Constructing a “Creative Reading”: Will US State Cannabis Legislation Threaten the Fate of the International Drug Control Treaties?

ABSTRACT

While marijuana remains illegal at the federal level in the United States, state-level efforts to legalize cannabis have gained enormous momentum in recent years. The federal government, which possesses only limited power to stop this trend, has responded by grudgingly allowing such efforts to proceed, maintaining that its inaction on the issue comports with the international drug control regime. This presents a particularly complex problem for international policymakers and legal scholars, who worry that this state–federal conflict may render international drug treaties meaningless. This Note argues that the federal government’s strategy is a productive lens through which to view an international treaty regime that must change to survive. If state-level cannabis experiments are too far along to rein in and the federal government lacks the power or motivation to stop them, the conventional wisdom is that the treaties will diminish. This Note challenges that misconception and assesses practical transnational dimensions of US state-level cannabis activity, including human rights arguments and sovereignty questions applied to the treaties governing international drug policy. In light of the strict text of the drug control treaties and the accelerating pace of state-level initiatives, preserving the international drug treaties demands a “creative reading” of their text alongside a flexible interpretive schema. This Note seeks to articulate the benefits and limitations of such a novel reading.
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I. BACKGROUND: INTERNATIONAL DRUG CONTROL AT THE CROSSROADS

State-level marijuana regulations in the United States are proliferating in great number. At the most radical end of the spectrum, Colorado, Washington, Massachusetts, Nevada, and California have all adopted pseudo-legalization regimes, permitting widespread recreational use of the drug; this means that in certain localities within these states, marijuana is as easy to purchase as liquor. Many other states have taken smaller steps toward legalization, such as allowing different types of medical marijuana use, decriminalizing small-scale possession, or designing other regulatory regimes. These regulatory regimes ultimately work to fit the respective state’s needs and policy goals. Most recently, in November 2016, four more US states passed ballot initiatives legalizing some form of marijuana use. In the eyes of federal law, of course, marijuana


remains grouped with heroin, peyote, and psilocybin as a Schedule I drug under the Controlled Substances Act (CSA). Decades after some commentators prematurely expressed optimism that marijuana would be legalized, and decades after policymakers first expressed concerns about potential problems with criminalizing cannabis, legal liberalization and regulation at the state level are proceeding at a rapid clip.

As states begin to work out kinks in their regulatory schemes, the United States will need to reevaluate its approach to international drug control obligations. The Obama administration’s strategy in this highly fluid area of law was to allow state-level legalization efforts to proceed within certain guidelines while maintaining that the United States remained in compliance with its international obligations. The Trump administration’s policy has been to vocally oppose state-level efforts, but the administration is bound by Obama-era legislative changes; thus far there has been little practical change in federal enforcement efforts in states where marijuana is now effectively legal.

The international body charged with administering drug control treaties has remained unconvinced of the wisdom of these changes, administration . . . can’t stop it but they’re clearly going to make it harder and more treacherous.”)

5. Schedule I drugs: (a) “[have] a high potential for abuse”; (b) “[have] no currently accepted medical use in treatment in the United States”; and (c) “[have] a lack of accepted safety for use of the drug or other substance under medical supervision.” Controlled Substance Act, 21 U.S.C.A. § 812 (West 2016).

6. See, e.g., Mark A. Leinwand, The International Law of Treaties and United States Legalization of Marijuana, 10 COLUM. J. TRANSNAT’L L. 413, 413 (1971) (citations omitted) (“As the debate on marijuana rages, the prospect must inevitably be considered that at some time the United States may legalize the drug.”).


9. See United States v. McIntosh, 833 F.3d 1163 (9th Cir. 2016).
expressing alarm at the prospect of state-level legalization.\textsuperscript{10} The Supreme Court has thus far declined to intervene.\textsuperscript{11}

This Note addresses several transnational dimensions of state-level marijuana law liberalization, arguing that the federal government’s exercise of prosecutorial discretion with regard to state-level liberalization efforts is a legitimate reinterpretation of international drug control treaty requirements. Though state-level liberalization threatens the integrity of the international drug control regime, the US federal government lacks the power to fully stop it. As a result, interpretive flexibility is necessary—it represents the best way to preserve the treaties at issue.

To defend this position, this Note argues that the federal government should incorporate two previously unlinked academic and policy critiques of the drug treaties into its contention that circumstances have changed sufficiently to allow a new approach. These two arguments are: (1) a human rights outlook, which focuses on the social impact of drug control policy on vulnerable communities, and (2) a sovereignty outlook, which argues for federalist interpretations of the drug treaties. A human rights perspective focuses on the social impact that drug control policies have had on vulnerable communities, and a sovereignty argument focuses on potential textual outlets in the drug treaties for federalist interpretations. The assertion of this joint argument will allow the treaties to continue to perform functions desirable at the international level (for example, international cooperation on heroin trafficking) while preventing over-criminalization of lower-impact activity (like personal consumption of cannabis) from threatening the treaties’ moral stature and textual cohesiveness. This strategy would also broaden the conversation on drug control, creating space for federalist nations to experiment internally with drug control.


\textsuperscript{11} See Nebraska v. Colorado, 136 S. Ct. 1034 (2016) (denying leave to file a complaint in case initiated to challenge Colorado’s marijuana regulatory structure); Christopher Ingraham, Where today’s Supreme Court decision means for the future of legal weed, WASH. POST: WONKBLOG (Mar. 21, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/03/21/what-todays-supreme-court-decision-means-for-the-future-of-legal-weed/ [https://perma.cc/RZP8-KGER] (archived Oct. 16, 2016) (“Oklahoma and Nebraska asked the Supreme Court to hear a challenge to Colorado’s marijuana legalization framework, saying that the state’s legalization regime was causing marijuana to flow across the borders into their own states . . . But by a 6-2 majority, the Supreme Court declined to hear the case, without comment.”); see also McIntosh, 833 F.3d at 1163 (holding that a Congressional rider prevented the Department of Justice from spending money on enforcement of marijuana laws against patients complying with state medical marijuana laws).
The law in this area is fragmented and fluid, as different jurisdictions both nationally and internationally revisit the legal status of marijuana. New US state ballot referendums regarding cannabis appear each election cycle, and foreign jurisdictions like Uruguay, Bolivia, Canada, and Portugal are years into their respective experiments with drug legalization. The Netherlands’ famously tolerant drug policy remains unchanged, despite a recent attempt to roll it back. On the commercial side in the United States, tobacco companies and other corporate actors eagerly anticipate legal cannabis’s entry into a competitive and lucrative national market.

12. A client posing a question to her attorney (“What will happen to me if I’m caught using marijuana?”) will be disappointed to hear that oft-repeated phrase (“It’s complicated.”). Indeed, factors influencing the lawyer’s answer might well include the state in which the conversation takes place, the client’s medical marijuana licensing status, who in fact is doing the “catching” (federal agents versus state officials), how much discretion officers of that state possess, the amount of marijuana in question, and the proximity of consumption to areas like school zones. Although this Note addresses international and transnational issues arising from legalization, the client context is crucial.


In the United States, marijuana liberalization has not increased usage rates or increased the rates of car accidents. At the same time, racial disparities in arrest statistics for marijuana offenses remain static, even in US states that have decriminalized marijuana possession. Meanwhile, the international treaties governing marijuana control are decades old. These issues raise the inevitable question: are international norms regarding marijuana taking a back seat to sub-national innovations? International norms are an important factor in the US federal government’s approach to legalization, and absent a major shift in federal priorities, marijuana policy will remain purgatorial, as innovation in legalization states accelerates.

There are few historical analogies to the statutory no man’s land in which a potential consumer of marijuana now finds him or herself. The illegal user, recreational user, registered patient, or unregistered patient’s rights shift markedly across US state boundaries. A federal prohibition on the use or possession of cannabis currently stands alongside many states’ embrace of tax revenues derived from the sale


of cannabis, in addition to states’ elimination of formerly strict prohibitions on personal consumption of the drug. States arguably are sanctioning and profiting from a statutorily impermissible activity at the federal level.

One might analogize to local opposition to Prohibition during the early part of the twentieth century, but no state government ignored the directive of the Eighteenth Amendment and collected taxes on public liquor sales. From an individual rights perspective, we might analogize to gay marriage before Windsor,19 but the Defense of Marriage Act simply prevented the federal government from recognizing same-sex marriage.20 As this dissonance between state and federal government approaches to marijuana continues to grow more pronounced, the federal government’s position on a potential resolution (rescheduling marijuana, or perhaps continuing the policies articulated by former Attorney General Holder, discussed below) must crucially incorporate a plan to contend with the international obligations to which the United States has acceded. This is an uncommon problem, and untangling it will take years.

Parts I.A and I.B of this Note survey the international drug control treaties, their text, and their effects. Part I.C discusses US federal law as it relates to marijuana enforcement in the states. Part II addresses the complexities of enforcing the international drug treaty regime. Part III articulates a human rights argument for the easing of the drug control treaties with regard to cannabis, and Part IV speaks to the complexities of nation-state sovereignty over treaty enforcement. American society is experiencing a déjà vu moment – just as in 1933, the costs of Prohibition are becoming apparent, and a new system is emerging through a tangled and inexact democratic process.21

20. Id. at 2694 (“Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound.”).

In this Note, I refer to “drug prohibition” as such, while I employ the term “Prohibition” to refer to the program carried out by the United States concerning alcohol under the Eighteenth Amendment between 1920 and 1933.
Prohibition itself can serve as a rough analog for a transition of drug policy from a prohibitionist approach to a regulatory approach.  

**A. The International Drug Control Treaty Regime**

The United States is party to three major international drug control treaties: (1) the Single Convention on Narcotic Drugs of 1961, amended by the 1972 Protocol; (2) the 1972 Protocol, which amended the Single Convention of 1961 to comport with the Convention of Psychotropic Substances of 1971; and (3) the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. Other commentators have conducted more in-depth surveys and analyses of these treaties.

Several crucial points should guide any analysis of these instruments. First, although marijuana produces similar physiological effects to alcohol, none of the conventions prohibits or regulates alcohol. If the United States were to adopt an alcohol-minded approach to marijuana (tax, regulate, and reduce harm with programs geared to alleviating alcoholism), the treaties could lose a major raison d’être behind their adoption. This omission casts doubt on the Conventions’ feigned concern with public health. Relatedly, the Conventions themselves are not based on the science and principles of harm reduction.

Second, the international regime on drug control was “developed on the premise that a reduction in the illicit drug markets will be

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22. See Harry G. Levine & Craig Reinarman, *The Transition from Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, in *How to Legalize Drugs*, supra note 21, at 282. Levine and Reinarman write: Punitive drug prohibition can therefore be distinguished from more tolerant and humane forms of drug prohibition – from what we call regulatory drug prohibition. Though still prohibitionist, regulatory prohibition does not rely so heavily on arresting and imprisoning men and women for possessing and using illicit drugs or for small-scale dealing.

Id. (emphasis in original).

23. See infra text accompanying notes 39, 49, and 54.


26. See Bewley-Taylor, supra note 7, at 287.
achieved predominantly through prohibition-oriented [supply-side] measures.”

27. Thus, the treaties were founded on the assumption that their adoption would decrease consumption. The assumption was that the treaties would be successful. It is well settled that the treaties have effectively failed.

