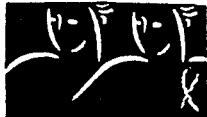


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## **Bill C-8 – The Impact of Canada’s Drug Laws on the Spread of HIV**

**A Joint Submission to the  
Standing Senate Committee on Legal and Constitutional Affairs  
by the  
Canadian HIV/AIDS Legal Network and the Canadian AIDS Society**

**prepared and presented by**

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**15 April 1996**

## Table of Contents

I.	Introduction	1
II.	Canadian HIV/AIDS Legal Network	2
III.	Canadian AIDS Society	2
IV.	Network Activities on Drug Use and HIV/AIDS	3
	A. <i>Canadian HIV/AIDS Policy &amp; Law Newsletter</i>	3
	B. HIV/AIDS Policy & Law Seminar Series	3
V.	CAS Activities on Drug Use and HIV/AIDS	3
	A. The HIV, Alcohol, and Other Drug Use Project	3
	B. A National Workshop on Street-Involved People and HIV/AIDS	5
	C. AIDS Awareness Week 1996	5
VI.	Joint CAS/Network Project	6
	A. Phase I	6
	B. Drug Use and HIV/AIDS: A Literature Review	7
	1. Calls for Changes to Drug Laws	7
	2. The Impact of HIV/AIDS	8
	3. Drugs as a Health Issue	10
	4. Drugs and Human Rights	11
	5. Recommendations	12
	6. Conclusions	13
	C. HIV/AIDS and Drug Use in Prisons	14
	1. Background	14
	2. New Developments	15
	3. The Moral and Legal Responsibilities of Prison Systems	16
	4. Conclusion	17
VII.	Alternatives and Recommendations	18
APPENDIX 1: Criminalization of Drug Use: Ineffective and Unethical?		

## I. INTRODUCTION

This paper outlines how Canadian drug laws and policies impact on the spread of HIV/AIDS and other diseases such as hepatitis B and C.

It first provides some information about the Canadian HIV/AIDS Legal Network (Network) and the Canadian AIDS Society (CAS), in particular, about their activities in the area of HIV/AIDS and drug use.

It then summarizes the results of Phase I of a Joint Project on Legal and Ethical Issues Raised by HIV/AIDS, undertaken by the Network and CAS. During this phase of the Project, **over 60 individuals and organizations consulted by the Project Coordinator expressed concern about the impact of Canadian drug laws and policies on the spread of HIV.** A literature review undertaken as part of Phase I of the Project showed that many authors expressed a view that **drug use should be treated as a health issue rather than a criminal activity, and that drug laws and policies need to be respectful of the human rights of persons using drugs.**

The paper then briefly discusses the results of the research undertaken by the Joint Project in the area of HIV/AIDS, drug use, and prisons. This research shows that **drug use is a reality in Canadian prisons and that Canadian drug laws and policies contribute to the spread of HIV among prisoners and to the community.**

The paper concludes by supporting the changes to Bill C-8 proposed by the Canadian Drug Policy Foundation (Foundation). CAS and the Network share the Foundation's criticism of Bill C-8, as voiced on 10 May 1994, when the Foundation appeared before the Health Subcommittee, and on 14 December 1995, when it appeared before this Committee. We share the Foundation's view that the Bill, in the amended form proposed by the Foundation, addresses many of the concerns with Bill C-8. In particular, **the amendments proposed by the Foundation would reduce the risk of further spread of HIV.**

Annexed to the submission is a paper first presented at a meeting on AIDS, Justice and Health Policy in Milan, Italy. The paper, entitled "Criminalization of Drug Use: Ineffective and Unethical?," argues that, particularly in view of the advent of HIV infection and the resulting increase in mortality for drug users, laws and policies should be revised because they have been increasingly recognized as ineffective in reducing or suppressing drug use and the harms resulting from drug use, and as impeding efforts to achieve these outcomes. The paper's conclusion is still valid:

Social policy-makers must meet the challenge of developing policies that will reduce the harms from drug use while at the same time protecting the liberty of individuals. Current and possible future measures should be evaluated according to the following criteria: first, how effectively they reduce harms from drug use, second, whether or not they are proportional to the harms defended against, and third, whether or not they can be justified ethically and economically. An approach to drug use is recommended that would match the

degree of regulation to the harms from the use of each drug to the user and to society. Such an approach should be congruent with principles of human rights, ethics and morals.

## **II. CANADIAN HIV/AIDS LEGAL NETWORK**

The Network is the only national, community-based, charitable organization in Canada working in the area of policy and legal issues raised by HIV/AIDS. It was formed in November 1992 with the mandate to advance education and knowledge about legal, ethical, and policy issues raised by HIV/AIDS, and to promote responses to HIV infection and AIDS that respect human rights.

The Network provides services to persons living with HIV/AIDS, to those affected by the disease, and to persons working in the area by educating about, facilitating access to, and creating accurate and up-to-date legal materials on HIV/AIDS. It links people working with or concerned by relevant social and legal issues in order to limit the spread of HIV and to reduce the impact on those affected by HIV infection and AIDS.

In October 1994, the Network launched the *Canadian HIV/AIDS Policy & Law Newsletter*, devoted to addressing the many legal, ethical and policy issues raised by HIV/AIDS. From the outset, it has provided extensive coverage of issues raised by HIV/AIDS and drug use. The *Newsletter* serves as a means of educating policymakers, lawyers and any other people with an interest in issues raised by HIV/AIDS about legal and policy developments, but also as a means of stimulating much-needed discussion about these issues.

## **III. CANADIAN AIDS SOCIETY**

The Society is a national coalition that supports community action on HIV/AIDS issues in Canada. It represents more than 100 community-based organizations across the country, providing the bulk of education, support and advocacy programs and services for individuals and communities affected by HIV/AIDS.

The role of the Society is to speak as the national voice and to act as a national forum for a community-based response to HIV infection and AIDS. The Society also undertakes advocacy on behalf of people affected by HIV and AIDS, acts as a resource on HIV and AIDS issues for its member organizations and coordinates community-based participation in a national strategy to combat HIV and AIDS. The Society carries out this role through national initiatives in prevention education, treatment, care and support.

#### IV. NETWORK ACTIVITIES ON DRUG USE AND HIV/AIDS

##### A. *Canadian HIV/AIDS Policy and Law Newsletter*

Recognizing that Canadian drug laws and policies have a significant impact on the spread of HIV, the editorial committee of the *Newsletter* has solicited contributions on HIV/AIDS and drug-use issues, resulting in the publication of articles on Bill C-7,<sup>1</sup> methadone and HIV/AIDS,<sup>2</sup> drug policy and HIV/AIDS in British Columbia,<sup>3</sup> and access to sterile needles for young people under the age of 14.<sup>4</sup>

##### B. HIV/AIDS Policy & Law Seminar Series

Dr Diane Riley was the second speaker in our Seminar Series. Her presentation, held on 21 November 1995, was entitled "Drugs and AIDS: The Impact of Canadian Drug Laws on the Spread of HIV." Riley discussed current Canadian laws and policies regulating the use of drugs. She argued that existing drug legislation and policies are irrational and confusing, and that they contribute to the deaths of thousands of people through the preventable spread of HIV and other infections such as hepatitis and tuberculosis.

#### V. CAS ACTIVITIES ON DRUG USE AND HIV/AIDS

##### A. The HIV, Alcohol, and Other Drug Use Project

In February 1995, CAS published the results of a six-month project on HIV, alcohol, and other drug use.<sup>5</sup> The project was developed to:

- identify barriers to services for people living with HIV/AIDS and chemical dependencies;
- facilitate closer collaboration between AIDS-service organizations, needle-exchange programs, and addiction-related service providers in an effort to find solutions to the

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<sup>1</sup> D Riley, E Oscapella. Bill C-7: Implications for HIV/AIDS Prevention. *Canadian HIV/AIDS Policy & Law Newsletter* 1995; 1(2): 1, 11-13; D Riley, E Oscapella. Bill C-7: An Update. *Canadian HIV/AIDS Policy & Law Newsletter* 1996; 2(3):5.

<sup>2</sup> D Riley. Methadone and HIV/AIDS. *Canadian HIV/AIDS Policy & Law Newsletter* 1995; 2(1): 1, 13-15.

<sup>3</sup> J Anderson. AIDS and Overdose Deaths in British Columbia. *Canadian HIV/AIDS Policy & Law Newsletter* 1996; 2(3): 1, 25-26.

<sup>4</sup> R Cloutier, D Roy. Access to Sterile Needles for Young People under the Age of 14. *Canadian HIV/AIDS Policy & Law Newsletter* 1996; 2(3): 3-4.

<sup>5</sup> CAS. Improving Services for People Living with HIV and Chemical Dependency. The HIV, Alcohol, and Other Drug Use Project: Findings and Recommendations. Ottawa: The Society, 1995.

