

DRUG POLICY AND THE LIBERAL SELF

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John Stuart Mill's harm principle is now in a peculiar predicament. Mill famously wrote that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."¹ The principle is very widely believed: each year at least one of my students recites the principle as if it were part of the Constitution, and everyone else in the room nods with approval. Yet our practices are inconsistent with the principle, and very few people are troubled by this. Common sense seems to dictate that we ought not to completely legalize heroin, or gambling, or prostitution, or gladiatorial fights to the death.

Thus Mill has simultaneously triumphed and failed. Unless the liberal can explain what limits the scope of the harm principle in these cases, the principle itself loses its force. A principle is weak if it must always contain the vague proviso "except sometimes."

Our present regime is subject to a powerful Millian critique, but this critique cannot be persuasive until the bounds of the principle are better mapped.

One potent area of application is American drug policy, the biggest policy disaster since Vietnam.² The United States now spends about \$35 billion a year to control the traffic in illegal drugs, compared with \$10 billion in the mid-1980s.³ The prohibition has called vast criminal enterprises into existence. In 1980, about 31,000 people were incarcerated for drug of-

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¹ JOHN STUART MILL, ON LIBERTY 68 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

² Another potential boundary of the Mill principle is obscenity. Elsewhere I have argued that obscenity law attempts to prevent a kind of genuine harm that Milleans tend to overlook, but does so too clumsily to do much good. See Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005).

³ ROBERT J. MACCOUN & PETER REUTER, DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES, AND PLACES 24 (2001). Reuter has lately revised his estimate to \$40 billion, see DAVID BOYUM & PETER REUTER, AN ANALYTIC ASSESSMENT OF U.S. DRUG POLICY (2005), but Jeffrey Miron estimates the amount as closer to \$33 billion, see Jeffrey Miron, *A Critique of Estimates of the Economic Costs of Drug Abuse* 12 (Aug. 2003) (unpublished manuscript, on file with author).

fenses; that population has now exploded to well over 400,000.⁴ Those who are imprisoned are disproportionately black.⁵ Crime and poverty in minority communities have been exacerbated by the illegality of drugs, while drug convictions have disproportionately deprived blacks of access to health and housing benefits, college aid, and the right to vote.⁶ The impetus to control an activity that often produces no complaining witnesses erodes privacy protections and inures people to the idea that the authorities have the right to police their daily recreations.⁷ Drug users themselves, the population that the policy purports to protect, are exposed to dangers of overdose and disease that would vanish if the drugs were legalized. These staggering costs have produced little benefit. The prices of the most dangerous drugs, heroin and cocaine, have fallen steadily in recent years. Consumption among hardcore users has not substantially declined.⁸

The time is ripe for new visions of policy. Yet the literature on drug policy is deeply unsatisfactory. While the law is animated by a crude authoritarianism, the scholars oscillate between crude utilitarianism and crude libertarianism.

⁴ MACCOUN & REUTER, *supra* note 3, at 25. MacCoun and Reuter arrive at an estimate of 401,000 by relying on 1996 figures, including FBI and Bureau of Justice Statistics (“BJS”) publications for state and federal prisoners and their own estimates of populations in local jails. The most recent BJS figures, in BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—2002, at 515–16 (2004), available at <http://www.albany.edu/sourcebook/archive.html>, indicate a rise in federal prisoners since 1996, from 55,964 to 77,658. The number of state prisoners has risen from 234,000 to 246,100. See OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, NUMBER OF PERSONS IN CUSTODY OF STATE CORRECTIONAL AUTHORITIES BY MOST SERIOUS OFFENSE, 1980–2001 (2003), <http://www.ojp.usdoj.gov/bjs/glance/tables/corrtptab.htm>. If the number of state prisoners is held constant at MacCoun and Reuter’s estimated 112,000, then the current total would be 435,758. Approximately 20% of state prisoners, and about 55% of federal prisoners, are in prison for drug offenses. See PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 2002, at 10, 11 (2003) [hereinafter BJS BULLETIN]. These figures surely understate the percentage of prisoners who are in jail because of the current drug laws, because the percentages do not include convictions for violent crimes that would not have taken place in the absence of illegal markets in drugs.

⁵ The most recent statistics show that 56.7% of state prisoners convicted of drug offenses are black, compared with 42% of those convicted of nondrug offenses. See BJS BULLETIN, *supra* note 4, at 10. The difference in rates of arrest far exceeds any disparity in the proportions of each race that actually use or sell drugs. See MACCOUN & REUTER, *supra* note 3, at 114.

⁶ Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); Director’s Message, *How the War on Drugs Influences the Health and Well-Being of Minority Communities*, RAND DRUG POL’Y RES. CTR. NEWSLETTER (Rand Corporation/Drug Pol’y Res. Ctr., Santa Monica, Cal.), June 2001, at 1.

⁷ STEVEN B. DUKE & ALBERT C. GROSS, AMERICA’S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 122–45 (1993).

⁸ MACCOUN & REUTER, *supra* note 3, at 31. Consumption has not increased in recent years, either, and that may be counted as a success. MARK A.R. KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS 360 (1992). But illegality alone, without much enforcement effort, would probably be enough to accomplish that. See *infra* notes 55–57 and accompanying text.

