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Tough on the Weak, Weak on the Tough

Drug Laws and Policing*

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ABSTRACT

This article aims to identify the main impacts of drug law enforcement on policing. It points to five interrelated effects: 1) Suppression focused on minor offenses and the weakest links in the chain; 2) Arrest patterns often based on stereotypes that affect the most vulnerable populations; 3) Perverse incentives that reward indiscriminate repression; 4) Corruption and penetration of organized crime; and 5) Excessive use of force and violations of human rights. Rather than discuss causes and effects, this study identifies drug policy as a factor that aggravates policing problems. Based on its findings, it pinpoints a series of interventions designed to keep low-level offenders out of the judicial system, explaining the advantages and challenges of each intervention. The article states that while this set of measures would have limited effects in terms of addressing structural problems in police institutions, it has the potential to focus limited state resources, curb levels of discretion, and implement differentiated interventions for the various links in the drug chain. As an immediate step, it recommends adopting alternatives to arrest and incarceration for those at the bottom of the chain, as a way to change incentives within the police force and redirect its objectives and metrics.

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Introduction

The enforcement of drug laws has had multiple effects on policing. Suppressing the market for illegal substances has created distortions in this institution's responsibilities, had a negative influence on its relationship with citizens, dispersed limited state resources, and generated perverse incentives. This has had serious human rights implications and has led to multiple cases of police abuse and violence.

From the standpoint of public health, the criminalization of drug use and its suppression by the police not only has produced a disproportionate response; it has also reduced the possibility of providing the treatment needed for people with serious addiction problems, as limited resources are concentrated on implementing punitive measures and criminalizing users.¹ There is sufficient evidence to state that under prohibition, drug users have become more vulnerable while prevention and treatment capacities have fallen short. According to the World Drug Report 2015, produced by the United Nations Office on Drugs and Crime (UNODC), only one out of six problem drug users has access to some type of treatment.²

Recognizing this reality, this article aims to identify the main impacts of drug law enforcement on policing. Basing its analysis on a review of available national studies and the systematization of quantitative information, it makes some recommendations that may help lead to changes in police forces and in drug policy in general. This study does not attempt to identify causes and effects but rather to lay out explicit correlations between drug law enforcement and its negative impacts on policing.

Likewise, this paper does not propose to precisely describe any specific case. Its purpose is to capture the basic features of a multifaceted and complex phenomenon. The assumption is that each country has its own particularities and that therefore any generalization must be made with reservations. The situations described in this article tend to be critically concentrated in specific territories and units, although it is important to keep in mind that in some cities and municipalities these can end up being recurrent behaviors.

It is important to note that low levels of police legitimacy cannot be explained by or limited to the role of the police in the “war on drugs.” In Latin America there is an extensive body of literature on the poor relationship between the police and the community, which stresses the perception of corruption, ineffectiveness, and poor training, among other factors.³ Moreover, it is important to keep in mind that policing is influenced by multiple variables which determine how this institution carries out its work on the streets and how police officers make decisions.⁴ Within this perspective, this paper aims to identify current drug policy as a factor that aggravates the problems faced by the police as an institution.

As part of this context, it is necessary to refer to the growing trend toward the use of criminal law, with the increase in drug-related behaviors and the imposition of severe penalties similar to those for a wide range of crimes with serious consequences—such as homicide or kidnapping. Colombian jurist Rodrigo Uprimny describes this situation as an “addiction to punishment,” in which states are constantly tempted to increase penalties in order to suppress the illegal market. However, since this has no effect either on supply or on consumption, the state then decides to increase the dose (of punishment) and its frequency. The result is an overburdened justice system that has little effect in shrinking the drug market.⁵

Under these conditions, drug laws—enforced with maximum severity—have aggravated existing weaknesses and created new problems for police forces. From this perspective, it is important for the debate on police reform to include the need for changes in drug policy, with a view to changing the perverse incentives produced by a policy that has not come close to reaching its objectives.

The hypothesis is that changes to the punitive approach of drug laws could contribute to policing that is more focused on more serious crimes and behaviors. At the same time, reforms in this area would have the potential to change the relationship of the police with communities and rein in abuses. The underlying challenge is to change anachronistic organizational cultures built on a model that has favored the use of force against the weakest.

The Impacts of the War on Drugs on Policing

Policing can be understood as the way police officers enforce the law as they go about their daily business. The police are on the front lines of law enforcement, and every day they have to decide how to ensure that the law is upheld. This situation creates significant levels of discretion, understood as “the perceived freedom...in making choices concerning the sort, quantity, and quality of sanctions and rewards on offer when implementing a policy”⁶—in this case, drug policy.