- barriers identified and enhance services for people living with HIV/AIDS and chemical dependencies; and
- provide direction for future national and regional collaborative initiatives with respect to meeting the needs of people living with HIV/AIDS and chemical dependencies.

Nearly 35 consultations and informal information gathering meetings were completed in 10 centres across Canada. People contacted include:

- counsellors from AIDS-service organizations;
- addiction professionals;
- people working with needle-exchange programs;
- HIV counsellors;
- department of health representatives;
- representatives from ethnocultural/aboriginal groups; and
- people living with HIV and chemical dependency.

The project identified numerous systemic barriers that marginalize and dehumanize drug users. Some of the barriers include:

- crime control (eg, users are viewed as criminals and will fear judgment if they attempt to access help; heroin cannot be prescribed and thus harm reduction for a person who uses heroin is difficult); and
- restrictive policies (eg, people without an address cannot access services; methadone prescriptions are not allowed in some areas; people who use drugs cannot use any drugs while in certain treatment programs thus eliminating necessary medications).

The project made the following recommendations to CAS:

It is recommended that the Canadian AIDS Society: ...

- Gets involved in advocating against negative judgments and attitudes toward people who use drugs. As outlined by the Working Group on Injection Drug Use of the National Advisory Committee on AIDS (1993), major improvement in professional and public attitudes to drug use and drug users is necessary since policies and actions which fail to respect the human rights and dignity of drug users may promote the hidden use of drugs [reference omitted]. Negative judgments create barriers to services for people living with HIV and chemical dependency. ...
- Advocates for the decriminalization of drugs.

- Advocates for harm reduction approaches. ...
- Advocates for prescribing programs such as cocaine and methadone. ...

The project report concludes that the "ultimate goal is to create programs and societal attitudes which not only accept people living with HIV and chemical dependency but welcome them."

Building on the results of the "HIV, Alcohol and Other Drug Use Project," in February 1996 CAS submitted a proposal for a one-year initiative to the AIDS Community Action Program, Health Canada. The purpose of the project is to enhance the skills of support service workers to enable them to adequately respond to the support needs of people living with HIV/AIDS and substance use issues.

#### **B. A National Workshop on Street-Involved People and HIV/AIDS**

A national workshop on street-involved people and HIV/AIDS, funded by Health Canada's AIDS Education and Prevention Unit and organized by CAS, was held in Toronto from 17-19 March 1995. At the workshop, one day was devoted to small-group work on designated topics, including "The Law and the Street" and "Drug Use." Among other issues, recommendations at the session on "The Law and the Street" focused on:

- opposing Bill C-7 – viewing drug addiction as a social and medical issue rather than a criminal issue; and
- using harm reduction approaches rather than abstention approaches.

Recommendations at the session on "Drug Use" focused on:

- recognizing that drug use is linked to other social issues such as poverty, abuse, lack of self-esteem, and families in difficulty;
- acknowledging that harm reduction is the most realistic model;
- lobbying for adoption of the recommendations of Coroner Cain's report on a national basis;
- pharmacies becoming needle exchanges;
- legalizing marijuana use, which would benefit people living with HIV/AIDS; and
- increasing services to drug users in prisons.

At the final plenary session, there was a call from one participant that all present should work to stop the passage of Bill C-7.

#### **C. AIDS Awareness Week 1996**

The theme of CAS 1996 AIDS awareness campaign is substance use and HIV/AIDS. The goal of the campaign will be to raise awareness about the links between drug use, and drug laws and policies, and HIV/AIDS. The campaign will also try to break down some of the stigmas that surround both substance use and HIV/AIDS, recognizing that failure to respect the rights and dignity of people who use drugs may promote the hidden use of drugs and impair efforts to stop the spread of HIV.

## VI. JOINT CAS/NETWORK PROJECT

The Joint Project on Legal and Ethical Issues Raised by HIV/AIDS started in January 1995 with a five-month development initiative and entered into its second phase in June 1995.

### A. Phase I

During Phase I of the Project, key legal and ethical issues raised by HIV/AIDS in Canada have been assessed and prioritized. After extensive meetings with over 60 persons living with HIV/AIDS, representatives from community-based organizations, lawyers, academics and government policy analysts active in the HIV/AIDS area, a list of eight topics was drawn up that includes legal and ethical issues identified as immediate priorities by the persons and organizations consulted. This list includes:

- (1) testing and confidentiality;
- (2) discrimination;
- (3) access to healthcare;
- (4) HIV/AIDS and homosexuality;
- (5) criminalization of HIV transmission;
- (6) drug laws and policies and their impact on the spread of HIV;**
- (7) laws and policies regulating prostitution and their impact on the spread of HIV;**
- (8) legal issues raised by HIV/AIDS in prisons.

With regard to HIV/AIDS and drug use, individuals and groups consulted were concerned that:

- drug users, rather than being offered easy access to treatment for both their drug use and HIV/AIDS, are being "driven underground";
- existing laws and policies make it difficult to reach and educate them;
- drug use is treated as a criminal activity rather than a health issue.

Many pointed out the existing inconsistencies between laws and policies regulating licit drugs, whose use is sanctioned and often even encouraged, and laws and policies regulating the use of illicit drugs. Other concerns included:



- limited access to methadone;
- limited availability of drug treatment;
- mandatory HIV-testing for people seeking access to certain drug-treatment programs;
- counselling of abortion for drug users, whether HIV positive or not, which was said to be common;
- limited availability of needle-exchange programs, often only in major centres, and there only in downtown areas; and
- non-inclusion of drug users in clinical trials.

## **B. Drug Use and HIV/AIDS: A Literature Review**

As part of Phase I of the Project, existing resources addressing legal and ethical issues raised by HIV/AIDS have been researched and documented. Resources have been evaluated, listed in an annotated bibliography, and included in a literature review.<sup>6</sup>

### **1. Calls for Changes to Drug Laws<sup>7</sup>**

Already in the early 1970s, the LeDain Commission recommended radical changes to Canadian drug laws,<sup>8</sup> including decriminalization of the possession of marijuana. A minority even called for decriminalizing the possession of all drugs, and for making "hard" drugs available to dependent users.<sup>9</sup> These conclusions were reached at a time when HIV/AIDS was unknown. They have remained controversial: for some, they did not go far enough and should have included a clear recommendation to decriminalize the possession of all drugs; for others, they went too far. Both supporters of decriminalization of drug use and supporters of the "War on Drugs" have continued to write numerous articles and reports laying out the main arguments in favour of their respective positions. Their positions seem irreconcilable, and both defend them with religious ardour. For example:

- Mitchell, who takes a position in favour of sweeping changes to existing drug laws, argues that drug-control legislation is founded on myth and prejudice rather than on

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<sup>6</sup> R. Jürgens. *Legal and Ethical Issues Raised by HIV/AIDS: Literature Review and Annotated Bibliography*. Canadian AIDS Society and Canadian HIV/AIDS Legal Network. Montréal, 1995.

<sup>7</sup> The following is a revised version the literature review. See also R Jürgens. Drug Laws and HIV/AIDS. *Canadian HIV/AIDS Policy & Law Newsletter* 1996; 2(3): 1, 26-28.

<sup>8</sup> For a review of Canadian drug legislation, see RM Solomon, SJ Usprich. Canada's Drug Laws. *Journal of Drug Issues* 1991; 21(1): 17-40.

<sup>9</sup> E Oscapella. Le Dain Revisited – 21 Years Later. *The Lawyers' Weekly* 1995; 14(35): 5.

principles of justice and scientific validity.<sup>10</sup> He calls for major changes in the law, in order to reduce drug-related social costs and to promote a more civil, drug-tolerant society;<sup>11</sup>

- Hadaway et al argue that "the harm to society and to individuals resulting from our drug control policies is ... greater than the benefits which drug policy legislators would have us believe are achievable. Through these policies, we are ... sacrificing our societal and individual rights, rather than supporting a rational effort toward lessening the abuse of drugs."<sup>12</sup>
- Erickson takes a more cautious position: although she admits that the "high costs and dubious benefits" of prohibitionist policies are well documented, she argues that it would not be useful to abandon present legal controls "simply from frustration or a sense of defeat." In her view, positive alternatives must be provided.<sup>13</sup>

## 2. The Impact of HIV/AIDS

In recent years, partly as a consequence of the HIV/AIDS epidemic, many have abandoned the narrow debate in favour of or against decriminalization, and have begun focusing on the harms deriving from drug use in an effort to develop pragmatic ways in which to reduce them. There can be no question that concern about HIV/AIDS, especially about the connection between the sharing of contaminated syringes and the spread of HIV, is having a significant impact on the course of drug-prevention policy.<sup>14</sup> The government-funded establishment of needle-exchange programs is probably the most notable example of the major changes that are underway. According to O'Brien, such programs represent an explicit recognition of the social reality of drug use, the impracticality and futility of efforts designed to eradicate the problem, and the public health necessity of adopting measures to contain the

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<sup>10</sup> CN Mitchell. A Justice-Based Argument for the Uniform Regulation of Psychoactive Drugs. *McGill Law Journal* 1986; 31: 212-263.

