caste: The Origins of Our Discontents* (New York: Random House, 2020); Yaner Lim, "Understanding the War on Drugs in America through the Lens of Critical Race Theory," *Bristol Law Review* 5 (2018): 156-170.
[1286] Case and Deaton (2020), 5.
[1287] Case and Deaton (2020), 64-65.
[1288] American Civil Liberties Union (2006); Alexander (2010).

the decline of American labor unions, wages, and working conditions to the disbenefit of all working-class people. At the same time, the income gap between whites and blacks increased.[1289] So, while drug control has affected the lives of impoverished Americans as a whole, black Americans have borne the brunt of the regime's harmful consequences.

A similar imbalance in the effects of US drug law and policy on black and white communities is evident in the recent opioid crisis. For white Americans "the rate of opioid overdose deaths increased by a factor of 3.3" between 1999 and 2015. Over the same period the rate for black Americans grew by "a factor of 1.7."[1290] The rapid increase for whites can be explained by the lower overall rate they began with as well as the meteoric rise in prescription opioid consumption. That said, since 2000 the number of heroin overdoses has almost doubled within the black population.[1291] So, while black American mortality rates have made progress from the 1930s on, the group continues to have a higher overall mortality rate than white Americans.[1292] In the midst of the crisis whites have fared better than their black counterparts, but this has not stopped public officials and the media from drawing special attention to the lot of white working-class men in the so-called flyover states. During the opioid epidemic, and for the first time, white Americans experienced the disadvantageous effects of the IDCS's necropolitics in large numbers.[1293] It was at this point that drug law and policy reform became an issue attracting bipartisan support.

The nexus between bio- and necropolitics with race, class, caste, and gender in US American drug control is affirmed by the narrative shift that occurred with respect to substance

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[1289] Thompson (2010).
[1290] Keturah James and Ayana Jordan, "The Opioid Crisis in Black Communities," *Journal of Law, Medicine & Ethics* 46 (2018), 405 (Fig. 1).
[1291] James and Jordan (2018), 404.
[1292] Case and Deaton (2020), 64 (Fig. 5.1) and 65.
[1293] Though the current era, and the regime sustaining it, is not the first to fail at preventing a drugs crisis among white US Americans. See Herzberg (2020).

use during pregnancy. Pregnant black women who used crack cocaine in the 1980s were criminalized and imprisoned as a matter of course, described as moral failures in popular media, and their fetuses designated as future social problems for the state. Pregnant white women using opioids during the current epidemic, by contrast, are regularly painted as victims suffering from the disease of substance use disorder, in need of rehabilitation not criminalization, and their fetuses as requiring state protection. The racial privilege accorded white women was and is conditioned by black disadvantage, but this dynamic has come to backfire on white women. The punitive, racist crime control model aimed at pregnant poor black women in the 1980s set US law and policy on a path dependent course, which pregnant poor white women are now reaping the consequences of.[1294] Around 21,000 women aged 15 to 44 reported misusing opioids between 2007 and 2012.[1295] Reporting requirements in the federal Child Abuse and Prevention Act 1974 and nearly half of US states mandate that healthcare providers alert child protective services when drug use is detected in pregnant women, bringing civil and criminal agencies into the policing of women's' bodies.[1296] Pregnant black women have been disproportionately targeted by such legislative schemes, as recognized by the SCOTUS in *Ferguson v City of Charleston* where 41 of 42 cases in which prosecutors were notified of a positive drug test involved women of color.[1297] Gender and pregnancy status have thus extended the scope of the criminalization of drugs and drug users, forcing women to contend with the criminal justice system and choose between penalization and mandatory treatment programs.[1298] The paucity of affordable programming means that only the well-to-do can access adequate addictions services.

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[1294] Khiara M. Bridges, "Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy," *Harvard Law Review* 133, 3 (2020), 788-793, 814-825, 834, 836, and 848-851.
[1295] Bridges (2020), 793.
[1296] Bridges (2020), 799.
[1297] *Ferguson v City of Charleston*, U.S. 67 (2001), cited in Bridges (2020), 820.
[1298] Bridges (2020), 803-813.

Once again, race, class, caste, and gender shape the meaning of drug control as well as life and death.

While the number of deaths of despair is less acute in Canada, it has also experienced a significant increase in opioid overdose deaths.[1299] From 2016 to June 2020 there were 17,602 "apparent opioid toxicity deaths" across the country. The "highest quarterly count" of 1,628 overdose-related deaths, however, took place during the Covid-19 pandemic between April and June 2020. Most of these, 97 percent, were deemed "accidental (unintentional)."[1300] In British Columbia the Covid overdose crisis has had a disparate impact on certain populations, with 80 percent of cases being men and indigenous peoples being five times more likely to overdose than their non-indigenous peers.[1301] And in Ontario, half of the 2,050 overdose deaths between March and December 2020 occurred among people who were unemployed and one in six was homeless.[1302] These racial and class trends appeared across the country. It was also a crisis of youth. From 2019 to 2020, the greatest increase in substance use-related emergency room and hospital visits and overdose deaths occurred among young to middle-aged men with low incomes.[1303] These dynamics are not only a North American phenomenon, however, as Anglophone jurisdictions across the Atlantic experienced similar events.

In England and Wales, a record (since 1993 when statistics were first taken) 4,561 people died of drug poisoning in 2020, most of which were attributed to cocaine and opiate-opioid

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[1299] Case and Deaton (2020), 38.

[1300] Special Advisory Committee on the Epidemic of Opioid Overdoses, *Opioid- and Stimulant-related Harms in Canada* (Ottawa: Public Health Agency of Canada, December 2020), https://health-infobase.canada.ca/substance-related-harms/opioids-stimulants.

[1301] Schmunk (2020).

[1302] Muriel Draaisma and Jasmin Seputis, "Ontario's opioid-related death toll surged to 2,050 during the pandemic in 2020, new report finds," *CBC News*, 19 May 2021, https://bit.ly/3peyEaM.

