

Addicted to Punishment: The Disproportionality of Drug Laws in Latin America

*Executive Summary*¹

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Introduction

Over the past several decades, Latin America has seen penalties for drug crimes—even small-scale selling—skyrocket. From Mexico to Argentina, non-violent offenders receive significantly longer penalties than many violent criminals. This comparative study of criminal legislation explores this phenomenon across time and between seven Latin American countries (Brazil, Ecuador, Peru, Mexico, Colombia, Bolivia, and Argentina).⁶ It finds that penalties for many drug crimes have grown in recent decades to be disproportionately more severe than the harms they cause—especially when compared to penalties for the more violent crimes of murder, rape, and aggravated assault. Drug laws and sentencing guidelines throughout the region fail to distinguish between the severity of different crimes. The implications of these trends are far-reaching; not only is disproportionate sentencing unjust, but it also overloads prison systems and draws funds and focus away from legitimate regional concerns.⁷

This research forms part of a collection of studies by the Research Consortium on Drugs and the Law (*Colectivo de Estudios Drogas y Derecho*, CEDD), which seek to quantify and analyze trends in disproportionate sentencing for drug related crimes throughout Latin America.⁸

Historical Context

Drug laws have not always been so harsh; much of the change can be traced back to the policies of the 1970 and 80s and the so-called “war on drugs.” Initiated by President Richard Nixon, the

U.S. government—soon joined by many foreign nations and international institutions—adopted zero tolerance policies toward drugs, using criminal law and brute force to crack down on the supply of and demand for these substances.⁹

Leaders soon became, in a sense, *addicted* to the judicialization of drug related offenses, expanding the use of police, criminal law, and force to curb drug related conducts at an ever-increasing rate. Just as the problematic user consumes more to combat a drug’s declining effects, public officials, seeing the scant impact of growing punitive repression, increased the dosage of their punitive actions. Despite decreasing returns on security investments, they increased spending and expanded the drug control network. From new elite police forces to expansive prisons and even more expansive penal codes, countries from Mexico to Argentina sought to smother the drug “problem,” at any cost.

Perhaps most importantly, the war on drugs fails to draw a distinction between the primary and secondary problems associated with drug use, often creating more problems than it has solved.¹⁰ Primary problems—those caused by the drugs themselves, such as health concerns and problematic drug use—should have been the central focus of drug policies. Instead, harsh policies *created* secondary problems—such as the violence associated with drug trafficking, which largely results from the lack of a legal (or at least *de facto* legal) marketplace, as well as disproportionate sentencing and over-incarceration.

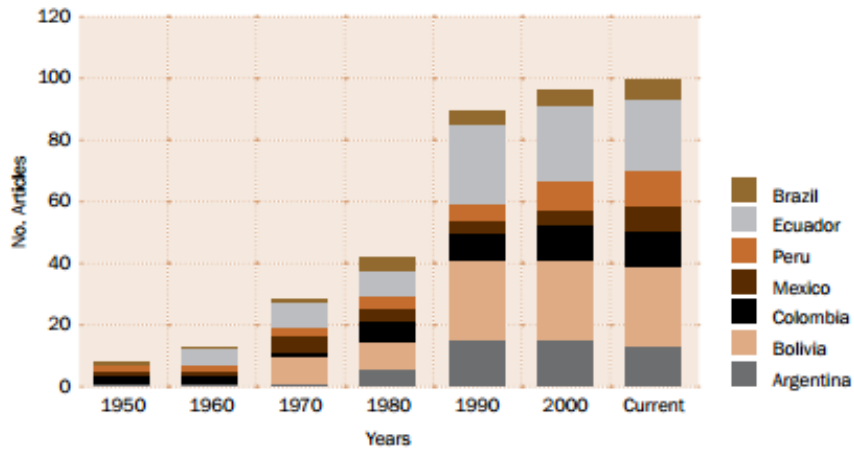
Overview of Changes in Sentencing

Before concluding what disproportionality there may be in drug laws, one must first explore the recent trends in drug legislation. Two measures are used to analyze evolutions in drug laws: the number of drug-related acts criminalized, and the length, in years, of prison terms imposed for those conducts. Together, these figures represent expansions in what is considered drugs “crime,” as well as expansion of the penalties those crimes carry.

