Foreword

On December 29, 2002, the American Philosophical Association’s Committee on the Philosophy of Law sponsored a symposium on the drug legalization at the Annual Meeting of APA’s Eastern Division in Philadelphia, Pennsylvania. At a time when the “war on drugs” has been increasingly assailed not only for its effectiveness but also for its legitimacy, the symposium was an expression of concern with both the social effects of drugs and drug legislation as well as its ideological underpinnings. The lead presenter was Douglas Husak, a preeminent philosophical critic of the legal status quo, and his contribution was critiqued by George Sher. A second position paper was delivered by Peter de Marneffe, taking a position that, if not completely in support of the current legal situation, was at least sympathetic to some of the concerns it embodies. His paper was responded to by Daniel Shapiro. All four papers have been revised for publication, and Lester Hunt, who chaired the session, has generously contributed an Epilogue.

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Four Points About Drug Decriminalization

DOUGLAS HUSAK

Philosophers have been strangely silent about the topic of illicit drugs, even though it is a gold mine of philosophical questions. It is distressing to see how few of the dozens of books now available on current moral and social issues contain sections on drug issues. It seems far more pressing to question the punishment of drug users than the execution of murderers—mostly because there are so many more of them. Approximately 80 to 90 million people have used illicit drugs at some point in their lives. There are well over 400,000 drug offenders in jail, about 130,000 for possession alone. Unlike the case of capital murder, it is plausible to suppose that drug users should not be punished at all, and this is what I want to argue here.

I suspect that the best single explanation for the philosophical neglect of this topic is that it is has a considerable empirical content. When I raise this issue with my undergraduate classes, and ask why we should or should not punish drug users, less than a minute is needed before someone makes a controversial empirical claim about the effects of given drugs on users or on society in general. No one can hope to address the set of moral and legal issues about drug decriminalization without knowing a lot of facts about drugs and drug users. Contrast this with abortion, in which the relevant facts can be learned fairly quickly. Philosophers understandably tend to shy away from topics with a heavily empirical component.

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Yet without the input of philosophers, the field has been left largely to scholars in criminal justice, nearly all of whom profess to have no theory of criminalization, but seem mostly to be consequentialists. They prepare cost-benefit analyses of the relative merits of criminalization and decriminalization. Many have concluded that our current drug laws are ineffective and counterproductive. They are probably correct, but that is not the line of inquiry I want to pursue here. As philosophers, I think we should be more interested in examining arguments of principle.

I The Meaning of Decriminalization

First, there is absolutely no consensus among those of us who work in criminal theory about the meaning of such terms as legalization or decriminalization. So I resort to stipulation. What I mean by the use of the term “decriminalization” in this context is that the use of a given drug would not be a criminal offense. I take it to be a conceptual truth for which I will not argue here that criminal offenses render persons liable to state punishment. Thus anyone who thinks that the use of a given drug should be decriminalized believes that persons should not be punished merely for using that drug.

I am aware that there is enormous confusion about this topic. In polls, many respondents report that they do not want to see a given drug decriminalized, but do not favor punishing people who merely use that drug. If my account of decriminalization is accepted, this response is incoherent.

For a number of reasons, this definition of decriminalization is deceptively simple. First, there really is little punishment for use today. In most but not all jurisdictions, what is punished is possession rather than use. Technically, then, drug use is generally not criminalized. But I take the fact that statutes punish possession rather than use to be relatively unimportant. Possession is punished rather than use because it is easier to prove. In what follows, I ignore this complication and continue to suppose that decriminalization pertains to drug use. Except perhaps in fantastic cases, no one can use a drug without possessing it.

Second, there is no clear understanding of what kinds of state responses amount to punishments. Many reformers argue that drug users should be fined rather than imprisoned, and they call this idea decriminalization. Others argue that drug users should be made to undergo treatment, and they also call this idea decriminalization. Whether these proposals are compatible with what I mean by decriminalization depends on whether fines or coerced treatment are modes of punishment rather than alternatives to punishment. I think both fines and coerced treatment are modes of punishment. Even though they are probably preferable to what we now do to drug users, these responses are ruled out by decriminalization as I construe it. But that is a quibble I hope not to worry about. Simply put, whatever you take punishment to be, that is what decriminalization forbids the state from doing to people who merely use drugs.

Third, decriminalization as I propose to define it has no implications for what should be done to persons who produce or sell drugs. Therefore, it is not really a comprehensive drug policy that can rival the status quo. The considerations that I think work in favor of decriminalizing use are somewhat different from those that apply to the decriminalization of production and sale, so I propose to put production and sale aside in this essay. This is bound to disappoint some people. Many thinkers are attracted to decriminalization, or reluctantly driven to support it, because they hope to end the violence, black market, and involvement of organized crime in drug transactions today. These sound like worthwhile objectives, but drug decriminalization per se does not achieve them. I think we should start by clarifying what should happen to drug users, and then move to the issue of whether or how production and sale should be regulated. Again, I am aware that many thoughtful people believe that these topics should all be tackled simultaneously, but I think it is easier to proceed one step at a time.

Finally, I admit that there is something odd about my understanding of decriminalization. What I call decriminalization in the context of drugs is comparable to what was called prohibition in the context of alcohol from 1920 to 1933. During those memorable years, production and sale were banned, but not the use or mere possession of alcohol. If we replicated that approach in our drug policy, I would call it decriminalization. That is admittedly odd, but it underscores the fact that our response to illicit drug users today is far more punitive than anything we ever did to drinkers.
II The Best Reason to Decriminalize Drug Use

With these preliminaries out of the way, let me proceed to the basic question to be addressed. In my judgment, the fundamental issue is not whether to decriminalize the use of any or all drugs, but whether to criminalize the use of any or all drugs. The status quo must be defended. If this is the right question to ask, I would now like to offer what I believe to be the most plausible answer to it: The best reason not to criminalize drug use is that no argument in favor of criminalizing drug use is any good—no argument is good enough to justify criminalization. I want to make three points about this general strategy for decriminalization.

First, I recognize that this approach is not very exciting. My reason to oppose criminalization does not invoke any deep principle worth fighting about like freedom of speech or religion. I am not sure that there is any deep principle that all drug prohibitions violate. In particular, my approach does not invoke the principle that some libertarians cite: the “freedom to do whatever you want to your own body.” I do not invoke this principle because I do not believe it is true. I am not a libertarian. Whether you have a right to do something you want to your body depends on what happens when you do it.

Then again, some drug prohibitions seem to violate deep principles that philosophers should care about. This becomes more apparent when you pause to consider exactly what it is that drug prescriptions are designed to prevent. Most drugs have a legitimate use, so drug consumption per se is rarely prohibited. Instead, the use of most drugs is prohibited only for a given purpose. To get directly to the heart of the matter, the proscribed purpose is usually to produce a state of intoxication or a drug “high.” In case there is any doubt, let me cite the California criminal statute regulating nitrous oxide. This statute makes it a crime for “any person [to possess] nitrous oxide . . . with the intent to breathe [or] inhale . . . for purposes of causing a condition of intoxication, elation, euphoria, dizziness, stupefaction, or dulling of the senses or for the purpose of, in any manner, changing. . . mental processes.” The ultimate objective of this statute is to prevent persons from breathing something in order to change their mental processes. It is hard to see why this objective is legitimate in a state committed to freedom of thought and expression. I am not sure that all drug prohibitions so transparently jeopardize our right to freedom of thought. In any event, I do not believe we need to appeal to any deep principle to resist drug prohibitions generally.3

Second, my case is necessarily inconclusive. I am in the unenviable position of trying to prove a negative. How can I hope to show that no argument in favor of criminalizing drug use is good enough? All I can ever aspire to do is to respond to the best arguments that have been given. I am reminded of a remark made by Hume. “Tis impossible to refute a system, which has never been explain’d. In such a manner of fighting in the dark, a man loses his blows in the air, and often places them where the enemy is not present.”4 This is the predicament someone faces in trying to defend drug decriminalization. I am usually asked to go first on panels convened to debate drug decriminalization, but I think I should go last so that I can respond to what others think are good reasons for criminalization.

Third, my case for decriminalization has the advantage of making minimal assumptions about justice. I assume that no one should be punished unless there are excellent reasons for doing so. Punishment, after all, is the worst thing our state can do to us. The imposition of punishment must satisfy a very demanding standard of justification. It is hard to imagine that anyone would reject this assumption.

The fundamental issue is not whether to decriminalize the use of any or all drugs, but whether to criminalize the use of any or all drugs.

Thus my case against criminalization depends on the claim that no case for criminalization has been adequately defended. It is utterly astounding, I think, that no very good argument for drug prohibitions has ever been given. When I am asked to recommend the best book or article that makes a philosophically plausible case for punishing drug users, I am embarrassed to say that I have little to suggest.6

Let me then cut directly to my own conclusions. No single argument for decriminalization responds to all
arguments for criminalization. We must respond argument-by-argument, and, I think, drug-by-drug. We may have good reasons to criminalize some drugs, but not others. For example, I do not know anyone who wants to punish persons who use caffeine. Surely this is because of empirical facts about caffeine—how it affects those who use it and society in general. I can certainly imagine a drug that people should be punished for using. Such drugs are easy to describe; they are vividly portrayed in great works of fiction. Consider the substance that transformed Dr. Jekyll into Mr. Hyde. If a drug literally turned users into homicidal monsters, we would have excellent reasons to prohibit its consumption. Fortunately, no such drug actually exists. In fact, I have never seen a persuasive argument for punishing persons who use any drug that I am aware is widely used for recreational purposes.

III Criminalization

Any good reason to criminalize a kind of behavior invokes a theory of criminalization. We cannot decide whether we have a good reason to punish persons who use drugs in particular unless we know what would count as a good reason to punish anyone for anything. We do not really have a theory of criminalization in the real world, unless “more is always better” qualifies for a theory. I want to pause briefly to describe what passes for a theory of criminalization in our constitutional law today. Most laws limit or restrict liberties. When the constitutionality of these laws is challenged, courts respond by dividing liberties into two kinds: fundamental and non-fundamental. The constitutionality of legislation that restricts a fundamental liberty is subjected to “strict scrutiny” and is evaluated by applying the onerous “compelling state interest” test. Virtually all criminal laws, however, limit non-fundamental liberties, and they are assessed by applying the much less demanding “rational basis” test. Under this test, the challenged law will be upheld if it is substantially related to a legitimate government purpose. The legitimate government purpose need not be the actual objective of the legislation—only its conceivable objective. Since only those laws that lack a conceivable legitimate purpose will fail this test, courts almost never find a law to be unconstitutional when non-fundamental liberties are restricted. As a result, the state needs only some conceivable legitimate purpose to enact the great majority of criminal laws on the books today—most notably, drug prohibitions, which are always evaluated by applying the rational basis test. So persons who break these laws can be punished simply because the state has a rational basis to do so.

What is remarkable about this approach is its complete indifference to the distinction between criminal and non-criminal legislation. It is one thing to enact non-criminal laws that pass the rational basis test. But it is quite another when criminal legislation is assessed by that same standard. Criminal law is different—it is importantly dissimilar from other kinds of law. Many of the arguments I have heard for drug prohibitions do a perfectly good job explaining why rational persons might well decide not to use illicit drugs, or why the state may have good reasons to discourage people from using drugs, but I fear they do not provide a justification for punishing drug users.

If our theory of criminalization in the real world is so bad, one would have thought that the most distinguished criminal theorists of our day would have had lots to say to rectify the situation. But they have said surprising little. They mostly continue to argue about the harm principle. But debates about whether to accept the harm principle in our theory of criminalization do not get us very far when trying to decide whether to punish drug users. We have excellent reasons to punish people who commit theft or rape. These offenses harm others by violating their rights. But this rationale cannot explain why drug users should be punished. I do not think there is any sense of harm or any theory of rights that can be invoked to show that I harm someone or violate his rights when I inject heroin or smoke crack. At worst, I risk harm to myself or to others when I use a drug. I conceptualize offenses that create only a risk of harm that may or may not materialize as inchoate offenses—similar to attempt, solicitation, or conspiracy. If I am correct, the criteria we should apply to assess the justifiability of drug proscriptions are those we should apply to assess the justifiability of inchoate offenses. Unfortunately, we have no such criteria. Almost no theorist has tried very hard to extend a theory of criminalization to conduct that creates a risk of harm rather than harm itself.