[1303] Canadian Institute for Health Information, *Unintended Consequences of COVID-19: Impact on Harms Caused by Substance Use* (Ottawa: CIHI, 2021); Karin Larsen, "5 British Columbians dying every day from overdose, coroner reports," *CBC News*, 25 November 2020, https://bit.ly/2SMOSvG; Draaisma and Seputus (2020).

consumption. The greatest increase was in the northeast, the former industrial heartland, half of cases involved opioids, two-thirds were male, and "[t]he highest rate of drug misuse deaths…found in those aged 45 to 49 years, closely followed by those aged 40 to 44."[1304] Scotland, which already had the highest overdose rate in Europe, saw a record 1,339 deaths in 2020. Again, males died at a rate 2.7 times that of women and nearly "two thirds of those who died last year were aged 35-54."[1305] Benzodiazepines, particularly adulterated NPS-type "street benzos" like etizolam, are implicated in approximately two thirds of drug overdoses in Scotland, often used in conjunction with opioids.[1306] Harm reduction NGOs in England, Wales, and Scotland posited that public sector cuts contributed to the rise in deaths, which could have been prevented by adequate support services and a more robust social safety net.[1307] Out of the labor market for a variety of reasons, including pandemic closures, drug users in need of harm reduction services were deprived of access to essential health care. As Covid-19 spread it became clear that while the National Health Service (NHS) was robust, it was underprepared to combat a pandemic and tend to the health needs of drug-using citizens.

The connection between employment, the economy, and drug overdoses in the US, Canada, and UK cannot be overstated. Social exclusion and isolation cause pain, which is not only mental but physical.[1308] As pharmakon, drugs offer "a powerful high or temporary relief

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[1304] Sarah Marsh, "Drug poisoning deaths in England and Wales reach record high," *The Guardian*, 3 August 2021, https://www.theguardian.com/society/2021/aug/03/drug-poisoning-deaths-in-england-and-wales-reach-record-high; Office for National Statistics, "Deaths related to drug poisoning in England and Wales: 2020 registrations," Statistical Bulletin, 3 August 2021, https://bit.ly/3NK7xPg.
[1305] Severin Carrell, "Drug deaths in Scotland soar to record level," *The Guardian*, 30 July 2021, https://www.theguardian.com/uk-news/2021/jul/30/drugs-deaths-in-scotland-soar-to-record-level.
[1306] Andrew McAuley, Catriona I. Matheson and James Roy Robertson, "From the clinic to the street: the changing role of benzodiazepines in the Scottish overdose epidemic," *International Journal of Drug Policy* 100 (2022): 103512; Scottish Government, Health and Social Care, "Evidence review: Current trends in benzodiazepine use in Scotland," Social Research Series (March 2022).
[1307] Marsh (2021); Carrell (2021).
[1308] "[T]here is evidence that social pain uses some of the same neural processes that signal physical pain." Case and Deaton (2020), 83.

[from] cravings" and psychosocial suffering. Aware of the risks, users "are not seeking death."[1309] During the crack epidemic of the 1980s and the contemporary opioid crisis drug users have sought out "drugs that could ease psychological or physical pain…at an (arguably) affordable price…hungry for the escape that they seemed to offer."[1310] In each locus these people, Mbembe's living dead, have been treated as disposable excrescences, a narrative is borne out by recent events.

The coronavirus pandemic has compounded the opioid epidemic, creating a "syndemic" for drug users, "a heightened vulnerability to morbidity and mortality due to a variety of synergistically correlated systems."[1311] Richard Horton, editor-in-chief of The Lancet, opined in September 2020 that the Covid-19 crisis revealed the role inequality plays in how disease impacts society.[1312] PWID, for instance, "are at higher risk of complications from COVID-19" due to the physical and psychological effects of substance use and the "economic, social, and environment challenges, such as homeless, poverty, unemployment, food insecurity and incarceration."[1313] Compounding this vulnerability is the reality that recovering drug users are at a heightened "risk of relapse or withdrawal" during crises[1314] and in-person treatment options were interrupted or closed during lockdown for fear of spreading the virus.[1315] Access to previously available products and services, including fentanyl testing strips and naloxone for

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[1309] Case and Deaton (2020), 39.
[1310] Case and Deaton (2020), 69.
[1311] Joe Tay Wee Teck and Alexander M. Baldacchino, "COVID-19 and Substance Use Disorders: Syndemic Responses to a Global Pandemic," in Nady el-Guebaly et al. (eds), *Textbook on Addiction Treatment: International Perspectives*, Second Edition (Cham: Springer, 2021), 1271.
[1312] Richard Horton, "Offline: COVID-19 is not a pandemic," *The Lancet* 396, 10255 (26 September 2020), P874, https://doi.org/10.1016/S0140-6736(20)32000-6.
[1313] Bartholomew et al. (2020); Nora D. Volkow, "Collision of the COVID-19 and Addiction Epidemics," *Annals of Internal Medicine* (7 July 2020), https://doi.org/10.7326/M20-1212.
[1314] Douglas (2020).
[1315] Osnat C. Melamed et al., "COVID-19 and persons with substance use disorders: Inequities and mitigation strategies," *Substance Abuse* 41, 3 (2020): 286-291.

overdose prevention, was obstructed in the 400 or so harm reduction centers throughout the US.[1316] Those requiring greater healthcare resources to maintain their health, wellbeing, and life in emergency times were forced to compete for scarce resources with a general public already skeptical of drug treatment programs. Many advocates turned to the courts and media to make the case for greater protection and compassion. In Canada, a Quebec harm reduction organization challenged the provincial government's curfew on the basis that it disproportionately impacted PWID's access to safe injection sites and health services.[1317] An Alberta-based grassroots groups argued for "a safe, regulated supply of substances" and the provision of evidence-based treatment to stop, or at least slow, the rise in overdose deaths.[1318] In any case, these gaps in care bespeak the stigmatization of and low priority given to drug users in public health policy.

For the incarcerated, already inadequate access to harm reduction services was further stymied by Covid-19. Recalcitrant prison administrations refused to provide what they do not see as a basic health intervention. Correctional Services Canada, for example, was unable to keep up with requests for opioid substitution therapy (OST), with nearly 500 inmates on the federal government's waiting list in June 2020.[1319] The issue is live in American prisons, too, where, as of 2018, only 30 of the nation's 5,100 carceral facilities offered medication-assisted treatment (MAT) for those with substance use disorders.[1320] The right to access OST-MAT in prison has been successfully litigated in the US on the basis that a prison's refusal to provide drug treatment

[1316] Bartholomew et al. (2020).
[1317] Marilla Steuter-Martin, "Harm reduction group to challenge Quebec curfew in court, saying injection users at risk," *CBC News*, 10 May 2021, https://bit.ly/3fBLbBH.
[1318] Emily Pasiuk, "Opioid deaths killed 997 Albertans in the first 11 months of 2020," *CBC News*, 13 February 2021, https://bit.ly/3vHYJ4k.
[1319] Raffy Boudjikanian, "More Canadian federal prisoners waiting for opioid treatment," *CBC News*, 28 August 2020, https://bit.ly/37KF9et.
[1320] Michael Linden et al., "Prisoners as Patients: The Opioid Epidemic, Medication-Assisted Treatment, and the Eighth Amendment," *Journal of Law, Medicine & Ethics* 46 (2018), 252.

