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ADDICTED TO PUNISHMENT:

*The disproportionality
of drug laws in Latin America*



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CEDD
Colección de Estudios Jurídicos y Sociales

Working Paper 1

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of drug laws in Latin America*

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In Latin America, trafficking cocaine so it can be sold to someone who wants to use it is more serious than raping a woman or deliberately killing your neighbor. While it may seem incredible, that is the conclusion of a rigorous study of the evolution of criminal legislation in the region, which shows that countries' judicial systems mete out harsher penalties for trafficking even modest amounts of drugs than for acts as heinous as sexual assault or murder.¹

How have we reached such an unjust and irrational point? In recent decades, especially the 1980s, Latin American countries, influenced by an international prohibitionist model, fell – ironically – into what we might metaphorically call an addiction to punishment.

Addiction² creates the need to consume more and more drugs, which have less and less effect; ultimately, the problematic user simply consumes drugs to avoid withdrawal. Drug legislation in Latin America seems to have followed a similar path. Countries have an ever-growing need to add crimes and increase the penalties for drug trafficking, supposedly to control an expanding illegal market, while this increasingly punitive approach has less and less effect on decreasing the supply and use of illegal drugs.

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- 1 To cite just a few examples, in Bolivia the maximum penalty is 25 years for drug trafficking and 20 years for murder, which means penalties are harsher for trafficking drugs than for killing another person. In Colombia, the maximum penalty is 30 years for trafficking and 20 years for rape, which means that under Colombian law, it is more serious to traffic psychoactive substances for someone who purchases them voluntarily than to subject a woman to violence and rape her. Similar conclusions were reached in nearly all the Latin American countries we studied.
 - 2 There is significant academic debate about the terms “addict” and “addiction,” because they have acquired a negative political and moral connotation. Although we use them here to reinforce the metaphor, we generally believe that the term “problematic drug user” is more appropriate.

So just as the problematic drug user faced with the declining effects of the drug automatically increases the frequency and amount consumed, public officials, seeing the scant impact of growing punitive repression, increase the dose and frequency. And our countries become addicted to punishment, which explains the disproportionate laws that are discussed and documented in this paper.

Over the past 60 years, this evolution has taken place within the context of the so-called “war on drugs.”³ The dominant worldwide policy on “illegal drugs” has been their prohibition, an approach characterized by the use of criminal law as the basic tool for combating all phases of the business (cultivation, production, distribution and trafficking), and in some cases even drug use. With some nuances and significant variation, the legislation in every country in the world contains criminal provisions calling for imprisonment for the distribution and trafficking of controlled substances.⁴

This is the result of a long global process that has had significant local manifestations. Following the terminology proposed by Boaventura de Sousa Santos, this process can be characterized as globalized localism,⁵ because the cause and strategies of one particular country, in this case the United States, gradually became an international issue and gave rise to a significant body of legislation. Since the early 20th Century,⁶ but especially since the

1960s,⁷ important international treaties have been adopted that form the legal basis for the prohibition of controlled substances. Before that, the international drug control regime was liberal, in the sense that it did not really contain regulations that limited or prohibited their use, production and transshipment.⁸

This international prohibitionist legal framework has had a great local impact around the world, especially in Western countries. By approving and ratifying these treaties, countries agree to adjust their domestic laws to the prohibitions established in the treaties. As a result, countries’ national legislation has gradually increased the use of criminal law in strategies for “combating drugs.” This can also be characterized as localized globalism,⁹ because global regulation has had significant national and local impacts which have profoundly transformed the response to drug-related problems, with those responses increasing more repressive.

This tendency to use criminal law as a basic strategy for combating drugs merits careful analysis for several key reasons. First, it implies a tendency to maximize the use of criminal law, contradicting the basic principle that criminal law should be a last resort.¹⁰ This basic guarantee implies that criminal sanctions can only be used when fully justified. Second, it can affect the basic rights and guarantees of a constitutional state, such as the guarantee of the proportionality of crime and punishment.

3 The “war on drugs” refers to the policy promoted by former U.S. President Richard Nixon in the early 1970s to fight the growing use of illegal drugs at that time among young people in the United States. This is a “zero tolerance” policy that uses criminal law and force to crack down at all costs on the supply of and demand for these substances and punish anyone involved in any aspect of the business.

4 On the global practice of punishing drug-related conducts with prison sentences that tend to be harsh, Gloria Lai (2012: 3) says: “While most countries of the world have signed up to international (and for some, regional) agreements recognizing the principle of proportionality, they often do not incorporate the requirements of proportionality in their sentencing framework of drug offences.”

5 See Santos (1998: 57 and following pages).

6 In 1909, the first international conference on the issue, the Shanghai Conference, was held to discuss the “harmful health consequences of opium.” The first international treaty, the International Opium Convention (The Hague, 1912), drew on the main conclusion of the Shanghai conference: to adopt strong regulation and control of opium production and distribution in domestic law. Controls were gradually strengthened in the Geneva Conventions of 1925; the International Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, signed in Geneva in 1931; the Convention for the Suppression of the Illicit Traffic in Dangerous of 1936; and other treaties.

7 Since the 1960s, three international treaties have established the prohibitionist legal framework on drugs: 1) the Single Convention on Narcotic Drugs of 1961, which calls for coordinated international action to combat drug abuse and trafficking; 2) the Convention on Psychotropic Substances of 1971, which establishes an international system for control of psychotropic substances, including synthetic drugs; and 3) the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which adopts comprehensive measures to combat drug trafficking.

8 As Jay Sinha (2001) notes, use of opium and coca, mainly as palliatives and tranquilizers, was generalized in the 19th Century in Canada, the United States, Europe and Australia. Because there was less medical and legal control over these drugs at that time, use was an individual decision that did not meet with social disapproval.

9 See Santos (1998: 57 and following pages).

10 Criminal law experts Juan Bustos Ramírez and Hernán Hormazábal Malarée (1997: 66) explain the principle of criminal law as a last resort as follows: “Criminal law must be understood as a *last resort* or, better yet, an *extreme* case. This means that the state can only turn to it when all other controls, both formal and informal, have failed. The seriousness of a criminal law response means that criminal law must only be considered an exceptional response to social conflict.”

This report explores whether the recent evolution of criminal legislation in Latin American countries with regard to drug-related conducts respects these minimal guarantees to which criminal law should be subject, and especially whether that criminal legislation can be considered proportionate to the harm caused by prohibited conducts. Ultimately, the question is whether the crimes and punishments outlined in national legislation are proportionate. If the answer is no, the conclusion should be that they may even be unconstitutional within the framework of a constitutional state.

To address this question, the report explores the recent development of criminal laws on drug-related crime in seven Latin American countries: Argentina, Bolivia, Brazil, Ecuador, Colombia, Peru and Mexico. These countries were chosen based on two basic criteria. First, they are of academic importance, because they have different drug-related problems, different geographic locations, diverse contexts and different political systems. According to traditional categorization, Colombia, Peru and Bolivia are considered producer countries; Mexico and even Brazil are considered transshipment countries.¹¹ They also represent the different regions of Latin America, from the Southern Cone to the furthest Spanish-speaking country in North America.

Second, there is a key practical criterion, because they are the countries represented in the *Colectivo de Estudios Drogas y Derecho* (CEDD), the group that carried out this study, which seeks to identify the characteristics of drug policy in the continent and document its effects. This investigation is a component of the second phase of CEDD's research, which focuses on exploring the proportionality of criminal legislation in those seven countries.¹² This comparative analysis contributes additional elements to discussion of the proportionality and reasonableness of prohibitionist drug policies.

¹¹ These traditional categories have been questioned recently, as the dynamics of the global drug business have undermined many of them. For example, while Colombia ranked as a drug producer in the 1990s, the increase in domestic use points to it also becoming a consumer country. For practical purposes, however, the classical categories mentioned are useful for identifying differences in the countries' domestic situations with regard to drugs.

¹² For more about CEDD's studies, see, among other works, reports by Metatal, P. and Youngers, C. (eds.) (2010) and Pérez Correa, C. (ed.) (2012). The individual reports about proportionality and drug laws in the seven countries studied by CEDD, are available at: http://www.wola.org/es/informes/colectivo_de_estudios_drogas_y_derecho

This report has three main parts. The first provides a conceptual and methodological overview of the elements that form the basis of the analysis. The second describes the principal recent trends in criminal drug legislation in Latin America. The third analyzes the proportionality of drug-related crimes and punishment in the countries, comparing them with penalties for other serious crimes, followed by some conclusions.

Conceptual and methodological overview

This section describes the concept of proportionality as used in this report and how it is used to measure the proportionality of drug control legislation. Before presenting the conceptual and methodological elements, however, an initial reflection is offered –essential for understanding the analysis– on the harm done by conducts that are defined in Latin America as crimes related to controlled substances.

Three key issues are the focus of this section. First is the issue of the legal interest supposedly protected by the definition of drug-related crime and the harm actually done by those conducts.¹³ Second, an explanation is provided on what is meant by proportionality and how it can be measured in criminal law. Finally, we discuss how proportionality is measured in drug-related crimes and penalties adopted in the seven selected countries in the past 60 years.

Protected legal interest and harm in drug-related crimes¹⁴

Before examining the proportionality of drug-related crimes, we must ask what legal interest¹⁵ is to be protected (*bien jurídico tutelado*) by the defini-

¹³ Note about the English translation: This paper was written originally in Spanish and included concepts and language developed in Latin American criminal law, which correspond mainly to civil law tradition. Legal concepts in the civil law tradition, which are widely used in Spanish, French or Italian, do not always have a precise English translation, because English legal terms are strongly linked to the common law tradition. We have therefore adjusted some terms in this English version, explaining those terms as necessary with the Spanish terms in parenthesis.

¹⁴ This preliminary discussion draws on and develops elements previously discussed by the authors, particularly Uprimny, Guzmán and Parra (2012).

¹⁵ From here on, we draw on a guarantee-based concept of legal interests, which is not reduced to the content of criminal law, but which requires, as a necessary and sufficient condition, some sort of social agreement. In speaking of the “protected legal interest,” therefore, we refer to a guar-

tion of the crime and what harm the law seeks to prevent or punish. This is crucial, because if drug policy is meant to address serious harm, it must be proportionately serious. If, however, drug policies seek to prevent or punish lesser harm, then it seems intuitively disproportionate to resort to such strict criminalization.

Drug policies rooted in the prohibitionist paradigm perpetuate the following logic: Because certain psychoactive substances are considered harmful and hazardous to public health, the goal is to avoid their use and abuse by criminalizing their production and commercialization. The basic purpose of drug policy, at least in its design, is related to public health, by keeping people from gaining access to psychoactive substances because of the harm their use could cause.

This is largely reflected in the criminal legislation of the selected countries, which states that public health is the legal interest protected by the definition of drug-related crimes. The criminal codes of Colombia, Mexico and Peru consider drug-related crimes to be crimes against public health. Other countries, such as Brazil, Argentina, Bolivia and Ecuador, where drug laws are independent of the Criminal Code, tend not to establish the legal interest being protected. Considering the context of these laws, however, it is possible to conclude that they also represent an attempt to protect public health. In Brazil, for example, drug-related crimes were included in the Criminal Code until 1976, and during that time they were also included in the section on crimes against public health.

By resorting to criminal prohibition, however, drug policies have created an illegal drug-trafficking market, with powerful organized criminal groups that have committed terrible crimes that affect all of our countries. This sometimes makes it difficult to identify the harm that drug policies are meant to prevent, as some analysts may focus on their primary objective, which is to protect public health, while others focus on instruments to combat drug trafficking, which is a result of prohibition.

antee-based concept like that explained by Bustos Ramírez, J. and Hormazábal Malarée, H. (1997: 58) based on Ferrajoli: "A theory of protected legal interests in a social and democratic state (...) is grounded in society and results from interactive processes within it. In a democratic state, they are the outcome of participatory debate, where the hegemony attained is willing to accept their future revision. The objects of protection, the legal interests, stem from society and are therefore also subject to further democratic debate. They are therefore dynamic in nature."

To determine the legal interest that is actually protected by defining drug-related conducts – such as the cultivation, production and trafficking of drugs – as crimes, it is important to draw a distinction between “primary problems” and “secondary problems” associated with illegal drugs or controlled substances. According to authors such as Louk Hulsman (1987) and Ethan Nadelmann (1992), the former are problems caused by the abuse of a psychoactive substance, while “secondary problems” result from prohibitionist policies.