What is needed is a more sophisticated rights-based philosophy than has heretofore been offered—one that recognizes the rights of the majority of drug users who are prudent and responsible, while also recognizing the appropriateness of even paternalistic intervention in the lives of those who have been or may be destroyed by an encounter with drugs. The best justification for drug regulation is the protection of the powers of adult citizens to freely govern themselves—powers that can be destroyed by drug abuse. Yet given this justification, much of contemporary policy is perverse, because it attacks those who are in no danger of the disintegration that the law fears.

The shrewdest critics of present policy, Mark Kleiman, Robert J. MacCoun, and Peter Reuter, criticize it from an economic perspective. They aspire to minimize the combined costs of drug abuse and drug law enforcement.⁹ If their recommendations were adopted, drug policy would be less mindlessly cruel and more effective than it is today. Yet one of the most troubling aspects of contemporary drug policy, its invasion of individual liberties, is either absent from their analysis, or figures in it only as diminished utility, to be weighed against the utilities of others. And these writers do not even try to take into account the benefits that illegal drugs offer to many users, because these are impossible to quantify.¹⁰ The analysis is thus distorted even by its own utilitarian criteria. Moreover, although utilitarianism is the normative basis of much of contemporary economics, it is dead as a political theory. Its fatal flaw is precisely its failure to give adequate weight to the dignity of persons.¹¹

The dominant strand of modern political theory follows Mill's view.¹² The importance of individual liberty is what the political theorists who have written about drug policy have emphasized. Drug laws, like all morals laws, are deeply suspect from a liberal point of view. For example, Samuel Freeman has convincingly shown that Rawlsian liberalism would permit regulation of drugs only to the extent that they "permanently or indefinitely impair our capacities for rational and moral agency."¹³ No drug has this effect on the majority of its users.¹⁴

⁹ See KLEIMAN, *supra* note 8, at 12–16; MACCOUN & REUTER, *supra* note 3, at 318.

¹⁰ See KLEIMAN, *supra* note 8, at xi–xii; MACCOUN & REUTER, *supra* note 3, at 70.

¹¹ See generally WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 10–52 (2d ed. 2001).

¹² John Rawls, for example, observes that the liberal conception of justice he advocates "requires us to show that modes of conduct interfere with the basic liberties of others or else violate some obligation or natural duty before they can be restricted." JOHN RAWLS, *A THEORY OF JUSTICE* 331 (1971).

¹³ Samuel Freeman, *Liberalism, Inalienability, and Rights of Drug Use*, in *DRUGS AND THE LIMITS OF LIBERALISM: MORAL AND LEGAL ISSUES* 110, 127 (Pablo De Greiff ed., 1999); see also Douglas N. Husak, *Liberal Neutrality, Autonomy, and Drug Prohibitions*, 29 *PHIL. & PUB. AFF.* 43 (2000). A dif-

There is no reliable way to determine how much consumption of the most dangerous drugs would increase if those drugs were legalized.¹⁵ This is perhaps the central problem that confounds the analysts who study drug policy. The liberal theorists cut through this difficulty by declaring it irrelevant: even if the number of cocaine abusers were to rise a hundredfold, their arguments imply, this effect would simply be the result of individuals' decisions to exercise their rights, and so would not properly be the law's concern. That conclusion is insane, and unfortunately leads some to conclude that liberal theory has nothing valid to say about drug policy.

The reasons for morals regulations such as the drug laws have been of intense concern to a third group of theorists, the Foucauldians, who focus not on what the law prohibits (as the economists and liberal philosophers do) but on what it produces. Modern morals regulation, Michel Foucault and his followers observe, aims at forming a certain kind of personality, one that is "concerned with personal self-formation through self-discovery and thus with the 'work' of forming a distinctive individual identity."¹⁶ In the

ferent interpretation of Rawlsian principles is offered in Peter de Marneffe, *Do We Have a Right to Use Drugs?*, 10 PUB. AFF. Q. 229 (1996), but de Marneffe interprets Rawlsian liberty so narrowly that the Mill principle completely disappears.

¹⁴ Mark Kleiman reports:

Some evidence about what might be thought of as *capture ratios* for various drugs—the proportion of their users who go on to compulsive use—comes from the surveys conducted by the Gordon S. Black Corporation. Respondents were asked both whether they had ever tried a given drug and whether they had ever "felt 'hooked' on" that drug. Nicotine was the outlier: 59 percent of those who had ever smoked a cigarette reported that they had been dependent at one time or another. The only other form of drug taking with a capture ratio greater than 1 in 5 was smoking cocaine (22 percent). The ratios for the other three powerful mass-market drugs were remarkably close together: 17.1 percent for alcohol, 16.6 percent for powder cocaine, and 13.7 percent for marijuana.

KLEIMAN, *supra* note 8, at 41–42; *see also* ERICH GOODE, *DRUGS IN AMERICAN SOCIETY* 129–30 (5th ed. 1999) (stating that, of people who have taken an alcoholic drink at least once in their lives, 62% have also done so in the past month; the figures for other drugs are cigarettes, 40%; marijuana, 15%; heroin, 9%; cocaine, 8%; stimulants, 9%; and hallucinogens, 7%); DOUGLAS N. HUSAK, *DRUGS AND RIGHTS* 124 (1992) ("[D]aily users of cocaine constitute less than 5 percent of all persons who use it annually and less than 2 percent of persons who have ever tried it, . . . [and t]hese figures do not seem to differ radically when cocaine is smoked in the form of crack."). These figures are misleading to the extent that they do not account for the importance of culture and environment in determining the severity of the consequences of capture. Becoming an addict is likely to be more destructive and more difficult to reverse if addicts are an isolated and liminal population rather than being integrated into normal society.