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constitutes cruel and unusual punishment under the Eighth Amendment.[1321] In *Pesce v Coppinger*,[1322] the US District Court for the District of Massachusetts determined that the plaintiff's Eighth Amendment claim, challenging prison authorities' refusal to provide MAT, was "likely to succeed"[1323] given "his medical claim need is or was 'sufficiently serious'…[and] that the defendants acted with intent or wanton disregard when providing inadequate care."[1324] The plaintiff, the Court held, would be "irreparably harmed if denied methadone treatment while incarcerated."[1325] It therefore granted the plaintiff's requested injunction to provide MAT on account of the "balance of harms" analysis weighing in his favor. Methadone, it added, "will ensure he remains in active recovery."[1326] In Europe, the European Court of Human Rights has held that states must provide the same health services to those in detention as are available to the public. Denying OST to a prisoner, even for "a long-term drug addict without any realistic chance of overcoming addiction," is a violation of the European Convention on Human Rights' Article 3 right to be free from inhuman and degrading treatment.[1327] These cases are an example of a jurisprudence that put constitutional rights and freedoms above the cost of implementing highly effective care programs.[1328] But however much comprehensive law and policy would ameliorate the situation, providing care and services to vulnerable populations in the knowledge they are necessary to live up to the constitutional order's ideals, it is less costly for decision-

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[1321] Linden et al. (2018). The Americans with Disabilities Act has also been found to apply in such circumstances. See *Smith v Aroostook County*, 376 F.Supp.3d 146 (D.Me., 2019).
[1322] *Pesce v Coppinger*, 355 F.Supp.3d 35 (D.Mass., 2018).
[1323] *Pesce v Coppinger*, para 18.
[1324] The objective and subjective elements, respectively, of the legal test. *Pesce v Coppinger*, paras 16-18.
[1325] *Pesce v Coppinger*, paras 19-20.
[1326] *Pesce v Coppinger*, paras 21-23. For more on the legal test see Linden et al. (2018), 254.
[1327] *Case of Wenner v Germany*, (App. No. 62303/13) ECtHR Fifth Section (1 September 2016), paras 80-81.
[1328] Linden et al. (2018), 259. See the latter's discussion of Rhode Island's MAT program and its public health impact. Linden et al. (2018), 261-262.

makers, legislators and administrators, to sacrifice those at the bottom of the social order to decrease costs and, for private prisons in the US, maintain profitability.

The upshot of the necropolitics of the Covid-19 and opioid overdose syndemic was a perversion of the concepts of equality and rights and freedoms. Only the privileged and useful were seen as worthy of dignity and protection. Drug users, downtrodden and unproductive, became superfluous bodies unneeded by the market and ignored by the state. They became Mbembe's living dead. The constitutional cost of this two-tiered response to both the pandemic and epidemic has been a deviation from liberal democratic constitutional commitments.[1329] In states of emergency interferences with rights and freedoms are supposed to be temporary stop-gap measures designed to minimally impair constitutional commitments while addressing the exigencies of extraordinary times. But the strict understanding of drug control is a permanent fixture of international and domestic law and policy, eroding constitutional commitments to human rights and fundamental freedoms. When the state of exception becomes the normal state of affairs law and policy "may render [constitutional] principles void."[1330] The undermining of core constitutional principles has been apparent from the beginning of the War on Drugs. The Covid-19 and opioid overdose syndemic is just an extreme episode of a pattern that has been unfolding over the past several decades.

5.5 The Right to Have Rights and The Siren of the Market

Citizenship is increasingly equated with consumerism in what Philip Bobbit calls the "informational market-state."[1331] In this arrangement, rather than governing the state is tasked

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[1329] Madrazo and Barreto (2018); Madrazo Lajous (2014).
[1330] Madrazo and Barreto (2018), 684-685 and 725.
[1331] Philip Bobbitt, "Future Scenarios: 'We are all failed states, now,'" in Hal Brands and Francis J. Gavin (eds), *COVID-19 and World Order: The Future of Conflict, Competition, and Cooperation* (Baltimore: Johns Hopkins University Press, 2020), epub.

with “adding value to the lives of those persons who are both the subject and the sovereign of the democratic state.”[1332] But if this is all there is to the constitutional order, he suggests, there is a risk that “the [US] would abandon [its] commitment to uniform guarantees of human rights.”[1333] Differential treatment based on geography, politics, race, class, caste, and gender may, according to Bobbit, render the promise of equal rights nugatory in post-Covid-19 America.[1334] This is not a new phenomenon, but another iteration of a broader trend of moral progress, or at least reform, coupled with selective, often violent, exclusion. Whose rights matter is more than a moral question, for “fiscal and budgetary questions” play into the calculus of what counts as a fundamental right and freedom and who benefits from it.[1335] Positive rights, to health for example, cost public money to implement. Negative rights simply require that the state leave its citizens alone, in the privacy of their home or domicile for instance. Articulating human rights and fundamental freedoms claims in either register can lead to unpredictable legal results, but what matters is that citizens have access to the fora, legislatures, courts, administrative decision-makers, etc., where key decisions about their lives are made.

While race, class, caste, and gender politics, and even animus, pervade drug control, explaining the disparate treatment of subaltern groups under the regime, the basis of their unequal protection in law is less explicitly discriminatory. It is just as much about indifference as it is motivated individual and collective self-interest. In liberal biopolitics, Foucault argued, “The ‘right’ to life, to one’s body, to health, to happiness, to the satisfaction of needs…this ‘right’—which the classical juridical system was utterly incapable of comprehending—was the political response to all these new [capitalist] procedures of power which did not derive…from the

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[1332] Bobbitt (2020).
[1333] Bobbitt (2020).
[1334] Bobbitt (2020).
[1335] Piketty (2020), 1029.

traditional right to sovereignty."[1336] So, the right to have rights in market societies derives in part on the ability of interest groups to mobilize social, political, and economic power to protect and promote their own self-serving policy preferences. Certainly, not all interest groups have the resources for this kind of mobilization.[1337] Understanding the bases of inequality and power differentials is thus crucial to comprehending the causes and consequences of drug reform schemes.