One example illustrates that difference: cirrhosis caused by the excessive use of alcohol or lung cancer caused by smoking are “primary problems,” because they result from abuse of the substance. However, violence by organized criminal groups that control the production and distribution of cocaine or HIV infection of heroin users who share needles are “secondary problems,” because they are directly related to the criminalization of the production and use of those drugs.

Violence that tends to be associated with drug trafficking (or narco-violence) is not really a result of the drugs themselves, but of prohibitionist policies that tend to create large incentives for the formation of organized criminal groups that use violence to maintain their power in the drug business. In discussing the proportionality of drug-related crime and punishment, therefore, it is important to distinguish between what can actually be protected by the definition of drug-related crimes and what cannot.

We assume that the proportionality of drug policies should be evaluated based on their primary purpose, which is to address public health problems directly associated with the possible abuse of certain drugs. From that standpoint, the harm to be considered in this analysis is the harm caused to the health of members of society by the use and distribution of controlled substances.

It could be argued that the definition of these crimes is meant to protect not only public health, but also such legal interests as personal integrity and national security. Such an argument would assume that because drug production and trafficking result in deaths and affect public security, people who participate should face criminal prosecution.

As explained above, however, harm caused by or resulting from criminal activity that is organized around the drug business is a secondary, rather than a primary, problem, as it results from prohibition and the profits generated because of prohibition, not from the conducts of culti-

vating, producing and distributing certain psychoactive substances. These legal interests are and must be protected by laws regarding other specific crimes, such as murder or personal injury.

Once the protected legal interest by which the proportionality of crime and punishment should be evaluated in the case of drug-related conducts is clarified, the harm must be more precisely defined. First, it must be determined what harm these conducts can actually produce, or the type of “wrongfulness” (*antijuridicidad*) that they can actually cause. Second is the determination of when the criminalization of a drug-related conduct, such as production or distribution, is justified.

It is clear that public health is a legal interest that merits protection. What is not so clear is that the production and distribution of psychoactive substances are serious threats to that legal interest, or that the definitions of crimes in the Latin American countries studied protect it adequately. The reason is that the criminalized conducts do not cause a specific harm, but create the risk that public health may be affected.

Transporting a certain quantity of drugs does not, in itself, cause specific harm to public health or to the individual health of a member of the community; it only creates the risk that a user’s health could be affected if he or she decided voluntarily to obtain and use those substances. From that standpoint, contributing to the cultivation, production distribution or trafficking of drugs does not directly affect an individual or collective legal interest. It could create a risk or encourage risky behavior, but it does not necessarily imply a specific hazard.

According to that reasoning, not all harm or risks to human health justify the criminalization of drug-related conducts. For example, the use of controlled substances by an adult who freely decides to do so should not be criminalized, as that is a conduct protected by the rights to privacy, self-determination and free will.

Colombia’s Constitutional Court established a legal rule when it decriminalized possession of a quantity of drugs for personal use, which is generally the philosophy of countries that have eliminated the criminalization of consumption or that seem to be moving in that direction.¹⁶

¹⁶ Latin American countries where drug use or possession for personal use has been decriminalized or that seem to be moving in that direction include Argentina, Brazil, Chile, Colombia, Mexico, Paraguay, Peru and Uruguay. For more about decriminalization of the use and possession of drugs for personal use in various countries around the world, see Rosmarin and

According to the court, consumption is a conduct protected by such fundamental rights as self-determination and personal autonomy. The state cannot punish such conduct because in a democratic order, only conducts that affect the rights of third parties can be criminally sanctioned.¹⁷

In contrast, the criminalization of other conducts is justified in a democratic constitutional state because they affect the rights of third parties. These include the distribution of controlled substances to minors, which could affect their psychological or physical development and, therefore, their health. For that reason, other people who participate in the production, distribution and trafficking of controlled substances can be punished criminally in a legitimate and proportionate manner.

When establishing proportionality between the harm done by the crime and the penalty determined by the Congress, it is therefore important to remember that drug-related conducts that have been defined as crimes tend not to cause direct, specific harm. Only in the case of very few criminal conducts can specific, direct harm be proven; these include providing drugs to a minor, because the distribution of drugs to children and adolescents could affect the free development of their personalities.

In most definitions of crimes in Latin America, the wrongfulness to which they refer is generally an abstract risk of harm to human health. Because this risk refers to the right of third parties, criminal penalties can be justified, as long as they are proportionate and respect the basic guarantees offered to all people under criminal law.

Proportionality of punishment¹⁸

The principle of proportionality is fundamental in criminal law, because it refers to the guarantee of proportionality of punishment that dates back to the Enlightenment and is now enshrined in the Rule of Law. It is based on the principle of legality and is related to the prohibition of cruel, inhuman and degrading punishment as a guarantee for the protection of human dignity, which is established in various international human rights

Eastwood (2012).

¹⁷ Colombian Constitutional Court, Sentence C-221 of 1994. M.P. Carlos Gaviria Díaz.

¹⁸ In this discussion, we refer to the concept of abstract proportionality developed by authors in Uprimny, Guzmán and Parra (2012: 10 and following pages).

treaties,¹⁹ as well as in the constitutions of most of the countries included in the study.²⁰ It is cruel and inhuman to punish a person with a penalty that is not reasonably proportionate to the seriousness of his or her action.

Despite the importance of this principle, it is difficult to establish objective criteria for determining the proportionality between the harm done and the punishment to be imposed. There must be an external legitimacy –from being a moral and political problem -- for the penalty imposed in each case. A theoretical and methodological approach based on that of Ferrajoli (2000: pp. 398 and following pages) is used to analyze the proportionality of drug-related crimes and punishment in the selected Latin American countries.

According to Ferrajoli, analysis of the proportionality of punishment can be broken down into three sub-problems: 1) the legislative branch's pre-determination of minimum and maximum penalties for each action, 2) the judge's determination of the penalty to be imposed in each specific case, and 3) post-determination, or enforcement of the penalty.

This paper focuses on the first of those sub-problems, which is referred to as abstract proportionality. This is the focus, rather than the other aspects, because abstract proportionality allows for the clearest and most efficient comparative analysis of the selected countries, as it is based on a review of existing criminal legislation. A comparative study of the penalties imposed and enforced would imply research costs and effort that could be – in the terms used in this study – “disproportionate.”

Two different approaches can be used to determine whether criminal legislation meets the criteria for proportionality. One is based on the theoretical principles proposed by various philosophers as criteria for defining the minimum and maximum penalty for a particular offense. Fer-

rajoli (2000: pp. 399 and following pages) notes two specific theoretical principles: *the advantage of the crime must not be greater than the disadvantage of the penalty*; and *the penalty must not be greater than the informal violence that the defendant would suffer, in its absence, by the aggrieved party or other more or less organized forces*.

Pre-determination of the penalty can also be based on comparison with penalties for other crimes defined in criminal legislation, analyzing whether the punishment for a certain crime is disproportionate in comparison to penalties for other crimes of greater or equal seriousness. For purposes of this investigation, the latter option was chosen because it provides more empirical elements for analysis. Abstract proportionality therefore refers to the analysis of proportionality used in the first stage of the definition of the penalty, when the legislative branch determines punishable offenses and their corresponding sanctions.

Elements for measuring proportionality

The next step in the difficult task of determining whether criminal drug laws in Latin America are proportional is a comparative analysis of the penalties for drug-related crimes and other serious crimes that have a significant social impact. For comparison, we have chosen murder, rape and aggravated robbery. This choice is based on the characteristics of these crimes, as all involve harm to protected legal rights: life, sexual freedom and integrity, and personal integrity and property. There is also a high rate of these crimes in Latin American countries, which makes comparison with drug-related crimes useful. If drug-related crimes are punished more severely than the others that would be evidence of disproportionality, because the seriousness of the crimes used for comparison is greater, or at least more obvious, than that of drug-related crimes.

One final point of clarification on the research methodology is in order. The original intent was to perform a differentiated analysis of the crime of trafficking, distinguishing between penalties for trafficking small quantities of drugs (micro-trafficking or street-level dealing) and trafficking large amounts, which involves strong criminal organizations (macro-trafficking). However, legislation in Latin America tends not to make this distinction, which demonstrates another element of disproportionality: The same type of penalty applies to two considerably different conducts, because, as we have unfortunately seen in the region, the potential harm associated with micro-trafficking is clearly less than the harm associated

¹⁹ Norms of international law that provide legal support for the principle of proportionality include Articles 5 and 29(2) of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, Article 5 of the American Convention on Human Rights and Article 49(3) of the Charter of Fundamental Rights of the European Union; it has been similarly developed in jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights.

²⁰ Although most of the constitutions do not explicitly mention the principle of proportionality, but include constitutional guarantees similar to the prohibition against cruel and inhuman punishment, some constitutions do refer to the principle. Article 22 of the Mexican Constitution states that “all penalties must be proportionate to the crime being punished and the legal right affected.”

with large-scale drug trafficking. Nevertheless, in some countries the punishment is equal, and in a few cases, a small-scale marihuana dealer is punished as if he were Pablo Escobar.

Before beginning the comparative analysis, the recent evolution of drug-related crimes should be examined. This preliminary analysis is useful, as explained in greater detail below, as it reveals a tendency toward gradual increases, which could be a factor of disproportionality in itself, because in a democracy, the criminal punishment of any conduct should be the exception and should respond to serious and clear objective causes. A tendency to maximize punishment is therefore suspect.

The analysis of trends also highlights commonalities at particular points in the evolution of criminal legislation in the region. If we can identify common moments at which countries tend to maximize penalties, we may find that there is also a common cause that merits study.

For these two analyses, both the comparative and the historical, the laws were identified that define drug-related crimes from the 1950s through 2011 in each of the seven selected countries in Latin America. Once identified, the laws, including their content, were organized systematically in separate, country-specific files. Researchers from CEDD verified the information gathered for each of their countries to ensure that it was reliable and current, and provided access to laws that were not available via Internet or in other sources in Colombia. That information was subsequently supplemented with data from each country's criminal code on penalties for the crimes chosen for comparison. The authors used this information for the comparative analysis.

Overview of criminal drug control legislation in Latin America

This section presents two analyses of criminal legislation defining drug-related crimes in seven countries in the region: 1) an analysis of historical trends from 1950 until 2012,²¹ and 2) the identification of some specific characteristics of those trends.

²¹ Although in some countries, such as Argentina, Colombia, Brazil, Mexico and Peru, drug crimes were defined in criminal legislation in the 1920s and 1930s, for a comparative analysis it is more appropriate to begin with the 1950s, because by then most countries had criminal drug laws, and it is therefore a date that marks the intensification of the war on drugs and the generalized use of criminal law towards that end.

Analysis of trends in the criminalization of drugs

The first criminal legislation on drugs in Latin America was passed in about the 1920s and was characterized by criminalizing very few drug-related conducts and applying relatively light penalties. In Argentina, Law 11.309 of 1924 punished only the clandestine introduction of drugs, their sale and improper prescription with a penalty of six months to two years in prison.²² In Colombia, Law 11 of 1920 imposed fines for trafficking or use,²³ and in Mexico, the first regulations were established in 1916, 1923 and 1927, and included prohibitions without defining specific crimes or establishing prison terms.²⁴

A review of current criminal legislation leads to the hypothesis that there is a tendency to maximize the use of criminal law to address the drug problem in Latin America. Unlike those of the 1920s, current laws establish severe penalties for a large number of drug-related conducts. Colombia is a very good example: While the first drug control laws imposed only fines on only two drug-related conducts, the current Criminal Code includes 50 verbs used to describe a criminal offence (*Descriptive Verbs*, hereafter also referred to as descriptive verbs) – in other words, punishable conducts -- and includes penalties of up to 30 years in prison, which can be increased in the case of an aggravated offense.

In testing this hypothesis, several trends in these laws emerge in two specific areas: the number of drug-related conducts criminalized and the length, in years, of the prison terms imposed for those conducts. The following section examines each of those trends, indicating their characteristics and nuances.