Notice, however, the enormous burden an argument for criminalization would have to bear. As I have said, there are about 80 or 90 million Americans who have used an illicit drug at some point in their lives. That is
approximately 42 percent of our population aged 12 and over. About 15 million Americans used an illicit drug last year, on literally billions of occasions. Very few of these occasions produced any harm. Longitudinal studies do not indicate that the population of persons who ever have used illicit drugs is very different from the population of lifetime abstainers in any ways that seem relevant to criminalization. So any argument for punishment would have to justify punishing the many, whose behavior is innocuous, for the sake of some objective that results in a very tiny percentage of cases. Many attempted murders result in successful murders, which are harms, but very few instances of drug use bring about any result we should describe as significantly harmful.

When you cannot possibly punish all of the people who commit a crime, you can only punish some. Inevitably, those who get arrested, prosecuted, and sentenced are the least powerful. Drug prohibition would have vanished long ago had whites been sent to prison for drug offenses at the same rate as blacks. Although minorities are no more likely to use illicit drugs, they are far more likely to be arrested, prosecuted, and punished when they do. This is one of the features of drug prohibitions that should outrage us all. Some people try to package drug prohibitions as a benefit to minorities, but there is plenty of evidence that they devastate minority communities and will continue to do so as long as enforcement is so selective. And yet enforcement will always be selective, since every offender cannot possibly be punished.

If drug prohibitions are so bad for minority communities, one may wonder why minority leaders are not more outspoken about the drug war. In fact, blacks are more ambivalent than whites about drug policy.11 Overall, blacks tend to have more negative opinions about drugs (both licit and illicit) than whites. At the same time, blacks are less likely than whites to believe that the solution to the problem is to enforce prohibition with severe punishments. Black mothers who are staunchly anti-drug are not enthusiastic about policies that lock up their sons and daughters for lengthy periods of time. But why are blacks not even more critical of the status quo? No one explanation can be given. But my own hypothesis cites the role of religion on attitudes about drugs. Although opinions about drug policy vary somewhat with age, education, income, and gender, no variable correlates with anti-drug attitudes more closely than religion and, at least in the United States, protestant Christianity in particular.

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**IV Predictions: A Bad Reason to Criminalize**

I have space to provide a brief critique of only one argument, and I apologize in advance if I neglect the reader's own candidate for the best reason to criminalize drug use. I will not comment on drugs and kids, drugs and health, drugs and crime, or drugs and morality. But I think the argument I discuss here may be the most common. It rests on predictions that the use of drugs would soar if we stopped punishing persons who use them. This argument, I think, flounders on both empirical and normative grounds.

I begin with the empirical considerations. My conclusion is that we simply do not have any good basis to predict how the amount of harm caused by drugs would change if we did not punish those who use them. Many persons find my uncertainty to be unwarranted. Economic models indicate that the frequency of use is a function of costs: decriminalize use, and the monetary and non-monetary costs of drugs will go down. The trouble is that all predictions about how rates of consumption will rise after use is decriminalized assume that nothing else will change. One thing we can predict is that many other things will change if drug use is decriminalized. Let me mention just a few things that might very well change, and that make all such predictions perilous.

I begin by challenging the claim that decriminalization will cause the monetary price of drugs to plummet. Why assume that decriminalization will make illicit drugs significantly more affordable? Decriminalization itself, as I have emphasized, need not allow illicit drugs to be sold with impunity. If decriminalization does not extend to sale, it need not have much affect on the monetary cost of drugs. But even were sale decriminalized, illicit drugs would become subject to taxation. I will not try to estimate the optimal rate of taxation. Whatever the exact amount, we can be sure that taxes would add enormously to the price of newly decriminalized drugs.

Another factor influencing the price of decriminalized illicit drugs is very difficult to estimate. If illicit drugs are anywhere near as harmful as many people believe, some mechanism must be created to compensate victims for the harms they suffer when drugs are used. These harms might befall users themselves, or be suffered by others.

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One way to compensate victims for each of these kinds of harms is by allowing lawsuits against producers of illicit drugs. We have been reluctant to allow such lawsuits in the cases of tobacco, alcohol, or firearms; powerful lobbies have fought against them for years. But we need not be so reluctant if we establish a new system of sale for illicit drugs. Producers could be made to pay for the costs of the various harms that their customers cause to themselves or to others. Producers would be able to pay these costs, and remain in business, only if they could pass them along to buyers by raising their prices. How much of an increase in price would be needed to compensate all of the victims for the harms they suffer when illicit drugs are used? No one can be sure. We cannot begin to answer this question unless we know how dangerous illicit drugs really are. I believe that the dangers of illicit drugs tend to be grossly exaggerated. Even if I am mistaken about the dangers of illicit drugs today, we can be confident that illicit drugs would be less dangerous in a world in which production and sale had been decriminalized. In such a world, suppliers would have enormous incentives to make their drugs as safe as possible in order to limit the amount of money they would be required to pay when harm was caused by the use of their product. If a given drug is very dangerous, we might even find that no company could hope to make a profit by selling it, and the drug would disappear from the lawful market. We simply do not know how dangerous illicit drugs will turn out to be after decriminalization, but financial incentives are bound to make them less harmful.

Illicit drugs would be less dangerous in a world in which production and sale had been decriminalized.

As a result of these two factors, we have almost no basis for estimating how the monetary price of decriminalized drugs would differ from their price in today's black market—if, that is, decriminalization were extended to production and sale. We do not know how much states will decide to tax the sale of drugs. In addition, we do not know how much sellers will have to charge in order to survive when lawsuits are brought against them. If this latter figure is high, drugs will be expensive, and fears about cheap drugs will be put to rest. If this figure is low, the price of drugs will decrease. But if the amount sellers must charge as a result of these lawsuits is low, it means that drugs will turn out to be less dangerous than we thought. If drugs turned out to be less dangerous than we thought, we will come to wonder why we were so worried about making them more affordable in the first place.

However uncertain we may be about how decriminalization will affect the monetary price of drugs, it will clearly eliminate the non-monetary cost of use. People will no longer fear arrest and prosecution. To the extent that this fear has helped to keep illicit drug use in check, we can anticipate that decriminalization would cause the incidence of drug use to rise. But to what extent? How will consumption change if drug users need not worry about punishment? No single piece of evidence on this point is decisive. But several factors suggest that the threat of punishment is not especially effective in curbing drug use. In what follows, I will describe a number of reasons to doubt that the removal of criminal penalties would cause a significant increase in the use of illicit drugs.

One source of evidence is obtained through surveys. People who have never used drugs are asked to explain their reasons for abstaining, and to speculate about how their willingness to experiment would be affected by a change in the law. Very few respondents cite their fear of punishment as a substantial factor in their decision not to try drugs. The more dangerous the drug is perceived to be, the smaller the number of respondents who mention the law when asked to explain their reluctance to use it. Other surveys ask former users why they decided to quit. Those who once used drugs are asked why they do not continue to do so today, and to explain why their behavior has changed. Very few respondents report that fear of arrest and prosecution led them to stop using drugs. They cite a bad experience with a drug or some new responsibility, like a job or a newborn, but rarely mention the risk of punishment. Of course, the value of these kinds of surveys is questionable. We may doubt that people have accurate insights into why they behave as they do, or what might lead them to behave differently. Surely, however, these surveys provide better evidence than mere conjecture. These surveys suggest that the fear of punishment is not a major factor in explaining why drug use is not more pervasive than it is.

For further evidence about how the fear of punishment affects the incidence of drug use, we might examine how trends in illicit drug use over the past thirty years are correlated with changes in law enforcement. If the fear of punishment were a significant factor in deterring illicit drug use, one would expect that rates of consumption
would decline as punishments increased in frequency and severity. There is no correlation, however, between the frequency and severity of punishment and trends in drug use. If we look at the decade from 1980 to 1990, a case could be made that punishments were effective in deterring use. The incidence of illicit drug use, which peaked in 1979, steadily decreased throughout the 1980s. But frequent and severe punishments have not caused further declines during the 1990s; drug use has remained relatively flat in the past decade. We reach the same conclusion when we examine the data on a state-by-state basis. States with greater rates of incarceration for drug offenders tend to experience higher rates of drug use. Prohibitionists who predict a massive increase in drug use after decriminalization must struggle to explain these data. If punitive drug policies keep drug use in check, why do actual trends in drug consumption prove so resistant to the massive efforts we have made to punish drug users?

**There is no correlation between the frequency and severity of punishment and trends in drug use.**

Additional evidence can be gleaned from the experience of other countries, where the fear of arrest and prosecution for the use of drugs is practically nonexistent. Most European countries have lower rates of illicit drug use, even though given drugs are often higher in quality, lower in price, and less likely to result in punishments. American teenagers consume more marijuana and most other illicit drugs than their European counterparts, although European teens are more likely to smoke cigarettes and drink alcohol. Consider the Netherlands, which is known for its relatively permissive drug laws. Although marijuana prevalence rates are roughly comparable in the two countries, about twice as many residents of the United States have experimented with other kinds of illicit drugs. In general, data from other parts of the world provide better evidence for an inverse than for a positive correlation between severities of punishments and rates of illicit drug use. Admittedly, however, this evidence is inconclusive. No country in the world has implemented decriminalization as I have defined it here.

The history of the United States provides further reason to doubt that fear of punishment plays a major role in reducing the use of illicit drugs. We must keep in mind that, for all practical purposes, drug prohibition did not begin until the early part of the twentieth century. In the nineteenth century, purchases of opium, morphine, cocaine, and marijuana were subject to almost no restrictions. Americans could buy these drugs in many different varieties from several different sources, including by mail order. But even though criminal penalties were not imposed for the use of opiates and cocaine, these drugs were probably less popular than today. Admittedly, however, the verdict of history is mixed. Most Americans agree that our era of alcohol prohibition was a dismal failure. By most accounts, however, per capita consumption of alcohol decreased throughout prohibition, and did not return to pre-prohibition levels for many years. This finding has led some social scientists to conclude that prohibition “worked” after all—if a reduction in use is the most important criterion of success. Others are skeptical. Curiously, however, even those social scientists who insist that alcohol prohibition was effective almost never recommend that our country should reinstate that policy.

Trends in the use of licit drugs provide yet another source of evidence. Prohibitionists tend to point to a reduction in illicit drug use over the last twenty years as a reason to believe that severe punishments have been effective in curbing drug use. Comparable declines in the use of alcohol and tobacco, however, have taken place over this same period of time, even without the threat of criminal liability. Rates of monthly illicit drug use in the United States peaked at about 14 percent in 1979, steadily declined to a low of just above 5 percent in 1992, and slowly increased thereafter to about 6 percent in 2001. Trends in alcohol and tobacco use exhibit more similarities than dissimilarities with these patterns. The overall use of alcohol and tobacco declined throughout the 1980s, and rebounded somewhat during the 1990s. We have ample evidence that the use of licit drugs can be decreased without the need to resort to criminal sanctions. We should assume that the same is true of illicit drugs.