<sup>11</sup> CN Mitchell. Introduction: A Canadian Perspective on Drug Issues. *Journal of Drug Issues* 1991; 21(1): 9-16.

<sup>12</sup> P Hadaway et al. Canadian Drug Policies: Irrational, Futile and Unjust. *Journal of Drug Issues* 1991; 21(2): 183-197.

<sup>13</sup> PG Erickson. A Public Health Approach to Demand Reduction. *The Journal of Drug Issues* 1990; 20(4): 563-575.

<sup>14</sup> R Power et al. Drug Prevention and HIV Policy. *AIDS* 1990; 4(Suppl 1): S263-S267.

rapidly increasing rate of HIV infection among injection drug users.<sup>15</sup> Many governments, including Canada's, are officially embracing the so-called "harm-reduction approach" to drug use. Under this approach, the first priority is to reduce the negative consequences of drug use rather than its prevalence. Harm reduction "establishes a hierarchy of goals, with the more immediate and realistic ones to be achieved as first steps toward risk-free use or, if appropriate, abstinence."<sup>16</sup> While some people fail to make a distinction between harm-reduction approaches and approaches advocating decriminalization, the difference is clear: a harm-reduction approach may or may not include the goal of decriminalization of drug use, but even if it does, this will only be one of many components of a strategy to reduce the harms from drug use, not its primary goal.

In practice, as pointed out by many, existing as well as proposed new drug laws and policies often render efforts to reduce the harms from drug use and, in particular, the spread of HIV/AIDS, more difficult to undertake. With regard to Bill C-8, Riley and Oscapella have said: "If the Bill is passed, the result will be continued misdirection of resources, continued emphasis on criminalization of drug users, and the unnecessary infection with HIV, and death, of many Canadians."<sup>17</sup> The authors provide a long list of reasons why "Canadian drug laws are contributing to the deaths of thousands of people through the preventable spread of HIV and other infections such as hepatitis and TB." These laws have:

- encouraged users to ingest certain drugs (eg, cocaine, heroine) in more efficient ways, often by injecting (injecting with contaminated equipment greatly increases the risk of HIV infection and other bloodborne infections);
- created a culture of marginalized people, driving them away from traditional social support networks;
- fostered a reluctance to educate about safe drug-use practices, for fear of condoning or encouraging the use of illegal drugs;
- fostered public attitudes that are "vehemently anti-drug user," creating a climate "in which it is difficult to persuade Canadians to care about what happens to their fellow citizens who use drugs";

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<sup>15</sup> M O'Brien. Needle Exchange Programs: Ethical and Policy Issues. *AIDS & Public Policy Journal* 1989; 4(2): 75-82.

<sup>16</sup> D Riley. *The Harm Reduction Model. Pragmatic Approaches to Drug Use from the Area Between Intolerance and Neglect*. Ottawa: Canadian Centre on Substance Abuse, 1993.

<sup>17</sup> D Riley, E Oscapella. Bill C-7: Implications for HIV/AIDS Prevention. *Canadian HIV/AIDS Policy & Law Newsletter* 1995; 1(2): 1, 11-13. For an update, see *infra*, D Riley, E Oscapella. Bill C-7: An Update.

- focused too much attention on punishing Canadians who use drugs, "thereby downplaying critically important issues such as why people use drugs and what can be done to help stop unsafe drug-use practices";
- greatly increased the risk of spreading HIV in prisons: dependent users may have to commit acquisitive crimes to be able to pay the exorbitant illegal market price of drugs, a price that is the product of prohibition; thus drug laws are indirectly responsible for other crimes and result in users being placed in prison environments where they will continue to use drugs, but will likely have no means to protect themselves against HIV infection; in prison, they are unlikely to receive effective drug treatment; because of drug testing programs, they may switch to injection drug use, thus increasing the risk of contracting HIV; finally, prisons have become overcrowded with people charged with drug offenses, making it more likely that AIDS will spread there. In addition, a number of prisoners report using drugs and injecting for the first time in their lives when they are in prison – perhaps because that is the only way they can cope with the oppression inherent in institutional environments; and
- led many drug users – who fear being arrested for possession of illegal drugs, and fear having their syringes used as evidence against them – to forego using their own drugs and syringes. Instead, they may go to "shooting galleries" where they may be given syringes contaminated with HIV.

### 3. Drugs as a Health Issue

This should be a time to re-evaluate Canada's drug laws and to draft new ones based on public health and harm-reduction principles. Canada should move toward treating drugs as a health, rather than criminal, issue. This view is shared by many authors. For example, Gostin argues that governments should pursue a policy on drug use that explicitly prefers therapeutic and public health goals to law enforcement goals "when these two are in conflict."<sup>18</sup> In his view, such a preference for therapeutic goals is needed because of the seriousness of the HIV epidemic and because the sweep of criminal prohibitions and government regulation often renders public health measures ineffective. He concludes: "Drug use and the needle-borne spread of infection are primarily public health problems. Seriously drug-dependent people are neither uncaring about the effects of drug use and HIV on themselves or their partners, nor unable to change their behaviors if given the education, means, and services to do so." Power et al urge that all legislation affecting drug policy take account of the consequences for preventative strategies concerning HIV, to avoid such

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<sup>18</sup> L. Gostin. *The Interconnected Epidemics of Drug Dependency and AIDS*. *Harvard Civil Rights–Civil Liberties Law Review* 1991; 26: 113-184; see also Gostin. *Drug Dependency and HIV*. In: S Burris et al (eds). *AIDS Law Today. A New Guide for the Public*. New Haven: Yale University Press, 1993, at 150-186.

legislation hampering HIV/AIDS prevention activities.<sup>19</sup> As stated by Oscapella, there are even more reasons today than 21 years ago (at the time of the LeDain Commission) for dealing with drugs as a health, not criminal, issue. The main reason for this is the advent of HIV/AIDS: a revived LeDain Commission "would have to question the sanity of laws and policies that invite further spread of this lethal disease for the sake of preserving some distorted notion of public morality."<sup>20</sup>

#### 4. Drugs and Human Rights

A further aspect that should guide drug legislation and policy is mentioned by Justice Michael Kirby, President of the Court of Appeal, New South Wales, Australia, and President of the International Commission of Jurists: drug laws and policies must be not only pragmatic, but also respectful of the human rights of persons using drugs. According to Kirby, the human rights of drug-dependent persons and of recreational drug users is a subject that has been ignored until now by most lawyers and virtually all judges:

We have all become caught up in the drug control prohibitionist model. ... The advent of the AIDS pandemic requires a completely fresh consideration of this strategy both at a global and at a national level. The matter must be addressed both in pragmatic and human rights terms. Putting it quite bluntly, it is an uncivilised act to punish people, with long periods of imprisonment, who are addicted to particular drugs. The problem is, and should be treated as, one of public health concern, not one of law and order. ... Drug use ... is here to stay. A sensible legal strategy will be targeted at harm minimisation. Not the elusive chimera of total legal prohibition. HIV/AIDS will eventually teach us this.<sup>21</sup>

McCarthy<sup>22</sup> and Silvis et al<sup>23</sup> also emphasize that the human rights of persons using drugs have been ignored. McCarthy points out that, for a variety of reasons, attempting to reduce discrimination against injection drug users is more difficult than attempting to reduce discrimination experienced by persons living with HIV/AIDS or by gay men. In her view, it has become apparent that society generally justifies discriminating against drug users

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<sup>19</sup> Supra, note 14.

<sup>20</sup> Supra, note 9.

<sup>21</sup> Kirby M. Sex, Drugs and the Family. [Australian] *National AIDS Bulletin* February 1994; 7(12): 20-22 at 21.

<sup>22</sup> G McCarthy. Drug Use & Discrimination. [Australian] *National AIDS Bulletin*; August 1994: 32-33.

<sup>23</sup> J Silvis et al (eds). *Drug Use and Human Rights in Europe*. Utrecht and Montréal: Willem Pompe Institute for Criminal Law & Criminology and McGill Centre for Medicine, Ethics and Law, 1992.