Within this perspective, an analysis of drug law enforcement and its impacts should take into account multiple players and motivations. The political leanings of civilian authorities and their stance on the drug problem,⁷ the interaction between law enforcement and criminal organizations—with agreements or clashes—and high-level corruption are all factors that influence how the law is enforced.⁸

At the same time, public opinion and the degree to which citizens tolerate authoritarian measures and disrespect for the law are factors that can also come into play in terms of how the police act. Interviews with members of the police, as well as various ethnographic studies, show that police officers justify aggressive and zero-tolerance attitudes based on community pressure to clamp down on specific sectors of the population—such as, for example, young people. Prevailing narratives about drugs and crime, which identify the use of psychoactive substances with violent behaviors or certain crimes, also play a role in how the law is enforced.

It is important to note that the police do not act in a vacuum; rather, their actions are a reflection of how the political system works, the stance of its leaders, and the type of society—its values and beliefs—as well as the influence of both legal and illegal players in how justice is carried out. This does not free police institutions from responsibility, but it does help to understand that other players also have an influence on their behavior and outcomes.

To begin with, it is possible to assert that drug law enforcement in Latin America has brought with it low levels of trust in the police, a perception of extensive corruption, and a growing skepticism about the capacity of the police to respond. This, in a context of considerable structural shortcomings: low levels of professionalization, few oversight mechanisms, and inadequate working conditions for its members.⁹

Anthony Bottoms and Justice Tankebe note that police legitimacy is based on three factors: procedural fairness (impartiality and being treated with dignity), lawfulness (police abide by

the law), and effectiveness (the outcome of police actions).¹⁰ Alex Stevens, in analyzing drug law enforcement by the police, finds that the punitive approach is frequently at odds with these three factors. Policing tends to be directed disproportionately toward certain sectors of the population, namely, the young and the poor; it is exposed to corruption by criminal organizations; it is often unlawful; and it provides modest outcomes.¹¹

In the words of Ret. Gen. Oscar Naranjo of the Colombian Police, the adoption of a predominantly punitive and reactive approach has brought police forces face to face with “four giant monsters”: brutality, ineffectiveness, lack of solidarity, and corruption.¹²

In this context, abuses and human rights violations in the name of an “iron fist” policy not only have reflected the excesses of that strategy and its ineffectiveness, but they have also had an impact on state legitimacy. Studies available in the region concur that victimization and fear of crime have an impact on the legitimacy of the political system.¹³ Among individuals who have a low perception of crime, support for political institutions is more than 3 percent higher than among those with high levels of fear.¹⁴ Moreover, based on surveys by the Latin American Public Opinion Project (LAPOP), there is evidence that citizens who live in unsafe environments and who do not have a positive view of the performance of government institutions tend to be more supportive of authoritarian leadership as a response to crime.¹⁵

In the case of Colombia, a study by Miguel Cruz finds that to the extent that the Colombian government hardens its strategy of eradicating illicit crops, levels of citizen trust in the police show a significant decline.¹⁶ In a context in which communities develop dependent relationships with illegal economies and the authorities favor the repressive aspect of the state—with no other types of alternatives—the relationship between citizens and the state deteriorates.

The following are some of the impacts of the current punitive approach on policing:

1. Suppression focused on minor offenses and the weakest links in the chain

The impact of policing generally falls on people who are easy to arrest, with offenses characterized as flagrant—as is the case with drug dealing, open drug use, or trafficking in small quantities. Meanwhile, more complex crimes, which require greater investigative capacity and intelligence, have low solve rates—in other words, there are high levels of impunity.

One aspect to note is that reporting flagrant offenses is much easier as it entails less risk (for example, neighbors who go to the authorities to report drug use or dealing in public places). Meanwhile, in the case of more complex crimes that involve one or more victims of a serious criminal act, going to the authorities requires relationships of trust and greater collaboration.

According to research done by the Centro de Estudios Latinoamericanos sobre Inseguridad y Violencia [Center for Latin American Research on Insecurity and Violence, CELIV] at Argentina’s Universidad Nacional Tres de Febrero (UNTFA) and the United Nations Development Programme (UNDP)—which included interviews with more than 7,000 prison inmates in Argentina, Brazil, Chile, El Salvador, Mexico, and Peru—police forces arrest mainly those at the lower end of the criminal chain, while they capture few heads of gangs or leaders of criminal organizations.¹⁷ Those locked up in the prison system are easily replaceable in criminal networks, and they spend their lives going in and out of jail.

In Mexico, research done by the Centro de Investigaciones y Docencia Económica [Center for Economic Research and Teaching, CIDE] shows that only 3.3 percent of 821 inmates interviewed at eight federal prisons—including two maximum-security facilities—claimed they were members of a drug trafficking cartel.¹⁸ According to the survey, 14.6 percent of the inmates had been convicted of organized crime; of this percentage, only 10.8 percent said they were the head of the organization, 14.2 percent acted as administrators, and 3.3 percent as hitmen.¹⁹

In Rio de Janeiro, Brazil, the profile of those convicted for drug trafficking is that of individuals with no criminal record (66.4 percent) who were acting on their own (60.8 percent). Moreover, only 14.1 percent were also convicted of possession of firearms.²⁰ According to Luciana Boiteux, recent studies in São Paulo and Brasília identify the same trend with regard to the profiles of those convicted for drug-related offenses.²¹

In Colombia, information from the Ministry of Justice and law—based on National Police records—shows that in the period from 2008 to 2012, 344,588 people were arrested for drug-related offenses. Of these arrests, 96 percent were for flagrant offenses associated with low-level crimes.²² In 2013, 93 percent of arrests for drug offenses involved small quantities, between 0 and 250 grams. Another point to stress is that 70 percent of people convicted for trafficking, manufacturing, or possessing drugs in Colombia were convicted because they accepted the charges against them; of the rest, 20 percent entered into a plea bargain with the Public Prosecutor's Office and the remaining 10 percent did not accept the charges against them.