Expanding Penal Codes

The expansion of drug-related articles in domestic penal codes demonstrates a growing reliance on criminal punishment—rather than treatment—to address the negative effects of drugs. By criminalizing more drug-related acts, governments have made it easier to incarcerate a wider range of users and small-scale sellers, often with penalties that far outweigh the severity of their crime.

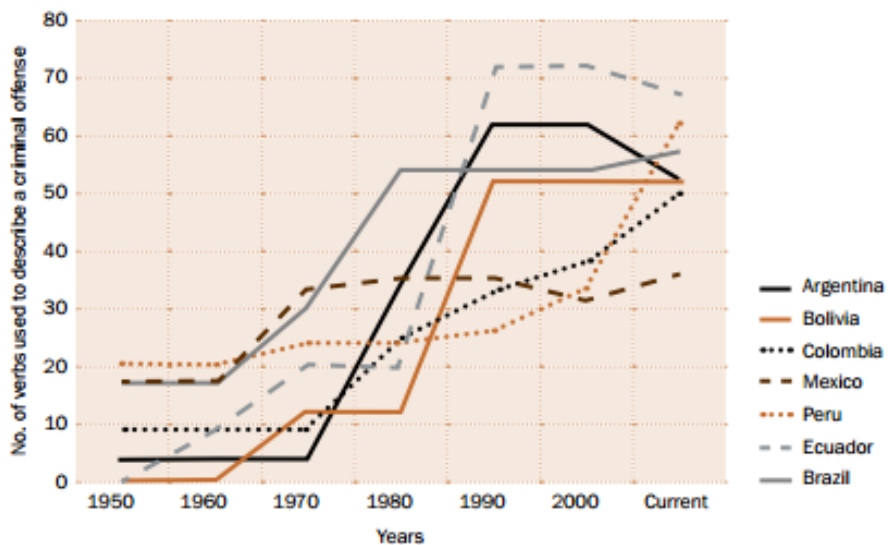
FIGURE 2.
Aggregate trend in number of articles on drugs
in criminal legislation



Source: Compiled by authors

Figure 2 illustrates how, throughout the region, the number of articles in drug legislation increased from fewer than 10 in the 1950s to nearly 100 today. Far from “ensuring greater precision in the legal definition,” one constitutional lawyer explains, this trend represents “an effort to cover all possibilities of a punitive approach” and expand the realm of what can be considered criminal behavior, often failing to distinguish between the severity of different actions.¹¹

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



Source: Compiled by authors

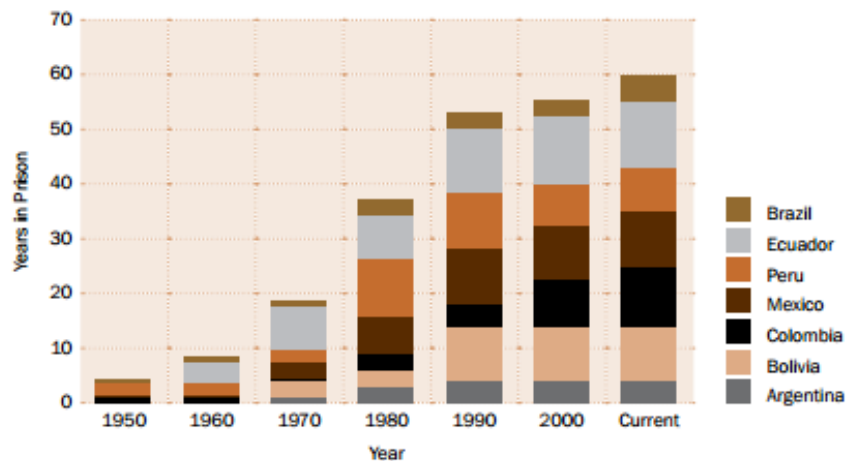
A similar trend exists with the expansion of the number of verbs (*verbos retores*) used to describe criminal offenses. As Figure 3 shows, the increase in the number of verbs used to define a criminal offense has been both steady and consistent in nearly all countries studied. Even more dramatic than the increase in the number of articles in criminal legislation, the number of descriptive verbs—in other words, punishable conducts—increased from about 50 to more than 350 currently.