"because the principle of fairness does not apply." Injection drug use is seen as a mere lifestyle choice, something that can be stopped, amended or changed, and people take the attitude that "[i]f they [drug users] don't like the way they're treated they can stop." McCarthy points out that experiences of discrimination are so common among injection drug users that most of them do not realize they are being discriminated against. For them, it has become "normal" to be treated badly and vilified, and fear of poor treatment is a major barrier to accessing needed services. For McCarthy, it was a "shock" to discover just how widespread discrimination against injection drug users is. She concludes:

I find it a sad comment on society when a group that is often most in need of services is denied access or actively discouraged from accessing these services. Even more disturbing is that this treatment of injectors seems so acceptable to society.<sup>24</sup>

## 5. Recommendations

Recognizing that **"the spread of HIV is a greater danger to individual and public health than injection drug use itself,"** (emphasis added) in 1990 the Working Group on HIV Infection and Injection Drug Use of the Canadian National Advisory Committee on AIDS (NAC-AIDS) issued a set of recommendations, many of which have still not been implemented. The Working Group pointed out that

major improvement in professional and public attitudes to injection drug use and injection drug users is necessary since policies and actions which fail to respect the human rights and dignity of injection drug users may promote the hidden use of drugs and impair the effectiveness of measures to combat the spread of HIV.<sup>25</sup>

In 1994, at the Second National Workshop on HIV, Alcohol, and Other Drug Use, participants agreed to adopt and promote the Working Group's recommendations as the foundation for a comprehensive action plan on HIV and drug use. They further debated a number of recommendations going beyond those contained in the NAC-AIDS document, focusing on the human rights of drug users and/or challenging some aspect of the way in which drug use is addressed through the criminal justice system in Canada. These include the following recommendations:

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<sup>24</sup> G McCarthy. Drug Use & Discrimination. [Australian] *National AIDS Bulletin* August 1994: 32-33.

<sup>25</sup> NAC-AIDS Working Group on HIV Infection and Injection Drug Use. Principles and Recommendations on HIV Infection and Injection Drug Use. In: *Second National Workshop on HIV, Alcohol, and Other Drug Use: Proceedings, Edmonton, Alberta, February 6-9, 1994*. Ottawa: Canadian Centre on Substance Abuse, 1994.

- de facto decriminalization of personal possession and use of cannabis, coupled with control of narcocriminality elements;
- changes to drug paraphernalia laws so that needles can be sold to shooting galleries;
- development of alternatives to imprisonment for people involved in drug crimes or drug-related crimes – drug offenders should generally be referred to community help and treatment services rather than be sent through the courts;
- acknowledgment by governments in Canada of the multiple harms caused by responding to drug issues through the criminal law, including: increased risk of HIV among injection drug users in the general population and in prisons; unwarranted criminalization of drug users; harm done to the fundamental human rights of all Canadians;
- stopping of proposed legislation, such as Bill C-7, aimed at strengthening and perpetuating the use of the criminal law. Instead, governments should focus on social policy and health measures to reduce drug-related harms at the individual and societal level.

Support for these recommendations was not unanimous. However, delegates agreed that reducing the harms from drug use must be the primary concern of Canadian drug laws and policies, and that this requires rethinking current laws and policies.

## 6. Conclusion

Among people and organizations working on issues raised by HIV/AIDS in Canada, there is a lot of concern that current and proposed Canadian drug laws and policies contribute to the spread of HIV and other bloodborne diseases among drug users and to the general public. There is consensus that

- while many reasons existed before the advent of HIV/AIDS to call for changes of laws and policies, the rapid spread of the disease has made these changes even more important and pressing: the spread of HIV is a greater danger to individual and public health than drug use itself;
- drug use should be treated as a health and social, rather than criminal, issue;
- respect for the human rights of all individuals, including drug users, needs to be ensured; and

- generally, reducing the harms from drug use needs to be the primary focus of Canadian drug laws and policies.

## C. HIV/AIDS and Drug Use in Prisons

### 1. Background

After completion of Phase I of the Project, the Project started working on legal and ethical issues raised by HIV/AIDS and drug use in prisons. One of the major concerns is that, because of current drug laws, many drug users spend years of their lives in and out of prisons, where they are at increased risk of contracting HIV (or, if they are HIV-positive, of transmitting HIV to fellow-inmates and to their partners outside prison). As stated by the Expert Committee on AIDS in Prisons (ECAP) in its 1994 Report on HIV/AIDS in Prisons:<sup>26</sup>

some inmates will enter prisons already infected; for those not infected when they enter prison, persistent injection drug use in prison without access to clean injection equipment means that HIV infection will be unavoidable. Some offenders will begin using drugs when they are incarcerated. And a significant number of inmates share injecting equipment for the first time when they are in prison.<sup>27</sup>

In most countries, including Canada, imprisonment is the single largest response to the drug problem, and more resources are used in moving drug users through the criminal justice system than any other form of management, medical or social. The Expert Committee concluded that the number of drug users who are incarcerated should be reduced:

Many of the problems created by HIV infection and by drug use in prisons could be reduced if alternatives to imprisonment, particularly in the context of drug-related crimes, were developed and made available.<sup>28</sup>

Similarly, the World Health Organization has stated that

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<sup>26</sup> Correctional Service Canada. *HIV/AIDS in Prisons: Final Report of the Expert Committee on AIDS and Prisons*. Ottawa: Minister of Supply and Services Canada, 1994. The report includes two other documents: *HIV/AIDS in Prisons: Summary Report and Recommendations*; and *HIV/AIDS in Prisons: Background Materials*.

<sup>27</sup> *Final Report* at 6, with reference.

<sup>28</sup> *Ibid.*



[g]overnments may ... wish to review their penal admission policies, particularly where drug abusers are concerned, in the light of the AIDS epidemic and its impact on prisons.<sup>29</sup>

In November 1995, only 18 months after the release of ECAP's *Final Report*, the Network/CAS Project released a new Discussion Paper on HIV/AIDS in prisons.<sup>30</sup> The Paper points out that many of ECAP's recommendations – including some that the Correctional Service of Canada (CSC) agreed with – have not been implemented.

## 2. New Developments

The Discussion Paper reviews a variety of new developments related to HIV/AIDS and drug use in Canadian federal prisons, which occurred since 1994:

- a 40 percent increase in the number of known cases of HIV/AIDS in federal correctional institutions over a period of 18 months;
- an increase in the number of prisoners living with symptomatic HIV infection or AIDS in prisons, requiring more extensive and costly medical care;
- increasing evidence of high-risk behaviours in prisons;
- increasing evidence that, as a result of such behaviours, HIV is being transmitted in prisons;
- the rapid spread of hepatitis C in prisons, as evidenced by three recent studies that revealed hepatitis C seroprevalence rates of between 28 and 40 percent;
- legal action undertaken by prisoners in two Australian states against their prison systems for failing to provide measures to prevent the spread of HIV;
- reports on HIV/AIDS in prisons issued in other countries, reinforcing the consensus that more needs to be done to prevent the spread of HIV in prisons, and to care for prisoners living with HIV/AIDS; and

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<sup>29</sup> Ibid, with reference to WHO. *Statement from the Consultation on Prevention and Control of AIDS in Prisons*. Global Programme on AIDS. Geneva: WHO, 1987.

<sup>30</sup> R Jürgens. *HIV/AIDS in Prisons: A Discussion Paper*. Montréal: Canadian HIV/AIDS Legal Network and Canadian AIDS Society, 1995.

- a pilot project for needle distribution in prisons in Switzerland, demonstrating that sterile needles can be distributed in prisons safely and with the support of inmates, staff, prison administrations, politicians, and the public.

### 3. The Moral and Legal Responsibility of Prison Systems

The Paper concludes that, although the prevalence of HIV among Canadian prisoners is more than 10 times higher than in the general community, far from enough is being done to prevent the spread of HIV infection in prisons and to provide prisoners living with HIV or AIDS with adequate treatment, support and care:

Provincial and federal prison systems have taken steps in the right direction, and there can be no question that the situation with regard to HIV/AIDS in prisons in Canada has improved over the years. However, many of ECAP's and PASAN's recommendations – including some recommendations CSC agreed with in its response to ECAP's report – have not been implemented, putting prisoners, staff, and members of the public at risk of their lives.

The Paper points out that, if federal and provincial prison systems want to fulfil their moral and legal obligations, they need to reconsider their response (or lack of response) to the recommendations made, and will have to adopt a more pragmatic approach to drug use in prisons. It emphasizes that the idea of a drug-free prison does not seem to be any more realistic than the idea of a drug-free society, and that stability may actually be better achieved by moving beyond this concept:<sup>31</sup>

Because of HIV/AIDS, prisons cannot afford to continue focusing on the reduction of drug use as the primary objective of drug policy. While reduction of drug use is an important goal, reduction of the spread of HIV and other infections is more important: unless prison systems act aggressively to reduce the spread of HIV, there may be slightly reduced rates of drug use in prisons, but many more prisoners living with HIV/AIDS and/or hepatitis C and other infections.