In the case of Argentina, research done by Alejandro Corda—published in 2011—shows that since 1990, when Drug Law 23.737 was enacted, 70 percent of drug-related cases involved police going after drug users. The rest of the police effort was focused on people from poor neighborhoods who were in possession of small amounts.²³ It is important to note that in 2009 the Argentine Supreme Court, in the Arriola decision, declared that the article criminalizing possession for personal use was unconstitutional. However, the law continues to punish possession, and police forces continue to enforce it with a heavy hand.

The justice system's concentration on minor offenses contrasts with the low levels at which the most serious crimes, such as homicide, are solved. According to the UNODC's Global Study on Homicide 2013, in Asia and Europe, respectively, 80 and 85 percent of homicide cases are "cleared" due to police response, while in the Americas the rate is 50 percent. In Asia and Europe, respectively, the conviction rate is 48 and 81 for every 100 victims of homicide, while in the Americas it is 24.²⁴ Just to take some examples, in Venezuela in the period 2007-2008, there were 9 arrests for every 100 murders; in other words, 9 out of every 10 homicides went unpunished.²⁵ In Brazil, the average number of homicides solved is less than one in four,²⁶ and in Colombia, the level of impunity for homicides between 2005 and 2010 has been estimated at 96 percent.²⁷

It is not just a matter of not going after the most violent crimes, but also not pursuing those crimes whose prosecution would have the potential to affect the finances of criminal organizations. On average, out of every 3,000 people incarcerated in the region for drug offenses, only one is serving time for money laundering.²⁸ As shown in the Regional Human Development Report 2013-2014 "Citizen Security with a Human Face: Evidence and Proposals for Latin America,"

arrests for money laundering are notoriously low in Latin America. Looking at the period from 2006 to 2011, in Argentina there were 6,962 arrests for drug-related offenses and only one conviction for money laundering; in Chile, the ratio is 14,717 to 1; in Ecuador, 902 to 2; in El Salvador, 1,036 to 8; in Peru, 4,529 to 4; and in Uruguay, 1,024 to 1.²⁹

These figures are an indication of the emphasis that has been placed on containing and suppressing the illegal drug market. It could be argued that police forces have also dealt severe blows to criminal organizations by capturing dozens of their leaders. These actions have had a tactical and operational impact that has led to transformations in the criminal world. However, the sustainability of these measures has been limited and has not necessarily produced the dismantling of criminal factions and the restoration of state authority. On no few occasions the “tough” have continued to exert an influence on the political, social, and economic order, through a complex structure of corruption and impunity.

2. Arrest patterns often based on stereotypes that affect the most vulnerable populations

In practice, the punitive approach—especially as it relates to drug law enforcement—falls on poor populations perceived by the authorities to be “dangerous.”³⁰ Those who are criminalized are disproportionately the most vulnerable: people living on the street, youth from marginalized areas, migrants of certain nationalities, and in some countries, the black population.³¹ A study done in eight countries by the Transnational Institute and the Washington Office on Latin America (WOLA), “Systems Overload: Drug Laws and Prisons in Latin America,” concluded that the weight of the law comes down on a specific part of the population: “people with little education and scant resources, who are either unemployed or holding down informal-sector jobs.”³²

According to the report “Women, drug offenses and penitentiary systems in Latin America,” by Corina Giacomello, the female prison population in Latin America nearly doubled between 2006 and 2011, from 40,000 to more than 74,000, most of whom were associated with low-level drug offenses.³³ A report by the Inter-American Commission of Women of the Organization of American States (OAS), “Women and drugs in the Americas,” states that 70 percent of women in prison in Latin America are there for nonviolent micro-trafficking offenses. The vast majority of these women are young, poor, with little schooling, single mothers, and responsible for the care of their children.³⁴

Results of surveys done in prisons by CELIV and the UNDP show that in five of the six countries surveyed, drug trafficking or possession was reported as the main crime committed by the female inmates, above robbery and homicide. In the case of Argentina, Brazil, Chile, and Peru, more than 50 percent of women in prison were incarcerated for drug trafficking or possession.³⁵

