

The Devil (and Drugs) in the Details: Portugal’s Focus on Public Health as a Model for Decriminalization of Drugs in Mexico

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INTRODUCTION

It is a crisp morning in November of 2000, on the outskirts of the capital city.¹ A man sits on the side of the road with a needle in his hand. Several individuals nearby make their home on the street. Some lay unconscious on the cold ground, some prepare to inject themselves with drugs, and still others wait for the droves of customers to pour into the area for their supply. It is an area characterized by rampant drug use, crime, and disease. Many of the people wandering these streets are infected with HIV, hepatitis, or tuberculosis. Rundown shacks and used needles evince the extreme poverty, social exclusion, and drug addiction that have become the norm here. Located on the fringe of Lisbon, Portugal, this place is called Casal Ventoso, and is notorious throughout Europe for being the continent's largest open-air drug market. Here, one could purchase illegal drugs as easily as one might draw a breath, and could contract a disease with hardly more effort. The needle in the hand of the man on the street contains a dose of heroin, the predominant drug of use in the area. Looking around at this slum, one cannot help but wonder if the novel drug laws that take effect in July 2001 will provide any hope for this ravaged region.²

Nearly a decade later, across the Atlantic Ocean, a similar scene has developed.³ On a blistering summer day in the heart of a major tourist city, addicts search for their drug of choice. A man sits on the sidewalk and injects himself with a needle that may be filled with any of a number of substances—heroin, cocaine, and methamphetamine have all become common among drug-using populations in this area. Just as in Casal Ventoso, poverty and disease have become prevalent. Illicit drugs can be readily purchased from what have become known as “ice cream trucks.” Roving the main streets of the town in broad daylight, these vehicles provide a constant supply of nearly any drug a customer could want.

Yet there is more to the story here, in the northern Mexican town of Tijuana.⁴ Violence plagues the area and fear grips the citizens. Drug-trafficking

¹ This paragraph is based on information taken from Caitlin Elizabeth Hughes, *Overcoming Obstacles to Reform?: Making and Shaping Drug Policy in Contemporary Portugal and Australia* 85, 102 (Oct. 2006) (unpublished Ph.D. dissertation, University of Melbourne) (on file with Research Collection, University of Melbourne).

² See Decreto-Lei 30/2000 [Decree Law 30/2000], DIÁRIO DA REPÚBLICA de 29.11.2000 (Port.) [hereinafter Decree Law 30/2000].

³ This paragraph is based on information from Chris Hawley, *Drug Addiction Soars in Mexico*, USA TODAY, July 22, 2008, http://www.usatoday.com/news/world/2008-07-22-mexaddicts_N.htm; and Marc Lacey, *In Mexico, Ambivalence on a Drug Law*, N.Y. TIMES, Aug. 23, 2009, <http://www.nytimes.com/2009/08/24/world/americas/24mexico.html?pagewanted=1&r=1>.

⁴ This paragraph is based on information from Jason Beaubien, *As Drug War Turns into Quagmire, Fear Rules Mexico* (pt. 1), NPR, Aug. 2, 2010,

organizations battle both each other and the government in their struggle to transport and sell drugs to their number one customer, the United States, and increasingly to domestic consumers. This phenomenon has spread to several areas throughout the country. Midday firefights have become a common phenomenon in many Mexican towns. Amid the addiction, disease, and violence, a shift in drug policy in 2009 seeks to eliminate the source of these ills for the citizens of these towns.

In an effort to confront their escalating drug crises, both Portugal and Mexico determined that decriminalizing the possession of drugs would help to alleviate the problems in areas like Casal Ventoso and Tijuana.⁵ In 2001, Portugal decriminalized possession of all drugs for personal consumption and has since reported positive results in combating drug addiction, related health problems, and drug trafficking.⁶ Then, in 2009, Mexico became the most recent country to participate in this trend, occurring primarily in Latin America and Europe, to ease drug policies, when it passed a bill decriminalizing the possession of small amounts of drugs.⁷ Although both Portugal and Mexico decided to explore drug decriminalization, as a result of their divergent drug legislation, the systems in each country are remarkably different. Thus far, Mexico's decriminalization scheme has not seen many, if any, of the positive effects witnessed in Portugal.⁸

Although it is too soon to conduct a comprehensive assessment of the outcomes of the decriminalization scheme in Mexico, this Note argues that Mexico's 2009 law decriminalizing the possession of small amounts of drugs will not be able to achieve the same positive results as the Portuguese law. By increasing penalties for small-scale dealers, only referring offenders to treatment after a third offense, and continuing to process offenders through the court

<http://www.npr.org/templates/story/story.php?storyId=128804488>.

⁵ Decriminalization should be distinguished from legalization, as the two terms are often confused. For the purposes of this Note, decriminalization refers to the removal of criminal sanctions while retaining administrative penalties, whereas legalization is the removal of all sanctions including administrative penalties, making the action legal.

⁶ See *infra* Section I.D.

⁷ Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Salud, del Código Penal Federal y del Código Federal de Procedimientos Penales [Decree Amending, Supplementing or Repealing Certain Provisions of the General Health Law, the Federal Criminal Code and Federal Code of Criminal Procedure], Diario Oficial de la Federación [DO], 20 de Agosto de 2009 (Mex.) [hereinafter *Narcomenudeo Law*]; see also Philip Smith, *Mexico and Argentina Enact Drug Decriminalization*, DRUG WAR CHRON., Aug. 28, 2009, http://stopthedrugwar.org/chronicle/2009/aug/28/feature_mexico_and_argentina_ena; Coletta A. Youngers & John M. Walsh, *Drug Decriminalization: A Trend Takes Shape*, AM. Q., Fall 2009, at 123, available at <http://www.americasquarterly.org/node/978/>.

⁸ See *infra* Section II.D.

system, the Mexican law focuses too much on criminal justice, at the expense of a more thorough public health approach.⁹ As a result, Mexican decriminalization fails to improve the ability of the government to address effectively drug use, drug-related disease, mortality, and the rights of the drug user. Though the current conflict in Mexico between law enforcement and drug-trafficking organizations creates a somewhat different landscape than the one in which Portugal enacted its decriminalization law,¹⁰ Mexico could nevertheless use Portugal's regime as a guide in developing a more public health-oriented approach to its drug problem. In doing so, Mexico would be able to enjoy reductions in many of the social ills that Portugal is currently experiencing.

This Note will begin in Part I by examining the evolution of drug policy in Portugal, the public health crisis that Portugal experienced in the mid-1980s through the 1990s, and the decriminalization law that was enacted in response to this crisis. It will also observe the positive developments that occurred after the enactment of Portugal's public health-oriented decriminalization law. Next, Part II will examine Mexican drug legislation before decriminalization and the violence, public health problems, and other social consequences associated with drug use and trafficking. It will then evaluate the recently enacted decriminalization law and its effects on Mexican society. This Note will proceed to argue, in Part III, that because of its misguided emphasis on criminal justice, Mexico's law as it currently stands will not be able to achieve the same progress against drug use and trafficking that Portugal's law has. It will propose that Mexico adopt a more explicitly public health-oriented approach to decriminalization, create administrative commissions to deal with drug possession offenses, and increase the maximum amount of drugs allowed to be possessed under decriminalization. Section III.D analyzes challenges to implementation, such as political obstacles, corruption, human rights abuses, violence, and shortages of resources, that may impede the success of Portuguese-style decriminalization in Mexico. These barriers, however, are not insurmountable, and Mexico should be able to follow Portugal's example and achieve similar favorable outcomes.

I. PORTUGUESE DRUG POLICIES AND PROBLEMS, PRE- AND POST-DECRIMINALIZATION

The legal approach to curbing personal consumption of illegal drugs in Portugal has varied considerably throughout the last century, ranging from a total

⁹ See Jorge Hernández Tinajero & Carlos Zamudio Angles, *Mexico: The Law Against Small-Scale Drug Dealing*, TRANSNAT'L INST. & WASH. OFFICE ON LATIN AM. 2 (2009), <http://www.tni.org/sites/www.tni.org/files/download/dlr3.pdf>.

¹⁰ See *infra* Section II.B.

absence of drug legislation to absolute statutory prohibition.¹¹ This Part will examine the evolution of Portuguese laws prior to decriminalization and the problems resulting from drug consumption that prompted the paradigm shift. Then it will describe Portugal's current drug policy, concluding with an observation about the effects of decriminalization on drug-associated problems.

A. Portugal's Legal Framework and Drug Policy Prior to Decriminalization

Use of specific drugs first became a penal offense in Portugal in 1970.¹² In 1974, when the totalitarian regime that had ruled since 1926 fell,¹³ illegal drug use became more visible.¹⁴ In response, the Portuguese government created a series of organizations whose main objectives were to study and reduce drug use.¹⁵ Portugal also enacted legislation aimed at decreasing illegal drug use and

¹¹ INEKE VAN BEUSEKOM ET AL., RAND EUROPE, GUIDELINES FOR IMPLEMENTING AND EVALUATING THE PORTUGUESE DRUG STRATEGY 7 (2002).

¹² *Id.*; see Decreto-Lei 420/70 [Decree Law 420/70], DIÁRIO DA REPÚBLICA de 3.9.1970 (Port.). However, drug trafficking was considered a penal offense before enactment of this decree. VAN BEUSEKOM ET AL., *supra* note 11, at 7. The criminalization of use most likely occurred in order to bring Portugal in line with the UN Single Convention on Narcotic Drugs of 1961. See *infra* notes 20-23 and accompanying text.

¹³ Following its liberation from dictatorship, Portugal enacted a new constitution that included a major focus on human rights. See CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA Apr. 2, 1976, pmb. (Port.). Under this constitution, the government has a duty to “[s]ecure the access of all citizens, regardless of their economic condition, to preventive as well as curative and rehabilitation medical care.” *Id.* art. 64(3)(a). As one researcher pointed out, “[w]hile the Constitution does not guarantee the right to take drugs, it does guarantee to provide treatment for drug users.” Hughes, *supra* note 1, at 95-96. For information on the totalitarian rule of Portugal from 1926 to 1974, see, for example, DAVID BIRMINGHAM, A CONCISE HISTORY OF PORTUGAL 161-84 (2d ed. 2003); and MALYN NEWITT, PORTUGAL IN EUROPEAN AND WORLD HISTORY 197-216 (2009).

¹⁴ VAN BEUSEKOM ET AL., *supra* note 11, at 7. Cannabis use among youths was the most visible. *Id.* Increased use rates may be attributable to the opening of relations between the people of Portugal and of other countries, which included the trading of ideas and attitudes regarding drugs. See José Manuel Gaspar de Almeida & Rosa Encarnação, *Building a Drug Treatment System in Postrevolutionary Portugal*, in DRUG TREATMENT SYSTEMS IN AN INTERNATIONAL PERSPECTIVE: DRUGS, DEMONS, AND DELINQUENTS 217, 217 (Harald Klingemann & Geoffrey Hunt eds., 1998). Other reasons include the return of exiles, colonial soldiers, and refugees to Portugal, and an influx of Brazilian students who brought with them new attitudes regarding drug use. *Id.* at 217-18.

¹⁵ In 1976, the Gabinete de Coordenação do Combate à Droga (Drug Fighting Coordination Office) was established and charged with collecting data on drugs and coordinating two other organizations: Centro de Estudo e Profilaxia da Droga (Drug Prophylaxis Studies Center), which was responsible for treatment and other demand reduction, and Centro de Investigação e Controle da Droga (Drug Control and Research

related problems, including a 1983 decree allowing for the suspension of punishment for some drug-related offenses as long as the offender agreed to enter a treatment program.¹⁶ In the late 1980s, government-operated anti-drug agencies also demonstrated dedication to approaches other than strict prohibition and incarceration.¹⁷ Although in 1993 new legislation increased penalties for trafficking drugs and diverting drugs from a legal source, it also made penalties for possession of substances for personal consumption more lenient.¹⁸ This law

Center), which was responsible for reducing the supply of illegal drugs. VAN BEUSEKOM ET AL., *supra* note 11, at 8. In 1982, the Drug Fighting Coordination Office was replaced by the Gabinete de Planeamento e de Coordenação do Combate à Droga (Drugs Planning and Coordination Office). *Id.* In 1987, Projecto VIDA—Vida Inteligente Droga Ausente (Project Life—Intelligent Life Without Drugs) was established. de Almeida & Encarnação, *supra* note 14, at 218-19.

¹⁶ Decreto-Lei 430/83 [Decree Law 430/83], arts. 25(2), 36, DIÁRIO DA REPÚBLICA de 13.12.1983 (Port.) [hereinafter Decree Law 430/83]; VAN BEUSEKOM ET AL., *supra* note 11, at 8. The preamble states that drug addiction creates many social costs, and that the causes of drug consumption must be identified and attacked. Decree Law 430/83, pmbl. It declares that the remedy is “education towards a healthy lifestyle where school, family and the whole environment helps the development of a balanced personality.” *Id.* It also states that the drug addict shall “not be considered as someone not in need of medical assistance,” and mandates that efforts must be made to treat and protect him. *Id.*

Possession of drugs was punishable by imprisonment of six to twelve years and a fine of PTE 50,000 to 5,000,000 (\$332 to \$33,252) unless the amount was a small quantity, meaning it did not exceed the necessary dose for individual consumption, in which case the penalty would have been one to four years’ imprisonment and a fine of PTE 20,000 to 1,500,000 (\$133 to \$9,976). Decree Law 430/83, arts. 23-24. However, if the drugs were intended for personal consumption, the penalty was up to one year of imprisonment and a fine of PTE 5,000 to 200,000 (\$33 to \$1,330). *Id.* art. 25.

PTE stands for Portuguese escudo, which was the currency of Portugal until it adopted the euro in 1999. PTE went out of circulation in 2002. Kalin Tasev, *Currency History – History of Portuguese Escudo*, CURRENCY HISTORY: INFORMATION ABOUT WORLD CURRENCIES AND THEIR DEVELOPMENT (Oct. 5, 2010, 11:44 PM), <http://currency-history.blogspot.com/2010/10/currency-history-history-of-portuguese.html>. All conversions from euros to U.S. dollars in this Note are calculated using a 1.40 conversion rate.

¹⁷ See VAN BEUSEKOM ET AL., *supra* note 11, at 8. Through Projecto VIDA, the government enacted thirty measures focused on prevention, treatment, reinsertion, and supply reduction. *Id.*

¹⁸ See Decreto-Lei 15/93 [Decree Law 15/93], arts. 21(2), 25(a), DIÁRIO DA REPÚBLICA de 22.1.1993 (Port.) [hereinafter Decree Law 15/93]. Compare Decree Law 15/93, art. 40, with Decree Law 430/83, arts. 23-25. The main objective of this law was to make sure that Portuguese domestic law was in compliance with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, discussed *infra*. VAN BEUSEKOM ET AL., *supra* note 11, at 9. Decree Law 15/93 was amended in 1996, but the amendments within are not applicable to the current analysis. See Decreto-Lei 45/96 [Decree Law 45/96], DIÁRIO DA REPÚBLICA de 3.9.1996 (Port.).

continued to allow for suspension of sentences if the offender agreed to enter into drug addiction treatment.¹⁹

Portugal's domestic drug legislation has been in compliance with the three major United Nations treaties pertaining to drugs.²⁰ Under the Single Convention on Narcotic Drugs of 1961, which Portugal signed in 1961 and ratified in 1971, all signing countries "shall take such legislative and administrative measures as may be necessary . . . to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs."²¹ Article 33 of the treaty forbids parties from permitting the possession of drugs except under legal authority.²² Additionally, Article 36(a) ("Penal Provisions") requires:

[E]ach Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention . . . shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of

¹⁹ Decree Law 15/93, art. 44. If such a person fails to meet all of the obligations of the treatment program, then they may be found guilty of the criminal offense of failure to comply and may have their suspension revoked, possibly resulting in a prison sentence. *Id.* art. 44(2)-(3).

²⁰ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3, Dec. 20, 1988, 1582 U.N.T.S. 95; Single Convention on Narcotic Drugs, 1961, as amended by the Protocol Amending the Single Convention on Narcotic Drugs, 1961 art. 4(a), Aug. 8, 1975, 18 U.S.T. 1407, 976 U.N.T.S. 105 [hereinafter Single Convention on Narcotic Drugs]; Convention on Psychotropic Substances art. 22, Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175. There are also several agreements regarding drugs and drug trafficking among countries of the European Union. *See* Resolução do Conselho de Ministros 46/99 [Resolution of the Council of Ministers 46/99], ch. I, § 7, DIÁRIO DA REPÚBLICA de 22.4.1999 (Port.) [hereinafter Resolution of the Council of Ministers 46/99]. For the most part, the strategies in these policies are the same as those of the international treaties described above. *See id.*

²¹ Single Convention on Narcotic Drugs, *supra* note 20, art. 4(c); *see also* *Single Convention on Narcotic Drugs, 1961*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-15&chapter=6&lang=en (last visited Apr. 24, 2012). Although the treaty lists a number of substances in the Schedules, the main drugs targeted by this treaty are cannabis, cocaine, and opiates. *See* Single Convention on Narcotic Drugs, *supra* note 20, scheds. I-IV.

²² Single Convention on Narcotic Drugs, *supra* note 20, art. 33.

liberty.²³

The Convention of Psychotropic Substances of 1971 “extended control to a broad range of fabricated behavior and mood-altering substances that according to the [United Nations] could lead to harmful dependencies,” and requires ratifying nations to limit the use of psychotropic substances listed in the treaty to scientific and medical purposes.²⁴ Further, it requires:

[E]ach 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.²⁵

Finally, Article III of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 requires all parties to create criminal offenses for the manufacture and distribution of any narcotic drug or psychotropic substance listed in the two earlier treaties.²⁶ Furthermore, it states:

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 offense under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for

²³ *Id.* art. 36(1)(a). It is important to note that the title of Article 36 is Penal Provisions. *Id.* Although possession is present in this list, this Article merely commands that Parties shall not admit possession under legal authority. *See id.* This suggests that under the treaty, possession does not need to be treated as a criminal offense. The treaty also states that “[t]he Parties shall give special attention to and take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved” *Id.* art. 38(1).

²⁴ Convention on Psychotropic Substances, *supra* note 20, art. 5; DAVID R. BEWLEY-TAYLOR, THE UNITED STATES AND INTERNATIONAL DRUG CONTROL, 1909-1997, at 166-67 (1999). The 1961 treaty could not encompass these substances within its scope because they were not “liable to similar abuse and productive of similar ill effects as the drugs in Schedule I or Schedule II,” namely coca, opium, or cannabis. *See* Single Convention on Narcotic Drugs, *supra* note 20, art. 3(3)(iii). The psychotropic substances referred to in this treaty include MDMA (ecstasy), amphetamines, barbiturates, benzodiazepines, psilocybin, lysergic acid diethylamide (LSD), and mescaline, among others. *See* Convention on Psychotropic Substances, *supra* note 20, scheds. I-IV.

²⁵ Convention on Psychotropic Substances, *supra* note 20, art. 22(1)(a).

²⁶ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 20, art. 3(1)(a)(i).

personal consumption²⁷

The remainder of the treaty is focused mainly on combating organized crime and controlling precursors to illicit drug use and trafficking.²⁸

Not only did Portugal change from having no drug regulation to enacting a criminalization regime, but it also entered into a system that constrained the types of regulation it was permitted to adopt. Despite added penalties, these policies did not prevent a rise in certain social problems related to drug use.

B. Social Problems Associated with Drug Use During the Mid-1980s and Throughout the 1990s

Portugal is the closest country in Western Europe to Latin America, and this proximity, coupled with its historical ties to this region, established it as an

²⁷ *Id.* art. 3(2). The possession or purchase of any narcotic drug or psychotropic substance for the purposes of manufacture or distribution is also to be made a criminal offense. *Id.* art. 3(1)(a)(iii).