According to the Paper, making available to inmates the means that are necessary to protect them from HIV transmission does not mean condoning drug use in prisons: rather, it is a pragmatic measure acknowledging that protection of prisoners' health needs to be the primary objective of drug policy in prisons. The Paper continues by saying that introducing harm-reduction measures is not incompatible with a goal to reduce drug use in prisons:

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<sup>31</sup> D Shewan et al. *Drug Use and Scottish Prisons: Summary Report*. Scottish Prison Service Occasional Paper no 5, 1994, at 24.

making sterile needles available to drug users has not led to an increase in drug use, but to a decrease in the number of injection drug users contracting HIV and other infections.<sup>32</sup> Similarly, making methadone available to some users does not mean giving up on the ultimate goal of getting people off drugs: rather, it is a realistic acknowledgment that for some users this requires time, and that they need an option that will allow them to break the drug-and-crime cycle, reduce their contact with the black market, link with needed services, and reduce the risk of their becoming infected with HIV.

The Paper concludes by saying that:

Clearly, prison systems also have a moral and legal responsibility to do whatever they can to prevent the spread of infectious diseases among inmates and to staff and the public, and to care for inmates living with HIV and other infections. Currently, they are failing to meet this responsibility, because they are not doing all they could: measures that have been successfully undertaken outside prison with government funding and support, such as making sterile injection equipment and methadone maintenance available to injection drug users, are not being undertaken in Canadian prisons, although other prison systems have shown that they can be introduced successfully, and receive support from prisoners, staff, prison administrations, politicians and the public.

The Paper expresses the hope that governments and the prison systems in Canada will act without prisoners having to undertake legal action holding them responsible for the harm resulting from their refusal to provide adequate preventative means. It emphasizes that

prisoners, even though they live behind the walls of a prison, are still part of our communities and deserve the same level of care and protection that people outside prison get: they are sentenced to prison, not to be infected.

#### 4. Conclusion

Much could be done to reduce the risk of HIV transmission in Canadian prisons. In particular, making sterile needles available to prisoners injecting drugs, and offering methadone maintenance programs and better treatment for drug use would help prevent the spread of HIV in prisons. However, Canada also has to address the underlying problem: **there can be no doubt that many of the problems raised by HIV/AIDS and drug use in**

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<sup>32</sup> See, eg, Centers for Disease Control and Prevention. *The Public Health Impact of Needle Exchange Programs in the United States and Abroad. Summary, Conclusions and Recommendations*. The Centers, September 1993, at iii-vii.

prisons are the result of Canada's drug policy which, instead of providing drug users with much-needed treatment, care, and support, criminalizes their behaviour and puts many of them in prison. The financial and human costs of this policy are enormous, and prison systems are burdened with a problem society fails to deal with, and that they are even less equipped to deal with.<sup>33</sup>

## VII. ALTERNATIVES AND RECOMMENDATIONS

As many of my colleagues have pointed out to this Committee, Canada needs an honest, open, objective, nonpartisan reassessment of its drug policy: we need to examine the role, the appropriateness and the status of the criminal law at the centre of this policy and to investigate the alternatives that are available. Three fundamental principles under which a policy review should take place have been identified:<sup>34</sup>

- public health;
- rational pharmacology;
- cost effectiveness.

The Canadian HIV/AIDS Legal Network and the Canadian AIDS Society would like to add a fourth principle:

- respect for human rights.

The Network and CAS are also aware that this Committee has only one of the following three options:

- amend the bill and then pass it;
- defeat the bill, which would result in the continuation of the status quo;

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<sup>33</sup> This was also expressed by participants at Canada's First National HIV/AIDS and Prisons Workshop, held in Kingston on 18-20 August 1995. Two hundred prisoners and ex-prisoners, community workers and prison activists, health-care staff and correctional officers from federal and provincial prisons, and representatives from Health Canada and the Correctional Service of Canada (CSC) met to discuss the many issues raised by HIV/AIDS in prisons. The Workshop was organized by the Toronto-based Prisoners with HIV/AIDS Support Action Network (PASAN) and was made possible with contributions from Health Canada and CSC under the National AIDS Strategy.

<sup>34</sup> The Standing Senate Committee on Legal and Constitutional Affairs. Ottawa, 14 December 1995, 1020-1 (Mr Benedikt Fisher speaking for the Canadian Drug Policy Foundation).

- pass the bill as it is.

In our view, the bill is fundamentally flawed. If it were to be defeated, this would send a clear signal to the government that the current and proposed drug legislation are irrational and defective. However, it would probably then take years before a new bill is proposed. Therefore, the Network and CAS would like to strongly support the amendments proposed by the Canadian Drug Policy Foundation and submitted to this Committee on 1 February 1996. In particular, we would like to support:

- the exception for "a syringe containing an amount less than that set out in Schedule X in relation to the substances identified there, in introducing the substance into a human body" under s 2.(2)(b)(ii)(B). (Injection drug users should always feel safe to carry their own injection equipment with them. If they do not, this will increase the likelihood that they share needles in shooting galleries, with the resulting increased risk of HIV transmission.)
- the "Declaration of Principle" inserted as s 3.1. While stating up front that the harmful use of substances should not be encouraged or promoted, this declaration would recognize (1) that drug use is primarily a health and social, rather than criminal, issue; (2) that Canada must strive to reduce the harms from drug use, including the spread of HIV and other bloodborne diseases; and (3) that the human rights of all Canadians, including Canadians using drugs, must be respected.
- the express inclusion of a review process of Canada's drug laws and policies, with clear deadlines and proposals for the composition of the committee that would undertake the review. While the Foundation's amendments significantly improve Bill C-8, this acknowledges that further changes are needed in the longer term.
- the confirmation that the provisions of the *Criminal Code* relating to impairment continue to apply to any impairment caused by any substance regulated by the bill; and
- removal of the criminal prohibition for the possession by adults of small amounts of substance for personal use; rationalization of sentencing for offences involving possession of larger amounts of substances; removal of the criminal prohibition on the transfer among adults, for no consideration, of small amounts of substances; and continuation of the prohibition of the trafficking of substances to minors, whether for consideration or not. These amendments would help to decrease the numbers of drug users in prisons and the sentence length of those who would still be imprisoned. Because prisons are places that contribute to the spread of HIV not only among inmates, but to society as a whole, keeping drug users out of them, or reducing the amount of time they spend in them, must be a priority.

In summary, the amendments would:

- reduce the spread of HIV and other bloodborne infections among injection drug users and to society in general;
- ensure that the necessary and long overdue, in-depth review of Canadian drug laws and policies take place; and
- constitute a first step toward treating drug use as a social and health, rather than criminal, issue and toward treating drug users as human beings with human rights, rather than criminals to whom we owe no respect and who have no dignity and no rights.

The Canadian HIV/AIDS Legal Network and the Canadian AIDS Society support harm-reduction approaches to drug use. We vehemently oppose passage of Bill C-8 as it is now because of its emphasis on criminalization of drug users and because it would contribute to the spread of HIV in Canada. As a compromise, we would support passage of Bill C-8, provided it is amended as proposed by the Canadian Drug Policy Foundation.

**APPENDIX 1**  
**Criminalization of Drug Use: Ineffective and Unethical?**

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Text of a paper presented at the colloquy  
"AIDS, Justice and Health Policy"  
Milan, Italy  
11 October 1991

(revised 10 November 1991)

\* The author is indebted to Norbert Gilmore, Diane Riley, Margaret Somerville and Sarah Wilson for their helpful comments and their criticism.

This research has been supported by Grant No. 6605-2897-AIDS of the National Health Research and Development Program of Health and Welfare Canada.

## 1. Introduction

Drug use is a persistent and serious health and social problem in industrialized countries. The current degree of concern about illicit drug use, sometimes bordering on hysteria, does not however accurately reflect the actual data on either the magnitude of the drug-use problem or the harms drug use produces. Recent estimates show that the most serious "problem drugs" by far are alcohol and nicotine (tobacco), whether assessed by damage to users, harm to society, or the number of persons dependent upon them.<sup>1</sup> In particular, the negative effects on health of alcohol and nicotine are much greater than most of those of the illicit drugs. In the United States, in 1985 the deaths of approximately 390,000 people were attributed to smoking,<sup>2</sup> while alcohol has been identified as the direct cause of 80,000 to 100,000 deaths annually, and as a contributing factor in an additional 100,000 deaths.<sup>3</sup> In contrast, illicit drugs were responsible for about 6,000 deaths in the United States in 1987.<sup>4</sup> Other harms from illicit drug use are also often seriously, and sometimes irrationally, overestimated. Moreover, some of the harms may be a result of current laws prohibiting the use of drugs.<sup>5</sup> The view would seem to be mistaken that "[illicit] drug use is a phenomenon of such destructive capacity that it even puts at risk the survival of the actual foundations of the World Community ... [and that] if we do not find the capacity to react and contain this phenomenon and drive it back, mankind itself runs the risk of not being able to survive."<sup>6</sup>

In the last decade, some of the harms from drug use have increased. Before the advent of HIV infection, drug use itself had a relatively low mortality rate because for many users there were alternating periods of abstinence and drug use, and natural recovery.<sup>7</sup> Since then an increase in deaths has been observed which has been associated not only with AIDS but also with other factors not directly related to the epidemic.<sup>8</sup>

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<sup>1</sup> Goldstein et al. 1990, at p. 1516; Jonas 1990, at p. 752.

