

# DISCIPLINING GLOBALIZATION: INTERNATIONAL LAW, ILLEGAL TRADE, AND THE CASE OF NARCOTICS

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Define new tactics in order to reach a target that is now . . . more widely spread in the social body. Find new techniques for adjusting punishment . . . and for adapting its effects. Lay down new principles for regularizing, refining, universalizing the art of punishing. Homogenize its application. Reduce its economic and political cost by increasing its effectiveness and by multiplying its circuits. In short, constitute a new economy and a new technology of the power to punish.

—Michel Foucault, *Discipline and Punish*<sup>1</sup>

The High-level Signing Conference for the United Nations Convention on Transnational Organized Crime concluded today its four-day session in Palermo, Italy. . . .

. . . .

. . . The Convention extends well beyond the sphere of cooperation on drug trafficking. . . . An important goal of the instrument is to get all countries to synchronize their national laws, so that there can be no uncertainty as to whether a crime in one country is also a crime in another.

—United Nations Press Release, December 15, 2000.<sup>2</sup>

This Article is the first in a series of studies of the globalization of illicit markets. My theses are as follows: First, the increase in international trade in illicit products and services parallels the growth in international trade more generally that accompanies the phenomenon of globalization.<sup>3</sup> Second, at the same time that most international trade law has moved toward a posture of liberalization, there has been a movement to strengthen the prohibition and punishment of trade in illicit transactions.<sup>4</sup> Third, the mechanisms that have developed to regulate this prohibition constitute a significant development in the international legal order.<sup>5</sup>

This Article seeks to establish a conceptual framework for analyzing the international law of illegal trade—one might say “prohibitive

1. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 89 (Alan Sheridan trans., Vintage Books 1979) (1977).

2. Press Release, United Nations, More Than 120 Nations Sign New UN Convention on Transnational Organized Crime as High-Level Meeting Concludes in Palermo, U.N. Doc. L/T/4359 (Dec. 15, 2000).

3. See *infra* Part I for a discussion of globalization in licit international trade and in international narcotics trafficking.

4. See *infra* Part II for an analytical framework of international trade, and Part III for a description of the cross-movements within licit and illicit international trade.

5. See *infra* Parts V and VI.

international law”—by focusing on the case of narcotics.<sup>6</sup> The history of prohibitive regimes in international law is under-studied. This framework moves beyond the criminological lens, which focuses on the question of whether criminalization is or is not the correct response to narcotics trade.<sup>7</sup> Rather, it situates the narcotics regime within the broader frame of international legal development.

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6. Cf. Kal Raustiala, *Law, Liberalization & International Narcotics Trafficking*, 32 N.Y.U. J. INT'L L. & POL. 89, 91 (1999) (noting that the relationship between liberalization of legal and illegal trade “has been the subject of surprisingly little legal and political attention”). Raustiala’s paper, documenting the empirical links between liberalization of legal and illegal trade that are also discussed in Part I of this Article, constitutes perhaps the only other treatment of the issue in the legal academy that does not employ an exclusively criminal law approach.

7. Weighing the costs and benefits of prohibition is complex. For example, there are at least three types of costs of prohibition. First, enforcement costs are very high, particularly for the United States. A formidable array of federal agencies combat narcotics, including the Department of State (Bureau of International Narcotics and Law Enforcement Affairs (INL), Bureau of International Organizations coordinating with United Nations agencies, and regional Bureaus), the Department of Defense, the Agency for International Development, the U.S. Coast Guard, and the Central Intelligence Agency.

Second, prohibition appears to breed violence and instability. Users commit theft crimes in order to pay the increased price of illegal drugs; dealers and suppliers commit crimes to control the lucrative trade. Traffickers seek to corrupt government agencies so as to prevent prosecution of narcotics crimes. Recently, a connection between illegal drugs and terrorism has also arisen. See *The Western Hemisphere’s Response to the September 11, 2001 Terrorist Attack in the United States: Hearing Before the House Subcommittee on the Western Hemisphere of the Committee on International Relations*, 107th Cong. 2 (2001) (statement of Rep. Ballenger) (stating that “drug trafficking and terrorism . . . share a symbiotic relationship—feeding off one another—one making the other possible” and discussing links between Columbian drug syndicates and the Revolutionary Armed Forces of Columbia (FARC) and National Liberation Army (ELN), as well as links between opium production and the Taliban in Afghanistan).

Third, there may be ideological costs associated with producing justifications that would prop up a regime that is so costly and generative of violence. In a liberal State, the exercise of government power must be justified in a way that reconciles authority with freedom. See Pierre Schlag, *The Empty Circles Of Liberal Justification*, 96 MICH. L. REV. 1 (1997). A prime justification for such authority is that it serves the public interest and is exercised with a certain level of expertise. See Chantal Thomas, *Constitutional Change and International Government*, 52 HASTINGS L.J. 1 (2001). Joseph Raz argues that authority serves to mediate “between people and the right reasons which apply to them, so that the authority judges and pronounces what they ought to do according to right reasons.” Joseph Raz, *Authority, Law and Morality*, 68 THE MONIST 295, 299 (1985). This justification, which Raz argues is implicit and pervasive, allows for what he terms the “practical authority” of law—a presumption that the law is justified on the basis of correct reasons, without a need to verify that it is. Raz’s conception of authority, however, is admittedly “ideal.” JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986). In contrast to this ideal, a State may make laws for *incorrect* reasons, yielding a number of troubling implications. In the case of narcotics, if the reasons supporting criminalization are wrong, then substantial governmental resources are wasted. The implications extend beyond material waste of public resources, however. If the State’s reasoning is flawed, then the presumption of its correctness will encourage wrong views amongst its constituencies. In the instant case, citizens would believe, incorrectly, that criminalization of narcotics is effective. To support this incorrect view, citizens might conflate

the violence that arises when narcotics use is criminalized with the use of narcotics itself. This conflation appears to be very real: the predominant view amongst the public appears to be that the use of narcotics inherently breeds violence. *See, e.g.*, ENCYCLOPEDIA OF CRIME & JUSTICE 571 (Joshua Dressler et al. eds., 2d ed. 2002) (contribution by Douglas Husak) ("Public anxiety about drug use is fueled by the perception that people under the influence of drugs often behave violently and irrationally.") However, substantial research supports the opposite view: that most narcotics-related violence results from the criminalization of narcotics rather than from the use of narcotics themselves. *See* DRUGS-VIOLENCE TASK FORCE, PRELIMINARY FINAL REPORT TO THE UNITED STATES SENTENCING COMMISSION 40 (1996); *see also* UNDERSTANDING AND PREVENTING VIOLENCE (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993). Finally, the ideological danger here is not just that the State can *generate* incorrect beliefs—for example, the belief that narcotics use inherently breeds violence—but also that it can *reflect* and *reinforce* incorrect beliefs. Elsewhere, I have discussed how "illegitimate ideologies" may serve to justify approaches to global poverty that attribute such poverty to defects inherent in the poor rather than to systemic causes or to the actions of the rich. *See* Chantal Thomas, *Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1999). For an application to the current case, *see* Symposium, *Legalization of Drugs*, 1991 U.C. DAVIS L. REV. 555.

Juxtaposed against these costs are what appear to be only limited benefits of prohibitionism. First, most social scientists have concluded that there is only a low deterrent effect of criminalizing drug use, production or trade. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 479–84 (3d ed. 2000). (For a dissenting perspective see James Q. Wilson, *Against the Legalization of Drugs*, COMMENT., Feb. 1990, at 21.) Second, criminalization is also unlikely to reduce supply. In 1999, the "farmgate" price per kilogram of coca base in Bolivia was estimated by the U.N. Office for Drug Control and Crime Prevention to be US\$900. In 1999, prices for Bolivia's major legal cash crops were US\$19 per kilogram of coffee—about 2 percent of the going price for the equivalent amount of coca base—and about US\$2, per kilo of soybeans, or about 0.2 percent of the coca base price. *See* FOOD & AGRIC. ORG. OF U.N., U.N. REPORT ON GLOBAL ILLICIT DRUG TRENDS, at 46, U.N. Sales No.E.00.XI.10 (2000); FOOD & AGRIC. ORG. OF U.N., THE STATE OF FOOD AND AGRICULTURE 2001, at 11–13 (FAO Agriculture Series No. 33, 2002). The criminalization of international trafficking, on the one hand, and the liberalization of the international market on the other, ensure that international narcotics trade will continue. Criminalization dramatically increases the potential profits of narcotics trade. For countries with few other competitive advantages, the lure may well outweigh the danger.