Increasing Penalties

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

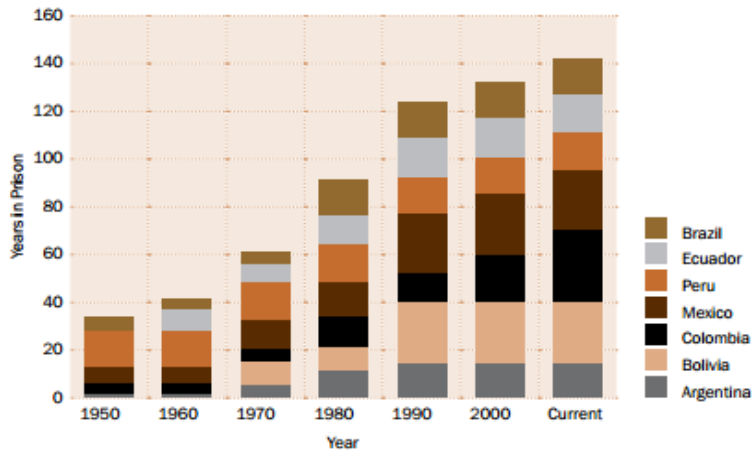
These trends also match the historical narrative; turning increasingly to criminal prosecution to address the primary harms of drug use, legislatures maximized the allowable penalties for drug-related crimes. The timelines line up as well. Figures 10 and 12 show a clear departure from modest sentencing in the 1970s—the start of the war on drugs—and the adoption of significantly longer sentences.

FIGURE 12.
Aggregate trend in the minimum 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

The study found that the aggregate minimum penalty (figure 12) and aggregate maximum penalty (figure 10)—the combination of the penalties for all seven studied countries—has increased substantially since 1950. 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 average¹² by 521 percent.

Interpretation and Analysis

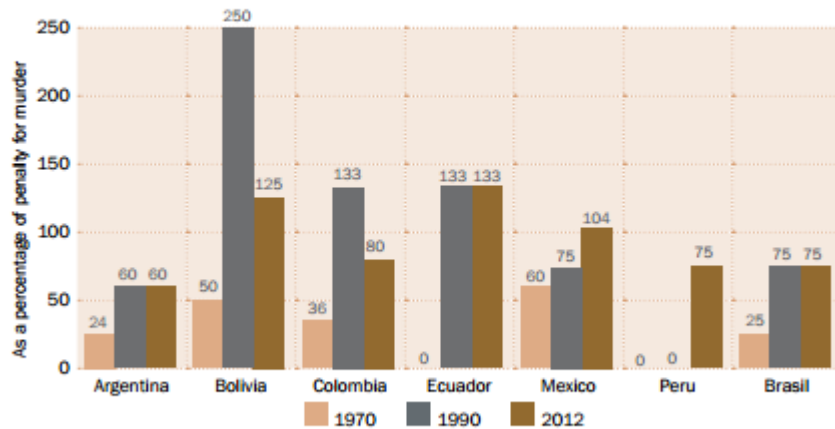
The preceding section demonstrates the existence of a significant increase in penalties for drug-related crimes. For these changes in sentencing to be *proportionate*, at least two things would have to be true.

First, did drug crimes begin to cause more social harms? Proportionality is maintained *only* if the increase in the penalties is matched by an increase in the *seriousness* and harm associated with the crimes. And this is not the case. It is impossible to demonstrate empirically that cocaine trafficking is more serious now than it was in 1950, because trafficking does not result in primary harms. Crimes committed by drug traffickers to protect and regulate their illegal business, such as murders and bribery—whose seriousness have clearly increased—are secondary effects of the war on drugs itself. In other words, many of the perceived “new” harms simply feed into a vicious circle, where more prohibition breeds more violence which breeds more prohibition.

Second, are sanctions for drug-related crimes comparatively less severe than those for more violent crimes? In other words, do laws distinguish between the severity of different crimes? The answer here, again, is no. Throughout Latin America, drug penalties are disproportionately higher than the penalties for most serious crimes.