Addiction is not the only bad effect of drug use, of course; there are also bad consequences from overdose and from chronic use. But most overdoses are the consequence of illegality, because users cannot verify the strength of the doses they buy. As for harms of chronic use, in most cases they do not permanently impair one's capacity for rational agency, and they only occur in a minority of users of any drug. Thus they raise the Millian question again: if the user rationally knows that he is taking a risk, should he be allowed to do so?

¹⁵ For a review of the inconclusive evidence, see MACCOUN & REUTER, *supra* note 3, at 331–37. If the consequence of legalization is a dramatic increase in users, many of those new users can be expected to continue their use even if the policy is reversed.

¹⁶ ALAN HUNT, *GOVERNING MORALS: A SOCIAL HISTORY OF MORALS REGULATION* 4 (1999). This idea is most prominently identified with Foucault and his followers, but historians noted the connection between the construction of the self and morals regulation before Foucault's work reached its

modern state, this involves constituting certain categories of person—the criminal, the drunkard, the homosexual, the prostitute, the drug fiend—as deviant, and using these persons as negative icons in the struggle of the majority for self-improvement. The impetus to constitute a certain kind of governed self also has reflected economic anxiety during precarious times: unless the self could be constructed in an economically functional way, as a reliable producer of economic value, the result would be financial catastrophe.¹⁷ Foucault and his followers are suspicious of all such governance strategies, which they hope to subvert with strategies of resistance.

The Foucauldian critique is often illuminating because it reveals motives for social control that might not otherwise have been apparent. The present hysteria over drugs has an intriguing analogue in the moral panic over masturbation, which began in the early-1700s and survives in attenuated form. Previously regarded as a minor sin, it was suddenly deemed a great physical and moral danger to youth, leading to lassitude, weakness, crime, insanity, and early death. Some parents sent their sons to prostitutes as a means of preventing it.¹⁸ Thomas Laqueur's definitive study of the panic concludes that it coincided with the emergence of a profoundly individualist culture, in which the individual was newly freed to pursue his own conception of the good, rather than to occupy his place within a providential order that lay beyond himself.¹⁹ This new autonomy generated the fear that the individual would withdraw entirely from society, pursuing pleasures that were asocial and autarkic.²⁰ The advances of modern medicine have refuted the claims of masturbation's destructive potential, but there seems to be a continuing need for a negative symbol for the "solipsistic rejection of public life."²¹ This symbolic fear has now evidently been displaced onto drugs.²²

The great weakness of the Foucauldian critique is that it does not recognize the positive value (or even the possibility) of the autonomous, self-governing self. Foucault is primarily a social critic, but the norm against which he judges social practice is obscure. Governance and repression may be bad things, but there is no ground from which to criticize them unless

present prominence. See, e.g., NORMAN H. CLARK, *DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION* (1976).

¹⁷ See CLARK, *supra* note 16, *passim*; DAVID WAGNER, *THE NEW TEMPERANCE: THE AMERICAN OBSESSION WITH SIN AND VICE* (1997).

¹⁸ See THOMAS W. LAQUEUR, *SOLITARY SEX: A CULTURAL HISTORY OF MASTURBATION* 373 (2003); see also WALTER KENDRICK, *THE SECRET MUSEUM: PORNOGRAPHY IN MODERN CULTURE* 138–43 (1988); HELEN LEFKOWITZ HOROWITZ, *REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH CENTURY AMERICA* 92–93, 97–107, 394–403 (2003).

¹⁹ Laqueur has some specific disagreements with Foucault, LAQUEUR, *supra* note 18, at 270–75, but the broad spirit of his narrative resembles Foucault's in that it focuses on the work of micropower on the formation of individual identity.

²⁰ The claim runs through Laqueur's book, but is stated briefly at two points. *Id.* at 210, 249.

²¹ *Id.* at 268.

²² Laqueur briefly develops the analogy. *Id.* at 238–43.

one posits what Foucault always denied, an authentic self that is oppressed by this activity.²³

The weaknesses of the Foucauldian and the liberal approaches complement each other. Robert George, critiquing liberal objections to morals regulation, argues that

[m]ore often than not . . . people who use pornography, patronize prostitutes, engage in drug abuse, etc., do not do so out of a deeply held belief that such activities are valuable for their human flourishing. Rather, they are attracted to and perpetuated in such conduct by emotional appeals, prospects of gratifying unintegrated desires, habits, and the like. Even when they hold opinions favoring such conduct (instead of merely engaging in it notwithstanding their recognition of it as immoral, vicious, and ultimately harmful to themselves), the opinions are unlikely to be reflective or held with great conviction.²⁴

George's claim is probably right about what is true "[m]ore often than not."²⁵ Any regulation constrains certain choices, but the constraint will constitute an assault on the person regulated only to the extent that the choice can reasonably be identified with that person. Foucault does not explain why the redirection of pleasure is per se bad. In order to know when the phenomena he identifies really are pernicious, we must return to the liberalism that he rejects.

