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## The Incompatibility of Liberalism and Drug Criminalization

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# The Incompatibility of Liberalism and Drug Criminalization

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Thesis for Honors in the Department of Philosophy

Defended on March 25, 2021

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The observant utilitarian should conclude that the war on drugs is unjust. The United States has spent trillions in an unsuccessful, decades-long attempt to stop drugs from entering its borders.<sup>1</sup> The opportunity cost of the assault on drug production, transportation, and possession should alarm any utilitarian, even those personally opposed to drug use. Individuals who have abridged no one's rights face serious prison time and lifelong disadvantages<sup>2</sup> for nonviolent drug offenses which, due to the cost of acquiring a competent defense, hurt racial minorities and low-income communities the most.<sup>3</sup> There is a near consensus among experts (although not among politicians or the general public) that, aside from the moral question of whether drug use is acceptable, enforcing drug criminalization has proved a catastrophe.<sup>4</sup> I argue in this essay, however, that drug criminalization is wrong under a liberal framework. I do this both because discussions of the drug war usually operate with a utilitarian focus, and because I believe the open-minded researcher will find that the costs outweigh the benefits. A more pressing question, as a matter of legal and moral philosophy, is whether there's a convincing justification that permits the liberal state to incarcerate nonviolent drug users.

I first outline the general values of a liberal society, resting on the assumption that the state should be neutral with regard to reasonable conceptions of 'the good life.' Narrowing my scope, I do not engage the arguments of liberals who abandon the goal of political neutrality. Next, I address whether the Harm Principle permits the liberal state to forbid drugs *and* punish drug users. I draw a distinction between the state's ability to take various steps towards improving its citizens' health, including seizing addictive drugs and providing the means for

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<sup>1</sup> "Making Economic Sense," Drug Policy Alliance, <https://www.drugpolicy.org/issues/making-economic-sense>

<sup>2</sup> For an excellent resource on the invisible costs of entering the justice system, on inmates as well as their families, see bibliography entry Chesney-Lind, Meda.

<sup>3</sup> "Race and the Drug War," Drug Policy Alliance, <https://www.drugpolicy.org/issues/race-and-drug-war>.

<sup>4</sup> Stéphanie Thomson, "Experts agree: the war on drugs has been a disaster. Is it time for legalization?" World Economic Forum, 29 November, 2016. <https://www.weforum.org/agenda/2016/11/war-on-drugs-legalization/>.

treatment, and the additional step of punishing drug users. If an individual drug satisfies the Harm Principle, it must be the case that using it harms others (in some tangible way) to a degree consistent with the existing criminal code. I will critically respond to arguments that have been offered for criminalization, concluding that while some could be strengthened by new evidence, the current justifications are wildly insufficient to imprison drug users. I close with the contention that even if a particular drug were found to violate the Harm Principle, a liberal could justly impose confiscation and treatment, but not criminal incarceration.

### **The Neutral Liberal State**

To discuss the essential features of liberalism, we must distinguish the colloquial meaning in America from its philosophical denotation. In the context of American politics the term is likely to invoke certain policies that are favored by the Democratic Party (a progressive tax system, healthcare for the poor, and gay rights to name a few). Because people apply liberal values in different ways, there are few policies which automatically follow from the label. Similar to libertarians, philosophical liberals believe that the government should have a limited role in regulating both economic exchanges and individuals. In stark contrast to utilitarians,<sup>5</sup> liberals hold that an individual's rights, freedom, and wellbeing are inherently valuable, not to be sacrificed for the benefit of the majority. Regardless of race, gender, popularity, or other morally irrelevant factors,<sup>6</sup> people deserve equal basic rights.<sup>7</sup>

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<sup>5</sup> Here I am referring to non-liberal utilitarians, excluding the influential John Stuart Mill. Mill advocated liberal principles from a foundational belief that they will benefit more people than competing ideologies. Whether the two are indeed compatible is not a question relevant to my inquiry.

<sup>6</sup> It's plausible that a morally relevant factor would allow a liberal government to legitimately disrupt equality of rights. For example, one could argue for the state's ability to deprive those people convicted of violent crimes the right to bear arms, given society's overwhelming interest in reducing violent crime and strong possibility that the firearm would be misused.

<sup>7</sup> Gerald Gaus et al, "Liberalism," The Stanford Encyclopedia of Philosophy (Fall 2020 Edition), Edward N. Zalta (ed.), 1.1-1.3.

With freedom as the supreme virtue, any given action is assumed to be legal even if the liberal government does not consider it fundamentally protected. The key mechanism by which liberal societies operate is consent. Nobody, the government included, can compel someone to take a particular job, but if a person enters into an employment contract knowingly (and without coercion), the liberal sees no injustice. Departing from libertarians, liberals claim that society's wealth (not just money, but scientific and technological advancements that originate from the effort and talent of privileged people) should be distributed to the least fortunate people. Liberals typically support some economic regulations and welfare policies to redistribute benefits to the poor. Under the umbrella of liberalism, scholars disagree about everything from the boundaries of personal freedom to the appropriate amount of redistribution.<sup>8</sup>

The liberal state which is neutral maximizes the range of acceptable value judgements that citizens can make. Recognizing that people vary in their values and preferences, and seeking to accommodate each individual's pursuit of 'the good life,' a neutral government prefers tolerance and pluralism to cultural uniformity.<sup>9</sup> The contemporary liberal John Rawls did not explicate his account of 'good' in 'the good life' beyond "the ends and purposes worthy of our devoted pursuit."<sup>10</sup> It is possible that the lack of explanation asserts neutrality itself, as further elaboration would stifle freedom by reducing the number of acceptable variations. If everyone is entitled to design their own lives, the "ends and purposes worthy of our devoted pursuit" should be understood as the ends and purposes each *individual* finds worthy of pursuing. Political neutrality agrees with the view that no amount of rational discourse will make two people agree on all that is moral and immoral; neutrality aims to respect people's autonomy, preferences, and

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<sup>8</sup> Gerald Gaus, "Liberalism," The Stanford Encyclopedia of Philosophy, 2.2-2.3.