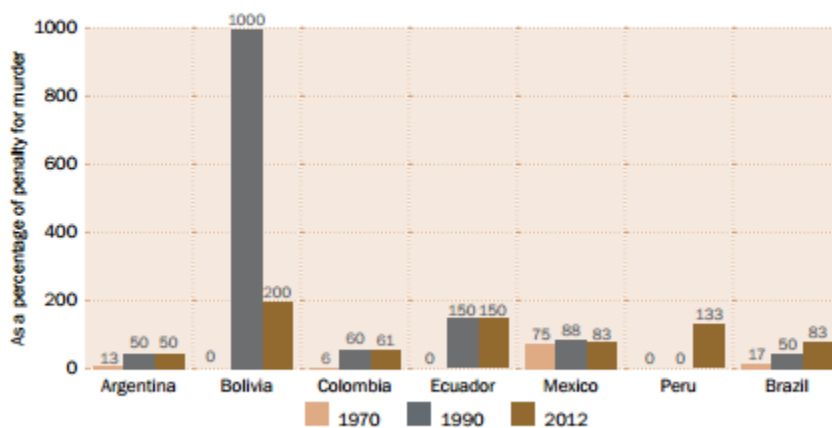
The following analysis explores this tendency in greater detail, looking at drug crime sentences in comparison with murder, rape, and aggravated robbery.¹³ These crimes were chosen because they are all serious acts that present serious harms to the victims and society at large—social harms greater than most drug crimes. Each of the three crimes is given a baseline value of 100 and compared against drug sentencing to show the percentage difference.

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



Source: Compiled by authors

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



Source: Compiled by authors

Trafficking vs. Murder

When comparing murder with drug trafficking, the logical assumption is that penalties for murder must be higher because it results in a concrete harm to a very important protected legal right—human life and personal integrity—while trafficking does not, in and of itself, lead to such a harm.

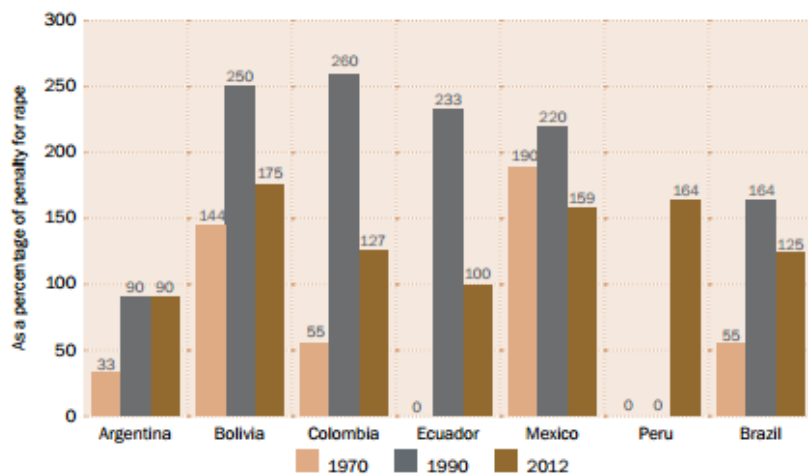
In three of the seven countries surveyed, drug trafficking garnered longer maximum (Figure 14) and minimum (Figure 15) penalties than murder, indicating a disproportionate use of criminal law in these cases. Comparatively shorter sentences in the other four countries, however, do not imply relaxed prosecution of drug crimes. Rather, many countries saw an increase in criminal penalties *writ large*. In Colombia, for example, the maximum penalty for murder rose from 15 to 37.5 years, while the maximum penalty for trafficking rose from 20 to 30 years.

The question is, then, is drug trafficking in Ecuador 1.33 times worse than murder? Or put differently, in Brazil, a country that long battled high murder rates, are 75 murders an equal threat to society as 100 incidents of trafficking? The answer to both is no.

Trafficking vs. Rape

The next comparison is between trafficking and rape. Despite causing broad physical and psychological harms, many far worse than those of non-violent trafficking, rape sentences tend to be shorter or on par with drug crimes. This fails to take into account the significantly greater harms caused by rape.