In the specific case of Argentina, drug law enforcement has affected two populations in particular: women and foreigners.³⁶ According to research done in women’s prisons by the Centro de Estudios Legales y Sociales [Center for Legal and Social Studies, CELS], the population of female inmates grew by 350 percent between 1990 and 2007. Eighty percent of them had not had any prior contact with the criminal justice system. Almost all of these inmates are mothers and at the time of their arrest were responsible for caring for minor

children; 64 percent of them are single-parent heads of household.³⁷

In Brazil, the National Youth Secretariat's "Mapa do Encarceramento os Jovens" found that 515,482 individuals were in jail in 2012, an increase of more than 200,000 inmates over 2005. More than 60 percent of these inmates are young and black—the same predominant profile as homicide victims.³⁸

In Colombia, Julieta Lemaitre and Mauricio Albarracín studied how police enforce the rules on amounts for personal use, based on interviews with patrol officers in charge of enforcing legal restrictions on use in public. The way the police operate on the streets could be extrapolated to other urban environments around Latin America:

"The Police...in their day-to-day work make decisions with respect to personal dose, based on their discretion to enforce the measures.... Detention, the most serious measure, is applied in particular to marginal populations. These populations are, first of all, young, low-income men who gather in groups in public spaces and smoke marijuana; and second, people living on the street."³⁹

One aggravating factor is the concentration of police abuse against certain sectors of the population. Young people living in vulnerable circumstances are the most frequent victims of this practice.⁴⁰

3. Perverse incentives that reward indiscriminate repression

The punitive approach has been encouraged by the use of economic incentives and promotions linked to the most arrests, seizures, and operations carried out against criminal organizations. The way security policies are evaluated has worked to maintain the inertia of the current approach: It is easy to understand (basically, numbers that show increases or decreases); it doesn't require complicated explanations of context; it is self-referential (generally, numbers are compared with the prior month or year); and it can be modified arbitrarily.⁴¹

Along with all this is an already established routine to highlight achievements: invoke exorbitant numbers when referring to drug seizures and raise the profile of criminal offenders to add value to any arrest and justify the use (and abuse) of force, warning about the magnitude and viability of the threat. This logic has been driven and reinforced by the creation of special units whose effectiveness is measured in terms of crops destroyed and seizures made—units which have received significant guidance and support from international cooperation efforts, especially from the United States.⁴²

Part of the reason for maintaining policies that have not had the expected results is that it creates the illusion that the state is in fact implementing measures and responding, putting the arrested criminals in front of the cameras and displaying the tons of illicit merchandise seized. As Fernando Escalante contends, analyzing the case in Mexico, the numbers, lists, and names are a way of showing that the state is supposedly doing what it has decided to define as its "job": capturing criminals.⁴³

Analyzing the case of Colombia, Santiago Tobón and Isabel Gutiérrez note that generally police indicators are progressive; in other words, if in 2013 a police station seized 100 kilos of marijuana, the amount seized should be greater in 2014. In this framework, certain units

have an increased incentive to engage in improper conduct, such as making sham arrests or recycling drugs that had already been seized.⁴⁴

The existence of this system of perverse incentives often comes down on drug users. Although in many countries drug possession is not penalized, the police seize small quantities in order to meet the goals that have been established. In countries where thresholds have not been established, the police have the authority to discern between users and traffickers. In this context, users in marginal circumstances are presented as drug dealers or as part of a criminal network. In addition, throughout the Latin American countries it is common to hear about cases in which evidence is planted by the police—although most of the time citizens prefer not to report it.

One pattern found in some Latin American countries is that once the police “specify the charge” against someone, it is rare for prosecutors or judges to question it. It is systematically found that the burden of proof rests on the police report. As an aggravating factor, according to the CELIV-UNDP study, many inmates say they never saw the judge who sentenced them.⁴⁵

One specific cause for concern is the frequent use of pretrial detention when it comes to drugs. According to the Inter-American Commission on Human Rights, more than 40 percent of those in prison—without making a distinction between types of crimes—are waiting for their cases to be resolved, with proportions that range from 30 to 85 percent, depending on the country.⁴⁶ This is despite the fact that the countries’ constitutions define pretrial detention as the exception, not the rule.

4. Corruption and penetration of organized crime

Current drug policy has proved to be vulnerable to the clear economic and armed power of criminal organizations. Organized crime has managed to penetrate police institutions—especially at the local level—guaranteeing protection for their operations and impunity for their actions.⁴⁷ In certain cases, police forces have participated directly in economies of crime, regulating transactions, demanding commissions, and controlling the sale of illegal goods and services. Moreover, in the midst of the war on drugs, police forces have come to establish alliances with criminal organizations to strike at opposing factions.