Gradual increase in the number of conducts described as criminal

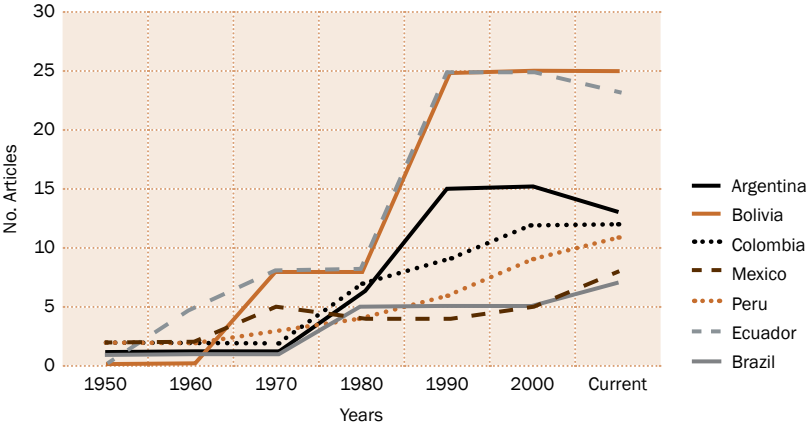
From the standpoint of guarantees, criminal law is constrained by the principle of minimal intervention.²⁵ According to this principle, criminal law

²² Corda, R.A. (2010).
²³ Uprimny and Guzmán (2010).
²⁴ Hernández (2010).
²⁵ Ferrajoli (2000: 336) explains the principle of minimal intervention as justification for criminal law as follows: “A criminal system is justified only if the sum of the violence – crimes, retaliation and arbitrary punishment – that it can prevent is greater than the violence represented by unprevented crimes and the penalties established for them. Such a calculation is, of course, impossible. But the punishment can be justified as the lesser

has two preventive purposes. The most obvious is to prevent crimes and to protect people who could be affected by those crimes; less frequently mentioned is the prevention of arbitrary punishment and the protection of defendants against unnecessary punishment.²⁶

Exceeding the minimal use of criminal law to fulfill the first purpose to the detriment of the second is not permissible. The increasing criminalization of a long list of conducts, far from serving as a guarantee for the victims of those crimes, may only lead to victimizing those convicted of them. This is even more problematic considering that, in most cases, drug-related crimes have no specific victims because those involved participate voluntarily in the illicit market. The heinous crimes committed by drug traffickers to protect their business are obviously a different matter. In studying drug-related criminal legislation and its evolution in the selected countries, we find that the tendency toward maximization of the use of criminal law is associated with an increase in the number of drug-related conducts defined as criminal since the first drug laws were passed.

FIGURE 1.
Comparative evolution in the number of articles
in criminal legislation that describe drug-related conducts



Source: Compiled by authors

evil – which is to say only if it is lesser, or less afflictive and less arbitrary – in comparison to other, non-judicial reactions that could be assumed to occur in its absence; more generally, the lower the cost of criminal law in comparison to the costs of punitive anarchy, the more justified the state monopoly on the power to punish.”

26 Ferrajoli (2000: 335).

This upward trend is confirmed by the number of articles in legislation in those countries that describe drug-related conducts. In most cases, the number increased from about two in the 1950s to what is now a broad array of articles describing drug-related crimes, as shown in Figure 1.

Figure 1, like the graphs that follow, is based on key laws for each country and the changes they represent in legislation on illegal drugs. Because laws were passed in different countries in different years, however, the legislative changes are presented by decade, which enables them to be grouped and thereby illustrate the main trends over time. The horizontal axis is therefore divided into decades, rather than the individual years in which the legislative changes were made.

This gradual and steady increase in the number of articles describing drug-related conducts as criminal is even more evident in Figure 2, which shows the total number of articles of criminal legislation that describe drug-related crimes in the countries studied. Each bar represents the number of articles describing drug-related crimes in Latin America during the reference period, as shown on the horizontal axis. The colors of the bars correspond to the countries selected for the study.

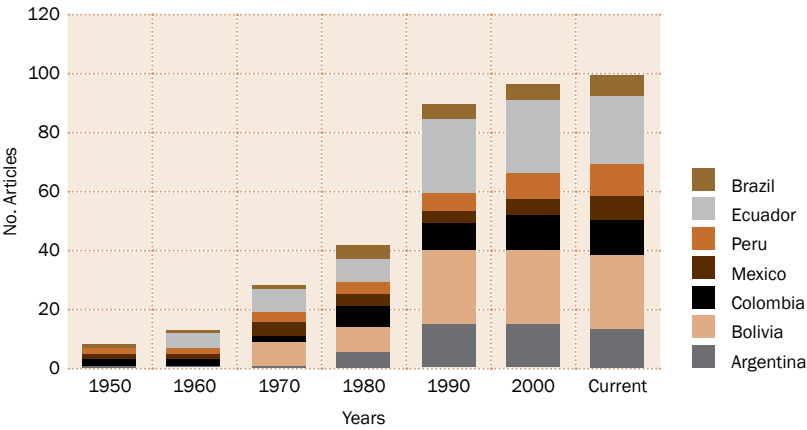
Although in some countries, such as Brazil and Mexico, the number of criminal articles is relatively small – no more than seven, despite some increase – there is a notable increase in the number of criminalized conducts and in particular the number of verbs used to describe a criminal offense. This represents a regional trend, or at least in the countries studied, where the number of articles in legislation increased from fewer than 10 in the 1950s to nearly 100 today.

In Mexico, for example, criminal legislation on drugs has been modified through reforms to the Criminal Code. As a result, the tendency has been to keep the same number of articles, but to increase the number of conducts described as criminal and the number of descriptive verbs included.

This suggests a problem with legislative practices in the description of drug-related conducts, which consists of increasing the number of verbs used to describe a criminal offense that are often unrelated or which tend to excessively expand each description of a crime or impose the same penalty on conducts that have very different degrees of seriousness. There are cases in which a definition of a crime in a specific article may include nearly 20 descriptive verbs.²⁷ As a result, the number of articles in a crimi-

27 This is the case in the first section of Article 197 of the Mexican Federal

FIGURE 2.
Aggregate trend in number of articles on drugs
in criminal legislation



Source: Compiled by authors

nal law does not necessarily coincide with the number of crimes defined, let alone the verbs used to define a criminal offense.

This is the case in Peru. The first law analyzed, which dates from 1921, included a total of eight descriptive verbs in five definitions of drug-related crimes contained in a single article of criminal legislation. The current Criminal Code has 11 articles criminalizing drug-related conducts, which include 17 descriptions of crimes and a total of 62 descriptive verbs. This occurs not only in Peruvian legislation, but in all of the countries studied,²⁸ leading to the conclusion that this problem of legislative practices resulting in the proliferation of articles in criminal legislation and the increasing number of descriptive verbs contributes to the tendency to criminalize all conducts related to the drug problem.

According to Zaffaroni, the proliferation of verbs used to define a criminal offense associated with drugs in some Latin American laws should not be considered a sign of great care “in the sense of ensuring

Criminal Code of 1931, after its reform in 1978, and with the crime of trafficking established in Article 48 of Law 1008 of 1988 in Bolivia, which includes 15 descriptive verbs.

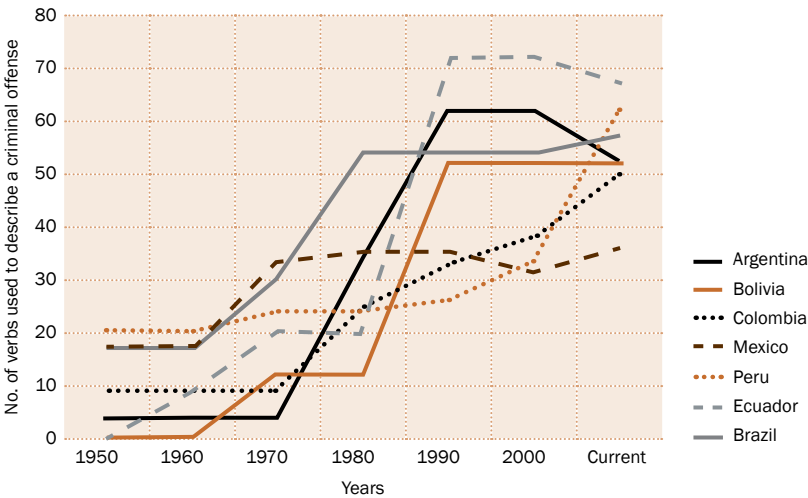
28 For data on the trend in the numbers of articles and descriptive verbs in criminal legislation on drugs in Latin America, see Table 1 in the annex to this paper.

greater precision in the legal definition, but an effort to cover all possibilities of a punitive approach.”²⁹ This shows a desire to leave no loophole in criminalization and implies an “unprecedented extension of a punitive approach” that calls into question the minimal guarantees of liberal criminal law, including the aforementioned principle of minimal intervention of criminal law.

Because counting articles gives an imprecise picture, given the huge increase in the number of descriptive verbs included in the definitions, the same analysis was performed with the verbs used to describe a criminal offense, which more directly reflect the conducts described and penalized. This analysis shows even more clearly the upward trend in the number of criminalized conducts in the seven countries studied. Figures 3 and 4 show that the number of drug-related criminal activities has tended to increase over time.

As Figure 3 shows, the increase in the number of verbs used to define a criminal offense has been both steady and consistent in nearly all the Latin American countries studied and is even more dramatic than the increase in the number of articles in criminal legislation. In some countries,

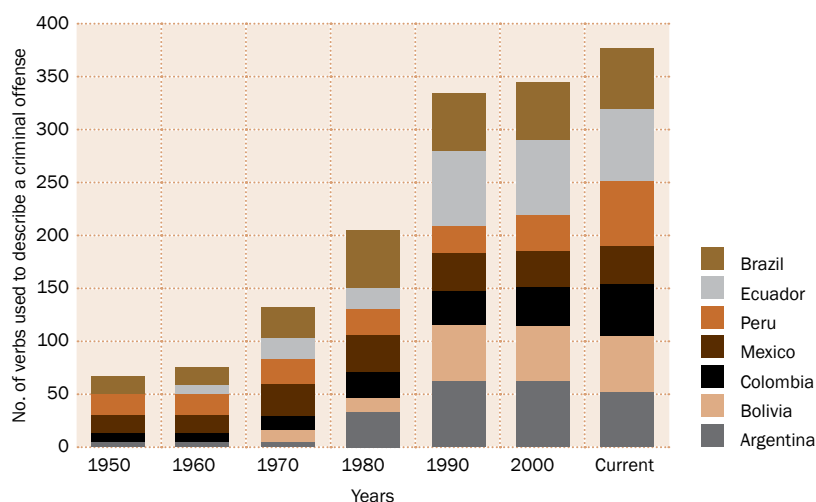
FIGURE 3.
Comparative trends in the number of verbs used
to describe a criminal offense



Source: Compiled by authors

29 Zaffaroni (2009).

FIGURE 4.
Aggregate trend in the number of verbs used
to describe a criminal offense



Source: Compiled by authors

such as Mexico, however, the upward trend is not as sharp, which could suggest a slower increase. Nevertheless, the increase is still consistent. The Figure 4 illustrating the overall trend shows that in the countries under study, the number of descriptive verbs – in other words, punishable conducts -- increased from about 50 to more than 350 currently.

Although the line graphs (Figures 1 and 3) for the seven Latin American countries show a decrease in these crime categories at certain points, they are exceptions to the rule. The overall trend in the seven countries is toward an increase in penalized drug-related conducts, as shown in the bar graphs (Figures 2 and 4).

Even when there are substantial differences between the numbers of criminalized drug-related conducts in two countries (for example, Mexican law currently includes 36 verbs used to describe a criminal offense, while Ecuadorian law contains 67), the aggregate data show that since 1950, there has been a general and steady increase in the number of criminalized drug-related activities. Proof of this is that the total number of descriptive verbs included in the definition of drug-related crimes in the seven countries rose from 67 to 344 in just 50 years (see Figure 4).

The question is whether there are sufficient objective grounds to justify this exponential increase in the number of criminalized drug-related conducts. Although this would require a case-by-case study of the legislatures' reasons for including new drug-related articles, definitions or descriptive verbs in criminal legislation, the answer, from the standpoint of the guarantees provided by criminal law, is negative.

The disproportionality seems clear, because instead of seeking to prevent drug-related conducts that are harmful to society, this increase in the classification of drug-related crimes reflects a desire to leave no loophole in the punitive approach. The goal is to maximize the use of criminal law to punish all drug-related conduct, whether or not it causes harm or jeopardizes a protected legal interest and regardless of whether the prohibitionist policy has effectively addressed the problem of abuse of psychoactive substances, which was its original purpose.

Gradual increase in penalties for drug-related crimes

Along with the increase in criminalized drug-related conducts, penalties have also increased. While the first drug control laws included minor penalties of up to two years in prison, or no prison term at all, those amounts have multiplied over the years. A trend toward longer sentences is a second element that would suggest disproportionality in Latin American criminal drug control legislation.