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



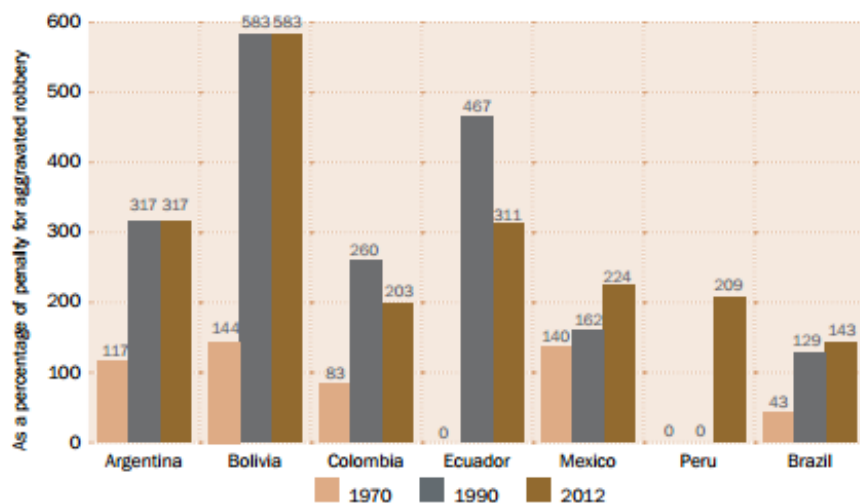
Source: Compiled by authors

In all of the countries studied, the maximum penalty for drug trafficking is nearly equal to or, in most cases, greater than the maximum for rape. Drug-related sentences ranged from 90 percent the length of rape sentences in Argentina (with one year more for rape) to 175 percent in Bolivia, where the average penalty for trafficking was *over 10 years longer* than for rape. 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 is significantly more severe than the punishment for such an extremely harmful crime as rape.

Trafficking vs. Aggravated Robbery

The last crime compared with drug trafficking—aggravated robbery—does not cause as serious harm as murder or rape, but has a considerable impact on society. Given the crime’s regularity and destruction, it can rightfully be considered a more severe crime than trafficking. To an even greater extent than the previous two crimes, aggravated robbery carries significantly lower penalties than trafficking.

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



Source: Compiled by authors

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, a five-fold difference.

Conclusion

This study demonstrates that penalties for drug-related crimes have increased substantially in recent decades. These findings, taken together with the conclusions from the Systems Overload study on over-incarceration, illustrate an epidemic of disproportionate sentencing. Sentences handed down for even minor drug crimes are sending millions of non-violent offenders to jail every year, often at much higher rates than for violent crime. It is undeniable that states have a legitimate interest in protecting potential victims through arrests and incarceration of criminals, but that duty comes with the responsibility to protect possible defendants against unjust and excessive punishment. As punishment has grown to overshadow basic rights, state policies have overloaded prisons from Mexico to Argentina,¹⁴ undermined the democratic principle of proportional punishment, and shifted focus and funding away from addressing legitimate public harms.

From human rights concerns to questions of the utilitarian value of over-incarceration, there is an urgent need for countries to reform drug laws and implement drug policies that respect human rights and basic criminal guarantees.¹⁵ 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; countries must implement alternative responses to the drug issue that favor harm reduction policies over punitive policies. The victims of this epidemic of incarceration—who often represent the most vulnerable sectors of society—must receive government assistance rather than excessive punishment. Looking forward, policies must adopt the goal of promoting public health instead of focusing merely on sanctioning offenders. Decreases in violence, illness, and corruption must be the metrics of success, not the number of people behind bars.

¹ Full version available at

http://www.dejusticia.org/index.php?modo=interna&tema=estado_de_derecho&publicacion=1391

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⁶ 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. They also represent the different regions of Latin America, from the Southern Cone to North America.

⁷ For an in-depth analysis of the negative effects of over-incarceration, please see *Systems Overload: Drug Laws and Prisons in Latin America*. Metaal, P. and Youngers, C. (eds.) (2010).

http://www.wola.org/publications/systems_overload_drug_laws_and_prisons_in_latin_america_0

⁸ In addition to the authors, researchers from the Colectivo de Estudios Drogas y Derecho (CEDD) participated in the research for this study: Alejandro Corda (Argentina-Intercambios Asociación Civil); Luciana Boiteux and Joao Pedro Padua (Brazil); Rose Achá (Bolivia-Acción Andina); Jorge Paladines (Ecuador-Universidad Andina); Coletta Youngers (USA-WOLA); Catalina Pérez Correa (Mexico-CIDE); Pien Metaal (Netherlands-TNI); Jérôme Mangelinckx and Ricardo Soberón (Peru-CIDDH). For more information about CEDD and its researchers, see: <http://www.wola.org/cedd>

⁹ The war on drugs also became enshrined in international legal conventions, effectively necessitating complementary domestic legislation from a broad swath of signatory countries.

¹⁰ See Nadelmann, E. (1992), "Thinking Seriously about Alternatives to Drug Prohibition" for more information on primary and secondary harms.

¹¹ Zaffaroni (2009).

¹² 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.

¹³ 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.

¹⁴ See *Systems Overload: Drug Laws and Prisons in Latin America*.

¹⁵ See *Ibid.* for a discussion of the costs—financial, social, and moral—of the prohibitionist approach.