The liberal critique of morals regulation itself rests on a powerful moral ideal: what Christine Korsgaard calls "the Kantian ideal of free and non-manipulative relations among rational beings."²⁶ This ideal insists that we each have the right to direct our own lives, and that we have a duty to respect one another by not interfering in others' choices about what ends to pursue. The Kantian ideal is powerful and attractive. Its possibility depends, however, on the existence of selves of the right kind: free, equal, self-governing agents who really do make choices about what ends to pursue. When a person is incapable of making such choices, such nonmanipulative relations are impossible. This is why it is appropriate to paternalize children.²⁷ Since the purpose of liberal rights is to allow persons to exercise their moral and rational powers, liberalism requires that persons possess those powers to some minimum degree.²⁸

The difficulty presented by psychoactive drugs, of course, is that (as George emphasizes) many chronic drug users are very distant from the

²³ See 2 CHARLES TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* 152 (1985).

²⁴ ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 106–07 (1993).

²⁵ *Id.* at 106.

²⁶ Christine Korsgaard, *Two Arguments Against Lying*, in *CREATING THE KINGDOM OF ENDS* 335, 358 (1996).

²⁷ See Tamar Schapiro, *What Is a Child?*, 109 *ETHICS* 715 (1999).

²⁸ See Freeman, *supra* note 13, at 117–18.

Kantian model. They are not now choosing the lives they lead, and they never did choose them.²⁹ It is a perversion of Kantian ideals to respect whims and impulses that yank a subject around like a marionette.³⁰ The person would be better respected if the strings were weakened.³¹ This is where the boundaries of Mill's principle are appropriately drawn.

Mark Kleiman argues that even a liberal framework that seeks to maximize people's ability to control their own lives should have room in it for the regulation of "vice," which he defines as any "activity voluntarily engaged in that risks damage and threatens self-command."³² While vice legislation often reflects social prejudice and exhibits excesses of its own, there may sometimes be good reason to interfere with certain vices—most importantly, "that many of its participants regret their initial choice to adopt it."³³ The mechanisms by which the vices do this include addiction, intoxication, temporal myopia, irrationality in the management of risk, routine, and the effects of fashion (which takes the form both of peer pressure and of favorable word of mouth about new drugs whose harms are not yet understood).³⁴ These mechanisms confound the assumption of ordinary economic analysis that the consumer is a reliable judge of her own interests.³⁵

If the aim of drug regulation is to produce the temperate and self-governing self envisioned by the Kantian, then some restrictive policies can be justified on Kantian grounds. The self-governing self does not just materialize in the world. It has to be constructed, and there are typical pitfalls in the process of construction.

The most potent grass-roots political force in the formulation of drug policy is parents who are concerned that their children will be seduced by the lure of drug use.³⁶ These parents are not crazy, and their concern cannot be reduced to a desire to pass on their economic status to their children.

²⁹ Liberal theorists who pose the issue as whether "a choice to lead a life of regular drug use . . . can qualify as a self-defining choice," Michael Moore, *Liberty and Drugs*, in DRUGS AND THE LIMITS OF LIBERALISM: MORAL AND LEGAL ISSUES, *supra* note 13, at 94, are laboring at some distance from reality. Paternalism may be insulting, but so is regarding a crack-addicted prostitute as if she had decided after reflective deliberation that this would be an attractive career option. There are a few rational agents whose lives are dominated by drug use, such as the chemist Alexander Shulgin, who has invented (and tested on himself) dozens of hallucinogens, but these are rare. See ALEXANDER SHULGIN & ANN SHULGIN, *PIHKAL: A CHEMICAL LOVE STORY* (1991); ALEXANDER SHULGIN & ANN SHULGIN, *TIHKAL: THE CONTINUATION* (1997); Mark Boal, *The Agony & Ecstasy of Alexander Shulgin*, *PLAYBOY*, Mar. 2004, at 80; Ethan Brown, *Professor X*, *WIRED*, Sept. 2002, at 114.

³⁰ See *BEING JOHN MALKOVICH* (Gramercy Pictures 1999).

³¹ See Schapiro, *supra* note 27, at 730–31.

³² Mark A.R. Kleiman, *Neither Prohibition nor Legalization: Grudging Toleration in Drug Control Policy*, 121 *DAEDALUS* 53, 55 (1992).

³³ *Id.* at 59.

³⁴ Kleiman describes all these defects of rationality in *Against Excess*. See *supra* note 8, at 30–45.

³⁵ For one sophisticated economist's analysis of the problems presented by the plurality of the self, see Thomas Schelling, *The Intimate Contest for Self-Command*, 60 *PUB. INT.* 94 (1980).

³⁶ See MICHAEL MASSING, *THE FIX* 143–65 (1998).

They are trying to make their children into autonomous selves who are capable of choosing and pursuing real goods, and they are trying to ward off real hazards that can frustrate these goals.

The strongest case for drug regulation is what I shall call the Pessimistic Cocaine Scenario. It holds that, if cocaine were legalized, the number of abusers would rise dramatically. Most cocaine users appear to consume it responsibly and avoid addiction, but at least some people become so transfixed by their desire for the chemical that they lose all interest in anything they once cared about. Friends, parents, children, and work all are cast aside or exploited in the compulsive pursuit of more of the drug. The Pessimistic Scenario claims that the number of such unfortunates would increase enormously if the law were relaxed. There is no way to know whether that would actually happen.³⁷ The point is that it matters.