The dynamics of contemporary capitalism, whose complex contours are beyond the scope of this work, are part and parcel of a social order that values private accumulation and conspicuous consumption over communal goals. Possession and consumption translate into real power, bending the arc of law and policy in the direction of consumer preference. With power comes voice, the ability to frame debates and control narratives. And as Mbembe argues: "The market…is increasingly reimagined as the primary mechanism for the validation of truth."[1338] The market also produces truth. Within the neoliberal economic paradigm, the social sciences themselves often function to "generate[] truth against (collective) prejudice and ideology."[1339] These market-generated truths can and often do go against the grain of factuality and common sense. It would be a mistake to lay blame for such misrepresentations and distortions solely at the feet of social scientists, however, as truth is instrumentalized vis-à-vis the natural sciences as well. The supposed neutral objectivity of scientific analysis is frequently deployed to further the narrow ideological interests of political factions.[1340] This observation fits with Sheila Jasanoff's

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[1336] Foucault (1991b), 267.
[1337] Lynn Mather, "Law and Society," in Robert E. Goodin (ed), *The Oxford Handbook of Political Science* (Oxford: Oxford University Press, 2011), 295.
[1338] Mbembe (2019), 109.
[1339] Thomas Biebricher, *The Political Theory of Neoliberalism* (Stanford, CA: Stanford University Press, 2018), 30.
[1340] Biebricher (2018), 134-135.

conclusion that "[s]cience and technology operate as…political agents."[1341] Because science operates within the confines of the social order, the two are "co-produced, each underwriting the other's existence."[1342] The question of who wields power when, and whose identity and which institutions, discourses, and representations win hegemony, is central in determining outcomes in the political co-production of science and social order.[1343] In short, market-generated truths validated by science carry great weight in liberal democratic orders. The same goes for scientific truths validated by the market.[1344]

States of emergency can accelerate the process of the ideological framing of truth. The Covid-19 pandemic allowed consumer-citizens and elites to mobilize resources, fiscal and political, to delimit the scope of government intervention in certain areas of law and policy. In developed countries, like Canada and the US, this has come about as a result of a compact between what Piketty terms the Brahmin Left and Merchant Right.[1345] As far as drug control is concerned, the social liberalism of the highly educated North American Brahmin Left, a significant number of whom are or were casual drug users, has joined forces with the profit maximizing Merchant Right, interested in the business opportunities arising out of cannabis legalization, in a synthesis of liberal thought and neoliberal political economy.[1346] A clear example of the reordering of truth to meet the demands of the privileged played out in San

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[1341] Sheila Jasanoff, "Ordering knowledge, ordering society," in Sheila Jasanoff (ed), *States of Knowledge: The co-production of science and social order* (London: Routledge, 2004b), 14.
[1342] Jasanoff (2004b), 17. "[C]o-production is…the proposition that the ways in which we know and represent the world (both nature and society) are inseparable from the ways in which we choose to live in it. Knowledge and its material embodiments are at once products of social work and constitutive of forms of social life…Scientific knowledge…both embeds and is embedded in social practices, identities, norms, conventions, discourses, instruments and institutions…what we term the *social*." Sheila Jasanoff, "The idiom of co-production," in Sheila Jasanoff (ed), *States of Knowledge: The co-production of science and social order* (London: Routledge, 2004a), 2-3.
[1343] Jasanoff (2004b), 36 and 38.
[1344] Jasanoff (2004b), 32.
[1345] See Piketty (2020), chapter 15.
[1346] In line with Britton-Purdy et al.'s (2020) Twentieth-Century Synthesis.

Francisco, a city representative of the Silicon Valley Brahmin set in the US, in December 2020. The city banned tobacco smoking inside apartments due to the health hazard posed by second-hand smoke. Smokers, of course, are also at a higher risk of complications from the virus than non-smokers. No matter the facts, activists were able to successfully ward off an attempt to prohibit cannabis smoking in the same ordinance on the grounds that private dwellings were the only lawful place to use it, public consumption being disallowed.[1347] Aside from the obvious point that second-hand smoke is harmful no matter the source, whether tobacco or cannabis, the exemption from the ban speaks to the fact that access to private property is a prerequisite to enjoying the right to consume cannabis. Lawmakers in San Francisco responded to the constituency with the purchasing power and discursive authority to determine elections. This is as it should be in a liberal democracy, but constitutional commitments to rights and freedoms require a baseline of equality in the design of law and policy. The double standards cannabis users have been able to carve out for their activities are in sharp contrast to the less than inadequate response from law and policymakers to the opioid epidemic.

Contemporary power differentials between races, classes, and castes, and the social cleavages they generate, are a product of the shifting of policy priorities in the latter third of the twentieth century. The parallel rise of neoliberal economics and human rights law and norms at the international level from the 1970s onward occurred as national welfare states were being dismantled. The West's emphasis on the centrality of civil and political rights within the human rights paradigm, promoted by governmental and non-governmental institutions, elided with neoliberalism's preference for the protection of private property, economic freedom, and individualism. The "sweetness of commerce," the argument went, would create a peaceful and

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[1347] AP, "San Francisco bans smoking inside apartments; pot smoking OK," *Associated Press*, 2 December 2020, https://bit.ly/2XJ5S8v.