²⁸ *See id.* arts. 5 (confiscation, including bank, financial, and commercial records), 6 (extradition), 7 (mutual legal assistance), 9 (other forms of cooperation and training), 10 (international cooperation and assistance for transit States), 12 (addressing precursors), 17 (illicit traffic by sea), 18 (free trade zones and free ports), 19 (the use of mails). Implementation of the treaties is monitored by the Commission on Narcotic Drugs of the Council (Commission) and the International Narcotics Control Board (INCB). *See* United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 20, arts. 21-22; Single Convention on Narcotic Drugs, *supra* note 20, arts. 5, 8(c), 9(4), 14; Convention on Psychotropic Substances, *supra* note 20, arts. 17, 19. If the INCB finds a signatory to be noncompliant with the treaty requirements, the INCB may request that the government concerned open consultations or furnish an explanation. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 20, art. 22(1)(a); Single Convention on Narcotic Drugs, *supra* note 20, art. 14(1)(a); Convention on Psychotropic Substances, *supra* note 20, art. 19(1)(a). If the INCB finds it necessary, it may then request that the government adopt remedial measures to ensure compliance with the treaties. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 20, art. 22(1)(b)(i); Single Convention on Narcotic Drugs, *supra* note 20, art. 14(1)(b); Convention on Psychotropic Substances, *supra* note 20, art. 19(1)(b). The INCB may also call the matter to the attention of the Commission, the Economic and Social Council of the United Nations, and the other Parties to the treaty. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 20, art. 22(1)(b)(iii); Single Convention on Narcotic Drugs, *supra* note 20, art. 14(1)(d); Convention on Psychotropic Substances, *supra* note 20, art. 19(1)(c). Should the INCB take this approach, it may also recommend that the Parties stop importing or exporting drugs from or to the noncompliant nation. Single Convention on Narcotic Drugs, *supra* note 20, art. 14(2); Convention on Psychotropic Substances, *supra* note 20, art. 19(2).

important trade route for drugs.²⁹ Cultural links to Brazil and access to the ocean make Portugal an attractive transshipment country.³⁰ Its location on the southwest border of Europe makes it a trafficking gateway to the rest of the continent.³¹ Cocaine comes into Portugal from Latin America (specifically Brazil and Mexico), heroin from Spain and the Middle East, hashish from Morocco, and herbal cannabis from southern Africa.³² Despite this, the percentage of the Portuguese population that claims to have used illegal drugs at least once has historically been low, indicating that these drugs are being exported to other countries in Europe.³³

During the 1990s, however, Portugal experienced a substantial influx of

²⁹ CAITLIN HUGHES & ALEX STEVENS, THE BECKLEY FOUND. DRUG POLICY PROGRAMME, *THE EFFECTS OF DECRIMINALIZATION OF DRUG USE IN PORTUGAL* 3 (2007).

³⁰ VAN BEUSEKOM ET AL., *supra* note 11, at 64. The assistant director of the Department of Narcotics Traffic of Portugal explained that “Portugal, and in a more general sense the Iberian Peninsula, is the big entry door for cocaine into Europe” Levi Fernandes, *Portugal Seen as European Gateway for Cocaine*, MAIL & GUARDIAN ONLINE, Feb. 12, 2011, <http://www.mg.co.za/article/2005-12-19-portugal-seen-as-european-gateway-for-cocaine>. Most of the cocaine entering Portugal originally comes from Colombia, but some is shipped through Brazil, a former Portuguese colony, Venezuela, which has a large Portuguese population, and Mexico. Caitlin Elizabeth Hughes & Alex Stevens, *What Can We Learn from the Portuguese Decriminalization of Illicit Drugs?*, 50 BRIT. J. CRIMINOLOGY 999, 1001 (2010). Easy access to other European Union countries and close ties to former Portuguese colonies in Northern Africa make Portugal an appealing transshipment point for traffickers. Fernandes, *supra*. In fact, about five percent of cocaine seized worldwide is in Portugal and Spain. *Id.*

³¹ Hughes & Stevens, *supra* note 30, at 1001. By the 1990s, “Portugal had developed a reputation as a gateway for drug trafficking, with more than three quarters of drugs seized destined for other European countries.” Matthew Hill, *Can Lessons Be Learned from Portugal’s Drug Laws?*, BBC, Oct. 2, 2010, <http://www.bbc.co.uk/news/uk-11454671>.

³² Hughes & Stevens, *supra* note 30, at 1001; Central Intelligence Agency, *The World Factbook: Field Listing—Illicit Drugs*, <https://www.cia.gov/library/publications/the-world-factbook/fields/2086.html> (last visited Apr. 24, 2012). “Since the 1970’s Latin America has been both the major producer and exporter of one of the main illegal drugs, cocaine Brazil is reckoned to be the major exporter of illegal drugs to Europe” Philip J. O’Brien, *Terrorism and the War Against Drugs, in SOUTH AMERICA, CENTRAL AMERICA, AND THE CARIBBEAN* 2003, at 28, 28 (Jacqueline West ed., 11th ed. 2002).

³³ Hughes & Stevens, *supra* note 30, at 1001. For example, in 2006, Portugal’s lifetime prevalence for cannabis use among adults aged fifty to sixty-four was 11.7%, compared to 40.6% in the United States, 30.1% in the United Kingdom, and 22.6% in the Netherlands. LOUISA DEGENHARDT ET AL., THE BECKLEY FOUND. DRUG POLICY PROGRAMME, *COMPARING THE DRUG SITUATION ACROSS COUNTRIES: PROBLEMS, PITFALLS, AND POSSIBILITIES* 4 (2009).

heroin, and with this increase came a rise in social problems related to its use.³⁴ The rate of injection drug-related AIDS cases rose from 0.1 per million persons in 1985 to 54.7 per million persons in 1998.³⁵ By 1999, Portugal had the highest rate of injection drug-related AIDS cases and the second-highest prevalence of HIV amongst injection drug users in the European Union.³⁶ In 2000, the prevalence of HIV among drug users who entered drug treatment in the public sector was fourteen percent.³⁷ Cases of tuberculosis and hepatitis B and C, common HIV co-infections, also skyrocketed during this period.³⁸ Additionally, the number of acute drug-related deaths in the country rose from about twenty in 1987 to almost four hundred in 1999.³⁹

Another consequence of the rise in use of heroin was an increase in the number of arrests for drug offenses—from 4,667 in 1991 to 11,395 in 1998.⁴⁰ Further, the number of treatment episodes in Portugal, the overwhelming majority of which were for the treatment of heroin addiction, rose from 56,438 in 1990 to 288,038 in 1999.⁴¹ Estimates for the late 1990s and early 2000s generally placed the number of drug addicts between fifty and sixty thousand out of a population of approximately ten million.⁴² Concerns of both the general public and the government over the social exclusion and marginalization of drug users grew.⁴³ Ultimately, this public health crisis became a turning point in the public's

³⁴ VAN BEUSEKOM ET AL., *supra* note 11, at 8.

³⁵ Mirjam van het Loo et al., *Decriminalization of Drug Use in Portugal: The Development of a Policy*, 582 ANNALS AM. ACAD. POL. & SOC. SCI. 49, 52 (2002).

³⁶ Hughes & Stevens, *supra* note 30, at 1001.

³⁷ Paula Vale de Andrade & Ludmila Carapinha, *Drug Decriminalisation in Portugal*, 341 BRIT. MED. J. 4554 (2010). Compare this number with the 0.6% HIV rate among the entire adult population of Portugal in 2009. See *Portugal*, HIV INSITE, <http://hivinsite.ucsf.edu/global?page=cr10-po-00> (last updated Sept. 2006).

³⁸ Hughes & Stevens, *supra* note 30, at 1001.

³⁹ van het Loo et al., *supra* note 35, at 53 fig.1.

⁴⁰ *Id.* at 52. In 1998, sixty-one percent of these arrests were for use or possession, and forty-five percent were heroin related. *Id.*

⁴¹ *Id.* at 53-54. Heroin users accounted for 95.4% of all drug users undergoing treatment in 1997. *Id.* at 54.

⁴² VAN BEUSEKOM ET AL., *supra* note 11, at 10. This is about 0.6% of the population. Comparatively, in the United States, “23.2 million persons (9.4 percent of the U.S. population) aged 12 or older needed treatment for an illicit drug or alcohol use problem in 2007.” *InfoFacts: Treatment Approaches for Drug Addiction*, NAT’L INST. DRUG ABUSE 1 (Sept. 2009), http://www.drugabuse.gov/sites/default/files/if_treatment_approaches_2009_to_nida_92209.pdf.

⁴³ Social exclusion is “a process of progressive social rupture, detaching groups and individuals from social relations and institutions and preventing them from full participation in the normal activities of the society in which they live.” HILARY SILVER, *SOCIAL EXCLUSION: COMPARATIVE ANALYSIS OF EUROPE AND MIDDLE EAST YOUTH 15* (2007).

perception of the drug-using population, resulting in a shift away from seeing an addict as a criminal toward seeing him or her as an ill person.⁴⁴ Casal Ventoso, described in the Introduction, played a major role in facilitating this change in conceptualization by serving as a test site for experimentation with harm reduction approaches such as mobile syringe exchange, methadone treatment, and the provision of clothes, food, and medical support to users.⁴⁵

C. Portugal's Decriminalization Scheme

Toward the end of the last millennium, the citizens and government of Portugal came to view drug abuse and its accompanying problems as uncontrollable.⁴⁶ The greatest obstacles to addressing these issues were the draining of financial and human resources caused by the criminalization regime and barriers to drug addiction treatment, like stigma and fear of prosecution.⁴⁷ As

⁴⁴ Hughes, *supra* note 1, at 103.

⁴⁵ *Id.* at 103. Harm reduction in the context of drug use is a public health philosophy that recognizes that complete abstinence from drugs is not a realistic goal for many users and focuses instead on education, injury prevention, and treatment to minimize the harms associated with drug use. *See, e.g., Reducing Drug Harm*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/issues/reducing-drug-harm> (last visited Mar. 4, 2012). It differs from supply reduction, which seeks to disrupt the production and supply of illicit drugs, and demand reduction, which seeks to prevent people from wanting and taking drugs, although all three strategies can be used in conjunction. CTR. FOR HARM REDUCTION, FACT SHEET: SUPPLY, DEMAND & HARM REDUCTION 1, 2 (2004). Because harm reduction focuses on the health of the user, it is regarded as a more public health-oriented approach to drug use, whereas prohibition is regarded as a criminal justice approach because of its focus on making use illegal. *Id.*

Syringe exchange programs provide a reliable way for injection drug users to get sterile syringes and dispose of used syringes at no cost, thus reducing the possibility that they will share or reuse syringes. *Syringe Exchange Programs*, CTRS. FOR DISEASE CONTROL AND PREVENTION 1 (Dec. 2005), http://www.cdc.gov/idu/facts/aed_idu_syr.pdf. In addition to lowering the risk of spreading blood-borne diseases, syringe exchanges provide a contact between injecting drug users and public health services, such as tuberculosis and sexually transmitted infection screening, condom distribution, and treatment providers. *Id.* at 2. Methadone is a synthetic opiate that blocks the receptor sites for heroin and other opiates, preventing the user from experiencing euphoric effects, reducing craving, preventing withdrawal, and allowing the user to function. *Methadone Maintenance Treatment*, CTRS. FOR DISEASE CONTROL AND PREVENTION 1 (Feb. 2002), <http://www.cdc.gov/idu/facts/MethadoneFin.pdf>.

⁴⁶ GLENN GREENWALD, CATO INST., DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES 6 (2009).

⁴⁷ *Id.* Criminal justice professionals also viewed the situation in this manner. Hughes, *supra* note 1, at 111. Many supported reform for two reasons: the belief that the drug trade in Portugal could never be halted and the belief that drug users could be better assisted through the health and social systems. This widely held belief led to a de facto

one commentator stated, “decriminalization was driven *not* by the perception that drug abuse was an insignificant problem, but rather by the consensus view that it was a highly significant problem, that criminalization was *exacerbating* the problem, and that only decriminalization could enable an effective government response.”⁴⁸ In fact, the decriminalization law was enacted only after an expert commission, known as the Comissão para a Estratégia Nacional de Combate à Droga (Commission for a National Drug Strategy, “CNDS”), conducted an extensive study of potential solutions to drug use and its related problems.⁴⁹ The CNDS issued a report recommending a drug strategy based on the principles of harm reduction, prevention, and reintegration of the drug user into society.⁵⁰ As one commentator noted, the “commission ultimately recommended decriminalization as the optimal strategy for combating Portugal’s growing abuse and addiction problems. The commission emphasized that the objective of its decriminalization strategy was to reduce drug abuse and usage.”⁵¹

In 1999, a newly elected Assembly of the Republic, Portugal’s primary Parliamentary body, took office and almost immediately began implementing the CNDS recommendations for national drug policy. The Assembly approved a strategy based heavily on the CNDS report,⁵² which takes the following view:

[D]rugs users are to be regarded as full members of society instead of cast out as criminals or other pariahs and . . . the strategy will not attempt to strive toward an unachievable perfection such as zero drug use but will instead try to make

decriminalization system in which the police would not enforce criminal penalties against users. *Id.* Instead, offenders could and were being sent to treatment or were not facing prosecution at all. LAURENCE ALLEN ET AL., THE BECKLEY FOUND. DRUG POLICY PROGRAMME, *DECriminalisation of Drugs in Portugal: A Current Overview 2* (2004).

⁴⁸ GREENWALD, *supra* note 46, at 6; see COMISSÃO PARA A ESTRATÉGIA NACIONAL DE COMBATE À DROGA [COMMISSION FOR A NATIONAL DRUG STRATEGY], *ESTRATÉGIA NACIONAL DE LUTA CONTRA DROGA [NATIONAL STRATEGY FOR THE FIGHT AGAINST DRUGS]* 82 (1998) (Port.) [hereinafter COMMISSION FOR A NATIONAL DRUG STRATEGY].

⁴⁹ COMMISSION FOR A NATIONAL DRUG STRATEGY, *supra* note 48; GREENWALD, *supra* note 46, at 6. The panel consisted of leading academics and medical professionals, among others. See ALLEN ET AL., *supra* note 47, at 2.

⁵⁰ *Id.*; see also COMMISSION FOR A NATIONAL DRUG STRATEGY, *supra* note 48.

⁵¹ GREENWALD, *supra* note 46, at 6-7 (emphasis omitted); see COMMISSION FOR A NATIONAL DRUG STRATEGY, *supra* note 48, at 82.

⁵² ALLEN ET AL., *supra* note 47, at 2; van het Loo et al., *supra* note 35, at 50; see Resolution of the Council of Ministers 46/99, *supra* note 20. Before the new Assembly took office, the recommendations of the CNDS had been ignored. Hughes, *supra* note 1, at 117.

things better for all segments of society.⁵³

It also stresses thirteen strategic options, including the decriminalization of drug use, the expansion of quality healthcare and access to treatment for addicts, the expansion of harm reduction policies including syringe exchange and substitution treatment, the guarantee of available voluntary treatment as a substitute for criminal penalties for drug addicts, and the reinforcement of the fight against drug trafficking and money laundering.⁵⁴ The strategy was approved later in 1999,⁵⁵ after which implementation efforts began in full force.

Decree Law 30/2000 was enacted in October 2000 and took effect on July 1, 2001.⁵⁶ This law decriminalizes the use and possession of drugs and establishes commission of these acts as an administrative offense, so long as the amount possessed or consumed does not exceed the quantity needed for average individual consumption over a period of ten days.⁵⁷ A ten-day supply would be one gram for heroin, ecstasy, and amphetamines, two grams for cocaine, and twenty-five grams for cannabis.⁵⁸ There is no distinction in the law between “hard” and “soft” drugs or between consumption and possession in public or private, as are sometimes made in the drug decriminalization schemes of other

⁵³ van het Loo et al., *supra* note 35, at 55. The report is based on eight structuring principles: international cooperation, prevention, humanism, pragmatism, security, coordination and rationalization of resources, subsidiarity, and participation. Resolution of the Council of Ministers 46/99, *supra* note 20, ch. II, § 5. “The principle of subsidiarity implies the distribution of responsibilities and competencies enabling decisions and actions to be entrusted to the level of Administration that is closest to the population” *Id.* ch. II, § 5(7).

⁵⁴ Resolution of the Council of Ministers 46/99, *supra* note 20, ch. II, § 10(2), (4)-(5), (8), (12).

⁵⁵ See Resolution of the Council of Ministers 46/99, *supra* note 20.

⁵⁶ van het Loo et al., *supra* note 35, at 57. The decriminalization law was not enacted without opposition. Hughes, *supra* note 1, at 121. Conflicting ideologies, political developments, and fears that Portugal would become a drug paradise generated opposition to the passage of the law. *Id.* For a full account of the political tension leading up to the passage of Decree Law 30/2000, see *id.* at 120-25.

⁵⁷ Decree Law 30/2000, *supra* note 2, art. 2.

⁵⁸ See Portaria 94/96 [Ordinance 94/96], art. IV(9), map, DIÁRIO DA REPÚBLICA de 26.3.1996 (Port.). According to this ordinance, a daily average intake would be 0.1 grams of heroin, 0.1 grams of ecstasy, 0.1 grams of amphetamines, 0.2 grams of cocaine, and 2.5 grams of cannabis. *Id.* It is estimated that average heroin addicts use somewhere between 0.15 and 0.25 grams of heroin daily. *Heroin Statistics*, HEROIN ADDICTION, http://www.heroin-addiction.info/Heroin_Statistics.htm (last visited Apr. 3, 2012). Five grams of marijuana is enough to make three to five joints (marijuana cigarettes) and 0.5 grams of cocaine is the equivalent of three to eight “lines.” Drug Policy Alliance, *DPA Statement: Mexico’s Drug Decriminalization Law Effective Today*, YOUTUBE (Aug. 21, 2009), <http://www.drugpolicy.org/news/pressroom/pressrelease/pr082109a.cfm>.

countries.⁵⁹

Offenses committed under this law are not handled by the criminal justice system.⁶⁰ Instead, the law creates special committees, known as Comissões para a Dissuasão da Toxicodependência (Commissions for the Dissuasion of Drug Addiction, “CDTs”), which have the power to enforce the provisions of the law by imposing fines and alternative penalties.⁶¹ The police refer users to a CDT within seventy-two hours of the offense, but no arrests may be made.⁶² The primary goal of removing both the authority of police to make arrests and the requirement that the offender appear before a criminal court is to prevent users from incurring the stigma that is attached to criminal proceedings, thus eliminating a key barrier to treatment and alleviating the user’s fear of prosecution when seeking help.⁶³

Each CDT is comprised of three government-appointed civilians.⁶⁴ One of the members must be a legal expert appointed by the Ministry of Justice, but the other two are appointed by the Ministry of Health and may be chosen from the fields of medicine, psychology, sociology, social services, or other areas where expertise in drug addiction may be found.⁶⁵ The CDTs hear from the accused and gather information to assess his or her economic status, determine if he or she is addicted, and evaluate the circumstances surrounding the drug consumption, including the nature of the substances consumed and the place of use.⁶⁶ These

⁵⁹ van het Loo et al., *supra* note 35, at 58. For example, in some countries marijuana may be considered a soft drug while heroin would be categorized as a hard drug. *See, e.g.*, D. VAN DER GOUWE ET AL., TRIMBOS INST., DRUG POLICIES IN THE NETHERLANDS 5 (2009).

⁶⁰ VAN BEUSEKOM ET AL., *supra* note 11, at 15. This distinguishes Portugal from countries like Spain, where there is a *de facto* decriminalization system where the user will not be sentenced to criminal penalties but will still be processed through the criminal justice system, and the United States, where the user can enter treatment only after being convicted in a criminal court. *Id.*

⁶¹ Decree Law 30/2000, *supra* note 2, art. 5(1)-(2); HUGHES & STEVENS, *supra* note 29, at 1.

⁶² ALLEN ET AL., *supra* note 47, at 2. Although citation by the police is the main method by which consumers are introduced into the administrative system, they can also be reported by their doctors. *See* Decree Law 30/2000, *supra* note 2, art. 3(2). However, doctors feel repugnance toward reporting, which may breach their oath of confidentiality. VAN BEUSEKOM ET AL., *supra* note 11, at 15-16.

⁶³ VAN BEUSEKOM ET AL., *supra* note 11, at 26; GREENWALD, *supra* note 46, at 9.

⁶⁴ Decree Law 30/2000, *supra* note 2, art. 7(1).

⁶⁵ *Id.* art. 7(2); *see* Decreto-Lei 40/2010 [Decree Law 40/2010], DIÁRIO DA REPÚBLICA de 28.4.2010 (Port.) [hereinafter Decree Law 40/2010]. Originally, the Instituto da Droga e da Toxicodependência became the government’s coordinator of drug policy. *See infra* note 89. However, changes in the law occurring in 2010 gave this responsibility to the Minister of Health. *See* Decree Law 40/2010, art. 5.