28. Because the premises underlying these treaties were faulty, the international drug control system has not achieved what the treaties were designed to do. Although this Note only addresses cannabis issues, these points apply with equal force to other narcotics. The United Nations Office on Drugs & Crime itself recognized the “unintended consequences” of international drug control, including: the development of the black market for illicit drugs, a policy displacement between law enforcement and public health, a geographical displacement of production, a substance displacement, and the marginalization of drug users. The failure of the treaties has


31. Raustiala, supra note 25, at 113 (“The effectiveness of the international legal regime for drug control is generally considered low in relation to the scope of the problem.”); see also BEWLEY-TAYLOR, supra note 7, at 291; CRICK, supra note 7, at 20 (calling the international drug control system “increasingly creaky”); Damon Barrett & Manfred Novak, The United Nations and Drug Policy: Towards a Human Rights Based Approach, in THE DIVERSITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR KALLIOPI K. KOUFA 449 (Aristotle Constantinides & Nikos Zaikos eds., 2009) (“[T]he United Nations drug control system is seen as a significant part of the drug problem, rather than part of the solution.”); Aart Hendriks & Katarina Tomasevski, Human Rights and Drug Use, in DRUG USE AND HUMAN RIGHTS IN EUROPE: REPORT FOR THE EUROPEAN COMMISSION 53 (Jos Silvis et al. eds., 1992); GDPO EXPERT SEMINAR REPORT, supra note 18, at 22 (“[F]rom an internal perspective, the UN Conventions are obsolete since drug consumption is a given in all parts of the world.”).

played out with devastating consequences in the world’s most vulnerable communities. Since the early twentieth century, drug prohibition has served as the instrument of society’s baser elements, racial animus and xenophobia. Philosophy scholars have asserted these arguments for decades. As Barrett and Novak have noted, “[t]here is a danger that drug control has become an end in itself.”

Third, the international drug control treaties might be better conceptualized as a fundamental misallocation of resources amongst demand-side, supply-side, and harm reduction solutions. A hypothetical drug control strategy could focus primarily on drug consumers (some might deem them addicts, while others might deem them patients), on suppliers and producers of drugs, or on reducing general harm to society. A demand-side strategy might include drug abuse treatment; a supply-side strategy might include crop destruction; and a harm reduction strategy might include state-sponsored needle exchanges.

The recent moves of US states to reduce criminal justice involvement in policing marijuana use are better understood as a state-sponsored transition to a harm reduction model. While legalizing and taxing marijuana may not fit the definition of a drug control strategy as contemplated by the

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31. Raustiala, supra note 25, at 96 (“Opium, marijuana, and cocaine use was also associated with ethnic and racial minorities in the United States, in particular with those of Chinese, Latin American, or African descent, and hence drug prohibition efforts were fed by xenophobia, racism, and anti-immigrant sentiments.”); see also Barrett & Novak, supra note 29, at 451 (discussing the increase in prison populations and racial disparities in enforcement of drug laws in the United States).

32. See, e.g., David A.J. Richards, Sex, Drugs, Death, & the Law: An Essay on Human Rights and Overcriminalization 179 (1982) (referencing drug use’s cultural connotations of the cultural “other,” and opining, “It is difficult to see anything in these claims but familiar sociological manifestations of cultural hegemony.”).


34. Raustiala, supra note 25, at 99–100 (noting that supply-side efforts are less effective and more expensive than demand-side and harm reduction strategies); see also Bewley-Taylor, supra note 7, at 294 (discussing a “policy displacement” between health and law enforcement).

35. Raustiala, supra note 25, at 99–100.

36. This shift would constitute a marked change from the “supply-side focus, criminal justice implementation, and moralizing impulse” characterizing prior U.S. drug control efforts. Id. at 137; see also Recalibrating the Regime, supra note 27, at 11 (discussing the “moralistic perspective” of the drug control regime).
international drug control treaties as originally written, marijuana remains a widely produced crop and is still used in countless jurisdictions by millions of users. Nothing in the treaties has changed these basic facts, and popular state-level movements to lessen penalties for cannabis use lay bare the contradictions inherent in the drug treaties’ normative structure.

B. The Single Convention, the 1972 Protocol, and the 1988 Convention

With those structural infirmities in mind, it is necessary to consider the text of the treaties themselves. The 1961 Single Convention, in the main, created a scheduling system for controlled substances, organized information-gathering protocols for member states, and authorized a treaty body, the International Narcotics Control Board (INCB), to investigate implementation issues. Under the Single Convention, the INCB has the power to recommend trade sanctions for treaty violators but has rarely done so. The INCB

[37] See Challenging the UN, supra note 27, at 173 (“The centrality of the principle of limiting narcotic and psychotrophic drugs for medical and scientific purposes leaves no room for the legal possibility of recreational use.”).


[40] Raustiala, supra note 25, at 107 (citing INT’L NARCOTICS CONTROL BD., EFFECTIVENESS OF THE INTERNATIONAL DRUG CONTROL TREATIES, at 20, U.N. Doc. E/INCB/1994/1/Supp.1, U.N. Sales No. E.95.XL5 (1995), https://www.incb.org/documents/Publications/AnnualReports/AR1994/E-INCB-1994-1-Supp-1-e.pdf [https://perma.cc/DB4S-8QVY] (archived Oct. 19, 2016) (“[T]he Board has often requested certain Governments to provide explanations or to take remedial measures . . . The Board has, until now, never made use of the final steps foreseen in article 14 of the 1961 Convention and article 19 of the 1971 Convention.”); see also WELLS BENNETT & JOHN WALSH, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS, MARIJUANA LEGALIZATION IS AN OPPORTUNITY TO MODERNIZE INTERNATIONAL DRUG TREATIES 13 (2014), https://www.brookings.edu/wp-content/uploads/2016/06/CEPMMJ Legalizationv4.pdf [https://perma.cc/3FYG-UJUF] (archived Feb. 18, 2017) (“[T]he Board has not, for example, paired its objections with a threat to exercise its rather gentle, purely recommendatory and rarely invoked sanctions power, regarding the import and export of drugs.”); Challenging the UN, supra note 27, at 173 (“Indeed, while often vocal in its criticism of national policy, the INCB, as the body responsible for overseeing the operation of the treaties, has no formal power to enforce the implementation of the Convention provisions. Nor has the Board the formal power to punish parties for non-compliance.”); GDPO EXPERT SEMINAR REPORT, supra note 18, at 25 (calling the INCB “a dog that can’t bite”); see generally DAMON BARRETT, INT’L HARM REDUCTION ASS’N, UNIQUE IN INTERNATIONAL RELATIONS? A COMPARISON OF THE
continues to release frequent reports on drug policy. The Single Convention also specifies that the World Health Organization (WHO) must assess the danger of problematic substances, and all treaty members must criminalize all quantities of possession of drugs designated as dangerous. The Single Convention “entailed far more regulatory power than any previous international drug accord,” and its primary approach was “prohibitionist.” Notably, the Netherlands, a Convention signatory, does not prosecute the use of marijuana; this longstanding practice exemplifies the toothless nature of the Board’s disapproval. Commentators have suggested that this particular treaty could accommodate a more flexible interpretation of drug use. An early commentator even suggested that the treaty’s provisions could be separable.


41. Aoyagi, supra note 30, at 583–85 nn.113–116 (discussing the INCB’s criticism of, amongst other things, Dutch coffee shops, personal use of marijuana, and certain types of heroin addiction programs). Aoyagi’s excellent assemblage and discussion of the INCB Reports is important for a simple reason: the INCB issues reports disdaining practices and does nothing more. These reports have even contained proposals criminalizing free speech. See Ted Galen Carpenter, Collateral Damage: The Wide-Ranging Consequences of America’s Drug War, in AFTER PROHIBITION: AN ADULT APPROACH TO DRUG POLICIES IN THE 21ST CENTURY 157 (Timothy Lynch ed., 2000).

42. Single Convention, supra note 39, art. 3 (noting that the WHO’s recommendation then passes to the Commission on Narcotic Drugs (“CND”), which can then adopt the recommendation).

43. For a more thorough exploration of the treaty’s finer points, see Panicker, supra note 28, at 7–8. See also Aoyagi, supra note 30, at 577–81. Consider too the radical nature of this requirement: as Prohibition proved, criminalizing an activity as widespread as personal drug use puts police in the uneviable position of preventing an activity that individuals may pursue entirely inside their homes.

44. Raustiala, supra note 25, at 107.

45. Heilmann, supra note 24, at 244–45.

46. Shu-Acquaye, supra note 10, at 715; see also Aoyagi, supra note 30, at 583–85 nn.113–116.

47. See, e.g., Heilmann, supra note 24, at 279 (“Understood correctly, the international drug control regime is not hostile towards a somewhat liberal approach that emphasizes education, treatment, and even harm reduction over purely repressive measures.”); Aoyagi, supra note 30, at 586 (“The foregoing justifications [of the INCB] constitute the prism though which advocates of punitive prohibition view the treaties. A straightforward analysis of the text of the treaty, however, yields a different, more flexible interpretation of the treaty’s provisions on personal drug use.”).

48. See Leinwand, supra note 6, at 430. Leinwand additionally posited that the inclusion of marijuana in the 1961 Convention was a mistake:

Cannabis thus does not belong – and, objectively, never did belong – in the provisions of a treaty whose stated purpose is to prevent ‘addition to narcotic drugs.’ The inclusion of cannabis in a narcotics
The 1972 Protocol updated the Single Convention in accordance with the goals and policy provisions adopted at the separate 1971 Convention on Psychotropic Substances. Compared with the strict controls imposed on plant-based drugs under the Single Convention, the 1971 Convention imposes a somewhat weaker control mechanism. A major focus of the 1972 Protocol is crop destruction. The 1972 Protocol also contains a trade measures provision, which, like the punitive measures specified for noncompliant signatories of the Single Convention, has seldom been used. One important difference is that the 1971 Convention, which prompted the adoption of the 1972 Protocol, used public health language to discuss the problem of drug control.

The 1988 Convention expanded the scope of enforcement to further criminalize supply-side activities like production, sale, and transport of both precursor and narcotic substances. The 1988 Convention “is striking for its focus on internal, domestic activities and on trade in legal drug-related commerce—such as precursors and equipment—rather than international drug trafficking only.” While the United States sought trafficking penalties during negotiations, “producer” countries, where drugs are manufactured or grown, argued for the inclusion of personal consumption penalties in “consumer” states like the United States. A focus on the “market chain” of substance abuse and the further criminalization of activities along the chain predating consumption is a crucial underpinning of the 1988 Convention.

treaty was a mistake, based on the erroneous scientific and medical information generally available to the delegates when the treaty was drafted.

Id. at 431 (citations absent in original); see also BEWLEY-TAYLOR, supra note 7, at 284–86 (discussing Leinwand).


50. Heilmann, supra note 24, at 247.

51. Id. at 246.

52. Raustiala, supra note 25, at 108–109 n.95.

53. Aoyagi, supra note 30, at 579.


55. Raustiala, supra note 25, at 108.

56. Id. at 109–110.

57. Aoyagi, supra note 30, at 580.

58. Panicker, supra note 28, at 11.
In general, as other commentators have noted above, these treaties do not contain many enforcement procedures outside of the issuance of referrals and reports. From an effectiveness perspective, as of 1999, illegal drugs still constituted almost 10 percent of world trade, exceeding the automobile market. Further, the treaties themselves comprise a skeletal legal architecture above a much wider range of international drug suppression efforts sponsored by the United States. These supply-side campaigns have largely failed. Therefore, laboratories of experimentation for marijuana reform are desirable, even necessary, in the twenty-first century.

C. US Federal Law Applied to Cannabis

While US federal law remains unchanged, US federal enforcement has shifted markedly. The current fragmented state of the law in this area is compounded by the fact that the agencies tasked with enforcing

59. See Aoyagi, supra note 30, at 583–85 nn.113–116; Aparna Bushan, Note, An Evaluation of the Effects of the Legalization of Marijuana in Colorado and Washington from an International Law Perspective, 39 CAN.-U.S. L. J. 187, 199–200 (2015) (pointing to Article 48 of the Single Convention, supra note 39, which allows for referral to the International Court of Justice (“ICJ”), but noting that all ICJ decisions are only enforceable with the assistance of the U.N. Security Council, where the U.S. has a veto); see also Angela Hawken & Jonathan Kulick, Commentary, Treaties (Probably) Not an Impediment to ‘Legal’ Cannabis in Washington and Colorado, 109 ADDICTION 355, 355–56 (2014) (“[T]he drug-treaty regime is barely enforceable: Bolivia suffered no lasting harm from its denunciation and re-accession, despite the INCB’s objections…and charges from abroad of hypocrisy or applying double standard have not been particularly effective in obliging the United States to abide by some less-ambiguous treaty obligations.”).