<sup>2</sup> Centers for Disease Control 1989, at p. 12.

<sup>3</sup> Nadelmann 1988, at p. 24.

<sup>4</sup> Jonas 1990, at p. 753.

<sup>5</sup> Hadaway et al. 1991, at p. 185.

<sup>6</sup> Di Gennaro 1990, at p. 8. According to Mitchell 1990, at p. 126, drug use, especially if compared to wars, starvation, parasites, infectious diseases, pollution and environmental degradation, is not a major threat.

Mitchell argues that drug use mostly injures drug users themselves and that, while it constitutes enough of a social cost to merit public intervention, "the cost is not huge." He concludes that even if prohibition could enforce total abstinence, "our major problems would still be with us."

<sup>7</sup> Brettle 1991, at p. 125. See also Mitchell 1990, at p. 20. He points out that the "instant, perpetual heroin addict is a myth" and adds that even "committed opiate users regulate quantity and frequency of use, often abstain voluntarily and usually mature out of use after about ten years."

<sup>8</sup> Perucci 1990, at pp. 35-36.



In recent years, efforts to control drug use have increasingly been directed at reducing both the demand for and the harms from drug use. This has been set out in policies that deal differently with trafficking and drug use.<sup>9</sup> The principal feature of drug policy in the international community, however, remains total prohibition of drugs. This raises the issue of the effectiveness of criminalizing the use of drugs and the potential conflict between criminal and health approaches to controlling drug use. Since criminal approaches often imply a moral judgment, moral arguments for criminalizing drug use also need to be analyzed. In this paper it is argued that, particularly in view of the advent of HIV infection and the resulting increase in mortality for drug users, laws and policies should be revised because they have been increasingly recognized as ineffective in reducing or suppressing drug use and the harms resulting from drug use, and as impeding efforts to achieve these outcomes. Social policymakers must meet the challenge of developing policies which will reduce the harms from drug use while at the same time protecting the liberty of individuals. Current and possible future measures should be evaluated according to the following criteria: first, how effectively they reduce harms from drug use,<sup>10</sup> second, whether or not they are proportional to the harms defended against, and third, whether or not they can be justified ethically and economically. An approach to drug use is recommended that would match the degree of regulation to the harms from the use of each drug to the user and to society. Such an approach should be congruent with principles of human rights, ethics and morals.

## 2. Current Laws and Policies

In this analysis of criminal law approaches to control drug use, the following hypotheses will be examined: first, that criminalization is ineffective in reducing drug use or its harms; second, that it is unethical; and third, that it is harmful in itself and impedes certain efforts to reduce harms from drug use.

### a. Ineffectiveness of Criminalization

Among the reasons that have been put forward for criminalizing drug use, the reduction or suppression of drug use is most common.<sup>11</sup> Other reasons include, for example, the protection of society and the protection of individuals from harm as a result of their own actions.<sup>12</sup>

Regardless of its intent, criminalization has apparently not been able to influence usage of drugs substantially. The failure of efforts to reduce the supply of drugs, as compared with reducing demand, means that drugs are freely available almost everywhere, and they are relatively

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<sup>9</sup> Council of Europe 1988.

<sup>10</sup> Analysis includes the benefits and harms, gained or lost, by a specific action or inaction.

<sup>11</sup> Jonas 1990, at pp. 755-56.

<sup>12</sup> Hadaway et al. 1991, at p. 185.

cheap.<sup>13</sup> Laws prohibiting drug use have no inherent effect on the demand for drugs. Such laws seldom appear to have deterred people from using drugs. Studies consistently indicate that the perceived certainty and severity of punishment are insignificant factors in deterring use.<sup>14</sup> Ninety-two percent of a sample of convicted cannabis offenders in Toronto continued to use cannabis after their conviction, and in most cases their level of use did not change.<sup>15</sup> As a primary prevention tool, criminal law is particularly ineffective against juveniles at the ages when much drug initiation occurs.<sup>16</sup> It could even encourage them to try drugs in order to do something that is "dangerous," challenges authority, or is simply prohibited.<sup>17</sup> That criminalization of drug use does not have a significant preventive effect, was recognized also by the World Health Organization, which stated that "the criminalization of drug use as currently applied should probably be seen mainly as a punitive measure without noticeable preventive effects."<sup>18</sup> What has been more important in reversing the trend of increasing illicit drug use that marked the 1970s has been the growth in perceived harmfulness of the activity.<sup>19</sup> Fashion, religious injunctions and commercial disincentives also limit drug use as much or more than legal orders.<sup>20</sup>

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<sup>13</sup> While some of the achievements of the Bush Administration's War on Drugs might be impressive, their actual effectiveness has always been seriously doubted by the police and the Drug Enforcement Agency (DEA). Officials responsible for interdiction have explained that borders are too many and too expensive to be patrolled adequately. Profits enable producers and distributors to match sophistication in surveillance and interdiction with more of the same in smuggling. See Hamid 1991, at pp. 26-27. Besides, the failure of supply reduction is not simply a matter of more policing and guarding of borders: as techniques for refining and transporting drugs become increasingly sophisticated, it becomes more and more difficult to detect them.

<sup>14</sup> Erickson 1990, at p. 565. See also Mitchell 1990, at p.127.

<sup>15</sup> Erickson 1980.

<sup>16</sup> Erickson 1990, at p. 566.

<sup>17</sup> Brecher 1972, at p. 232 suggests that early anti-cigarette laws served to publicize smoking and to make the practice more attractive. According to Mitchell 1990, at p. 127, using the forbidden drug may become a badge of courage, a sign of fashion or a symbol of rebellion. Prohibition publicizes unknown drugs and engenders curiosity and desire – the "forbidden fruit" effect. Ibid. at 130.

<sup>18</sup> WHO 1990.

<sup>19</sup> Erickson 1990, at p. 565.

<sup>20</sup> Mitchell 1990, at p. 58. However, there has been a significant decrease in the number of people using illicit drugs in the United States since 1987. This decrease is, at least in part, attributable to the "War on Drugs", which has apparently deterred some people from using drugs. This is often cited as evidence of the "success" of the "War on Drugs," and raises the further issue of how "success" should be measured: is reduction in the number of users the measure for "success," or rather reduction in the harms from drug use? This is important particularly in view of the fact that the admittedly significant decrease in the number of casual drug users has not lead to a parallel decrease in harms from drug use. Casual drug users most often do not harm themselves or others through their drug use. While they constitute a very large number of people, they only use a small portion of the total amount of drugs used. Further, when assessing the "success" of the "War on Drugs," its costs also have to be taken into account.

Criminalization also does little if anything to prevent or reduce harms from drug use to society. It is often assumed that drug use leads to addiction, poverty and criminality. Drugs, therefore, are considered to be the cause of many of our social ills.<sup>21</sup> However, a great deal of evidence indicates that drug use could be as much a result as a cause of social stress.<sup>22</sup> Drug prohibition is also often justified on the grounds that there is a link between drugs and crime. While it is true that there is much drug-related crime, this may be more a result of criminalization than a justification for it. To maintain an illicit drug habit, some users will inevitably turn to crime. Licit drug habits, on the other hand, rarely lead to the commission of crime simply to allow the user to purchase the drug.<sup>23</sup>

Another argument often put forward in favour of criminalization of drug use is that it upholds and promotes morality. While some argue that it is wrong to try to legislate morality, others argue that legislating morality is an inherent function of the criminal law. The famous Devlin - Hart debate is relevant in this regard: Lord Devlin strongly upheld the right and obligation of society to enforce morality by means of the criminal sanction. For him, positive morality holds society together. To preserve itself, society must therefore enforce its morality through the coercive sanctions of the law. Enforcement should, however, only take place when the behaviour in question is not merely distasteful but actually repugnant to society in general. The determination of the degree of such repugnance is left to a jury of average citizens. Hart replied to this by saying that Lord Devlin's designation of the ordinary citizen, and more specifically, of the feelings of "intolerance, indignation, and disgust" on the part of the ordinary citizen, as the indication of whether private acts should be punished, represents a kind of moral populism that if given free reign, would destroy all the liberties which the individual currently enjoys.<sup>24</sup>

In the United States, the proponents of the "War on Drugs" attribute the choice to use any illicit drug, in any amount, to the moral failure of users.<sup>25</sup> As Skolnick has stated, the "War on Drugs" is built on the premise that drug dealing and use is something morally repugnant in and of itself;<sup>26</sup> the solutions that flow from this premise treat people's involvement in drugs as natural crimes which must be punished.