If changes in the certainty and severity of punishment are not major factors in explaining trends in illicit drug use, what does account for these patterns? This is one of the most fascinating and difficult questions that arises about drug use, and I confess to having no good answer to it. Trends in the use of both licit and illicit drugs are as baffling and mysterious as trends in fashion. Unless we have better theories to explain why people use drugs, our forecasts about the future are bound to be simplistic. No one has a convincing explanation of why the use of a given drug increases or decreases within a given group in
a given place at a given time. By 2001, the popularity of crack in inner cities had waned enormously. Crack is no longer regarded as "cool" or "hip." Why? No simple answer can be given. Most experts believe that a heightened consciousness about health contributed to the reduction in the use of illicit drugs during the 1980s. But what caused this growing concern about health, and why did it not lead rates of drug use to fall still further throughout the 1990s? Again, no answer is clearly correct. But credibility is strained if we suppose that a factor is important in accounting for decreases in the consumption of alcohol and tobacco but unimportant in accounting for decreases in the consumption of illicit drugs, especially when the patterns of these decreases are roughly comparable. In any event, we have little reason to believe that punishments play a central role in explaining trends in drug use.

The state may adopt any number of devices to discourage drug use, as long as these devices are not punitive.

I have provided several reasons to doubt that punishment is needed to keep rates of illicit drug use within reasonable bounds. But skepticism about the efficacy of punishment as a deterrent to drug use is only a small part of the reason why predictions about drug use after decriminalization are so tenuous. Recall the terms of decriminalization that I have offered here. The only change that this policy requires is that the state would not punish anyone simply for using a drug for recreational purposes. The state may adopt any number of devices to discourage drug use, as long as these devices are not punitive. Even more important, institutions other than the state can and do play a significant role in discouraging drug use. After decriminalization, some of these institutions might exert even more influence. Private businesses, schools, insurance companies, and universities, to cite just a few examples, might adopt policies that discriminate against drug users. Suppose that employers fired or denied promotions to workers who use cocaine. Suppose that schools barred students who drink alcohol from participating in extracurricular activities. Suppose that insurance companies charged higher premiums to policy holders who smoke tobacco. Suppose that colleges denied loans and grants to undergraduates who use marijuana. I do not endorse any of these ideas; many seem unwise and destined to backfire. Removing drug-using kids from schools, for example, seems destined to increase their consumption. I simply point out that such institutions could have a far greater impact than our criminal justice system on people's decisions to use drugs.

Predictions about drug use after decriminalization are confounded by yet another phenomenon—the "forbidden fruit" effect. Many people, adolescents in particular, are attracted to an activity precisely because it is forbidden or perceived as dangerous. Much of the thrill of illicit drug use stems from its illegality and the culture of deviance that surrounds it. Might the use of some illicit drugs actually decrease because they are no longer forbidden? If we change the law, the appeal of illicit drugs will be changed as well. To what extent? No one knows. Although many scholars have noted the forbidden fruit effect, serious research has yet to demonstrate its real significance.

Alarming predictions about future use assume that the drugs of tomorrow will resemble the drugs of today. This assumption seems extraordinarily naive. The development of new and different substances makes predictions about consumption enormously speculative. Even though many illicit drugs—heroin and LSD, for example—were originally created by pharmaceutical companies, reputable corporations have tried hard to disassociate their drug products from illicit drugs. Decriminalization may lead pharmaceutical companies to expend their talent and ingenuity to create better and safer recreational drugs. One can only wonder about the products that might be developed if the best minds were put to the task. If more enjoyable and less dangerous drugs could be perfected, consumption might boom. But the development of better and safer drugs would make the increase in consumption less of a problem.

Whether or not better drugs appear on the market, no one can predict how users will substitute newly decriminalized drugs for existing licit drugs. After decriminalization, consumers will have lawful alternatives that we take for granted in other contexts. We simply do not know whether and to what extent users will substitute newly decriminalized drugs for those licit drugs they now tend to prefer. If a great deal of substitution takes place, the enormous social harm presently caused by tobacco and alcohol might decline considerably. So the total amount of harm caused by all categories of drugs might actually decrease, even if the consumption of illicit drugs were to increase. I do not find this conjecture so implausible. Over time, one would expect that users would tend to gravitate toward those drugs that could be integrated more easily.
into their lifestyles. In particular, we should welcome a possible reduction in alcohol use. As any college administrator knows, alcohol is the drug implicated in most of the date rapes, property damage, and violent behavior on campus. A possible decrease in alcohol consumption is one of the silver linings on the feared black cloud of drug decriminalization.

For all of these reasons, we should avoid predictions about how the decriminalization of drugs will affect rates of consumption. An even more important point is that these empirical conjectures are not especially relevant to the topic at hand. We are looking for a respectable reason to criminalize drug use. Predictions about how decriminalization will cause an increase in drug use simply do not provide such a reason. Indeed, this reason could be given against repealing virtuously any law, however unjustified it may be. Let me illustrate this point by providing an example of an imaginary crime that I assume everyone would agree to be unjustified. Suppose that the state sought to curb obesity by prohibiting people from eating pizza—an offense that would pass the rational basis test, by the way. Suppose that a group of philosophers convened to discuss whether we should change this law and decriminalize pizza consumption. Someone would be likely to protest that repealing this law would cause the consumption of pizza to increase. I imagine they would be correct. But surely this prediction would not serve to justify retaining this imaginary prohibition. If we lacked a good reason to attack the problem of obesity by punishing pizza eaters in the first place, the effects of repeal on pizza consumption would not provide such a reason. And so with drugs. Unless we already have a reason to punish pizza consumption, the prediction does not provide a good reason to continue to punish it.

If there is a good reason to criminalize illicit drug use, we have yet to find it. We need a better reason to criminalize something other than predictions about how its frequency would increase if punishments were not imposed. These predictions are dubious both normatively and (in this case) empirically. Despite my uncertainty about the future, there is one prediction about which we can be absolutely confident. After decriminalization, those who use illicit drugs will not face arrest and prosecution. The lives of drug users would not be devastated by a state that is committed to waging war against them. Punishment, we must always be reminded, is the worst thing a state can do to us. The single prediction we can safely make about decriminalization is that it will improve the lives of the hundreds of thousands of people who otherwise would be punished for the crime of using drugs for recreational purposes.

NOTES

[These comments are drawn from two books I have written about drug prohibitions. See Douglas Husak: Drugs and Rights, Cambridge: Cambridge University Press, 1992; and Legalize This! The Case for Decriminalizing Drugs, London: Verso Press, 2002.]
2. This point is made nicely by Richard Boire. See his http://www.cognitiveliberty.org.
3. I would be happy to be mistaken about this. Anyone who is more confident in his ability to identify and defend deep principles that are violated by all drug prohibitions is welcome to enlighten and assist me.
6. When I lecture about this topic, I try to anticipate and respond to an argument that I think people in the particular audience are likely to hold. Invariably, among the first points raised in the ensuing discussion is: You did a fine job with the argument you addressed, but you did not respond to some other argument. Of course, the argument to which I did not respond is the very argument which I addressed in a previous lecture, when someone in the audience protested that I neglected the argument to which I am now responding. This is all very frustrating. Again, I find myself in the predicament described by Hume.

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On the Decriminalization of Drugs

GEORGE SHER

In his lively and provocative paper, “Four Points About Drug Decriminalization,” Douglas Husak advances two main claims: first, that none of the standard arguments for criminalizing drugs are any good, and, second, that there is little evidence that drug laws deter drug use. In these comments, I will not take up the second claim (though I must admit to some skepticism), but I do want to take issue with the first. My strategy will be, first, to sketch three pro-criminalization arguments that I take to have real weight; second, to respond to an objection of Husak’s that, if sound, would tell against all three of my arguments; and, third, to confront the related objection that we cannot consistently support the criminalization of narcotics without also supporting the criminalization of alcohol.

I Three Arguments for Criminalization

I begin with two ritual disclaimers. When I say that there is a good case for continuing to attach criminal penalties to the use of narcotics, I do not mean that that case extends to any particular schedule of penalties or to any special list of drugs. I am sure that many drug sentences, both past and present, are far too harsh. I am also willing to concede that the harms and bads associated with some drugs—marijuana is the obvious example—may not be significant enough to justify attaching even minor penalties to their use. I do think, however, that the harms and bads associated with many other drugs are sufficiently weighty to justify their continued criminalization. The drugs of which I take this to be true include heroin, cocaine, methamphetamine, LSD, and ecstasy, among others.

What, then, are the main arguments for criminalizing these drugs? They are, I think, just the familiar ones: drug users harm themselves, they harm others, and they do not live good lives. At the risk of sounding like an eighth-grade teacher, or a drug czar, I will briefly sketch each argument.

(1) The paternalistic argument

The nature of the harms that drug users risk is of course a function of the drugs they use. Thus, to borrow a point from Peter de Marneffe, heroin harms the user by sapping his motivation and initiative. Also, because heroin is addictive, using it now forecloses the option of comfortably not using it later. By contrast, cocaine and methamphetamine do not have only these effects (though “crack” is by all accounts highly addictive), but their regular use also significantly increases the risk of heart attack and stroke. Furthermore, by drastically enhancing self-confidence, aggression, and libido, these drugs elicit behavior that predictably culminates in high-speed collisions, shootouts in parking lots, and destroyed immune systems. Other drugs have still other destructive effects: LSD can trigger lasting psychosis; ecstasy harms the brain, impairs the memory, and, taken with alcohol, damages the liver; and so on. Thus, one obvious reason to continue to criminalize these drugs is simply that many persons deterred by the law from using them will thereby be spared serious injury.

(2) The protective argument

Just as drug use can harm the user, so, too, can it harm others. Drug use harms strangers by involving them in the collisions, shootouts, and other catastrophes to which the impaired and overly aggressive are prone. It harms

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family members by depriving them of the steady companionship and income of their addicted partners. It harms fetuses by exposing them to a toxic and permanently damaging prenatal environment. It harms children by subjecting them to the neglect and abuse of their drug-addicted parents. Thus, a second obvious reason to continue criminalizing drugs is that many persons deterred by the law from using drugs will thereby be prevented from harming others.

(3) The perfectionist argument

Just as there is broad agreement about what constitutes harm, so, too, is there broad agreement about many factors determining both good and bad lives. Most would agree that it is bad when people stumble through life with a blurred and distorted view of reality; bad when they cannot hold a thought from one moment to the next or follow a simple chain of reasoning; bad when they drift passively with no interest in pursuing worthwhile goals; and bad when they care more about the continued repetition of pleasant sensations than about the needs and interests of those who love and depend on them. Many would agree, too, that it is doubly bad when the reason people live this way is simply because they have squandered the chance to live better. Thus, a third main argument for retaining the drug laws is that many persons whom they deter are thereby prevented from wasting their lives.

II Criminalization and the Risk of Harm

There may be other arguments for continuing to criminalize drugs, but the three just mentioned are surely among the most influential. However, although Husak concedes that some such arguments may indeed explain “why rational persons might well decide not to use illicit drugs, or why the state may have good reasons to discourage people from using drugs,” he denies that any of them “provide a justification for punishing drug users.” Why, exactly, does he deny this?

As Husak agreeably acknowledges, his opposition to criminalization is not a matter of deep principle. He emphasizes that he is not a libertarian, and allows that he can easily imagine drugs so harmful that they should be criminalized: “[i]f a drug literally literally turned users into homicidal monsters, we would have excellent reasons to prohibit its consumption.” However, according to Husak, no actual drug satisfies this description because no drug causes harm in more than a small proportion of cases. As Husak points out, “[a]bout 15 million Americans used an illicit drug last year, on literally billions of occasions,” but “[v]ery few of these occasions produced any harm.” Because the antecedent likelihood of harm is small on any given occasion, Husak maintains that there is no “sense of harm . . . that can be invoked to show that I harm someone . . . when I inject heroin or smoke crack. At most, I risk harm to myself or to others when I use a drug.” This is said to undermine the case for criminalization because “[a]llmost no theorist has tried very hard to extend a theory of criminalization to conduct that creates a risk of harm rather than harm itself.”