Thus, a prohibitionist approach to the international narcotics trade exacts a whole host of costs. However, it is difficult to determine whether those costs are less than those that would result under a more lenient regulatory model. Decriminalizing the narcotics trade would almost certainly reduce the price of narcotics, because many more suppliers would be willing to enter into licit production, and transaction costs would be much lower. A likely result of reducing the restrictions on narcotics, would be increased recreational use of narcotics, both due to the lower price and due to increased consumer amenability to usage of licit as opposed to illicit goods. This might generate the kind of public health costs associated with current legal drugs: health effects from long-term use, increased risk of accidents resulting from impairment, like car crashes, etc. (Another result of decriminalization would be the lowering of "farmgate" prices for developing country producers. Although it might be viewed as a perverse effect the current system does redistribute wealth away from rich consumers to poor farmers even if most of that wealth is absorbed by traffickers in the middle). On the other hand, decreased revenue under a decriminalized regime might well be offset by net benefits resulting from greater stability and less violence and corruption in supplier countries.)

Because the distributional consequences of various regulatory modes are so complex, weighing them falls beyond the scope of this Article. This Article does not endorse a particular

## I. THE GLOBALIZATION OF NARCOTICS

While the omni-term “globalization” can mean many (probably too many) different things, from a purely material standpoint the term refers to the dramatic increase in contemporary times of international production and consumption.<sup>8</sup>

After World War II, world trade in goods<sup>9</sup> “grew at a rate twice as fast as the overall world economy.”<sup>10</sup> For the United States, “trade volume multiplied nearly twenty-fold” during the same time frame.<sup>11</sup> In the globalized economy, intricate chains of manufacture, assembly, distribution, and retail link together an ever greater number of countries. Lan Cao’s description of modern automobile production is classic:

A Chevy may be built in Mexico from imported parts and then re-imported into the United States; a Ford built in German plants by Turkish workers and sold in Hong Kong and Nigeria; a Toyota Camry designed by an American designer at Toyota’s Newport Beach California Caltex Design Research Center, assembled at the Georgetown, Kentucky plant from American-made parts (except that the engine and drive trains are still Japanese) and then test driven at Toyota’s Arizona proving ground.<sup>12</sup>

Car production seems a typical facet of the global production. Illegal drug production, however, exceeds car production as a proportion of the global economy.<sup>13</sup> The United Nations Office for Drug Control and

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regulatory model. Rather, it highlights the substantive and institutional dynamics of the current model and the significance of those dynamics for the international legal order.

8. See Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 U.C. DAVIS L. REV. 1451, 1476 (2000). In fact, globalization has a more specific vector: it has to do with increasing penetration of *industrialized* societies by the international market. Developing States, as a result of colonialism, have arguably been in the throes of “globalization” since their inception.

9. The international economy consists not only of trade in goods, but also of trade in services and of international capital flows. These latter sectors have increased dramatically as well. See *id.* at 1476–78.

10. *Id.* at 1477 (citing 1999 TRADE POLICY AGENDA AND 1998 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 19).

11. 1999 TRADE POLICY AGENDA AND 1998 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 19.

12. Thomas, *supra* note 8, at 1479 (quoting Lan Cao, *Money, Power, and Culture in the Global Economy: Towards a New Sensibility for International Economic Development* 15–27 (1998) (unpublished manuscript, on file with author)).

13. “Illegal drugs are one of the world’s largest traded sectors, with the global market estimated at \$400–\$500 billion a year—nearly 10% of total world trade and larger than the global automobile market.” Raustiala, *supra* note 6, at 90. In the 1980s alone, for example, global illicit coca leaf production tripled, and global illicit opium production increased eightfold. U.N. OFFICE FOR DRUG CONTROL AND CRIME PREVENTION (UNODCCP), *WORLD DRUG*

Crime Prevention (UNODCCP) reports that the last two decades have witnessed “*the global spread of drug trafficking*,” rendering it “now truly a global phenomenon.”<sup>14</sup> The complexity of narcotics trade rivals that of multinational corporations.<sup>15</sup> The United States Bureau for International Narcotics and Law has observed that “[t]he relatively simple charts of drug flows” of previous eras “now resemble schematic drawings of intricate . . . networks tying nearly every country in the world to the . . . drug production and trafficking countries.”<sup>16</sup>

In addition to sharing the same *characteristics*, the globalization of licit goods and illicit narcotics share many of the same *causes*. Advances in communications technology constitute one such cause;<sup>17</sup> for example, the telecommunications network that facilitates international capital investment also facilitates money laundering for the illicit narcotics

REPORT 2000, at 24, U.N. Sales No. G.V.E.00.0.10 (2000) [hereinafter WORLD DRUG REPORT 2000] (showing an increase between 1980 and 1990 in coca leaf production from approximately 100,000 to 325,000 tons, and in opium production from approximately 500 to 4,000 tons). In the latter half of the 1990s, global production of opium remained stable, until a sharp increase in 1999 production in Afghanistan brought the 1999 total to 6,500 tons. *See id.* Coca leaf production, however, has declined in the late 1990s to approximately 300,000 tons. *See id.*

14. WORLD DRUG REPORT 2000, *supra* note 13, at 32–33. The report states:

In 1980–81, one hundred and twenty countries and territories reported drug seizures. By 1987–88, this number had increased to 144. Over the next decade, it again increased substantially, to 170 in 1997–98. Though the total number of countries in the world also increased during the period, this is still unequivocal evidence of the fact that drug trafficking is now a truly global phenomenon.

*Id.*

15. Cocaine generally originates in the Andean countries—Colombia, Bolivia, and Peru. *Id.* at 33. From these countries, cocaine travels “*via Central America to Mexico and the USA; via the Pacific coast to North America, via Venezuela and/or the Caribbean to Europe; from Peru and Bolivia to Brazil and via western or southern Africa to Europe.*” *Id.* at 35.

Opiates, on the other hand, generally originate either in Asia, particularly Afghanistan and Myanmar, or in Latin America, particularly Colombia. *Id.* at 32–33. From Afghanistan, they travel “*via Pakistan, Iran, Turkey and the Balkan route (and its various branches) to countries of the European Union and the European Free Trade Association.*” *Id.* at 33. From Myanmar, opiates travel “*via China (including Hong Kong SAR and Taiwan, Province of China) to North America (complementing and partly replacing the traditional route via Thailand and Hong Kong SAR).*” *Id.* at 35. From Colombia, opiates proceed “*along new trafficking routes—often parallel to those already in existence for cocaine—to the USA.*” *Id.* Finally, “[v]arious African countries are increasingly linked into trafficking routes for transshipment purposes.” *Id.*

16. BUREAU FOR INT’L NARCOTICS AND LAW, U.S. DEP’T OF STATE, INT’L NARCOTICS CONTROL STRATEGY REPORT (1998) [hereinafter INT’L NARCOTICS CONTROL STRATEGY REPORT]. For example, “Colombian syndicates have established cocaine distribution centers on every continent . . . . They share the lucrative drug trade with Russian, Turkish, Italian, Nigerian, Chinese, Lebanese and Pakistani heroin trafficking syndicates.” *Id.*

17. *See* Thomas, *supra* note 8, at 1480 (describing how, for licit goods, “[c]ommunications and information technology advances have made it easier to move money and know-how internationally and to coordinate production internationally”).

trade. In addition, modern transportation (such as air, rail, road, and even national mail and commercial courier services) facilitates the production and distribution of narcotics.<sup>18</sup> Further, because narcotics are so frequently smuggled in otherwise legal distribution chains, often it is not only the same types of technology, but the same actual shipment, that drives trade in both licit goods and illicit narcotics.<sup>19</sup>

There is one final connection between the globalization of licit and illicit trade, found in international trade law itself. The primary multilateral trade agreements name the expansion of world trade as their central objective.<sup>20</sup> Most believe that these agreements have largely achieved their objective: John Jackson, for example, has asserted that “[t]o a great extent, contemporary international economic interdependence can be attributed to the success” of the multilateral trade regime in expanding global trade.<sup>21</sup> The expansion in communications, transportation, and trade volume also facilitates trafficking, so that the institutionalized expansion of legal trade has generated “spillover effects” expanding illegal trade.<sup>22</sup>

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18. WORLD DRUG REPORT 2000, *supra* note 13, at 35. As Kal Raustiala has observed, “international economic liberalization eases the transboundary movement of illicit drugs by lowering transport prices, improving transportation infrastructure, and enhancing distribution networks.” Raustiala, *supra* note 6, at 117.