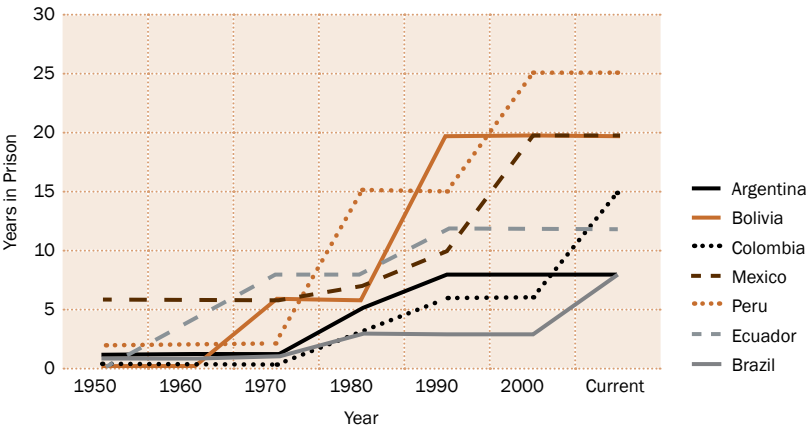
To prove this upward trend, the lengths of sentences³⁰ established for all drug-related crimes and for drug trafficking in particular were studied and compared to all laws in the seven selected Latin American countries since 1950.

First, the lengths of penalties for all drug crimes in each country's legislation were analyzed, focusing specifically on the highest minimum penalty and the highest maximum penalty– that is, the lengths of the highest minimum and highest maximum sentences for all drug-related crimes in each country's legislation.³¹ Figure 5 shows the trend toward an increase in the minimum penalty for drug-related crimes.

³⁰ The lengths of the penalties studied correspond to the simple form of each drug-related crime. These penalties obviously increase in cases of aggravated forms of the crime, but we chose not to consider those increases because the legislation makes it difficult to calculate the corresponding amounts.

³¹ For example, in current Colombian legislation, of all the drug-related

FIGURE 5.
Comparative trend in highest minimum penalty
for drug-related crimes



Source: Compiled by authors

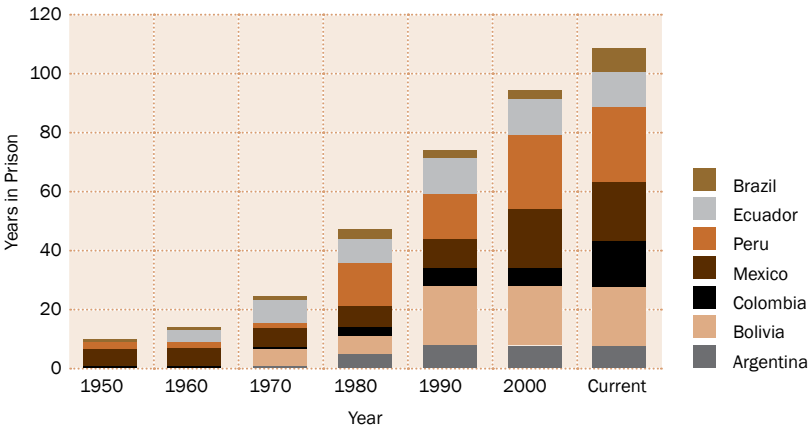
According to the data, the country with the most marked upward trend is Peru, where in less than 60 years, the highest minimum penalty increased from two years to 25 years. Bolivia and Mexico also have high minimum penalties of as much as 20 years in prison.

Analysis of the overall situation in Latin America seems to show a steady increase over the past 60 years. As the aggregate trend in Figure 6 shows, the highest minimum penalties for drug-related crimes have increased considerably, confirming the tendency to maximize the use of criminal law in drug control efforts.

The highest maximum penalties follow the same trend. Figure 7, which compares the highest maximum penalties for drug-related crimes, shows that the Latin American countries in the study have tended to increase their most severe sanctions. Mexico and Peru report the highest maximum penalties, at 40 and 35 years, respectively. Although Ecuador,

crimes defined in the Criminal Code, the one with the longest minimum penalty is the crime of *aggravated use, construction, commercialization and/or possession of semisubmersibles or submarines* (Criminal Code Art. 377B), with a minimum of 15 years in prison. The crime of *trafficking, manufacturing or possession of narcotics* (Criminal Code Art. 376) has a maximum penalty of 30 years in prison, which is more severe than the maximum penalty for any other drug-related crime.

FIGURE 6.
Aggregate trend in highest minimum penalties
for drug-related crime

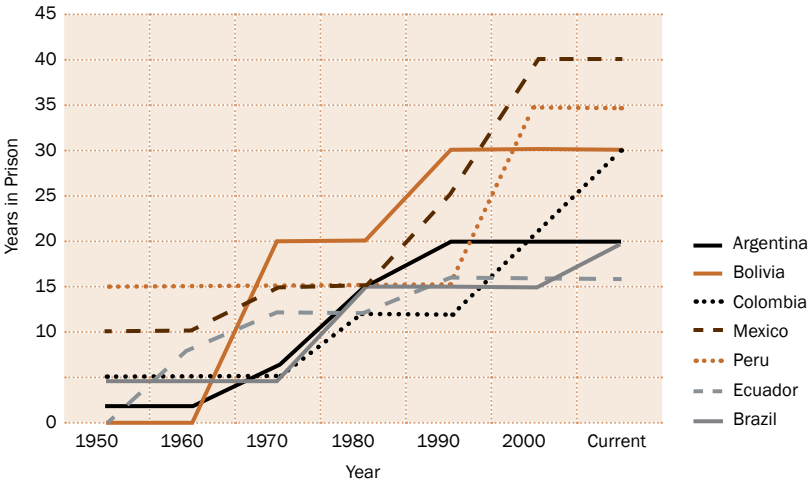


Source: Compiled by authors

Brazil and Argentina report the lowest maximum penalties in the region, they also show a gradual increase in the severity of sanctions.

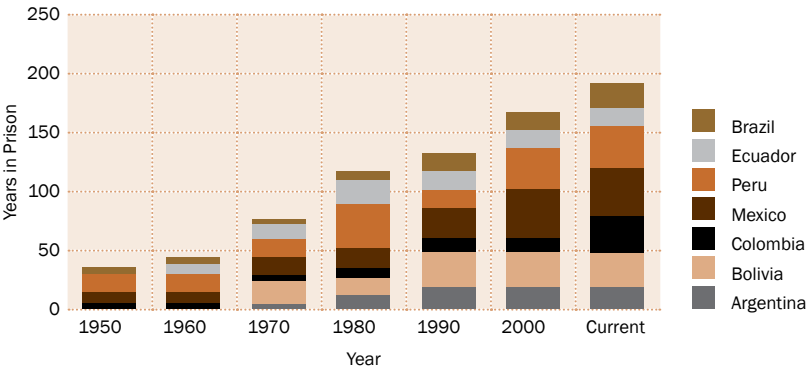
As with the minimum penalties illustrated in Figure 6, there has been a steady upward trend in maximum penalties in Latin America over the past

FIGURE 7.
Comparative trends in highest maximum penalties
for drug-related crimes



Source: Compiled by authors

FIGURE 8.
Aggregate trend in highest maximum penalties
for drug-related crimes



Source: Compiled by authors

60 years. Figure 8 shows the aggregate highest maximum penalties for drug-related crimes in the countries studied. In the 1950s, the sum of the highest maximum penalties in the region did not exceed 50 years, but by 2011, it had reached nearly 200 years, an overall increase of nearly 150 percent.

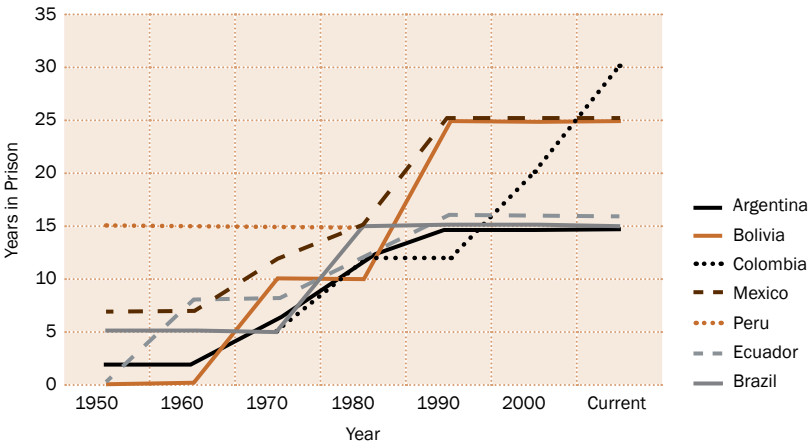
The preceding statements need to be nuanced somewhat. Although it is difficult to speak of an upward trend in the minimum and maximum penalties for drug-related crimes between 1950 and 1970, there has been a clear increase since then. Some specific cases illustrate this.

Two examples of the minimum penalty are worth citing: 1) between 1950 and 1970, the highest minimum penalty for various drug-related crimes in Peruvian legislation was two years in prison, but that rose to a minimum of 15 years in 1980 for the crime of promoting or organizing criminal gangs that engaged in drug trafficking; 2) similarly, the minimum penalty in Argentina until 1970 was one year in prison, but by 1980 that rose to five years for the crime of organizing or financing drug-related activities.

The upward trend is even clearer for the maximum penalty. As Figures 9 and 10 illustrate, between 1970 and 1980, the maximum penalties rose from six to 15 years in Argentina, from five to 15 years in Brazil, and from five to 12 years in Colombia. Similarly, between 1960 and 1970, they rose from two to six years in Argentina, from zero³² to 20 years in Bolivia, from 10 to 15 years in Mexico and from eight to 12 years in Ecuador.

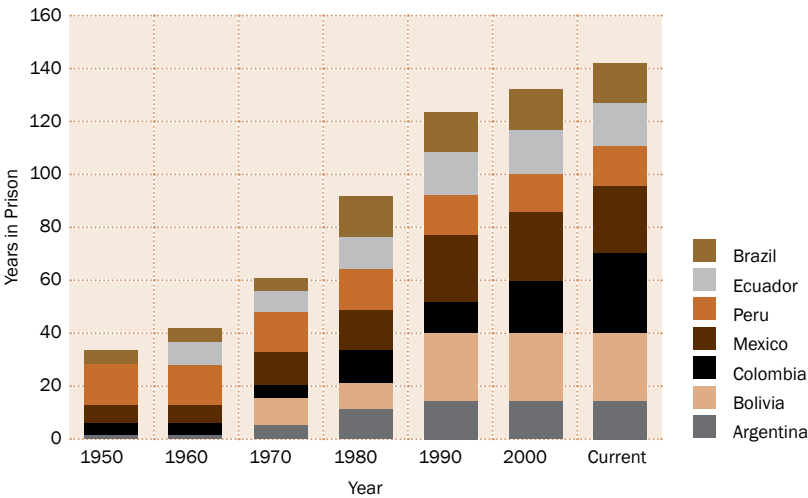
32 The first criminal law establishing drug-related crimes in Bolivia was Law

FIGURE 9.
Comparative trend in the maximum penalty
for the crime of drug trafficking



Source: Compiled by authors

FIGURE 10.
Aggregate trend in the maximum penalty
for the crime of drug trafficking



Source: Compiled by authors

171 of January 10, 1962, so in 1950 there were no criminal penalties for these conducts.

Those trends are confirmed by analysis of the increase in penalties not for all drug-related crimes, but for one crime in particular: drug trafficking. This punishable activity is particularly important because it is central to the drug economy. That makes the trend in the sanction for this crime a good criterion for analyzing the growing repressiveness of drug policies.³³

Penalties for drug trafficking show similar trends in drug control legislation in the region. In general, penalties have increased since 1950, except in a few cases where they have remained steady or decreased slightly. Only Peru is an exception as the highest maximum sentence of 15 years in prison established in Decree Law 11005 of 1949 remained unchanged as of 2012.³⁴ At the same time, the minimum penalty decreased slightly with the 1991 Criminal Code, falling from 10 years in prison to eight years, the only time the penalty for drug trafficking was reduced.

To verify the tendency toward longer sentences for drug trafficking, the historical trend in the minimum, maximum and average penalties was graphed.³⁵ Figure 9 shows the comparative trend in the maximum penalty for the crime of drug trafficking. Colombia stands out for a significant increase in the length of penalties, which over 60 years rose from less than five years to 30 years. Mexico, which has the second-highest maximum penalty, also shows an upward trend, although it held steady in the last two decades of the period studied. Countries such as Peru and Brazil have also held steady in recent years after an initial upward trend.