61. Ted Galen Carpenter, Ending the International Drug War, in HOW TO LEGALIZE DRUGS, supra note 21, at 293 (“Washington has taken four approaches to eradicating the supply of such [illegal] drugs: global agreements, regional and sub-regional agreements, bilateral agreements with drug-producing or drug-transiting countries, and unilateral coercive measures.”).

62. See id. at 305 (citations omitted) ("The data merely confirm what many policy experts – even those who do not favor legalization – have concluded for years: the international supply-side campaign against drugs has produced meager results.").

63. See Robin Room & Peter Reuter, How well do international drug conventions protect public health?, 379 THE LANCET 84, 90 (2012) (arguing that “[t]he international drug treaties in their present form seriously constrain governments’ capacities to engage in such policy experiments [relating to harm reduction]”).
federal law are allowing state-level regulation, in clear conflict with federal and international law, to proceed.

For instance, a marijuana producer who complies with state law in Colorado remains in violation of federal law, which prohibits the use and possession of marijuana. However, the existence of the federal ban does not automatically mean that it will be enforced against all who break it—the Attorney General is responsible for determining how federal law will be enforced and against whom. While the Attorney General’s guidelines are only advisory, in practice they set the tone. Just as this Note went to press, Attorney General Sessions rescinded these guidelines.


65. The guidelines issued by the Obama administration identified eight priorities in federal enforcement of the law: (1) preventing distribution of marijuana to minors; (2) preventing the diversion of marijuana-based revenue to criminal enterprises; (3) preventing the movement of marijuana from states where it is legal to states where it is illegal; (4) preventing state-authorized marijuana activity from obscuring other illegal activity; (5) preventing violence; (6) preventing drugged driving; (7) preventing marijuana cultivation on public land; and (8) preventing marijuana possession and use on federal property. 2013 AG Guidelines, supra note 64, at 1–2. In late 2017, commentators considered it unlikely that much would change in this arena quickly. See Janet Burns, Trump Extends Cannabis Protections ‘Til December As Plans For Study, States Remain Hazy, FORBES: WOMEN@FORBES (Sept. 25, 2017, 1:50 PM), https://www.forbes.com/sites/janetburns/2017/09/23/trump-budget-extends-cannabis-protections-til-december-as-plans-for-study-states-remain-hazy/#6e9f914b47ff (archived Oct. 23, 2017) (“[M]any aspects of federal and state game-plans for the cannabis industry remain uncertain, forcing a range of cannapreneurs to proceed unprotected while hoping for the best.”). But in early 2018, Attorney General Sessions revoked the Cole Memorandum; this move could allow federal prosecutors greater latitude to bring charges against marijuana producers. See Charlie Savage & Jack Healy, Trump Administration Takes Step That Could Threaten Marijuana Legalization Movement, N.Y. TIMES (Jan. 8, 2018), https://www.nytimes.com/2018/01/04/us/politics/marijuana-legalization-justice-department-prosecutions.html\?r=0 (archived Jan. 12,
A separate executive agency memorandum, issued on February 14, 2014, noted that financial institutions could reasonably rely on the accuracy of state information relating to marijuana businesses. In other words, the current state of US law perpetuates a legal purgatory signposted with unenforced federal prohibitions, complex state laws, and revocable guidelines.

Given the widespread use of marijuana (every instance of which technically violates federal law), the Obama-era Attorney General’s guidelines were an attempt to bridge the gap between states moving ahead with marijuana regulation schemes and a static federal and international regime. A later memorandum emphasized that the documents should serve “solely as a guide to the exercise of investigative and prosecutorial discretion,” and may “not be relied upon to create any rights, substantive or procedural.” Despite this hedge, it can hardly be argued that documents encouraging de facto legalization on the ground do not at least straddle a line between prosecutorial discretion and encouraging a violation of federal and international law. The Attorney General—no matter who holds that
office—is caught in a difficult position between managing the responsibility to enforce the law and accommodating congressional tolerance for state-level experiments. The result is that marijuana has not been de facto legalized, but it does potentially open the door to allegations that the United States is violating international law. The question is whether there are sufficient grounds for the Attorney General’s promulgation of the guidelines and for an exercise of prosecutorial discretion (effectively forced by Congress’s hand) as to cannabis.

Wherever the limits of the United States’ enforcement discretion under the drug treaties might be drawn precisely, we know that such discretion by definition cannot be an across-the-board, categorical affair, when the issue is federal tolerance of regulated, comprehensive marijuana markets established by state law. And that’s just it: if more states take a legalize-and-regulate approach, a federal-level decision not to prosecute similarly situated persons could start to look like blanket non-enforcement of implementing legislation—something that, in our view, the drug treaties do not contemplate.

BENNETT & WALSH, supra note 40, at 17. Bewley-Taylor takes a similar approach: As we have seen, during the course of two significant waves of soft defection, various regime members or sub-national jurisdictions therein have moved in a variety of ways to mitigate the effects of punitive prohibition on the non-medical and non-scientific use of cannabis. Yet, any significant moves to reduce the suboptimability of the GDPR and go beyond the softening of cannabis prohibition remain legally problematic. Even the most creative reading of the treaties would be unable to legitimize regulation without coming into conflict with the current international legal framework. Moves to regulate the market in order to monitor strength and purity, take the lucrative business out of the hands of increasingly powerful criminal organizations as well as allow the generation of what are currently much needed tax revenues would be impossible without either some form of full defection from or revision of the conventions. Moreover, as with any shift towards a tolerant approach to the possession of any currently prohibited substance for personal use, individual drug users in most instances still source their drugs from the illicit market; an uncomfortable paradox that exposes the limits of pragmatism within the current international legal structure.

Bewley-Taylor, supra note 7, at 299–300. But see Hawken & Kulick, supra note 59, at 356 (“Whether the Single Convention requires federal preemption is not evident from a plain reading, and is much disputed.”).
II. ENFORCING & ALTERING THE DRUG TREATY REGIME

A. Introduction

International policymakers have several different avenues for changing the international drug control regime: (1) modification, (2) amendment, (3) denunciation, or (4) disregard of controlling treaties. Each of these four avenues has disadvantages. For example, using treaty procedures to modify the Single Convention and reschedule cannabis could not permit private cultivation; that would require a formal treaty amendment rather than a modification. Amending the treaties could prove problematic given the number of signatories.

B. Limitations with the Current Treaty System

There is a difference between a “soft” treaty challenge (for example, arguing that because medical use of marijuana is undefined in the treaties, there could be leeway for a medical marijuana regulatory regime), and a “hard” treaty challenge (legalizing all drugs, taxing them at the federal level, and ignoring the international fallout). Given the United States’ past efforts to “persuad[e], cajol[e], and brib[e] other nations to wage a coordinated war against drugs,” a limited renunciation of the treaties’ marijuana provisions (or a valid re-interpretation) could better preserve US credibility in future regulation of more dangerous drugs, like heroin, and drug trafficking.
The United States supplied the “moral legitimacy” and the economic heft to enforce these treaties.74 Ironically, the most powerful force animating the drug control enforcement system is inertia.75 Inertia in this context means that because the political will to change the regime has not materialized, the status quo remains in force. The fact that the United States created the international drug control unusual nor unprecedented. See Syméon Karagiannis, *The Territorial Application of Treaties*, in *The Oxford Guide to Treaties* 305 (Duncan B. Hollis ed., 2014). Karagiannis writes:

> A federal State may also seek to issue reservations or understandings on ratification that address obligations that might otherwise be inconsistent with the State’s federal system. The United States has used both approaches . . . . Alternatively, federal States may seek to adjust the treaty obligations themselves to avoid federalism issues, for example, by limiting implementation requirements to the ‘national level.’

Id. at 314 n.44 (citations omitted) (discussing Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1377 (2006)).

74. *Challenging the UN*, supra note 27, at 174; *see also Bennett & Walsh*, supra note 40, at 18 (citations omitted) (“The United States was a—if not the—key protagonist in developing the 1961, 1971, and 1988 Conventions, as well as the 1972 protocol amending the 1961 Convention; the United States has for decades been widely and correctly viewed as the treaties’ chief champion and defender.”) (emphasis in original);

Bewley-Taylor, supra note 7, at 336 (“Would it not be the ultimate paradox if the currently fractured consensus were shattered by events within the cradle of prohibition itself?”); *Richards*, supra note 32, at 168. Richards writes:

> It is disingenuous to suppose that the American criminal prohibition of drug use is based on the secular concerns of criminogenesis and control of drug-related injuries . . . . These arguments are, at best, post hoc empirical makeweights for justifications of a different order, namely, moralistic and paternalistic arguments of a peculiarly American provenance.

Id.

75. *See Challenging the UN*, supra note 27, at 174. Bewley-Taylor opines:

> As its staunchest defender, it is the US that provides the INCB with the muscle to police the regime’s disciplinary framework. Pressure from Washington has long supplemented the moral legitimacy bestowed upon the doctrine of prohibition by the UN. Such a US–UN alliance represents a formidable source of inertia.

Id.; *see also* Neil Boister, *Waltzing on the Vienna Consensus on Drug Control? Tensions in the International System for the Control of Drugs*, 29 LEIDEN J. INT’L L. 389, 408–09 (2016) (“One cannot be sanguine about making predictions of major reform of the drug control system; there is too much institutional inertia and too many States have bought heavily into the current approach as the only possible way of controlling their domestic drug problems.”). Political consensus, both foreign and domestic, is crucial to treaty longevity, and is the only way to break this cycle. *Bennett & Walsh*, supra note 40, at 25 (“No treaty can survive the collapse of a political consensus supporting it. And no treaty system can endure if it cannot cope with changing political conditions. Sustainability in international law depends not only on commitment but also on resilience and adaptability.”) (emphasis in original).
Conducting a "Creative Reading" system serves as an implicit check on other nations that might consider easing their own drug control policies. If that bulwark were removed, then the treaties’ power, already weak in the form of an advisory INCB, would lose its teeth. Functionally, the United States provides a majority of the funding for UN drug control organizations and could exercise its power to dictate new enforcement priorities that do not include marijuana to the same degree as other drugs. Because political consensus is collapsing within the United States, at least with regard to criminalizing cannabis, the international drug control enforcement regime is under threat as its biggest proponent withdraws.

The treaties may also have constitutional limitations. One textual source of this complication is language in Article 3 of the 1988 Convention, which states:

Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances.

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76. See David R. Bewley-Taylor, The United States and International Drug Control 1999–97 (1999) (“As we have seen, the United States has effectively used the UN in an effort to create a prohibitive norm for international drug control and promote its own moral value system towards drug use in other nations. This it has achieved by a combination of international treaty obligations and economic coercion.”); see also Carpenter, supra note 41, at 292, 294. Carpenter argues:

“Indeed, the United States has been, especially in recent decades, the principal architect of that [international drug prohibition] structure. Any decision by U.S. leaders to change policy and opt for the legalization of drugs would therefore cause an array of international complications. The prospect of such complications is not a sufficient reason for rejecting the option of legalization . . . .”

Id. (emphasis added). For an analysis of Bolivia’s recent renunciation and re-accession to the treaties, see Bennett & Walsh, supra note 40, at 23.