19. Kal Raustiala has vividly described this phenomenon:

Higher trade volume results in more places to hide drugs and, *ceteris paribus*, a lower probability of interdiction and seizure. Coupled with law enforcement clamp-downs on alternate smuggling techniques, such increases in sheer trade volume and the number of hiding spots make commercial shipping increasingly attractive to drug traffickers. The greater use of containers in international trade adds to this dynamic. At the U.S.–Mexico border, for example, illegal drugs have been discovered hidden in highway trucks in every imaginable way, including in the hollowed-out cores of vegetables.

Raustiala, *supra* note 6, at 119.

20. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, pmbl. [hereinafter WTO Agreement], LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 81, 84 (1994) (observing the importance of “expanding the production of and trade in goods and services”); General Agreement on Tariffs and Trade, Oct. 30, 1947, pmbl., 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT] (avowing a commitment to “developing the full use of the resources of the world and expanding the production and exchange of goods”).

21. LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (John H. Jackson et al. eds., 3d ed 1995); see also Thomas, *supra* note 8, at 1480 (“International trade agreements have probably been the most important instruments the federal government has used to catalyze globalization.”).

22. Raustiala, *supra* note 6, at 116 (“International law has been a crucial part of [the] liberalization project: . . . The clash with international drug control comes from the fact that separating legal goods from illegal goods, at an acceptable administrative cost, is extremely difficult.”).

Yet, while the globalization of legal trade has preoccupied many in international legal literature, the globalization of illegal trade has been largely neglected. This Article seeks to situate the latter issue within international legal analysis, as an overlooked aspect of the international trade regime. The next Part describes a framework for this end.

## II. AN INTERNATIONAL TRADE ANALYSIS: THE SUBSTANTIVE AND INSTITUTIONAL AXES

This Article will employ the framework for analyzing international economic law that I have developed elsewhere.<sup>23</sup> This framework operates along two axes: the substantive and the institutional.

The substantive axis, described broadly, considers how loose or how strict are the legal controls placed on trade flows. On one side of the spectrum, governments adopt rules that minimize trade restrictions and therefore maximize trade flows. A government that has adopted a very liberal trade regime will impose few trade restrictions on imported goods,<sup>24</sup> whereas a government with a more restrictive trade regime will adopt rules that maximize trade restrictions and minimize trade flows.<sup>25</sup> In the middle of this spectrum, a government operates in what might be called an “administrative” mode.<sup>26</sup> A government in the administrative mode will balance trade policy alongside other concerns, such as protecting domestic industry, or pursuing environmental or health objectives. The term “balance” here is not intended to portray the administrative mode as either more valid or less valid than the other regulatory models. Rather, it simply indicates that, in the administrative mode, trade policy will not necessarily preempt other objectives.

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23. See, e.g., Chantal Thomas, *Balance-of-Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order*, 15 AM. U. INT'L L. REV. 1249 (2000).

24. Examples of low trade restrictions are very low tariffs or no tariffs at all on imported goods, elimination of quotas on imported goods, elimination of policies that discriminate in favor of certain producers over others, streamlining social regulations to offer the least possible resistance to trade flows, and so on.

25. A government that has adopted a very prohibitive trade regime will impose very high tariffs on imported goods, establish strict quotas on imported goods, maintain policies that discriminate against foreign producers in favor of domestic producers, and even in favor of some foreign producers (based on the government's political alliances) over others, maintain social regulations that are complex and difficult to negotiate for foreign producers, and so on.

26. This term is somewhat misleading in that the liberal and prohibitive models of trade regulation also, of course, require administration. The term is intended, however, to evoke a sense that the government does not hold either the maximization or the minimization of trade flows as a primary objective.



While the substantive axis constitutes an important element of any analysis of international trade, such analysis is not complete without addressing institutional considerations. The institutional axis assesses an issue that domestic law scholars take for granted, but perennially occupies international law scholarship: enforceability.<sup>27</sup> Institutional analysis in international law studies how best to secure efficacy and order.

The opposite poles of the institutional analytical axis might be described as “pragmatism” versus “legalism.”<sup>28</sup> These two poles represent radically different styles of international governance. The pragmatic approach seeks to inculcate a general spirit of compliance amongst its members, rather than seeking to constrain sovereigns through strict enforcement of rules. This is done by emphasizing, at every given opportunity, the importance of the central principles of the system without converting those principles into actionable claims.<sup>29</sup> A legalistic institutional approach rejects pragmatism as insufficient to build a coherent and stable international order. Legalism holds central the attainment of an international rule of law that approximates domestic legal systems. A legalistic approach will, therefore, favor relatively bright-line interpretations of rules over flexible interpretations. It will seek to develop and expand formal constraints on State behavior.

Both the substantive and institutional axes are critical to a full understanding of the dynamics within international trade law. The next Part will consider both the licit international trade regime and the international regime governing illicit narcotics transactions through this framework. To begin with, it will demonstrate that while these regimes

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27. A classic query in international law puts it bluntly: “Is international law really law?” See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 209 (1961) (“The question ‘Is international law really law’ can hardly be put aside.”); Peter J. Spiro, *Globalization, International Law, and the Academy*, 32 N.Y.U. J. INT’L L. & POL. 567, 576 n.16 (2000) (quoting HART, *supra*, at 209); see also Anthony D’Amato, *Is International Law Really “Law”?*, 79 NW. U. L. REV. 1293 (1985); Richard S. Kay, *The European Human Rights System as a System of Law*, 6 COLUM. J. EUR. L. 55, 55 (2000) (noting the “venerable and unresolved question: Is international law really ‘law’?” and citing D’Amato, *supra*); Anne Orford, *Positivism and the Power of International Law*, 24 MELB. U. L. REV. 502, 521 (2000) (“‘Is international law really law?’, a question that haunts international legal theory, is a manifestation of the sense that international law lacks . . . sovereign force.”) (citing D’Amato, *supra*). In accordance with this classic query, a classic paranoia of international law is that there is no “real” rule of law at the international level, but only a system of “might makes right” among sovereign States. For an influential exposition of this thesis, see HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (5th ed. 1973).

28. A pragmatic institutional strategy for effectiveness recognizes that the State Parties to any international agreement are sovereign, and as such have the inherent ability to withdraw from or otherwise undermine the international system at any time. This description benefits from John Jackson’s discussion of “power-oriented” versus “rule-oriented” systems.

29. This approach has prevailed at different times in a variety of regimes, including the human rights and trade regimes.

can be placed along the same substantive spectrum, they have progressed in opposite directions along that spectrum. It will then discuss the concepts that mediate this apparent contradiction.

### III. THE SUBSTANTIVE ANALYSIS

#### A. *The GATT/WTO Regime: Protectionism to Liberalization*

In the twentieth century, the licit international trade regime progressed from a relatively antagonistic approach to imports to an ever more liberal one. In the period after World War I and before World War II, the governments of Europe and the United States engaged in unabashed protectionism. The United States, for example, adopted tariff levels under its Smoot-Hawley Tariff Act of 1930 that resulted in the highest average tariff imposed on dutiable goods in U.S. history.<sup>30</sup> Following World War II, most economists and statesmen concluded that the ills of the interwar period—both the economic decline and the political hostilities—had been exacerbated by the protectionist policies of the world's major powers.<sup>31</sup> Consequently, the leading governments after World War II sought to construct a trade regime that would prevent a return to such widespread protectionism. The resulting General Agreement on Tariffs and Trade (hereinafter GATT) established basic principles of non-discrimination and a mechanism through which governments could negotiate the gradual reduction of trade barriers.

While the GATT system embraced the liberal economic theory that the reduction of trade barriers increases domestic and global social welfare, the particulars of the system allowed for considerable departure from this theory. Members could adopt trade barriers intended as temporary protection ("safeguards") against a sudden and unexpected import surge that could harm domestic industry.<sup>32</sup> A member could also impose trade barriers on imports that were "unfairly traded" (for

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30. The old chestnut that Smoot-Hawley established the "highest tariff schedule in American history" is mistaken, according to Alfred Eckes. ALFRED E. ECKES, JR., *OPENING AMERICA'S MARKET: U.S. FOREIGN TRADE POLICY SINCE 1776* (1995). Eckes observes that the "average duty on all imports—free and dutiable" established by Smoot-Hawley (13.7 percent) was lower than it had been for almost a century prior to World War I. *Id.* at 106. Eckes points out that Smoot-Hawley's notorious 59.1 percent average tariff is based on the "average ad valorem equivalent rate on dutiable imports in 1932." *Id.* But "Congress did not enact such a high average tariff in 1930. Price declines during the depression produced that result, [since] [l]ike predecessor tariffs, Smoot-Hawley relied on a combination of specific and ad valorem rates." *Id.*

31. As governments engaged in rounds of escalating protectionism, imports and exports sharply decreased worldwide. *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS*, *supra* note 21, at 5.