Although Husak’s official aim in these passages is only to cast doubt on those defenses of the drug laws that appeal to the harm principle, his reasoning can also be extended to the paternalistic and perfectionist arguments. To extend it, we need note only that just as no single occasion of drug use is likely to harm anyone other than the user, so, too, is no single occasion likely either to harm the user himself or to reduce significantly the goodness of his life. Because the (un)likelihood of each effect is roughly equal, the threats that Husak’s reasoning poses to our three arguments seem roughly equal as well. This, of course, makes it all the more urgent to ask whether the reasoning can in fact be sustained.

Whatever else we say, we surely must insist that all reasonable theories of criminalization do allow governments to criminalize behavior simply on the grounds that it is too risky. We must insist on this not only for the boring reason that all reasonable theories permit governments to attach criminal penalties to drunk driving, discharging firearms in public places, and innumerable other forms of endangerment, but also for the more interesting reason that any decision to criminalize a form of behavior must be made before any occurrence of that behavior for which anyone can be punished. Such a decision must be based on an ex ante judgment about how risky the behavior is. Husak can hardly be unaware of this, and so his point can hardly be that we are never justified in criminalizing behavior merely on the grounds that it is risky. Instead, I take him to be making only the more modest (but still relevant) point that we are not justified in

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criminalizing behavior merely on the grounds that it imposes a risk of harm that is as small as the risk imposed by a single instance of drug use.

Should we accept this version of Husak’s claim? We might have reason to accept it if the relevant forms of low-risk behavior could all be assumed to be rare, for then the amounts of harm we would tolerate by tolerating them would also be small. However, drug use is of course not rare—Husak puts its frequency at billions of occurrences per year—so even if the risk on any given occasion is small, the total amount of harm must still be large. Even if, say, cocaine users harm no one but themselves in 999 out of 1000 cases, ten million uses of cocaine will still harm non-users ten thousand times. If there is any reason to take this number of harms less seriously when they result from ten million uses of cocaine than when they result from only ten thousand uses of some more reliably harmful drug, I must confess that I do not see what it is. Thus, if criminalizing the more reliably harmful drug to prevent this number of harms to non-users is legitimate—as it surely would be if each harm were on average as severe as the average harm done by cocaine—then criminalizing cocaine to prevent this number of harms must be legitimate too.

Even were prevention of harm to others the only legitimate rationale for criminalizing any form of behavior, the aggregative nature of the harms associated with drug use would pose a serious problem for Husak’s claim about risk. However, if, as I believe, the state may also legitimately criminalize behavior for paternalistic and perfectionist reasons, then aggregation will pose problems for his claim in at least four more ways. First, just as the infrequent but serious harms that drug users do to others are bound to add up, so are the infrequent but serious harms they do to themselves. Second, if each use of a given drug does a small amount of harm to the user’s brain or heart, then his frequent and repetitive use of that drug is likely to do his brain or heart a lot of harm. Third, even if no single instance of drug use has much impact on the goodness of a person’s life, a life entirely given over to drug use may be very bad indeed. And, fourth, just as there can be aggregation within each category of harm or bad, so, too, can there be aggregation across the categories. If the cumulative harm that drug users do to themselves is one reason to criminalize drugs, and the cumulative harm they do to others is another, and the cumulative badness of their lives is still another, then the cumulative weight of the three cumulative reasons must surely be greater than the weight of any single one alone.

III If Narcotics, Why Not Alcohol?

Given all this, I am unconvinced by Husak’s suggestion that the risks associated with drugs are too small to warrant their criminalization. However, another objection to their criminalization—an objection which Husak does not make explicit but which hovers near the edge of much of what he says—bothers me more. This is the objection that every argument that speaks for the criminalization of drugs speaks with equal strength for the criminalization of alcohol. If this objection can be sustained, then those who favor criminalizing drugs but not alcohol—as I do—are simply giving their preferred intoxicant a free pass.

Although the parallels between drugs and alcohol are pretty obvious, it may be useful to make a few of them explicit. To bring these out, we need only remind ourselves that alcohol, too, is famous for causing people to do things that culminate in fiery collisions, parking-lot shootouts, and destroyed immune systems; that alcoholics are well known for neglecting their partners and abusing their children; that alcohol creates an environment that is toxic and permanently damaging to fetuses; that being drunk cuts a person off from reality and prevents him from thinking clearly; and that alcohol harms the brain, impairs the memory, and, taken with ecstasy, damages the liver. We may remind ourselves, as well, that although most instances of alcohol use have no such effects, its use is so common—Americans drink alcohol billions of times per year—that the overall amount of harm and degradation that it causes is very large indeed.

The reason for treating drugs and alcohol differently will be that we can hold the relevant harms and bads below the threshold by legally permitting one or the other but not by permitting both.

Given these impressive similarities, the arguments for criminalizing the two intoxicants appear to stand or fall

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together. Thus, having claimed that the arguments succeed for drug criminalization, I may seem also committed to the view that they succeed for alcohol. However, because I find a world without beer too grim to contemplate, I want to resist this conclusion if possible. Is there any wiggle room here?

Given the structure of the pro-criminalization arguments, I think there may be. The salient feature of each argument is that it appeals to a kind of harm or bad that is (relatively) infrequent but whose overall total exceeds some crucial threshold. Thus, all three of my arguments leave open the possibility that the reason drugs take us past the threshold is that alcohol has already gotten us part of the way there. It may be the case, in other words, that either alcohol or the use of drugs by itself would not produce more harms or bads than a reasonable society can tolerate, but that in combination they would produce harms and bads that surpass the threshold. If anything like this is true, then it will not be at all inconsistent to advocate the criminalization of drugs but not alcohol. The reason for treating drugs and alcohol differently will be that we can hold the relevant harms and bads below the threshold by legally permitting one or the other but not by permitting both; the reason for continuing to criminalize drugs but not alcohol will be that this is easier and less costly than switching—easier because it avoids divisive legislative battles and the uprooting of entrenched traditions, less costly because it does not require the dismantling of a multi-million-dollar industry.

Is what I have just described anything more than a bare logical possibility? Would the decriminalization of drugs, together with the continued non-criminalization of alcohol, really take us beyond some crucial threshold of harm and badness? I must admit that I do not know. I do not know how to conceptualize the relevant threshold, how to quantify the harms and bads to which it applies, or (therefore) how to decide whether drugs plus alcohol would add up to one legal intoxicant too many. But although I am sure that I do not know these things, I am also sure that those who favor drug decriminalization do not know them either. Thus, as long as there is some level of harmfulness and badness beyond which criminalization becomes reasonable, the question of whether we should legalize both intoxicants, or one of the two, or neither will remain unsettled. Although the status quo is not easy to defend, it is not clear that Husak's relaxed alternative is really any easier.

NOTES

1 Douglas Husak, "Four Points about Drug Criminalization," Criminal Justice Ethics, 22 (this issue, 2003), pp. 3-11.
2 Peter de Marneffe, "Against the Legalization of Heroin," Criminal Justice Ethics, 22 (this issue, 2003), pp. 16-22.
3 Husak, "Four Points about Drug Criminalization," p. 6.
4 Id.
5 Id., p. 7.
6 Id., p. 6.
7 Id.
Against the Legalization of Heroin

PETER DE MARNEFFE

The case against drug legalization rests on the empirical premise that drug use would increase in the absence of drug control laws. Everything I know about human nature and the effects of drugs supports this. People use drugs because they are pleasurable, and because they are an effective antidote to anxiety, frustration, and feelings of inadequacy. Were drugs legal, they would be socially destigmatized and they would become easier to acquire, cheaper to purchase, and safer to use. Given the genuine psychological benefits of drug use, we can be sure that it would increase were drugs legalized.

The predictable increase in drug use alone, however, does not justify drug laws, nor does it provide a convincing argument against legalization. For one thing, drinking might decrease as a result of increased drug use, which would be a good effect if drinking is more harmful. Even if increased drug use would not have this indirect benefit, drug laws impose substantial burdens. They impose risks of criminal liability on those tempted to deal drugs, especially young men in poor urban neighborhoods; they create incentives for gang membership and gang violence; they cost money in law enforcement; they result in outlaw groups abroad having more money and influence than they otherwise would, with dangerous political consequences; they increase the risk of overdose and other health risks commonly associated with drug use; and, of course, they make an enjoyable recreational activity illegal. Given these burdens, the benefits of keeping drug use down must be substantial in order to justify drug control. What are these benefits? This depends on the drug in question. Here I focus on heroin.¹

The strongest argument against heroin legalization, in my opinion, is its predictable effect on the life prospects of young people in poor communities. A person who is ill-educated, whose skills are not in demand, who does not feel admired or respected by society, who has no clear path to social success or financial security, is likely to feel self-doubt and frustration in large measure. Such feelings can be relieved by heroin. Given the intense pleasure and temporary relief that heroin provides, many of those who try it in any community, rich or poor, are likely to use it again and some are likely to develop a habit. Why would this be bad? Habitual heroin use typically lowers a person's expectations of himself and decreases his concern with what others expect of him; it typically weakens a person's motivation to accomplish things and to meet his responsibilities to others. A general increase in the availability of heroin would therefore increase the risk to children of inadequate parenting, and would make it more likely that young persons disposed to drug abuse will not do what they need to do in order to get a decent education, develop good work habits, develop relationships with mentors, and so on.

By “drug abuse” I mean drug use that has negative consequences for the user or others that are sufficiently bad to make this use either imprudent or irresponsible. Poor people are not uniquely susceptible to drug abuse. Life is difficult, especially in adolescence. Heroin brings pleasure and relief. We can therefore predict that adolescents in every economic group would begin using it regularly if it were legalized. Some, perhaps most, would “mature out” of a habit, but drug abuse during crucial stages of a person’s mental and emotional development, whether by oneself or one’s parents, will typically have lasting consequences that are difficult to correct. The greater availability of heroin might distract some young people from problem drinking, but the impact of heroin abuse on a person’s development is arguably more severe because the degree of indifference it produces toward tasks and mentors is arguably greater. If it is, then the impact of legalization on poor communities is especially worrisome: because an increase in drug abuse there would further clog already narrow opportunities for achievement and success.² Legalization would no doubt pose

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less of a threat were wealth distributed more equally, but this is no argument for legalization until it is.

Perhaps I am wrong. Perhaps the legalization of heroin would not result in an increase in drug abuse. Perhaps an increase in drug abuse would not have a disproportionately negative impact on the poor. I am convinced, however, that these effects would occur. So I wish to consider the justifiability of heroin laws on these assumptions in order to make a philosophical point about the morality of drug control. I argue that if drug laws are morally objectionable, this is not because of some general principle of political morality such as Mill’s principle of anti-paternalism or Dworkin’s principle of neutrality; it is because the burdens they impose on individuals outweigh the benefits they bring to them as a matter of fact.

A coercive government policy violates a person’s moral rights, in my view, if and only if it violates a principle I call the burdens principle. This principle prohibits the government from adopting a coercive policy that burdens someone unless (a) someone would bear a burden in the absence of this policy that is at least nearly as great, and (b) there is sufficient epistemic reason for government officials to believe that someone would bear this burden in the absence of this policy. To say that a person is burdened by a policy is to say there is good reason for her to prefer her situation without this policy, that her situation is objectively better in some way without the policy. To say a person is burdened by the absence of a policy is to say there is good reason for her to prefer her situation with this policy in place, that it objectively improves her situation in some way. A coercive government policy violates a person’s moral rights, then, if the reasons for her to prefer her situation in the absence of this policy have substantially greater objective moral weight than any reason a person has to prefer her situation under this policy.

A natural objection is that this account of rights rules out all criminal laws since the burden imposed on those who are caught and punished for breaking a criminal law is generally worse than the worst burden someone would bear in the absence of this law. The burden of being imprisoned seems worse, for example, than a greater risk of being robbed. However, the situation relevant to assessing whether a criminal law violates the burdens principle is not the situation of the person who has been caught or who is already in prison; it is the situation of the person contemplating doing something illegal. With respect to laws against theft, the question is whether the reasons we have to want our possessions made more secure by law are at least as weighty as the reasons a person has to want the legal freedom to take from others whatever he wants when he wants it. In a society in which no one must steal to survive, this is true, and laws that prohibit theft therefore satisfy the burdens principle.