⁶⁶ Decree Law 30/2000, *supra* note 2, art. 10(1). There are no set criteria for

commissions are designed to emphasize respect for the alleged offender at each step of the process and to encourage offender participation.⁶⁷ To facilitate this respectful setting, commissioners dress informally, sit on the same level as the alleged offender, and allow a therapist of the alleged offender's choice to take part in the proceeding.⁶⁸

If a user is found to have no prior offenses under the law and is not addicted, the CDT must provisionally suspend the proceedings.⁶⁹ If the CDT determines that the user is addicted, but the user has not committed a prior offense under the law, then the proceedings are provisionally suspended if the addict voluntarily agrees to undergo treatment.⁷⁰ The CDT also has discretion to provisionally suspend proceedings if the user is found to be an addict with prior offenses under the law but agrees to undergo treatment.⁷¹ If a non-addicted user does not repeat the offense, or in the case of an addicted user, completes treatment without interruption, then the proceedings may not be reopened.⁷² If the CDT decides to impose penalties against an addicted user, these may be suspended if the user voluntarily agrees to undergo treatment.⁷³

CDTs may assess a wide variety of sanctions for violations. For addicted users, the penalties can include: ineligibility for the practice of certain occupations requiring licenses; expulsion from certain places; prohibition on associating with certain people; restrictions on foreign travel; periodic presentation at a place indicated by the commission (usually for medical services); ineligibility for firearm licenses; seizure of objects that represent a risk to the consumer or the public or that would encourage the commission of a crime or other offense; termination of public benefits for subsidies or allowances; mandatory donation to a charitable organization; or required hours of community service.⁷⁴ Non-addicted users are subject to all of the same penalties, in addition

determining if a user is addicted and it is left to the judgment of the CDT. *See id.* However, the CDT may request that medical examinations be conducted in order to help make this determination. *Id.* art. 10(3).

⁶⁷ GREENWALD, *supra* note 46, at 6.

⁶⁸ *Id.* at 5-6. Alleged offenders are not represented by attorneys, further emphasizing that the proceeding is not criminal in nature. Alex Kreit, *The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model?*, 2010 U. CHI. LEGAL F. 299, 327 (2010).

⁶⁹ Decree Law 30/2000, *supra* note 2, art. 11(1). Suspensions of proceedings last for two years, unless the CDT decides on due grounds that it should last three years. *Id.* art. 13(1).

⁷⁰ *Id.* art. 11(2).

⁷¹ *Id.* art. 11(3).

⁷² *Id.* art. 13(2).

⁷³ *Id.* art. 14(1). The penalties may be suspended for up to three years, at which point the proceedings will be closed and the penalties will not apply. *Id.* art. 14(2)-(4).

⁷⁴ *Id.* art. 17(2)-(3); *see id.* art. 15(2). An example of a place that a person can be

to or in place of a fine between \$35 and the minimum national wage, which was \$792.16 per month in 2012.⁷⁵ CDTs also have the power to limit sanctions to a mere warning if it is determined, after consideration of the circumstances of the user, the type of consumption, and the substance consumed, that the user will abstain from future consumption.⁷⁶ The CDT decides which penalties to apply based on several factors so that each case is individualized.⁷⁷ These factors include: seriousness of the act; degree of fault; type of substance consumed; whether consumption was public or private; and, if public, the place where it occurred.⁷⁸ For non-addicted users, additional considerations include the occasional or habitual nature of use and the personal circumstances (mainly financial) of the user.⁷⁹ The national government has the power to enforce these penalties through its administrative offices in each district.⁸⁰

When this legislation was first adopted, Portugal recognized the possible tension between its decriminalization of possession and use of drugs and the international treaties with which it is obligated to comply, but ultimately decided that its policies were consistent with those treaties.⁸¹ The International Narcotics Control Board (INCB) initially stated in 1999 that removal of criminal sanctions for possession of drugs was not in line with the international treaties.⁸² In their 2004 report, however, the INCB stated the following about Portugal's policy:

[T]he acquisition, possession and abuse of drugs had remained prohibited. While the practice of exempting small quantities of drugs from criminal prosecution is consistent with the international drug control treaties, the Board emphasizes that the objective of the treaties is to prevent drug abuse and to limit the

prohibited from visiting would be a nightclub. GREENWALD, *supra* note 46, at 4. An example of the type of people that the user may be prohibited from associating with might be acquaintances with whom the user consumes substances.

⁷⁵ Decree Law 30/2000, *supra* note 2, arts. 15(1), 16(1); GREENWALD, *supra* note 46, at 3; *NMW - National Minimum Wage - Portugal*, DATOSMACRO.COM, <http://www.datosmacro.com/en/national-minimum-wage/portugal> (last visited Mar. 4, 2012). The law notes the figure of \$35 as PTE 5,000. See Decree Law 30/2000, *supra* note 2, art. 16(1).

⁷⁶ Decree Law 30/2000, *supra* note 2, art. 18(1).

⁷⁷ VAN BEUSEKOM ET AL., *supra* note 11, at 53.

⁷⁸ Decree Law 30/2000, *supra* note 2, art. 15(4).

⁷⁹ *Id.*

⁸⁰ *Id.* art. 5(2).

⁸¹ Resolution of the Council of Ministers 46/99, *supra* note 20, ch. IV, § 28.

⁸² INT'L NARCOTICS CONTROL BD., REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 1999, at 56, ¶ 449, U.N. Doc. E/INCB/1999/1, U.N. Sales No. E.00.XI.1 (2000); Hughes, *supra* note 1, at 94. For more information on the INCB, see *supra* text accompanying note 27.

use of controlled substances to medical and scientific purposes.⁸³

To accompany the decriminalization law, the Portuguese government enacted a law establishing rules for the implementation of harm reduction measures.⁸⁴ Portugal's law sought as its main objective to "create programmes and social and health structures designed to raise awareness amongst drug users and to guide them towards treatment, as well as to prevent and reduce risk attitudes and to minimise the damage caused to individuals and society by drug addiction."⁸⁵ The law regulates the development of mobile centers for the prevention of infectious diseases, drug substitution programs, and syringe exchange schemes, among others.⁸⁶ Although the law sets a uniform framework for implementing these harm reduction measures, it does not command specific implementation of these measures by any enforcement entity.⁸⁷

Between 1998 and 2000, a new agency was established that would eventually become known as the Instituto da Droga e da Toxicodependência (Institute for Drugs and Drug Addiction, "IDT").⁸⁸ The purpose of creating the

⁸³ INT'L NARCOTICS CONTROL BD., REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2004, at 80, ¶ 538, U.N. Doc. E/INCB/2004/1, U.N. Sales No. E.05.XI.3 (2005) [hereinafter INCB Report for 2004].

⁸⁴ Decreto-Lei 183/2001 [Decree Law 183/2001], DIÁRIO DA REPÚBLICA de 21.6.2001 (Port.) [hereinafter Decree Law 183/2001]; see VAN BEUSEKOM ET AL., *supra* note 11, at 17.

⁸⁵ Decree Law 183/2001, *supra* note 84, ch. I, art. 1.

⁸⁶ *Id.* ch. I, art. 3. Specific criteria for the authorization and funding of these services were set forth in 2007. See Portaria 748/2007 [Administrative Rule 748/2007], DIÁRIO DA REPÚBLICA de 25.6.2007 (Port.); Portaria 749/2007 [Administrative Rule 749/2007], DIÁRIO DA REPÚBLICA de 25.6.2007 (Port.).

⁸⁷ VAN BEUSEKOM ET AL., *supra* note 11, at 17. For example, the law dictates the structure for programs of supervised drug use, but Portugal does not currently have any of these programs. See Decree Law 183/2001, *supra* note 84, ch. X. A reason for this may be that the United Nations has stated that supervised consumption sites violate international treaties. See *Safe Injection Site Breaks Treaties, UN Agency Says*, VANCOUVER SUN, Mar. 2, 2007, <http://www.canada.com/vancouvernews/story.html?id=f9922177-8a0b-4f2f-8323-8bec41ef2819&k=70372>.

⁸⁸ See Decreto-Lei 269-A/2002 [Decree Law 269-A/2002], DIÁRIO DA REPÚBLICA de 29.11.2002 (Port.) [hereinafter Decree Law 269-A/2002]; see also Decreto-Lei 31/99 [Decree Law 31/99], DIÁRIO DA REPÚBLICA de 5.2.1999 (Port.) [hereinafter Decree Law 31/99] (repealing Decreto-Lei 365/82 [Decree Law 365/82], DIÁRIO DA REPÚBLICA de 8.9.1982 (Port.) (establishing Gabinete de Planeamento e de Coordenação do Combate à Droga)); Decreto-Lei 418/85 [Decree Law 418/85], DIÁRIO DA REPÚBLICA de 21.10.1985 (Port.). Originally called the Instituto Português da Droga e da Toxicodependência (Portuguese Institute for Drugs and Drug Addiction), this agency combined with the Serviço de Prevenção e Tratamento da Toxicodependência (Service for the Prevention and Treatment of Drug Abuse) to form a single institution (Institute for Drugs and Drug Addiction), consolidating the evaluation and other responsibilities of the two

IDT was to consolidate resources; oversee the CDTs; appoint CDT members; and collect, process, and disseminate data in the area of drug use and addiction.⁸⁹ It has since issued regulations and guidelines for specific types of cases, created a central committee to provide advice to the CDTs, and developed a database of information about the individuals brought before the CDTs and the decisions rendered, to monitor effectiveness.⁹⁰ The IDT is also charged with promoting, planning, coordinating, and implementing the harm reduction programs in each geographic region, ensuring that none are duplicated, and evaluating the programs' effectiveness.⁹¹ Since the inception of the IDT, healthcare for drug users has been provided mainly through public network services.⁹²

D. Effects and Developments After Portuguese Decriminalization

Portugal has undergone several institutional changes in response to the decriminalization law, including establishing CDTs in every region of Portugal, increasing the provision of drug treatment and education, and refocusing police efforts on large-scale operations.⁹³ In 2009, there were 7,549 processes filed with the CDTs, 5,508 of which were resolved by the end of that year.⁹⁴ This represented both the highest number of processes filed and decisions rendered since decriminalization was implemented.⁹⁵ Of the commission rulings, eighty-five percent suspended the proceeding; fourteen percent imposed a sanction, and one percent resulted in absolution.⁹⁶ This distribution has remained constant since the law's enactment.⁹⁷ In order to facilitate these changes, drug policy

organizations. *See* Decree Law 269-A/2002, *supra*.

⁸⁹ Decree Law 269-A/2002, *supra* note 88, Annex art. 5; Resolution of the Council of Ministers 46/99, *supra* note 20, ch. I, § 1; *see* Decree Law 31/99, *supra* note 88, arts. 2, 3(a)-(b), 13; VAN BEUSEKOM ET AL., *supra* note 11, at 17.

⁹⁰ VAN BEUSEKOM ET AL., *supra* note 11, at 17.

⁹¹ Decree Law 269-A/2002, *supra* note 88, Annex art. 5; Decree Law 183/2001, *supra* note 84, ch. I, art. 5; *see, e.g.*, Decree Law 183/2001, *supra* note 84, ch. II, art. 13; *id.* ch. IV, art. 28. In 2010, Decree Law 40/2010 extended authority of the IDT to cover harmful use of alcohol. *See* Decreto-Lei 40/2010 [Decree Law 40/2010], DIÁRIO DA REPÚBLICA de 28.4.2010 (Port.).

⁹² INSTITUTO DA DROGA E DA TOXICODÊPENDÊNCIA [INST. FOR DRUGS & DRUG ADDICTION], 2010 NATIONAL REPORT (2009 DATA) TO THE EMCDDA 63 (2010), http://www.idt.pt/PT/IDT/Documents/Ponto_Focal/2010_NationalReport.pdf.

⁹³ HUGHES & STEVENS, *supra* note 29, at 2.

⁹⁴ INSTITUTO DA DROGA E DA TOXICODÊPENDÊNCIA, *supra* note 92, at 107.

⁹⁵ *See id.*

⁹⁶ *Id.*

⁹⁷ GREENWALD, *supra* note 46, at 6. Where sanctions were imposed, the majority were requirements that the offender periodically report to designated locales. *Id.* In 2002, ninety-one percent of commission rulings suspended the proceeding, six percent resulted in sanctions, and three percent resulted in absolution. ALLEN ET AL., *supra* note 47, at 2.

expenditures doubled between 1998 and 2004, and by 2008, spending had risen to \$77.5 million.⁹⁸

Decriminalization in Portugal has generally been seen as a success.⁹⁹ A comprehensive study by the CATO Institute noted that “[w]hile drug addiction, usage, and associated pathologies continue to skyrocket in many EU states, those problems—in virtually every relevant category—have been either contained or measurably improved within Portugal since 2001.”¹⁰⁰ Further, Portugal has outperformed the overwhelming majority of other nations in almost all categories of significance since decriminalization.¹⁰¹ Many categories of drug use, such as prevalence rates within certain age groups and problem drug use, have actually decreased in absolute terms, contrary to fears of the opposite effect, and usage in other categories has increased only slightly or mildly.¹⁰²

In 2005, eighty-three percent of commission rulings suspending the proceeding, fifteen percent imposed a sanction, and two percent resulted in absolution. GREENWALD, *supra* note 46, at 6. An added benefit of the commissions is that most cases are resolved in four to five weeks, whereas court decisions can take up to two years. ALLEN ET AL., *supra* note 47, at 3.

⁹⁸ DEGENHARDT ET AL., *supra* note 33, at 12; Hughes, *supra* note 1, at 120.

⁹⁹ See, e.g., Peter Beaumont et al., *Britain Looks at Portugal's Success Story over Decriminalising Personal Drug Use*, GUARDIAN.CO.UK, Sept. 5, 2010, <http://www.guardian.co.uk/politics/2010/sep/05/portugal-decriminalising-personal-drug-use>; Lauren Frayer, *Is Portugal's Liberal Drug Policy a Model for US?*, AOL NEWS, Aug. 14, 2010, <http://www.aolnews.com/2010/08/14/is-portugals-liberal-drug-policy-a-model-for-us/>; Keith O'Brien, *Drug Experiment*, BOSTON GLOBE, Jan. 16, 2011, http://www.boston.com/bostonglobe/ideas/articles/2011/01/16/drug_experiment/; *Portugal's Drug Policy: Treating, Not Punishing*, ECONOMIST, Aug. 27, 2009, <http://www.economist.com/node/14309861>; Michael Tracy & Neima Jahromi, *Importing the Portuguese Model of Drug Reform*, THE NATION, Dec. 15, 2010, <http://www.thenation.com/article/157124/importing-portuguese-model-drug-reform>; Brian Vastag, *5 Years After: Portugal's Drug Decriminalization Policy Shows Positive Results*, SCI. AM., Apr. 7, 2009, <http://www.scientificamerican.com/article.cfm?id=portugal-drug-decriminalization>. But see *Mixed Results for Portugal's Great Drug Experiment*, NAT'L PUB. RADIO, Jan. 20, 2011 (radio broadcast).

¹⁰⁰ GREENWALD, *supra* note 46, at 28.

¹⁰¹ *Id.* at 11.

¹⁰² *Id.* at 11-12. For thirteen- to fifteen-year-olds the rate of lifetime use dropped from 14.1% in 2001 to 10.6% in 2006 and for sixteen- to eighteen-year-olds the rate of lifetime use dropped from 27.6% in 2001 to 21.6% in 2006. *Id.* For those two groups, rate of use for virtually every drug has decreased since decriminalization. *Id.* “[S]ubsequent to decriminalization in Portugal, for almost every narcotic, the lifetime prevalence rates . . . [are] far lower in Portugal than in Europe generally.” *Id.* at 22; see also *supra* text accompanying note 33 (comparing drug usage rate in Portugal with other countries). “Problem drug use,” defined as long-term use or injecting opioids, cocaine, or amphetamines, is also much lower in Portugal than in some other countries. See DEGENHARDT ET AL., *supra* note 33, at 6. For example, in 2005 it was estimated that

Although syringe exchange has been in place since at least 1993, by 2008 the number of syringe exchange programs had reportedly increased to cover fifty percent of Portugal's territory.¹⁰³ The amount of people utilizing opioid substitution treatment, such as methadone replacement therapy, has also increased considerably since decriminalization.¹⁰⁴ In general, "treatment programs—both in terms of funding levels and the willingness of the population to seek them—have improved substantially."¹⁰⁵

With the increase in treatment and emphasis on public health, many improvements in the rates of disease associated with intravenous drug use have been recorded. For instance:

[T]he number of newly reported cases of HIV and AIDS among

Portugal had a prevalence rate of problem drug use between 4.3 and 7.4, whereas the United Kingdom's rate was 9.9. *Id.*; European Monitoring Center for Drugs and Drug Addiction, *Estimates of Prevalence of Problem Drug Use at National Level: Summary Table, 2004–2009, Rate Per 1000 Aged 15–64*, <http://www.emcdda.europa.eu/stats11/pdutable> (last visited Mar. 4, 2012). Although lifetime prevalence of drug use in the general population has increased slightly, use rates among young and problem users have decreased. Hughes & Stevens, *supra* note 30, at 1008. About ninety-five percent of citations for drug offenses in Portugal are for Portuguese citizens. INSTITUTO DA DROGA E DA TOXICODEPENDÊNCIA, *supra* note 92, at 109; GREENWALD, *supra* note 46, at 6.

¹⁰³ de Almeida & Encarnação, *supra* note 14, at 221; Dagmar Hedrich et al., Eur. Monitoring Centre for Drugs and Drug Addiction, *From Margin to Mainstream: The Evolution of Harm Reduction Responses to Problem Drug Use in Europe*, 15 DRUGS: EDUC., PREVENTION, & POL'Y 503, 508 (2008). In 2007, more than one hundred needles were exchanged per intravenous drug user in Portugal. Bradley M. Mathers et al., 2009 Reference Grp. to the U.N. on HIV and Injecting Drug Use, *HIV Prevention, Treatment, and Care Services for People Who Inject Drugs: A Systematic Review of Global, Regional, and National Coverage*, 375 LANCET 1014, 1018 (2010). In 2009, users exchanged 2,365,821 syringes. INSTITUTO DA DROGA E DA TOXICODEPENDÊNCIA, *supra* note 92, at 88. For more information on syringe exchanges, see *supra* text accompanying note 45.

¹⁰⁴ GREENWALD, *supra* note 46, at 15. In 1999, there were 6,040 people utilizing substitution treatment, compared to 14,877 in 2003. *Id.* In 2007, the number had again increased to 17,780 people. Mathers et al., *supra* note 103, at 1018. "Substitution therapy . . . is defined as the administration under medical supervision of a prescribed psychoactive substance, pharmacologically related to the one producing dependence, to people with substance dependence, for achieving defined treatment aims." WHO ET AL., SUBSTITUTION MAINTENANCE THERAPY IN THE MANAGEMENT OF OPIOID DEPENDENCE AND HIV/AIDS PREVENTION: POSITION PAPER 12 (2004). "Substitution maintenance therapy is one of the most effective types of pharmacological therapy of opioid dependence." *Id.* at 13.

¹⁰⁵ GREENWALD, *supra* note 46, at 15. Between 1998 and 2008, the number of people seeking treatment for drug addiction increased from 23,654 to 38,532. Hughes & Stevens, *supra* note 30, at 1015.

drug addicts has declined substantially every year since 2001. The percentage of newly diagnosed HIV and AIDS patients who are drug addicts has steadily decreased over the same time. Likely for the same reasons, there has been, since 2000, a mild decrease in the rates of new hepatitis B and C infections nationwide, all of which are attributed by analysts to the enhanced treatment programs enabled by decriminalization.¹⁰⁶

This same study notes that there have been significant reductions in tuberculosis and HCV, the virus that causes hepatitis C.¹⁰⁷ Moreover, drug-related mortality has decreased since decriminalization, with the total number of drug-related deaths decreasing from almost 400 in 1999 to 290 in 2006.¹⁰⁸

In the first four years after decriminalization, the number of sentences for drug-trafficking offenses rose by eleven percent as compared to the four-year period leading up to decriminalization.¹⁰⁹ This may be attributed to a refocused effort against drug trafficking by police, an increase in trafficking in Portugal, or both.¹¹⁰ Since 2003, total convictions for drug trafficking has decreased.¹¹¹ Overall, the number of criminal offenses related to drugs decreased from 14,000 in 2000 to between 5,000 and 5,500 per year since decriminalization.¹¹²

Additionally, the amount of drugs seized in Portugal has increased considerably.¹¹³ In total, the amount seized for the period of 2000 to 2004

¹⁰⁶ GREENWALD, *supra* note 46, at 16 (footnotes omitted). Notifications of new drug-related HIV infections dropped by seventeen percent between 1999 and 2003. HUGHES & STEVENS, *supra* note 29, at 3. Between 2000 and 2008, the number of HIV cases among injection drug users decreased from 907 to 267, and the number of AIDS cases among injection drug users decreased from 506 to 108. Hughes & Stevens, *supra* note 30, at 1015.

¹⁰⁷ Hughes & Stevens, *supra* note 30, at 1014.