³³ There are two other reasons for focusing specifically on the crime of drug trafficking: 1) it is a conduct that has been penalized since the first drug control laws appeared in Latin America, and 2) it has a significant impact on institutions, because a high percentage of the region's prison inmates were sentenced for drug-related activities. On this topic, see Metaal and Youngers (eds.) (2010).

³⁴ To clarify, the military junta's Legislative Decree 122 of 1981, better known as the Law of Repression of Illicit Trafficking of Drugs, established that trafficking would be punished by "no less than 10 years in prison," without setting a maximum penalty. Because it is impossible to include the absence of a maximum penalty without affecting the consistency of the graph, and considering that this law was in effect for only three years, we assume here that the maximum penalty for this crime in 1980 was still 15 years.

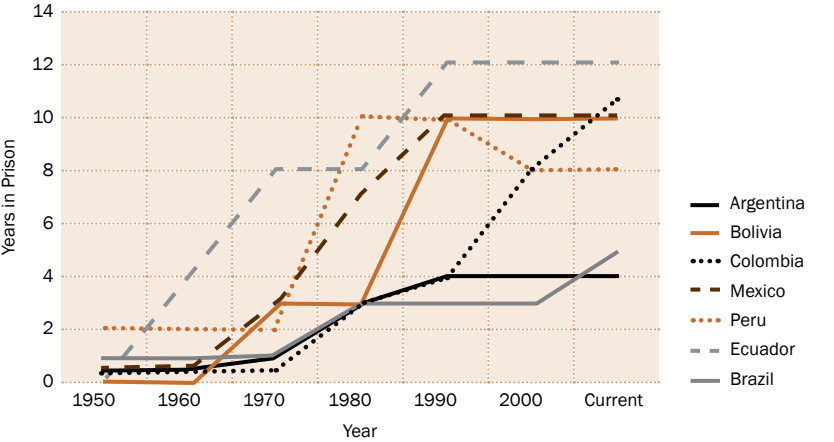
³⁵ To clarify, these calculations correspond to penalties for simple drug trafficking. Some legislation treats other trafficking-related offenses separately, and those penalties are not included here. That is the case, for example, with crimes such as the financing of organizations dedicated to drug trafficking.

Figure 10 shows the aggregate trend in the maximum penalties for the crime of drug trafficking. There is an overall upward trend in the region, although some countries have maintained their penalties without significant changes in the past two decades. The increase tended to be more significant between the 1960s and 1980s. The more drastic changes seen during that period may have been related to the approval of major international conventions on drugs (1961 and 1988) and the importance given to the issue in US foreign policy, especially after President Nixon declared the so-called war on drugs.

Analysis of the minimum penalties for drug trafficking shows greater dispersion in the trend among the Latin American countries studied. Nevertheless, a gradual increase is still evident. Ecuador seems to have experienced the steepest and most significant increases, although it has held steady over the past two decades. This recent stability in the length of the minimum penalty is also seen in other countries, such as Mexico, Argentina and even Peru. Colombia is an example of a steady increase in the penalty, especially since the 1970s, as Figure 11 shows.

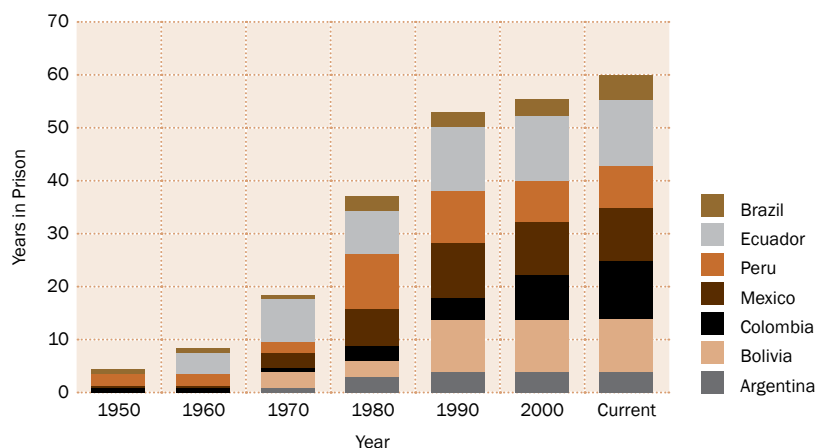
As in the preceding cases, an overall analysis of Latin America shows an upward trend in the lengths of penalties. The most significant increases in the maximum penalty for trafficking came in the decade between 1960 and 1970, and later around the beginning of the 1980s. Although some

FIGURE 11.
Comparative trend in the minimum penalty
for the crime of drug trafficking



Source: Compiled by authors

FIGURE 12.
Aggregate trend in the minimum penalty
for the crime of drug trafficking

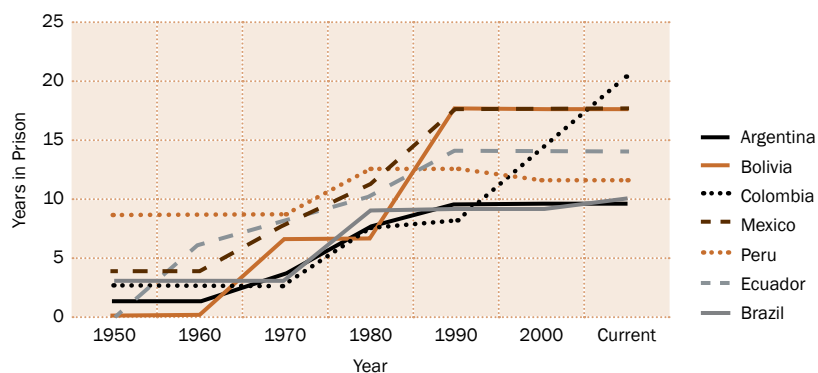


Source: Compiled by authors

increases have occurred since the 1990s, they have generally been smaller than in the earlier decades. This is reflected in Figure 12, which illustrates the aggregate trend in the minimum penalty for the crime of drug trafficking from 1950 to 2011, the most current date in the study.

Analysis of the average penalty for drug trafficking shows more clearly the steady upward trend in the sanctions, which appears more dramatic

FIGURE 13.
Comparative trends in the average penalty
for the crime of drug trafficking



Source: Compiled by authors

for particular countries at certain times. The average penalty used here and throughout this paper is the simple average of the maximum and minimum penalties and was calculated based on the penalties established in each country's legislation. As Figure 13 shows, there was a steady and consistent increase in most of the countries until the 1990s and the lengths of penalties have held fairly steady since then, except in Colombia, where there have been further significant increases.

Figures 9, 11 and 13, which show the comparative trend in the maximum, minimum and average penalties for the crime of drug trafficking, confirm that only Peruvian legislation has not followed the general trend of increasing penalties. But they also show a generalized practice of punishing drug trafficking more severely over time in all seven countries. While in 1950, the average penalty for this crime was not even five years (except in Peru, where it was 8.5 years), it currently ranges from 10 to 20 years in prison.

Figures 10 and 12, which show the aggregate trend in the maximum and minimum penalties for drug trafficking, point to the same conclusion. While in 1950, the sum of the penalties in the seven countries was 34 years for the maximum and 4.5 years for the minimum, with an average penalty of 19.25 years, those figures are now 141 years, 59.7 years and 100.4 years, respectively. That means that in just over 60 years, the aggregate maximum penalty increased by 415 percent, the minimum by 1,327 percent and the average by 521 percent.

This specific analysis of penalties for drug trafficking confirms the upward trend that is evident in penalties for all drug-related crimes. Taken together, these data lead to the conclusion that since 1950 in Latin America, there has been a generalized tendency to increase the lengths of penalties for drug-related crimes.

This increase in penalties would be justified if there were a corresponding increase in the harm associated with drug-related crimes. Proportionality is maintained only if there is both an increase in the penalties and an increase in the seriousness and harm associated with the crimes that those more severe sanctions are meant to punish. If the harm did not increase, the increase in the punishment would not be justified, because there would be no objective grounds for more severe punishment.

That is the case with drug-related crime. These are offenses that do not result in direct harm except in cases such as supplying drugs to minors. It is impossible to demonstrate empirically that cocaine trafficking is

TABLE 1.
Comparison of maximum penalty and penalties
for drug-related crimes, 2012

Penalty/ Country	Maximum penalty	Maximum penalty for all drug-related crimes	Maximum penalty for drug trafficking
Argentina	35	20	15
Bolivia	30	30	25
Colombia	60	30	30
Mexico	60	40	25
Peru	35	35	15
Ecuador	35	16	16
Brazil	30	20	15

Source: Compiled by authors

more serious now than it was in 1950, because it does not result in direct harm. Crimes committed by drug traffickers to protect and regulate their illegal business, such as murders and bribery -- whose seriousness has clearly increased -- are another matter. But the seriousness of those other crimes is different from the seriousness of the production and trafficking of controlled substances. And the upward trend in punishments, from five years in prison to 15 or 30 years, indicates the disproportionality associated with drug-related crimes.

It may be argued that these upward trends are not specific to drug-related crimes, but reflect a general punitive tendency in Latin American countries. Although this potential critique does not change the issue of proportionality, we have chosen to consider it separately. Therefore, an additional element of analysis is offered, which is the comparison of penalties for drug-related crimes with the maximum penalties allowed by criminal legislation in each country.

Table 1 shows this comparison for 2012, because the difficulty of obtaining earlier criminal codes in all of the selected countries made it impossible to gather the data needed to compare trends. We therefore compare only the maximum penalty allowed in each country, the longest maximum penalty for all drug-related crimes, and the maximum specifically for the crime of drug trafficking.

Bolivia and Peru are emblematic cases. In those countries, some drug-related crimes are punished with the most severe penalty allowed by the legal system. That would mean, in theory, that they are the most

serious crimes in criminal legislation. As noted, however, they are actually crimes in which the harm is not clear and which are considerably less serious than murder, which will be discussed below.

This would suggest that drug-related crimes are characterized by a more intensive punitive approach that is part of a general tendency to use punitive measures that seems more or less common to all Latin American criminal legislation, or, in other words, a disproportionality within the general disproportionality that exists for other crimes. As shown in the next section, however, the disproportionality tends to be greater for drug-related crimes than for other crimes.

This punitive approach within a punitive approach is most evident in Colombia and Mexico. These two countries have the longest possible maximum penalties of the seven countries studied, with maximum sanctions of 60 years, reflecting the punitive nature of their criminal legislation. Although they are not very long compared to the maximum possible sentence, penalties for drug-related crimes are equal to or longer than the maximum penalties in most of the other countries. So not only is there a general tendency toward a punitive approach overall in these countries, but within that can be found a particular and specific manifestation of the punitive approach: the disproportionality in the treatment of drug-related crimes.

Analysis of criminal proportionality
in the abstract sense

The discussion so far points to similar tendencies in Latin America with regard to various conducts defined as crimes and the lengths of penalties for drug-related crimes. These include a steady increase in the number of conducts penalized, the lack of good legislative practices in changing legislation on sensitive issues, and the increase in the lengths of both the minimum and maximum penalties. These, in turn, seem to indicate a tendency toward maximization of the use of criminal law in drug control efforts, which raises questions about basic guarantees for defendants under criminal law.

This section analyzes proportionality in the strict sense. As indicated in the section on conceptual boundaries, we compare the way in which countries in the region have defined drug-related crimes and other crimes that are clearly serious and have an impact on society: murder (*homicidio simple*), rape (*violación*) and aggravated robbery (*hurto con violencia sobre*

la persona).³⁶ Although legislation in different countries uses different terminology, information was gathered about the conducts and sanctions corresponding to these crimes covering the period from 1970 to the present.³⁷

The underlying assumption is that the offenses chosen for comparison, especially murder and rape, are clearly serious acts that cause considerable individual and social harm. In fact, they could be considered more serious crimes than drug trafficking alone. The closer the penalty for trafficking is to the penalty for those crimes, therefore, the more disproportionate it can be considered.