Why would it be bad if the number of cocaine abusers rose dramatically? Our concern is not with the addict's physical well-being, or about the external effects of his addiction. It is true that many drug abusers in contemporary America are in wretched health, undernourished and sickly, and that many of them are infected with AIDS, often as a result of shared needles for intravenous drug use. Many steal to support their habits, and of course the drug trade produces enormous violence and corruption. These are, however, artifacts of illegality. If drugs were legal and cheap, these people would be able to get their supply with no danger to their health, and needle sharing would disappear. Drug addicts could live more comfortably than they do now, albeit in some cases at the margins of society. Purveyors of alcohol today do not engage in gang wars, and most alcoholics do not steal to support their habits.³⁸ There are, of course, other bad third-party effects of alcoholism. It is no fun being the child of an alcoholic, for example. But there are many activities that some people engage in to the neglect of their family responsibilities. If the state could ban any pursuit that sometimes distracts some people from their duties, then the harm principle would amount to nothing. Third-party effects, then, are not a good reason to single out drugs for prohibition.³⁹

If we judge the obsessive addict's (or the alcoholic's) life to be a terrible one, it is because she is cut off from most of the goods that make life worthwhile. If someone becomes so captivated by her addiction that she no longer regrets the disappearance of friends and family and work, we regard this as exacerbating, not ameliorating, her misfortune. The drug is an infe-

³⁷ For optimistic predictions, see DUKE & GROSS, *supra* note 7, and many of the essays in CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE (Craig Reinerman & Harry G. Levine eds., 1997). For a pessimistic prediction, see KLEIMAN, *supra* note 8, at 302–16. For an agnostic view, see MACCOUN & REUTER, *supra* note 3. Each of these writers offers a plausible inference from the ambiguous data.

³⁸ All these points are argued in detail in DUKE & GROSS, *supra* note 7.

³⁹ John Stuart Mill makes a similar point about alcohol consumption in *On Liberty*, *supra* note 1, at 167–68.

rior substitute for these goods, and if she no longer sees this, that is itself evidence that her reason is impaired. Distraction from human goods is part of the concept of drug abuse: if a drug user, even an addict, manages to integrate chronic drug use with other goals, so that those goals are in no way impaired, then what could be abusive about the consumption? Our reasons for interfering with drug abuse are straightforwardly paternalistic.⁴⁰

Outlawing the ingestion of certain chemicals is a clumsy strategy for constructing the liberal self, however. There is no one-to-one relationship between any chemical and any behavior. The danger that any drug presents to the liberal self depends on the norms that surround its use. The same drug can be harmless in one society and disastrous in another, or even in different situations in the same society.⁴¹ So it is impossible to say what the consequences of drug legalization would be, even if consumption increases: the answer depends on contingencies of context. The goal of policy should be not to minimize drug use, but to minimize a certain kind of destructive drug use, and to construct and reinforce social norms of appropriate behavior toward drugs.

The norms described here are, at least in part, the animating force behind contemporary drug policy. But if this is the goal,⁴² the state is at best clumsy in its pursuit.

In the first place, there is no reason to think that a self-governing person will entirely abstain from psychoactive drugs. Each of us sometimes finds our mental state to be bad in itself or an obstacle to our goals or both. Sometimes we just feel that a buzz would be fun. In all such cases, chemi-

⁴⁰ In the episode of the country of the Lotus-Eaters in the *Odyssey*, we are told that the sailors who ate lotus “wanted to stay there with the lotus-eating/people, feeding on lotus, and forget the way home.” HOMER, *THE ODYSSEY* 9:96–97 (Richmond Lattimore trans., 1967) (n.d.). When Odysseus “took these men back weeping, by force, to where the ships were,” *id.* at 9:98, his primary concern was for himself, of course: he needed their help. But was it perhaps bad for the men themselves to want to forget the way home? Would it have been more respectful to leave them there?

⁴¹ Consumption of alcohol was not generally regarded as a social problem at all at the beginning of the nineteenth century, when Americans consumed each year more than seven gallons of absolute alcohol per capita, but it became increasingly regarded as a severe problem in the late nineteenth and early twentieth centuries, when consumption was approximately two gallons of absolute alcohol annually per capita. MARK EDWARD LENDER & JAMES KIRBY MARTIN, *DRINKING IN AMERICA: A HISTORY* (rev. ed. 1987). It became so because social norms had changed. See generally CLARK, *supra* note 16. Alcohol use leads to aggression and sexual arousal in some cultures but not others. CRAIG MCANDREW & ROBERT EDGERTON, *DRUNKEN COMPORIMENT* (1969). Ethan Nadelmann observes:

[W]hile certain types of drugs are more difficult to use in moderation than others, the principal determinants of destructive drug use patterns involve not the pharmacology of the drug but the set and setting in which the drug is consumed. That is why alcohol consumption among conquered aboriginal groups and cocaine consumption among some inner-city populations have more in common with one another than either does with patterns of alcohol or cocaine consumption among less vulnerable sectors of the population.

Ethan A. Nadelmann, *Thinking Seriously About Alternatives to Drug Prohibition*, 121 *DAEDALUS* 85, 102 (1992).

⁴² One might reasonably attribute other, more sinister goals to contemporary policy, and some do. But since debates about motive are unresolvable, I propose to ignore them.

cals are a valuable tool.⁴³ The phenomenon is clearest among clinically depressed persons, who commonly self-medicate with both legal and illegal drugs, but it is also apparent in the ordinary citizen's morning coffee and evening beer.

Thus far I have operated within the Kantian paradigm that holds the self to be prior to its ends, so that ends have value only through being chosen. Critics have objected that this view leaves no basis for choice, and that rational choices aim at goods that are extrinsic to the act of choice itself. If we ask whether there can be anything valuable about the consumption of illegal drugs, the answer is clearly yes. Some drug users are pursuing ends of great moral seriousness.⁴⁴ In short, when the law denies rational persons the right thus to control their internal states, it is wrongfully paternalizing them, perversely harming those it purports to want to help, and attacking exercises of the self-governance that is its best reason for being.