According to the LAPOP/UNDP 2012 survey, when asked whether the police “protect people from crime” or “are involved in crime,” 44 percent of respondents state that the police are involved in crime. In 7 of the 18 countries surveyed, the proportion is over 50 percent.⁴⁸ In addition, while levels of trust in the police have improved in recent years, they are still below 50 percent, and the perception of corruption within this institution is high in most countries, according to Latinobarómetro 2013.⁴⁹

In Argentina, a study done by Marcelo Saín, “Police Regulation of Drug Trafficking in Buenos Aires Province,” points to the existence of what he calls the “double pact” of governance and public security. According to Saín, this pact means, for one, that public security is delegated by successive governmental authorities to the upper echelons of the police (a “political-police pact”) and, for another, that crime, particularly complex crime, is controlled by the police, who regulate and/or participate in it (a “police-criminal pact”).⁵⁰ For Juan Gabriel Tokatlian, drug trafficking in Argentina is supported by a criminal coalition in which the police, politicians, and gangs are intertwined.⁵¹

In the case of Brazil, specifically in the favelas of Rio de Janeiro, Desmond Arias asserts that the persistence of high levels of violence is linked to the existence of criminal networks involving community and political leaders and the police. In this state and others, dozens of members of this institution have been arrested for being part of drug networks, and others have been involved in multiple homicides.⁵²

In Mexico, thousands of police officers have been arrested or fired because of links to drug trafficking gangs, including cases in which they were accused of participating in killings.⁵³ State and municipal authorities have dismissed or prosecuted practically all of their own police, replacing them with military troops. In Colombia, every so often the news media report the arrest of members of the police who are said to have collaborated with criminal organizations involved in the drug market.⁵⁴ There are many cases of active members who belonged to drug trafficking networks, although it is difficult to determine the true extent of this problem.

In Bolivia, high-level officials of the Special Force against Drug Trafficking have been investigated and prosecuted for their participation in this illegal economy.⁵⁵ In Paraguay, dozens of police officers were arrested for the “disappearance” of tons of drugs.⁵⁶ In Guatemala, the International Commission against Impunity in Guatemala even stated that 90 percent of all police officers had received a bribe from organized crime at least once in their career.⁵⁷

Estimating the extent of corruption within the ranks of the police is a task for which there is no public information available. Beyond press reports and anecdotal references to police practices in environments heavily influenced by illegal economies, the participation of police officers in illicit activities continues to take place in the shadows, operating with a low profile and with high levels of risk for those who decide to report it.

5. Excessive use of force and violations of human rights

In practice, drug law enforcement has translated into systematic abuses of human rights and fundamental freedoms. In a recent report, the UNDP states, “In many countries around the world, drug control efforts result in human rights abuses: torture and ill treatment by police, mass incarceration, extrajudicial killings, arbitrary detention, and denial of essential medicines and basic health services.”⁵⁸

According to Damon Barrett, current drug policy highlights a contradiction between state drug control measures and human rights. While eradicating crops, going after traffickers, and making arrests for drug-related offenses are assumed to be indicators of “success,” they can represent a human rights risk.⁵⁹ Specifically in the case of the police, enforcement of drug policy has been disconnected from the protection and safety of citizens.

Academic studies and reports by human rights organizations have repeatedly brought to light violations by the police and by military forces in the context of the so-called “war on drugs.”⁶⁰ Human Rights Watch, in its World Report 2014, notes that tough anti-drug policies around the world have resulted in multiple human rights abuses, ranging from violating people’s privacy to forcing drug users to enter treatment facilities.⁶¹

In some countries and cities—those for which information is available—there are unacceptable patterns of killing and victimization by the police. According to a recent study by the Fórum Brasileiro de Segurança Pública [Brazilian Forum on Public Safety], 1,890 people died in 2012

in Brazil as a consequence of police actions; in Mexico, the number was 1,652; in Venezuela, 704; and in the Dominican Republic, 268. By way of comparison, in that year in the United States, a country with over 100 million more people than Brazil, there were 410 deaths in confrontations with the police—a high rate of lethality when compared with that of other developed countries.⁶²

One matter of particular concern is the trend toward the militarization of the police in responsibilities associated with drug law enforcement. In this context, a culture of violence has permeated police institutions, distancing them from their job of protecting the community and giving priority to the “fight” against the enemy—which in this case is defined as drugs. Anti-crime operations have brought with them a history of abuses and serious breaches of law.

In Mexico, Amnesty International found that cases of torture and ill-treatment by security agents rose drastically between 2003 and 2013—in the midst of the “war on drugs.” There were 1,505 cases of torture or abuse reported in 2013, close to a 700 percent increase over the 219 cases reported in 2003. The report details the lack of investigation and punishment for these cases.⁶³ Meanwhile, a CIDE survey of inmates from eight federal prisons found that 59 percent of the prisoners reported having been beaten while incarcerated, 65 were victims of robbery, and in 49 percent of cases they were threatened with having false charges brought against them.⁶⁴

In Colombia, the relationship between human rights abuses and the strategy to suppress the drug market is difficult to discern, with strong interconnections between the armed conflict and the existence of multiple economies of crime. In this context, state intervention and disputes among illegal factions have produced violence and massive displacements, among other effects. A report by the National Center for Historical Memory—BASTA YA. Colombia: memorias de guerra y dignidad [“Enough Already!” Colombia: Memories of War and Dignity]—concluded about drug trafficking that “its unlimited corrupting power permeated the police and coopted the state, but its devastating violence also shook the foundations of the state and found in the armed conflict an opportunity to linger on and achieve political recognition under different banners.”⁶⁵