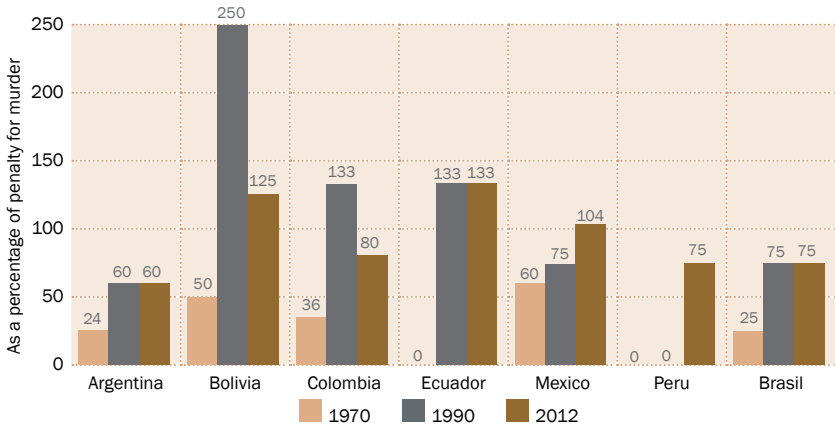
Although all forms of aggravated robbery may not be considered more serious than drug trafficking, it is included because it has a high social impact and there tends to be significant public pressure for more severe punishment. It is therefore useful for illustrating that even in comparison to crimes with a high societal impact, penalties for trafficking tend to be extremely severe in most of the region's countries. The following section discusses the results of the comparisons.

Drug trafficking compared to murder

For the comparison, the length of penalties for drug trafficking as a percentage of the length of penalties for murder is considered. The logical assumption is that punishment for murder cannot be similar to penalties for trafficking, because murder is clearly more serious, as it results in concrete harm to a protected legal right of great social importance – human life and personal integrity.

A comparison of the increase in penalties for the two crimes in recent decades therefore indicates whether the criminalization of drug-related crimes is excessive, starting from the premise: The closer the penalty

FIGURE 14.
Maximum penalty for trafficking as percentage of maximum penalty for murder (1970-2012)



Source: Compiled by authors

for drug-related crimes is to the penalty for murder, the greater the disproportionality. Landmark laws from each country are used to answer the following question: If the penalty for the crime of murder is given a value of 100 percent, what corresponding percentage is represented by the penalty for drug trafficking? This exercise is repeated for the maximum, minimum and average penalties for the crimes being compared.

As Figure 14 shows, in the case of the maximum penalty, the countries with the greatest disproportionality are Bolivia, Colombia and Ecuador.

According to Figure 14, the maximum penalty for drug trafficking is currently greater than the most severe penalty for the crime of murder in three of the seven countries studied: Bolivia, Ecuador and Mexico.³⁸ In Colombia, the maximum penalty for drug trafficking was equal to 133 percent of the maximum penalty for homicide in 1990, while in Bolivia it was 250 percent.

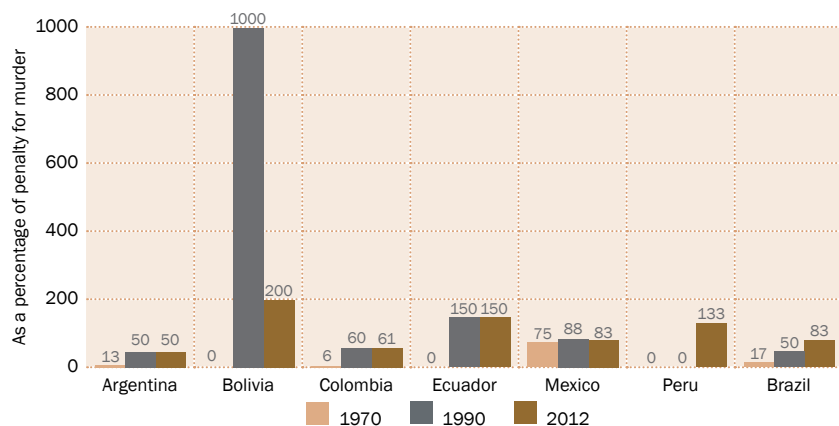
Except in Bolivia and Colombia, none of the legislation studied shows a decrease in the percentage of the maximum penalty for drug traf-

36 Aggravated robbery is defined as the taking of money or goods in the possession of another, from his or her person or immediate presence, by force or intimidation.

37 Unlike the calculations for the previous section of this paper, the period covered in the comparative analysis of different types of crimes begins not in 1950, but in 1970. The reason for this change is the difficulty in obtaining copies of the criminal legislation that was in effect in each country in 1950, which included the crimes of murder, rape and aggravated robbery. We do not believe that this affects the analysis, however, because as noted above, the lengths of penalties for drug trafficking began to increase notably as of the 1970s. Because we were unable to obtain data about criminal laws in Ecuador in 1970 and Peru in 1970 and 1990, this information is represented as zero in the graphs of this part of the text.

38 In Bolivia, the maximum penalty for trafficking is currently 25 years in prison, while the maximum for murder is 20. In Mexico, the maximum penalty for trafficking is 25 years, while the maximum for murder is 24; and in Ecuador, while the maximum penalty for trafficking is 16 years, the maximum for murder is 12 years in prison.

FIGURE 15.
Minimum penalty for trafficking as percentage
of minimum penalty for murder (1970-2012)



Source: Compiled by authors

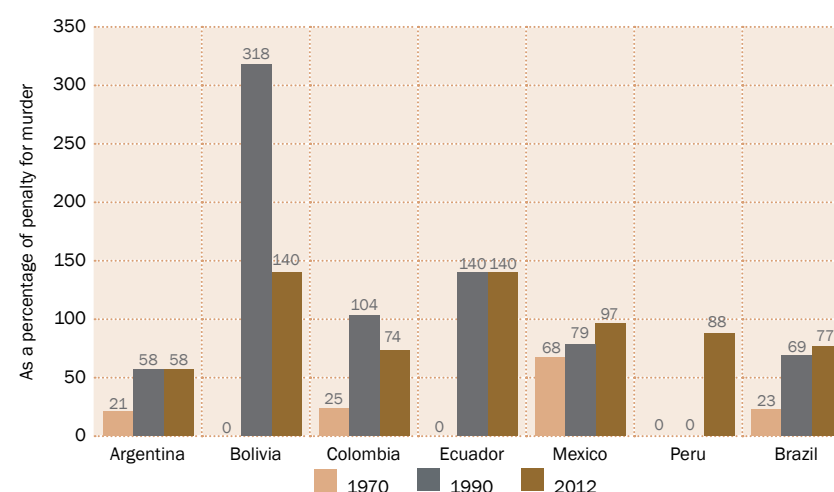
ficking in comparison to the maximum penalty for murder. The case of Mexico illustrates what could be an upward trend in this percentage in Latin American legislation since 1970, as it rose from 60 percent in 1970 to 85 percent in 1990 and 104 percent in 2012.

While the percentage relationship declined between 1990 and 2012 in the exceptional cases of Bolivia and Colombia, that did not imply a reduction in the maximum penalty for drug trafficking. On the contrary, in Bolivia, that penalty remained the same over that period (25 years in prison), while the maximum penalty for murder increased (from 10 years to 20 years in prison). In Colombia, both penalties increased. The penalty for trafficking rose from 20 years to 30 years in prison, while for murder, it increased from 15 to 37.5 years. A decrease in the percentage alone therefore does not necessarily imply a decrease in the repressive use of criminal law in the case of drug trafficking.

A comparison of minimum penalties produces similar results. In three countries – Bolivia, Ecuador and Peru – the minimum penalty for drug trafficking is currently higher than the minimum penalty for murder.³⁹ Bolivia showed the greatest disproportionality in 1990, when the

³⁹ In Bolivia, the minimum penalty for trafficking is 10 years in prison, while the minimum for murder is five years. In Ecuador, the minimum for trafficking is 12 years, while the minimum for murder is eight years. And in Peru,

FIGURE 16.
Average penalty for trafficking as percentage
of average penalty for murder (1970-2012)



Source: Compiled by authors

minimum penalty for drug trafficking (10 years in prison) was 10 times the minimum for murder (one year in prison).

The only substantial decrease in penalties occurred in Bolivia. The reason for this change in legislation between 1990 and 2012 was the same as in the case of the average penalty: while the minimum penalty for trafficking remained unchanged, the minimum for murder increased considerably. In addition, in cases such as that of Colombia, although the percentage seemed proportionate over the last several decades (60 percent and 61 percent), the minimum penalty for drug trafficking is particularly high (10.6 years in prison⁴⁰), preventing judges from opting for a lighter sentence in cases in which the conduct is less serious.

Finally, the average penalty allows analysis of the overall trend in legislation on both maximum and minimum penalties for the crimes being compared. Figure 16 shows what was already analyzed in the preceding

the minimum penalty for drug trafficking is eight years, while the minimum for murder is six years.

⁴⁰ This does not take into account the penalty for dealing small amounts of drugs, which has a prison term of 5.3 years. The same is true for calculation of the maximum and average penalty in the other comparisons in this report.

graphs: The general rule is an increase in the penalty for trafficking as a percentage of the penalty for murder.

Bolivia and Colombia remain the only cases in which there is a decrease in that percentage, which, as noted above, responds not to a decrease in the penalty for trafficking, but to a considerable increase in the penalty for murder, which, in Colombia, is accompanied by an increase in the penalty for trafficking. In Mexico and Brazil, there is a clear upward trend from 1970 to 2012, while in Ecuador, the penalty for trafficking has been 1.4 times as great as the penalty for murder since 1990.

These three graphs confirm the disproportionality of the punishment of drug-related crimes such as trafficking in comparison to a very serious crime such as murder. Except in Argentina -- where the average penalty for trafficking represents 58 percent of the average for the crime of murder and has held steady since 1990 -- the legislation in the countries analyzed has taken an increasingly repressive approach to drug-related crimes.

Between 1990 and 2012, five of the seven countries studied (Bolivia, Colombia, Ecuador, Mexico and Peru) at some point considered longer penalties (maximum, minimum or average) for the crime of drug trafficking than those established for murder. The logic was the same in Brazil, as the average penalty for drug trafficking, as a percentage of the average for murder, has increased from 23 percent in 1970 to 77 percent in 2012.

Between 1970 and 2012, therefore, criminal legislation in Latin America has tended to entrench disproportionality in the treatment of drug-related crimes. Unlike murder, which clearly has serious consequences for society, drug-related crimes cause no concrete, direct harm. However, the legislation studied does not reflect this difference in the seriousness associated with each conduct, since it is not unusual in the countries studied for drug-related crimes to be punished as severely as or more severely than the crime of murder.

Drug trafficking compared to rape

Rape is a very serious crime, considering its concrete and specific harm to a person’s sexual freedom and integrity.⁴¹ A comparison between penalties

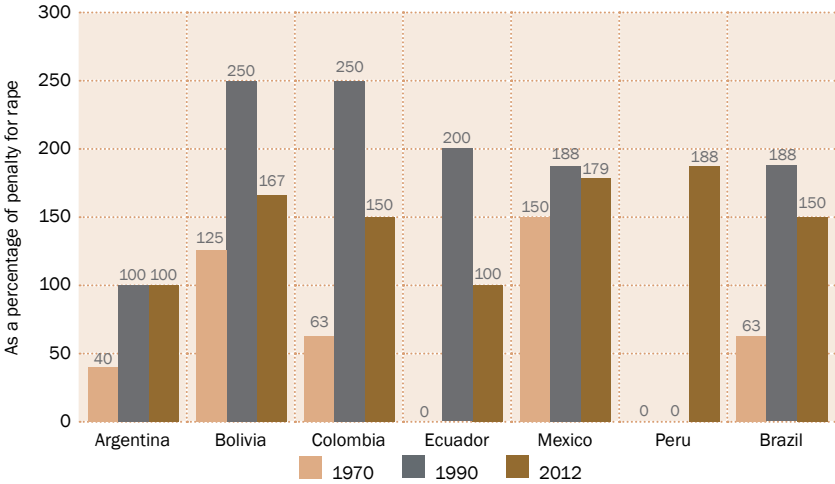
for rape and for drug trafficking is therefore useful for identifying disproportionate treatment of drug-related crimes.

The same type of percentage comparison is used as was used for murder. A percentage nearly equal to or exceeding 100 percent would confirm disproportionate punishment for drug-related crimes. In theory, to ensure at least minimal protection for the principle of proportionality of punishment, penalties for rape should be substantially more severe than for drug trafficking, given the greater seriousness of the crime. If that is not the case, it confirms the disproportionality that was evident in comparing drug-related crimes to murder.

Figures, 17, 18 and 19 illustrate the trend in the percentage represented by the maximum, minimum and average penalties, respectively, for drug trafficking, compared to those for the crime of rape.