78. Challenging the UN, supra note 27, at 177. Bewley-Taylor writes:

Thus, if the highest courts in signatory nations ruled that prohibition of a single drug (cannabis for example) or a selection of outlawed substances, was unconstitutional then the Parties involved would no longer be bound by the limitations of the Conventions with respect to those drugs. Such action would be perfectly legitimate according to the provisions of the treaties themselves.

for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

As a matter of statutory interpretation, this language contains a directive—criminalization—preceded by an important limitation.\textsuperscript{79} Bewley-Taylor and Jelsma have called this language an “escape clause.”\textsuperscript{80} More than a simple safety valve, this language recognizes an inherent limitation in the treaties’ power—enforcement of their principles inherently relies on compliance of signatories in creating criminalization regimes. A further complication is the extent to which states within federal systems are bound by international treaties acceded to by the federal entity.\textsuperscript{81}

Domestic enforcement of drug law rests upon formal and informal prosecutorial discretion.\textsuperscript{82} The scale and geographic breadth of drug use in any nation necessarily demand that said nation compose and enforce guidelines allowing prosecutors in disparate areas to deal with problems in their communities. Indeed, the international drug treaties reflect a shift over the years to emphasize drug trafficking control. Because the government cannot possibly prosecute each infraction of drug law, its efforts logically are constrained by resources and priorities.\textsuperscript{83} For example, states suffering from addiction epidemics may focus on rehabilitation once a defendant enters the criminal justice system, whereas a border state would likely concern itself with efforts to curtail trafficking within its borders. This applies to the federal government, too. The very structure of the international treaties governing drug control might be construed as a guideline for prosecutorial discretion. Countries agree on priorities and a skeletal

\textsuperscript{79} 1988 Convention, supra note 54, art. 3.
\textsuperscript{80} DAVID BEWLEY-TAYLOR & MARTIN JELSMA, TRANSNATIONAL INST., THE UN DRUG CONTROL CONVENTIONS: THE LIMITS OF LATITUDE 6 (2012), https://www.tni.org/files/download/dlr18.pdf [https://perma.cc/YAY6-56XJ] (archived Nov. 11, 2016) [hereinafter LIMITS OF LATITUDE] (“Further, the article allows for nonprosecution via a number of routes including expediency or public interest principles, even though it restricts the application of such national discretionary powers when it relates to trafficking offences.”).
\textsuperscript{81} See infra text accompanying notes 146–48; see also BENNETT & WALSH, supra note 40, at 15 n.35; LORD MCNAIR, THE LAW OF TREATIES 79 n.1 (1961). But see Hawken & Kulick, supra note 59, at 356 (“[M]ost constitutional and international law scholars maintain that the Conventions do not bind member states with federal systems of government to over-ride legalization in their constituent political units, no matter that the spirit of the treaties does.”). Practically speaking, of course, the INCB cannot compel a sub-federal state to change its laws.
\textsuperscript{82} See Levine & Reinarman, supra note 22, at 259, 284 (discussing opposition to drug laws by law enforcement officials who wish to de-prioritize minor drug arrests, instances of judges refusing to enforce mandatory minimum statutes, and district attorney perspectives on the success of the drug war).
\textsuperscript{83} CRICK, supra note 7, at 14 (discussing the federal government’s minimal resources for widespread drug enforcement).
oversight structure, but the goals of the treaties are primarily accomplished by member states through their own internal justice systems.

One might characterize federal law as an instrument of international law, and vice versa. But that picture is now complicated by the tension between the law of US states and both federal and international law. The federal government’s approach, which maintains the federal government’s ability to reverse course or intervene in marijuana-regulating states, will have the effect of legalizing marijuana for millions. To some extent, to a medical marijuana patient or a casual user, the international treaties and federal laws may not mean much. But it is crucial for the United States to craft a coherent approach that allows state experiments to proceed and explains why its approach is consistent with the treaties’ aims.

C. Assessments of the Treaty System & the Limitations of Such Surveys

Two commentators have proposed a three-tier, traffic-light model in assessing whether different drug control approaches violate treaty norms.84 Bewley-Taylor and Jelsma posit that: (1) decriminalization, drug consumption itself, possession and cultivation for personal use, and harm reduction strategies are all permissible options for a state to enact under the treaties;85 (2) drug consumption rooms, medical marijuana, and Dutch coffee shops are contested or contestable options under the treaty regime;86 and (3) regulated markets for non-medical purposes are impermissible under the current treaty structure.87 This traffic-light model, while helpful for assessing the limits of the treaties, ignores the realities taking shape on the ground in US states: even if regulated markets are technically impermissible, they are thriving. The only question is how the treaty signatories proceed given this new reality. The United States’ best (and only88) option is to argue that the

84. See LIMITS OF LATITUDE, supra note 80.
85. Id. at 4–11.
86. Id. at 11–15.
87. Id. at 16–17.
88. Per the Congressional rider discussed in United States v. McIntosh, 833 F.3d 1163, 1169 (9th Cir. 2016), federal enforcement faces a dual challenge: (1) the government has no desire to entirely do away with the international treaty regime, especially for activities like drug trafficking that still draw federal interest; but of course, (2), its power to interfere with state experimentation is extremely limited. Thus, the federal government’s argument is that the treaties are consistent with international norms of prosecutorial discretion. What makes this stance desirable from the perspective of international norms? The only way forward is to characterize the U.S. approach as more in line with international norms like human rights, and to expand a reading of the
federal exercise of prosecutorial discretion is permissible under the treaty structures, and that this position is buttressed by human rights and sovereignty considerations. The federal government’s current approach, purgatorial though it may seem at first glance, allows the states ample latitude to experiment with the regulation of cannabis. The approach also presents an argument that prosecutorial discretion is allowed by the treaties; this enables the government to claim it wants to pursue international drug control efforts governing drugs other than marijuana.

D. The Path Forward

In the current state of discord between federal and state law regarding marijuana, the federal government has several options in constructing a response to the quickening pace of state action. Legalizing marijuana at the federal level by placing cannabis outside of the CSA would flagrantly disregard the core tenets of the international regime. It would also endanger cooperation with US partners abroad in drug operations the United States maintains an interest in pursuing (e.g., combatting heroin smuggling). Allowing states to opt out of the CSA and granting certain states conditional waivers overseen by the Justice Department could constitute middle ground steps. Assuming that the United States is interested in maintaining its role, built up over decades, as a major player in international narcotics treaty governance, the best avenue to pursue would be to allow states to experiment with cannabis but limit federal involvement in the mechanisms of state taxation. This would allow the United States to maintain its position in the international community with regard to other higher-harm drugs that remain illegal at the federal level like heroin, while allowing state efforts to go forward.

treaties that focuses on domestic sovereignty. Although the Obama administration’s concerns with racial equality have faded into the background as the Trump administration takes shape, those impacts can still be used to justify the federal government’s response to state efforts vis a vis the treaties.

With regard to the international treaties themselves, the United States can assert that its constructive laissez-faire policies towards marijuana-permissive US states constitute valid exercises of prosecutorial discretion. Both sovereignty and human rights arguments support this position.\textsuperscript{90} While some commentators have argued that international treaties do not bind the states,\textsuperscript{91} the federal government’s response to state legalization initiatives is what matters—without federal sanction or blessing, state legalization cannot succeed. Because state legalization must eventually exist alongside, or at least, with the blessing of, the federal system, and because the federal system must contemplate adherence to the treaties, the international regime is relevant to state action.\textsuperscript{92} In

\textsuperscript{90} See infra Parts III & IV.

\begin{quote}
The U.S. federal government is a signatory to the treaty, but the States of Washington and Colorado are not. Countries with federated systems of government like the U.S. and Germany can only make international commitments regarding their national-level policies. Constitutionally, U.S. states are simply not required to make marijuana illegal as it is in federal law. Hence, the U.S. made no such commitment on behalf of the 50 states in signing the UN drug control treaties.
\end{quote}


\begin{quote}
Now, both sides of the debate might say to me: Okay, so the state actions were not violations of the UN treaties, but if the federal government was bound by this treaty then the Attorney General was required to sue Washington and Colorado to overturn their legalization laws. This may well be correct from a legal point of view, but from a substantive drug policy outcome viewpoint, it does not make sense to me.
\end{quote}

Id.

\textsuperscript{92} See NEW YORK CITY BAR ASS’N, supra note 72, at 3.

The authors write:

\begin{quote}
While each state has its own drug laws and controlled substances acts (many of which mirror the CSA), federal law preempts, or overrides, state law when it covers the same subject matter. And since the Supremacy Clause of our nation’s Constitution places international treaties on the same legal footing as federal law, both the Conventions and the federal drug laws preempt any conflicting state law. So it could be said that while the international treaties do
attempting to reconcile events on the ground with the text of the treaties, one might conclude that the United States is in breach of the treaties, but this conclusion is undesirable because it endangers the treaties’ survival. Instead, a “creative reading” is necessary to assert that, in fact, the United States’ actions are designed to (and in fact do) protect the treaties’ larger goals.93

The government’s argument that its actions comply with the treaties should rest on marijuana remaining illegal at the federal level, and would emphasize the untenable dissonance and tension between international marijuana control regimes and international values.94 There can be no doubt a conflict exists between the United States’ reading and the text of the treaties; but, to borrow Bewley-Taylor’s phrasing, a “creative reading” of the drug treaties95 is a crucial interpretive instrument in moving past the inertia and stasis characterizing the current international narcotics control regime as it relates to cannabis. The key to this creative reading is assessing arguments for state sovereignty within the treaties themselves, and incorporating into them a longstanding human rights critique of the drug control system.

III. HUMAN RIGHTS PRINCIPLES SHOW THAT THE INTERNATIONAL DRUG CONTROL TREATIES ARE OUTLIERS IN THE INTERNATIONAL SYSTEM

Because the federal government must simultaneously administer treaty compliance and may not spend any money enforcing the CSA not, as a legal matter, directly apply to the states, as a practical and political matter, they do.

Id. Bennett and Walsh similarly argue:

Tempting though it may be to view the tension between marijuana reform and the drug treaties as a technical problem, much more than procedural hygiene is at stake. Whether the United States and its foreign interlocutors can adapt the three conventions to rapidly increasing domestic tolerance for marijuana is a stress test, so to speak, for the adaptability of today’s international legal framework. To preserve American interests in a host of other treaties—and in the compliance that underpins them—we think the administration and its treaty partners abroad should consider substantive changes to the treaties themselves, so as to give international drug law the flexibility it might well need in the years to come.

Bennett & Walsh, supra note 40, at 3.

93. See supra text accompanying note 68.
94. Bewley-Taylor, Emerging Policy Contradictions, supra note 77, at 424–26 (discussing sovereignty, human rights, and international security as nodes of tension afflicting drug control policy at the international level).
95. Bewley-Taylor, supra note 7, at 299.
upon defendants compliant with state law, it can only argue that its current position is desirable from a policy perspective. This outcome is inherently unstable, so a change in language is necessary. The executive branch must adopt new arguments to solidify the reasonableness of its position. A human rights argument for relaxing prohibitionist and punitive drug control regimes (or in a different linguistic formulation, of the same concept, allowing US states to reduce costs and raise revenue) emphasizes the social costs of prohibition, the monetary costs of enforcement, the disproportionate impact on minorities and vulnerable populations, the needs of patients in distress, and the failure of the criminal law to administer equal justice or reduce drug usage rates.