The effort to use law to police social norms can also become an excuse for cultural imperialism.⁴⁵ Failure to conform to parochial cultural norms is often wrongly taken to bespeak a failure of competence. Worse still, mere poverty can be so construed.⁴⁶

The Pessimistic Cocaine Scenario is powerful because three different considerations happen to come together here.

First of all, the desire of a potential addict to try an easily available drug is likely to be an instance of what Cass Sunstein and Richard Thaler have called "ill-formed preferences," which are the product, not of rational deliberation, but of default rules, framing effects, and other ways in which

⁴³ This is eloquently emphasized in David Pearce, *The Hedonistic Imperative*, HEDWEB.COM, <http://www.hedweb.com/hedethic/tabconhi.htm> (last visited Sept. 15, 2005). Thanks to J-me Savage for directing me to this essay, which has helped me to think about these issues.

⁴⁴ Some illegal drugs can facilitate the pursuit of such ends. The most striking illustration I know of is Walter Pahnke's "Good Friday" experiment. On that holiday in 1962, Pahnke administered capsules to twenty Protestant divinity students, who then attended a religious service. Half of the capsules contained psilocybin, an extract of hallucinogenic mushrooms; the other half contained a placebo. Six months after the experiment, the subjects who had taken the hallucinogen, to a far greater extent than the control subjects, reported having had a mystical experience that produced persisting positive changes in attitude and behavior. Moreover, a follow-up set of interviews, conducted twenty-four to twenty-seven years after the original experiment, found that these effects persisted. The experimental subjects, most of whom had been members of the clergy all of their lives, and so should be as qualified as anyone to know a religious experience when they have one, "unanimously described their Good Friday psilocybin experience as having had elements of a genuinely mystical nature and characterized it as one of the highpoints of their spiritual life." Most of the control subjects, on the other hand, "could barely remember even a few details of the service." Rick Doblin, *Pahnke's "Good Friday Experiment": A Long-Term Follow-Up and Methodological Critique*, 23 J. OF TRANSPERSONAL PSYCH. 1, 13 (1991). The experiment has not been repeated, because changing drug laws soon made it illegal to do so. I am grateful to Ethan Nadelmann for directing me to this article.

⁴⁵ "Cultural imperialism involves the universalization of a dominant group's experience and culture, and its establishment as a norm," so that benign cultural differences are reconstructed as deviance and inferiority. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 59 (1990).

⁴⁶ See DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 26-46 (2002).

the human mind arrives at decisions unconsciously. In such cases, it is not disrespectful to paternalize people in a way that will promote their welfare.⁴⁷ The choices that are overridden (unlike, say, the choices of non-Christians under Story's establishment clause) are not authentically theirs. And it is clear that the preferences for drugs of at least some users do fit this description. If all cocaine users were like this (as we have seen, many are not), one would have a pretty clean exception to liberal antipaternalism. Refusing to paternalize an addict would in that case be a category mistake, an insistence on extending respect to an entity that in fact is not an autonomous seeker of ends.

Second, the desire for cocaine appears to be an instance of what Charles Taylor calls "weak evaluation." Taylor thinks that the distinction between strong and weak evaluation is a central element of ordinary moral reasoning. Strong evaluation involves "discriminations of right or wrong, better or worse, higher or lower, which are not rendered valid by our own desires, inclinations, or choices, but rather stand independent of these and offer standards by which they can be judged."⁴⁸ A person who did not make any such discriminations, a "simple weigher of alternatives,"⁴⁹ would be a very strange sort of person; it is not clear whether there could be a person so lacking in depth.⁵⁰

Some drug users are motivated by strong evaluation: they think that the drug in question will make it possible for them to achieve goods of a fundamental kind. Aldous Huxley and Timothy Leary's interest in LSD rested on this kind of consideration.⁵¹ But the likelihood of such considerations being in play varies from one drug to another. No one, not even Freud in the period of his greatest enthusiasm, has regarded cocaine as an object of strong evaluation, or even as a path to such objects.⁵² The desire for cocaine can be understood in purely utilitarian terms: it gives pleasure. This can then be readily weighed against, not only the disutility of cocaine abuse, but also of the loss of goods that are weightier than utility. The

⁴⁷ See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003). Sunstein and Thaler argue that when such preferences are at work, it is not inappropriate for social planners to disregard them and seek to maximize welfare. They do not define "welfare," and it is uncertain whether they use this term to refer to subjective satisfaction or to some more objective conception of well-being.

⁴⁸ CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 4 (1989).

⁴⁹ 1 CHARLES TAYLOR, *HUMAN AGENCY AND LANGUAGE: PHILOSOPHICAL PAPERS* 23 (1985).

⁵⁰ 1 *Id.* at 27–28. Even utilitarians who are officially committed to such simple weighing tend to be animated by motives of a loftier sort; they cannot account for their own existence. *Id.* at 76–86, 322–45.

⁵¹ See JAY STEVENS, *STORMING HEAVEN: LSD AND THE AMERICAN DREAM* (1989).