As the preceding graph shows, the disproportionate treatment of drug-related crimes is much more obvious when compared with the crime of rape. In all of the countries studied, the maximum penalty for drug trafficking is currently equal to or greater than the maximum for rape. The smallest percentage currently is in Argentina (100 percent), where the maximum penalty for both is 15 years in prison, and Ecuador (100 percent), where the same penalty is 16 years.

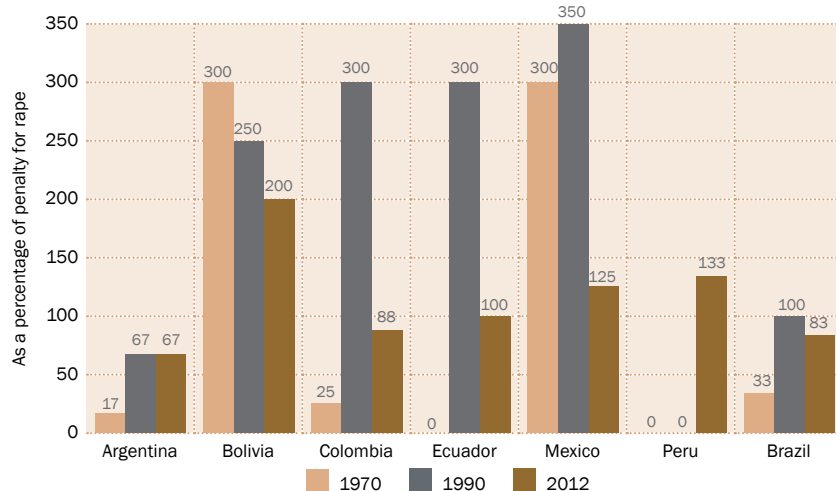
FIGURE 17.
Maximum penalty for trafficking as percentage of maximum penalty for rape (1970-2012)



Source: Compiled by authors

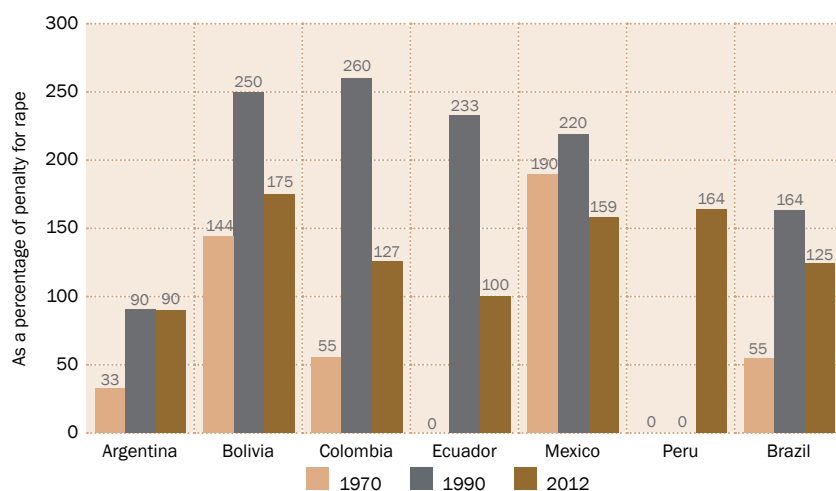
41 Rape is a crime that implies the use of sexual violence and constitutes an attack against the victim’s sexual freedom and integrity. Unlike drug-related crimes, it causes concrete harm, both physical and psychological, which can have repercussions for the person’s life in society.

FIGURE 18.
Minimum penalty for trafficking
as percentage of minimum penalty for rape (1970-2012)



Source: Compiled by authors

FIGURE 19.
Average penalty for trafficking as percentage
of average penalty for rape (1970-2012)



Source: Compiled by authors

In the other countries, the maximum penalty for drug-related crimes is considerably higher than that for the crime against sexual freedom and integrity. In Mexico, the percentage comparison is 179 percent, followed by Bolivia with 167 percent, and Colombia and Brazil with 150 percent. The disproportionality of these maximum penalties was highest in 1990, when the penalty for trafficking in Bolivia and Colombia was 2.5 times the maximum for rape.⁴² The data therefore show that the difference in the seriousness of these two offenses is not reflected proportionately in their maximum penalties, because the punishment for drug-related crimes seems much more severe than the punishment for such an extremely harmful crime as rape.

While the comparison of maximum penalties reached 250 percent, the minimum penalty comparison exceeded that percentage by a wide margin. In four countries, the minimum penalty for drug trafficking was three or four times as long as the minimum for rape. Bolivia, Colombia, Ecuador and Mexico showed the greatest discrepancies in penalties for drug-related crimes as compared to those for rape, especially in 1970 and 1990.

In five of the seven countries studied, the minimum penalties are currently longer for drug trafficking than for rape. The greatest disproportionality is in Bolivia, where the minimum penalty for drug-related crimes is twice that of rape; while the former is 10 years in prison, the latter is five years. Although not reflected fully in the comparative percentage, Ecuador and Colombia have the highest minimum penalties for drug trafficking, at 12 years in prison for Ecuador and 10.6 years for Colombia.

As with the study of the maximum and minimum penalties, analysis of the average penalties also shows that those for drug-related crimes are disproportionate. Only in Argentina is the penalty slightly higher for rape (10.5 years in prison) than for drug trafficking (9.5 years in prison). In the other six countries, the average penalty for drug trafficking is equal to or greater than the average for rape. Bolivia and Mexico – where the percentage comparison is 175 percent and 164 percent, respectively – stand out in particular.

Most countries registered the greatest disproportionality in 1990. With the exception of Argentina, in all countries the average penalty was

⁴² In Bolivia, the maximum penalty for drug trafficking was 25 years in 1990, while the maximum for rape was 10 years in prison. In Colombia, the maximum penalties were 20 years for drug trafficking and eight years for rape.

longer for drug trafficking. In Colombia, the penalty for drug trafficking was 13 years in prison, compared to five years for rape. In Bolivia, there was a difference of 10.5 years in prison in 1990.

These three graphs lead to the conclusion that drug trafficking has been punished more severely than rape in most countries, especially between 1990 and 2012. Although the disproportionality was greater in 1990, that does not mean the situation has changed much. As the graphs show, in 2012, penalties for drug trafficking were not at all proportionate to those for a sex crime as serious as rape, a sign that the countries continue to impose more severe punishments for less serious crimes.

As with the crime of murder, the disproportionality of the treatment of drug-related crimes is evident when compared with penalties for rape, although the latter crime seriously affects two of the legal rights most important to society: sexual freedom and integrity. By punishing drug-related crimes such as trafficking more severely, Latin American legislation contradicts the principle of proportionality of punishment.

A clarification is in order here. These conclusions should not lead us to think that the solution to this disproportionality is to increase the lengths of the penalties for the crimes used for comparison (murder and rape), because that would only mean taking an even more punitive approach, with the costs that this implies in terms of reasonable criminal policy and human rights. Instead, it should lead to an evaluation of the actual harm caused by drug-related crimes and how to respond to that harm in a way that is reasonable and proportionate.

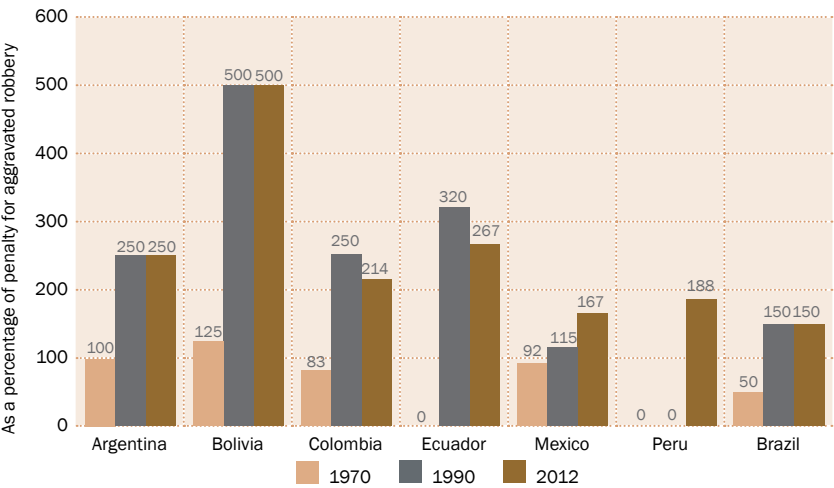
Drug trafficking compared to aggravated robbery

The last crime we compared – aggravated robbery – does not cause as serious harm as murder or rape, but has a considerable impact on society, because it occurs so frequently. Once again, a percentage comparison is used, analyzing the length of the penalty for drug trafficking as a percentage of the penalty for aggravated robbery. Because the latter is considered a more serious offense, the principle of proportionality implies that it should be punished more severely than drug trafficking.

Figures 20, 21 and 22 show the trend in this percentage in the maximum, minimum and average penalties, respectively.

This time, the difference is much more obvious. In all of the countries, including Argentina and Brazil, which had previously appeared to be exceptions, drug trafficking is currently punished much more severely

FIGURE 20.
Maximum penalty for trafficking as percentage
of maximum penalty for aggravated robbery (1970-2012)



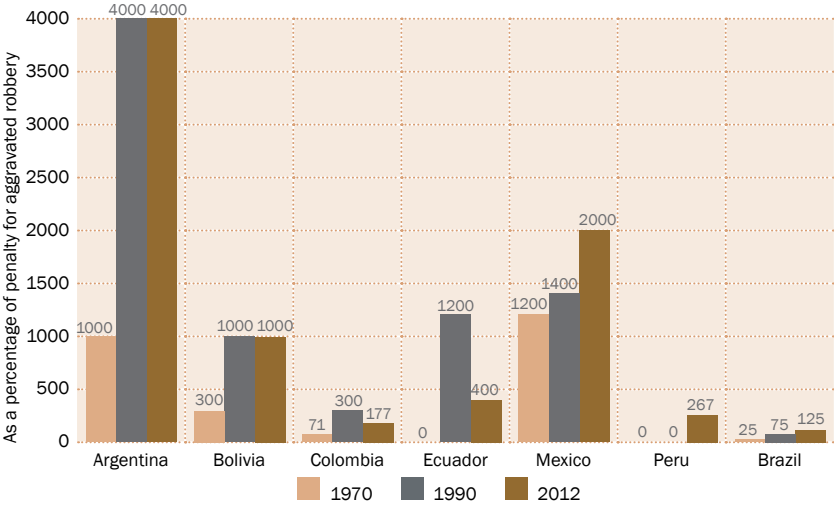
Source: Compiled by authors

than aggravated robbery. The percentages are as high as 500 percent in Bolivia and 267 percent in Ecuador. In other words, penalties for drug trafficking can be five times as long as penalties for aggravated robbery.

Only Colombia and Ecuador show a decrease in that disproportionality between 1990 and 2012. In Ecuador, that is because the maximum penalty for aggravated robbery increased by one year (from five years in prison to six), while the maximum for drug trafficking remained at 16 years. In Colombia, far from being the start of a decrease in disproportionality, the trend demonstrates the maximization of the use of criminal law, as penalties for both crimes increased considerably between 1990 and 2012: Drug trafficking increased from 20 to 30 years in prison, while aggravated robbery increased from eight to 14 years.

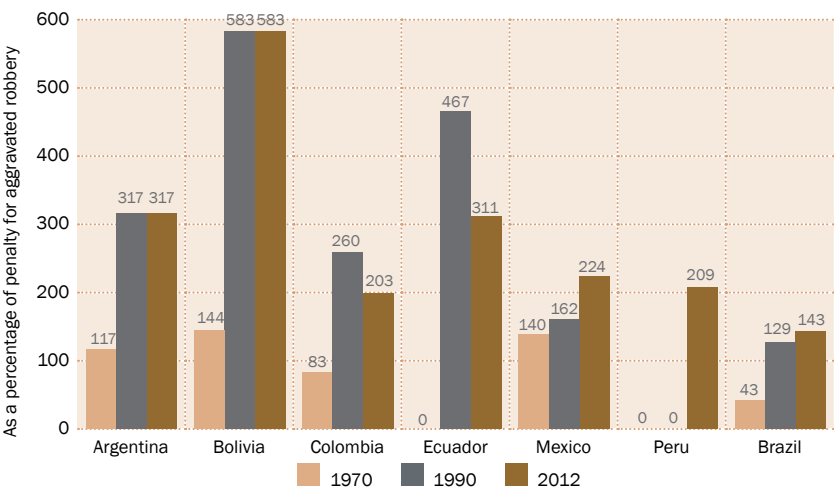
The minimum penalty for aggravated robbery tends to be very low in some countries; for example, it is one month in Argentina, six months in Mexico and one year in Bolivia. In comparison, the corresponding penalties for drug trafficking are excessive. In these three countries, the minimum penalty for drug trafficking is four years in prison in Argentina and 10 years in Mexico and Bolivia. This explains why the percentage comparison shows figures as exorbitant as 4,000 percent in Argentina and 2,000 percent in Mexico.