In the Northern Triangle countries, drug law enforcement has been accompanied by an “iron fist.” In Honduras, according to information from the Public Prosecutor’s Office, most of the complaints reported to the District Attorney’s Office and human rights bodies are directed against police, with incidents that include unlawful entry and search, abuse of authority, and false imprisonment.⁶⁶ In its World Report 2014, Human Rights Watch also notes that extrajudicial killings and disappearances are carried out by the police.⁶⁷

In El Salvador, the organization Interpeace states that youth violence is interpreted as “a deviation linked to drug trafficking and organized crime, which represent a threat to public security.” In this context, it cautions that this approach has led to “...violations of the human rights of children, adolescents, and youth, including practices of torture, rape, and extrajudicial executions by agents of state security forces or related groups.”⁶⁸

The historical account of the impact of drug policy on human rights has yet to be written, with thousands of victims who have not been recognized by the state. Many of them prefer not to come forward for fear of reprisals. Given the lack of transparency surrounding these

actions, it is difficult to estimate the consequences of implementing an approach that has primarily been repressive and that has affected vulnerable segments of the population.

Under these circumstances, the use of force by the state—especially when it leads to the death of one or more individuals—must be subject to vigilance and investigation by the institutions of the justice system.⁶⁹ Otherwise, the lack of punishment and scrutiny will play out repeatedly in the form of policing by force.

What to do? Alternatives for the Weakest Links as a First Step

In Latin America, the modernization and reform of police forces has been identified as a key step needed to be able to respond to the region's security situation. One question along these lines is what role the punitive approach has had in exacerbating existing weaknesses or creating new problems. The combination of poorly trained police forces, characterized by high levels of corruption and weak oversight mechanisms, and a punitive strategy—deliberate and with few enforcement guidelines—has had an influence on this institution's low levels of efficiency and legitimacy.

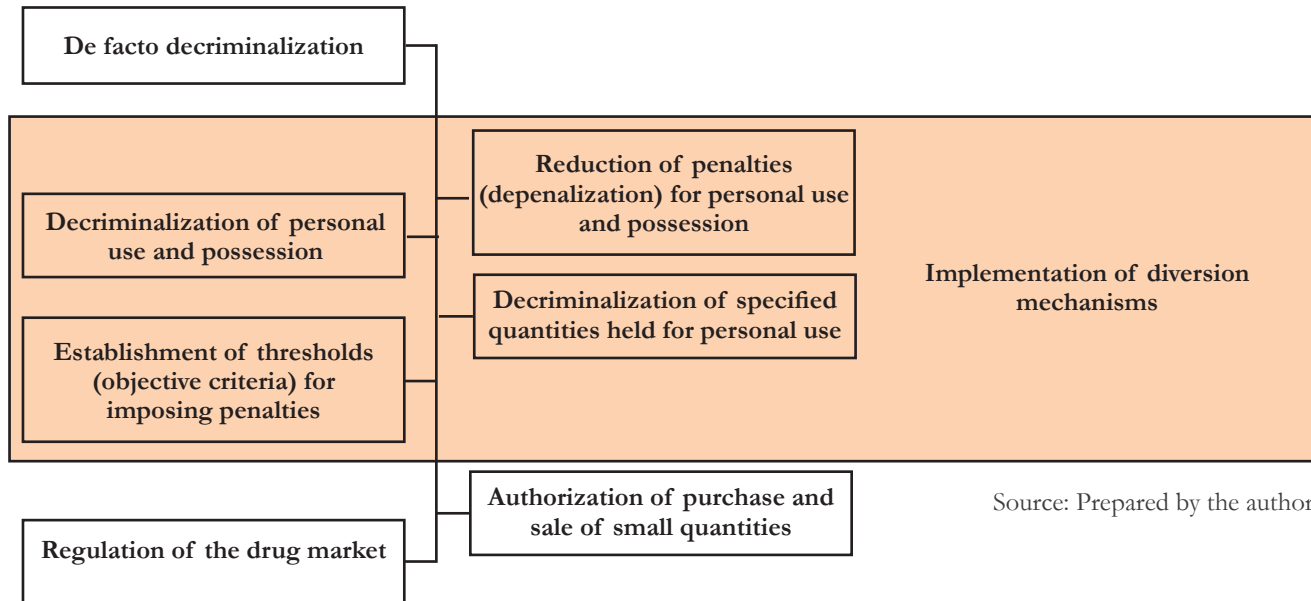
From the standpoint of public policies, at least two questions arise: Is it necessary to reform police forces to change the current paradigm? Or would a change in the work of policing—focused more on the protection of citizens and less on punishment—facilitate the process of transformation within the police force? Drug policy reform could help redirect priorities and change the incentives for the police. It is important to be cautious in making such a statement, though, especially considering the distortional capacity of organizational cultures that resist change and continue to favor the use of force.

The factor that must be stressed is that drug laws have been conducive to heavy-handed policing, with low levels of vigilance and high degrees of discretion and corruption. The implementation of a primarily punitive approach has distorted the work of policing, setting goals that have little to do with the main job of the police, protecting the population.