32. GATT art. XIX.

example, “antidumping duties” against “dumped” imports) and where there is injury or a threat of injury to domestic industry.<sup>33</sup>

Although the international trade regime embraced liberal principles, it tolerated a significant level of deviation from these principles by governments who were pursuing competing objectives of domestic economic protection or social regulation. The aggregate effect of GATT’s provisions placed it somewhere between the liberal end of the spectrum—articulated in its principles—and a more middle-ground “administrative” approach that balanced the principles of liberalization with other concerns expressed in the GATT’s numerous exceptions.

This structure, though, provided an internal logic that would propel the regime ever closer to the liberal approach. Subsequent trade negotiations focused not only on lowering tariffs, but also on narrowing these exceptions. The institution that succeeded the GATT—the World Trade Organization (WTO)—restricts the conditions under which safeguards, antidumping duties, and other trade restrictions can be imposed.<sup>34</sup> While the shift to a liberal approach is far from complete—the GATT/WTO system still constitutes an intricate interplay between rule and exception—it is nonetheless significant. Under the WTO, tariff levels are at an historic low.

#### *B. The International Narcotics Regime: Liberalization to Prohibition*

At the same time that the international regime for governing trade in licit goods was slowly shifting from a protectionist to a liberal approach, the international narcotics regime was effecting a shift in the opposite direction.

For most of the nineteenth century, the British championed the expansion of international trade in narcotics. Indeed, through its production stronghold in India, the narcotics trade provided a significant source of revenue for the British Empire. So dear was the opium market that Britain went to war with China over the latter’s refusal to admit British imports of opium.<sup>35</sup> Of course, the preference for liberalization was not total—the British trade in opium traveled through monopolies—but the British unquestionably favored the minimization of import restrictions

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33. GATT art. VI. A member could adopt trade restrictive “social regulations”—for example, environmental conservation measures—provided such measures were not unduly arbitrary or discriminatory against foreign producers. GATT art. XX.

34. See, e.g., Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Agreement on Safeguards, Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 27, 33 I.L.M. 1125, 1153 (1994).

35. See generally PETER W. FAY, *OPIMUM WAR* (1975).

on narcotics at this time. At the turn of the twentieth century, both opium and cocaine were widely used by consumers in the developed world in a variety of over-the-counter food and medicine products.

Between the conclusion of the Opium War and the first modern multilateral agreement regulating trade in narcotics—the Hague Convention of 1912—the prevalent attitude in the West toward narcotics shifted considerably. The Hague Convention of 1912 obliged signatories to “confine to medical and legitimate purposes the manufacture, sale and use of” opium, heroin, morphine, and cocaine.<sup>36</sup> The next several agreements built on this model of medical control. The Geneva Convention of 1925 required Member States to furnish statistics supporting their estimates of “medical and legitimate” narcotics imports and exports.<sup>37</sup> The Geneva Convention of 1931 required Member States to extend their export control schemes to all States, not just other members.<sup>38</sup> Finally, the 1948 Paris Protocol required Member States to report information about any “medical and scientific” drugs not listed in the 1931 Convention that could have harmful effects or could be subject to abuse. The Protocol also provided for the application of the 1931 Convention’s controls to any drug deemed harmful by the World Health Organization.<sup>39</sup>

Thus, the agreements in the first half of the twentieth century gradually strengthened the medical controls narcotics trade. In doing so, the agreements evinced an “administrative” approach—neither liberal, nor prohibitive—that sought to circumscribe, but not to prevent, narcotics production and trade. These early agreements sought neither to expand nor to eliminate narcotics production and trade, but rather to control it in accordance with “medical and scientific” concerns.

The second half of the twentieth century saw the U.N. narcotics regime shift from an administrative model toward an increasingly prohibitionist one. The 1961 United Nations Single Convention on Narcotic Drugs<sup>40</sup> marked the beginning of this shift. On the one hand, the 1961 Convention retained the administrative focus, though it tightened controls on members’ ability to produce and trade narcotics for medical

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36. International Opium Convention, Jan. 23, 1912, 8 L.N.T.S. 187.

37. Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium, Feb. 11, 1925, 51 L.N.T.S. 337.

38. Agreement Concerning the Suppression of Opium Smoking, Nov. 27, 1931, 177 L.N.T.S. 373.

39. Protocol Bringing Under International Control Drugs Outside of the Scope of the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, Nov. 19, 1948, 44 U.N.T.S. 277.

40. The Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1408, 520 U.N.T.S. 204 [hereinafter 1961 Convention].

purposes.<sup>41</sup> On the other, it sowed the seeds of a punitive approach by requiring Member States to establish as criminal offenses the production or trade of narcotics.<sup>42</sup> The 1961 Convention also required States to establish conspiracy as a crime.<sup>43</sup>

The 1961 Convention's intermingling of the medical-administrative and punitive approaches is perhaps best found in an important exception to the criminalization provisions: where unauthorized narcotics production or trade occurred at the hands of "abusers of drugs," a signatory could adopt measures of "treatment, education, after-care, rehabilitation and social reintegration" as an alternative response.<sup>44</sup>

The medical, rehabilitative tone of the 1961 Convention shifted to a more punitive register in the 1988 Convention on Narcotic Drugs and Psychotropic Substances.<sup>45</sup> The 1961 Convention's "drug abuser" exception narrowed in 1988 to production only "for personal consumption," or otherwise to "cases of a minor nature."<sup>46</sup> Moreover, the 1988 Convention multiplied the number of offenses deemed criminal: Now not only were production, trade and conspiracy criminal, but knowing acquisition, possession, use, conversion or transfer of property derived the reform.<sup>47</sup> By expanding the scope of the criminal and reducing the reach of the rehabilitative, the 1988 Convention shifted away from the administrative and toward the prohibitive mode.<sup>48</sup>

41. The Convention retained the basic import-export scheme established by the 1925 Convention, providing that each signatory would establish estimates of the amount of narcotics required to fulfill "medical and scientific" purposes. *Id.* art. 19, 520 U.N.T.S. at 252. The Convention went on to provide a series of detailed instructions relating both to production, possession and trade of narcotics to ensure that these limitations were upheld, in particular establishing several categories of control relating to opium and coca.

42. *Id.* art. 36, para. 1(a), 520 U.N.T.S. at 252.

43. "Intentional participation in, conspiracy to commit and attempts to commit" such offenses "if committed in different countries" were punishable offenses. *Id.* art. 36, para. 2, 520 U.N.T.S. at 252.

44. *Id.* art. 36, para. 1(b), 520 U.N.T.S. at 252.

45. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, May 20, 1988, 1582 U.N.T.S. 95 (1988) [hereinafter 1988 Convention]. The 1988 Convention established the next multilateral instrument to deal frontally with narcotics. The 1971 Convention on Psychotropic Substances established similar controls over LSD and similar substances. 1971 Convention on Psychotropic Substances, Feb. 21, 1971, T.I.A.S. No. 9725, 1019 U.N.T.S. 174.

46. 1988 Convention, *supra* note 44, art. 3, para. 4(c) & (d), 1582 U.N.T.S. at 172-73.

47. *Id.* art. 3, para. 1(b) & (c), 1582 U.N.T.S. at 172.

48. The 1988 Convention does preserve the 1961 Convention's parameters for licit trade in narcotics by defining as an offense the production or trade of a narcotic or psychotropic substance "contrary to" the 1961 Convention's controls. *Id.* art. 3, para. 1, 1582 U.N.T.S. at 172. While the administrative controls for licit trade in narcotics under the 1961 Convention remained intact, the 1988 Convention substantially expanded the 1961 Convention's punitive sanctions aimed at illicit trade.