<sup>9</sup> John Patrick Rudisill, "The Neutrality of the State and Its Justification In Rawls and Mill," *Auslegung*, Vol. 21, No. 2. 154-5.

<sup>10</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 37.

competing values in a diverse society. In deciding whether an issue warrants neutrality, there must be a dispute in value judgement, not fact. It's also important that there is cultural uncertainty such that labeling one judgement superior is "unwarranted."<sup>11</sup>

Neutrality has been justified by the plurality of moral beliefs found not only across different hemispheres, but within single cultures. Many liberals go further to argue that the government, besides being neutral itself, is obligated to prevent nongovernmental institutions—should they exercise enough power—from imposing one conception of 'the good life.'<sup>12</sup> Rawls considered a nonneutral state to be one which "bases its political decisions on some particular comprehensive conception of the good life,"<sup>13</sup> preventing citizens from having alternative lifestyles.<sup>14</sup>

Before proceeding I wish to note a relevant caveat to the neutral conception of liberal government. There are some moral questions which the state cannot dodge through inaction. Abortion, a topic of persistent controversy in American culture, is one such case.<sup>15</sup> As Michael Sandel notes, it is impossible for the government to be neutral on the central question of abortion—whether a fetus is a full and equal human being. To permit or prohibit abortion takes a stance, and doing nothing isn't neutral either. If the government enacts no law regarding

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<sup>11</sup> John Patrick Rudisill, "The Neutrality of the State and Its Justification In Rawls and Mill," *Auslegung*, Vol. 21, No. 2. 154.

<sup>12</sup> Lyle A. Downing and Robert B. Thigpen, "A Defense of Neutrality in Liberal Political Theory." *Polity*, Spring, 1989, Vol. 21, No. 3. <https://www.jstor.org/stable/3234745>. 505-6.

<sup>13</sup> John Patrick Rudisill, "The Neutrality of the State and Its Justification In Rawls and Mill," 158.

<sup>14</sup> Though I mention some of the justifications for neutrality, and freely admit to preferring it, I'm not intending to offer a comprehensive account. Rather, I am explaining the intellectual framework on which my thesis rests.

<sup>15</sup> The prevailing pro-choice view in American politics, which claims that abortion is a matter of personal autonomy, fails because it begs the central question—assuming that a fetus does not have equal rights. We can recognize that some opposition to abortion is misogynist in nature while admitting that the matter is not as simple as "my body, my choice" (I say this as a pro-choice individual).

abortion, it implicitly endorses the view that fetuses aren't complete humans.<sup>16</sup> Given this reality, the state must indeed make some nonneutral value judgements. It seems important to mention, however, that the vast majority of social advancements regarding individual rights in American history—from ending slavery to granting equality to ethnic and sexual minorities—are justified on noncontroversial liberal grounds. I do not mean that these issues were not politically controversial—some remain controversial to this day. Nevertheless, no truly-liberal philosopher can succeed in opposing these advancements without contradiction. Barring prejudice or ignorance, one cannot oppose the right for women to vote or LGBTQ people to enter civil partnerships. Cases which are genuinely controversial under liberalism, such as abortion, are a minority when it comes to moral questions addressed by the law.

Whether drug use is acceptable is a value judgement that no set of facts can negate. It could be proven that all drugs can only affect one's health negatively, but this would not tell us that drug use is morally wrong. After all, if the only factor that determined moral virtue was whether an act was the safest possible choice, it would be reprehensible to leave one's home. Individuals are constantly making value calculations about the costs and benefits of hundreds of actions. Many Americans choose to drive cars, eat at McDonald's, and watch television for hours a day despite their awareness that these are not the healthiest possible options. People take these risks, for better or worse, to increase their current wellbeing; whether the line of moral wrongdoing is drawn at snorting cocaine or drinking a soda is necessarily a judgement of value.

It is here that the prohibitionist is likely to object—it's foolish to compare the caffeine rush of a soda to a hard drug like cocaine because, our criminal justice system presumes, drugs

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<sup>16</sup> Michael J. Sandel, *Justice: What's the Right Thing to Do?* Chapter 10. "Justice and the Common Good." Farrar, Straus and Giroux, New York. 131.

do not only affect the user. Drugs destroy families and vastly increase the chance that one will commit crimes. From these claims, the advocate of criminalization will argue that because individual use harms others, the state is justified in imprisoning a person just on the basis of drug use or possession. Though these premises are flawed, as I argue for the bulk of this essay, the argument is certainly valid under liberalism—there must be a rule to differentiate acceptable, free behavior from actions that hurt others.