¹⁰⁸ GREENWALD, *supra* note 46, at 17. Decreases in deaths related to opiate use has been partially contributed to an increase in users entering substitution treatment. HUGHES & STEVENS, *supra* note 29, at 3 (citation omitted).

¹⁰⁹ HUGHES & STEVENS, *supra* note 29, at 4.

¹¹⁰ *Id.* “The data thus suggests that the Portuguese decriminalization may have increased efficiency of police or court operations as they became less crowded with drug offenders.” Hughes & Stevens, *supra* note 30, at 1009.

¹¹¹ GREENWALD, *supra* note 46, at 15.

¹¹² Hughes & Stevens, *supra* note 31, at 1008-09 (citation omitted). Arrests for drug consumption or possession also decreased significantly from 8,030 in 1999 to 4,998 in 2004. Hughes, *supra* note 1, at 192 (citation omitted). A person may still be arrested for possession if they possess an amount over the maximum allowed under decriminalization. Decreto-Lei 15/93 [Decree Law 15/93], arts. 21(1), 26(1), DIÁRIO DA REPÚBLICA de 22.1.1993 (Port.).

¹¹³ HUGHES & STEVENS, *supra* note 29, at 3 (“There were increases of more than 100 percent in the amount of heroin, cocaine, cannabis, and ecstasy seized between the four years 1995-1999 and the 2000-2004 period, even though the number of seizures

increased by nearly five hundred percent as compared to the amount seized for the period of 1995 to 1999.¹¹⁴ Commentators suggest that this increase in quantity seized is evidence of increased law enforcement effort to constrain drug trafficking, rather than an indication of an increase in the domestic market for drugs.¹¹⁵

Another positive consequence of this new legislation has been a reduction in Portugal's prison population.¹¹⁶ The number of offenses committed under the influence of drugs or to fund drug consumption has decreased from forty-four percent in 1999 to twenty-one percent in 2008.¹¹⁷ In total, between 2001 and 2005, the number of prisoners declined from 199 to 101.5 per 100 prison spaces.¹¹⁸ Portugal enjoyed a continued decline in the number of inmates throughout the first decade of the 2000s.¹¹⁹ Overall, the strategy has resulted in considerable financial savings for the court and prison systems.¹²⁰

Despite these benefits, some commentators have argued that the strategy of decriminalization with an emphasis on addiction treatment has not been implemented to its full potential.¹²¹ A major impediment to implementation has been the national government's failure to provide additional resources to the CDTs.¹²² For example, between 2003 and 2009, several CDTs were functioning without a quorum.¹²³ When all CDTs obtained full membership, the decision-making capacity increased beyond the level of previous years.¹²⁴ Setbacks in execution of the strategy may stem in part from political ideologies of the party in power at the time.¹²⁵ These criticisms, however, merely demonstrate that greater resources and political will should be devoted to the current strategy.

Portugal extended this strategy until January 2012,¹²⁶ when a change in the

decreased." (citation omitted)).

¹¹⁴ Hughes & Stevens, *supra* note 30, at 1011.

¹¹⁵ *Id.* (comparing seizure patterns of Portugal to Spain and Italy).

¹¹⁶ See HUGHES & STEVENS, *supra* note 29, at 5.

¹¹⁷ Hughes & Stevens, *supra* note 30, at 1010.

¹¹⁸ HUGHES & STEVENS, *supra* note 29, at 5.

¹¹⁹ See INSTITUTO DA DROGA E DA TOXICODÉPENDÊNCIA, *supra* note 92, at 115.

¹²⁰ ALLEN ET AL., *supra* note 47, at 4.

¹²¹ Hughes & Stevens, *supra* note 30, at 1005.

¹²² *Id.* Another noted problem is the lack of appropriate treatment for occasional drug users and for those addicted to drugs other than opiates. *Id.*

¹²³ INSTITUTO DA DROGA E DA TOXICODÉPENDÊNCIA, *supra* note 92, at 107 n.50.

¹²⁴ *Id.* at 106.

¹²⁵ See Hughes, *supra* note 1, at 205-08 (explaining that the Social Democratic Party (PSD), which had gained control of Parliament after decriminalization legislation was enacted, threatened to re-criminalize drug use and interfered with full implementation of the law).

¹²⁶ See generally INSTITUTO DA DROGA E DA TOXICODÉPENDÊNCIA [INST. FOR DRUGS & DRUG ADDICTION], NATIONAL PLAN AGAINST DRUGS AND DRUG ADDICTION 2005-

law significantly altered the scheme. On February 1, 2012, Decree Law 17/2012 transferred almost all of the duties of the IDT to a new organization called the Serviço de Intervenção nos Comportamentos Aditivos e nas Dependências (Service of Intervention in Addictive Behaviors and Addictions, “SICAD”) and made regional governmental authorities responsible for providing treatment and other services previously provided by the IDT.¹²⁷ Economic downturn and attempts to consolidate and conserve resources spurred this transition.¹²⁸ Treatment and harm reduction providers have become worried that this change will result in disrupted or discontinued funding and possible closure of services.¹²⁹ The effects that this shift in policy will have on rates of drug use, treatment uptake, drug-related disease, and other factors are as yet unknown and will have to be studied more thoroughly in later years. Portugal focused on public health when decriminalizing drugs, and the result has been an increase in treatment uptake and savings, and a decrease in drug-related disease rates and prison population. However, without the emphasis on public health, decriminalization can produce much different results.

II. MEXICAN DRUG POLICIES AND PROBLEMS, PRE- AND POST-DECRIMINALIZATION

Part II will focus first on the development of drug policy in Mexico prior to decriminalization. It will then address the social ills that were present before the recent law was enacted. Next, it will examine the provisions of the law against small-scale trafficking. Finally, it will identify the effects that the law has had since its implementation and will offer predictions about the effects that the law might have on Mexican society more broadly.

A. Mexico’s Legal Framework and Drug Policy Prior to Decriminalization

Throughout the nineteenth century, drug use in Mexico—primarily use of

2012 (2004).

¹²⁷ Decreto-Lei 17/2012 [Decree Law 17/2012], DIÁRIO DA REPÚBLICA de 26.1.2012 (Port.). The only duties now left to the IDT are the licensing of private healthcare providers in the area of drug addiction, the implementation of programs of local intervention, and monitoring trends in drug use and treatment. *Id.* art. 10.

¹²⁸ See *id.* p.mbl.; Alexandra Kirby-Lepesh, *In Times of Austerity, a Threat to Portugal’s Drug Policies*, OPEN SOCIETY FOUNDATIONS, Feb. 10, 2012, http://blog.soros.org/2012/02/in-times-of-austerity-a-threat-to-portugals-drug-policies/?utm_source=Open+Society+Institute&utm_campaign=43677f33f6-health-20120221&utm_medium=email.

¹²⁹ Kirby-Lepesh, *supra* note 128; *Instituto da Droga e Toxicoddependencia acaba hoje. Comunidades terapêuticas às escuras* [Institute for Drugs and Drug Addiction Ends Today. Health Communities in the Dark], RENASCENÇA, Jan. 31, 2012, http://tr.sapo.pt/informacao_detalhe.aspx?fid=31&did=48662.

marijuana, cocaine, and opiates—was legal and common.¹³⁰ People who were addicted to drugs were considered ill or sick, not criminal.¹³¹ This was recognized in legislation in 1940, when a reform to the Federal Criminal Code included a regulation declaring “the vice-ridden person should be conceived of more as a patient who must be cared for and cured than as a true criminal who should suffer a penalty.”¹³² After the United States outlawed these three drugs in the early twentieth century, the conditions for a lucrative trade in drugs illegal in the U.S. materialized south of the U.S.-Mexico border. Following the rise of the illegal drug trade between these two countries, Mexico began to enact penal provisions for drug offenses.¹³³

By the late 1960s, possession or distribution of a number of illicit drugs was punishable by three to twelve years of imprisonment.¹³⁴ It was not an offense, however, for an addicted individual to possess any drug if the amount possessed was for personal consumption.¹³⁵ This changed in the mid-1970s, when possession of marijuana or other illicit drugs (not including heroin or cocaine) for personal use became punishable by six months to three years of imprisonment.¹³⁶

¹³⁰ LUÍS ASTORGA, UNESCO, DRUG TRAFFICKING IN MEXICO: A FIRST GENERAL ASSESSMENT 11 (1999).

¹³¹ *Id.*

¹³² Ana Paula Hernández, *Drug Legislation and Prison Situation in Mexico*, in SYSTEMS OVERLOAD: DRUG LAWS AND PRISONS IN LATIN AMERICA 60, 60 (Pien Metaal & Coletta Youngers eds., 2011); see also Reglamento Federal de Toxicomanías [Federal Rules of Addiction], Diario Oficial de la Federación [DO], 17 de Febrero de 1940 (Mex.).

¹³³ ASTORGA, *supra* note 130, at 11. Mexico has supported opium cultivation since at least the early twentieth century. The practice was heavily concentrated in the Mexican states of Sinaloa, Durango, and Chihuahua. JOSÉ LUIS VELASCO, INSURGENCY, AUTHORITARIANISM, AND DRUG TRAFFICKING IN MEXICO’S “DEMOCRATIZATION” 97 (David Mares ed., 2005). Today, Mexico is the world’s third-largest producer of illegal opium. INT’L NARCOTICS CONTROL BD., REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2010, at 68, ¶ 416, U.N. Doc. E/INCB/2010/1, U.N. Sales No. E.11.XI.1 (2011) [hereinafter INCB Report for 2010].

¹³⁴ Decreto que reforma los Artículos 15, 85, 193, 194, 195, 196, 197, 198, 199, 201, 306, 309 y 387; modificación del nombre de Capítulo Primero, Título Séptimo, Libro Segundo; y adición del Artículo 164 Bis del Código Penal para el Distrito y Territorios Federales en materia de Fuero Común y para toda la República en materia de Fuero Federal [Decree Amending Articles 15, 85, 193, 194, 195, 196, 197, 198, 199, 201, 306, 309 and 387, Changes in the Name of Chapter One, Part Seven, Book Two, and Addition of Article 164 Bis Penal Code for the Federal District and Territories in Ordinary Matters and for the Entire Republic in Matters of Federal Jurisdiction], art. 195, Diario Oficial de la Federación [DO], 8 de Marzo de 1968 (Mex.).

¹³⁵ *Id.*

¹³⁶ Decreto de Reformas al Código Penal para Distrito Federal en materia de Fuero Común y para toda la República en materia de Fuero Federal; al Código Sanitario de los Estados Unidos Mexicanos, en relación con estupefacientes y psicotrópicos y al Artículo

Possession of a quantity of marijuana over the amount for personal consumption or possession of heroin or cocaine was punishable by five to twelve years of imprisonment.¹³⁷ However, the law still exempted addicts who were in possession of a small quantity of drugs for personal consumption only.¹³⁸

In 1976, the Ministry of Health was charged with developing a national program for the prevention and treatment of drug abuse and addiction and was given the broad mandate to “promulgate drug addiction control measures.”¹³⁹ More specifically, it was directed to issue general standards for treatment, provide medical care for drug addicts, give advice on the treatment of drug addicts, and create, promote, and expand services and establishments that provide care in this area.¹⁴⁰

Trafficking in Mexico became more prevalent throughout the twentieth century, especially during the 1980s and 1990s.¹⁴¹ By the mid-twentieth century,

41 del Primer Ordenamiento [Decree Amending the Penal Code for all Ordinary Offenses in the Federal District and for Federal Offenses Throughout the Republic; and the Health Code of the United Mexican States, in Respect of Narcotic Drugs and Psychotropic Substances, as Well as Article 41 of the First Ordinance], art. 195, *Diario Oficial de la Federación* [DO], 31 de Diciembre de 1974 (Mex.).

¹³⁷ *Id.* art. 198(I).

¹³⁸ *Id.* art. 198(V). However, drug addicts could be forced into confinement. *Id.* art. 24(3).

¹³⁹ Reglamento sobre estupefacientes y sustancias psicotrópicas [Regulations Concerning Narcotic Drugs and Psychotropic Substances], arts. 77, 79, *Diario Oficial de la Federación* [DO], 23 de Julio de 1976 (Mex.) [hereinafter Regulations Concerning Narcotic Drugs and Psychotropic Substances].

¹⁴⁰ *Id.* art. 88.

¹⁴¹ GUILHEM FABRE, *CRIMINAL PROSPERITY: DRUG TRAFFICKING, MONEY LAUNDERING AND FINANCIAL CRISES AFTER THE COLD WAR* 112 (RoutledgeCurzon 2003) (1999). “[I]t is incontestable that Mexico has become an important place for transiting, providing and laundering for the biggest drug market of the world [the United States].” *Id.* Contributing factors were the increase of law enforcement in the Caribbean, the collapse of the Colombian drug cartels, and the signing of the North American Free Trade Agreement (NAFTA). VELASCO, *supra* note 133, at 95; Colleen W. Cook, Congressional Research Service, *Mexico’s Drug Cartels, in COOPERATION WITH DRUG TRANSIT COUNTRIES OF ILLEGAL DRUGS* 39, 42 (Benjamin S. Rosen ed., 2009); J. Patrick Larue, *The “ILL-ICIT” Effects of NAFTA: Increased Drug Trafficking into the United States Through the Southwest Border*, 9 CURRENTS INT’L TRADE L.J. 38, 38 (2000); Luis Astorga & David A. Shirk, *Drug Trafficking Organizations and Counter-Drug Strategies in the U.S.-Mexican Context* 5 (Center for U.S.-Mexican Studies, Working Paper No. 10-01, 2010). For more information on the collapse of Colombian drug cartels, see RON CHEPESIUK, *THE BULLET OR THE BRIBE: TAKING DOWN COLOMBIA’S CALI DRUG CARTEL* (2003). For more information on how NAFTA influenced drug trafficking on the Mexican-U.S. border, see Larue, *supra*; and Taylor W. French, Note, *Free Trade and Illegal Drugs: Will NAFTA Transform the United States into the Netherlands?*, 38 VAND. J. TRANSNAT’L L. 501, 530-34 (2005).

the Federal Security Directorate, the Federal Judicial Police, and the national army had become the main institutions responsible for eliminating the drug trade. The 1980s saw a renewed effort to combat the escalation in drug trafficking and resulted in framing drug policy as a national security issue.¹⁴² Yet at the same time, reforms to the Federal Criminal Code in 1994 resulted in the removal of penalties for persons in possession of any drug who were not addicted, if this was their first offense, and if the amount possessed was for personal consumption only.¹⁴³ Additionally, an exemption remained in place in criminal legislation for possession of any drug for individual use by an addict.¹⁴⁴ Also during this period, Mexican drug legislation underwent reforms that focused law enforcement efforts on organized crime, but a disproportionate share of the arrests made during this time were for small-scale growers and traffickers.¹⁴⁵ Throughout the 1990s and 2000s, Mexico's federal anti-drug budget increased significantly. In 1991, the Mexican federal government allocated \$100 million to anti-drug

¹⁴² ASTORGA, *supra* note 130, at 14; MAUREEN MEYER, THE BECKLEY FOUND. DRUG POLICY PROGRAMME & WASH. OFFICE ON LATIN AM., AT A CROSSROADS: DRUG TRAFFICKING, VIOLENCE, AND THE MEXICAN STATE 4 (2007).

¹⁴³ Decreto que reforma, adiciona y deroga diversos articulos del Código Penal para el Distrito Federal en Materia de Fuero Común y para toda la República en Materia de Fuero Federal, del Código Federal de Procedimientos Penales, del Código de Procedimientos Penales para el Distrito Federal, de la Ley de Amparo Reglamentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos, de la Ley de Extradición Internacional, del Código Civil para el Distrito Federal en Materia Común y para toda la República en Materia Federal, de la Ley Federal de Responsabilidades de los Servidores Públicos, de la Ley Orgánica del Tribunal Fiscal de la Federación, de la Ley del Tribunal de lo Contencioso Administrativo del Distrito Federal, de la Ley Federal para Prevenir y Sancionar la Tortura y de la Ley de Presupuesto, Contabilidad y Gasto Público Federal y de la Ley Orgánica del Poder Judicial de la Federación [Decree that Amends, Adds, and Repeals a Significant Number of Articles of the Criminal Code for the Federal District and for the Entire Country at the Federal Level, the Federal Code of Criminal Procedure, the Code of Criminal Procedure for the Federal District, the Law of Amparo Which Regulates Articles 103 and 107 of the Political Constitution of the United Mexican States, the Law of International Extradition, the Civil Code for the Federal District and for the Entire Country at the Federal Level, the Federal Law of Responsibilities of Public Servants, the Organic Law of the Fiscal Tribunal of the Federation, the Law of the Contentious Administrative Court of the Federal District, the Federal Law to Prevent and Sanction Torture, the Law of the Budget, Accounting, and Public Federal Expenses, and the Organic Law of the Judicial Power of the Federation], art. 195, Diario Oficial de la Federación [DO], 10 de Enero de 1994.

¹⁴⁴ *Id.* art. 199.

¹⁴⁵ VELASCO, *supra* note 133, at 110. In 1992, the Instituto Nacional para el Combate a las Drogas (National Institute to Combat Drugs) was formed and included representatives from the military, for the first time, in the drug policy decision-making process. MEYER, *supra* note 142, at 4. For more on how the military became an integral part of Mexican drug strategy, see *id.*

spending.¹⁴⁶ As of 2009, this number had risen to \$4.3 billion.¹⁴⁷

Mexico has also ratified the same three United Nations drug treaties to which Portugal is a signatory: the 1961 Single Convention on Narcotic Drugs, 1971 Convention on Psychotropic Substances, and 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.¹⁴⁸ Accordingly, Mexico's domestic drug policies must comply with the provisions of these treaties.¹⁴⁹

B. Social Problems Associated with Drug Use in the New Millennium

At the beginning of the twenty-first century, the Institutional Revolutionary Party, which had been in power throughout most of the twentieth century, collapsed.¹⁵⁰ After the collapse, the protection that the party had offered to traffickers waned, resulting in a struggle amongst traffickers to maintain power, and increasing the conflict between law enforcement and traffickers.¹⁵¹ When President Vicente Fox was elected in December 2000, his administration utilized aggressive enforcement and militarization of drug policy to combat drug trafficking, and established institutional changes reflecting this agenda.¹⁵²

Despite this reorganization of anti-drug priorities and policy reform, Mexico did not realize a reduction in the volume of drug trade or violence; nevertheless, the militarization of police forces continued as the next administration took

¹⁴⁶ Astorga & Shirk, *supra* note 141, at 3 n.4.

¹⁴⁷ *Id.*

¹⁴⁸ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 20; Single Convention on Narcotic Drugs, *supra* note 20; Convention on Psychotropic Substances, *supra* note 20.

¹⁴⁹ For more information about treaty requirements, see *supra* Section I.A.

¹⁵⁰ HAL BRANDS, STRATEGIC STUDIES INST., MEXICO'S NARCO-INSURGENCY AND U.S. COUNTERDRUG POLICY 6 (2009).

¹⁵¹ See LUIS ASTORGA, MEXICO: ITS DEMOCRATIC TRANSITION AND NARCO-TERRORISM 3-4 (2010), available at <http://www.yorku.ca/robarts/projects/canada-watch/obama/pdfs/Astorga>; BRANDS, *supra* note 150, at 6; Associated Press, *Voters End 71 Years of PRI Rule in Mexico*, DESERET NEWS, July 3, 2000, <http://www.deseretnews.com/article/769662/Voters-end-71-years-of-PRI-rule-in-Mexico.html>.

¹⁵² VELASCO, *supra* note 133, at 117, 119. This included the creation of a new cabinet position called the Ministry for Public Safety and Services to Justice, which controls the Federal Police, the creation of "a Special Deputy Attorney General Office Specialized in Organized Crime, the largest institution ever set up within the PGR (Mexico's attorney general office) for prosecuting organized crime and illegal drug activities," and the creation of the Federal Investigative Agency to replace the Federal Judicial Police because of widespread corruption that had infiltrated that agency. *Id.* at 117. It was also bolstered by the grant of authority by the Mexican Supreme Court to extradite Mexican nationals to the United States. *Id.*

control.¹⁵³ At the end of 2006, newly elected President Felipe Calderón launched an offensive against the nation's four largest drug-trafficking organizations, even going so far as to deploy 20,000 troops to patrol border cities.¹⁵⁴ Since the beginning of this attack on organized drug crimes in 2006, violence has escalated between government officials and the drug-trafficking organizations.¹⁵⁵ This drug-related violence has resulted in a total of at least 47,515 deaths, with 15,273 of those occurring in 2010 alone.¹⁵⁶ Within the first four years of Calderón's administration, the number of drug-related homicides—more than 35,000—was four times greater than the 8,901 such deaths during President Fox's term.¹⁵⁷ A related problem is the considerable corruption that pervades all sectors of the

¹⁵³ MEYER, *supra* note 142, at 7-8; VELASCO, *supra* note 133, at 118-19. In fact, both the amount of seizures and arrests decreased, while production increased between 2000 and 2002. VELASCO, *supra* note 133, at 118. The Defense Ministry has taken control over all drug eradication programs, and in 2007 a Special Support Force (Cuerpo Especial de Fuerzas de Apoyo del Ejército y la Fuerza Aérea Mexicana) composed of army and navy personnel was established to combat organized crime. MEYER, *supra* note 142, at 8.