The latest U.N. agreement, the Convention on Transnational Organized Crime of 2000, expands the range of criminal offenses even further. In addition to the offenses identified by the 1961 and 1988 Conventions, the 2000 Convention adds anti-racketeering type provisions, criminalizing “participation in an organized criminal group” and “laundering of the proceeds of crime.”<sup>49</sup> The 2000 Convention also makes criminal both the promise, offer, or gift of reward to, and the solicitation or acceptance of reward by, a public official to facilitate criminal activity.<sup>50</sup>

Comparing the development of the international trade regime to the international narcotics regime reveals opposing trends. The regime governing general trade in goods has shifted from a protectionist regulatory model, to an administrative model, and finally toward a liberalized model. The regime governing trade in narcotics, however, has moved from a liberalized model to an administrative model, to an expansively prohibitionist model. The next Part offers an explanation of the conceptual dynamic that reconciles these trends.

#### IV. MEDIATING THE TENSION

The GATT/WTO system operates on the foundational belief that liberalization of international trade in goods will maximize world welfare. The international narcotics regime operates on the belief that prohibition of trade in narcotic drugs will do the same. Why should liberalization of one set of goods be desirable, but liberalization in another set of goods be undesirable?

Like any species of market control, the criminalization of the international narcotics trade betrays the ambivalent impulses of “liberal governance.” On the one hand, the market provides a grand theater for individual choice that is the sine qua non of prevailing liberal theory.<sup>51</sup>

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49. Convention on Transnational Organized Crime of 2000, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Agenda Item 105, Annex I, arts. 5, 6, at 5–7, U.N. Doc. A/RES/55/25 (2000) [hereinafter 2000 Convention].

50. *Id.* art. 7, at 7–8.

51. Political theorists champion such pursuit as an essential component of individual liberty. Economists assure that such pursuit also paves the best route to social welfare, since individual market transactions allocate social resources in the most efficient way. Welfare economics assumes “that the individual—and no one else—is the best judge of his own well-being.” E.J. Mishan, *A Survey of Welfare Economics*, 80 *ECON. J.* 197 (1960). Welfare ( $W$ ) =  $W(U_1, U_2, \dots, U_n)$ , where  $U_1$ , etc. represent the “utility indexes” of individual members of society. An individual’s “utility” is attained when that individual reaches the maximum level of satisfaction available to her given her choices. Thus, each individual’s utility is itself a function of that individual’s preferences. Social welfare, by extension, is a function of the preferences of all individuals in the society.

On the other hand, governments maintain an infinite array of controls on the choices available to individuals in the market.

The tension between principles of liberalism and practices of market control emerges in both the trade regimes for legal goods and for illegal narcotics. In the GATT/WTO system, the principles of free trade are offset by exceptions allowing for trade restrictions. In the international narcotics regime, the backdrop of a liberalized international economic order contrasts with the foreground of narcotics prohibitionism.

Such puzzles should not be dismissed as unrelated idiosyncrasies of modern international governance. These conflicting regimes do relate to each other in an underlying framework, in which the discrepancy between liberalization and prohibition is mediated through the concept of *normalcy* in international trade: liberalization for “normal” international trade; restriction and prohibition for “abnormal” international trade. The normalcy concept organizes the apparent contradiction along parallel sides of a dichotomy.<sup>52</sup>

#### A. *Normalcy as a Basis for Controlling Licit International Trade*

Within the GATT/WTO system, the concept of normalcy rationalizes exceptions for trade restrictions.<sup>53</sup> Normalcy in trade is emphatically conceptual, rather than empirical. Member States, in imposing trade restrictions, operate against a background assumption that the “usual, normal condition is . . . non-intervention” in the market; but their regular and vigorous use of such provisions belies any portrayal of them as exceptional measures, at least as measured by frequency of occurrence.<sup>54</sup>

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52. The reconciliation does not resolve the conflict but sends it underground, where it generates a subterranean turmoil that reform advocates—including advocates of drug legalization—are constantly attempting to unearth.

53. Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546 (1987). The same analysis could be applied to the “social clause” exception in the GATT/WTO system. Commentators have at times been at pains to establish, for example, the reasons why the social clause exception seems to provide insufficient support for WTO members to maintain environmental restrictions on international trade. Critics of the WTO dispute settlement body’s interpretation of the social clause have worried about the narrow construction the WTO has adopted. The basic response to this worry is the rejoinder that, in the WTO, principles must be construed broadly and exceptions narrowly in order to maintain the integrity of the system. While this narrowness is worrisome even without considering normalcy as a mediating concept, it takes on new dimensions when such a consideration is addressed. If normalcy is a mediating concept, then the implication of the status of the social clause as an exception to, rather than a central principle of, the trade regime is that social regulation is itself somehow “abnormal.” Such a view would almost certainly result in increased pressures over time under WTO law to lower the levels of social regulation of its Member States.

54. *Id.* at 550. In particular, use of antidumping duty laws, pioneered by the U.S. government, is chronic and increasing. *Id.*

Moreover, the assumption driving such measures is that “abnormal” market conditions are afoot—goods have been sold at “less than normal value,” or have been imported at abnormally high levels<sup>55</sup>—but the criteria by which such findings are made find very little support among economists.<sup>56</sup>

The lack of empirical coherence suggests that governments employ trade restrictions not to counteract objectively ascertainable market distortion, but rather to service policy goals that compete with market liberalization, such as protecting domestic industries and workers from dislocation caused by market competition.<sup>57</sup>

Too explicit a recognition of such activity, however, would undermine the ideological imperative that the market is *always* good, and more competition is *always* better than less competition. The mediating concept of normalcy steps in to buffer and obscure awareness of the limits of this imperative. Rather than market competition per se causing dislocation and harm, trade law restrictions assert that the harm is caused by an *abnormal* market. A submerged, but powerful, syllogism operates: “Since the market is normally good, market constraints are not normally justified. If the market is normally good, then a bad market is an abnormal market. If the market is abnormal, then market constraints are justified.”<sup>58</sup> With this syllogism in place, governments are able to move from a liberal model to an administrative model that discounts the norm of liberalization, but in a constrained fashion that does not threaten the entire framework.

### *B. Normalcy as a Basis for Prohibiting International Narcotics Transactions*

While a tension exists between liberal market norms and trade restrictions in the licit international trade regime, the contrast between

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55. The former finding would support an imposition of antidumping duties, the latter would support an imposition of safeguards. In each case, a finding of injury would also be required.

56. Antidumping duty laws have been criticized for, among other things, failing to have a factually reliable means of determining “normal value,” and failing to take into account key indicators of dumping such as the prevailing market price for the good in question. Safeguard laws have been criticized for using a variable time frame to determine what constitutes an abnormally high import level, and also for failing to reliably distinguish the impact of imports from other potential causes of injury to domestic industry. These decisions are made by administrative agencies with relatively high levels of discretion, using criteria that vary from case to case. The instability of the frameworks has helped to create an impression that the application of these laws is not reliably governed by empirical economic findings.

57. Under the antidumping and safeguard rules, both producers and workers have standing to petition the United States to impose protections.

58. For one illuminating discussion of free market ideology, its benefits and its limits, see JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002).



liberal market norms and the international narcotics regime is more extreme. As Anthony Kronman has observed, "Whenever the law invalidates a class of agreements . . . , it runs counter to the liberal ideal of a legal order that does not discriminate among conceptions of the good."<sup>59</sup> After all, a hallmark principle of liberal, market society is that individuals can pursue their own "conceptions of the good" as long as they do not "violate the rights of others."<sup>60</sup> Prohibiting some goods would seem to challenge the liberal belief in the sanctity of personal freedom and the priority of choice.<sup>61</sup>

So why prohibition of narcotics? From the conclusion that market controls are justified on the premise of abnormality, derived from the syllogism described above, it follows that international narcotics trade is viewed as abnormal trade—and trade so extremely abnormal that near-total prohibition is warranted.

In what way(s) are narcotics "abnormal" goods? Not from an economist's perspective: The economic definition of a "normal good" (a good of which one tends to consume more as one's income increases, assuming that one has a preference for it) applies no less to narcotics (and in fact more to narcotics) than to other goods. The concept of normalcy here, then, does not describe the market dynamics related to production and consumption of narcotics.

More likely, narcotics register as "abnormal" by virtue of their harmful impact. If narcotics users regularly harm others—family and community members, employers, co-workers—prohibition reduces this abnormally harmful impact.<sup>62</sup> Most studies, however, suggest that

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59. See Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 *YALE L.J.* 794–95 (1983).