In this context, it is necessary to identify alternatives that make it possible, on the one hand, to focus policing efforts on the crimes and groups that have the greatest impact on society and, on the other, to create differentiated responses for those at the bottom of the chain. This would give top priority to preventing crime, as well as building trust with the community. This does not mean that the police will no longer arrest people or bring those who commit crimes to justice, but that the use of criminal law is reserved for the most harmful behaviors and crimes.

The following diagram identifies a series of measures that states could take to focus drug law enforcement on the strongest links in the chain (“the tough”), taking differentiated actions that offer alternatives to incarceration for those at the bottom of the chain—those who in the majority of cases commit minor offenses. These alternatives concentrate on limiting entry into the criminal justice system and have the potential to free up the police, making available resources and capacities to address other crimes. Moreover, the adoption of these measures could help recalibrate the metrics and exclude from indicators the number of arrests for minor offenses which for the most part have no direct victims.

Interventions to Limit Entry into the Criminal Justice System



Source: Prepared by the author

The following chart defines each of these alternatives, pointing out its advantages and main challenges.

Types of Interventions: Advantages and Challenges

Type of Intervention	Advantages	Challenges
De facto decriminalization Situation in which use, possession, and personal cultivation are illegal, but in practice there are very few arrests and penalties.	Is easy to enforce. Does not require legal changes.	Produces uncertainty in the justice system, as it is highly arbitrary. Generates an informal system tied to police corruption. Exposes police forces to penalties for failure to enforce the law. Creates gray areas where the role of police forces is undefined.
Reduction of penalties (depenalization) for personal use and possession Reduced severity of penalties without eliminating the crime.	Enables a more proportionate enforcement of drug laws.	Imposes treatment as a punishment (enforced treatment). Criminalizes the drug user and exposes him or her to the criminal justice system. Makes no distinction between different types of drugs. Creates a criminal record for drug use and possession.
Decriminalization of personal use and possession Use and possession are not subject to criminal penalties. Instead, administrative measures are imposed, or all types of punishment are eliminated.	State response involves administrative or health-related services. Does not involve an arrest by the authorities. Does not create a criminal record. Lowers costs for the criminal justice system.	Distinction between personal use and possession with intent to distribute. The production, distribution, and sale of drugs continue to be illegal. A restrictive definition of possession for personal use may ignore consumption patterns and penalize possession of quantities held for personal use. If thresholds are not established, police have the authority to assess the intent of possession—with the risk of stigmatizing and discriminating against certain sectors.

Decriminalization of specified quantities held for personal use. Possession of quantities above the minimum dose allowed by law is not subject to criminal penalties as long as it can be proved it is for personal use.	Enables a response to social-use practices (among several people) without imposing a legal penalty. Takes into account the dynamics of drug dealing, in which drugs are typically sold in quantities greater than the minimum dose established by law. Provides more leeway on drug possession, to respond to certain consumption patterns. Reduces costs for the criminal justice system.	Distinction between personal and collective use, on the one hand, and possession with intent to traffic, on the other. The production, distribution, and sale of drugs continue to be illegal. Greater leeway on possession for personal use can be taken advantage of for trafficking and sales. Creates gray areas that are difficult for judges to address.
Establishment of thresholds (objective criteria) for imposing penalties Establishment of maximum quantities that serve as a guide to distinguish between personal and commercial use.	Thresholds allow for criteria that guide police actions. Maximum quantities can be used to distinguish not only between personal and commercial use but also between those carrying small quantities (“mules”), micro-traffickers, and large-scale traffickers. Thresholds allow for responses that take into account different types of substances.	Maintains the maximum quantity as simply one indicator in a whole set of variables to be evaluated (such as, for example, intention, state of vulnerability, role of offender, and type of substance). Thresholds can ignore patterns in which personal use exceeds the established quantity, with the risk of criminalizing possession. Maintains the capacity of prosecutors and judges to make case-by-case decisions, based on the available evidence.
Authorization of purchase and sale of small quantities Authorization of purchase and sale of small quantities through licensing and defined regulations.	Avoids exposing drug users to the illegal drug market.	Everything that happens outside distribution centers continues to be illegal, creating conditions for a black market. Conditions created for so-called “drug tourism.”
Regulation of the drug market Eliminates the illicit nature of the activities that make up the drug chain, establishing rules for control.	Policing would focus on enforcing regulations, with a focus on a more limited black market. Fewer arrests. Possible reallocation of resources toward prevention and the public health system.	Prevents sale to minors. Restricts the formation of a black market that would compete with the legal market. Prevents the sale and distribution of the regulated drug beyond the border. Prevents an increase in traffic accidents due to substance use. An increase in other types of crime, as a substitute for the loss of income due to regulation.