A. Introduction

These arguments are easily deployed from outside the drug control system as a historical critique, as a political argument, and as a sociological reading of available data. The human rights argument, however, is difficult to make from within the system—from the position of the Justice Department, or from the position of a US representative to an international drug control body—simply because these arguments assume and acknowledge the failures and abuses of the system. The Justice Department would likely never admit that the statute it administers, the CSA, has functioned as an instrument of human rights violations. The human rights perspective also is hobbled by the fact that it lacks limits.\[96\]

The problems of responsibility and extendibility, while important, are inapposite. While each administration’s goals may differ, one may hew a rough sketch of a sensible schema for the United States’ goals in the international arena in light of state-level legalization efforts: allow state experiments with cannabis law to proceed within reason, while preserving the international drug control treaty regime to continue operations against drug trafficking, criminal activity, and supply-side efforts for “harder” drugs like opiates or cocaine. In other words, the United States needs an argument that preserves the treaty regime, but loosens the restrictions on cannabis; even more simply, the United States needs an argument that allows its states to experiment with their own laws in proportion to their own needs.

96 A human rights argument (namely, that human rights concerns compel change in a prohibitionist drug control regime criminalizing possession and individual use) could be extended from less harmful substances like cannabis to substances with far greater public support for criminalization, like crack cocaine. If racial disparities in enforcement and incarceration persist across most classes of narcotics, then why should the human rights argument not apply to “harder” drugs like crack cocaine or heroin? This Note leaves for another day the application of human rights principles to other criminalized substances.
States needs a valid argument that allows for governments with subnational components to monitor different forms of regulation within its borders.

Ignoring a human rights perspective is foolish because the United States can advance it within the current treaty framework as a rationale behind the 2013 and 2014 AG Guidelines. An admission by the United States that its drug policies have been used as instruments of human rights abuses would acknowledge an enormous problem, and set an example moving forward that drug reform efforts are necessary. The alternative to assembling these arguments is a breach of the treaty, which is not in the United States’ best interests. Outside of formal amendment, a partial renunciation of the treaties as they relate to marijuana, or ignoring the treaties entirely, the construction of an argument along these lines can only serve to enhance US credibility and stature.

“[T]he dominant prohibitive ethos of the UN drug control system can be seen to be increasingly at odds with the Organization’s position on human rights.” Referencing specific textual nodes of tension, Bewley-Taylor points to the United Nations Charter: the Preamble; Article 1, ¶ 3; Article 55, ¶ c; and the Declaration of Human Rights at Article 25. In a very general sense, the international drug control treaties claim to derive their purpose from an interest in the health

97. See supra text accompanying note 64.
98. Bewley-Taylor, Emerging Policy Contradictions, supra note 77, at 425; see also Neil Boister, Penal Aspects of the UN Drug Conventions 524 (2001) (“Rights to privacy, liberty, property, due process and so forth are all threatened by the conventions, which do little to safeguard these rights.”).
100. “[The Purposes of the United Nations are:] To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion[.]” Id. art. 1, ¶ 3 (emphasis added).
101. “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: . . . c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Id. art. 55, ¶ c.
102. “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” G.A. Res. 217 (III) A. The Universal Declaration of Human Rights, art. 25 (Dec. 10, 1948).
and welfare of mankind.103 The 1988 Convention itself states that all crop destruction measures "shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment."104 Despite this admonition, commentators consider this language little more than a fig leaf for state-sanctioned human rights violations. "[W]hat states are required to do under the drug treaties is inherently questionable from a human rights perspective, considering that they include obligations, the achievement of which requires investigation, arrest, prosecution, imprisonment, restrictions on freedom of speech (incitement), confiscation of property, extradition, eradication of crops and other actions."105

This conflict between human rights norms and the requirements of the drug treaties is important for two reasons. First, the entire international legal system is in large measure focused around human rights. Second, because the enforcement of any instrument depends on consent and consensus, tension between drug control treaty requirements and expectations of citizens of signatory nations could be a death knell for the whole drug treaty regime. In many US states, human rights arguments are already being advanced in favor of easing

103. BEWLEY-TAYLOR, supra note 7, at 297. Bewley-Taylor writes:
To be sure, an overriding emphasis on punitive prohibition frequently threatens the regime's own ostensible concern with the health and welfare of humankind. The manifestations of such a self-defeating dynamic can be seen at various points on a drug policy spectrum ranging from the handling of individual drug users to the collateral damage caused by crop eradication and the militarized pursuit of a 'war' on drug traffickers.

104. 1988 Convention, supra note 54, art. 14, ¶ 2 (emphasis added).
105. GDPO EXPERT SEMINAR REPORT, supra note 18, at 15.
drug prohibitions.\textsuperscript{106} From a human rights perspective, it is crucial to recognize that calling cannabis a “controlled” substance is to badly misstate the point; cannabis is a banned substance, but its production and distribution are not controlled in the sense of a pharmaceutical or a regulated product subject to various public health restrictions.\textsuperscript{107} A human rights- and harm reduction-oriented system would allow the state to “control” cannabis in the truer sense of the word, and, indeed, medical marijuana statutes accomplish this feat by treating cannabis as a substance fit for use within certain parameters.\textsuperscript{108} A right to use medical marijuana is qualitatively easier to sell to the public from a human rights perspective than a right to use marijuana recreationally; this is why all recreational marijuana states first enacted medical marijuana statutes.\textsuperscript{109} Apart from a theoretical or philosophical argument that all drug use should be protected as a fundamental human right,\textsuperscript{110} scholars

\textsuperscript{106} See supra text accompanying note 17.
\textsuperscript{107} Eddy L. Engelsman, Cannabis Control: The Model of the WHO Tobacco Control Treaty, 14 INT’L J. OF DRUG POL’Y 217, 218 (2003). Engelsman writes: Cannabis like other illicit drugs is a so-called ‘controlled drug’. A closer look makes clear that these drugs are in fact far from being ‘controlled’. The cultivation, trade, transport, wholesale distribution, sale, and above all the unsafe composition, potency and quality of the products are not controlled at all. Neither is the use. All this is a threat to public health. Id. \textit{But see} Mikos, supra note 3, at 201–02, 214 (discussing the fact that to re-schedule cannabis under the CSA, it would be necessary to demonstrate its health value in a system designed for pharmaceuticals). This is the ultimate catch-22, because the government so heavily restricts research on cannabis. \textit{See} Alex Kreit, Controlled Substances, Uncontrolled Law, 6 ALB. GOVT’L REV. 332, 352–58 (2013) (cited by Mikos).

\textsuperscript{108} The California Compassionate Use Act of 1996 states in part that one of its purposes is: To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person’s health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2017).

\textsuperscript{109} \textit{See} Mikos, supra note 3, at 99.

\textsuperscript{110} \textit{See}, e.g., Neil Hunt, Public Health or Human Rights: What Comes First?, 15 INT’L J. OF DRUG POL’Y 231–37 (2004); Erik van Ree, Drugs as a Human Right, 10 INT’L J. OF DRUG POL’Y 89–98 (1998); \textit{see also} Richards, supra note 32, at 183 (“There is almost no form of drug use which . . . may not advance important human goods, including the capacity of some poor and deprived people to work more comfortably, to endure adverse climatic and environmental circumstances, and in general to meet more robustly and pleasurably the demands of their lives.”) (citations omitted). For a contrary view, see generally Saul Takahashi, Human Rights and Drug Control: The False Dichotomy (2016).
have argued that human rights norms demand that marijuana be regulated differently. Two commentators, Piet Hein van Kemoen and Masha Fedorova, have argued that the regulation and state control of the marijuana trade are not only permissible, but required by human rights obligations in certain circumstances. The efforts by US states are an imperfect fit for this model, simply because those projects have not been undertaken at the national level and are not explicitly grounded solely in a human rights rationale in each instance. Conversely, the human rights argument is easier to make for medical marijuana than recreational marijuana. One could also argue that a legalization regime with aspects of taxation encourages cannabis use by implicitly imprinting the state’s seal of approval on dispensaries; a counter-argument would be that actively discouraging cannabis use is too expensive and fruitless of an exercise for the state to involve itself in. In addition, the decriminalization of marijuana in some states has not alleviated the racial disparities in drug control enforcement (problematising requirement two of the commentators).

But in general, the argument is strong with regard to “softer” drugs like cannabis, given that the principles of human rights and the admonitions of the international drug control treaty regime are in extreme tension.

111. Press Release, Radboud Univ., International Law Allows for the Legalisation of Cannabis (May 30, 2016), http://www.ru.nl/english/news-agenda/news/vm/law-0/law/2016/international-law-allows-legalisation-cannabis/ [https://perma.cc/S5HX-DYVG] (archived Jan. 7, 2017) [hereinafter Van Kemoen / Fedorova Press Release]. Van Kemoen and Fedorova entitle their study, “International Law and Cannabis II: regulation of cannabis cultivation and trade for recreational use: positive human rights obligations versus UN Narcotic Drugs Conventions.” Only the Executive Summary has been published in English. I refer hereinafter to this Executive Summary as “Van Kemoen / Fedorova Executive Summary.” The argument takes the following course: (1) positive human rights treaty obligations justify the regulation of cannabis on public health, security, and crime control grounds; (2) human rights treaty obligations supersede conflicting treaties under international law (like the drug control treaties); (3) thus, states can regulate cannabis legally under international law; and (4) certain conditions must be met in order to justify regulation. Van Kemoen / Fedorova Executive Summary, supra, at 338. In other words, because human rights obligations are more forceful than the drug control conventions, those human rights obligations justify overriding the conventions in favor of regulating cannabis. According to van Kemoen and Fedorova, in order to track this argument correctly, any regulation legalizing cannabis must: (1) be “in the interest of the protection of human rights”; (2) must show that the regulation itself will more effectively protect human rights; (3) must have public support and be decided by a national democratic process; (4) must ensure that the drug control system is closed, so as not to affect or disadvantage other countries; and (5) must actively discourage cannabis use. Van Kemoen / Fedorova Press Release, supra.

112. See infra text accompanying note 122.

113. See also UNIQUE IN INTERNATIONAL RELATIONS, supra note 40, at 29 (“If there is a conflict between human rights and drug control as bodies of law, human rights
B. Human Rights as a Counterbalance to the Drug Treaties

This tension extends to legal and public health perspectives. There can be no doubt that the international drug control regime has failed to improve health in its signatory states.114 From a legal perspective, the human rights treaties carry more legal force than the drug control treaties.115 “More than a mere counter-balance to drug control treaties, human rights law occupies a position of much greater legal authority.”116 Therefore, the argument here is not necessarily that the drug control conventions themselves constitute or lead to human rights abuses, but that the treaty system cannot be separated from domestic drug control policy, which itself could be problematic from a human rights standpoint.117 Obligations to criminalize certain behaviors and compulsory property confiscation all relate to human rights issues like abridgement of civil rights, mass incarceration, and public health.118

Users of illegal drugs are frequently subject to human rights abuses.119 By criminalizing the behaviors of certain vulnerable social

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114. See Robin Room & Peter Reuter, How Well Do International Drug Conventions Protect Public Health?, 379 THE LANCET 84, 88 (2012). Room and Reuter argue:

[T]o separate the effects of the treaties from the effects of the national policies implemented in accordance with their provisions is impossible . . . . [C]riminalisation of the non-medical use of these drugs ensures that we have poor data on the extent of and the harm caused by their use. These challenges notwithstanding, to argue that the effects have been beneficial is difficult.

Id. (emphasis added); see also supra text accompanying note 30.

115. Recalibrating the Regime, supra note 27, at 7, 20–23; see also Bewley-Taylor, supra note 7, at 139–41.

116. Recalibrating the Regime, supra note 27, at 43. The authors argue:

It is clear that human rights have a higher standing [than drug control] in the Charter and therefore in the UN system. If there is a conflict between drug control and the human rights obligations in the Charter and the Universal Declaration of Human Rights, the protection of human rights must be the priority.

Id. at 43.