60. See *id.*

61. Take, for example, the definition of economically rational action, which is any action that furthers an individual's own preferences according to his or her own ranking. If left unqualified, this definition means that anything an individual chooses to do is, by necessity, rational: kill his parents, jump off a bridge, watch professional bowling on television, and so on—including, of course, snorting cocaine or injecting heroine. This is not satisfying for purposes of justifying legal constraint.

62. Here we can introduce two concepts that bolster the basic justification for the liberal State: order and mistake. Order provides a justification for liberal governance because it constrains individual freedom insofar as such constraint is necessary to preserve the conditions for freedom over the long term. The possibility of mistake endows the liberal subject with the potential, through exercise of free will, for triumph or failure. Mistake also means the correctness of one's actions is judged not according to one's own preferences, but rather according to some external ranking. A ranking provided by religious doctrine might condemn drug use because it defiles the human body, which is the product of divine creation. A ranking provided by the economic principle of wealth maximization might condemn drug use because it increases waste of resources: the drug user may squander her assets in order to fuel her addiction. (In economic terms, her demand for drugs would be absolutely inelastic downward, and elastic only upward. This extreme inelasticity might prevent socially optimal tradeoffs.)

narcotics consumption does not, by itself, cause violent behaviour.<sup>63</sup> Longer-term public health or economic concerns about the welfare or productivity of the individual may also justify prohibiting narcotics. Yet, most substances whose ingestion may produce long-term harmful effects are not prohibited. Production, trade, and consumption of many of these substances is regulated and controlled, but not completely prohibited. Prohibition is objectively justified only if the long-term destructive effects of narcotics use substantially exceed those of other harmful, non-prohibited substances.<sup>64</sup>

While medical and social science provides a partial explanation for prohibitionism, one might also turn to history. In part, prohibition resulted from a late nineteenth-century and early twentieth-century reform movement endorsing a moral, social, and religious condemnation of indulgence. The professional health and science corps also began to deplore “[h]abit-forming drugs and their ravages, destructive of both the morals and the health of the community.”<sup>65</sup> In the United States, this tone grew increasingly alarmist in the early decades of the twentieth century. In a 1913 article announcing “Drug Habit Grips the Nation,” a New York Times reporter recounted a speech made by Dr. B.C. Keister before a meeting of “scientists and specialists” about narcotics use in the United States, said to be “second only to China.”<sup>66</sup> Dr. Keister reportedly asserted that “the menace is so great . . . there is danger of our ‘degenerating back to something worse than monkeydom.’”<sup>67</sup>

As this last account may begin to suggest, the high-toned invocations of morals and health at times intermingled with coarser concerns about “unassimilable” populations crowding native shores at the turn of the twentieth century.<sup>68</sup> During the nineteenth century, the United States experienced a significant increase in Chinese immigration. At the same time, reports of opium importation from China, often in evasion of the United States’s early and substantial tariffs on opium imports, occurred

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63. See *supra* text accompanying note 7.

64. Alcohol, tobacco, and fast food provide ready examples. Some may argue that, however harmful addictions to alcohol, tobacco, or fast food might prove, narcotics addictions exceed these others in destructiveness by an order of magnitude. A comparison of the public health and sociopharmacological effects of these and other addictive products is beyond the scope of this Article.

65. Edward Marshall, *Great Legislative Plan to Stamp Out Cocaine Habit*, N.Y. TIMES, Feb. 22, 1914, Magazine, at 8; see also Davis Edwards, *Opium a Greater Menace to New York Than Liquor*, N.Y. TIMES, Oct. 20, 1912, Magazine, § 5, at 1.

66. Special to the New York Times, *Say Drug Habit Grips the Nation*, N.Y. TIMES, Dec. 5, 1913, at 8.

67. *Id.*

68. The concerns did limit themselves to narcotics. “Middle-class America deplored the[] open acceptance of liquor” among newly populous “Roman Catholics and Jews from Italy, Poland and Russia.” DAVID J. LANGUM, *CROSSING OVER THE LINE* 16 (1994).

frequently.<sup>69</sup> The U.S. government's concern about opium mirrored that of the Chinese government, and both governments led the way in shifting the posture of the international trade regime away from Britain's market-expansion approach and toward prohibitionism. Nevertheless, alarm over narcotics use often found expression in the same vein as alarm over Chinese immigration. An 1878 article decried "[t]he constant immigration of Chinese, together with the extent of the use of this noxious drug [opium] in the United States."<sup>70</sup>

The combination of anti-immigrant and anti-narcotics sentiment did not only influence public commentary, it also manifested in foreign relations policies of the U.S. government. On the same day in 1880, for example, the U.S. government signed anti-narcotics and anti-immigration treaties with the Chinese government. The first provided that the United States could "regulate, limit or suspend" the "coming of Chinese laborers to the United States" to protect the "interests" or "good order" of the United States. The second prohibited "Chinese subjects" from importing opium into the United States, as well as "citizens of the United States" from importing opium into China.<sup>71</sup>

The categorization of narcotics as "abnormal" goods, then, appears complex and multilayered. In part, prohibition of narcotics rests on contemporary health policy concerns. In part, prohibition is the legacy of a complex set of social reform movements that peaked at the turn of the twentieth century. The voices of reform often conflated moral and health

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69. See, e.g., *A Heavy Opium Seizure*, N.Y. TIMES, Feb. 28, 1897, at 1 (noting that drugs valuing \$400,000 were "[i]mported by Chinamen"); *Four Chinamen Captured*, N.Y. TIMES, May 4, 1897, at 3 (noting that the captured men "had secreted [opium] in the lining of their clothing"); *Two Thousand Pounds of Opium Seized*, N.Y. TIMES, Jan. 14, 1882, at 3.

70. *The Opium Traffic*, N.Y. TIMES, Aug. 18, 1878, at 6. The interaction between anti-narcotics and anti-immigration sentiment came on full display in an 1885 New York Times column. The author, writing from Portland, reported: "Ever since Chinese began to come to the Pacific coast there has been more or less ill feeling towards them . . . The appearance, habits, customs and non-assimilating character of the race were objected to." *The Chinese Question*, N.Y. TIMES, Nov. 27, 1885, at 3. The combined expression of economic and social alarm continued:

In both [San Francisco and Portland], the Chinese had established their shops, opium dens, and gambling houses in the very heart of the business portion of the city, and by reason of their having obtained long leases of the buildings it was impossible to drive them to any other quarter. The race was non-assimilating, had no desire to become American citizens or to even learn the language. Its sole desire was to make money out of Americans and return with it to China.

*Id.* The tone crescendoed to a panicky excoriation of the Chinese as a threat to public health, leaning heavily on the opium threat: "[T]hey live in the foulest kind of atmospheres in underground holes and in filthy places with the sickening fumes of opium forever prevalent." *Id.*

71. See *The Treaties with China*, N.Y. TIMES, Jan. 14, 1881, at 1 (both treaties were signed at Peking on November 17, 1880). For a treatment of this phenomenon in Australia, see generally DESMOND MANDERSON, *FROM MR. SIN TO MR. BIG* (1993).

concerns. Some voices further conflated such concerns about immigration of a distinctly xenophobic cast.

Within this latter discourse, narcotics posed one of many threats to the "social body." This threat was bound up with an interlocking set of threats posed by immigration, urbanization, and industrialization. Within this discourse it was possible to urge the expulsion of foreign elements from the social body through the language of prohibitionism. The category of the abnormal mediated the oppositional relationship between this strong prohibitionist impulse and the emerging embrace of market liberalization.<sup>72</sup>

## V. THE INSTITUTIONAL ANALYSIS

### A. *The GATT/WTO Regime*

Whereas the general international trade regime and the international narcotics regime moved in opposite directions in their substantive strategies, on the institutional level they each moved in parallel directions toward greater harmonization and authoritativeness of enforcement.

According to the accepted view, for much of the postwar era the GATT deliberately set low expectations for compliance, overlooking blatant departures from GATT discipline.<sup>73</sup> This pragmatic approach was part of a self-consciously sophisticated and "cosmopolitan"

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72. In the late eighteenth and early nineteenth centuries, the prohibitionist position found its strongest support in the United States and Chinese governments. The Chinese government opposed the narcotics trade in part as an anti-imperial move resisting British economic domination. As a nascent world power, the United States gestured toward China to build an alliance against this seemingly corrupt aspect of the British Empire. The American view toward China was complex in a way that cannot be captured in this brief treatment, and involved, among other things, domestic tension between the West Coast where most Chinese immigration occurred, and the East Coast which seemed to hold a more ambiguous cultural fascination with the "Celestial Empire," and foreign affairs strategy, which involved the American attempt to stake out a position as a leader in the international community. In the early phase of the narcotics regime, the U.S. and China positions were buffered by the more liberal views of the United Kingdom and Europe. In the early agreements, science mediated between licit and illicit consumption. The gradual rise to preeminence of the prohibitionist position over the mid-twentieth century can be attributed to several factors, including: the continued ascendancy of the United States as a world power, the increased association of narcotics with organized crime, and the rise of the countercultural threat to middle-class society.