### **The Harm Principle**

Distinguishing itself from anarchism, liberalism<sup>17</sup> places limits on the individual's conduct by guaranteeing equal rights and liberty for all citizens. Birthed in John Stuart Mill's widely influential work *On Liberty*, the Harm Principle intends to reconcile the virtue of liberty with some government actions which deprive it. According to Mill, "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."<sup>18</sup> While Mill expressly rejects the application of his principle to self-harm, some modern philosophers have done so. Liberalism holds that all people have equal worth, valuing an individual's autonomy and allowing one to pursue her own happiness.<sup>19</sup> It is easy to see, if each individual's rights are unalienable, why outwardly harmful behavior may be prohibited by the state. That said, liberals are skeptical of any constraint on freedom. The burden rests on advocates of a restriction to demonstrate why an action harms or risks harming society, not on defenders of liberty to explain why an action should be allowed.

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<sup>17</sup> Henceforth, I use "liberal" to include the qualification of neutrality.

<sup>18</sup> John Stuart Mill, *On Liberty*, Batoche Books, Kitchener, 2001.  
<https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/mill/liberty.pdf>, 13.

<sup>19</sup> The justifications for individual rights, like other aspects of liberalism, are controversial. Perhaps the most common explanations are that such value is endowed by God and that humans have unique value because of their capacity to reason.

It is crucial to distinguish harmful actions from conduct that is purely offensive. There is a clear difference between the possible offense taken by members of a community when a person is loud and drunk in public, and the genuine harm caused by an individual crossing the centerline because he's driving under the influence. Under the principle, merely offensive actions are not fair game for criminalization even if every member of a community believed so. Mill argues that creating a severe risk of harm is subject to regulation if a consequence  $y$  is reasonably predicted by action  $x$  (I explore questions of risk in relation to drug use in the following section).<sup>20</sup>

### **Harm to Others—Drug Use and Crime**

Having detailed the liberal state and Mill's Principle of Harm, I am ready to address whether an individual's drug use unreasonably harms others. Mill conceded that nearly every action taken by an individual affects society in in some way. We should only criminalize an activity which causes, or has a significant risk of causing, "definite damage."<sup>21</sup> Joel Feinberg suggests two principles to help us apply the Harm Principle to an issue. It's important to consider both the magnitude of harm, or how bad the consequences of action  $x$  could prove, as well as the likelihood that action  $x$  will directly harm another. An act becomes more viable for prohibition if the magnitude of harm is extreme, even if the risk is low.<sup>22</sup>

It is clear that under Mill's principle, drug use does not *directly* harm others in the sense that theft or violence clearly do. What is argued by criminalization advocates is that drug use should be proscribed because it indirectly harms, presenting an unreasonable risk to others' wellbeing. This argument is not invalid under liberalism. If drug use were not found to breach

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<sup>20</sup> David Brink, "Mill's Moral and Political Philosophy," The Stanford Encyclopedia of Philosophy (Winter 2018 Edition), Edward N. Zalta (ed.), 3.6.

<sup>21</sup> Kyle J. Lucas, "Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?" 34.

<sup>22</sup> Joel Feinberg, *The Limits of the Criminal Law: Harm to Others*, Vol 1. New York: Oxford University Press, 1984, 191.

the Harm Principle, it would not follow that individuals have an absolute right to use drugs wherever and whenever they please. It is perfectly consistent with liberal values, as most states recognize, to permit the consumption of alcohol while restraining one's ability to drive while impaired.

A strong justification for prohibiting action  $x$  is that it significantly increases the likelihood of criminal behavior. It is often assumed that due to the correlation between the two, drug use generally causes more crime. Kyle Lucas discusses four tenets proposed by Douglas Husak in determining when a risk is too great. The first principle is that to criminalize conduct  $x$  on the ground of some harm  $y$ , it must be the case that "conduct that directly and deliberately causes  $y$ " is also prohibited. Driving under the influence is illegal because of its likelihood to cause one to drive recklessly, causing a harmful accident. It would violate this principle to criminalize drunk driving but not reckless driving. A justification we should not accept is that drug use causes people to be unproductive, which harms society. Because being unproductive or lazy isn't a genuine crime under liberalism, this reasoning is arbitrary.<sup>23</sup>

It shouldn't take much argumentation to defend this principle under a liberal notion of government. As demonstrated by the unproductive example, this principle provides a check on the state's ability to exercise bias in which activities it prohibits. Without it, there could be no end to arbitrary criminalization. Lucas offers a potential exception to this principle which could apply to certain drugs. Having a mental breakdown isn't illegal but could be the catalyst of actual societal harm. Therefore, if there were a drug that typically threw people into mental states which significantly raised their risk of harming others, this would call for criminalization. In

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<sup>23</sup> Kyle J. Lucas, "Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?" 36.

addition to a mental state significantly raising the chances of committing other crimes, the drug must have a certain likelihood of causing that mental state. While it's possible that certain drugs meet these criteria, the burden remains on prohibitionists to demonstrate that a particular drug unacceptably raises the risk of harm. From that, it would not follow that any other drug, let alone all except for alcohol and cigarettes, should be criminalized.<sup>24</sup>

Considering both factors, it seems doubtful that the majority of illegal drugs are distinguishable from alcohol in both likelihood of causing a particular mental state and likelihood of that mental state causing harm to others. This essay is not conclusive about the list of drugs that *could* satisfy the Harm Principle, were extensive studies done about particular substances and their propensity to cause violence. Studies are not conclusive about the relationship between alcohol and crime, despite alcohol being the most commonly used drug in America. The correlation is irrefutable. Nearly one in four victims of a violent crime report that the perpetrator had consumed alcohol. While this proves no causation on its face, alcohol is “more likely than other drugs to be involved in substance-related violence,” according to the National Crime Victimization Survey.<sup>25</sup> I mention these facts not to claim that illegal drugs have no relation to other crime, but to provide doubt that the current distinctions of mind-altering substances are appropriate. Carrying the burden of justification, prohibitionists must explain why relatively few of the tens of millions of people who used illegal drugs in the past month committed any crimes (besides offenses inherent in drug use/possession).<sup>26</sup> For drugs like PCP, methamphetamine, and alcohol, causation of a dangerous mental state seems plausible in a

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<sup>24</sup> Kyle J. Lucas, “Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?” 36.