In my opinion, current heroin laws violate our moral rights because they license penalties for early offenses, and this makes the risk of imprisonment too great for those tempted to buy or sell heroin. Furthermore, some penalties are draconian and unfair because disproportionate. Current policy, however, is not the only form that drug control might take. Penalties for manufacture, sale, and possession of heroin might be gradual and proportionate: no one serves prison time for first or second offenses, provided he meets the conditions of probation, and prison terms after multiple offenses remain proportionate in length to the potential harm involved. Suppose a system of penalties like this one, if reliably enforced and effectively targeted at assets, would reduce drug consumption roughly as much as current policy does. This is not utterly fanciful, since criminologists take seriously the possibility that softer penalties—reliably enforced—are more effective than harsh penalties enforced erratically. If current laws reduce heroin abuse substantially, then, I think, a moderate system of penalties like this one might better satisfy the burdens principle and so respect our moral rights.

Of course it is commonly objected that drug laws “don’t work,” in which case an alternative policy that works just as well will not work either. The “don’t work” objection, however, might mean at least three different things. It might mean that drug laws do not eradicate drug use. It might mean that they do not decrease drug use at all. Or it might mean that they do not decrease it enough to justify the burdens they impose. Certainly drug laws do not eradicate drug use. Neither do property laws eradicate theft. This is no argument for their abolition. On the other hand, no informed student of drug policy supposes that drug laws do nothing to lower drug use. Since they make drugs scarcer, more expensive, more dangerous to use,
and reinforce social norms against use, they predictably reduce consumption, a prediction supported by the best available evidence. The "don’t work" objection should therefore be taken seriously only if it means drug laws do not reduce consumption enough to justify the burdens they impose. This may be true, but if the alternative policy I have sketched would reduce heroin abuse in poor communities roughly as much as current policy does, and current policy does reduce this drug abuse substantially, then I think it is not true.

The burden of criminal liability is not the only burden imposed by drug laws. Among other things, they make an enjoyable recreational activity more difficult, costly, and dangerous. A complete defense of any drug law must consider the greatest total burden it imposes on any individual and explain why this burden is justified by its greatest benefit to someone. My aim here is not to provide a conclusive defense of drug laws. It is to explain how they might be justified as compatible with respect for our moral rights. Drug laws are compatible with our rights, I maintain, if they satisfy the burdens principle. But some may think that drug laws are wrong because they are paternalistic or fail to be neutral toward different conceptions of a good life. Thus I should explain why I think a policy that satisfies the burdens principle is not open to criticism on these grounds.

I have given two arguments in favor of heroin laws.

Drug laws are compatible with our rights if they satisfy the burdens principle.

The first is that they would reduce the risk to children of inadequate parenting by reducing the likelihood that their parents will abuse heroin. The second is that heroin laws would reduce the risk to young people of developing a habit that undermines their own opportunities for future achievement and well-being. The first justification is not paternalistic in the way liberals have traditionally opposed, since it limits the liberty of adults to prevent harm to children. The second justification, however, may seem objectionably paternalistic in aiming to deter young adults from heroin abuse that undermines their own life prospects. Heroin addicts commonly oppose drug legalization when asked about it. This is noteworthy since the paternalism Mill opposes in On Liberty consists in policies that limit a person’s liberty for his own good against his will, and if a person supports a coercive policy, then the coercion it involves is not against his will in the relevant sense. But I will assume for the sake of argument that the policy I am considering can be fully justified only as benefiting some young adults who oppose it, and that it is therefore paternalistic in the way Mill opposed.

Paternalistic interference with a person’s liberty is wrong in my view only when it violates the burdens principle with respect to that person. A policy violates the burdens principle with respect to a person only if the (objective) reasons for her to want the government not to limit her liberty decisively outweigh every (objective) reason she has to want the government to limit it. When this is not the case—when a person’s reasons for wanting the government to limit her liberty in some way outweigh her reasons for wanting the government not to do so—paternalistic interference with her freedom does not violate the burdens principle, at least not with respect to her, and so does not violate her moral rights. My argument for heroin laws assumes that the reasons why some individuals want the manufacture, sale, and possession of heroin to be illegal do outweigh their reasons to want it to be legal. If so, then heroin laws do not violate their rights even if paternalistic.

A persistent objection is that if this kind of paternalism is permissible, there is no limit to the kind of paternalism the government may engage in. If the government is justified in prohibiting heroin because its habitual use is bad for the user, it must also be justified in prohibiting alcohol, tobacco, gambling, and fatty foods. Where will it all end? I will remain neutral here on the justifiability of alcohol prohibition, but I will concede that if the burdens principle permits the government to restrict the possession and sale of every product that provides an opportunity for self-destructive use, then it licenses too much government interference with our liberty. I should now explain, then, why I do not think the burden’s principle implies this.

I believe a person’s reasons for wanting the legal freedom to buy fatty foods decisively outweigh his reasons for wanting not to have this legal freedom, and that the burdens principle therefore prohibits paternalistic interference with a person’s freedom to buy fatty foods. To be sure, there are good reasons for a person who is tempted to eat himself into an early grave to want to have greater difficulty in acquiring unhealthy foods. But since the length of a person’s life is not the only factor in happiness, and eating, preparing, and sharing fatty foods is part of what makes life enjoyable, and a general legal
discretion over what foods to buy is valuable in other ways, I believe that paternalistic interference with the freedom to buy fatty foods is not in fact justifiable. My argument for heroin prohibition would suggest the opposite if our reasons to want the legal freedom to buy heroin were as weighty as our reasons to want the legal freedom to buy fatty foods, and our reasons to want not to have the legal freedom to buy fatty foods were as weighty as our reasons to want not to have the legal freedom to buy heroin. But I think this claim about the relative weight of reasons is incorrect. My argument for drug prohibition is that drug legalization would further dim the life prospects of young people in poor communities. The main reason to prohibit the sale of fatty foods is to discourage behavior that tends to shorten a person's life. I think the reasons for a young person to want to be deterred from engaging in conduct that closes important opportunities to achieve the good things in life going forward have objectively greater moral weight than the reasons a person has to want to be protected from engaging in conduct that will shorten his life. This is because a person will have already had most of the opportunities he will have to achieve and enjoy these good things by the time that eating fatty foods will have the effect of shortening his life. This is not to deny that obesity closes desirable opportunities, but these are not so numerous or important, it seems to me, as those closed by a failure to become educated and to develop self-discipline in adolescence and early adulthood, which I assume is a common consequence of habitual heroin use. It thus makes sense, in my view, to hold that while the burdens principle prohibits fatty food paternalism it permits paternalistic drug laws.

My argument for drug prohibition is that drug legalization would further dim the life prospects of young people in poor communities.

Here it is perhaps natural to ask: on what principle do I distinguish permissible from impermissible forms of paternalism? The formal answer is, on the basis of the burdens principle. But, some may wonder: on what more specific principle do I distinguish those forms of paternalism that violate the burdens principle from those that do not? The answer is, none. Judgments about whether a government policy violates the burdens principle rest on judgments about the relative weight of the relevant reasons. Judgments of this kind are not based on further principles; rather they are the basis on which more specific principles of liberty are justified. How, then, does one know whether a particular form of paternalism violates the burdens principle? By thinking carefully about the relevant reasons, checking for consistency and coherence, and discussing the matter with others. If this seems insufficient to ground a knowledge claim about our rights, it is important to recognize that no claim about our rights can be justified without relying on this process of reflection at some point. Thus while one might justify a rights claim by reference to whatever principle of liberty would be chosen in John Rawls's "original position," the argument for this principle from the original position must itself rely on assumptions about the relative weight of individuals' interests in liberty and other goods that are justified by this same process of reflection.

If someone's reasons for wanting the government to prohibit him from buying fatty foods have at least as much moral weight as any reason he has to want to be free to do so, then, it is true, the burdens principle does permit this form of paternalism, assuming it could be adopted and enforced at a tolerable cost to others. Some may conclude the burdens principle permits too much paternalistic interference and it is therefore a poor account of our rights. But on this assumption about the relative weight of reasons, it is not possible to identify anything wrong with this form of paternalism. If no one's reasons to want the government to reject a policy have greater moral weight than anyone's reasons to want it accepted, then no one has a decisive complaint against this policy, and if no one has a decisive complaint against a policy, it does not violate anyone's moral rights. It is thus only on the assumption that a form of paternalism does violate the burdens principle—whether it limits our freedom to buy fatty foods, cigarettes, or chances to win at the casino—that it makes sense to think it is wrong.

I have just explained why I do not think the paternalistic character of drug laws provides a decisive reason for objecting to them. Another general principle of political morality that drug laws might be thought to violate is the liberal principle of neutrality toward conceptions of a good life. Drug laws may seem to violate this principle because they make it more difficult to pursue certain conceptions of the good—those conceptions of good that endorse recreational drug use. But the principle of neutrality cannot be understood to rule out policies that make some conceptions of a good life more difficult to pursue as
a matter of fact since every defensible system of laws will make some conceptions of the good more difficult to pursue: those that require a system of slavery, for example. The principle of neutrality therefore must be interpreted to rule out only policies that cannot be fully justified by neutral reasons. Any policy that satisfies the burdens principle can be justified by neutral reasons, I would argue. So heroin laws do not violate the principle of neutrality, properly understood, if they can be justified in the way I propose.

Some advocates of neutrality may, of course, oppose all forms of paternalism, but it is important to make a distinction here between those kinds of paternalism that clearly violate the principle of neutrality as intuitively understood and those that do not. Among the paternalistic reasons that seem clearly non-neutral are “perfectionist” reasons: the reason to prohibit an activity or pursuit because it is intrinsically bad, for example, or degrading, ignoble, or worthless. Not all paternalistic reasons are perfectionist in this way, and some that do not seem relatively neutral, like the paternalistic reason of safety to require motorists to wear seatbelts. The argument I have given for heroin laws is paternalistic but not perfectionist. It holds that drug laws are justified by the negative effects the easy availability of drugs will have on the life prospects of the least advantaged. This is a neutral reason in my view because improving the life prospects of the least advantaged is a neutral goal. It is a “political value” in Rawls’s sense, one that might be appealed to in defending drug control while fully adhering to his idea of public reason.17

The argument I have given for heroin laws is paternalistic but not perfectionist.

I have just explained why I do not think heroin laws—justified in the way I have proposed—are wrong in being paternalistic or non-neutral. Some may think they are still wrong in sacrificing the liberty of the many for the benefit of the few. My argument does not suppose heroin laws are to everyone’s benefit. It does not suppose that most people who use heroin are likely to abuse it. Nor does it suppose that heroin poses such a serious threat to a person’s autonomy, by short-circuiting his capacities for rational self-governance and thereby turning him into a zombie, that the protection of everyone’s autonomy requires its prohibition. Indeed, my argument for heroin laws allows that they make some people worse off: those recreational users for whom pleasure is a good reason to use it, who would not abuse it if they did use it, but for whom the price, difficulty, and danger of its use is increased sharply by its illegality. For this reason it would be inaccurate to criticize my argument as involving an illegitimate generalization from worst-case scenarios. To the contrary, it supposes that the genuine risk to some individuals due to the substantial losses that would accompany an increase in heroin use suffices to justify limiting the liberty of everyone. But this may seem to make my argument even worse. I should therefore explain why I do not think it does.

The burdens principle is individualistic in nature, not aggregative. It requires that we evaluate policies by making a one-to-one comparison of the burdens on individuals. Only if the burden some individual would bear in the absence of a policy is great enough to justify the worst burden this policy would impose on anyone can this policy be justified. Aggregative considerations properly come into play only when the worst burdens that individuals would bear with and without this policy are roughly equivalent, and the numbers must be appealed to in order to break a tie.