¹⁵⁴ Hawley, *supra* note 3. By 2009, the number of Mexican soldiers combating drug-trafficking organizations had increased to 45,000. *Escalating Violence in Mexico and Southwest Border as a Result of the Illicit Drug Trade: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) (statement of Rep. Sheila Jackson Lee, Member, H. Subcomm. on Crime, Terrorism, & Homeland Security).

¹⁵⁵ Ken Ellingwood, *More Than 12,000 Killed in Mexican Drug War This Year, Officials Say*, L.A. TIMES, Dec. 16, 2010, <http://www.latimes.com/news/nationworld/world/la-fg-mexico-death-toll-20101217,0,3176872.story>. For more information on the Mexican drug-trafficking organizations, see, for example, GEORGE W. GRAYSON, MEXICO: NARCO-VIOLENCE AND A FAILED STATE? (2010); and Cook, *supra* note 141, at 39.

¹⁵⁶ VIRIDIANA RÍOS & DAVID A. SHIRK, TRANS-BORDER INST., DRUG VIOLENCE IN MEXICO: DATA AND ANALYSIS THROUGH 2010, at 8 (2011); Damien Cave, *Mexico Updates Death Toll in Drug War to 47,515, but Critics Dispute the Data*, N.Y. TIMES, Jan. 11, 2012, <http://www.nytimes.com/2012/01/12/world/americas/mexico-updates-drug-war-death-toll-but-critics-dispute-data.html>. Critics estimate a much greater number of homicides have occurred, including one estimate nearing 70,000. See Cave, *supra*. “[M]any of [the killings] are accompanied by beheadings, dismemberment, torture, and other acts of extraordinary cruelty.” RÍOS & SHIRK, *supra*, at 13. These deaths include drug traffickers, law enforcement personnel, government officials, and innocent bystanders. VELASCO, *supra* note 133, at 101. There has also been an associated rise in kidnappings. *On the Trail of the Traffickers*, THE ECONOMIST, Mar. 5, 2009, <http://www.economist.com/node/13234157>. As a result of this violence, U.S. Attorney General Eric Holder stated in 2009 that the drug-trafficking organizations of Mexico posed a threat to national security. Randal C. Archibold, *U.S. Moves Against Top Mexican Drug Cartel*, N.Y. TIMES, Feb. 26, 2009, <http://www.nytimes.com/2009/02/26/us/26raids.html>.

¹⁵⁷ RÍOS & SHIRK, *supra* note 156, at 8.

Mexican government and continues to hinder efforts to reverse the rise in drug-related violence:¹⁵⁸

[C]orruption remains a significant impediment to counter narcotics efforts in Mexico. Cartels combine threats of violence with promises of financial gain . . . to influence law enforcement and government officials. Their influence is greatest among lower paid municipal and state police who have historically low hiring standards and fewer controls in place to check for corruption. This is a significant problem given that these police organizations represent roughly 90 percent of Mexico's total police force.¹⁵⁹

There is significant drug-related corruption among police agents, high-ranking police officials, members of the armed forces, the Attorney General's Office, and the political elite.¹⁶⁰ Evidence demonstrates that corruption is a systemic component of the drug problem.¹⁶¹ There have been several instances where local police forces have become so infested with corrupt officials that the federal government forced them to disband.¹⁶²

¹⁵⁸ See U.S. DEP'T OF STATE BUREAU OF INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 434-35 (2010). According to a recent study measuring perceptions about the extent of corruption in the public sectors of different countries, on a scale from zero to ten, with ten being not corrupt and zero being completely corrupt, Mexico received a 3.1. TRANSPARENCY INT'L., CORRUPTION PERCEPTIONS INDEX 2010, at 3 (2010).

¹⁵⁹ U.S. DEP'T OF STATE BUREAU OF INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, *supra* note 158, at 434-35. This method of corruption by the drug-trafficking organizations is known as "plata o plomo" ("money or lead"). BRANDS, *supra* note 150, at 16.

¹⁶⁰ VELASCO, *supra* note 133, at 100. Corruption in the military has resulted in defection to drug trafficking organizations, which has contributed to their militarization and increased violence. See Astorga & Shirk, *supra* note 141, at 29. Los Zetas is probably the most infamous example. For more information on Los Zetas, see, for example, Cook, *supra* note 141, at 47-49; and George W. Grayson, *Los Zetas: The Ruthless Army Spawned by a Mexican Drug Cartel*, FOREIGN POL. RES. INST. (May 2008), <http://www.fpri.org/enotes/200805.grayson.loszetas.html>.

¹⁶¹ VELASCO, *supra* note 133, at 101.

¹⁶² BRANDS, *supra* note 150, at 16. The Federal Investigative Authority created in 2001 was "widely criticized for corruption by 2005 and partially disbanded by 2009." STAFF OF S. COMM. ON FOREIGN REL., 111TH CONG., COMMON ENEMY, COMMON STRUGGLE: PROGRESS IN U.S.-MEXICAN EFFORTS TO DEFEAT ORGANIZED CRIME AND DRUG TRAFFICKING 10 (Comm. Print 2010). It was replaced with the Federal Ministerial Police, which has more investigative powers, but is also required to undergo more rigorous inspection for corruption. Astorga & Shirk, *supra* note 141, at 31. More recently, the Veracruz-Boca del Rio police force was disbanded as part of a campaign to root out

Compounding this problem, the Mexican judiciary has been inadequate in its administration of justice.¹⁶³ This results from “persistent and deeply engrained problems in the functioning of courts and penal institutions, which suffer from significant resource limitations and case backlogs.”¹⁶⁴ As a result, only about one in five reported crimes are investigated and one in one hundred result in conviction.¹⁶⁵ In addition, defendants are frequently held in pre-trial detention with restricted access to bail, even for minor offenses.¹⁶⁶

Furthermore, serious human rights violations committed by law enforcement, such as extrajudicial executions, forced disappearances, and torture, have increased since the late 1990s.¹⁶⁷ These abuses have mainly affected impoverished people and small-scale traffickers.¹⁶⁸ Human rights abuses are counterproductive, as they erode trust between the armed forces and the public, making citizens less likely to cooperate with law enforcement efforts.¹⁶⁹

In this climate, use rates for methamphetamine, cocaine, and heroin in Mexico have skyrocketed.¹⁷⁰ Addiction rates have also risen substantially,

corruption. *Mexico Disbands Veracruz-Boca del Rio Police Force*, BBC, Dec. 21, 2011, <http://www.bbc.co.uk/news/world-latin-america-16296273>.

¹⁶³ DAVID A. SHIRK, TRANS-BORDER INST., JUDICIAL REFORM IN MEXICO: CHANGE AND CHALLENGES IN THE JUSTICE SECTOR 6 (2010) (attributing the inadequacy of the judiciary to historical neglect and other factors that hindered democratic development, resulting in much more powerful legislative and executive branches).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 7.

¹⁶⁷ VELASCO, *supra* note 133, at 108. For information about how the prosecutorial system of Mexico may contribute to human rights abuses, see Ronald F. Wright, *Mexican Drug Violence and Adversarial Experiments*, 35 N.C.J. INT'L L. & COM. REG. 363, 371-74 (2010). There have also been reports of arbitrary detentions, illegal searches, theft, and sexual assaults. See BRANDS, *supra* note 150, at 17; MAUREN MEYER & ROGER ATWOOD, WASH. OFF. ON LATIN AM., REFORMING THE RANKS: DRUG-RELATED VIOLENCE AND THE NEED FOR POLICE REFORM IN MEXICO 2 (2007); Steve Fainaru & William Booth, *Mexican Army Using Torture To Battle Drug Traffickers, Rights Groups Say*, WASH. POST, July 9, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/08/AR2009070804197.html>. Torture methods such as asphyxiation, electric shocks to the genitals, and submerging the individual's head in water are also used by law enforcement. Fainaru & Booth, *supra*.

¹⁶⁸ VELASCO, *supra* note 133, at 108.

¹⁶⁹ BRANDS, *supra* note 150, at 18. Although the United States can suspend funding to foreign militaries or police units if they are implicated in human rights violations, this power has rarely been invoked. See Coletta A. Youngers, *Executive Summary* of WASH. OFFICE ON LATIN AM., DRUGS AND DEMOCRACY IN LATIN AMERICA: THE IMPACT OF U.S. POLICY 8 (Coletta A. Youngers & Eileen Rosen eds., 2004).

¹⁷⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-1018, *Drug Control: U.S. Assistance Has Helped Mexican Counternarcotics Efforts, but Tons of Illicit Drugs Continue To Flow into the United States*, in COOPERATION WITH DRUG TRANSIT

doubling between 2002 and 2008 to nearly half a million people (0.6% of the population).¹⁷¹ As a result of these increasing use rates, the number of new patients in Mexican drug treatment centers has more than quadrupled since 2000.¹⁷²

Moreover, the prevalence of HIV along the U.S.-Mexico border is rising and could impact rates in the rest of Mexico.¹⁷³ The co-occurrence of the drug and sex trades may be contributing to the increasing rates of HIV and other sexually transmitted infections.¹⁷⁴ A recent study in *The Lancet* estimated that 1 in every 116 persons in Tijuana aged fifteen to forty-nine years was infected with HIV in 2006.¹⁷⁵ High prevalence rates of hepatitis B and C have been reported among injection drug users, as well.¹⁷⁶

Until the mid-2000s, only one syringe exchange program existed in Mexico.¹⁷⁷ By 2010, syringe exchange had expanded and programs were established in nine of thirty-one Mexican states.¹⁷⁸ Additionally, mobile clinics funded by the government and offering syringe exchange have been established

COUNTRIES OF ILLEGAL DRUGS 91, 99 (Benjamin S. Rosen ed., 2009). The problem is particularly acute at regions near the U.S. border. MEYER, *supra* note 142, at 9. In Tijuana, a city with a population of 1.4 million, there were over 100,000 methamphetamine addicts. *Id.*

¹⁷¹ CONSEJO NACIONAL CONTRA LAS ADICCIONES [NATIONAL COUNCIL AGAINST ADDICTIONS], ENCUESTA NACIONAL DE ADICCIONES 2008 [NATIONAL SURVEY ON ADDICTIONS 2008], 89, 90 (2008) (Mex.) [hereinafter NATIONAL COUNCIL AGAINST ADDICTIONS]; Alexis Okeowo, *Drug Addiction Explodes in Mexico*, S.F. CHRON., Feb. 8, 2009, http://articles.sfgate.com/2009-02-08/news/17187173_1_drug-users-cartels-drug-prevention. A national survey totaled the number of people addicted to one or more illicit drugs at 428,819. NATIONAL COUNCIL AGAINST ADDICTIONS, *supra*, at 89-90.

¹⁷² Hawley, *supra* note 3.

¹⁷³ Steffanie A. Strathdee & Carlos Magis-Rodriguez, *Mexico's Evolving HIV Epidemic*, 300 JAMA 571, 571 (2008). The rate of those infected with HIV in Ciudad Juarez was reported at 2.1% among injection drug users in one recent study. See Joan P. Baumbach et al., *Seroprevalence of Select Bloodborne Pathogens and Associated Risk Behaviors Among Injection Drug Users in the Paso del Norte Region of the United States—Mexico border*, 5 HARM REDUCTION J. 1, 5 (2008).

¹⁷⁴ Strathdee & Magis-Rodriguez, *supra* note 173, at 571.

¹⁷⁵ See José Guadalupe Bustamante Moreno et al., *Tackling HIV and Drug Addiction in Mexico*, 376 LANCET 493, 493 (2010).

¹⁷⁶ Baumbach et al., *supra* note 173, at 1 (finding that hepatitis B was estimated at 88.3% and hepatitis C at 98.7% in injecting drug users in Ciudad Juarez).

¹⁷⁷ Strathdee & Magis-Rodriguez, *supra* note 173, at 572.

¹⁷⁸ Moreno et al., *supra* note 175, at 494. However, a recent study found that 85.3% of injecting drug users were unaware of needle exchange programs in the area of Ciudad Juarez, and 64.7% reported sharing a needle with another user. See Baumbach et al., *supra* note 173, at 7.

in some Mexican cities.¹⁷⁹ However, only one publicly funded methadone substitution program existed in 2008.¹⁸⁰ Furthermore, preventative and rehabilitation efforts are each distributed across several agencies.¹⁸¹ In an attempt to address drug use-related problems, a government program entitled “Limpiemos México” (Let’s Clean Mexico) has been established to create three hundred specialized units for the treatment of addiction throughout Mexico by 2012.¹⁸²

Although 58.5% of Mexicans believe that those addicted to drugs are sick and 60.4% believe that addicts are people in need of help,¹⁸³ incarceration rates continued to rise. The prison population in Mexico increased by almost 100,000 between 1998 and 2009.¹⁸⁴ Mexico now has the sixth largest prison population in the world.¹⁸⁵ It was estimated that in 2007 the cost of containing this many prisoners was \$775 million per year.¹⁸⁶ An analysis of the prison system in Mexico found that fifty percent of the prisoners who were detained for selling drugs had possessed an amount worth less than \$100, and twenty-five percent were detained for an amount worth \$18 or less.¹⁸⁷

C. Mexico’s Decriminalization Scheme

The United States has been a key factor in both the development and maintenance of militarized police forces in the Mexican drug war.¹⁸⁸ In fact, in

¹⁷⁹ Strathdee & Magis-Rodriguez, *supra* note 173, at 572.

¹⁸⁰ Mathers et al., *supra* note 103, at 1021; *see also supra* text accompanying notes 45, 104 (discussing methadone substitution treatment).

¹⁸¹ MEYER, *supra* note 142, at 9.

¹⁸² *Id.*

¹⁸³ NATIONAL COUNCIL AGAINST ADDICTIONS, *supra* note 171, at 71.

¹⁸⁴ *See* Hernández, *supra* note 132, at 64 (presenting data from the Ministry of Public Security showing that the total Mexican prison population rose from 128,902 in 1998 to 227,021 in 2009).

¹⁸⁵ *Id.* at 65.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *See* VELASCO, *supra* note 133, at 93, 94, 103, 119; Jorge Chabat, *Mexico’s War on Drugs: No Margin for Maneuver*, 582 ANNALS AM. ACAD. POL. & SOC. SCI. 134, 135 (2002). “[T]he United States has progressively increased its *de facto* role in the design and implementation of Mexico’s law enforcement policies.” Chabat, *supra*. One major reason that the United States has played such a large role in shaping drug policy in Mexico is because if it determines that Mexico has not demonstrated substantial efforts to adhere to international counter-narcotics agreements, the U.S. may suspend foreign assistance appropriations. *See* Narcotics Control Trade Act, 19 U.S.C.A. § 2492 (West 2011); LIANA SUN WYLER, CONG. RESEARCH SERV., RL 34543, INTERNATIONAL DRUG CONTROL POLICY 9 (2009); Chabat, *supra*, at 142-43. Mexico may also be subject to sanctions under NAFTA if the United States believes that these sanctions are in its

2006, Mexico's Congress approved a decriminalization bill that contained almost exactly the same provisions as the one that ultimately passed in 2009.¹⁸⁹ Then-President Fox, however, refused to sign the bill due to pressure from the U.S. government.¹⁹⁰

Three years later, the political dynamic had changed. There was little resistance from the United States to the passage of a bill introduced in 2008 by President Calderón that would decriminalize the possession of small amounts of illegal drugs, as well as increase penalties for traffickers.¹⁹¹ The change in pressure may reflect a difference in the approach to drug policy between the presidential administrations of George W. Bush and Barack Obama, a reconsideration of the confrontational approach to drug policy followed thus far in the United States, predictions that the law will have little effect on the street, and lack of publicity of the law.¹⁹² Both houses of the Mexican Congress passed

national security interests. See North American Free Trade Agreement art. 2102, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); Joe Swanson, Note, *Drug Trafficking in the Americas: Reforming United States Trade Policy*, 38 GEO. WASH. INT'L L. REV. 779, 788, 795 (2006). Still further, in 2007, the United States and Mexico signed the Mérida Initiative, an aid package proposing \$1.4 billion in foreign aid to Mexico to help reduce drug trafficking. CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., R 40135, MÉRIDA INITIATIVE FOR MEXICO AND CENTRAL AMERICA: FUNDING AND POLICY ISSUES 1 (2009); Colleen W. Cook & Clare Ribando Seelke, *Mérida Initiative: Proposed U.S. Anticrime and Counterdrug Assistance for Mexico and Central America*, in COOPERATION WITH DRUG TRANSIT COUNTRIES OF ILLEGAL DRUGS 61, 61 (Benjamin S. Rosen ed., 2009). For information on the Mérida Initiative, see generally Cook & Seelke, *supra*; and Steven E. Hendrix, *The Mérida Initiative for Mexico and Central America: The New Paradigm for Security Cooperation, Attacking Organized Crime, Corruption and Violence*, 5 LOY. U. CHI. INT'L L. REV. 107 (2008). For the argument that a new approach to Mérida is needed, see BRANDS, *supra* note 150; and Stephanie E. Brewer, *Rethinking the Mérida Initiative: Why the U.S. Must Change Course in its Approach to Mexico's Drug War*, 16 HUM. RTS. BR. 9 (2009).

¹⁸⁹ Ioan Grillo, *Mexico's New Drug Law May Set an Example*, TIME, Aug. 26, 2009, <http://www.time.com/time/world/article/0,8599,1918725,00.html>.

¹⁹⁰ *Id.* Officials from the U.S. State Department and Office of National Drug Control Policy expressed concern that decriminalization would encourage both drug use locally and drug tourism (visiting Mexico to use drugs). Danna Harman, *Debate Far from Over for Mexico's Drug Bill*, CHRISTIAN SCI. MONITOR, May 10, 2006, <http://www.csmonitor.com/2006/0510/p04s01-woam.html>.

¹⁹¹ Tinajero & Angles, *supra* note 9, at 1; Grillo, *supra* note 189.

¹⁹² Patrick Corcoran, *Decriminalization Fails To Alter Mexican Reality*, ALLVOICES, Jan. 15, 2010, <http://www.allvoices.com/contributed-news/5045291-decriminalization-fails-to-alter-mexican-reality>; Grillo, *supra* note 189; R. Gil Kerlikowske, *The Obama Administration's Public Health Approach to Drug Policy*, HUFFINGTON POST, Feb. 1, 2011, http://www.huffingtonpost.com/r-gil-kerlikowske/the-obama-administrations_1_b_816786.html (outlining the Obama administration's commitment to drug problems as a public health issue); Scott Michels, *Drug Czar Nominee: Renewed Focus on Prevention*,

the law in April 2009, and it officially came into effect on August 21, 2009.¹⁹³

The main objective of the law, which is known as the Ley de Narcomenudeo (Law Against Small-Scale Drug Dealing), was to allow counter-narcotics officials to focus their efforts on drug traffickers instead of drug users.¹⁹⁴ Secondary objectives included freeing up space in Mexican jails and emphasizing treatment and harm reduction instead of incarceration for users.¹⁹⁵ The law was not designed to protect drug users' rights or develop an effective public health system, but instead was constructed with the predominant mentality that criminalization and incarceration are the primary solutions to the drug problems in Mexico.¹⁹⁶

The law imposes no criminal penalties for possession of drugs if the quantity possessed is within the legal amount for personal consumption.¹⁹⁷ The amounts that are permitted for personal consumption are 50 milligrams of heroin, 5 grams of marijuana, 500 milligrams of cocaine, 0.015 milligrams of LSD, and 40 milligrams of MDMA (ecstasy) or methamphetamine or one pill weighing no more than 200 milligrams that contains MDMA or methamphetamine.¹⁹⁸ If a person is found to have been in possession of an amount of drugs within these limits, then they will be given a warning for the first two offenses.¹⁹⁹ The third

ABC NEWS, Apr. 2, 2009, <http://abcnews.go.com/Health/story?id=7233062&page=1>; Tracy Wilkinson, *Mexico Moves To Decriminalize Minor Drug Use*, L.A. TIMES, June 21, 2009, <http://articles.latimes.com/2009/jun/21/world/fg-mexico-decriminalize21>. The Obama administration has decided to take a "wait and see" approach to Mexico's decriminalization. See WYLER, *supra* note 188, at 34; Grillo, *supra* note 189. Another influencing factor may have been the release of a statement by a committee comprised of politicians, journalists, and scholars, including three former Latin American Presidents (César Gaviria Trujillo of Colombia, Ernesto Zedillo Ponce de Leon of Mexico, and Fernando Henrique Cardoso of Brazil), which advocated for a public health approach to drug policy and for the decriminalization of possession of cannabis for personal use. See LATIN AM. COMM. ON DRUGS AND DEMOCRACY, DRUGS AND DEMOCRACY: TOWARDS A PARADIGM SHIFT 8-10 (2009) ("Treating drug users as a matter of public health and promoting the reduction of drug consumption are actually the inescapable preconditions for focusing repressive action on two critical points: reduction of production and dismantling the networks of drug trafficking.").