<sup>25</sup> “Alcohol and Violence,” National Institute of Health. “Chapter 1: Drinking Over the Life Span: Issues of Biology, Behavior, and Risk” in *Issues of Biology, Behavior and Risk*, 54-5.

<sup>26</sup> I support this claim later in this section.

nonnegligible portion of cases. For drugs such as psilocybin “magic” mushrooms or marijuana, the risk comes nowhere close to that of alcohol.

Husak’s second principle requires that conduct  $x$ , if it should be banned, causes “substantial” (high-magnitude) harm to society.<sup>27</sup> While this requires interpretation to be applied, it’s hardly disputable that, if liberty is to be valued, trivial harms cannot be prohibited. Without this principle there would be no limit to the prosecution of trivial infractions, which are virtually impossible to avoid if one lives near other people. Indeed, there is probably identifiable harm to children’s health when they grow up surrounded by gas-powered vehicles, as compared to growing up on a farm. This wouldn’t permit the liberal state to prosecute the former neighbors of a woman who develops lung cancer in her forties, claiming that any amount of harm justifies criminal punishment. Husak’s third principle addresses “remoteness.” It holds that conduct  $x$  “should not be criminalized on the ground that it increases the likelihood of harm  $y$  unless  $x$  and  $y$  are sufficiently proximate.”<sup>28</sup> To frame this as a test, it might be asked “Could harm [ $y$ ] have been reasonably predicted given action [ $x$ ]?” The drunk driving example is again helpful for applying this principle. We know about the biological effects of alcohol on the brain and body, which include slowed reflexes and decreased eye-hand coordination. Given this information, we can reasonably predict that if the road were full of drunk drivers, the prevalence of dangerous accidents would significantly increase.

Lucas offers a useful explication of the ‘remoteness’ principle, arguing that the standard of proximity is more stringent than ‘but-for’ cause. A ‘but-for’ variable  $x$  is one which, in the event of some result  $y$ ,  $y$  would not have occurred unless  $x$ . There can be many but-for variables

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<sup>27</sup> Kyle J. Lucas, “Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?” 36.

<sup>28</sup> Kyle J. Lucas, “Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?” 37.

in an outcome, especially in a complex situation. Lucas's point is that some of the arguments about societal harm of drug use are not proximate enough to justify criminalization.<sup>29</sup> Drug use may be a but-for factor in certain crimes, but if the drug use wasn't a proximate, or foreseeable cause of another crime, criminalization on causal grounds would violate this principle. If you are doubting the validity of such a stringent requirement, consider an illustration of the problematic nature of but-for reasoning. There are many necessary variables for the 9/11 terrorist attacks—some known to the public and others that will undoubtedly remain classified. An obvious example is that the 9/11 attacks wouldn't have occurred but-for the colonies' revolt against the British monarchy in the late 18<sup>th</sup> century.

Consider a more-proximate example in the form of a thought experiment—imagine that we knew that the terrorist plot succeeded in-part due to miscommunication between intelligence-gatherers (American assets in foreign countries and all the people we pay for information) and decision-makers (leadership of intelligence agencies, politicians, etc.). What if the miscommunication wouldn't have happened but-for the delayed presidential transition of George W. Bush, which wouldn't have happened but-for Al Gore contesting the election results in Florida? Gore pursued every legal option available to him to challenge the count in Florida, which went to Bush by a margin of hundreds of votes. Would it then be appropriate, in this hypothetical, to say that Gore bears responsibility for 9/11 because his choice to contest the results in Florida, in a short list of causal factors, is a but-for variable in the execution of the terrorist attacks? That would be absurd because Gore's choices did not reasonably lead to the events of 9/11. This example helps to justify Husak's third principle of remoteness: in

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<sup>29</sup> Kyle J. Lucas, "Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?" 37.

criminalizing an activity due to potential harm against others, it must be the case that activity *x* calls for a reasonable prediction of harm *y*.

A fourth principle by which to evaluate an action's relationship to societal harm is called the Empirical Principle. Coming as no shock, conduct *x* may be criminalized if it raises the chances of harm *y* "in a reasonably high percentage of cases." This is what people typically have in mind when they claim that drug use brings people to commit crimes at an unreasonable rate. The correlation between drug use and crime is undeniably high. Satisfying this principle, however, requires more than demonstrating that a significant percentage of prisoners have used drugs. It must be the case that using drugs *causes* one to commit crimes at a sufficient rate. Our analysis of which crimes should be excluded in evaluating whether drug use causes crime, drug possession being an obvious one, is further complicated by the criminalization of all drug-related activity.<sup>30</sup> In essence, some of the crimes for which people are imprisoned—disputes between dealers, punishing customers who don't pay, or carrying drugs across state borders, for example—either would not be crimes or wouldn't occur if drug laws were relaxed. The drug prohibitionist can't strengthen his argument by claiming that drug-users commit the crimes mentioned without begging the question, as such activities wouldn't happen without existing drug policies. Therefore, in evaluating the causation between drug use and societal harm, the latter only includes those crimes that would bring harm in a society where people could obtain, transport, and use drugs legally.