The conception of criminal justice according to which society has not only a right but an obligation to enforce morality by means of criminal sanctions has been severely criticized. One

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<sup>21</sup> Hadaway et al. 1991, at p. 185.

<sup>22</sup> Hadaway et al. 1991, at p. 185.

<sup>23</sup> Oscapella 1988, at p. 10. Rising drug costs due to prohibition necessitates resources that go beyond those readily available to people other than through crime. See also Mitchell 1990, at p. 17, who says that "under different laws and social conditions, everything now said about cocaine could be said about nicotine."

<sup>24</sup> Whitaker 1969, at p. 213, citing Devlin 1965, at p. 17.

<sup>25</sup> Skolnick 1990, at p. 76.

<sup>26</sup> "Mala in se"; see Skolnick 1990, at p. 78.

theory that can be used to critically analyse the assumptions underlying this conception of criminal justice is utilitarianism. A utilitarian argument against this conception began in 1859 with the publication of Mill's *On Liberty*. According to Mill, acts may be made criminal only if they inflict concrete harms to assignable persons, and then only to the degree proportionate to those harms;<sup>27</sup> it is never proper to criminalize an act solely on the ground of preventing harm to the agent, except to protect those who are vulnerable (children, incompetent people, and "barbarians"); it is never proper to criminalize conduct solely because the mere thought of it offends others.<sup>28</sup>

Following Mill, opposition to criminalization of victimless crimes relied on efficiency-based arguments deploring the pointless or counterproductive use of valuable and scarce resources in the enforcement of victimless crimes. Utilitarian arguments for decriminalization, however, are problematic in that they do not address the moral questions that defenders of criminalization traditionally raise. In practice, efficiency-based arguments have not been very successful in reducing the scope of victimless crimes. Decriminalization of some of these crimes have resulted from a shift in moral judgment; when moral judgments remain unchanged or unchallenged as is the situation with regard to drug use, enforcement costs are likely to be accepted. Criticism of the criminalization of drug use, therefore, must not rely only on utilitarian or economic arguments; challenging criminalization on the basis that it is unethical provides such an approach.

**b. Claims against criminalization**

Mill clearly rejected, as a justification for criminalization, the interests of others in punishing acts that are offensive to them. A justice-based argument in support of Mill's conception of criminal justice points out that, indeed, criminalization on such a basis must in itself be the object of moral criticism and constitutional attack, for to give weight to such interests would violate the rights of the person "in the service of mere majoritarian distaste and ... prejudice."<sup>29</sup> For many, attitudes toward drug use will differ depending on the levels of intoxication resulting from drug use and the time, place, and occasion of intoxication. They may also be ambivalent about the moral blameworthiness of drug use. In a society that neither has nor wants a unitary set of moral norms, the enforcement of morals carries a heavy cost in repression. Criminalizing people may be society's most powerful and ritualistic way of disidentifying from (or

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<sup>27</sup> When an action harms others without their consent, the state may interfere with it; steps may be taken to prevent the person inflicting the harm from performing it. Mill also believes that any proposed interference needs to be shown as efficacious. As Illingworth 1990, at p. 25 has pointed out, this has important implications for social policy: for a liberty-limiting policy to be put into practice it must not only achieve the end for which it is designed, but the proposed interference should not cause more harm than it prevents.

<sup>28</sup> Richards 1981, at p. 611 citing Mill 1947, at pp. 9-10, 90-91.

<sup>29</sup> Richards 1981, at p. 629.

"excommunicating") them. It "others" them, making them vulnerable to discrimination. The more heterogenous the society, the more repressive the enforcement of morals must be.<sup>30</sup>

Drug enforcement also involves its own immoralities:<sup>31</sup> drug enforcement agents have been given extraordinary powers of search and seizure and rely heavily on undercover operations and on informants.<sup>32</sup> While these techniques may be considered to be indispensable to drug law enforcement, they are among the most intrusive tools used by society and would not be tolerated in almost any other situation. The same is true of drug testing, which threatens the right to privacy, and would be justifiable only if it promoted safety and if less intrusive means were not available.<sup>33</sup>

Most current drug laws and policies can be considered inconsistent: drugs like alcohol and nicotine, known to be both addicting and harmful, are freely available and openly and intensively marketed, whereas marijuana, the use of which is rated by some experts as less harmful than the use of alcohol or nicotine, remains prohibited, and often its use is punished.<sup>34</sup> Drug laws that

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<sup>30</sup> Skolnick 1990, at p. 83. See also Alexander 1991, at p. 302, where he points out that there is a painful conflict of values concerning drugs in society: "A majority of Canadians feel that neither children nor adults should use the illegal drugs. But other Canadians and many people of other cultures ridicule this abstemious view. Drugs provoke [and symbolize] one of the intense value conflicts that fracture contemporary Canadian society. Informing the public that there is a legitimate conflict of values at issue makes possible a search for reasonable accommodations."

<sup>31</sup> Nadelmann 1989, at p. 943.

<sup>32</sup> Mitchell 1990, at p. 2 says that "drug law enforcement relies on informants, entrapment and undercover agents and creates a warlike atmosphere conducive to the abuse of human rights." For Goode (Drugs in American Society 1984, at p. 270, cited in Mitchell at p. 101) one of the major costs of prohibition is the sacrifice of "privacy, civil liberties, freedom from surveillance, the right of suspects ... and freedom from cruel and unusual punishment."

<sup>33</sup> Privacy Commissioner of Canada 1990. But see Jarvik 1990, at p. 390. He suggests that drug testing be used to curb drug use by identification of users, and sees drug detection as a means to generate antidrug social pressure. Kaplan (cited in Jarvik at p. 390) has indicated that the major factor in reducing drug use would be judicious application of urine testing.

<sup>34</sup> As Mitchell 1990, at p. 14 has pointed out, the assumption guiding lawmakers is that the degree of harm engendered by drug use varies tremendously because some drugs are inherently "soft" while others are "hard." However, research indicates that harm results from many factors apart from a drug's inherent properties. In assessing the harm caused by the use of different drugs, it is important to consider that an unbiased assessment cannot be made by comparing drugs as they now happen to be used. Dosage, duration of use, purity, legal status, method of ingestion and a host of social factors also have to be considered.

Another assumption guiding law- and policymakers is that drugs are inherently addictive and that no one can resist their addictive impact. It is often assumed that everybody is equally susceptible to addiction, and that the only factor that influences whether or not someone becomes addicted is whether he or she uses a particular substance. It is also often assumed that addicted individuals are ill and/or have lost all ability to control their behaviour (Peele 1990, at p. 639). Law- and policymakers therefore hold that the best solutions for addiction are "to protect people from exposure to drugs at all costs[:] ... to warn people continuously about the

do not deal with equivalent behaviour or wrongdoing consistently are unethical;<sup>35</sup> it is impossible to make a legitimate moral distinction between alcohol or tobacco and some of the drugs that are now illegal.<sup>36</sup>

That the use of one drug is criminalized, whereas use of another drug is tolerated, although all aspects of use of the drug are similar, also contravenes the principles of legal equality and fairness.<sup>37</sup> These require (1) that we justify nonequivalent treatment for users of similar substances and (2) that we justify nonequivalence between drug users and persons engaged in equally harmful but non-drug-using behaviours. Even if we accept that individuals can be restricted for the common good, no person should face a legal burden "except in expectation that everyone in similar circumstances is similarly burdened."<sup>38</sup>

According to the requirement of proportionality, the degree of coercion employed by a state must be proportional to the harm defended against. Most of the harms that derive from the use of illicit drugs for most people are minor, while law, prohibiting any use of illicit drugs and giving wide powers of enforcement, fosters the misperception that any degree of illicit use is serious abuse.<sup>39</sup> When one considers the number of persons who use illicit drugs, it becomes

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addictive effects of (some) drugs[; and] ... to treat people for the uncontrollable medical condition of addiction after they fail to benefit from [these] governmental efforts" (ibid at 640). These assumptions have been demonstrated to be wrong. Any statement about addiction that omits the actor and the setting can never possibly capture the reality of addiction. Surveys found that only small percentages of those who ever used cocaine and crack used it in the last month before the survey, and far smaller percentages used it daily. For references, see Peele 1990, at p. 640, Peele 1977, at p. 103-124, Alexander 1990, at p. 37-65, McCarthy and Anglin 1990, at p. 99-123.

I am not arguing here that drugs do not possess inherent differences. Various drugs take effect at different rates, have different potencies and trigger some unique consequences. The relevant question therefore must be whether these differences suffice to justify legal discrimination (Mitchell 1990, at p. 9).