just international market order. This trend, which has since become hegemonic, undercut efforts at reorienting the international human rights regime toward equality and egalitarianism based on social and economic rights obligations. Aspirations to fulfill the substantive collective needs of society in the name of global justice were quashed in the name of providing formal recognition of individual rights and the satisfaction of basic needs to the poorest alone. In short, human rights were deployed to legitimize the inequalities wrought by the market.[1348] Constitutionalism as a global enterprise brought these dynamics to bear on domestic governmental arrangements, projecting Northern legal structures and norms on "nations everywhere."[1349] Neoliberal thought's aversion to courts intervening in law and policy via judicial review, though not unique, propagated a preference for legislative supremacy over legislating from the bench.[1350] In North America courts have nonetheless interceded to protect the civil and political rights and freedoms of individuals against the state and IDCS. In Canada, constitutional rights and freedoms played a significant role in destigmatizing and medicalizing cannabis.[1351] The decriminalization of cannabis for personal consumption in private in Alaska similarly rested on the state constitution's robust protection of privacy.[1352] In both cases medicalization normalized the plant's use and helped prepare the way for legal cannabis markets.[1353] But it has been the dogged persistence of consumers and markets, not judges, that have stimulated change. The emergence

[1348] Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (London: Verso, 2019); Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: Harvard University Press, 2018).
[1349] Mark Tushnet, "The globalisation of constitutional law as a weakly neo-liberal project," *Global Constitutionalism* 8, 1 (2019), 34.
[1350] Biebricher (2018), 56-58. Carl Schmitt was also skeptical of the judiciary's strengthened adjudicatory role during economic crises. Scheuerman (2000), 1884.
[1351] Matthew DeCloedt, "Human Rights Litigation and the Medicalization of Cannabis in Canada, ca. 2000-Present," *Pharmacy in History* 61, 3-4 (2019): 59-77.
[1352] *Ravin v State*, 537 P.2d 494 (Ak. 1975).
[1353] Beau Kilmer and Robert J. MacCoun, "How Medical Marijuana Smoothed the Transition to Marijuana Legalization in the United States," *Annual Review of Law and Social Science* 13 (2017): 12.1-12.22; DeCloedt (2019).

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of dual drug control regimes is indicative of the inequalities of status underlying reform campaigns.

Grassroots mobilization played a central role in bringing attention to the cannabis question across North America from the 1990s, especially in the US. State-level ballot initiatives and referenda in the 2010s gave advocates and drug policy reformers a platform to frame the cannabis issue as one of "white individualism," rather than a chance to rebalance the scales of socioeconomic and racial justice. David Schlussel has traced how "depictions of hardworking, middle-class whites who exercise individual responsibility and use marijuana responsibly"[1354] were successfully deployed in Washington, Oregon, Colorado, and Alaska. By contrast, attempts to bring race and class to the fore in legalization campaigns have led to more mixed results, with success in Massachusetts and failure in California.[1355] The whitewashing of cannabis has caused a lag in the implementation of measures that could begin to redress the wrongs of its prohibition, particularly in communities of color.[1356] The opioid crisis, too, has been whitewashed as "attention has focused on the increase in overdose deaths among white, suburban, middle-class users" despite the decades of devastation wrought by opiates-opioids in the black community.[1357] As black American deaths still go largely unnoticed, white Americans have only come to recognize the seriousness of the opioid crisis as they and those like them fall into dependency and addiction and lose those close to them.[1358] In the push to humanize drug control law and policy compassion and care are preserved for the privileged.

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[1354] David Schlussel, "The Mellow Pot-Smoker: White Individualism in Marijuana Legalization Campaigns," 105 *California Law Review* 885 (2017), 907.
[1355] Schlussel (2017), 916-918.
[1356] Schlussel (2017), 927.
[1357] James and Jordan (2018), 416.
[1358] James and Jordan (2018), 412-413.

The disparate treatment of individuals based on markers of race, class, caste, and gender as with cannabis and opiate-opioid users, is not a feature unique to the IDCS or its domestic configurations. “Neoliberal capitalism has left in its wake a multitude of destroyed subjects,” writes Mbembe, “many of whom are deeply convinced that their immediate future will be one of continuous exposure to violence and existential threat.”[1359] Its expansion has caused a “division along a variety of lines of separation and disjunctive inclusions.”[1360] As such, racism and racial capitalism, “the process of deriving social and economic value from the racial identity of another,” affect the distribution of social capital and status privilege, perpetuating color-based inequalities.[1361] In the US, black Americans have been disproportionately impacted by Covid-19 due to their structural and systemic exclusion from the labor market, which precludes access to health insurance through employment. The coronavirus mortality rate for black Americans was up to 2.1 times the white rate.[1362] And the economic state of emergency, rather than leading to an expansion of government services to meet the needs of the present, has “been used to slash the welfare state and maintain fidelity to the principles of nineteenth-century economic liberalism.”[1363] The capacity of citizens to weather the ups and downs of the pandemic and consequent economic flux, i.e., their very survival, was dependent on the politics of race, class, caste, and gender. This dynamic is discernable in drug reform processes, too, whether they occur in the courtroom, at the ballot box, or on the streets.

The tragedy of the Covid-19 and opioid syndemic demands a rethinking of the IDCS’s imperatives. States are responsible for mitigating the risks and consequences of a toxic illicit

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[1359] Mbembe (2019), 115.
[1360] Mbembe (2019), 180.
[1361] Nancy Leong, “Racial Capitalism,” *Harvard Law Review* 126, 8 (2013), 2190.
[1362] Centers for Disease Control and Prevention, “COVID-19 Hospitalization and Death by Race/Ethnicity,” 18 August 2020, https://bit.ly/35dvuM8.
[1363] Scheuerman (2000), 1873.

drug supply through the establishment of safe, licit ones to comply with international and constitutional rights to life and health. Rather than framing all non-medical, non-scientific use as problematic and users as in need of medical treatment, the provision of a safe supply can be formulated as a manifestation of consumer protection. As is the case with legal cannabis markets, a safe supply of opioids would entail the legalization and regulation of supply and demand, decriminalization and destigmatization of users, and minimization of harm through quality-assurance.[1364] The failure of the strict control, prohibition, suppression, and criminalization model to quell the demand for illicit drugs, the heterogeneous impact of law and policy on the life and health of vulnerable and minority groups, and harmful consequences of penalization and incarceration on drug users support the claim that the IDCS needs to be radically reformulated. Decriminalization, safe supply, and public health and harm reduction services may even be required to comply with human rights and fundamental freedoms requirements,[1365] like the section 7 right to life, liberty, and security of the person under the Charter of Rights and Freedoms.