Individualism cuts in two ways against aggregative arguments. If individualism prohibits enslaving a minority to benefit the majority, it also permits restraining the majority in other ways to benefit the minority, at least in principle. The mere fact that a policy burdens more people than it benefits is no objection; a policy is morally objectionable only if the burden it imposes on the many is at least nearly as great as the benefit it provides the few. Anti-discrimination laws, for example, limit the liberty of more people than they directly benefit, but this does not mean that they are wrong. They are permissible because the burden of being discriminated against is substantially worse than the consequent burden of having less associational freedom.

Consider in this connection how the burdens principle bears on the common objection that drug laws are costly. Suppose that heroin laws cost each of us an average of $50 a year in police, court, prison, and military expenditures, and foreign aid. Whether this is a decisive objection depends on how this cost is distributed and on whether the policy improves the situation of someone enough to justify this cost to everyone. To assess this from an individualistic perspective, one asks whether the benefit to someone is great enough to justify the loss to each of us of whatever money an equitable tax would impose on

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us, in addition to whatever other burdens this policy imposes. We do not aggregate here in comparing benefits and burdens; we compare the total burden on each individual one to one. If the reduced risk to someone of losses associated with drug abuse is worth at least as much to her as the amount that any individual is required to pay, then this expense is compatible with the burdens principle and so with the individualism essential to taking rights seriously, provided that it does not make the total burden on anyone too great.

One might still argue on purely individualistic grounds that drug laws unjustifiably deprive some individuals of the opportunity to enjoy heroin legally. The enjoyment of life is a good thing, and moderate drug use promotes it. But I think the government is justified in restricting this particular source of enjoyment, given the existence of so many other sources, if doing so is necessary to secure goods of greater moral importance. Successful emotional and intellectual development in adolescence and early adulthood are goods of greater moral importance. So if prohibition would substantially reduce the risk to someone of losing these goods, this can justify the consequent loss of this legal opportunity for enjoyment.

My argument against heroin legalization rests on a number of empirical assumptions. First, that legalization would result in an increase in heroin abuse with a disproportionate negative impact on the opportunities of individuals in poor communities. Second, that heroin use could be kept at its current levels by laws reliably enforced by a proportionate and fair system of penalties that targets assets effectively. Third, that the financial cost of enforcing these laws could be equitably distributed through a progressive tax without substantially reducing anyone’s standard of living. Many other empirical assumptions must be added to provide a conclusive case against heroin legalization. It must be assumed that the risks of gang violence can be kept at acceptable levels by effective neighborhood policing without drug legalization. It must be assumed that the health risks created by drug control can be reduced to acceptable levels by the distribution of public information and sanitary needles. It must be assumed that drug control can be effectively enforced without destabilizing governments in other countries and without greatly increasing the risk of terrorist violence here and elsewhere. And these assumptions are only the beginning.

The fact-dependence of this argument naturally raises the question of burden of proof: how much evidence must one have before being morally justified in supporting drug prohibition? I suppose a person is justified in supporting a coercive policy for a reason only if there is sufficient epistemic justification for her to accept the proposition that provides this reason. Whether this is true of the empirical assumptions I have made here is open to debate. What I have done is sketch an individualistic framework within which drug laws might be justified, consistent with taking our rights seriously. If this framework is sound, and my empirical assumptions are correct, and we are justified in believing them, the government may therefore prohibit heroin without violating anyone’s moral rights.

NOTES

[I thank Andrew Koppelman, Daniel Shapiro, and Leif Wenar for comments on drafts.]

1 I intend my argument here to apply also to morphine, heroin's less popular sibling, with the exception mentioned in note 8, below.

2 Acceptance of this argument, or something like it, provides the most plausible explanation, in my view, of why leaders of poor urban communities typically support drug laws, a fact that casts doubt on the charge that such laws are "racist."


5 Some may find it unnatural to say that a person is burdened by the absence of a coercive policy, but since I think that individuals would be burdened by the repeal of some coercive policies, like laws against theft, I think it makes sense to say that individuals can be burdened by the absence of a policy.

6 In allowing penalties for possession I do not directly disagree with the claim that use should not be criminalized, which Douglas Husak argues ("Four Points About Drug Decriminalization," Criminal Justice Ethics, 22 [this issue, 2003], pp. 3-11). The goal of the drug prohibition I defend here is not to reduce use per se, but to reduce certain kinds of abuse by reducing drug availability and by making drug use more burdensome legally and socially. If drug abuse would be substantially reduced in these ways, by a gentle system of penalties for possession combined with stiffer penalties for manufacture and sale, I would defend penalties for possession on this ground. By a "gentle" system of penalties, I mean one that gives everyone convicted the probationary opportunity to avoid imprisonment by accepting some form of treatment, per-


8 Another objection to current policy is that it makes illegal the medical use of heroin for the treatment of pain. This objection is compelling only if heroin is more effective than morphine. If not, then the current policy of permitting the medical manufacture, sale, and possession of morphine suffices to meet the medical needs of patients. If heroin is more effective, then it should be treated by the law in the same way morphine is now. For an expression of doubt about the greater effectiveness of heroin, see John Kaplan, *The Hardest Drug*, Chicago: The University of Chicago Press, 1983, p. 6.

9 Three facts are commonly cited as evidence that heroin use varies in proportion to availability, which, it is assumed, drug prohibition reduces to some degree. First, the percentage of American troops who used heroin in Vietnam, where it was easily available, is much higher than the percentage of the same group who used the drug before and after their service there. Second, opiate use is much higher among medical professionals, who have much greater access to opiates, than it is in the general population. Third, alcohol consumption fell substantially during Prohibition. All three arguments are endorsed by Erich Goode, *Drugs in American Society*, 4th ed., New York: McGraw Hill, Inc., 1993, pp. 375-76. See also Kaplan, *The Hardest Drug*, p. 113, for an endorsement of the first two arguments.

10 It is sometimes said that since heroin is already available in poor urban communities, drug laws do little to reduce drug consumption there, but this reasoning is flawed in at least three ways. First, while heroin is relatively available in some poor urban communities, it is not nearly as safe, plentiful, and affordable as it would be if sold legally along with liquor or candy at the corner store (Kaplan, *The Hardest Drug*, pp. 123-24). Second, although heroin is now quite available in some poor urban communities, it is much less available in others (id., p. 88). Third, even in those poor communities in which heroin is now quite available, the expense, unreliability, danger, and inconvenience of supporting a habit remain a strong incentive to stop using it (id., p. 125).

11 Note that in both cases the relevant burden is the greater risk of loss under a policy of legalization, and not the actual loss that results. If the relevant comparison were of the actual losses from prohibition and legalization, then drug laws would surely violate the burdens principle because, to make just one comparison, death from drug-related gang violence is worse than inadequate parenting.


14 Note that I do not say that the burdens principle is violated if the reasons someone has to want the government not to limit her liberty outweigh every reason she has to want it to do so. I think this claim about reasons holds for many recreational drug users, but the burdens principle is violated only if their reasons to want drugs to be legal decisively outweigh everyone's reasons to want it to be illegal, a claim that I believe to be false.

15 Perhaps it is worth observing here that while alcohol prohibition might be permitted by the burdens principle, the argument I have given for heroin laws does not alone warrant the conclusion that it is. This is because the legal prohibition of a drug is likely to be far more effective in reducing abuse where its use is already generally believed "wrong." This is now the case with heroin but not with alcohol. Although the (greater) deterrent benefits of reducing heroin abuse might now be sufficient to justify continuing heroin prohibition, the (lesser) benefits of reducing problem drinking might not be sufficient to justify a return to alcohol prohibition, even if drinking is equally harmful. The reason I remain neutral on the justifiability of alcohol prohibition is that I suspect that problem drinking is more harmful on average than heroin abuse is, especially to others.


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Individual Rights, Drug Policy, and the Worst-Case Scenario

There is a lot to admire about Peter de Marneffe’s paper. It takes seriously the harm produced by drug prohibition. It does not falsely assume, as does much of the literature critical of drug legalization, that most illicit drug users—in this case, heroin users, who are his focus—are addicts. His essay also does not assume that moderate, controlled use of illicit drugs, specifically, heroin, is impossible. Furthermore, his argument does not rest on the assumption that drug legalization will bring about an epidemic of addiction. De Marneffe is thus correct when he says that “it would be inaccurate to criticize my argument as involving an illegitimate generalization from worst-case scenarios.” In addition, his paper presents what, to the best of my knowledge, is an original argument, something that is very rare in discussions of drug policy.

Unfortunately, de Marneffe’s argument rests on a questionable theory about rights, or, more specifically, a theory about how we determine whether or not a government policy violates individual rights. I will argue that this view is mistaken, and thus that his argument fails.

One terminological clarification is necessary before I begin my discussion. De Marneffe says that he objects to legalizing heroin, but he never defines the term precisely and there is no standard meaning for drug “legalization.” However, at the very least, the legalization of a certain drug would have to include the freedom to sell and manufacture it, since the freedom to produce something is the sine qua non of a legal market. One could distinguish further between a policy of restricted legalization—in which it is legal to manufacture and sell a certain drug, but purchase is restricted via state licensed gatekeepers (doctors, pharmacists, and such like)—and a policy of full legalization in which a drug’s legal status is similar to that of alcohol—manufacture and sale is legal, and it is legal to purchase it in ordinary retail outlets. I examine the distinction between these two different policies of drug legalization toward the end of this essay, but for most of my discussion, I simply refer to drug legalization without distinguishing its different forms.

Turning now to de Marneffe’s argument, he maintains that legalization of heroin will increase drug use, and that some of that increased use will result in a net increase in habitual or addictive heroin use. Heroin addiction is bad because it typically lowers a person’s expectations of himself and decreases his concern with what others expect of him. In addition, it typically weakens a person’s motivation to accomplish things and to meet the expectations of others. Heroin addiction thus would, first, increase the risk to children of inadequate parenting, and, second, make it more likely that young persons disposed to drug abuse—particularly in poor, economically depressed communities—would not do what they need to do in order to get a good education and develop good work habits. De Marneffe asks us to assume that these claims about heroin addiction are true, and to assume that the policy he favors—retaining criminal penalties for heroin use, manufacture, and sale, but reducing them so that they would be proportional and would be imposed only for repeated violations—would reduce consumption by roughly the same amount as current laws. With these background assumptions in place, he proposes the burdens principle: a coercive government policy violates a person’s moral rights if the reasons for someone to prefer her situation in absence of that policy have substantially greater objective moral weight than any reason someone has to prefer her situation under this policy. Since the reasons that those who would be prevented from becoming heroin addicts under de Marneffe’s drug policy are, he thinks, objectively far weightier than the reason anyone has to prefer a policy of legalization, he concludes that his policy would not violate individual rights.

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I will not challenge de Marneffe's view that legalizing heroin will increase heroin addiction, nor his view that the policy he proposes will reduce consumption as much as the present policy of drug prohibition. My objection is to the burdens principle. Notice, first, that the argument de Marneffe presents for heroin laws is generalizable across a very wide variety of cases. Any time the legal freedom to engage in a certain activity enables someone—and de Marneffe's argument is literally about some one—to significantly mess up his life or part of his life, the argument implies that restricting or eliminating that freedom is justified. De Marneffe misses the way his argument is generalizable because he focuses on an example—the freedom to overeat—which he thinks mainly concerns shortening one's life, rather than restricting one's opportunities or worsening one's life prospects. I am fairly sure that de Marneffe is wrong about overeating—my casual inspection of morbidly obese people at malls in West Virginia suggests to me that their weight is restricting their opportunities and life prospects, and the scientific literature seems to bear this out as well—but even were de Marneffe right about overeating and obesity, there are plenty of other activities in which bad choices or destructive behavior by young people can restrict or close off opportunities to achieve good things in life. Consider, for example, compulsive gambling, massive debt, poor and reckless investment decisions, and psychologically harmful and destructive romantic and sexual choices or partners—the list could be quite large, since there is no shortage of ways in which people can embark on activities that make their lives significantly worse for large periods of time. As much as these destructive habits or activities are similar to heroin addiction in their ability to seriously mess up someone's life (or part of his life), it is hard to avoid the conclusion that the logic of de Marneffe's argument supports restricting or prohibiting a significant range of peaceful activities. Since de Marneffe said that there would be something wrong with the burdens principle were it to imply that the freedom to buy and sell fatty foods should be restricted or prohibited, then he would also agree that there would be something wrong with that principle were it to imply restrictions or prohibitions on the freedom of adults to gamble, obtain credit cards, invest in the stock market, have sex, or get married.