<sup>35</sup> Mitchell 1986, at p. 233.

<sup>36</sup> Nadelmann 1988, at p. 493.

<sup>37</sup> On the principle of fairness, see Mitchell at p. 71.

<sup>38</sup> Beauchamp, cited in Mitchell at p. 91. Drug use is comparable to other activities. Mitchell (at p. 108) points out that medical and licit drugs as well as many other pastimes are as dangerous as prohibited substances. According to Szasz (in Mitchell at p. 108), the lack of fairness in current drug regulations is the principal clue needed to expose the objectives of the prohibition: if prevention of social and self-harm were the real purpose, then why are drugs like alcohol and nicotine not banned? Szasz suggests that certain drugs are outlawed as symbols of wickedness and that, as symbols, these drugs are burdened with fictional characteristics by authorities who create the drug problem under the guise of solving it. He concludes by saying that since framing certain drug users as scapegoats and outlaws has nothing to do with fairness, human rights or pharmacology, these elements are irrelevant to current drug laws and policies.

<sup>39</sup> According to Mitchell (at p. 87) the reason law enforcement agents engage in this deception is plain: they need to magnify the harm caused by illegal drugs to match the scale of the intrusion and the penalties inflicted.

apparent that many people who consume them do not harm others directly<sup>40</sup> and that many of them do relatively little harm even to themselves. It has been concluded that people who use illicit drugs and do not hurt anyone are not the state's concern;<sup>41</sup> that if somebody uses illicit drugs and ends up hurting himself or herself, he or she needs help, and not criminal sanctions; that if other people are hurt, punishment should follow not for the use of the drug itself, but for the act committed.<sup>42</sup> However, since drug use imposes some level of harm on others, it does not fall within Mill's pure self-harm category. While Mill assumed that drug use did not require public law controls because the harm to others was too remote or indirect, some form of control is required. State regulation is not limited to total control/criminalization or no control. In deciding what form it should take, there should be adherence to the principles of justice. In this context, it is also relevant that many of the indirect harms associated with drugs, in particular drug-related crime, do not derive from their use, but rather from prohibition. Benefits from drug use – seldom mentioned and even less often analyzed – also need to be considered.<sup>43</sup> In short, in any examination of harms deriving from drug use, one must also consider the benefits from their use and the harms from prohibiting them.

The benefits to be achieved by social policies – for example, those prohibiting drug use – must also be proportionate to the harms imposed on individuals affected by them. Therefore, for example, prohibiting access to sterile needles and syringes for injection drug users or to the means to cleanse injection equipment no longer withstands ethical scrutiny.<sup>44</sup> Not to act to reduce lethal risks inherent in socially undesirable activities cannot be ethically justified. To prohibit the means to reduce or prevent such risks is unconscionable.

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<sup>40</sup> There is, however, indirect impact such as lost productivity, costs for health and social services, higher taxes and insurance rates, etc.

<sup>41</sup> According to others, paternalism, the notion that the state can protect the individual against himself, is a valid basis for legislation. They suggest that paternalism toward the user is the explanation for restrictions on drug use rather than the desire of society to punish the user for his or her immorality. Paternalism of the kind that interferes with drug use "on the basis of values that the agent does not himself share ... underlies many laws currently criminalizing drug use." According to Richards 1981, at p. 669, this is not only objectionable, but can be seen as a violation of human rights.

<sup>42</sup> Nadelmann 1990, at p. 493.

<sup>43</sup> According to Mitchell (at p. 46) drug use benefits fall into three categories: symptom relief, recreation and commercial profits. For positive and negative effects of moderate cocaine use, see Alexander 1991, at p. 201-02. For medical uses of illicit drugs, see Grinspoon and Bakalar 1987, at p. 183.

<sup>44</sup> Nolan 1989. Generally, ethical responsibility is borne for unintended consequences of laws and policies. With respect to drug laws and policies it could be argued that they have resulted in increased use of cocaine and heroin and decreased use of marijuana. The line of argument runs like this: the use of psychoactive substances is a need for many people; discouraging these people from taking one substance will drive them to take another. By making a less harmful drug unavailable or inaccessible people will be driven to use more harmful ones. The easy detectability and the relatively low profits from the sale of marijuana in comparison with other drugs such as crack or heroin, has favoured the availability and accessibility of these latter drugs. Also, aggressive enforcement policies have made marijuana more scarce and costly, as well.

**c. Specific harms from criminalization**

While criminalization of drug use is increasingly being recognized as an unethical and ineffective way to reduce demand for drugs and harms from their use, there is a reluctance to abandon it. Italy, for example, has recently made drug use punishable.<sup>45</sup> It can also be argued that criminalization is often in conflict with prevention efforts and impedes certain efforts to reduce harms from drug use.

First, criminalization may inhibit people from seeking treatment.<sup>46</sup> In 1973, Canada's Commission of Inquiry into the Non-medical Use of Drugs found that by making conduct criminal people may be inhibited from seeking help. The Commission further found that the fear of being identified as a drug user, and thereafter being subject to surveillance, may make some people reluctant to approach treatment facilities.<sup>47</sup>

Second, criminalization may inhibit education efforts against drug use.<sup>48</sup> A legal prohibition of drugs that is at extreme variance with the facts of drug use, as has been the case with marijuana, can undermine not only the credibility of the law, but the credibility of educators and information about drugs. For example, the misleading impression that the law has conveyed about marijuana, by placing it on the same level as opiates, and the seemingly arbitrary distinction that the law makes between alcohol or tobacco and marijuana and other illicit drugs, has led many young people to disbelieve the information about all drugs and to question the credibility of educators.<sup>49</sup>

**3. Future: Moving from Criminalization to Health Promotion**

Many lessons that have been learned from dealing with HIV/AIDS are applicable to the drug use problem. For example, prohibiting access to clean needles and syringes has greatly contributed to the spread of HIV and done little or nothing to reduce drug use. Coercive interventions have, in general, proven counterproductive in controlling HIV transmission or its consequences, in contrast to interventions promoting healthy behaviour and cooperation. There are no reasons to believe that the current enforcement approaches applied to drug use will not be counterproductive and probably harmful.

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<sup>45</sup> See Art. 13 , Aggiornamento, modifiche ed integrazioni della legge 22 dicembre 1975, n.685, recante disciplina degli stupefacenti e sostanze psicotrope, prevenzione, cura e riabilitazione dei relativi stati di tossicodipendenza, which modifies art. 70 of the law of 22 december 1975.

<sup>46</sup> Oscapella 1988, at p.11.

<sup>47</sup> Commission of Inquiry 1973, at p. 57.

<sup>48</sup> Oscapella 1988, at p.11.

<sup>49</sup> Commission of Inquiry 1973, at p. 57.



In particular, it is suggested that drug policy and laws should be based on a more realistic conception of the reasons why people use drugs and a recognition that they will not be deterred from using drugs by criminal sanctions. Approaches to drug use should be based upon accurate, up-to-date scientific information. There is a wide gap between what scientists know about drugs and what the public and politicians believe. The harms from drug use are less than many perceive them to be; laws and policies should reflect this. The aim must be to engender respect for rather than disobedience of the law: when people using drugs do not perceive them to be intrinsically harmful, disregard for and disrespect of drug laws follows.<sup>50</sup>

Further, approaches should promote and protect the autonomy of everyone in society. This means that individuals should be empowered and enabled to make healthy choices, so that personal responsibility becomes a realistic goal. It also implies respect for human rights of people using drugs, and respect for privacy and protection of one's rights from unjustified intrusion.

#### 4. Conclusion

The recent increase in mortality of drug users should drive governments to renew their efforts to prevent harms from drug use, or reduce those which cannot be prevented. This should first direct them to review their current drug laws and policies so that this is possible. While efforts have begun in the area of demand and harm reduction, these have been compromised by international conventions necessitating prohibition of drug use and national laws criminalizing drug use. This paper has argued that these laws are intrinsically ineffective, that they impede efforts to reduce harms from drug use, and that they may impose harms disproportionate to any benefits they claim to produce. Moreover, they are morally questionable and contravene the principles of justice. They should therefore be revised or abandoned.

But this is not enough. One must recognize the urgent need to educate people about drug use. This includes efforts to prevent harms and to reduce them when they occur. In revising laws, consideration should be given to laws that can promote a reduction in demand for drugs and reduce their harms. At the same time, such laws would avoid the harm of engendering disrespect for the law.

Finally, the question of why there is so much reluctance to change laws and policies will have to be addressed.

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<sup>50</sup> Mitchell 1990, at p. 65 argues that, in general, the criminal law should not prohibit activities, such as premarital sex, that many people engage in. According to him, crimes cannot be serious breaches of the social contract if most people do not uphold the given standard of restraint.

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