¹⁹³ Tinajero & Angles, *supra* note 9, at 1.

¹⁹⁴ Hernández, *supra* note 132, at 63. The law does recognize and exempt ceremonial use of peyote and psychedelic mushrooms by indigenous populations. See Narcomenudeo Law, *supra* note 7, art. 195 BIS(II).

¹⁹⁵ WYLER, *supra* note 188, at 33-34; Tinajero & Angles, *supra* note 9, at 1.

¹⁹⁶ Hernández, *supra* note 132, at 63; Tinajero & Angles, *supra* note 9, at 2.

¹⁹⁷ Narcomenudeo Law, *supra* note 7, art. 478.

¹⁹⁸ *Id.* art. 479.

¹⁹⁹ *Id.* art. 193 BIS. Although the law explicitly defines consumer and addict as distinct, they are treated the same when apprehended for this offense. See *id.* arts. 473, 193 BIS.

offense of this type results in placement of the offender in mandatory drug addiction treatment.²⁰⁰ The judge is not empowered to make a decision based on factors such as social status, circumstances of the arrest, or number of offenses in determining whether the offender will be criminally charged because the sole decisive factor is the quantity possessed.²⁰¹

Although the law decriminalizes possession of drugs for personal consumption, its main features reflect a traditional criminal justice approach to drug use and trafficking. One important amendment is the increase in penalties for possession over the amount defined for personal use.²⁰² Should a person be found in excess of the maximum amount for personal use but less than one thousand times the maximum amount for personal use, they will be sentenced to three to six years of imprisonment if it is determined that the drugs were intended for distribution, or ten months to three years of imprisonment if it is determined that the drugs were not intended for distribution.²⁰³ Prison terms for sale of any drug above the maximum amount for personal use but below one thousand times that amount were increased to between four and eight years.²⁰⁴

The law further increases penalties for possession of large amounts of drugs. Possession of any substance in an amount equal to or greater than one thousand times the maximum amount for personal consumption warrants a sentence ranging from four years to seven years and six months if it is determined that the offender did not have intent to distribute the drugs.²⁰⁵ If the offender can be shown to have had intent to distribute, then the sentence increases to between five and fifteen years of imprisonment.²⁰⁶ These increased penalties demonstrate that Mexico was focused mainly on incarceration as the solution to problems associated with drug use.

Another novel approach set forth by these amendments is the ability of state and local authorities to apprehend drug users, an authority that until passage of these amendments was reserved only for federal officers.²⁰⁷ The rationale behind this change was to allow state and local law enforcement to focus on small-scale traffickers, while the federal government would have more resources to pursue

²⁰⁰ *Id.* art. 193 BIS. The law does not specify a penalty for noncompliance to enter treatment. Lacey, *supra* note 3.

²⁰¹ MARTIN JELSMA, TRANSNAT'L INST., TRENDS IN DRUG LAW REFORM IN EUROPE AND LATIN AMERICA 9 (2010).

²⁰² See Narcomenudeo Law, *supra* note 7, arts. 475-76.

²⁰³ *Id.* For example, possession of over 50 milligrams but less than 50 grams of heroin would be punishable by this sentence.

²⁰⁴ *Id.* art. 475. For example, sale of any amount of cocaine between 500 milligrams and 449 grams would earn this penalty.

²⁰⁵ *Id.* art. 195.

²⁰⁶ *Id.* art. 195 BIS.

²⁰⁷ *Id.* arts. 194, 195, 195 BIS, 474.

large drug-trafficking organizations.²⁰⁸ Federal police officers were also given authority to simulate drug buys to arrest offenders.²⁰⁹ By increasing the reach of law enforcement, Mexico further solidified its criminal justice approach to drug use.

It is important to note that persons found to be in possession of drugs, even if within the amount permitted for personal consumption, can still be taken into custody by the police and detained until the Public Ministry determines whether it will file charges.²¹⁰ In this sense, the user is treated as an offender until the prosecutor decides to release him.²¹¹ This contrasts with Portugal's policy, where police are not authorized to arrest users determined to possess an amount of drugs within the limits for personal consumption.²¹²

Mexico's criminal decree also commands the Ministry of Health to formulate a national program for addressing drug prevention and treatment.²¹³ It lays out broad mandates that the national program must contain for prevention and treatment programs, but contains limited substantive requirements.²¹⁴ The decree also requires the Ministry of Health to conduct research regarding effective treatment and prevention of drug use and methods of evaluation for these programs.²¹⁵ Despite these limited provisions, the main thrust of the law furthers the criminal justice approach as the solution to problems associated with drug use and traffic.

D. Effects and Developments After Mexican Decriminalization

Although, at the time of this writing, the criminal decree has been in effect for almost three years, problems associated with drug use and traffic have continued.²¹⁶ One journalist noted:

[C]ops, treatment counselors, government officials, researchers and addicts interviewed last month said there have been no discernible changes related to the new law. Police still arrest and

²⁰⁸ See Hernández, *supra* note 132, at 63.

²⁰⁹ Narcomenudeo Law, *supra* note 7, art. 180 BIS.

²¹⁰ Hernández, *supra* note 132, at 63.

²¹¹ *Id.* "The inefficiency or lack of investigation by the country's prosecutorial authorities often leads to a large number of persons being arrested before the authorities have pulled together the necessary evidence to be able to file charges or indict and convict them." *Id.* at 65.

²¹² See ALLEN ET AL., *supra* note 47, at 2.

²¹³ Narcomenudeo Law, *supra* note 7, art. 192.

²¹⁴ *Id.* arts. 192 TER, 192 QUÁTER, 192 SEXTUS.

²¹⁵ *Id.* art. 192 QUINTUS.

²¹⁶ Although there have not yet been comprehensive reviews performed of the law's effects, this Note argues that the way that the law is structured will most likely result in little or negative consequences.

incarcerate drug users. Americans have not flocked to dope parlors south of the border. Mexican narcotics abuse surges unabated, as does the flow of drugs and blood.²¹⁷

As noted previously, the death tolls have continued to rise, with 2011 being an especially violent year.²¹⁸

Some commentators have predicted that the law will actually exacerbate the problems that Mexico was experiencing before decriminalization.²¹⁹ One analyst observed that the quantities defined under the law as personal use are so small that prosecution may actually increase for simple possession.²²⁰ Because the amount defined as personal use is in fact lower than the amount at which most of the drugs on the street are sold, in reality, most personal use is not decriminalized.²²¹ For example, the law only allows for possession of half a gram of cocaine, despite the fact that cocaine is normally sold by the gram.²²² Portuguese law, by contrast, decriminalizes possession of up to two grams of cocaine.²²³ Mexico's policy has the danger of further increasing the prison population by incarcerating more low-level dealers and minor offenders.²²⁴

Although some commentators have noted that "the change takes the discretion of whether to throw drug users in jail away from police officers, who frequently shook down people by threatening them with arrest," this is most likely inaccurate.²²⁵ While the public prosecutor is ultimately responsible for determining whether the drugs possessed fall within the allowable quantity, police are still authorized to make arrests for drug possession.²²⁶ As a result, the use is still referred to the criminal justice system, and this may increase the burden on the Public Ministry's office.²²⁷ Furthermore, because number of arrests is a common metric used to ascertain the effectiveness of police efforts in drug policy, police may continue to make arrests without regard to the actual quantity of drugs possessed by the offender, in the hopes that the artificial inflation of their arrest count will make their department look more successful.²²⁸

²¹⁷ Dennis Wagner, *Drug Law Changes Little for Life in Mexico*, ARIZONA REPUBLIC, Jan. 10, 2010, http://www.azcentral.com/news/articles/2010/01/10/20100110_mex-drugs.html.

²¹⁸ See Cave, *supra* note 156.

²¹⁹ See, e.g., Hernández, *supra* note 132, at 63-64; Wagner, *supra* note 217.

²²⁰ Hernández, *supra* note 132, at 63-64.

²²¹ *Id.* at 64; Wagner, *supra* note 217.

²²² Hernández, *supra* note 132, at 64.

²²³ See *supra* note 58.

²²⁴ Hernández, *supra* note 132, at 65.

²²⁵ Lacey, *supra* note 3.

²²⁶ Tinajero & Angles, *supra* note 9, at 3.

²²⁷ *Id.*

²²⁸ *Id.* at 5-6.

There is a very real possibility that this law will actually increase corruption and extortion by police forces.²²⁹ Jurisdiction to enforce criminal penalties for small-scale trafficking has been extended to state and local police, believed to be the most corrupt segments of Mexican law enforcement.²³⁰ These agencies will in turn experience new pressure to pursue drug offenders, requiring them to obtain more resources and skills. This will be a difficult task because they are already lacking in professional staff and sufficient capital.²³¹ Extortion may also increase under this law because the low possession quantities that qualify as personal use under the amended laws could encourage state police forces to “shake down” addicts who possess an amount over the prescribed limit.²³²

Additionally, some fear that the law may distract enforcement authorities from pursuing more serious crimes, including large-scale drug-trafficking operations.²³³ This, in addition to a failure to focus on demand reduction,²³⁴ has prompted some observers to claim that the law will not significantly impact the market for drugs in Mexico.²³⁵ They note that the economic reality of the situation is that someone will rise to fill the shoes of the small-time trafficker who has been apprehended by the authorities.²³⁶ Under the current Mexican decriminalization regime, the inadequate emphasis on demand reduction does little to diminish the problems associated with drug use. Because demand reduction would require the government to focus on the user, public health, rather than criminal justice, is prioritized.

In 2009, Mexico had over three hundred government-funded drug treatment centers.²³⁷ However, most centers were staffed by personnel with limited training in drug counseling due to the inadequate resources allocated to demand reduction and the lack of comprehensive training programs for substance abuse professionals.²³⁸ Consequently, only 39,000 people received treatment that year,

²²⁹ *Id.* at 2; Wagner, *supra* note 217.

²³⁰ See Narcomenudeo Law, *supra* note 7, arts. 194, 195, 195 BIS, 474; U.S. DEP’T OF STATE BUREAU FOR INT’L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, *supra* note 158, at 434-35.

²³¹ Tinajero & Angles, *supra* note 9, at 2. “Local and state law enforcement agencies, in particular, suffer a lack of institutional capacity Most Mexican police officers have had few opportunities for educational development, and lead lives that are terribly impoverished.” Astorga & Shirk, *supra* note 141, at 27.

²³² Tinajero & Angles, *supra* note 9, at 4.

²³³ *Id.* at 2.

²³⁴ Demand reduction is discussed *supra* in the text accompanying note 45.

²³⁵ Tinajero & Angles, *supra* note 9, at 2.

²³⁶ *Id.*

²³⁷ U.S. DEP’T OF STATE BUREAU FOR INT’L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, *supra* note 158, at 436.

²³⁸ *Id.* Mexico began a program to train and accredit treatment providers in 2009. INCB Report for 2010, *supra* note 133, at 72, ¶ 442.

a small proportion of the nearly 430,000 estimated addicts.²³⁹ In 2010, a national action program for the prevention and treatment of addictions was launched, expanding the number of community-based centers offering basic services in addiction treatment.²⁴⁰ This was accompanied by a nationwide effort to expand opioid substitution treatment.²⁴¹

The international community has disputed whether the drug decriminalization legislation complies with international treaties. In 2009, the INCB indicated concern that the legislation in Mexico would send the wrong message.²⁴² It went on to state:

The Board would like to remind the Government [of Mexico] that article 3, paragraph 2, of the 1988 Convention [Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances] requires each party to that Convention to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended by the 1972 Protocol or the 1971 Convention.²⁴³

However, the INCB report for 2010 did not mention decriminalization in Mexican legislation nor did it declare that Mexico was in violation of the treaties, and in its 2011 report, the INCB noted that Mexico was “firmly committed to the goals and objectives of [the UN] treaties.”²⁴⁴

III. ANALYSIS

Although Mexico now joins several other Latin American countries that have adopted some form of a decriminalization scheme,²⁴⁵ a comparison of

²³⁹ *Id.*; see *supra* text accompanying note 171.

²⁴⁰ INCB Report for 2010, *supra* note 133, at 71-72, ¶ 442.

²⁴¹ Moreno et al., *supra* note 175, at 494.

²⁴² INT’L NARCOTICS CONTROL BD., REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2009, at 68, ¶ 408, U.N. Doc. E/INCB/2009/1, U.N. Sales No. E.10.XI.1 (2010) [hereinafter INCB Report for 2009].

²⁴³ *Id.*

²⁴⁴ INT’L NARCOTICS CONTROL BD., REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2011, at 12, ¶ 87, U.N. Doc. E/INCB/2011/1, U.N. Sales No. E.12.XI.5 (2012) [hereinafter INCB Report for 2011]; see also INCB Report for 2010, *supra* note 133, at 65, ¶¶ 401-02.

²⁴⁵ See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE ECUADOR [C.P.] art. 364 (Ecuador); Lei No. 11.343, de 23 de Agosto de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 24.08.2006 (Braz.); Law No. 20.000, arts. 4, 50, Febrero 16, 2005, DIARIO OFICIAL [D.O.] (Chile); Law No. 1.340, *as amended*, art. 30, Noviembre 22, 1988,

Portugal and Mexico is especially appropriate for five reasons: First, both countries established decriminalization through the legislative process, rather than through judicial interpretation, as did Argentina, or through constitutional amendment, as did Ecuador.²⁴⁶ Second, both countries have decriminalized possession of all drugs, not merely soft drugs, which were the sole target of decriminalization in some other countries.²⁴⁷ Third, addiction treatment and harm reduction were motivating goals behind the implementation of both countries' laws, although Portuguese law emphasized these goals to a much greater extent.²⁴⁸ Fourth, in Mexico, the increasing rates of addiction and drug-related health outcomes, such as HIV infection, resemble the crisis that precipitated Portuguese decriminalization.²⁴⁹ Finally, both countries maintain significant drug export industries, and their decriminalization laws are intended to address their domestic drug trades and illicit international trafficking.²⁵⁰

This Part will address the different approaches to decriminalization in Portugal and Mexico and will ultimately argue that Mexico could achieve decreased rates of drug use and drug-related disease, a reduction in prison populations, and an increase in resources for enforcement against large-scale drug trafficking if Mexico were to adopt a model similar to the one in Portugal. More specifically, this Part will first suggest ways in which Mexico could adopt a more effective approach by replicating Portugal's focus on public health rather than measuring success in terms of criminal justice outcomes. Next, it will argue that the CDTs in Portugal could serve as a valuable model for Mexico and that implementation of these commissions in Mexico could result in a reduction in judicial backlog and governmental corruption. Another aspect of the Portuguese law that could provide a model for Mexico is the quantities of drugs the law defines as within the limits for personal use. An increase in the maximum allowable quantities would make available resources currently tied to the criminal justice system, and redirect those resources toward programs targeting

GACETA OFICIAL DE LA REPÚBLICA (Para.); CÓDIGO PENAL (Criminal Code), *as amended*, art. 299, Abril 3, 1991, DIARIO OFICIAL [D.O.] (Peru); Law No. 14.294, art. 31, Noviembre 11, 1974, DIARIO OFICIAL [D.O.] (Uru.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 25/8/2009, "Arriola, Sebastián y otros / recurso de hecho," Fallos (A. 891. XLIV) (Arg.) [hereinafter Arriola]; *see also supra* note 7.

²⁴⁶ *See* Narcomenudeo Law, *supra* note 7; Decree Law 30/2000, *supra* note 2; *see also* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE ECUADOR [C.P.] art. 364 (Ecuador); Arriola, *supra* note 245.

²⁴⁷ *See* Narcomenudeo Law, *supra* note 7, art. 478; van het Loo et al., *supra* note 35, at 58; *supra* text accompanying note 59.

²⁴⁸ *See* Decree Law 183/2001, *supra* note 84; WYLER, *supra* note 188, at 33-34; Tinajero & Angles, *supra* note 9, at 1.

²⁴⁹ *See supra* Sections I.B, II.B.

²⁵⁰ *See supra* Sections I.C, II.C.

users directly. Finally, this Part will address potential problems that Mexico may face should it choose to implement a strategy like Portugal's, including political hurdles, pervasive corruption and violence, and the availability of resources.

A. Abandoning the Criminal Justice Approach for a Public Health Approach

In Portugal, the rights of the addict and the impact of drug use on the country's growing public health problems were the driving factors behind decriminalization.²⁵¹ It is clear that decriminalization in Portugal was implemented as a means of reducing the disease and death that were associated with drug use and encouraging drug users to seek treatment by removing the stigma associated with the criminal justice system.²⁵² By contrast, in Mexico, the shift to decriminalization was driven by escalating drug trafficking and associated violence.²⁵³ This led Mexico to take a criminal justice approach to drug regulation, giving only a nod to public health concerns in its legislation. As discussed in Section I.D, Portugal's public health approach has significantly impacted the rates of drug use, the prevalence of associated disease and death, and the efficacy of law enforcement against drug trafficking.²⁵⁴ Given the recent rise in drug use, addiction, and drug-related health problems, such as HIV infection, Mexico should look to Portugal's program as an example of success in reducing these societal ills. Following the Portuguese model would also allow the Mexican government to more effectively focus on dismantling drug-trafficking organizations, which was the original purpose of Mexico's decriminalization legislation. By further decriminalizing drug possession, it is possible that Mexico could realize similar results to those observed in Portugal. First, however, it must restructure its law to target public health issues before criminal justice concerns. There are several ways that Mexico can use the development of decriminalization in Portugal as a model for how to create its own public health-oriented approach.

Mexico's focus on the violence of drug traffickers and its desire to increase enforcement against small-scale traffickers is misguided for three reasons: First, targeting small-scale traffickers will not reduce drug-related violence, since this violence is mostly produced by large drug-trafficking organizations. Second, the current system will most likely allow harms associated with drug use itself to persist at their current rate because the criminal justice system will operate as it did in the past and preoccupy itself with the frequent arrest and incarceration of addicts. This approach fails to appropriately consider the impacts of drug-related disease and mortality. Mexico, although caught in a violent standoff with drug-

²⁵¹ GREENWALD, *supra* note 46, at 6-7; *see also* Decree Law 183/2001, *supra* note 84, ch. I, art. 1; COMMISSION FOR A NATIONAL DRUG STRATEGY, *supra* note 48, at 82.

²⁵² *See* Decree Law 183/2001, *supra* note 84, ch. I, art. 1.

²⁵³ *See* Hernández, *supra* note 132, at 63; Tinajero & Angles, *supra* note 9, at 2.

²⁵⁴ *See supra* Section I.D.

trafficking organizations, must take account of other ills, namely the rising drug use and addiction rates and increasing HIV and hepatitis rates observed in high-drug-trafficking areas, before they spread to the rest of the country. Addressing these issues will also allow Mexico to devote greater resources to fighting drug trafficking and the violence it produces.

Third, stigma is frequently a barrier to treatment of addiction, and decriminalization can help to eliminate that barrier, thereby encouraging an uptake in treatment and a gradual decline in the rate of addiction.²⁵⁵ A key feature of Portugal's drug regime is the recognition that the imposition of criminal penalties on people who are addicted to drugs might discourage them from actively seeking help.²⁵⁶ By maintaining the primary objective of incarcerating those involved in the drug trade, Mexican policy continues to discourage addicts from openly entering treatment by stigmatizing their drug use as a moral failing. However, Mexico has a long history of identifying the addicted person as a sick individual, rather than as a criminal.²⁵⁷ A recent survey showed that the majority of Mexican citizens believe that an addict is ill and in need of professional medical help.²⁵⁸ Mexico can and should capitalize on this prevalent attitude by developing a public health-oriented approach to drug policy aimed at reducing stigma and increasing treatment uptake.²⁵⁹ Acknowledging that stigma is an impediment to receiving help is an important step in breaking down the barrier to treatment created by the fear that users may have of the criminal justice system, ultimately reducing addiction rates.²⁶⁰ A concrete

²⁵⁵ See *supra* Section I.C.