⁵² See PETER GAY, *FREUD: A LIFE FOR OUR TIME* 42–45 (1988).

rights-based argument has less force with respect to cocaine, methamphetamine, or heroin than it does with respect to the hallucinogens.⁵³

Finally, the consumers of cocaine have never been clear enough in their own minds about the good that they are defending to form an organized social movement to promote it and to change the laws. This can be taken as strong evidence of the first two factors: Preferences are more likely to be either products of considered reflection or objects of strong evaluation if they are articulated. The gay rights movement offers a helpful comparison. By virtue of its mere existence, it showed that homosexual desire is not merely a kind of compulsive twitch, but rather is an object of reflective endorsement for many people. When such movements do not exist, their absence may be revealing in a similar way.

So there is reason to put pressure on drug users, in order to diminish the incidence of consumption. The decision to consume an addictive drug should be the product of more than a whim. On the other hand, the obstacles should not be so severe as to be incapable of evasion by responsible users. And when those users do succeed in getting their hands on the stuff, the state should not go into conniptions over it.

The drug law enforcement budget we have is massively overinflated.⁵⁴ If illegality aims paternalistically at reducing consumption, diminishing returns set in very quickly. During prohibition, alcohol consumption dropped by between 33% and 50%,⁵⁵ even though nearly nothing was spent on enforcement.⁵⁶ Reducing sentences for drug crimes would shrink prison populations without increasing consumption much, if at all.⁵⁷ Less punitive approaches meanwhile are starved for funding. Treatment programs, the most cost-effective measure for reducing drug abuse, have to turn away huge numbers of addicts who want to quit.⁵⁸ Needle exchange programs could radically reduce the spread of AIDS among heroin users, and have

⁵³ Opium is a doubtful case, if only because Coleridge wrote *Kubla Khan* under its influence. See SAMUEL TAYLOR COLERIDGE, *Kubla Khan: Or, A Vision in a Dream*, in THE MAJOR WORKS 102 (H.S. Jackson ed., 1985); RICHARD HOLMES, COLERIDGE: EARLY VISIONS 162–68 (1989).

⁵⁴ See *supra* note 3 and accompanying text.

⁵⁵ CLARK, *supra* note 16, at 146–48; LENDER & MARTIN, *supra* note 41, at 136–47.

⁵⁶ In 1922, Congress spent \$6.75 million for a force of 3060 Prohibition Bureau employees, including agents, clerks, and stenographers. Some districts had no automobiles or boats. CLARK, *supra* note 16, at 161.

By 1926, state legislatures in the United States were appropriating annually a total of only \$698,855 for Prohibition enforcement, an amount estimated as approximately one-eighth of that which the same governments were spending to police their laws for the control of fish and game. Some states were spending nothing at all.

Id. at 163.

⁵⁷ MACCOUN & REUTER, *supra* note 3, at 26, 94–98.

⁵⁸ See generally MASSING, *supra* note 36.

done so in other countries.⁵⁹ All such measures are fiercely resisted on the grounds that they would “send the wrong signal.”

At the same time, the symbolic effect that the law does have can mislead people about the actual dangers that they confront. Marijuana, the most widely used illegal drug, is not much of a danger to high school students. Most of them do occasionally use the stuff, but usually with no lasting ill effects.⁶⁰ The most severe high school drug problems are tobacco, a spectacularly addictive drug that continues to be used by about 25% of high school seniors,⁶¹ and alcohol: 30% of high school seniors report having had at least five drinks in one sitting in the past week.⁶² The obsessive focus on illegal drugs does not well serve its supposed beneficiaries.

Finally, if the best justification for drug policy is the protection of the integrity of the liberal self, then present policy is positively perverse in its targeting of casual users.⁶³ Drug policy has been effective in reducing the number of casual users, while it has been ineffective in reducing the number of hardcore users.⁶⁴ Yet the casual user is precisely the one whose Millen

⁵⁹ MACCOUN & REUTER, *supra* note 3, at 380–82; Phil Coffin & Julie Ruiz-Sierra, *Research Brief: Syringe Access*, DRUGPOLICY.ORG, Mar. 2001, http://www.drugpolicy.org/docUploads/syringe_access_brief.pdf.

⁶⁰ See Jonathan Shedler & Jack Block, *Adolescent Drug Use and Psychological Health: A Longitudinal Inquiry*, 45 AM. PSYCH. 612 (1990) (consequences of drug use); Press Release, Univ. of Mich. News and Info. Servs., Overall Teen Drug Use Continues Gradual Decline; But Use of Inhalants Rises (Dec. 21, 2004), available at <http://www.umich.edu/news/index.html?Releases/2004/Dec04/r122104a> (drug use rates). The innocuousness of most adolescent drug use sheds light on Justice Breyer’s claim that intrusive mandatory drug testing is justified by the high rate of drug use by high school students. *Bd. of Educ. v. Earls*, 536 U.S. 822, 838–40 (2002) (Breyer, J., concurring). There was a time when adolescent drug use was a serious problem. In 1978, more than one in ten high school seniors reported using marijuana at least twenty times per month. 1 LLOYD D. JOHNSTON ET AL., NATIONAL SURVEY RESULTS ON DRUG USE FROM THE MONITORING THE FUTURE STUDY, 1975–1995: SECONDARY SCHOOL STUDENTS tbl. 14 (1996). But consumption has been lower than that for a long time, even though prices have declined and potency has increased. The progress that has been made has not had much to do with the law.

⁶¹ See Press Release, Univ. of Mich. News and Info. Servs., Cigarette Smoking Among American Teens Continues 8-Year Decline (Dec. 21, 2004), available at <http://www.umich.edu/news/index.html?Releases/2004/Dec04/r122104>. The same study found that nine percent of 8th graders are current smokers. *Id.*

⁶² MACCOUN & REUTER, *supra* note 3, at 169.