FIGURE 21.
Minimum penalty for trafficking as percentage of minimum penalty for aggravated robbery (1970-2012)



Source: Compiled by authors

FIGURE 22.
Average penalty for trafficking as percentage of the average penalty for aggravated robbery (1970-2012)



Source: Compiled by authors

Even in countries where the minimum penalty for aggravated robbery is relatively high, drug trafficking is still punished more severely. That is true in Colombia, which currently has the highest minimum penalty for aggravated robbery of the group of countries studied. While the minimum penalty for aggravated robbery is six years in prison, the minimum for drug trafficking is 10.6 years. The situation is similar in Peru, Brazil and Ecuador.

Not surprisingly, the percentages in the comparison of average penalties are extremely high. All seven countries currently punish drug trafficking more severely than aggravated robbery. The widest margin is in Bolivia, where the average penalty for aggravated robbery is three years in prison, while the average penalty for trafficking is 17.5 years.

Only in Colombia and Ecuador did the average penalty for trafficking as a percentage of the penalty for aggravated robbery decrease between 1990 and 2012. Again, however, that change did not result from a decrease in the severity of sanctions for drug trafficking. On the contrary, that penalty remained unchanged in Ecuador during the period, while it increased slight in Colombia. As with the other comparisons, the decrease in the percentage does not imply a decrease in the maximum use of criminal law.

This analysis confirms that in the seven countries studied, there is a generalized practice of establishing much more severe penalties for drug trafficking than for aggravated robbery, re-affirming the disproportionality of the treatment of drug-related crimes that was illustrated in the preceding comparisons. The disproportionality evident in the comparison with murder became even more apparent in the comparison to rape and was definitively confirmed in the comparison to aggravated robbery. In all three cases, the principle of proportionality of punishment is ignored, because a less serious crime is punished more severely. That is not only unreasonable, but it also calls into question the standards by which society judges these offenses.

It is difficult to argue that society prefers to punish a drug trafficker more severely than a rapist or murderer, especially in Latin American countries like the ones studied, where those crimes may be related to armed conflict, as in Colombia, or high levels of criminal violence, as in Mexico. More severe punishment for drug-related crimes such as trafficking, therefore, contradicts the views of society and the principle of proportionality in criminal law.

These data suggest that Latin American legislation violates the principle of proportionality described by Ferrajoli (2000, 402), which states that “if two crimes are punished with the same penalty, it means the legislative branch considers the seriousness to be equivalent, while if the penalty for one crime is more severe than that established for the other, the first crime is considered more serious than the second.” In this case, the opposite is true: the less serious crime is punished with a penalty equal to or exceeding the penalty for the more serious crime.

In conclusion, disproportionality in the punishment of drug-related crimes in Latin American legislation is evident since 1970. This practice is generalized in the seven countries studied and reached a peak in 1990, although that does not imply a change in approach, as explained above.

Conclusions

Proportionality in penalties is not just a principle associated with the postulates of criminal law as a mechanism of last resort and of minimum criminal law, but it also constitutes a substantive guarantee for defendants and people convicted under criminal legislation. It protects those who play the weakest role in the criminal process and maintains a balance between the goal of protecting potential victims through the prevention of additional crimes and the goal of protecting possible defendants against unjust and excessive punishment.

Any state policy that uses criminal law must therefore respect and guarantee strict compliance with the principle of proportionality. Otherwise, various human rights would be violated, which is unacceptable in constitutional regimes. Latin American countries, in particular, should do all they can to ensure that drug policies are a proportional response that guarantee respect for the rights of all actors related to any phase of the drug business.

This study, however, provides sufficient grounds to conclude that the trend in drug control policy in the region is toward the maximum use of criminal law and a consequent disproportionality in the treatment of drug-related crimes. This tendency is evident in the fact that both the number of drug-related conducts penalized and the lengths of the penalties have increased steadily since 1950. This has degenerated into such a punitive approach that in a single body of legislation, 50 or more drug-related conducts are penalized and penalties of 30 or more years in prison are imposed.

The disproportionality in drug policies in Latin America is confirmed by a comparison to other crimes that societies consider more serious and that cause far greater, more concrete and more direct harm to protected legal interests. The punitive response to drug-related crimes is equal to or more severe than the penalties established for the crimes of murder, rape and aggravated robbery. The greater severity of penalties for drug-related crimes not only ignores proportionality, but also contradicts the Latin American social sensibility that would rather punish a murderer or rapist than a person who deals or uses drugs.

This study has also corroborated at least two other characteristics of criminal drug legislation in Latin America that help maintain and expand disproportionality. The first is the generalized presence of deficiencies in legislative practices that could hamper protection of the rights of people charged with and convicted of drug crimes, such as the tendency to include a large number of verbs used to describe a criminal offense in a single article of the law, which leads to the same penalty being imposed for crimes with different degrees of seriousness. The second is the existence of a punitive approach (in drug legislation) within a punitive approach (in the criminal justice system in general), which was identified by the similarity between sanctions for drug-related conducts and the maximum penalties established in criminal law.

Given this obvious disproportionality in the treatment of drug-related crimes in Latin America, there is an urgent need for countries to take adequate measures to change the situation and implement drug policies that respect human rights and basic criminal guarantees.

Reinforcing this, the people most affected by the disproportionality of crimes and penalties tend to be the most vulnerable members of Latin American societies and the weakest links in the trafficking chain. As was documented in the study, *Systems Overload: Drug Laws and Prisons in Latin America*, the criminalization of the cultivation, manufacturing, commercialization, trafficking and even use of controlled substances generally involves people who live in more precarious socio-economic conditions and have less formal education. They also tend to constitute the weakest links in the drug business.⁴³

43 This was confirmed by an earlier CEDD study that concluded that the main victims of excessively repressive drug control policies are low-income people with little formal education, who play a smaller role in the drug cycle and are easily replaced in the various phases of the drug economy. See

And although the serious effects of prohibitionist policies on human rights and constitutional guarantees are enough to justify a call for them to be restructured, the high costs and low return in utilitarian terms mean the drug problem must be addressed from a different perspective. In another study, CEDD quantified many of these costs, which are added to the huge collateral costs of violence associated with large criminal and drug-trafficking organizations that have affected Latin American countries so seriously.⁴⁴ There is no justification, in terms of rights or economics, for maintaining a punitive approach to drug policy in the region.

It is therefore crucial to make every possible effort to refocus drug policy in the region. Criminal punishment can no longer be the main approach. Because of the vulnerability and lack of protection for human rights that has resulted, countries must implement alternative responses to the problem of drugs. They should favor harm-reduction policies over punitive policies; the weak links in the drug chain must receive government protection rather than excessive punishment, and the possible harm associated with psychoactive substances should be minimized through an approach based on public health and alternative development, not criminal punishment and the use of force.

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⁴⁴ See Pérez Correa, C. (ed.) (2012). Costs in terms of human rights and the economic deficit created by prohibitionist policies in the region have led to international debate being spearheaded by Latin American leaders who propose a new government response to the drug problem. The adoption of alternatives in some cases is already underway, such as the legalization of marihuana in the U.S. states of Colorado and Washington in November 2012 and the proposal to legalize use and sale of marihuana that is being led by Uruguay.

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ANNEX

TABLE 1.
Comparative evolution in the number
of criminalized drug-related conducts in Latin America

Year		1950	1960	1970	1980	1990	2000	2012
Argentina	Criminal Articles	1	1	1	6	15	15	13
	Descriptive Verbs*	4	4	4	34	62	62	52
Bolivia	Criminal Articles	0	0	8	8	25	25	25
	Descriptive Verbs	0	0	12	12	52	52	52
Brazil	Criminal Articles	1	1	1	5	5	5	7
	Descriptive Verbs	17	17	30	54	54	54	57
Colombia	Criminal Articles	2	2	2	7	9	12	12
	Descriptive Verbs	9	9	9	25	33	38	50
Ecuador	Criminal Articles	0	5	8	8	25	25	23
	Descriptive Verbs	0	9	20	20	72	72	67
Mexico	Criminal Articles	2	2	5	4	4	5	8
	Descriptive Verbs	17	17	33	35	35	32	36
Peru	Criminal Articles	2	2	3	4	6	9	11
	Descriptive Verbs	20	20	24	24	26	34	62

Source: Compiled by authors

* As we said in the main text, by descriptive verb we mean the verb used to describe a criminal offence (verbo rector), in other words, punishable conducts.

TABLE 2.
Highest minimum penalty for all drug crimes in each
country's criminal legislation (1950 – Current)
[Years in prison]

País/año	1950	1960	1970	1980	1990	2000	Current
Argentina	0,5	0,5	1	5	8	8	8
Bolivia	0	0	6	6	20	20	20
Colombia	0,5	0,5	0,5	3	6	6	15
Mexico	6	6	6	7	10	20	20
Peru	2	2	2	15	15	25	25
Ecuador	0	4	8	8	12	12	12
Brazil	1	1	1	3	3	3	8

Source: Compiled by authors

TABLE 3.
Highest maximum penalty for all drug crimes in each
country's criminal legislation (1950 – Current)
[Years in prison]

Country/Year	1950	1960	1970	1980	1990	2000	Current
Argentina	2	2	6	15	20	20	20
Bolivia	0	0	20	20	30	30	30
Colombia	5	5	5	12	12	12	30
Mexico	10	10	15	15	25	40	40
Peru	15	15	15	15	15	35	35
Ecuador	0	8	12	12	16	16	16
Brazil	5	5	5	15	15	15	20

Source: Compiled by authors

TABLE 4.
Minimum penalty for drug trafficking (1950-Current)
[Years in prison]

Country/Year	1950	1960	1970	1980	1990	2000	Current
Argentina	0,5	0,5	1	3	4	4	4
Bolivia	0	0	3	3	10	10	10
Colombia	0,5	0,5	0,5	3	4	8	10,7
Mexico	0,5	0,5	3	7	10	10	10
Peru	2	2	2	10	10	8	8
Ecuador	0	4	8	8	12	12	12
Brazil	1	1	1	3	3	3	5

Source: Compiled by authors

TABLE 5.
Maximum penalty for drug trafficking (1950 – Current)
[Years in prison]

Country/Year	1950	1960	1970	1980	1990	2000	Current
Argentina	2	2	6	12	15	15	15
Bolivia	0	0	10	10	25	25	25
Colombia	5	5	5	12	12	20	30
Mexico	7	7	12	15	25	25	25
Peru	15	15	15	15	15	15	15
Ecuador	0	8	8	12	16	16	16
Brazil	5	5	5	15	15	15	15

Source: Compiled by authors

TABLE 6.
Average penalty for drug trafficking (1950 – Current)
[Years in prison]

Country/Year	1950	1960	1970	1980	1990	2000	Current
Argentina	1,25	1,25	3,5	7,5	9,5	9,5	9,5
Bolivia	0	0	6,5	6,5	17,5	17,5	17,5
Colombia	2,75	2,75	2,75	7,5	8	14	20,35
Mexico	3,75	3,75	7,5	11	17,5	17,5	17,5
Peru	8,5	8,5	8,5	12,5	12,5	11,5	11,5
Ecuador	0	6	8	10	14	14	14
Brazil	3	3	3	9	9	9	10

Source: Compiled by authors



This document analyzes the proportionality of drug related crimes in seven Latin American countries through the study of the evolution of their criminal legislations from 1950 until 2012. The study suggests the existence of a regional tendency to maximize the use of criminal law for combating this type of conducts. This is reflected in: i) the gradual increase in the number of drug-related conducts described as criminal, ii) the exponential growth of the penalties with which those conducts are punished and iii) the incomprehensible tendency of punishing with more severity the drug-related crimes rather than those more evidently severe such as homicide, rape and aggravated robbery. Those upward trends indicate that the Latin American States have become *addicted to punishment* because of their frequent and empirically groundless increasing of the punitive dose, regardless of its constantly decreasing benefits.

Addicted to punishment is part of a series of studies carried out by the Research Consortium on Drugs and the Law (CEDD) that critically analyze the application of the proportionality principle in relation with drug crimes. The studies find that the punishments imposed and the punitive treatment of the offenders are disproportional, often generating more damages than benefits.



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