²⁵⁶ See GREENWALD, *supra* note 46, at 9; VAN BEUSEKOM ET AL., *supra* note 11, at 15-16.

²⁵⁷ See *supra* Section II.A.

²⁵⁸ See NATIONAL COUNCIL AGAINST ADDICTIONS, *supra* note 171, at 71.

²⁵⁹ See, e.g., Regulations Concerning Narcotic Drugs and Psychotropic Substances, *supra* note 139, art. 88 (commanding the Ministry of Health to provide medical care to addicts); Ana Paula Hernández, *Drug Legislation and Prison Situation in Mexico*, in SYSTEMS OVERLOAD: DRUG LAWS AND PRISONS IN LATIN AMERICA 60, 60 (Pien Metaal & Coletta Youngers eds., 2011) (noting that legislation enacted in 1940 regarded the addict as a sick person). Professionals vigorously debate how to characterize addiction. Two predominant and competing models describe addiction as either mental disease or a behavioral disorder. See, e.g., ADDICTION MEDICINE (Bankole A. Johnson ed., 2011). Under the disease model, a combination of substance use, environmental, genetic, and societal factors result in modification of brain function, causing the user to repeat use and eventually become addicted. Daniel Buchman & Peter B. Reiner, *Stigma and Addiction: Being and Becoming*, 9 AM. J. BIOETHICS-NEUROSCIENCE 18 (2009). Scientists and public health advocates have long argued that society should accept this view. *Id.* at 18-19. "Attributing neurobiological factors to addiction has the potential to reduce stigma (both perceived and experienced), blame and responsibility, and provide more effective treatment options for society." *Id.* at 19.

²⁶⁰ See James. D. Livingston et al., *The Effectiveness of Interventions for Reducing*

strategy for eliminating stigma based on the Portuguese model will be set forth in Section III.B.

Another means of strengthening the public health approach is the reorganization of agencies that are responsible for monitoring and reducing drug use and related problems. When Portugal enacted its decriminalization law, the multiple organizations charged with addressing drug use were replaced by the IDT.²⁶¹ The government's consolidation of a number of ineffective organizations into a single effective agency with a new mandate for research, evaluation, implementation, and oversight of drug treatment programs demonstrated a novel commitment to a public health approach to combating drug use. It also created a national standard for harm reduction programs and for the CDTs, so that all drug regulations would be uniform.²⁶² This consolidation is important not only because it exemplifies the government's perspective that drug use is a public health issue, but because it also allows one agency, instead of several, to coordinate efforts in reducing social ills associated with drug use, ensure programs are not duplicated and resources are not wasted, and evaluate existing efforts for effectiveness. Although the IDT was recently stripped of most of its power due to austerity measures, Mexico can look to the example that Portugal set in consolidating its resources into a unified agency.

Mexico should follow Portugal's approach in reorganizing the agencies that address drug use and related problems. Restructuring and consolidating the numerous government-run organizations that address drug use and harm reduction in Mexico would demonstrate a commitment to addressing serious drug problems through public health measures. It would also allow a central agency to create a uniform approach to drug issues, to appropriate resources to support programs in line with that approach, and to evaluate efforts already under way. Explicitly requiring the organization to complete these tasks, instead of only giving the vague command to institute drug addiction control measures, should foster the growth of addiction services and positively impact rates of drug use and associated harms.²⁶³ Further, reorganization may actually reduce corruption

Stigma Related to Substance Use Disorders: A Systematic Review, 107 ADDICTION 39, 40-41 (2011).

²⁶¹ See Decree Law 269-A/2002, *supra* note 88; Decree Law 31/99, *supra* note 88; *supra* text accompanying note 88.

²⁶² See Decree Law 269-A/2002, *supra* note 88, Annex art. 5; Decree Law 183/2001, *supra* note 84, ch. I, art. 5.

²⁶³ See Narcomenudeo Law, *supra* note 7, art. 192 (describing the Mexican Ministry of Health's obligations under the new law). Although the recent law includes a mandate for the Ministry of Health to create a national program for addressing drugs, the terms are broad and are similar to those it was charged with in 1976. Compare *id.*, with Regulations Concerning Narcotic Drugs and Psychotropic Substances, *supra* note 139, arts. 77, 79. The Ministry of Health would also be able to oversee the commissions, the implementation of which is argued for *infra* Section III.B.

in Mexico. By restructuring an agency, it is possible to root out officials who have been bought by drug-trafficking organizations, as has been attempted in the police forces.²⁶⁴ Mexico would need to develop procedures for detecting corruption in new applicants, as well as a system for evaluating the levels of current corruption. Overall, the introduction of a new agency will show that public health is a primary concern of the Mexican government, paving the way for the implementation of new measures designed to effectively address drug use.

The Portuguese experience demonstrates another means of prioritizing public health through a decriminalization scheme. Implementation of decriminalization in Portugal was accompanied by another decree that laid out the framework for establishing harm reduction service centers.²⁶⁵ This accompanying decree was important for three key reasons: First, it again demonstrated the government's dedication to addressing drug use as a public health problem by prioritizing the health of drug users and the prevalence of disease in society over incarceration of drug crime perpetrators. Second, it encouraged the creation of specific harm reduction programs that directly targeted the health-related dangers of drug use, such as shelters for homeless drug users and needle exchanges all over the country. Third, it provided uniform standards for the creation, implementation, and evaluation of these programs, guaranteeing equal services in regions where the programs exist.

A similar measure, if enacted in Mexico, would help redirect the focus of decriminalization to decreasing the levels of drug use, addiction, and related diseases. It would demonstrate that the government is concerned with the health of its population and is taking steps to remedy the current high drug use situation. It would also provide the organization in charge of drug prevention and treatment with clear guidelines for implementing services instead of the vague mandates with which Mexico's Ministry of Health must currently comply.

Finally, Mexico must act to increase the resources available to address the harms associated with drug use. The rising rates of addiction, HIV, and hepatitis in Mexico can only be quelled if services exist for their treatment. In Portugal, the significant increase in providers all over the country has resulted in reductions in drug use and drug-related mortality and disease.²⁶⁶ Although, in Mexico, the number of syringe exchanges increased substantially in the 2000s and programs have been established to increase the number of treatment providers, more services, especially opioid replacement therapy, are needed.²⁶⁷

²⁶⁴ See BRANDS, *supra* note 150, at 16.

²⁶⁵ See Decree Law 183/2001, *supra* note 84.

²⁶⁶ See GREENWALD, *supra* note 46, at 15-17; de Almeida & Encarnação, *supra* note 14, at 221; Hedrich et al., *supra* note 103, at 503, 508.

²⁶⁷ See MEYER, *supra* note 142, at 9; Mathers et al., *supra* note 103, at 1020, 1021 (noting that only one publicly funded methadone maintenance program existed in 2009); Moreno et al., *supra* note 175, at 494; INCB Report for 2010, *supra* note 133, at 71-72, ¶

Additionally, the lack of resources and training for existing providers must be addressed. Devoting resources to and encouraging the creation of these services could allow Mexico to realize some of the successes of Portugal's decriminalization scheme, while also cementing the notion that Mexico is committed to addressing drug use as a public health issue. The fact that Mexico has already begun to implement these measures demonstrates the government's desire to achieve the results that the criminal justice system has failed to produce.

Reframing its drug crisis in terms of public health would help Mexico achieve reductions in drug use, addiction, disease, and other related consequences. However, redefining objectives is not enough in itself. Mexico must also make concrete changes to its decriminalization structure. One of these needed alterations should be modeled after a cornerstone of Portugal's law: the CDTs.

B. Implementing Commissions Based on the Portuguese Model

The CDTs are arguably the most unique feature of decriminalization in Portugal. These bodies represent a marked departure from traditional law enforcement in addressing drug use. Mexican decriminalization could much more effectively reduce drug use, drug-related disease, and burdens on the criminal justice system if it were to adopt commissions like the CDTs of Portugal for two reasons: First, a diverse panel would be able to make offender-specific determinations and impose a variety of sanctions aimed at achieving the most effective outcomes. Second, the commission would be removed from the criminal justice system. This separation is likely to encourage users to seek treatment voluntarily; reduce the burden of drug use cases on the courts; decrease corruption, extortion, and human rights abuses; and refocus law enforcement efforts on large-scale drug trafficking.

An advantage of the Portuguese system is that experts in the field of drug addiction, and not judges with limited knowledge in this field, determine whether a drug possession offense has occurred and whether the offender is addicted.²⁶⁸ The creation of similar commissions in Mexico would allow for experts in the area of substance abuse to determine whether or not a user is addicted. This is preferable to having a judge perform this task, since the commission would likely be more familiar with the symptoms and presentation of addiction and would be able to more accurately decide whether a person is addicted. Additionally, removal of this decision-making power from the criminal justice system would help reduce the stigma associated with addiction, thus mitigating one barrier to treatment.

Currently, in Mexico, the decision to impose a sanction on a drug offender is

442.

²⁶⁸ See Decree Law 30/2000, *supra* note 2, art. 7(2).

made solely by the amount of the drug possessed and whether the offender had been apprehended twice before.²⁶⁹ This approach does not leave discretion to the sentencing body to take into account the circumstances of the offense or offender, or to tailor an individualized sanction that would encourage the offender to abstain from reoffending. Expert panels with the ability to consider all the facts, like the CDTs of Portugal, are more likely to produce results that reflect the best interests of both the individual user and of Mexican society. By encouraging offender participation in the proceedings, expert sentencing bodies would contribute to the visibility of both drug addicts as people in need of help and drug use as a public health problem. Both of these features of an expert commission would facilitate rehabilitation and improve treatment outcomes.

Moreover, compelled treatment for third-time offenders is the only penalty that can be imposed on those whose possession is within the decriminalized amount under the current regime in Mexico.²⁷⁰ This approach is both over- and under-inclusive. It is over-inclusive because a person who is a third-time offender but not an addict would still be subjected to the inappropriate, and most likely unhelpful, sentence of forced treatment. It is also under-inclusive because an addict in need of treatment will not be compelled to get help until his third offense. This will likely incur greater costs for the criminal justice system and for the individual's health because an addicted person will have to report to court three times before receiving treatment. This is another reason why discretion by the deciding body is important. As already noted, the experts on CDTs are better equipped than the judges in the criminal justice system to determine whether an alleged offender is addicted and to fashion the most appropriate sanction for an individual.

Further, the variety of sanctions available to the CDTs should serve as a model for Mexico. In Portugal, the penalties for drug offenses include prohibitions on visiting certain places or people, fines, suspension of professional licenses, or prohibition on travel.²⁷¹ Because the main purpose of imposing sanctions is to deter the offender from committing offenses in the future, a wide variety of penalties are needed to address the needs of the specific individual. Mexican law should empower commissions to impose a variety of sanctions, rather than only mandating treatment after the third offense, because allowing for personalized penalties would increase the probability that the individual will not reoffend.

The method of referrals to commissions is another opportunity to further a public health-oriented approach to drug use. Although in Portugal users are still referred to CDTs by police officers, this encounter represents the only contact

²⁶⁹ See *Narcomenudeo Law*, *supra* note 7, art. 193 BIS.

²⁷⁰ *See id.*

²⁷¹ See Decree Law 30/2000, *supra* note 2, arts. 11(1), 15-18.

between the user and the criminal justice system.²⁷² In contrast, users in Mexico can be arrested and held in pre-trial detention until a prosecutor determines whether the amount possessed is within the limit for personal use.²⁷³ Mexico's approach does not remove the user from the criminal justice system. As a result, the stigma of being considered a criminal is still present and functions as a barrier to treatment. This was an important consideration in Portugal's decision to remove the authority of police officers to arrest for drug possession.²⁷⁴ Since adopting this strategy, Portugal has seen a significant increase in the number of people seeking treatment for drug addiction.²⁷⁵ Removing the power of the police to make arrests for drug possession under the defined amount in Mexico would be a major step both in eliminating the stigma associated with the criminal justice system and in moving toward a public health approach. It would also likely result in less extortion because the corrupt state and local officials granted power under the current law to enforce drug offenses would not be able to leverage their arrest power over citizens to receive bribes.²⁷⁶ Although police officers may still demand a bribe to prevent them from issuing a referral to the commission, the removal of this process from the criminal justice system is likely to persuade more citizens to accept the referral than would have accepted arrest, thus increasing the likelihood that a user will receive treatment if needed.²⁷⁷ Pre-trial detention of offenders may decrease as well, which would conserve resources and prevent unwarranted confinement of minor offenders.

Establishing commissions like the Portuguese CDTs would complete the removal of minor drug possession offenses from the criminal justice system. In addition to reducing the stigma associated with a criminal charge and enabling users to openly seek treatment without fear of criminal penalties, a commission could have several other positive effects. First, it would reduce the burden on courts. In Mexico, this would mean removal of jurisdiction over several offenses from the resource-strapped and backlogged judiciary.²⁷⁸ Corruption could also be avoided, as the offender would not have to deal with judges or prosecutors, but

²⁷² See ALLEN ET AL., *supra* note 47, at 2.

²⁷³ See *Narcomenudeo Law*, *supra* note 7, art. 180 BIS; Hernández, *supra* note 132, at 63.

²⁷⁴ See GREENWALD, *supra* note 46, at 9; VAN BEUSEKOM ET AL., *supra* note 11, at 26.

²⁷⁵ See GREENWALD, *supra* note 46, at 15.

²⁷⁶ See *Narcomenudeo Law*, *supra* note 7, art. 474 BIS; U.S. DEP'T OF STATE BUREAU FOR INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, *supra* note 158, at 434-35.

²⁷⁷ For example, because users could no longer be placed in jail, the fear of having their freedom infringed and being removed from loved ones would no longer exist.

²⁷⁸ See SHIRK, *supra* note 163, at 6 (describing the shortage of resources in the Mexican judiciary).

would instead be sent to a newly formed commission that could implement new procedures for assuring that its members were not corrupt.²⁷⁹ Police officers and prosecutors would be able to focus more intensely on major drug-trafficking cases instead of having to deal with minor possession cases. As has been seen in Portugal, this refocused effort can produce significant increases in drug seizures.²⁸⁰ Human rights abuses such as illegal searches and detentions could also be curtailed by this new approach because police would be formally prohibited from targeting those populations suspected to be solely in possession of the quantity of drugs typical of personal use.

For these reasons, the adoption of a system of commissions and the removal of drug possession cases from the criminal justice system are imperative to implementing a public health approach. Although adoption of Portuguese-style CDTs is a crucial step toward achieving positive results through drug decriminalization, Mexico must also address the maximum amounts of drugs that it characterizes as personal use.

C. Increasing the Maximum Amounts of Drugs Defined as Personal Use

Under current Mexican law, the amount defined as personal use for most drugs is set quite low, at under a gram for all drugs except marijuana.²⁸¹ In contrast, the law in Portugal defines a ten-day supply of any drug as decriminalized, with one gram being the lowest of the maximums.²⁸² This stark difference again reflects the divergent legal approaches taken by the two countries. Mexico, focused on increasing penalties for small-scale trafficking instead of on directly improving the health of the drug user, designated the allowable limit at a very low threshold and increased penalties for possession of all amounts above that limit.²⁸³ This will not solve any of the problems that Mexico is currently facing, and in fact, may exacerbate them. In order for decriminalization to have a positive impact on its drug crisis, Mexico should follow Portugal's lead and increase the amounts defined as personal use.

What is striking about the current limits in Mexico is that they are below the amount in which most drugs are sold on the street.²⁸⁴ For example, the maximum limit for cocaine is five hundred milligrams, but most users buy their supply by

²⁷⁹ To fully achieve this change, programs to combat corruption would have to be developed.

²⁸⁰ See HUGHES & STEVENS, *supra* note 29, at 3.

²⁸¹ See *Narcomenudeo Law*, *supra* note 7, art. 479 BIS.

²⁸² See Decree Law 30/2000, *supra* note 2, art. 2; Portaria 94/96 [Ordinance 94/96], art. IV(9), mapa, DIÁRIO DA REPÚBLICA de 26.3.1996 (Port.); *supra* text accompanying note 58.

²⁸³ See *Narcomenudeo Law*, *supra* note 7, arts. 476-77; Hernández, *supra* note 132, at 63-64.

²⁸⁴ See Hernández, *supra* note 132, at 64.

the gram.²⁸⁵ This creates several problems: First, this will likely result in more addicts being imprisoned. Because many drug addicts may purchase and possess drugs in greater quantities than what is allowed, they could be designated as criminals within the legal regime, not as users in need of help. Because the law also increases penalties for possession over the defined limit, these addicts may end up spending a longer term in prison than they would have prior to decriminalization. Such an outcome is inconsistent with a public health approach to addressing a national drug crisis, because it incarcerates addicts instead of providing them with needed treatment. Increasing the maximum amount of non-criminalized possession would ensure that addicts are diverted from the criminal justice system into the administrative regime, where they can receive the appropriate sanctions to discourage recidivism. If Mexico adopted the CDT system, raising the maximum amounts would allow the commission members to consider the quantity possessed by users as a factor in determining an appropriate sanction. As a result, criminal penalties would not automatically apply to addicts in possession of slightly larger quantities of drugs than as defined for personal use.

A related negative consequence of Mexico's currently low thresholds is the stress they place on the already over-burdened prison system. Mexico has the sixth highest prison population in the world and overcrowding is pervasive in prisons throughout the country.²⁸⁶ Because the typical drug user will possess an amount over the decriminalized limit after purchasing drugs, most addicts are at risk of being incarcerated, not of being released or mandated to undergo treatment.²⁸⁷ Moreover, since Mexico has lengthened the prison sentences for possession over the stipulated amount it decriminalized, users caught possessing greater quantities than this will be imprisoned for longer periods, further exacerbating the problem of prison overcrowding.²⁸⁸ If Mexico were to follow Portugal's approach and increase the maximum limit to a more reasonable amount—one that more accurately reflects the known average purchase quantities of various drugs—then prison populations would likely decrease. This was one positive outcome experienced by Portugal in the years immediately following the adoption of its decriminalization legislation. The rate of drug-related offenders in prison decreased significantly and the total number of people

²⁸⁵ *Id.*

²⁸⁶ *See id.* at 64-65, 70.

²⁸⁷ There may be concern over whether there are treatment resources available for all offenders. In Portugal, even though treatment facilities are divided between inpatient and outpatient services, treatment is fully available for any drug user seeking treatment. *See Drug Treatment Overview for Portugal*, EMCDDA, <http://www.emcdda.europa.eu/data/treatment-overviews/Portugal> (last visited Mar. 6, 2012).

²⁸⁸ *See supra* Section II.B.

in prison also declined substantially.²⁸⁹ Raising the criminalized quantities under Mexican decriminalization should result in similar penal outcomes. Mexico would also experience considerable monetary savings in the prison system, which currently spends approximately \$775 million annually on the containment of inmates.²⁹⁰

Furthermore, increasing the quantity limits for possession might reduce the amount of extortion that occurs among law enforcement agencies. Under the current legal limits, it is actually more likely that extortion will increase than decrease. Because the penalties for those caught in possession over the limit have grown harsher, police will have greater leverage to extract payoffs from suspected offenders. Increasing the limits should discourage this extortion by cabining some of this police leverage. Assuming that arrest power for drug possession offenses has been removed, police officers will not be able to target users and addicts who possess amounts below the maximum—removing or limiting their ability to threaten offenders with incarceration if they fail to produce a bribe. In fact, without raising the limits, removing the arrest power for these offenses would do little to combat corruption, because in most cases the addict will possess drugs in quantities over the maximum. This is especially significant because state and local law enforcement in Mexico, empowered to enforce drug charges under the recent amendments, are widely regarded as the most corrupt of law enforcement officials.²⁹¹

A final benefit of increasing the limits would be that police could refocus their efforts on traffickers. Because the possession limits are currently set so low, police continue to expend substantial resources apprehending small-time users and addicts instead of pursuing high-level distributors.²⁹² In Portugal, setting the limits at a higher amount allowed police to shift their attention to combating trafficking, resulting in major increases in the amount of drugs seized.²⁹³ Mexican law enforcement officials could, therefore, benefit from increasing the maximum amount by concentrating on major drug-trafficking organizations and combating the violence that they produce, instead of incarcerating low-level dealers in possession of an amount worth less than \$100.²⁹⁴

²⁸⁹ See HUGHES & STEVENS, *supra* note 29, at 4; Hughes & Stevens, *supra* note 30, at 1010.