Another reason to question the link between drug use and social harm is that many incarcerated people, who were convicted for drug-related crimes, committed their offenses to be

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<sup>30</sup> Kyle J. Lucas, "Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?" 37.

able to afford more drugs. While it is easy to interpret this as showing the dangers of drug use, such desperation is largely caused by drug policy, which disincentivizes seeking treatment, increases rates of recidivism, raises the prices of drugs, and severely limits supply. If alcohol were prohibited in the U.S. for a second time, some alcoholics who could not afford the new street price of liquor would commit crimes to afford it.<sup>31</sup>

The strongest argument against criminalizing drugs on alleged harm to others invokes the empirical and remoteness principles. Of the ~43 million Americans who've used an illegal substance in the past month,<sup>32</sup> only a fraction committed crimes outside of those relating to their drug use.<sup>33</sup> Even with generous estimations, as many criminal actions elude law enforcement, the number of crimes that can reasonably be described as drug-caused are a relative fraction of the instances where people use drugs and don't harm others. Thus, while most criminals are also drug-users, the vast majority of drug-users are not (otherwise) criminals.<sup>34</sup> To restate Husak's first two principles for determining whether conduct causes harm to others: 1) other actions that directly cause harm  $y$  must also be prohibited; 2) conduct  $x$  must bring a risk of substantial harm.

As well as limiting its restrictions to genuinely harmful activities, the state must avoid exercising bias with regard to different legal classifications for equivalent conduct. If one reviews the evidence and determines that marijuana meets the criteria for criminalization under one's application of the principles, one can't make an exception for alcohol if the latter is equally

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<sup>31</sup> Kyle J. Lucas, "Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?" 38.

<sup>32</sup> "Rates of Illicit Drug Use in the U.S" reveals that about 11.7% of the population (12 or older) uses an illegal drug in any given month, which calculates to about 43 million Americans.

<sup>33</sup> To clarify, I'm still excluding only those actions which would be decriminalized under my argument, such as drug transportation (in reasonable amounts) and drug use under legal conditions. Drug-related actions that create an additional risk to others, consistent with Husak's first principle (driving under the influence of drugs, for example) would remain illegal.

<sup>34</sup> Kyle J. Lucas, "Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?" 38.

high in its likelihood to cause harm (studies have shown it is actually higher).<sup>35</sup> While a reduction of costs might be justified under a solely utilitarian framework, allowing a more popular drug (alcohol) to remain legal while others are criminalized, liberalism regards such a distinction as morally capricious. As such, however the principles are applied to particular drugs, they must be applied neutrally.

The ultimate division between legal and illegal substances must reflect genuine differences between the likelihood for legal drugs to cause additional crime as compared to illegal drugs. I am confident that while reasonable people could disagree about certain drugs, such as meth and PCP, these principles would not lead us anywhere close to the United States' current classifications. Our current laws allow for alcohol but not magic mushrooms, which experts have ranked the least dangerous drug (both for the individual and via social cost).<sup>36</sup> The Controlled Substances Act creates federal classifications for different substances.<sup>37</sup> Carrying the strongest penalties, Schedule 1 drugs have supposedly no medical use (this is demonstrably false in the case of marijuana) and a high potential for abuse. The inclusion of marijuana and LSD in this category, despite both of them having a lower potential for abuse, higher medical value, and lower social harm than alcohol and tobacco, is an embarrassment of drug policy.<sup>38</sup>

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<sup>35</sup> "What is the most dangerous drug?" *The Economist*, June 25 2019. <https://www.economist.com/graphic-detail/2019/06/25/what-is-the-most-dangerous-drug>.

<sup>36</sup> "What is the most dangerous drug?" *The Economist*.

<sup>37</sup> "Drug Scheduling," Drug Enforcement Administration. "What We Do," <https://www.dea.gov/drug-scheduling>.

<sup>38</sup> While it is beyond the scope of this paper to critically evaluate the different classifications of drugs, the open-minded researcher will find few health-related reasons for the government's distinctions. To examine the medical benefits researchers have found in psychedelic use, see bibliography entries Miller, Daniel and "LSD as a therapeutic treatment."

## Collective/Social Harm

An objection to Husak’s triviality principle is that while individual cases of harm may be trivial, the collective harm of all such cases make them significant. This logic works for the prohibition of littering. Individual cases of littering can’t possibly damage the planet to the magnitude that justifies substantial fines, but the potential environmental harm of widespread littering is catastrophic. This reasoning certainly seems to fit the narratives of Presidents Nixon and Reagan, whose administrations were pivotal in targeting low-income, minority communities with selective policing and enhanced penalties for drugs associated with indigent people. In general, sentences for drug-related offenses increased throughout both administrations.<sup>39</sup>

Before delving into this inquiry, it should be mentioned that this objection is dangerously vague. In the legitimate case of littering, collective environmental damage is measurable and conclusive. In the case of drugs, one must specify what exactly she means by “collective harm” of drug use. Advocates of criminalization may not simply assume that traces of negligible harm amount to a problem that justifies state intervention. Social harm is difficult to gauge because people and events are complicated—there are typically dozens of factors to rule out before causation can be asserted.