73. See, e.g., Detlev Vagts & John H. Jackson, Book Review, *Law And Its Limitations In The GATT Multilateral Trade System*, 82 AM. J. INT'L L. 653, 653-54 (1988) ("[T]he GATT has had to exist without the many institutional clauses found in normal organization charters. These deficiencies are noted by the author, who describes many of the fascinating circumstances of practice and evolution that have allowed the GATT to exist as a pragmatic and reasonably effective legal order.")

approach to international law and policy.<sup>74</sup> With the establishment of the GATT's successor organization, the World Trade Organization, the international trade regime moved decisively toward legalism as an institutional model.<sup>75</sup> The crowning glory of the WTO was its dispute settlement system, which remains the strongest multilateral forum by a considerable measure.<sup>76</sup>

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74. See David Kennedy, *The International Style in Post-War Law & Policy*, 1994 UTAH L. REV. 7 (1994). This narrative may have emerged partially in hindsight and may therefore seem over-determined. There is significant truth, however, to the notion that "pragmatic" institutional values were explicitly in circulation in the GATT at the time. For instance, Olivier Long, who headed the GATT in the 1970s, wrote a testimonial to this concept entitled *Law and Its Limitations in the GATT*. See OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 94-98 (1985) (highlighting, from Long's position as Director-General of the GATT from 1968 to 1980, the practical enforcement techniques of the GATT). The shortfalls in compliance during this era were numerous. Industrialized countries, for their part, engaged in substantial departure from GATT disciplines on textiles and agriculture. See *id.* at 56. If developing countries had a less glaring problem with formal compliance, it was because they argued that the principle of "special and differential treatment" should except them from many GATT rules. See ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 30 (1987) (describing developing-country compliance as a situation of form without substance). It should be noted, however, that the principle of special and differential treatment enjoys a solid basis in international law, both in form and substance. See Thomas, *supra* note 23, at 1259-60 (describing the emergence of the principle and its operation in the GATT). Whereas public international institutions explicitly aspired toward universal and universally obeyed standards the GATT was content with compliance that reflected the will of the States.

75. The Uruguay Round of GATT negotiations, which led to the establishment in 1995 of the WTO, marked a decisive break with the pragmatic strategy of the past. Kenneth W. Abbott, *The Many Faces of International Legalization*, 92 AM. SOC'Y INT'L L. PROC. 57 (1998); Miquel Montaña i Mora, *A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103 (1993); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 1995 DUKE L.J. 830, 833 ("[T]he new WTO system represents a stunning victory for international trade 'legalists' in their running debate with trade 'pragmatists' . . ."); Thomas, *supra* note 23, at 1250 ("[I]nstitutionally, the order has moved away from 'pragmatism' and towards 'legalism.'")

76. SYLVIA OSTRY, REINFORCING THE WTO 20 (1998) (describing the dispute settlement mechanism as "the 'jewel in the crown' of the WTO"). The WTO dispute settlement mechanism featured the following novel reinforcements: (1) it established a dispute resolution timeline of approximately fifteen months (whereas disputes in the GATT were not subject to any timeline, and the longest one ran for over a decade); (2) it created an appellate review body (no such body existed in the GATT); (3) it made adoption of findings virtually automatic (findings can be rejected only by unanimous decision—by contrast, GATT findings were infrequently adopted because unanimous consent was required for their adoption rather than their rejection); (4) it increased the ease and likelihood of concrete sanction for non-compliance through the authorization of retaliation by the adversely affected party (such retaliation had occurred only once in the decades-long operation of the GATT dispute resolution mechanism). For a general discussion of the WTO dispute settlement system and comparison with the GATT, see LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, *supra* note 21, at 327-71.

### B. *The International Narcotics Regime*

Progression toward a formal and uniform structure for enforcement also characterizes the international narcotics regime.<sup>77</sup> Again, this progression has occurred incrementally. The 1961 Convention said relatively little about the institutional mechanics of punishing illicit trade,<sup>78</sup> but it did establish basic standards for extradition of offenders.<sup>79</sup> The 1988 Convention went further, requiring a Member State that refused extradition to pursue internal prosecution.<sup>80</sup> The 2000 Convention expanded the bases for extradition to include not only those acts defined as offenses under the treaty, but also any other act involving an “organized criminal group” that constituted an offense in both countries.<sup>81</sup>

The 1988 and 2000 Conventions developed additional mechanisms to increase efficacy in criminal enforcement. Both conventions

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77. Both multilateral regimes bear the distinct imprimatur of the United States, which is not surprising given its position as the sole superpower. The enhanced multilateral dispute settlement of the WTO was a project of the United States. The enhanced mechanisms for enforcing narcotics prohibition multilaterally also stem largely from the United States. Even the most idealistic internationalist acknowledges that international legal mechanisms rest on the will of States, and the will of States is the result not only of domestic political decisions but also of international pressures. The landscape of international law in our age then reflects both the substantive and institutional preferences of the current hegemon. Substantively, there is a general preference for liberalizing trade, curtailed sharply by strong prohibitions of selected forms of trade. Institutionally, there is a strong preference for judicialized resolution of disputes over licit trade—a sort of intergovernmental civil litigation—and a preference for a very strong punitive treatment of illicit trade. We can identify these dynamics without necessarily casting a value judgment—unless it is from the perspective of a more balanced distribution of power in the initial decisions as to substantive and institutional framework. We can also expect, consequently, that if and when the balance of power shifts, the substantive and institutional dynamics of the world order will shift accordingly. There is much talk, for example, of the twenty-first century as an era that will witness the ascendance of Asia, and in particular of China, in international relations. At the moment, however, I want to set aside the origins of the current multilateralism, and to examine its general implications for international order.

78. In the administrative phase reflected in the 1961 Convention, there were instructions on how the administration of licit trade in narcotics should occur. The 1961 Convention required, for example, that a signatory establish a centralized “national opium agency” that would closely control both cultivation and trading of opium. 1961 Convention, *supra* note 40, art. 23, para. 2(a)–(e), 520 U.N.T.S. at 234.

79. *Id.* art. 36, para. 2(b), 520 U.N.T.S. at 252. The 1961 Convention provided that offenses as defined under the treaty were extraditable. As described above, these included both illicit production and trade, and “[i]ntentional participation in, conspiracy to commit and attempts to commit” such activities. *Id.* art. 36, para. 1(a), 2(a)(ii), 520 U.N.T.S. at 252. Signatories could, if they made extradition conditional on the existence of a treaty, use the provisions of the Convention for that purpose. *Id.* art. 36, para. 2(b), 520 U.N.T.S. at 252.

80. 1988 Convention, *supra* note 45, art. 6, para. 9, 1582 U.N.T.S. at 181.

81. 2000 Convention, *supra* note 49, art. 16, para. 1, at 13.

progressively expanded subject matter jurisdiction.<sup>82</sup> They also multiplied the bases for confiscation of narcotics materials and instruments.<sup>83</sup> Each convention also contributed unique techniques to the enforcement arsenal. The 1988 Convention allowed for and encouraged eradication of illicit crops.<sup>84</sup> The 2000 Convention allows Member States to use “special investigative techniques, such as electronic or other forms of surveillance and undercover operations” to aid enforcement.<sup>85</sup> The 2000 Convention also requires members to “institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions . . . in order to deter and detect all forms of money laundering.”<sup>86</sup>

Finally, by the 2000 Convention, the regime had achieved a remarkably high level of coordination of the international punishment of the narcotics trade, not only in the “horizontal” sense that uniform mechanisms for enforcement had been established, but also in the “vertical” sense that those mechanisms enable greater extension of the punitive arm of the State than envisioned under any previous multilateral arrangement. The next and final Part discusses the implications of this development for international law.