119. Recalibrating the Regime, supra note 27, at 11 (“They are a group that is vulnerable to a wide array of human rights violations, including abusive law enforcement practices, mass incarceration, extrajudicial execution, denial of health services, and, in
groups, the drug conventions arguably criminalize those groups themselves. In the United States, the question is one of proportionality: are the punishments imposed for drug use proportional to the threat that drugs like cannabis pose to society? If not, who pays the costs of that disproportionality? Mandatory minimum sentencing and racial disparities in enforcement are just a few American examples of this phenomenon; to illustrate, African American men are incarcerated for drug offenses 13.4 times more often than white men. Domestic drug laws often function as instruments that, far from contributing positively to the health of the citizenry, work instead to abridge human and civil rights. When laws begin to facilitate outcomes that are at odds with the goals of a society, then those norms demand re-examination.

C. Private & Public Use

The powers of the American state to control drug use extend into the most private zones of citizens’ lives, further calling into question the justifications for such actions. The exercise of these powers arguably perpetuates injustice rather than achieving some abstract measure of moral societal purity. In dealing with controlled

...
substances, the state confronts a complex balancing act: keeping its citizens healthy by limiting access to harmful substances; ensuring that addicts receive treatment in conjunction with or instead of a criminal penalty; minimizing intrusions onto private property; and reducing criminal activity associated with drug use and trafficking.\textsuperscript{127} A common problem in this balancing act is the conflation of trafficking with consumption.\textsuperscript{128}

Public drug use presents the state with a different set of problems than private drug use because the government has an interest in keeping public spaces free of intoxicated individuals. To borrow Gilmore’s terminology, we might distinguish between “voluntary and innocuous” drug use and “compulsive and likely harmful drug use.”\textsuperscript{129} “Innocuous” drug use in this schema could include activities like occasionally drinking coffee or alcohol or smoking tobacco; these activities may be harmful to the self or others, but society recognizes that the costs of banning these practices are significant.\textsuperscript{130} Outside of this zone of legality, though, “most drug use is transient, noncompulsive, and innocuous.”\textsuperscript{131} Harm reduction and supply control\textsuperscript{132} are consistent with positive human rights obligations of the government.\textsuperscript{133}

Gilmore has argued that private drug use has at least four human rights implications: (1) prohibiting private drug use must be “the least restrictive and intrusive intervention available to prevent the risks

\begin{itemize}
\item \textsuperscript{127} Hendriks & Tomasevski, supra note 29, at 53.
\item \textsuperscript{128} Hendriks and Tomasevski argue: Although drug consumption and the trafficking in drugs are very distinct issues, policy measures adopted to control drugs have not always clearly distinguished between these two aspects of the ‘drug problem.’ This text argues that the prevalent linking of these two issues has resulted in the conceptual confusion regarding the application of human rights in drug control, where argumentation in favour of applying human rights is erroneously identified with advocacy for legalization of drugs or abandonment of the suppression of drug trafficking.
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Id. at 411.
\item \textsuperscript{131} Id. at 412. It is important to note that this formulation of drug use refers to noncompulsive drug use; in other words, this schema does not include addictive drugs like opiates.
\item \textsuperscript{132} See supra text accompanying notes 103–04.
\item \textsuperscript{133} Gilmore, supra note 121, at 416 n.241; see also Jos Silvis, The History of Drug Control with Regard to Human Rights, in Drug Use and Human Rights in Europe, supra note 29, at 33, 49 (“But if repressive politics in the field of drugs has no perspective of reducing or limiting the problems surrounding the use of drugs, and if it doesn’t prevent its use, then the infringements from the State in private affairs is more problematic, because there is no competing value being served.”).
\end{itemize}
and harms of drug use”; (2) if drug use is a largely private activity, then the government’s focus should be on public health-oriented interventions rather than supply control; (3) understanding drug use as a private activity reduces opportunities for human rights infringements through violations of the Fourth Amendment; and (4) “considering drug use to be a private behavior would help decrease the stigmatization and scapegoating of drug users.”134 One might understand state-level cannabis regulation regimes as exercises in a different schema of drug policy. These changes are exercises in harm reduction triage because they do not claim to solve all of the problems created by drugs like cannabis, but focus law enforcement resources elsewhere. Under Gilmore’s analysis, states are becoming more tolerant of private drug use occurring outside of the public sphere (driving, public use), and this outcome brings prohibitions on drug use more in line with human rights norms. It is crucial to crystallize the sometimes-nebulous concept of human rights into the experiences of drug users on the ground.135

With attitudes changing so quickly, the United States must address the tensions between the drug control treaties it signed and the human rights principles animating the entire international system. Cannabis simply presents the best opportunity to rethink the treaties, given that United States domestic law is changing with such speed. An essential argument the United States should make brings these human rights concerns to the fore and keeps them on the table for future discussions about other narcotics. Simply ignoring the treaties does nothing for US credibility abroad—cannabis is an issue where the United States can take the lead in rethinking its international obligations and maintain its position as a chief proponent of international drug control. Human rights abuses in the name of drug control are carried out every day in American neighborhoods and cities, and an acknowledgement of this reality gives the United States

135. Gilmore offers eleven situations in which drug control policies directly and concretely affect the human rights of users: (1) privacy breaches; (2) “absent or diminished due process”; (3) rules of criminal procedure applied specifically to users of narcotics, which diminishes or corrupts a presumption of innocence; (4) arbitrary and excessive detentions; (5) reduced access to healthcare; (6) reduced employment opportunities; (7) reduced housing opportunities; (8) reduced educational opportunities; (9) exclusion from travel and immigration; (10) reduced eligibility for insurance; and (11) wrongful discrimination. Id. at 444–46. These situations are applicable to users of all drugs, but are especially relevant to cannabis. Each of these harms has been visited on American cannabis users. Private and public tension is especially great when a relatively non-harmful private behavior affects an individual’s rights in the public sphere. Abridgement of those rights under such circumstances could be construed as a human rights violation.
credibility to leverage in leading a formal reassessment of the treaties.  

Although international drug control regimes and human rights law developed side by side, the drug control treaties were produced and modified in “an artificial legal vacuum.” That is, the two systems developed concurrently without comingling. Drug policy was specifically omitted from mention in the U.N. Charter; the signatories understood the subject to rest under the umbrella of development rather than law enforcement. In more recent years, the U.N. General Assembly has adopted resolutions calling for drug control efforts that comply with the human rights provisions of the Charter. The principles in the U.N. Charter and the more recent moves in the General Assembly represent the wiser conception of human rights as applied to drug control.

Articulating a human rights approach to drug control is no mere abstract exercise. “Human rights law recognises that without certain civil and political rights being guaranteed, economic, social and cultural rights will remain out of reach.” A human rights approach to drug control would entail elevating well-being and harm reduction over a demand and supply reduction strategy: “placing demand and supply reduction as overall objectives or strategy pillars is to confuse goals, processes and outcomes. The goal, for example, is not demand reduction per se. It is, among other concerns, improved health. And the strategy is not demand reduction; it is, for example, prevention and treatment.”

Allowing certain US states to regulate marijuana is a step in the right direction in bringing the drug treaties into line with human rights norms, because regulation removes the drug from criminal markets and lifts its users out of the criminal justice system. The conventions, in a sense, are backwards because they do not contemplate curing the root causes of drug abuse. In fact, they perpetuate the problem by continuing to require local criminalization in the face of overwhelming evidence that the criminal market for narcotics remains robust. Although the drug treaties are silent as to

138. Id. at 457–58.
139. Id. at 459.
140. Id. at 450 (discussing G.A. Res. 63/197, ¶ 1 (Mar. 6, 2009)). The INCB has for the most part failed to discuss human rights. See also BEWLEY-TAYLOR, supra note 7, at 148 (noting the rising international support for reform).
142. Id. at 468 (emphasis in original).
143. Barrett and Novak state:
proportionate penalties for drug use, “[i]f a measure cannot or has not achieved its stated aim, can it be considered necessary or proportionate?”

Cannabis is the best place to start.

IV. A TRUE SAFETY VALVE? A SOVEREIGNTY ARGUMENT FOR PROSECUTORIAL DISCRETION UNDER THE INTERNATIONAL DRUG CONTROL TREATIES.

A second set of arguments is useful in seeing the US approach as logical and productive: the drug treaties themselves contain provisions regarding signatory sovereignty. Crucially, treaty enforcement rests on the powers of the enforcer, which itself, at least in the United States, is far from unitary. The president, local prosecutors, state legislators, federal drug authorities, and activists all play important roles in enforcement. Each of these actors agitates within his or her sphere to extend or limit sovereign power. As a result, enforcement of a treaty obligation is not a simple matter.

A. Sovereignty & Treaty Enforcement in a Federal System

The Vienna Convention on the Law of Treaties states that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” The Single Convention states, “The parties shall take such legislative and administrative measures as may be necessary . . . [t]o give effect to and carry out the provisions of this Convention within their own territories . . . .”

But none of the conventions make reference to poverty, discrimination or social exclusion, well known to act as push factors towards the drug trade and as significant risk factors for drug dependence and drug related harms. Instead, they focus on drug use and supply – visible symptoms, not root causes. Indeed, for many, the problem being addressed within the conventions is one which they themselves perpetuate – the criminal market for drugs.

Id. at 462 (citations omitted).

144. Id. at 463, 469.


146. Single Convention, supra note 39, art. 4.
themselves do “not establish binding domestic law; rather [they] must be implemented through domestic legislation.”\textsuperscript{147} With regard to implementation in a federal system—that is, a system of government like the United States or Germany, with a centralized federal government sitting above provincial entities like states—Boister has argued that “a federal state cannot justify its failure to perform a treaty obligation because of any special features of its constitutional system unless otherwise provided in the treaty itself.”\textsuperscript{148} This issue is more complex than Boister recognizes,\textsuperscript{149} and, while the INCB has adopted this position,\textsuperscript{150} scholars have not unanimously endorsed this proposition.\textsuperscript{151} Because the international drug control treaties are not self-executing,\textsuperscript{152} the United States enforces its international

\textsuperscript{147} CRICK, supra note 7, at 20.

\textsuperscript{148} Boister, supra note 75, at 405 (quoting and discussing LORD MCNAIR, supra note 81, at 78–81 (1961)); see also id. at 79 n.1 (1961). McNair writes: The division of powers in Federal States between the Federal Government and the Governments of the States or Provinces gives rise to special problems. Normally the treaty-making capacity resides in the Federal Government, while the legislative power is divided between the Federal Government and the Governments of the States or Provinces. \textit{The principle is clear that if the Federal Government concludes a valid treaty, it is responsible for seeing that is performed.}

\textit{Id.} (emphasis added).

\textsuperscript{149} “[T]he longstanding doctrine of state responsibility holds nations exclusively responsible for the conduct of constituent territorial units under international law.” Peter J. Spiro, \textit{The States and International Human Rights}, 66 FORDHAM L. REV. 567, 580 n.47 (1997) (collecting other authorities). \textit{But see} Hawken & Kulick, supra note 59, at 356 (“[M]ost constitutional and international law scholars maintain that the Conventions do not bind member states with federal systems of government to over-ride legalization in their constituent political units, no matter that the spirit of the treaties does.”) (emphasis added).

\textsuperscript{150} The INCB has taken the position that “[i]f a State, irrespective of its constitutional framework and legal system, enters into an international agreement . . . that State must ensure that all state and/or provincial policies and measures do not undermine its efforts to combat drug abuse and trafficking in narcotic drugs, psychotropic substances and precursor chemicals.” Int’l Narcotics Control Bd, Rep. of the Intl’ Narcotics Control Bd. for 2011, ¶ 287, U.N. Doc E/INCB/2011/1 (Feb. 28, 2012); see also Alice P. Mead, \textit{International Control of Cannabis}, in \textit{HANDBOOK OF CANNABIS} 50 (Roger Pertwee ed., 2014).