There is institutional support for a reorientation of law and policy toward better adherence to public health principles and the protection of rights and freedoms. In July of 2020 Adam Palmer, Vancouver's Police Chief and President of the Canadian Association of Chiefs of Police (CACP), announced the latter's decision to call for the decriminalization of the possession of illicit drugs for personal consumption. A public health approach is necessary to address what is, at base, a wellness issue: "Being addicted to a controlled substance," Palmer declared, "is not

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[1364] Joanne Csete and Richard Elliott, "Consumer protection in drug policy: The human rights case for safe supply as an element of harm reduction," *International Journal of Drug Policy* 91 (2021): 1-5, 102976.
[1365] Martha Jackman, "Protecting Health, Respecting Rights: Decriminalizing Drug Possession as a Constitutional Imperative," in Vannesse Gruben (ed), *First Do Less Harm: Harm Reduction as a Principle of Health Policy and Law* (Ottawa: University of Ottawa Press, forthcoming).

a crime and should not be treated as such."[1366] Vancouver, at the epicenter of Canada's opioid epidemic, already had a policy of "de facto decriminalization" in place, but what is needed to address the root causes of addiction is access to support services: "housing, education, employment and a regulated drug supply."[1367] Dr. Perry Kendall of the British Columbia Centre on Substance Abuse cautiously applauded the CACP statement: "We've known for many years that the current approach to classifying some drugs as legal and some as illegal doesn't have any logical basis behind it."[1368] Kendall's characterization of the regime as arbitrary confirms the idea that truth and rights are the product of market politics in the neoliberal era. Cosmetic measures alone, from the deprioritization of drugs policing to decriminalization, cannot contain the drugs trade or consumption. More comprehensive reforms are needed to keep drug control's fatal repercussions in check.

Socioeconomic reason palpably animates the maintenance of separate control regimes for cannabis and opioids in Canada and the US, though both substances are subject to the same rules under the Single Convention. Race, class, caste, gender, and consumer preference exert a key influence on the attributes legal and regulatory innovation. As the INCB recorded in its 2018 report: "In 2000, total licit production [of cannabis] was 1.4 tons; by 2017, it has increased to 406.1 tons."[1369] Cannabis' commercial success despite decades of concerted effort aimed at its suppression and eradication demonstrates the impossibility of creating a drug free society. But

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[1366] Jennifer Saltman, "Police chiefs across Canada advocate decriminalization of illicit drugs for personal use," *Vancouver Sun*, 10 July 2020, https://bit.ly/2TTxGlv.
[1367] Saltman (2020). These reforms broadly align with those recommended by the peer-based advocacy organization the International Network of People Who Use Drugs. See Judy Chang et al., "COVID-19 – Enacting a 'new normal' for people who use drugs," *International Journal of Drug Policy* 38 (2020): 1-6, https://doi.org/10.1016/j.drugpo.2020.102832.
[1368] Saltman (2020).
[1369] International Narcotics Control Board, Narcotic Drugs: Estimated World Requirements for 2019, Statistics for 2017 (United Nations: Vienna, 2019), accessed 28 September 2020, https://www.incb.org/documents/Narcotic-Drugs/Technical-Publications/2018/INCB-Narcotics_Drugs_Technical_Publication_2018.pdf, 21-22.

legal cannabis markets are largely in place in WEIRD countries: western, educated, industrial, rich, and democratic. Liberal attitudes regarding cannabis in these jurisdictions have not translated into equal treatment for users of other controlled substances, even amid extraordinary death rates. The bio- and necropolitics of the IDCS, detrimental to rights and freedoms in their own right, were exacerbated by the coronavirus pandemic and opioid epidemic, emphasizing the drug control regime's severe shortcomings and the need for radical reform, if not outright revolution.

5.6 Reform or Revolution?

The constitutional costs of upholding selected tenets of the IDCS during the syndemic in North America were manifold, from the failure to fulfill commitments to dignity, equality, and human rights and fundamental freedoms for all citizens, including socioeconomically disadvantaged drug users, to the subversion of the international legal agreements. The conflict over legal cannabis markets in Canada and the US is a striking example of the contradictions facing the IDCS. Further developments and future challenges include the prospect of cannabis' federal legalization in the US[1370] and potential wholesale decriminalization of drug possession for personal consumption. Oregon's successful ballot initiative vis-à-vis the latter and the many states that legalized cannabis in the 2020 US election[1371] point to the continued erosion of the IDCS from its foremost historical proponent. Canada's criminal laws fall under federal jurisdiction, so the decriminalization of personal possession requires parliamentary intervention to amend the Controlled Drugs and Substances Act. The government, aware of the dire situation

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[1370] See, e.g., US Representative (D-NY-10) Jerrold Nadler's Marijuana Opportunities, Reinvestment and Expungement (MORE) Act of 2020 and US Senator (D-NJ) Cory Booker's Marijuana Justice Act of 2017.
[1371] Poppy Noor, "US drug laws set for sweeping overhaul as voters choose decriminalization," *The Guardian*, 4 November 2020, https://bit.ly/35cJF3N.

on the streets of Canadian cities, chose to shift policy more subtly, with the Department of Justice instructing federal prosecutors "to avoid prosecuting simple drug possession cases unless major public safety concerns are at play" in August 2020.[1372] These are an important steps in reducing the negative impact of the moralistic strict control, prohibition, suppression, and criminalization approach to drug control, but they are also stop gap measures delaying a reckoning with the nearly universally ratified drug control conventions and an international community largely unreceptive to negotiating a new framework.

Constitutional rights and freedoms have undoubtedly set limits on the domestic implementation of the IDCS in Canada and the US. That said, broader law and policy reform is necessary for the cycle of crises to end, as are social, economic, and cultural adjustments. The politics of drug control are far from settled, but the market has already taken a leading role in guiding the course of events. "In a world set on objectifying everybody and every living thing in the name of profit," Mbembe observes, "the erasure of the political by capital is the real threat. The transformation of the political into business raises the risk of the elimination of the very possibility of politics."[1373] To avoid capture of the drug control regime's agenda by interest groups, the pharmaceutical industry, and financial capital, and end the perpetuation of race, class, caste, and gender-based disenfranchisement, legal cannabis markets, the law and policy under which they operate, and future reform efforts must be attuned to distributive justice. A focus on redressing inequality is essential to avert replacing the problematic scheme that is the IDCS's punitive regime with an unappealing alternative: "profit-maximizing multinational corporations

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[1372] Catharine Tunney, "Federal prosecutors told to avoid drug possession charges when possible in new directive," *CBC News*, 19 August 2020, https://bit.ly/2UaNbp4.
[1373] Mbembe (2019), 116.

controlling how legal drugs are made and available to consumers."[1374] The opioid epidemic has made clear that private enterprise cannot be trusted to self-regulate the drugs market in the public interest.