To validate prohibition on these grounds, the social harm at play must be tangible. A particular drug’s aggregate harm is either above the acceptable level or below it. For prohibitionists to succeed in the public interest argument, they must argue “that either drugs

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<sup>39</sup> In particular, the egregious sentencing disparity between cocaine and its less expensive, less potent counterpart, crack cocaine, which still exists today, can only be attributed to a combination of prejudice (either racial or economic in nature), ignorance, and propaganda. For roughly 25 years one had to be caught with 100 times the amount of cocaine to trigger a five-year sentence minimum as compared to crack. From 1986-1990, the average federal drug sentence for African Americans compared to whites jumped from 11% to 49% higher (see Vagins, Deborah J.). In 2010, Congress reduced the disparity from 100:1 to 18:1 with the “Fair Sentencing Act.”

currently cause an unacceptable level of aggregate harm or would cause an unacceptable level if not proscribed.”<sup>40</sup> As there is no objective limit to when aggregate harm becomes unacceptable, the limit must be established comparatively. It is here that, once again, prohibitionists face a difficulty in distinguishing alcohol from other drugs.<sup>41</sup> While illegal drugs such as heroin and methamphetamine rank higher on the scale of harm to the user, in the case of aggregate harm, alcohol is by far the worst offender. An analysis by 26 experts of drug effects and policy, from a variety of different countries and backgrounds, compared the harm of several drugs, both legal and illegal in the U.S. Using community, economic, and environmental costs, likelihood to cause crime and injury, and propensity to cause family adversities, experts determined that alcohol was the most-costly substance, ahead of heroin, meth, and crack cocaine. Two drugs that were given no social harm, yet remain illegal in the U.S. and most countries, are the psychedelic substances, LSD and psilocybin mushrooms.<sup>42</sup>

In responding to this line of argument the prohibitionist has two apparent options. She may concede that alcohol causes an unacceptable level of aggregate harm and adopt a consistent approach to drug policy—as the U.S. nearly did in 1920—and advocate the criminalization of all drugs. I don’t expect this to be a popular position among liberals, but it’s certainly arguable, under the view that no level of social harm is acceptable, that no exceptions should be made for recreational drug use. The challenge for this position is whether it can distinguish drugs, especially those with little to no aggregate harm (including psychedelics, ecstasy, and marijuana) from other conduct which has larger aggregate harm. I believe the prohibitionist will find herself calling for the criminalization of many activities cherished by millions of Americans—including

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<sup>40</sup> Kyle J. Lucas, “Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?” 39.

<sup>41</sup> Kyle J. Lucas, “Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?” 39.

<sup>42</sup> “What is the most dangerous drug?” *The Economist*.

not only alcohol and tobacco consumption, but fast food, sugary beverages, eating meat,<sup>43</sup> and driving cars.<sup>44</sup> The second possibility, rather than calling for the prohibition of all drugs, would be to claim that the current aggregate harm caused by alcohol necessitates the criminalization of other drugs. Under this view, the aggregate harm of alcohol and total illegal drug use is deemed within the acceptable level, but were other drugs to be decriminalized, there would be an epidemic that would push the aggregate harm beyond the acceptable.<sup>45</sup>

While the first position is consistent in a valuable way, such restrictions on individual liberty open a door that liberals wish to keep closed. If the social harm caused by alcohol and illicit drugs is unacceptable, so too are the vices of fast food and soda—whose contributions to the obesity epidemic<sup>46</sup> kill more Americans than all drug overdoses in a given year.<sup>47</sup> Recalling Mill’s distinction between harm and offense, even if the majority of a population finds an action contemptible, it is not necessarily justified in criminalizing it. The state must have direct interest in protecting the fundamental rights of its citizens to penalize certain conduct.<sup>48</sup> Alternatively to

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<sup>43</sup> This will seem silly unless one has explored the astronomical environmental costs of factory farming. Attempting to calculate emissions, using data from the United Nations, *The Guardian* found that “the top 20 meat and dairy companies emitted more greenhouse gases in 2016 than all of Germany, Europe’s biggest climate polluter by far” (see Majot, Juliette in bibliography). If we considered the social harm of meat production’s contribution to climate change and somehow quantified environmental damage, the extent of which nobody knows, I’d bet America’s meat consumption does more social damage than all of America’s illegal drug use. The comparison would not be close if schools and politicians valued education and treatment over fear tactics and punishment, respectively.

<sup>44</sup> “Annual United States Road Crash Statistics,” Association for Safe International Road Travel, <https://www.asirt.org/safe-travel/road-safety-facts/#:~:text=More%20than%2038%2C000%20people%20die,for%20people%20aged%201%2D54>.

<sup>45</sup> Kyle J. Lucas, “Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?” 40.

<sup>46</sup> Susan M. Gale et al, “Energy Homeostasis, Obesity and Eating Disorders: Recent Advances in Endocrinology,” *J Nutr.* (2004);134(2):295-8. doi: 10.1093/jn/134.2.295.

<sup>47</sup> “America’s Drug Overdose Epidemic: Putting Data to Action,” Centers for Disease Control and Prevention, [https://www.cdc.gov/injury/features/prescription-drug-overdose/index.html#:~:text=From%201999%20to%202018%2C%20over,synthetic%20opioids%20\(like%20fentanyl\)](https://www.cdc.gov/injury/features/prescription-drug-overdose/index.html#:~:text=From%201999%20to%202018%2C%20over,synthetic%20opioids%20(like%20fentanyl)).