Source: Prepared by the author, based on the Technical Report on Alternatives to Incarceration for Drug-Related Offenses (CICAD-OAS: 2015), by the Technical Secretariat Working Group on Alternatives to Incarceration, Washington, D.C.: CICAD-OAS; International Drug Policy Consortium (2012), Drug Policy Guide, available at: https://dl.dropboxusercontent.com/u/64663568/library/IDPC-Drug-Policy-Guide_2nd-Edition.pdf; Rosmarin, A. & Eastwood, M. (2012), A Quiet Revolution: Drug Decriminalisation Policies in Practice Across the Globe. UK: Release, Harris, G. (2011). Conviction by Numbers. Transnational Institute, Series on Legislative Reform of Drug Policies, No. 14.

Besides these alternatives, there are also diversion mechanisms, which enable cases to be transferred from the criminal justice system to the administrative arena, with implementation of non-punitive measures. In this case, the person is not criminally punished but instead could have access to treatment, education, and employment. These programs can take effect at the time of arrest or may reach a court.⁷⁰ In the latter case, it is important to mention from a public

health standpoint that some mechanisms that continue to connect problem drug use to the judicial system—for example, so-called drug courts—are not the best way to provide support for people who have an addiction problem.⁷¹

One case that illustrates how these mechanisms can be implemented by giving the police an active role is the Law Enforcement Assisted Diversion (LEAD) program in Seattle. LEAD offers treatment services and community support to people involved in drug offenses and prostitution.⁷² Police officers can decide whether to divert the case to someone who will be in charge of establishing a support plan, outside the criminal justice system. Recently, in response to an increase in heroin use, police departments in some counties in the United States have opted to give amnesty to drug users who come forward to seek support and treatment.⁷³ As the OAS indicates, in contexts of extensive corruption there is a risk that police officers will take advantage of these mechanisms for personal gain.⁷⁴

It is important to mention that in countries with drug production dynamics, the range of options mentioned can also be considered for growers (from reduction of penalties to regulation of crops). The same holds for human couriers (the inappropriately named “mules”) and micro-traffickers who are put to use by criminal networks because of their gender, social exclusion, or their own dependence on a substance.

The adoption of alternatives should take into account the characteristics of each context, looking at particular needs and the institutional capacity available. This should be part of a public policy that seeks to effectively counter the strongest links in the chain while strengthening the availability of institutional services to address the situation of the weakest. To be sure, this type of intervention will not solve the root problems of police forces, and in some countries the impact on the prison system will be modest. However, it could end up encouraging the adoption of new objectives and metrics; help to better invest scarce resources; and balance out state responses with interventions that go beyond the enforcement of a punitive approach.

Conclusion: Neither Magic Solutions nor Dire Predictions

Drug laws and policing practices are a two-way street. On the one hand, drug laws create a series of incentives and practices that define the work of the police, their room for discretion, their relationship with the community, and their adherence to the rule of law. At the same time, police forces determine how these laws are applied on the street, making decisions about the type and nature of penalties as well as the profile of those allegedly implicated. The result of this interaction influences how the justice system works and who will be affected by the application of criminal law.

Based on what happens in Latin America, it is possible to assert that the drug control system has been applied asymmetrically, with the development of a punitive approach that has come down hardest on the weakest links in the chain. Most people who are arrested are in possession of small amounts of drugs, belong to marginal sectors of society, and are not part of a criminal organization. The available evidence also shows that arrest patterns are often based on stereotypes that affect the most vulnerable populations—immigrants, youth, women, and certain ethnic and racial groups. This finding matches what has been seen in other countries and regions,⁷⁵ and is also correlated to what happens with other types of crimes.

The enforcement of drug laws has created perverse incentives that reward excessive repression and have been accompanied by a disproportionate use of force and repeated violations of human rights. It is possible to conclude that the combination of poorly trained police forces, characterized by high levels of corruption and weak oversight mechanisms, and a punitive strategy—deliberate and with few enforcement guidelines—has had an influence on the low levels of efficiency and legitimacy of this institution.

In response to this situation, a set of interventions was identified to keep low-level offenders out of the criminal justice system. These measures, which in some cases involve reform of drug laws, can help to free up policing, focus state actions on the stronger links in the chain, and offer appropriate responses to problems that should be addressed from the standpoint of public health and social inclusion. The impact of these measures will depend on the type of drugs affected by the decisions; for example, the impact of regulating marijuana will be different from that of interventions that involve cocaine or heroin.⁷⁶

Drug policy reforms should not be seen as a panacea for the problems and challenges faced by the police. That institution requires profound changes and measures, especially when it comes to addressing serious human rights violations. However, the adoption of alternative measures for low-level offenders can help to channel the state's limited resources, curb levels of discretion where necessary, and implement differentiated interventions for the various links in the drug chain.

This does not mean that the state is going to refrain from enforcing the law or that the police are going to stop making arrests and investigating organized crime. To the contrary, drug policy reforms can create better conditions for the state to meet its obligations, making the protection and well-being of its citizens a priority. Heading down this road should not be interpreted as a sign of weakness and tolerance of crime. It is about redirecting the justice system and the limited resources available toward more serious and harmful crimes, inverting the current relationship so as to be tough on the “tough” and responsible and compassionate toward the weak.

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