\textsuperscript{151} Tom Grant, \textit{Who Can Make Treaties? Other Subjects of International Law, in THE OXFORD GUIDE TO TREATIES, supra note 73, at 125, 146 (“[T]he view has not been unanimous that only the [national] State may hold responsibility [for a breach]. Lauterpacht accepted that, under certain circumstances, the constituent [sub-federal] unit could act separately, and thus it would be to that unit, not the State, that responsibility [for a breach] would attach.”).}

obligations through a federal statute, the CSA. But US federal power over state law is limited in many ways.

US federal drug control strategy contemplates not just the cooperation of states but, by design, envisions states as leading the charge on drug control: practically, this means that the states are prosecuting drug-related offenses like possession, distribution, and manufacture.¹⁵³ Federal systems in other international law contexts often closely track this model of delegation.¹⁵⁴ The “willingness of state law enforcement officials to enforce” drug policy underpins the entire US domestic enforcement system.¹⁵⁵ The CSA itself enshrines both prosecutorial discretion¹⁵⁶ and state cooperation¹⁵⁷ into law.

On an even more basic level, the federal government cannot compel states to change their own statutes,¹⁵⁸ and it cannot commandeer state law.¹⁵⁹ Indeed, the outright elimination of all state-

Conventions is left to the parties themselves. This leaves room for interpretation, allowing countries to develop a differentiated national drug policy. However, this latitude is not unlimited. In general, the Conventions require loyal enforcement by the parties.”).

¹⁵³. BEWLEY-TAYLOR, supra note 7, at 169 (noting that the “vast majority” of cannabis possession actions are prosecuted under state statutes in state courts).

¹⁵⁴. See Karagiannis, supra note 73, at 313–14. Karagiannis writes: Besides [national] States endowed with overseas territories, federal States also present difficulties as far as the territorial application of treaties. The crux of the problem is that international law . . . enables only federal States to enter into international treaties. But many federal States’ constitutions entitle their sub-federal governmental units (states, Länder, regions, provinces, or cantons) to implement – either exclusively or concurrently – the measures necessary for the federal State to comply with a treaty. In important areas, such as criminal law, human rights law, environmental law, and civil law, the federal State may simply lack domestic legal authority to apply treaty provisions in the absence of implementation by the sub-federal unit that the federal State may have no authority to require.

Id. (citations omitted) (referencing Duncan B. Hollis, Executive Federalism: Forging New Federalist Constraints on the Treaty Power, 79 S. CAL. L. REV. 1327, 1371–72 (2006)).

¹⁵⁵. CRICK, supra note 7, at 14.


¹⁵⁷. See id. § 873(a)(7) (authorizing the Attorney General to enter into contractual agreements with the states “to provide for cooperative enforcement and regulatory activities under this chapter.”).

¹⁵⁸. Boister, supra note 75, at 405 n.122.

¹⁵⁹. See Robert Mikos, On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime, 62 VAND. L. REV. 1419, 1446 (“the anticommandeering rule constrains Congress’s power to preempt state law in at least one increasingly important circumstance—namely, when state law simply permits private conduct to occur—because preemption of such a law would be tantamount to
level criminal penalties for possession and use of cannabis is a less desirable result for the federal government than a state regime regulating the drug; if the states removed all prohibitions on drug use, there would effectively be no penalty for cannabis use because the executive branch lacks the resources to enforce the CSA everywhere.\textsuperscript{160} “[F]ederal ‘success’ in blocking [Colorado and Washington’s] new laws, were it achievable, would really embody a defeat for federal interests; it would likely upend the regulatory component of the states’ new systems but leave intact the repeal of state prohibitions against commandeering.”; see also Erwin Chemerinsky et al., \textit{Cooperative Federalism and Marijuana Regulation}, 62 UCLA L. REV. 74 (2015). The authors state:

Because Congress has the authority under the Commerce Clause to prohibit even the intrastate cultivation and possession of marijuana, no state can erect a legal shield protecting its citizens from the reach of the CSA. But at the same time, states’ decisions to eliminate state marijuana prohibitions are simply beyond the power of the federal government. The federal government cannot command any state government to criminalize marijuana conduct under state law. From that incontrovertible premise flows the conclusion that if states wish to repeal existing marijuana laws or partially repeal those laws, they may do so without running afoul of federal preemption.

\textit{Id.} at 103 (emphasis added) (citations omitted). By that same token, “it appears that the executive branch often may opt not to act on . . . judicial pronouncements of its authority [to sue state agencies to carry out treaty obligations to foreign powers] and may invoke federalism to explain why.” Hollis, \textit{supra} note 154 at 1384–94.

160. Chemerinsky et al.’s thought experiment on this point bears repetition in full:

Imagine that the day after repealing all its marijuana laws, [a] state enacted a new regulatory scheme under which only adults twenty-one and over would be allowed to possess marijuana and only up to one ounce. Assume further that this new state regulatory scheme empowered local jurisdictions to license commercial cultivation and the sale of marijuana to adults; production and sales conforming to these regulations— but only such sales—would now be permitted. Under these new state regulations, possession of more than one ounce, unlicensed cultivation or sale, and distribution of marijuana to a minor would all become new criminal offenses. Enacting these new state laws, creating a tightly regulated marijuana market, and adding new criminal penalties, could not be deemed an obstacle to the CSA’s objectives of ‘combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances.’ \textit{The state’s new laws are a greater support to the federal goals on day two than they were on day one.} On day one the state permitted all marijuana activity; on day two it prohibited most marijuana activity, permitting only regulated sales and possession of small amounts. If the state can remove all its marijuana prohibitions on day one despite the CSA’s prohibition and despite the Supremacy Clause—and it clearly can—the state can certainly add some prohibitions back on day two without running afoul of the CSA.

Chemerinsky, \textit{supra} note 159, at 112 (emphasis added) (citations omitted); see also Mikos, \textit{On the Limits of Supremacy}, \textit{supra} note 159 at 1464.
marijuana.” In sum, if the federal government loses its state-level enforcement partners for cannabis regulation, there is little the federal government can do to stop citizens from using the drug.

Indeed, some scholars have argued that the federal authorities would do well to work with states, as an outright crackdown on static policies would lead to the de facto legalization of cannabis. An outright crackdown is highly undesirable, even from the perspective of perpetuating the CSA, because it removes the state entirely from the regulation of the drug. By way of analogy, in the human rights law context, “[t]he U.S. government retains ultimate responsibility for treaty compliance and thus may be held responsible under international law if its constituent states fail to implement international human rights obligations.” But just as with drug control, federal enforcement power over state action is better understood as quite limited.


163. See Rauch, supra note 162, opining:

Legally speaking, then, the federal government cannot prevent the states from removing their troops from the battlefield; practically speaking, it cannot enforce the CSA by itself. The implication is that it might be impractical, counterproductive, or both for the federal government to attempt to impose a ‘zero tolerance’ model on Colorado and Washington, which legalize but regulate marijuana, because they or other states might respond by simply legalizing marijuana without regulating it—almost certainly a worse outcome from a federal point of view. Instead, the federal government might better serve the policy goals of the CSA by working with Colorado and Washington to focus federal and state enforcement on high federal priorities, such as preventing legalized marijuana from spilling across state borders, rather than on trying to shut down the states’ experiments.

Id. at 3 (emphasis added).


165. Id. at 384 n.125 (citing and discussing Spiro, supra note 149, at 572–78). Spiro notes that, “The federal government has persistently refused to correct state practices which may violate international human rights” because of concerns about
B. The History of State-Level Cannabis Regulation & Differentiation as Productive

In the United States, state differentiation of cannabis policy has been present since the 1970s. In 1975, Alaska’s Supreme Court found that the right to privacy prevented the state from banning personal possession and use of cannabis. The Ravin decision, like the Netherlands’ drug policy, demonstrates that the domestic and international drug control system, while disclaiming tolerance for local differentiation in enforcement priorities, has always contained a multiplicity of perspectives on cannabis control. The federal strategy in the Obama era towards the drug control treaties was to embrace this differentiation rather than sweeping it under the rug. The Trump administration has not yet deviated from this course.

federalism. Spiro, supra note 149, at 572–73. Despite this parallel track of non-enforcement, if the U.S. advanced a human rights argument as a reason behind its choice to exercise prosecutorial discretion with regard to state cannabis regulation, then the most receptive body in the world to such arguments is likely the United Nations. In other words, the U.S.’s invocation of a human rights argument in this context would carry the greatest weight.

166. BEWLEY-TAYLOR, supra note 7, at 189 (discussing Ravin v. State, 537 P.2d 494 (Alaska 1975)). The Ravin Court opined:

Thus, we conclude that citizens of the State of Alaska have a basic right to privacy in their homes under Alaska’s constitution. This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home unless the state can meet its substantial burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest.

167. In 2014, Assistant Secretary of State William Brownfield discussed this federalist differentiation as it relates to the enforcement of the drug treaties. He outlined four “pillars” of U.S. policy towards the drug treaties upon which he hoped an international consensus would converge. BENNETT & WALSH, supra note 40, at 8–9. These “pillars” are: (1) ensuring the treaties’ integrity by adjusting the older treaties, and avoiding the adoption of new treaties; (2) flexibly interpreting the treaties as “living documents”; (3) “tolerating different national strategies or policies”; and (4) working against international criminal organizations. Id. President Obama made similar arguments, stating:

The U.N. drug conventions, which recognize that the suppression of international drug trafficking demands urgent attention and the highest priority, allow sovereign nations the flexibility to develop and adapt new policies and programs in keeping with their own national circumstances while retaining their focus on achieving the conventions’ aim of ensuring the availability of controlled substances for medical and scientific purposes, preventing abuse and addiction, and suppressing drug trafficking and related criminal activities. The United States supports the view of most countries that revising the U.N. drug conventions is not a prerequisite to advancing the common
Because the CSA incorporates the drug treaties by reference, rescheduling cannabis is not something the executive can do with the stroke of a pen. But conversely, the executive’s interpretation of a treaty is entitled to deference. Reading between the lines of this publicly articulated strategy, the federal government’s approach is designed to ensure that state experimentation can proceed while the international drug treaties remain in force. More broadly, the Obama administration tried to simultaneously prevent ossification of the older treaties, preclude the adoption of newer treaties that might reduce the US role in international drug control, and interfere as little as possible with many states that have decided to decriminalize or legalize cannabis in different ways.

There is a fundamental and widening dissonance between what is happening in US states on the ground and outdated interpretations of the drug control treaties’ text. If state experiments proceed at the same rate they have been occurring for the past ten years, then the question is not whether the treaties have been formally breached, but to what extent the international community wants this treaty regime to survive, and even thrive, in the context of this already-transpiring reality. That is the more fundamental goal here, and a flexible approach to the treaties accomplishes that goal.

Sovereign discretion over enforcement was not contemplated in the earlier drug treaties, but is present in the 1988 Convention. One relevant portion of the 1988 Convention states:

The Parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law and shared responsibility of international cooperation designed to enhance the positive goals we have set to counter illegal drugs and crime.

Id. at 10–11. Academic reaction to the four pillars strategy was skeptical. One report called the arguments “legally unpersuasive and problematic” and concluded that a “unilateral interpretation of international laws sets a risky precedent for treaty adherence in other areas, including arms control and human rights.”

Academic reaction to the four pillars strategy was skeptical. One report called the arguments “legally unpersuasive and problematic” and concluded that a “unilateral interpretation of international laws sets a risky precedent for treaty adherence in other areas, including arms control and human rights.”