⁶³ “[I]n 1994, 136,000 persons were convicted of felony possession (which does not include possession with intent to distribute), and 29 percent of these were sentenced to state prison.” *Id.* at 25. The authors note that this figure includes an unknown number of persons who had been charged with possession with intent to distribute and whose charges were bargained down. *Id.* at 25 n.18. For evidence that most of these prisoners were involved in some way in drug distribution, see Jonathan P. Caulkins & Eric L. Sevigny, *How Many People Does the U.S. Imprison for Drug Use, and Who Are They?*, 32 CONTEMP. DRUG PROBS. 405 (2005).

⁶⁴ This fact was presented as a partial triumph by the first Bush administration in U.S. OFFICE OF NAT’L DRUG CONTROL POL’Y, NATIONAL DRUG CONTROL STRATEGY 4 (1989). For a similarly flawed analysis, see Stephen D. Easton, *Everybody Knows It, but Is It True?: A Challenge to the Conventional Wisdom that the War on Drugs Is Ineffective*, 14 FED. SENT’G REP. 132 (2002).

claims are most powerful, who probably knows what he is doing and ought to be let alone by the state.

The great objection to blanket prohibition of vices, Kleiman notes, is the heterogeneity of participants.⁶⁵ Drugs are beneficial for the majority of users, who achieve the effects they seek without adverse consequences. They are harmful, sometimes terribly harmful, for a few. A form of regulation that takes account of this heterogeneity is what he calls “grudging toleration.” It has three elements: (1) Teach people better decision skills and impulse control; make them more aware of self-command as a problem and the specific threats to it. (2) Create conditions that discourage use of vicious goods and services, by making them expensive or hard to obtain,⁶⁶ and restrict promotional messages for those vices.⁶⁷ (3) Temper the bad results: make it safer to perform vices, make it easier to quit, and target for special regulation those whose vices are a problem for others. The goal ought to be to maximize conscious choice and to minimize impulsive mistakes. Grudging toleration is not a universal panacea. Kleiman thinks that the worst drugs, such as cocaine, are so dangerous that grudging toleration is too weak a policy.⁶⁸ On the other hand, grudging toleration has much to recommend it as a policy, not only for presently illegal drugs such as marijuana and LSD, but also for legal but dangerous substances such as alcohol and tobacco.

More aggressive prohibition may have its uses if it is narrowly targeted. For example, there is a very large overlap between the population of heavy drug users and the population of criminals. If, say, only persons on parole or probation who had been identified as drug users were aggressively monitored for drug use, drug abuse could be radically reduced while leaving most of the population undisturbed.⁶⁹ This sort of disaggregation may be

⁶⁵ See Kleiman, *supra* note 32, at 63.

⁶⁶ One possibility is to issue licenses to consume certain drugs, revocable for misbehavior. KLEIMAN, *supra* note 8, at 98–102.

⁶⁷ The direct restriction of promotional messages probably violates the first amendment. See Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589 (1996). Duke and Gross provide an ingenious solution to this problem by proposing that vendors of newly licit drugs be denied trademark protection for their wares and that these drugs be sold in generic packaging only, without brand names. DUKE & GROSS, *supra* note 7, at 268–72.

⁶⁸ See KLEIMAN, *supra* note 8, at 302–07. Even with respect to the worst drugs, such as heroin, free availability seems to do some good. In the limited heroin maintenance trials conducted in Switzerland in 1994–96, participants were allowed to receive as large a dose as they wanted, and began by consuming huge amounts. Yet even at these high doses, they functioned at a higher level than they had before the trials, and some went on to quit the drug. The dynamics of quitting appeared to work this way: until the trials, their lives had been organized around the scarcity of heroin. With that problem solved, they were finally able to focus on the fact that they had other problems. MACCOUN & REUTER, *supra* note 3, at 288–96.

⁶⁹ Mark A.R. Kleiman, *Coerced Abstinence: A Neopaternalist Drug Policy Initiative*, in THE NEW PATERNALISM: SUPERVISORY APPROACHES TO POVERTY 182 (Lawrence M. Mead ed., 1997). Kleiman’s article only proposes the increased monitoring of parolees and probationers; the suggestion that everyone else be left undisturbed is mine. “Left undisturbed” could mean a range of things, and ex-

impossible. Perhaps leakage between the relevant populations is inevitable. But we don't know that. It is revealing that no efforts are being made to find out.

Our drug laws represent a powerful moral aspiration, and no critique of our present authoritarian crusade can be persuasive unless it does justice to that aspiration. Our current policies do not pursue their ideal effectively, and they tread hard on competing ideals. Drug laws should help to make us free. They should not themselves be obstacles to our freedom.

perience will have to determine just what level of tolerance is appropriate. What I have in mind is not complete legalization, but something somewhere between grudging toleration and the criminalization-plus-very-weak-enforcement that was alcohol policy for most of Prohibition. The goal of reducing consumption to zero should be abandoned—not only because it is impossible, but also because it is a bad aspiration. The interests of responsible drug users do not play a large enough role in Kleiman's analysis. See Craig Reinerman, *Temperance Ideology and Sociological Denial: Prohibitionism in Drug Policy Discourse*, 12 CRIM. JUST. ETHICS 2, 29 (1993) (reviewing KLEIMAN, *supra* note 8).