De Marneffe might reply that heroin addiction is different because it causes more irreversible and terrible losses than any of the other examples I have given. It permanently closes off opportunities for young people, particularly poor young people, whereas compulsive gambling, or bad economic, sexual, and romantic choices do not. But were de Marneffe to go down this path, he would abandon the realistic and accurate picture of heroin use for which I praised him at the beginning of this essay. Heroin addiction is not a permanent condition; most people who use heroin heavily eventually stop doing so. The claim is sometimes made that "once a heroin addict, always a heroin addict," but that is false. De Marneffe briefly alludes to this when he refers to maturing out of addiction—this is the label that is sometimes attached to the observation that as people get older and acquire more responsibilities they tend to outgrow or overcome addiction problems. Thus, although heroin or other drug addictions are hardly to be recommended, they are not essentially different from other bad habits or destructive choices that harm part of one's life or close off opportunities for a while, but do not, as a rule, permanently foreclose the possibility of a good life.

Since there are always some people who make a mess of their lives, or part of their lives, the burdens principle has the potential to make any particular right insecure.

Another reply de Marneffe might give to my reductio is that the burdens principle cannot be used to justify wholesale restrictions on the freedom to pursue activities that are part of an enjoyable and rewarding life because there are reasons to allow people the freedom to pursue a wide variety of activities, reasons that are objectively weightier than preventing someone from making bad or destructive choices or falling into addictions. The burdens principle, he might add, can be used to justify only a few select restrictions on freedoms, because only if there are many sources of enjoyment or satisfaction in life are the reasons to pursue a potentially destructive source of enjoyment, such as the freedom to buy heroin for pleasure, less weighty than the reasons to restrict such freedom in the name of preventing people from falling into a destructive habit. In addition, de Marneffe could point out the overwhelming practical problems in trying to restrict some of these activities.

This reply might work, and in any event I do not want to rest my argument solely on a reductio. It is what lies behind the reductio that is important. What lies behind it

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is that the burdens principle must be mistaken because it makes a person's freedoms hostage to the worst thing someone—and it could be just one person—can do with that freedom, even if that person's mistakes are in no way connected to other people's more responsible use of their freedom. It is very hard to see why one's freedoms should be held hostage this way. Since there are always some people who make a mess of their lives, or part of their lives, the burdens principle has the potential to make any particular right insecure.

To make this clear, let us return to heroin. Suppose I am a moderate or occasional user of heroin. My use of it does not disrupt my life. The burdens principle tells me that I have no right to buy or use heroin for pleasure, because if someone else had such a right that person would end up addicted to it for part of his life and possibly worsen his life prospects as a result. Furthermore, this is true even though there are a lot more people like me than there are who become heroin addicts. But why? My exercise of my freedom is not causing them to mess up their lives. Indeed, what I am doing may have no effect on them. As far as I can tell, the only argument de Marneffe offers to justify restricting the liberty of the many because a few use that liberty to mess up their lives, or part of their lives, is when he refers to anti-discrimination laws. But his example fails. Assume for the sake of the argument that laws that ban discrimination by private parties and businesses are justified, even though they restrict freedom of association and private property rights. Such laws are justified because the exercise of associational freedoms and private property rights is directly causing a harm to the minorities that are discriminated against by the exercise of those freedoms and rights. This is not a parallel to de Marneffe's burdens principle, which licenses restrictions on the freedom of responsible or moderate heroin users even though their heroin use has no connection with the heroin use of an irresponsible or addicted heroin user.

Since the burdens principle holds an individual's rights hostage to the person who is the most irresponsible and destructive in using her freedom, it is a fair criticism to say that the burdens principle is incompatible with the value of individualism, contrary to what de Marneffe argues. De Marneffe says that because the burdens principle is not aggregative, it is individualistic. But there is more to the value of individualism than simply blocking aggregative arguments. If one values individualism, one places a very high value on the ability of people to lead their own lives, pursue peaceful projects, and so forth, free of the coercive interference of others. That value is not deemed important if it can be limited solely because someone else is a hard luck case. At the beginning of my paper I stated that de Marneffe was correct in saying that his argument did not rest on the illegitimate generalization of worst-case scenarios, but now we can see that his argument rests on the existence of worst-case scenarios, and this does not seem to be an improvement. Of course, it could turn out to be the case that the reasons for the hard core addict to oppose heroin legalization are not objectively weightier than the reason for others to prefer a policy of legalization, but I would not want to bet on that, and in any event, the problem with the burdens principle is that it always has the potential to hold the right to pursue peaceful projects hostage to the existence of people who make a mess of their lives. Even if that potential is not realized, there is still something objectionable and anti-individualistic in a theory of rights that has this feature—just as there is something objectionable and anti-individualistic about those consequentialist theories of rights that have the potential to hold individual rights hostage to how the calculations of aggregate welfare play out.

There is more to the value of individualism than simply blocking aggregative arguments.

This leads to me to my final point, which I put forth tentatively. It may be that part of the reason that the burdens principle holds one's rights hostage to the existence of the person who fulfills the worst-case scenario is because de Marneffe reverses the relationship between individual rights and justification or evaluation of coercive government policies. The usual way of understanding this relationship is that, first, one justifies a theory of basic rights, and second, one evaluates or justifies various coercive government policies based on how they compare with alternative policies as far as respecting or violating these rights. (Of course, this evaluation or justification may be circumscribed by an "other things being equal" clause, since, depending on one's political philosophy, other standards besides respecting individual rights may be relevant to justifying or evaluating coercive government policies.) But if I understand de Marneffe correctly, according to his view one decides whether or not one has a right (or more precisely, whether a govern-
ment policy violates a right) by seeing how the coercive government policy stacks up in terms of the objective weight of an individual’s reasons to prefer or not prefer a certain policy. The individual’s reasons to prefer or not prefer coercive government policies determine whether or not one has a right or whether that policy violates a right. This may be part of the explanation of why rights are rather insecure when supported by the burdens principle, since, given certain assumptions about the objective weight of reasons, the reasons for any particular individual to prefer the freedom to choose a certain way of life may be less weighty than someone else’s reasons to prefer being prevented from having the freedom to mess up his life. Whereas if individual rights are justified prior to the evaluation or justification of coercive government policies, then once these rights are justified one’s reasons to prefer a government policy that violates them become largely irrelevant. Admittedly, this is a tricky matter, for, as de Marneffe rightly points out, at some point in one’s arguments about individual rights, one has to make judgments about the weights of various reasons. Furthermore, the fact that de Marneffe reverses the usual way of understanding the relationship between individual rights and the evaluation or justification of government policies is not, by itself, objectionable. Originality in political philosophy is hardly a sin, to put it mildly. However, I do not see that de Marneffe has given us any reason to reverse the usual relationship. Because the usual way seems commonsensical, and because it is more likely to make individual rights more secure against preferences for and against coercive government policies, I am inclined to stick with it.12

Once one sticks with an individualistic theory of rights that justifies rights prior to evaluating reasons for or against coercive government policies, I strongly suspect that it will provide support for the legalization of drugs that are now illegal in the United States, such as heroin, cocaine, and, in many states, marijuana. Whether it is Mill’s harm principle, or a Lockeian view of self-ownership, or a Kantian theory about respect for persons or treating people as ends-in-themselves, any individualistic theory of rights will have to consider the right to put what one wants into one’s body as basic.13 Such an approach will rule out the crime of drug possession, and will view the right to buy and sell drugs as not fundamentally different from the right to buy and sell any other ordinary commodity, thus ruling out the criminalization of these activities as well. Whether it is preferable to have full legalization—treating these drugs the way alcohol is now treated—or to have restricted legalization whereby one can only purchase drugs via prescription, is a separate question, but unless one assumes that the typical user is likely to be in the grip of an involuntary addiction,14 it is hard to see why one has a right to obtain such substances only if one is ill or presents oneself as ill. This, of course, is only an argument sketch, and is thus not likely to be compelling, but I hope that it is sufficient to indicate how an individualistic theory of rights would shift the philosophical center of gravity toward full legalization. The originality of de Marneffe’s approach is that without assuming that the typical user of illegal drugs—specifically heroin—is an addict and without invoking aggregative considerations about the negative social consequences of legalization, he nevertheless presents a rights-based argument against legalization. If I am correct that the burdens principle that undergirds his theory of rights is mistaken, then, without the use of a claim about ubiquitous addiction or invocation of negative aggregate consequences, an individualistic theory of rights is likely to look very kindly upon the option of full legalization.

NOTES

1 Peter de Marneffe, “Against the Legalization of Heroin,” Criminal Justice Ethics, 22 (this issue, 2003), pp. 16-22.
2 Id., p. 20.
3 Id.
4 Id.
5 However, as I point out in note 12 below, there is an interpretation of the burdens principle in which it is unobjectionable. In that case, my objection concerns de Marneffe’s account of the weight of objective reasons.

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6 At one point de Marneffe does say that obesity closes desirable opportunities, but this seems merely a passing remark, since he also says that the “main reason to prohibit sale of fatty foods is to discourage behavior that tends to shorten a person’s life,” “Against the Legalization of Heroin,” p.12, my emphasis.


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8 Indeed, de Marneffe concedes that his argument might support alcohol prohibition, which is quite a significant addition to the list. “Against the Legalization of Heroin,” p. 22, note 15.


10 De Marneffe suggests something like this when he says that “the government is justified in restricting this particular source of enjoyment [heroin use], given the existence of so many other sources.” “Against the Legalization of Heroin,” p. 21.

11 Lest this point become a purely terminological one, I could rephrase my argument and say that if individualism means only that aggregative arguments for restricting freedom are illegitimate, then a deeper or different sense of individualism will also block restrictions on freedom based on the existence of hard luck cases.

12 At one point, in justifying the burdens principle, de Marneffe says: “If no one’s reasons to want the government to oppose a policy have greater moral weight than anyone’s reasons to want it, then no one has a decisive complaint against this policy; and if no one has a decisive complaint against a policy, I do not see how it could violate anyone’s moral rights,” “Against the Legalization of Heroin,” p.19. I would say, however, that even if someone’s reasons to want the government to reverse the policy of heroin prohibition are not weightier than the heroin addict’s reason to want heroin prohibition to remain, there could still be a decisive complaint against heroin prohibition—namely that it violates individual rights. I view matters this way because I think of the justification of individual rights as taking justificatory priority over individuals’ reasons to prefer or not to prefer a certain policy, or to put matters another way, as setting constraints within which individuals reasons to evaluate those policies take place. In conversation, de Marneffe told me that the burdens principle couldn’t be applied prior to the level of evaluating government policy. If so, then the claims he made in the quotation I cited above would be correct. Indeed, they would be trivially true, since the weight of reasons would presumably include all the considerations that are relevant to justifying individual rights in the first place. If that is the way the burdens principle is used, then the burdens principle is unobjectionable and my criticism would shift to de Marneffe’s account of the weight of objective reasons. I would argue that, at the level of reasons that are relevant for justifying individual rights, no individualistic theory of rights can maintain that the reasons for restricting the freedom to pursue a potentially destructive habit or activity outweigh the reasons for the freedom to engage in that habit or activity. If the former did outweigh the latter, then the individualism that is at the heart of a theory of individual rights would be gone.