Questioned on how the federal government would deal with Canada's overdose crisis in the autumn of 2020, Prime Minister Justin Trudeau stated that decriminalizing drug possession was not a feasible option. Trudeau instead emphasized that public health and harm reduction measures are the surest way to reduce overdose deaths, such as providing a safe supply of medical-grade opioids to users. "The opioid crisis," he said, "is much more of a health issue rather than a justice issue."[1375] The federal government has pledged more than $1 billion CAD in funding for harm reduction and treatment services since Covid-19 appeared and vowed to vigorously counter the suppliers of toxic illicit drugs.[1376] US President Joe Biden's administration likewise framed the matter as a health problem first and foremost, announcing $1.5 billion USD in funding for states to combat the opioid epidemic in the spring of 2022. The program, Health and Human Services Secretary Xavier Becerra commented, is aimed at ensuring "prevention, harm reduction, treatment and long-term recovery supports are in place and accessible to all who need them."[1377] The White House Office of National Drug Control Policy also committed to "reduc[ing] the supply of illicit drugs in our communities and dismantle[ing] drug trafficking."[1378] In both jurisdictions the basic parameters of drug control have gone unquestioned. The expansion of health services for drug users remains tied to the crime control

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[1374] Antonia Eliason and Robert Howse, "Towards Global Governance: The Inadequacies of the UN Drug Control Regime," *AJIL Unbound* 114 (2020), 294-295 (quotation at 295).
[1375] "Decriminalization of drugs 'not a silver bullet' for overdose crisis, prime minister says," *CBC News*, 2 September 2020, https://bit.ly/37jagOc.
[1376] Government of Canada (June 2022).
[1377] Substance Abuse and Mental Health Services Administration (SAMHSA), "Biden Administration Announces $1.5 Billion Funding Opportunity for States Opioid Response Grant Program," *HHS Press Office*, 19 May 2022, https://bit.ly/3nLsm2w.
[1378] SAMHSA (2022).

model of enforcement, with a supply-side oriented strategy continuing to dominate policy. If the public health approach is to adequately address demand it must be accompanied by a more generous interpretation of health, which encompasses more than simple corporeal wellness. It requires a revised understanding of the place of social relations in the equation, what anthropologist Jarret Zigon calls "attuned care": an ethic of openness, compassion, and the "letting-be of being-with" one's fellows as opposed to the paternalism of conventional "caring for" and "taking-care-of."[1379] Drug users must be seen as more than physically and mentally ill or diseased citizens. Funding for health and social interventions is critical, but so too is how drug users are conceived. As the work of Case and Deaton on deaths of despair demonstrates, inequality directly affects the health of individuals and society, which is ultimately a matter of justice. Whose interests are promoted and protected in law and policy is thus a symptom and a cause of the necropolitics of drug control.

Public health experts have warned that the "policy decisions made now will shape the future economy in ways that could either improve or damage sustainability, health, and health inequalities."[1380] Likewise, decisions taken and executed in alignment with the IDCS must held to account for the direct and indirect effects of the bio- and necropolitics of the regime and the constitutional costs, in rights and freedoms, of maintaining the strict control, prohibition, suppression, and criminalization of drugs and drug users. Judicial interventions have checked some of the excesses of the system in select contexts, but piecemeal solutions can only do so much in the face of powerful public and private actors. In the meantime, businesses, licit and illicit, are content with satisfying consumer desires and turning a profit while doing so.

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[1379] Zigon (2018), 136.
[1380] Douglas (2020). Carl Schmitt also suggested that "intervention in the economy means that state actors now face the task of: (1) coordinating *contemporary* economic trends; and (2) guiding the *future* course of economic life." Scheuerman (2000), 1887.

Lawmakers and regulators in Canada and the US have decided on not only tolerating, but legitimating and regulating one market sector, cannabis, while a moralistic, law and order approach to drug control continues vis-à-vis users of other substances like opioids, though both are classified as Schedule I drugs under the Single Convention. Indeed, there is insufficient flexibility in the IDCS conventions to bend them towards accepting legal cannabis markets without breaking. The actions taken to mitigate the damage done by the Covid-19-opioid overdose syndemic, by contrast, were permitted under the IDCS before the virus hit. The disaster was avoidable. And so is the hypocrisy of sustaining dual drug control regimes. Reforms must be based on more than the consumer preferences of the politically empowered. A drug control revolution may be necessary to balance to scales of justice in favor of equal treatment and live up to international and constitutional commitments to human rights and fundamental freedoms. Whether this entails states engaging in principled noncompliance with the IDCS until the international community remedies the regime's defects[1381] or full-scale denunciation and withdrawal therefrom is up to individual states to decide. Either way, the status quo, driven by a bio- and necropolitics hamstrung by international legal commitments and institutions seemingly indifferent to the suffering of people, cannot be maintained indefinitely.

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[1381] Haase (2019).

Conclusion

Whether the IDCS can keep up with the changing political economy and legal regulation of narcotic and psychotropic substances is open to debate. While it may be desirable to insinuate that international human rights norms and constitutional rights and freedoms require the alteration of drug law and policy, the reality of what the IDCS is and requires must be confronted. As Neil Boister put it: "these treaties are not human rights instruments, they are law enforcement instruments and their main purpose is the effective suppression of crime."[1382] The selective renegotiation of norms and reinvention of tradition regarding drug control in North and South America, Europe, and Africa, and even within IDCS treaty bodies, as explored in chapter 2, demonstrates the extent to which people and power challenge and shape institutions by way of institutional bricolage, defying top-down formulations of law and policy and their execution.[1383] In the reformist jurisdictions explored in the preceding chapters the meaning of drug crimes and criminality changed as a result of activism, litigation, and irrepressible consumer behavior. Success depended on action undertaken by and on behalf of socioeconomic and political factions with the resources, material and symbolic, necessary to alter discourse and power relations vis-à-vis their preferred controlled substances. Using the language of constitutional human rights and fundamental freedoms reformers won legal and political battles in a process this thesis calls cannabis constitutionalism, reframing drugs of choice as harmless diversions and criminalized acts as instances of righteous civil disobedience performed in the name of liberty. The attainment of progressive outcomes is certainly contingent on the constitutional context in which adjudication takes place, which indicates that the prospect of systemic change across domestic

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[1382] Boister (2002), 216-218 (quotation at 216).
[1383] Cleaver (2012), i.

legal orders is constrained by local conditions. But the IDCS ultimately sets the parameters of what is possible with regard to reform. The legalization of cannabis, for instance, is legally beyond the pale no matter rights and freedoms considerations.