²⁹⁰ See Hernández, *supra* note 132, at 65.

²⁹¹ See Narcomenudeo Law, *supra* note 7, art. 474; U.S. DEP'T OF STATE BUREAU FOR INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, *supra* note 158, at 435.

²⁹² Wagner, *supra* note 217.

²⁹³ See Hughes & Stevens, *supra* note 31, at 1011.

²⁹⁴ See Hernández, *supra* note 132, at 65 (noting that fifty percent of those incarcerated for selling drugs were in possession of amounts worth \$100 or less); *supra* Section I.D (explaining how Portugal was able to refocus its efforts on trafficking after decriminalization).

The amount that Mexico should set as the maximum under its decriminalization scheme need not be exactly the same as Portugal's, but Portuguese limits would serve as an apt example because of the successes that Portugal's structure has produced. A ten-day supply allows an addict or user to possess an amount of the drug that falls within the normal quantity of drugs purchased by users, but still sets a threshold to differentiate users from traffickers. Conducting empirical research on the typical drug quantity purchased by users in Mexico may help to determine the most appropriate threshold. If the definitional limits for personal use under the current law were determined to be a one-day supply, then decriminalizing a ten-day supply may be too much. Instead, it may be best to consider not the abstract concept of a ten-day supply, but rather the concrete numerical amounts identified by the Portuguese law.

Implementation of the solutions described above could alleviate many of the problems that plague Mexico's drug crisis. Nevertheless, Mexico and Portugal are different countries, and execution of these objectives in Mexico may encounter several difficulties.

D. Potential Obstacles to Implementing Portuguese-Style Decriminalization

Although both are supply countries that have experienced (or in the case of Mexico, are still experiencing) similar public health problems related to drug use, Portugal and Mexico have different histories, governments, and relationships with foreign nations. Therefore, Mexico may face different challenges to implementation of decriminalization than did Portugal. Political pressure from the United States, the international community, and groups within Mexico may impede the adoption of these recommendations. Although implementing the strategies described in this Part may alleviate some corruption, human rights abuses, and extreme violence, these and other obstacles may still stand in the way of the strategies' full execution. Since these strategies will not be a cure-all for drug-related problems, obstacles will most likely persist on some level after the new policy is in place. Finally, Mexico must be willing and able to produce the needed resources for successful implementation of the program. This Section will address these potential issues and offer solutions where appropriate.

Unlike in Portugal, the development of drug policy in Mexico has always been heavily influenced by the United States.²⁹⁵ It is, therefore, highly likely that the United States would play a major role in Mexico's decision about whether to adopt the Portuguese model of decriminalization. In fact, Mexico experienced such intense pressure from the United States when it first attempted to implement its own style of decriminalization that it abandoned the effort.²⁹⁶ Mexican officials would most likely be wary of adopting a drug policy that the United

²⁹⁵ See VELASCO, *supra* note 133, at 93-94, 103, 119; Chabat, *supra* note 188, at 135.

²⁹⁶ See Grillo, *supra* note 189.

States would disfavor. Mexico's current approach is acceptable because it furthers the militarization method that the United States supports.²⁹⁷ Moving away from this attitude toward a public health approach may expose the Mexican government to significant additional pressure from the United States.

However, there are indications that the United States would accept such a paradigm shift in Mexico. Although the United States applied immense pressure against legislative change in 2006 when Mexico first attempted decriminalization, resistance to the 2009 changes was minimal.²⁹⁸ It is possible that the United States would oppose Mexico's adoption of the Portuguese model, but the recent public rhetoric and attitude in the United States suggest that it may be willing to accept this new structure in the drug regime of its southern neighbor.²⁹⁹ Arguing that implementing the Portuguese approach will allow Mexican police forces to focus on large-scale trafficking may help to persuade skeptical U.S. policymakers that this method is preferable, as Mexican drug-trafficking organizations are considered a major threat to U.S. national security.³⁰⁰ Additionally, changes to the Mexican law could still increase penalties for traffickers, reinforcing the objective of identifying and dismantling drug-trafficking organizations while providing more resources for drug users. Of course, the U.S. approach to drug policy is likely to vary significantly based on the political party in control, and changes in the presidential administration may cause policymakers' mindsets to again shift towards increased militarization.

The United States is not the only source of political pressure from the international community that Mexico must address. As a signatory to the three major United Nations drug treaties, Mexico is obligated to comply with their provisions or face international scrutiny.³⁰¹ Initially, the International Narcotics Control Board (INCB) suggested that the new approach in Mexico may violate these UN treaties.³⁰² However, they have more recently approved of Mexico's dedication to the treaties' goals and commitments.³⁰³ Furthermore, the INCB has approved the Portuguese model and has explicitly stated that the "practice of exempting small quantities of drugs from criminal prosecution is consistent with the international drug control treaties."³⁰⁴ In fact, by following the Portuguese precedent in adopting a model of sanctions administered by commissions, it is more likely that the international community would accept a revised Mexican decriminalization scheme. Under the Mexican structure, offenders are not

²⁹⁷ See *supra* Section II.C.

²⁹⁸ See Grillo, *supra* note 189.

²⁹⁹ See *id.*; *supra* text accompanying note 192.

³⁰⁰ See Archibold, *supra* note 156.

³⁰¹ See *supra* text accompanying note 27.

³⁰² See INCB Report for 2009, *supra* note 242, at 68, ¶ 408.

³⁰³ See INCB Report for 2011, *supra* note 244, at 12, ¶ 87.

³⁰⁴ INCB Report for 2004, *supra* note 83, at 80, ¶ 538.

sanctioned until their third offense.³⁰⁵ In Portugal, the CDTs can exercise discretion to apply a wide array of sanctions to offenders, within some limits.³⁰⁶ Although they must provisionally suspend the proceedings if they determine that the offender was not addicted and that this was the first offense, this suspension can be viewed as a form of probation, because the proceedings will resume if the user is caught reoffending.³⁰⁷ Therefore, if Mexico were to enact new legislation permitting greater discretion by sentencing officials among a wider variety of sanctions, the INCB would be more likely to accept the structure. Finally, the U.N. Convention identifies “the prevention of abuse of drugs and [] the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved” as imperative goals and require all signatories to “take all practicable measures” to further them.³⁰⁸ Under the Portuguese approach, these prevention and treatment objectives are paramount, and the significant reductions in drug-related disease and death as well as the recorded increases in treatment in Portugal after decriminalization lend credence to the notion that Mexico would be able to advance these aims by following Portugal’s lead.

Of course, Mexico is only one of the most recent countries to enact some form of drug decriminalization legislation. In fact, a trend toward this type of policy has been observed both in Europe and in Latin America.³⁰⁹ These countries are therefore likely to offer support for the adoption of the Portuguese model in Mexico, offsetting contrary political pressure.³¹⁰

Even if the international community would accept a shift from Mexico’s current scheme to a structure based on Portugal’s, there must be domestic political support for these changes. This domestic political support will depend heavily on the political party in power in Mexico. Officials must determine priorities and respond to their party’s objectives and the wishes of their constituencies. Given the current state of the drug crisis in Mexico, it does not

³⁰⁵ See *Narcomenudeo Law*, *supra* note 7, art. 193 BIS.

³⁰⁶ See *supra* Section I.C.

³⁰⁷ See Decree Law 30/2000, *supra* note 2.

³⁰⁸ Single Convention on Narcotic Drugs, *supra* note 20, art. 38(1); see also *supra* text accompanying note 23.

³⁰⁹ See Youngers & Walsh, *supra* note 7, at 123.

³¹⁰ Additionally, there is support for more public health-oriented approaches to drug policy from the Latin American Commission on Drugs and Democracy and the Global Commission on Drug Policy, a body comprised of important political figures from around the world, including former presidents. See GLOBAL COMM’N ON DRUG POLICY, REPORT OF THE GLOBAL COMMISSION ON DRUG POLICY (2011); *supra* text accompanying note 192. The President of Guatemala has also called for legalization of drugs as a solution to the problems that Latin American countries are facing. Catherine E. Schoichet, *Guatemalan President Leads Drug Legalization Debate*, CNN, Mar. 23, 2012, <http://www.cnn.com/2012/03/23/world/americas/guatemala-drug-legalization/index.html>.

seem that prioritizing the adoption of a more effective drug strategy would be a great hurdle for any political party. However, various parties' proposals for addressing drug use are likely to vary significantly. Mexico will elect a new president in the summer of 2012, and the three candidates each have unique views on whether a more liberal approach to drug policy should be taken.³¹¹ If the administration elected in 2012 were to view drug use as a criminal offense, it might even work to repeal the current decriminalization law or may exhibit a lack of vigor in its implementation. As seen in Portugal, execution of the decriminalization strategy can suffer if politicians fail to provide adequate resources.³¹² Since at least 1940, however, addicts in Mexico have been identified in legislation as sick persons in need of help, and not categorized as criminal offenders, so long as the amount possessed was for personal consumption.³¹³ Additionally, recent polls indicate that the majority of Mexican citizens view drug addiction as a sickness and believe that the addict is a person in need of help.³¹⁴ This history and context suggests that adopting a public health approach more similar to the drug legislation in Portugal might not meet an extraordinary amount of domestic opposition in Mexico.³¹⁵

Aside from political challenges, implementation of the Portuguese decriminalization regime presents other problems. The level of corruption that

³¹¹ Enrique Peña Nieto of the Institutional Revolutionary Party (PRI) is completely opposed to legalization and favors the currently prevailing approach of militarization. Josefina Vázquez Mota of the National Action Party (PAN) encourages debate on the topic of legalization, but contends that legalizing drug use would constitute a surrender to the drug-trafficking organizations. Andrés Manuel López Obrador of the Party of the Democratic Revolution has come closest to supporting legalization by proposing to submit the question of whether drugs should be legalized to a national debate. Katie Putnam, *The Week in Review: 3/5/2012*, MEXICO INST. ELECTIONS GUIDE (Mar. 5, 2012, 7:08 AM), <http://mexicoinstituteelections.wordpress.com/2012/03/05/the-week-in-review-352012/>. Unfortunately, little information is available on the candidates' views on the current policy of decriminalization.

³¹² See Hughes & Stevens, *supra* note 30, at 1005.

³¹³ See Regulations Concerning Narcotic Drugs and Psychotropic Substances, *supra* note 139 art. 88; Reglamento Federal de Toxicomanías [Federal Rules of Addiction], Diario Oficial de la Federación [DO], 17 de Febrero de 1940 (Mex.).

³¹⁴ See NATIONAL COUNCIL AGAINST ADDICTIONS, *supra* note 171, at 71.

³¹⁵ Domestic support for a public health-oriented approach to drug legislation is especially likely after the Mexican government's recent expansion and centralization of healthcare, which has been lauded by the international public health community. See Decreto por el que se reforma y adiciona la Ley General de Salud [Decree Amending and Adding to the General Health Law], Diario Oficial de la Federación [DO], 15 de Mayo de 2003 (Mex.); see also Felicia Marie Knaul et al., *Evidence Is Good for Your Health System: Policy Reform To Remedy Catastrophic and Impoverishing Health Spending in Mexico*, 368 LANCET 1828 (2006) (arguing that Mexico's health reform should serve as an example for other countries).

pervades the Mexican government is staggering and stands in the way of executing any real reform. An extensive reform of the justice system in Mexico is needed; Portuguese-style decriminalization will not be a panacea for the system—and may in fact suffer as a result. Should the members of the proposed CDT-style commissions be as corrupt as their existing law enforcement analogs, they may extort users diverted to them, and fail entirely to impose sanctions or refer addicts and users to treatment.

Yet the nature of what is at stake in these CDT commissions may actually decrease the chances that its members will be corrupt. Drug-trafficking organizations would not have as much to gain from bribing commission members as they would from bribing prosecutors or judges. Bribing CDT members would only protect users and addicts who come in contact with these commissions, not high-ranking individuals in trafficking organizations. Additionally, since users in possession below the raised maximum amounts would not be in danger of arrest, the police would have diminished leverage for extortion. Resources saved by diverting these offenders to an administrative system could also be refocused on battling larger-scale drug-trafficking organizations and on curbing corruption within the ranks of the Mexican government. Although far more extensive efforts will be needed to successfully address the widespread corruption among Mexican officials in all areas of government, implementing the Portuguese model of decriminalization may offer some relief at the law enforcement level.

Human rights abuses committed by Mexican police and military forces present another predicament. The Portuguese model of decriminalization may have some positive effects on the mistreatment of drug users. Although refocused efforts should decrease the amount of contact between addicts and the police, there still exists the initial contact where police cite the offenders and apprise them of their obligation to report to the commission. Present in this situation is the opportunity for an official to perform an illegal search, detention, or torture to procure information. The proposed reform would, however, grant less opportunity for this given that the contact between user and law enforcement is shorter and there is less incentive for such abuses since the end result will not be criminal sanctions. Although the potential for human rights abuses would be lessened under the Portuguese approach, serious reform of professional standards, training, and education for law enforcement agents are needed to address this problem.

The amount and extremity of violence has become perhaps the most visible aspect of the drug crisis in Mexico. This has been a major cause of the increase in militarization and aggression by Mexican law enforcement—which has, in turn, exacerbated the violent nature of the drug problem.³¹⁶ Because addressing violence is such a primary focus of the struggle in Mexico, its decriminalization

³¹⁶ See MEYER, *supra* note 142, at 8; RIOS & SHIRK, *supra* note 156, at 8.

policy continues to promote military involvement and increased penalties for those found in the drug trade. This approach may impede the implementation of the Portuguese model of decriminalization, which instead focuses on the public health issues associated with drug use. It may also lead to further violence and abuse by Mexican law enforcement. Although many drug strategists in Mexico have taken the militarization approach, a policy like that of Portugal should actually allow law enforcement to focus more on traffickers. Removing drug users and addicts from the criminal justice system should allow the concentration of resources and personnel on drug-trafficking organizations. In Portugal, where the amount of drugs seized has vastly increased, this has proven to be the case.³¹⁷ Mexican officials will likely be able to better focus on reducing violence once greater resources are free to target traffickers.

With a potential shift in focus toward large-scale illegal drug operations, a concern that may arise is that police officers may ignore those in possession of personal amounts of drugs and choose not to issue a citation compelling them to appear before a commission. Officers may no longer be concerned with the petty offender or may feel that referrals to the commissions are useless. The amended decriminalization regime may need to develop incentives to motivate police officers to issue citations to low-level offenders, if the CDT-style model is adopted.

A final difficulty of importing the Portuguese model of decriminalization to Mexico lies in the allocation of resources. In order to fully effectuate its strategy, Portugal increased overall funding for drug policy implementation, increased the number of public treatment and harm reduction facilities, and established CDTs in every region of the country.³¹⁸ In Mexico, public health measures focused on drug use have increased during the last decade, but needle exchange and opioid substitution programs are still not at the capacity reached in Portugal.³¹⁹ Furthermore, most of the staff in these treatment centers are undertrained as a result of inadequately funded and poorly managed training programs.³²⁰ Efforts to reduce drug-related health consequences must be supplemented by adequate resources; without the additional infusion of resources, such measures are destined to fail.

This resource problem is compounded by the fact that most police forces are already under-resourced and understaffed.³²¹ The Mexican government may be

³¹⁷ See HUGHES & STEVENS, *supra* note 29, at 3.

³¹⁸ See DEGENHARDT ET AL., *supra* note 33, at 12; GREENWALD, *supra* note 46, at 15; INSTITUTO DA DROGA E DA TOXICODÊPENDÊNCIA, *supra* note 92, at 106; Hughes, *supra* note 1, at 120.

³¹⁹ See INCB Report for 2010, *supra* note 133, at 71-72, ¶ 442.

³²⁰ See U.S. DEP'T OF STATE BUREAU FOR INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, *supra* note 158, at 436.

³²¹ See Tinajero & Angles, *supra* note 9, at 2; Astorga & Shirk, *supra* note 141, at 27.

reluctant to divert resources to public health measures that it feels might better be used in combating the drug-trafficking organizations. Yet, as noted earlier, the allocation of resources to such measures should actually increase the resources that are available in the criminal justice system to target traffickers, as removing low-level drug users from the criminal system could save both court costs and the costs of incarceration. These cost savings have already been realized in Portugal.³²² The criminal justice system is also likely to conserve resources as the reduction in addiction rates results, over time, in fewer addicts committing crimes either to support their habit or while intoxicated. Additionally, the associated reduction in disease, death, and addiction should reduce healthcare spending broadly. As low-level users come in contact with the public health system, they can begin to receive treatment for HIV, hepatitis, and tuberculosis. This, in turn, should reduce the prevalence of these diseases and associated death, a particularly significant effect given that these diseases are major drivers of national healthcare expenses.

Thus, in the long term, the adoption of a decriminalization scheme that shares the public health orientation of Portugal's drug regime could result in net savings for the Mexican government. But failure to adequately fund such a program from the outset could result in a corrupt system of commissions not significantly different from current law enforcement. Without sufficient resources, the members of these commissions may resort to soliciting bribes from offenders who come before them, either because commissioners might not have the time or ability to hear the volume of cases presented to them or because commissioners need to supplement their own insufficient salaries. In light of the impoverished status of most law enforcement agencies in Mexico, such grave concerns must inform the implementation of any new drug decriminalization policy.

Finally, it is worth noting that Mexico already expends an appreciably greater amount of money on its existing drug policies than does Portugal. While Portugal only spent \$77.5 million in 2008, Mexican drug policy expenditures totaled \$4.3 billion in 2009.³²³ Of course, the population of Mexico is about ten times that of Portugal, yet Mexico is still spending more than fifty-five times the amount that Portugal is on addressing its drug crisis. This suggests, in part, that it may be possible to achieve a reduction in public health problems and an increase in drug seizures through a lower-cost drug enforcement regime.

CONCLUSION

Today, the scene at Casal Ventoso has changed dramatically. No longer is

³²² See ALLEN ET AL., *supra* note 47, at 4.

³²³ See DEGENHARDT ET AL., *supra* note 33, at 12; Astorga & Shirk, *supra* note 141, at 3 n.4.

the area known across Europe as a scourge, an uncontrolled venue for the purchase of dangerous substances. No longer is a visitor to the area likely to spot a man on the side of the street with a syringe in his hand, casually administering an illegal drug. Fewer homeless individuals inhabit the region, and disease rates have dropped significantly. The effects of Portugal's new approach to drug policy have produced a noticeable impact on this once-dismal scene, and the outlook for continued improvements is positive.

On the other hand, the outlook is much bleaker in Tijuana than before. Dealers continue to roam the streets in "ice cream trucks," people still openly use their drug of choice, disease remains common, and violence is never far away. It is not easy to identify evidence of any positive outcomes of the new law decriminalizing possession of small amounts of drugs. Clearly, a new approach to drug policy is needed in Mexico. In order to achieve reductions in addiction and disease, public health must become a priority in the development of the national drug strategy. This, more than Mexico's current approach, will allow an increased focus on large-scale drug-trafficking organizations; for this reason, the structure in Portugal could serve as a groundbreaking new model for Mexico.

Developing an effective drug policy is a challenge that must take into account criminal justice, public health, and political concerns. Each country must adopt a strategy that conforms to its ideals of good government and individual rights. Certainly, different political pressures, governmental structures, and histories inform the conditions of drug-related law enforcement in Mexico and in Portugal. But the similar societal problems experienced in both countries as a result of escalating drug use, and the status of each country as a supplier nation, make comparison valuable and suggests that implementation of the Portuguese decriminalization scheme would be successful in Mexico.

If Mexico were to implement Portuguese-style decriminalization, it is likely to realize several positive effects. A new focus on public health could reduce the number of addicts and the rate of disease by increasing publically available harm reduction services and encouraging addicts to seek treatment. It could allow law enforcement to more effectively target large-scale traffickers and address other ancillary issues including corruption, human rights abuses, and violence. The prison population and backlog of casework in the criminal justice system are also likely to decrease; this, coupled with a reduction in spending on small-scale drug crimes, would free up resources to address other crimes.

Mexico may not be able to adopt the Portuguese model without opposition. The country is likely to experience adverse political pressure from several sources, including the very influential United States. Additionally, problems of local and national corruption, violence, and human rights abuses will persist. Implementing a decriminalization scheme as Portugal has done, however, should eventually abate the impact of these issues in Mexico, and would likely generate positive public health outcomes related to drugs, through increased treatment

uptake and reductions in drug-related disease. Such a legislative change is, therefore, a worthwhile objective that will better promote not only the well-being of drug users, but also the broader aims and efficacy of Mexico's criminal justice system, and the cohesion and health of Mexican society.