169. David Sloss, Domestic Application of Treaties, in THE OXFORD GUIDE TO TREATIES, supra note 73, at 367, 384 (“The United States may be the only State where courts have adopted an explicit interpretive presumption favouring deference to the executive branch on treaty interpretation issues.”) (citing Medellin v. Texas, 552 U.S. 491, 513 (2008)).
170. BENNETT & WALSH, supra note 40, at 11 (“The 1961 and 1971 Conventions do not specifically address the issue of enforcement discretion, and thus don’t obviously seem to cabin its ordinary exercise by governments; for its part, the 1988 Convention explicitly recognized states’ discretion with respect to Convention-required offenses.”) (citing 1988 Convention, supra note 54, art. 3(6)).
enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.\textsuperscript{171}

Article 3 also contains limiting language discussing the constitutional principles of a signatory’s legal system.\textsuperscript{172} Additionally, the commentary accompanying the 1988 Convention specifically referenced prosecutorial discretion as an example of the basic concepts of a legal system upon which a country could rely in designing enforcement structures.\textsuperscript{173} This language provides a domestic outlet for differing visions on personal use of cannabis, and “the article allows for non-prosecution via a number of routes including expediency or public interest principles, even though it restricts the application of such national discretionary powers when it relates to trafficking offenses.”\textsuperscript{174} One could argue that the \textit{Ravin} case pursued this exact route as a judicial determination that Alaska’s constitution could not tolerate limits on private cannabis consumption in the home.\textsuperscript{175} Canadian and Colombian courts have also ruled that cannabis criminalization is invalid in certain contexts.\textsuperscript{176} Indeed, under this provision:

As a result, a country might rule that, in line with its own national circumstances, it is not within the interest of society to prosecute for drug possession for personal use, that the right to privacy overrules state intervention regarding what people consume or possess in their private homes, or that self-destructive behaviour—be it consumption of potentially harmful substances or other behaviour up to suicide—shall not be subject to punishment.\textsuperscript{177}

A respect for domestic law and prosecutorial discretion is also embedded in Article 3(11) of the 1988 Convention and Article 36(4) of the Single Convention.\textsuperscript{178} So while it may be said that the treaties have some “safety valves” for domestic law,\textsuperscript{179} especially with regard to the

\textsuperscript{171} Id.
\textsuperscript{172} See supra text accompanying notes 78–81.
\textsuperscript{173} Aoyagi, supra note 30, at 591–92 nn.141–42 (referencing the Dutch policies of drug control as “under[lying] the dichotomy between ‘law-on-the-books’ and ‘law-in-action’”). Indeed, it is difficult to reconcile the longstanding existence of the Dutch cannabis control system, with its mix of technical illegality and practical availability, with the treaties’ text; the analogies to the new U.S. state systems are easy to make.
\textsuperscript{174} LIMITS OF LATITUDE, supra note 80, at 6.
\textsuperscript{175} See supra text accompanying note 166.
\textsuperscript{176} Mead, supra note 150, at 50.
\textsuperscript{177} LIMITS OF LATITUDE, supra note 80, at 6.
\textsuperscript{178} Boister, supra note 75, at 405 n.126.
\textsuperscript{179} Bewley-Taylor and Jelsma describe this “escape clause” as a “relative rarity” in international law. See LIMITS OF LATITUDE, supra note 80, at 12 n.26 (discussing the limits to which a country that is a signatory to a treaty may use its “domestic legal system as a justification for not complying with international rules”).
personal consumption of cannabis, a reading of these provisions as allowing for regulated markets of cannabis—complete with taxation and quality standards—is strained. But of course, a strained reading—to the mind of a policymaker looking to preserve some components of the treaties—is far more desirable than an overly technical reading that a breach has occurred.

One problem with this “safety valve” argument is that it could potentially be extended to any international obligation: “[T]his approach must be applied with circumspection, and perhaps only to minor offenses, since it could be employed to avoid any or perhaps all international obligations, thereby undermining the entire treaty system.” True, but recall that the federal government has limited power to contain or change what the states are doing. That reality above all else should legitimize a creative reading that puts these domestic outlet clauses into a new, brighter light. Countries are empowered to consider “mitigating circumstances” in tempering and adapting their enforcement efforts. While the United States’ current policy may push the drug treaties to the outer bounds of interpretation,
this outcome is logical and unavoidable when one considers the extent and limits of the power of the actors involved. The textualist perspective, universally accepted by commentators, ignores the fundamental reality of present limits of US power to change its states’ laws.

From a practical standpoint, when one acknowledges that the most powerful force at work here has been inertia, the United States’ position ironically begins to look more treaty-friendly. Instead of assessing the legal merits of the United States’ arguments, the better mode of analysis is to examine the actors at play in this arena and the power each possesses. The international organ charged with overseeing treaty compliance is toothless and only has the power to issue referrals and reports. The Justice Department technically has the obligation to enforce compliance with international agreements to which the United States has acceded, but more directly, it is responsible for enforcing the CSA and answering to the president. The Justice Department’s resources for performing these tasks are limited by the number of personnel in its employ, and its power is limited by the level of cooperation it will receive from state analogs. The federal government has no interest in enforcing every violation of the CSA in the states, nor does it have any interest in a situation where all state laws regulating cannabis are removed, thus de facto legalizing the drug, with only federal agents available to enforce federal law on multitudinous state users.

As head of the executive branch, the president possesses the power to direct treaty enforcement, but bears the consequences of domestic political pressures surrounding cannabis.184 Meanwhile, state authorities are interested in the tax revenue derived from the sale of marijuana and in negotiating stable understandings with federal authorities. There is little incentive on the part of any of these American actors to put a full stop to the state regulation of cannabis. The only question of import is which actor has the power to affect practical change in domestic law; the answer is the power to affect change on the ground has long resided at the state level. From the perspective of the treaties, the more important question is where authority resides to determine whether “mitigating circumstances” have been met; the answer is that it is largely left to treaty signatories to interpret and enforce the treaties. As long as cannabis remains criminalized at the federal level, and as long as the United States’ position goes unchallenged, the status quo will remain in force.185

C. Prosecutorial Discretion Empowers the President to Enforce Treaty Obligations

Many scholars have explored whether under US law, principles of prosecutorial discretion authorize the president to allow state legalization experiments to proceed; they have largely concluded that President Obama was within his rights to set priorities for enforcement. A separate question is whether the president can ignore or under-enforce a treaty obligation. Article 26 of the Vienna Convention states, “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” Good faith in the context of treaty interpretation may even imply embracing the spirit of a treaty over the letter.

Commitment to supply control and its own practice. It appears to be intent on sticking with the existing treaties, fostering flexible interpretation to suit changing conditions, tolerating different national strategies and countering transnational criminal networks.” Id. at 407–08. Boister notes that this contradictory approach can survive only as long as the U.S. does not overextend its reach in countering the transnational drug trade. See Bradley E. Markano, Note, Enabling State Deregulation of Marijuana Through Executive Branch Nonenforcement, 90 N.Y.U. L. REV. 289, 301 (2015) (“The choice to implement policy through prosecutorial discretion raises a fundamental question: How much can the executive ignore federal drug law without crossing the line into unconstitutional legislation by fiat? Fortunately for the President, the Supreme Court’s standard of review for executive action allows him to go quite far.”); see also Kate Andrias, The President’s Enforcement Power, 88 N.Y.U. L. REV. 1031, 1125 (2013) (“In the end, given all the structural forces that encourage unilateral executive action, and given our basic constitutional structure, it is hard to imagine a world without presidential enforcement.”); Zachary S. Price, Enforcement Discretion and Executive Duty, 67 VAND. L. REV. 671, 759 (2014) (“[T]he best achievable balance between prudent policy and executive duty is likely the sort of unsatisfactory two-step reflected in the Obama Justice Department’s statements: a directive to prosecutors that certain offenses should be low priority, accompanied by a reminder that federal laws remain in effect, that Congress is constitutionally responsible for any legal change, and that all prosecutorial decisions should be made case by case.”); Daniel Stepanicich, Comment, Presidential Inaction and the Constitutional Basis for Executive Nonenforcement Discretion, 18 U. PA. J. CONST. L. 1507, 1546 (2016) (“Executive nonenforcement discretion is constitutional. If Congress is concerned about executive discretion, then it should follow the instruction of Chaney and enact legislation rather than continuing the practice of abdicating power to the executive branch.”).

186. See Vienna Convention, supra note 145, art. 26.
187. Gardiner, supra note 184. In discussing Article 26, Gardiner states: Good faith, therefore, means more than simply bona fides in the sense of absence of mala fides, or rejection of an interpretation resulting in abuse of rights (though, of course, it includes such absence and rejection). It signifies an element of reasonableness qualifying the dogmatism that can result from purely verbal analysis . . . . [T]he term is also capable of a sufficiently broad meaning to include the principle of effective interpretation. Translating the requirement of good faith into a practical outcome is only easy in the extreme case. Vattel instances the account of how Tamerlane, having
“Good Faith” Argument
Criticizing US Strategy

The United States’ tolerance—even tacit endorsement—of state-level legalization efforts is a bad faith interpretation of the treaties’ requirements, and the United States has already effectively breached by preventing federal enforcement authorities from pursuing state actors. The United States’ “prosecutorial discretion argument” is nothing more than a weak reading of a minor clause in the treaties; its human rights concerns are disingenuous at best, and deeply hypocritical at worst.

“Good Faith” Argument
Allowing for Interpretive Flexibility

The international drug control system has always rested on a fundamental assumption: that its signatories, cajoled by the United States, would enforce prohibitionist measures against citizens violating domestic drug use laws. Long critiqued by scholars and long aggrieved by internal dissent (as in Alaska and the Netherlands), the political consensus around cannabis prohibitions is crumbling. The new state of affairs should contemplate federalism, signatory discretion, and human rights concerns as new priorities in reevaluating the regime.

The argument on the left serves no practical purpose for both critics and supporters of the international treaty regime. Given the new reality in US states—and the limited power of the federal government to turn the clock back on marijuana reform—the best path forward is to broaden our interpretive horizons with regards to the US approach to the treaties. The argument of the right does this well. This is the only way that the treaties will survive the change in status of their former chief enforcer of cannabis prohibitions.

A better way to conceptualize the issue of good faith—and a response to the argument on the left above—is to acknowledge that the

agreed with those in the city of Sebastia that if they capitulated he would shed no blood, then, when they had fulfilled their part of the deal, caused all the soldiers of the garrison to be buried alive...Good faith colours a key part of the general rule of treaty interpretation, giving the more generous approach to texts of treaties that characterizes many a decision of international tribunals... 

Id. (citations omitted) (emphasis in original). This logic means that saving the treaties may mean acknowledging their flaws and embracing previously demeaned readings of their text.
legalization of marijuana at the state level in the United States represents a threat to the international treaty system; that is precisely why the international community should accept any reasonable interpretation that the United States has not breached. Indeed, this makes all the more sense when the proffered explanation rests on the bedrock elements of the international system itself: human rights and state sovereignty. The human rights and sovereignty theories, once linked, help to resolve the dissonance. Good faith in this context may mean understanding when a flexible interpretation ensures the treaties' continued survival.189

V. CONCLUSION

Fading public support for cannabis prohibition in signatory states threatens the future of the international drug control regime. The efforts of US states to change cannabis law have thrown the legal and political dissonance around drug control into stark relief. The United States, far from acting the ostrich, is grappling with the limited powers of its federal government; the prosecutorial discretion approach is a logical response to that problem and to the limits imposed by Congress on enforcement. But it cannot persist forever in this dynamic legal environment. The best path forward is to acknowledge the human rights implications of past enforcement actions, and fit those arguments into what limited sovereignty safety valves the treaties allow. A creative reading of the treaties is, simply, the only path to allowing them to survive.

Michael Tackeff *

189. Duncan B. Hollis, Defining Treaties, in THE OXFORD GUIDE TO TREATIES, supra note 73, at 11, 41 (“[I]n the absence of global or universal enforcement mechanisms, international law leaves treaty enforcement to States. As a matter of ‘good faith,’ States making treaty commitments are primarily responsible for their own compliance.”).

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