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82. Thus, the 1988 Convention required a signatory to establish jurisdiction over defined offenses when such offenses were committed in the signatory’s territory or in vessels bearing its flag or registered under its laws. 1988 Convention, *supra* note 45, art. 4, para. 1(a), 1582 U.N.T.S. at 174. It also allowed signatories to establish additional jurisdiction to cover offenses committed by its nationals or residents, or outside its territory “with a view to the commission, within its territory,” of a defined offense. *Id.* art. 4, para. 1(b), 1582 U.N.T.S. at 175. The Convention also allows a member to establish jurisdiction when “the offence is committed on board a vessel concerning which that Party has been authorized to take appropriate action . . .” *Id.* The 2000 Convention adds to these options for jurisdictional expansion the right of a Member State to include offenses committed against a national of that State. 2000 Convention, *supra* note 49, art. 15, para. 2(a), at 12.

83. The 1988 Convention required its members to adopt measures enabling the confiscation of narcotics or materials and instruments used in their production, as well as of proceeds derived from their illicit production or trade. *Id.* art. 5, para. 1, 1582 U.N.T.S. at 176. The 2000 Convention adds to this a requirement for international cooperation for purposes of confiscation. A Member State that has received a request from another Member State having jurisdiction over a defined offense (under the expanded substantive scope of the 2000 Convention, including not only production or trade of narcotics, but also conspiracy or attempt thereto, as well as money laundering, corruption, or obstruction of justice) for confiscation of proceeds within its territory “shall, to the greatest extent possible within its domestic legal system . . . give effect” to such a request. 2000 Convention, *supra* note 49, art. 13, para. 1(a), at 10. A Member State also “shall take measures to identify, trace and freeze or seize proceeds of crime, property or other instrumentalities” related to defined offenses, at the request of another Member State. *Id.*

84. 1988 Convention, *supra* note 45, art. 14, 1582 U.N.T.S. at 194–95.

85. 2000 Convention, *supra* note 49, art. 20, at 20–21.

86. *Id.* art. 7, at 7–8.

## VI. THE "MICRO-PHYSICS" OF POWER AND THE INTERNATIONAL SOCIAL BODY

Few theorists of the State have looked to the punitive arm of the State as *constitutive* of the State's authority. Rather, contractarian and civic republican theorists view the punishment of individuals as a *consequence* of State authority. Such theorists see the ability to punish as an indispensable attribute of sovereignty; but that sovereignty has already been established through a "social contract" between the State and its citizen/subject, or as a result of shared civic mores. It is possible, however, to conceptualize punishment as performing a formative role for the State. Rather than punishment flowing from power, power may flow from punishment.

In his relatively brief survey of criminal punishment under monarchic and republican French governments, Michel Foucault attempted to show how the act of exercising direct, ultimate dominion over individual bodies through the administration of punitive sentences secured the State's authority in a way not possible through any other means. Foucault began by suggesting that, in the pre-modern, monarchic era, public spectacles of punishment—hangings and more gruesome forms of execution—generated power by publicly displaying the State's ultimate control over individual life and death.<sup>87</sup>

By juxtaposing the modern penal State with this pre-modern style of punishment, Foucault showed how the power-generating function of punishment in fact continued in the modern era. The transition featured the transformation of punishment from the occasional spectacle to less violent but more sustained controls on the criminal population, through imprisonment. The legal and administrative functions of the modern State combined to form a bureaucracy of punishment.<sup>88</sup> The modern State revamped the technologies of punishment into fine-grained and constant monitoring and control over criminals, establishing a "micro-physics" of power.<sup>89</sup>

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87. See FOUCAULT, *supra* note 1.

88. Foucault wrote:

Throughout the eighteenth century, inside and outside the legal apparatus, in both everyday penal practice and the criticism of institutions, one sees the emergence of a new strategy for the exercise of the power to punish . . . : to make of the punishment and repression of illegalities a regular function, coextensive with society; not to punish less, but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity; to insert the power to punish more deeply into the social body.

*Id.* at 81–82.

89. *Id.* at 139.



The idea that the modern State controls individual activity through punishment is by no means unique. To the contrary, as described above, an important justification for the liberal State is precisely that it constrains individuals where such constraints are in the "public interest."<sup>90</sup> The Foucauldian insight is limited, therefore, to the thesis on the constitutive role of punishment. According to this thesis, the expansion of the apparatus of punishment not only results from, but is also critical to building, legitimacy for the State.

Can this insight be transferred to the international order? International legal theorists have devoted considerable energy to determining the bases for building efficacy and authoritativeness in the international legal order. For much of the post-World War II era, many theorists assumed that such efficacy would come from the central organs of the United Nations. In the past decade, however, new twists in international legal development have suggested that other sites in the international legal landscape may ultimately be more productive in generating authoritativeness. For example, the international trade regime has become surprisingly authoritative, causing theorists to accord it new recognition as a critical part of public international law.<sup>91</sup>

Just as the expansion of the international trade regime has proved an important source of authority for the international legal order, the reinforcement and expansion of agreements for controlling illegal international markets may prove to offer a surprising source of energy and ballast for this order.

Particularly because these agreements are designed to effectuate the punishment of individuals, they seem to command an authoritativeness more direct and more pervasive than that found in other multilateral regimes. This development can be related to the effort to construct an International Criminal Court (ICC), which also seems to signal a new era of international authoritativeness. The ICC seeks to target State practices, but will do so through the punishment of individuals in a centralized forum. In contrast, the U.N. conventions on narcotics trade retain a decentralized mechanism for punishment, allowing States to pursue punishment internally or bilaterally, but seek control over individuals *qua* individuals.

The unique qualities of this regime can be placed alongside other contemporary developments in international law to show how the international legal order is exercising increasingly direct authority over the

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90. Indeed, the entire pantheon of modern State theory justifies constraining, through criminal or civil measures, constitutional or otherwise, individual action to secure the public interest.

91. See, e.g., Kenneth W. Abbott, *supra* note 75, at 57; Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 BROOK. J. INT'L L. 31 (1992).

individual. Human rights law, of course, paves the way by seeking to protect individuals and in some cases offer them direct access to international tribunals. The ICC will punish individuals in an international tribunal, for actions committed on behalf of States. The narcotics regime does not provide an international tribunal, but establishes a multilateral basis for the uniform punishment of "private" individuals.<sup>92</sup> As such, the development of an international criminal law for the enforcement of narcotics prohibition provides a distinctive site for international legal authority.

As this discussion shows, the international legal order does not operate through a monolithic world government. The piecemeal adaptation of public functions to the international level challenges a traditional view that international law will progress toward a centralized, coordinated transfer of social regulation to the international order. Instead, currently there are particular versions and types of the public, rather than one universalized regime.

It is the sheer expanse of envisioned control that makes the international narcotics regime so interesting from this point of view. Consider Foucault again:

The true objective of the reform movement, even in its most general formulations, was not so much to establish a new right to punish based on more suitable principles, as to set up a new "economy" of the power to punish, to assure its better distribution, so that it should be neither too concentrated at certain privileged points, nor too divided between opposing authorities; so that it should be distributed in homogenous circuits capable of operating everywhere, in a continuous way, down to the finest grain of the social body.<sup>93</sup>

The United Nations conventions on narcotics have extended and refined these international mechanisms of distributing punishment. As the narcotics trade has become globalized, more "widely spread," the Conventions have "[d]efine[d] new tactics."<sup>94</sup> Punishment and the effects of punishment have indeed been adapted through these "new techniques."<sup>95</sup> The "art of punishing" has indeed, through these conventions, been

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92. The ICC tracks the traditional division of power at the international level because its focus is on State behavior. In a sense, the ICC involves the agreement of Member States to set up a system for judging their actions, as States, against recognized human rights principles. As such, the ICC does not transcend the traditional contours of law at the international level—those contours reflecting the sovereign States—but reinforces them.

93. FOUCAULT, *supra* note 1, at 80.

94. See *supra* note 1 and accompanying text.

95. *Id.*

“regulariz[ed], refin[ed], universaliz[ed].”<sup>96</sup> The “circuits” of enforcement have duly been “multipl[ied].”<sup>97</sup> In short, then, these conventions have succeeded in “constitute[ing] a new economy and a new technology of the power to punish.”<sup>98</sup>

Such legal development suggests that a new “social body” may be forming at the international level as a result of this spread of control. In that sense, the multilateral narcotics regime—as one aspect of the regulation of markets—is an important, if oft overlooked, part of the public international order.

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96. *Id.*

97. *Id.*

98. *Id.*