13 Douglas Husak, in “Four Points about Drug Decriminalization,” Criminal Justice Ethics, 22 (this issue, 2003), p. 5, says that such a right would have to be qualified by what occurs after one puts something into one’s body. To some extent I agree: if putting something in one’s body caused one to lose the ability to choose to do so in the future, or if it caused one to act in an uncontrollable manner, then such a right might not apply to certain substances. But setting aside such cases, a right to put whatever one wants in one’s body seems to me a very strong candidate for a basic right.

14 Usually the assumption about involuntary addiction rests on a view that illegal drugs such as heroin and cocaine are highly addictive or inherently addictive because of their pharmacological properties. I argue against that view in “Addiction and Drug Policy,” in Morality and Moral Controversies, ed. John Arthur, 6th ed., Upper Saddle River, NJ: Prentice Hall, 2002, pp. 399-404.
Epilogue: What Good Are Drugs Anyway?

LESTER H. HUNT

I have learned a great deal from this lively exchange of views. One thing I found oddly instructive was the extent to which the general outlines of the discussion conformed to my already existing expectations. Despite the fact that the exchange showed substantial originality on the part of our four discussants, and a number of surprising turns of thought, the broad features of the arguments on both sides were in several respects what I thought they would be. For instance, both the contributors who spoke against decriminalization—George Sher and Peter de Marneffe—presented the issue as a question of the consequences of drug use.1 The issue, for both of them, is to a great extent a matter of weighing goods and bads. This is not very surprising. The case for making (or keeping) drugs illegal seems, at least on a first glance, to be best supported by weighing the publicized harm that they do. Further, neither Sher nor de Marneffe relied on deontic concepts, such as individual rights, as ideas that support their side of the issue. Although de Marneffe did discuss rights at some length, his point was to defend against rights-based objections to drug laws. This, too, is not at all surprising. Since drug laws are instances of state coercion against individuals, we would naturally expect the notion of individual rights to be most useful to those who oppose such laws. Further, both Sher and de Marneffe offer little or no support for the idea that drug use might yield significant benefits that should be weighed in the balance against the bad that drugs sometimes do. De Marneffe characterizes drug use simply as an "enjoyable recreational activity." Sher describes drugs as producing "pleasant sensations," and in the question and answer period when these papers were first presented in Philadelphia, he acknowledged that their use could be "fun," but he made no other mention of beneficial results that they might produce. Again, this is not terribly surprising. If the case against drugs is to be based on the evils they bring with them, then the case against them is the stron-

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flourishing. To describe them merely as recreational is to trivialize them misleadingly. My point is not to defend illicit drugs or to present an argument for making them legal. The point is that, if we gain some insight about how drugs might play a role in a conception of human flourishing, we will see that it makes a difference what one’s conception of flourishing is—in fact, it might make a big difference.

First, I will need to explain the meaning of a term that is already familiar. Everyone knows what moods are. They are relatively enduring emotions or emotion-like states. Like emotions, moods include feelings that seem to be rather strongly influenced by states of the body. Many people find that they are most likely to be irritable (irritability being an obvious example of a mood) when they are hungry or tired, or more likely to be depressed (another obvious example) early in the morning when they are still barely awake. Further, and this is another way in which they resemble emotions, moods are characterized by the way things seem to us when we are under their influence. When we are feeling irritable, things are more likely to seem offensive or abhorrent. When we are in a depressed mood, nothing seems interesting or worthwhile. We may know, intellectually, that things are really not as they seem at the moment, but this knowledge is often maintained only with effort. A mood often has the power to overwhelm and submerge the thoughts that compete with it.

Something that helps to free us from the tyranny of our moods thereby contributes to our well-being in a way that is much more pervasive than something that is merely fun.

Our moods tend to have a strong influence on our lives, and this influence is pervasive. They affect not only our thoughts and beliefs, but our deliberations, choices, behavior, and, of course, our passing emotions. As the weather is to our physical environment, so are our moods to our inner lives: they are determinative. They are also rather like the weather in another way, in that they tend to be outside our direct control. We often cannot change our moods simply by choice, nor do we ever seem to experience a mood (or snap out of one) simply because we believe we should. Though moods have a considerable measure of control over us, we have rather poor control over them.

To experience a mood is to experience one’s powerlessness. Human beings do not tolerate this sort of powerlessness very well, and we have managed to find many activities through which we can indirectly influence our moods. Our thoughts have some effect on our moods, and consequently we can have some small measure of control over our moods by simply avoiding thoughts that enhance the moods we wish to avoid. In addition, there are a number of remedies that operate on the body rather than on the mind, including taking hot baths or steam baths, taking cold showers, eating, fasting, resting or sleeping, taking physical exercise, meditating, doing things that are monotonous or repetitive, and doing things that are new and interesting. Further, there are a number of helpful measures that do not seem to be either purely mental or purely physical, such as dancing, listening to music, and watching television. There are many different ways in which people are apt to find their moods deficient, and there seems to be little that they are unwilling to do in order to bring about improvements.

By now it is perhaps obvious what my main point is: taking psychotropic drugs is one of the activities through which people indirectly alter their moods. Drugs can constitute a sort of technology of mood adjustment. If this is true, then there are some rather obvious ways in which they might be thought to make a substantial contribution to human well-being. First, as is implied by what I have already said, drugs, like all technology, potentially expand human liberty. Admittedly, they do not expand what is traditionally called “negative liberty,” the sort of freedom that consists of the absence of coercion by others. Rather, they extend “positive liberty,” the sort of freedom that consists in our capacity or power to do what we wish and choose to do. This is important because positive liberty, unlike negative liberty, seems to have an internal relation with happiness. The various powers that expand our positive liberty—wisdom, wealth, health, self-control, and so forth—all seem to be constitutive elements of well-being. Further, the part of life within which this technology extends our liberty—namely, the realm of our moods—seems on the face of it to be profoundly relevant to human well-being. Though the precise nature and extent of this relevance is of course disputable, I think most philosophical theories of human flourishing would imply that moods have a substantial importance. This is the view of common sense as well. On the face of it, something that helps to free us from the tyranny of our

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moods thereby contributes to our well-being in a way that is much more pervasive than something that is merely fun. Fun is after all a mere episode, a sort of psychological holiday that transpires while the more serious business of life is on hold, while mood is something that is always with us and affects the quality of our experience in every aspect and all the time.

There is a great deal more to be said about this, but I think it is already clear that a case can be made for the idea that drugs can make a significant contribution to human flourishing. This contribution has to do with two factors that would appear to be central to any reasonable conception of flourishing: the degree of the individual’s freedom and the quality of the individual’s feelings. At the same time, a number of objections to this case come readily to mind.

First, it might be objected that the description I have given of the value that drugs is wildly overgeneralized. It might be sensible enough if applied to drugs like nicotine and caffeine, since it probably is true enough that these drugs tend to be used to make adjustments in our moods, but the sorts of drugs that we make illegal are not used that way at all. They are used to bring about inebriation or intoxication, and this seems to be very different from mood adjustment. In response to this, I need to clarify what I have been trying to say. I do not mean to assert that mood adjustment is the only use to which these drugs can be put, but rather that it is arguably a way in which they contribute to the human good. This would commit me to saying that they can be used for this end and further that they effectively accomplish it.

Nonetheless, despite this slight refinement in the point I am making, it might be said that my argument is still absurdly over-broad, since LSD and heroin are not means of mood adjustment at all. I would reply that, as a matter of fact, that is exactly what they are. The states of mind that are variously referred to as inebriation or intoxication are moods as I have defined them. They are of course extreme states of mind, rather remote from the ones we normally experience, and they make it difficult or impossible to carry on many normal activities and mental processes. Nonetheless, there are times when some people prefer them to the states of mind they would otherwise be in. When Arthur Rimbaud said that he took drugs to “systematically derange” his senses, he was saying that he found his normal mental state deficient (on occasion, at least) by virtue of its not being deranged, and that drugs provided the needed adjustment.

This of course suggests a further refinement in my thesis: the mood adjustments of which I spoke encompass enormous differences of degree. They vary from subtle alterations at one end of the scale to blowing one’s mind at the other. Drugs offer us the opportunity to bring about a very great range of effects, depending on what the drug is and how it is taken.

Another objection to my account of the good of drugs denies that drugs enhance positive liberty. Addiction, after all, is a way of lacking positive liberty. Addiction indicates a certain incapacity to do what one chooses or wishes to do. Addicts cannot quit the habit even if they want to: addiction constitutes a loss of will-power. Since will-power enhances (positive) freedom, drugs make us less free. I think this objection probably captures one of the reasons why drug laws exist. Such laws represent a Rousseauian attempt to force people to be free: drug laws take away some negative liberty (through government coercion) in order to enhance positive liberty, by increasing the extent to which people possess the control over their own lives that only an non-addicted person can have.

The diminution of freedom that addiction is said to bring is typically a foreseen effect of the behavior that triggers it.

Nonetheless, even if everything in this objection holds, my account still shows that the idea of positive freedom does not weigh in only on the side of drug prohibition. Not only do drugs tend to take away some of our capacity to control our behavior, but they also enhance our capacity to feel the way we wish we could feel. Further, the statements in the above objection are considerably overgeneralized. Not all illicit psychoactive drugs are strongly addictive. Further, there are probably addictive drugs that have non-addictive uses, and the degree of addictiveness of any one substance probably depends on how it is taken and on the individual who is taking it. What is perhaps even more important is the fact that the diminution of freedom that addiction is said to bring is typically a foreseen effect of the behavior that triggers it. Even if the behavior of an addict is involuntary, once he or she is addicted, their becoming addicts is not involuntary. If it is true that such conduct on my part does destroy my liberty, it is at least arguable that, because it is a loss that I knowingly bring upon myself, the loss of freedom

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involved is less great than the one I would suffer were someone else to wrest a powerful technology out of my hands.

In the final analysis, the objection to my account that may well carry the greatest weight for many people will be that certain states of mind—namely intoxication or inebriation—have no value for human beings at all. To experience such states of mind is to diminish or obliterate certain qualities that are essential to human happiness and dignity, qualities like self-control and mental lucidity. The technology of producing such states of mind therefore makes no significant contribution to human well-being and its coercive suppression involves no significant loss and, in fact, constitutes a pure gain.

Rather obviously, these claims are open to charges of over-breath: some psychoactive drugs, both licit and illicit, can be taken in ways that seem to enhance mental functioning and they are often used for precisely that reason. This point will have little effect on those who are impressed and upset by the fact that various other drugs are generally used only to induce extreme states of mind. This use may be as much due to the subculture of the drug user as to the physical properties of the drug itself: some of these drugs are used in the context of a view of life in which intoxication and ecstasy are viewed as valuable and worth pursuing. Of course, to those who wish these drugs to be suppressed, such a perspective is simply wrong—what I have described as states of ecstasy would better be characterized as episodes of slack-jawed stupidity or dangerous debauchery. In a way, however, this fact lends support to the simple point I wish to make here: the debate about the permissibility of using drugs rests in part on precisely such differences in point of view. It depends to a significant extent upon disagreements about what things are worth pursuing, about the content of the human good.

NOTES


3 The only fairly clear exception I can think of is Stoicism, which maintains that virtue is the only thing that is needed for flourishing. I would expect my observations here to have little effect on people who hold Stoic opinions on this subject. Such people, however, seem to be extremely rare.


5 To this class belong all the drugs that are often classed as “stimulants,” including illicit ones such as cocaine and amphetamines as well as licit ones such as nicotine and caffeine. See Marcus Boon, The Road of Excess: A History of Writers on Drugs, Cambridge, MA: Harvard University Press, 2002, ch. 4: “Induced Life: Stimulants and Literature.”