National amendments to drug control law and policy must ultimately contend with the IDCS. The Single, 1971, and 1988 conventions and UN treaty bodies foreclose extensive reform without revolution, i.e., the creation of a new legal regime overseeing drugs and drugs users. Modifications that fail to preserve the core of the conventions, limiting the use of narcotic and psychotropic substances to medical and scientific purposes only, while broadening the ability of states parties to pursue independent drug laws and policy, the creation of recreational cannabis markets and proliferation of psychedelic-assisted therapy outside the clinical setting for instance, are unlikely to win recognition and legitimacy with the international community, committed as it is to the contemporary paradigm of strict control, prohibition, suppression, and criminalization. If, as the pluralists would have it, all manner of departure from the strictures of the regime, such as the legalization cannabis, can be accommodated via inbuilt treaty flexibilities what good are the treaties? Passive international acquiescence to local faits accomplis is no basis for an enduring international legal order. And dual regimes with bifurcated controls are inconsistent with the spirit and uniform application of the treaties. The comparative constitutional case law discussed in chapters 3 and 4, read through the constitutional caveats-safeguard clauses contained in the conventions, establish bills of rights as both stop-gap instruments correcting unwarranted limitations and abuses of human rights and fundamental freedoms and sources for systemic reform efforts should the case law be taken up and built upon by other national jurisdictions and international institutions. As such, narrowly tailored exemptions crafted by the judiciary constitute the true extent of the IDCS's purported flexibility, refined post-hoc by

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domestic law and policymakers in the legislative and executive branches of government. Rights and freedoms jurisprudence proffers an abundance of reference points for future apex courts to invoke and develop in the name of progressive reform, but solutions to constitutional problems do not remedy conflicts and contradictions between domestic and international legal obligations.

Contrary to the pluralist perspective, which holds that the IDCS has proved to be and is sufficiently flexible to meet the challenges of a changing law and policy environment while leaving its "regulatory core" intact,[1384] this thesis has contended that the reform integrationist position, which puts the US at the center of the drug control narrative, is the correct one in fact and law. The severity of the drug control conventions may have been tempered by diplomatic compromise, which forces a rethink of the Single Convention's drafting, but the IDCS instituted a regime that puts strict control, prohibition, suppression, and criminalization at the center of law and policy in line with US American priorities. The treaties were certainly not "the sole determinant of drug policies globally," but they have served as "a legal enabler" that "facilitated" the War on Drugs.[1385] Even if US policy shifts towards a softer drug control and enforcement model its paradigm of strict control, prohibition, suppression, and criminalization will continue to be maintained by illiberal control regimes and politics in the Philippines,[1386] Russia,[1387] Sweden and Japan,[1388] and jurisdictions across Latin America,[1389] enabled as states are by the conventions to impose "more strict or severe measures" on users and traffickers.[1390] It is in these places and paragraphs that the IDCS's tolerance of pluralism is most apparent. The IDCS and

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[1384] Collins (2021), 200-203.
[1385] Collins (2021), 190 and 205.
[1386] Marlies Glasius, "Illiberal Practices," in András Sajó, Renáta Uitz and Stephen Holmes (eds), *Routledge Handbook on Illiberalism* (New York: Routledge, 2022), 342-344.
[1387] Tinasti (2019), 113-114.
[1388] Sánchez-Avilés and Ditrych (2020), 29.
[1389] Dominic Corva, "Neoliberal globalization and the war on drugs: Transnationalizing illiberal governance in the Americas," *Political Geography* 27, 2 (2008): 176-193.
[1390] Single Convention, Article 39; 1971 Convention, Article 23; 1988 Convention, Article 24.

UN system in which it is based has legitimated and provided cover for all manner of international human rights law violations and exacted domestic constitutional costs on states executing the treaties in good faith, bound and encouraged as they are by the regime and its principal supporters to discipline and punish drug traffickers and users.

Domestic judicial intervention has been and is insufficient to cause a transformation in the international drug control system. Reform, however, is not dependent on the law alone. Indeed, the political economy of consumption and market fluctuations, licit and illicit, significantly influence national and international responses to drugs and will continue to do so into the future. The opioid crisis and Covid-19 pandemic are proof positive of this dynamic. As Daniel Wisehart observes: “Drug control has constantly struggled with changing patterns of recreational use of psychoactive substances.”[1391] The US-led War on Drugs, which globalized the carceral state and militarization of drug enforcement, has failed to contain the citizen-consumer and law of supply and demand. The history and practice of drug control at the international and national levels lays bare the fact of law’s inability to engineer social outcomes and control human behavior, as well as the inadequacy of legally entrenched rights and freedoms to prevent disproportionate exercises of power, public and private. To avoid repeating past injustices the IDCS should return to its roots as an international trade regime and abandon the emphasis on the strict control, prohibition, suppression, and criminalization of drugs and drug users, which has neither created a “drug free world” nor respected the rights and freedoms of individuals, groups, and whole peoples. The drug control conventions should be revised to formally integrate and mainstream human rights and fundamental freedoms protections into drug enforcement and accommodate national schemes legalizing the trade in Scheduled controlled

[1391] Wisehart (2019), 6.

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substances. The alternative to such compromise is the fragmentation of the regime, with like-minded states grouping together to create bi- and multilateral agreements as between themselves outside the scope of the IDCS. This is not as radical as it sounds. The IDCS is a failure by its own standards. It cannot limit access to controlled substances to medical and scientific purposes alone, licit and illicit markets are beyond the control of international and domestic regulators and law enforcement agencies, and access to essential medicines is the privilege of the wealthy few countries that can afford them. Waiting for global consensus to emerge around reform initiatives has and will only serve to exacerbate the crises faced by the subjects of the IDCS, which is nearly the entirety of humanity.

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