According to these sources, obesity kills about 300,000 Americans each year compared to around 70,000 from drug overdoses.

<sup>48</sup> David Brink, “Mill’s Moral and Political Philosophy,” *The Stanford Encyclopedia of Philosophy* (Winter 2018 Edition), Edward N. Zalta (ed.), 3.6.

the ‘criminalize everything’ approach, the prohibitionist might claim that the current level of harm is acceptable, but that further decriminalization would lead to an unacceptable degree of social harm. This view, also, is somewhat inconsistent with the values of a neutral state. The state is biased to the majority—beginning to lean utilitarian and away from the liberal’s emphasis on neutrality—when it allows the use of two popular (and profitable) drugs with devastating social effects, while punishing users of a dozen substances of lower social harm. It seems logically convenient to claim that the permissible level of aggregate drug harm is just beyond the harm caused by current level of alcohol and tobacco consumption. The more reasonable view, if one genuinely wanted to reduce aggregate harm while preserving some drug use, would be to criminalize alcohol, heroin, meth, cocaine, and the other socially-damaging drugs, while legalizing psychedelics, ketamine, and ecstasy (marijuana occupies an in-between position, and could be reasonably sorted into either category). Instead of the morally-arbitrary factor of popularity, why not go by the empirical harm?

In any case, a prohibitionist could defend the current level of aggregate harm suffered under alcohol by maintaining that decriminalization of other drugs would lead to an epidemic. I won’t pretend that the evidence is conclusive on this point because it certainly isn’t. Fortunately for everyone interested in this issue, Oregon’s recent move to decriminalize all drugs (legalizing some, such as psilocybin mushrooms, while implementing fines and drug courts for addictive substances) will allow for many useful studies in coming years. Until then, we are limited to the reliability of public polling and case studies outside the United States. On the former point, researchers have found that a slim minority of drug-abstainers report not using drugs, or ceasing to use drugs, because it is illegal.<sup>49</sup> Also considering that the vast majority of casual drug users

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<sup>49</sup> Kyle J. Lucas, “Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?” 40.

face no legal consequences, it seems quick to assume that a particular substance's legal status determines its popularity.<sup>50</sup> For a recent case study on decriminalization, consider Portugal's drug use by age before and after it decriminalized in 2001.<sup>51</sup> While drug possession became an administrative, not criminal offense, drug trafficking and production remained illegal. The question, then, is what happened to people's drug use—did it skyrocket? Glenn Greenwald of the Cato Institute found not only that rates failed to increase in the years after decriminalization, but Portugal's rates of drug use have become among the lowest in the EU. The policy brought a host of benefits, allowing addicts to seek help without fear of prosecution, without any substantial downsides, such as the prior fear that decriminalization would lead to “drug tourism.” In two key age-groups, 13-15 and 16-18, drug use notably dropped. While there were mild increases in the young adult age groups,<sup>52</sup> the aggregate level of drug use has decreased since 2001.<sup>53</sup>

Like some of the other possible justifications, the ‘drug epidemic’ argument may be strengthened by future evidence. It's possible that Oregon, and other states that follow it, will face a drug epidemic following decriminalization, though I firmly doubt it. Since the available evidence, while tending to favor decriminalization, is inconclusive, we must reject the justification that a “drug epidemic” would ensue if drugs were not deterred by criminalization. Remembering that the burden is on the prohibitionist to justify criminalization, as social freedom

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<sup>50</sup> History would not support a tight relationship between criminalization and reducing drug use, either. Just as alcohol was consumed throughout prohibition, cocaine use exploded during the 1980s despite its constant illegal status.

<sup>51</sup> A country that suddenly reversed its drug policy, like Portugal, is more useful for evaluating the policy's effects compared to a country with long-standing acceptance or intolerance for drugs.

<sup>52</sup> Studies have shown that illicit drug use is highly concentrated on young adults, with the vast majority avoiding negative consequences because they stop in their 30s. The CDC found that in 2018, < 12% of Americans over the age of 11 had used an illicit substance in the past month (see “Illicit Drug Use”).

<sup>53</sup> Glenn Greenwald, *Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies*, Washington D.C.: Cato Institute, 2009.

is the default position for a liberal, we shouldn't accept criminal punishment on an assumption that everyone would begin abusing drugs without it.

Claiming that drug use is seldom a victimless crime because of the “web of social interactions that constitute human existence,” Drug Free Australia (DFA) argues that a person's choices are never isolated. According to this logic, the victims of drug use include a person's family and associates, who are impacted in small to large ways. Citing a 2007 study in the U.S., it claims that one of every nine children lived with at least one “drug dependent or drug abusing parent.” Judging that drug use presents an unreasonable threat to “responsibility to others” in one's community, criminalization is thus validated.<sup>54</sup>

There are a number of issues with this argument, both in its validity and the truth of its premises. First of all, DFA is ignorant to or willfully ignores the substantial variances between addiction rates of different drugs. We must limit this argument to the discussion of highly-addictive drugs, such as alcohol, tobacco, methamphetamine, heroin, and cocaine. Even within this narrowed scope, no figures are cited about the propensity for a particular drug to cause addiction in users. DFA does not offer empirical evidence to challenge the conclusion that a statistical fraction of people who have tried addictive drugs have used them in the past year.<sup>55</sup> Further, even if we grant that any level of addiction is too high, the data cited (on the prevalence of American children living with a drug-addicted parent) does not justify criminalization on its face. First of all, it fails to illustrate how many children, with one parent depending on drugs, are

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<sup>54</sup> “Drug Free Australia's Arguments Against Drug Legalisation.” Drug Free Australia. Resources, [https://www.drugfree.org.au/images/pdf-files/library/Drug-Free-Australia/Taskforce\\_Arguments\\_for\\_Prohibition.pdf](https://www.drugfree.org.au/images/pdf-files/library/Drug-Free-Australia/Taskforce_Arguments_for_Prohibition.pdf). 7-8.

<sup>55</sup> Douglas N. Husak, “Liberal Neutrality, Autonomy, and Drug Prohibitions,” 77.

The study Husak cites found that 9 percent and < 1 percent of those who have tried heroin and cocaine, respectively, had used in the past month.

being neglected. There are presumably some parents who are dependent on a substance whose children, by luck or extraordinary effort, are not physically or emotionally hurt (I do not mean to suggest that this is ideal or that many children aren't harmed by drug-addicted guardians). Secondly, acknowledging addiction as a social blight that can and should be addressed doesn't lead one to criminalize drug use. For every drug-dependent parent in the United States, children suffer more as a result of criminalization—even if parents are never arrested but especially if they are—than education and treatment would bring.<sup>56</sup> The superior methodology, if one is genuinely interested in reducing rates of drug addiction, is for the state to provide free and effective treatment. It doesn't take an expert to recognize that prisons are counterproductive environments for overcoming addiction (high stress, availability of drugs, decreased self-worth, lack of emotional support). They are also counterproductive for the American taxpayer, whose dollar would be better spent at a treatment center than on costly prisons with high rates of recidivism.<sup>57</sup>

Considering our understanding of the socially-harmful impacts of various drugs, a blanket ban on substance use is clearly unjustified by the Harm Principle. I cannot rule out that a particular drug, alcohol being the most viable candidate, could abridge the principle. It is possible that future studies will identify a drug as exceedingly harmful to others, questioning the range of my conclusion. Since Mill does not have a monopoly on liberal theory, it is also possible that a new principle will successfully distinguish drug use from other actions with

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<sup>56</sup> Again, I am excluding the cases of dangerous or highly neglectful drug-addicted parents. It would seem that a fraction of parents who are moderately to heavily dependent on alcohol or illegal drugs are so harmful that the family would be better off with the parent in prison, losing access to family and undermining one's ability to secure decent employment and housing prospects after the sentence is completed.

<sup>57</sup> "Is providing drug abuse treatment to offenders worth the financial investment?" National Institute on Drug Abuse, <https://www.drugabuse.gov/publications/principles-drug-abuse-treatment-criminal-justice-populations-research-based-guide/providing-drug-abuse-treatment-to-offenders-worth-financial-investment>. Also see McVay, Doug.

equivalent harm. As of now, there is no doctrine that accomplishes this without infringing the unbiased, freedom-focused values of a neutral liberal state.

### **Exploring Drug Policy if the Harm Principle Were Violated**

Having offered my main conclusions about the validity of drug criminalization under liberalism, I turn to policies which might be justified were the Harm Principle violated by a certain drug. Rather than offering a complete account of drug policy, I'll explain what it must *not* entail, given my research and conclusions. I do not see how imprisoning people just on the basis of drug use could be justified, even if a drug generally raised the risk of harm beyond an acceptable level.

Assume that heroin violates the Harm Principle due to any sound argument. Why would the appropriate response be to place addicts in prison, where they are unable to seek effective treatment and still able to get heroin? If there's any social network for the addict to damage, a prison sentence almost certainly inflicts more damage to that community when the options are using heroin at home or getting heroin in prison, where one is physically and emotionally isolated. How could whatever loss of autonomy suffered by heroin use not be exceeded by a prison sentence and all the individual costs that follow a felon for the rest of her life? If the United States having the highest rate of incarceration in the world is cause for concern, the inefficacy of American prisons in helping convicts overcome addiction is cause for panic.<sup>58</sup> The National Institute of Health reports not only that drugs are commonly available in prisons, but that forced sobriety of those inmates unable to obtain drugs fails to prepare them for life after release, leading to eventual relapse. This, among many other reasons, is why one out of four

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<sup>58</sup> "United States Still Has Highest Incarceration Rate in the World." Equal Justice Institute. 26 April 2019. <https://eji.org/news/united-states-still-has-highest-incarceration-rate-world/>.

people released after drug-related convictions are back in prison within three years.<sup>59</sup> Regardless of one's personal view of drug use, it would seem that the U.S. can't afford *not* to decriminalize. Since they claim to be interested in the wellbeing of drug-users, prohibitionists are oddly silent on the established failure of the American justice system to help addicts.

If a liberal society found that any particular drug violates the Harm Principle, it would only be justified in prohibiting that substance (allowing it to be confiscated) and requiring users to seek treatment. By educating children and offering to treat addicts, the liberal state lives up to both of its essential principles—respecting freedom and helping the disadvantaged. While this seems lost on American legislators, criminal punishment should be a last resort, reserved for conduct which directly and intentionally harm others. I am open to arguments that the most socially-detrimental drugs should be illegal to sell and transport in large quantities. However, assuming a liberal society wishes to keep the sale of alcohol and tobacco products legal, it should also decriminalize (if not legalize)<sup>60</sup> the production and sale of those drugs with equivalent risks of dependency and social harm—that would be neutrality.

The sale of most substances, I am inclined to believe, should not carry penalties. I speculate that a few exceptions might be alcohol, heroin, cocaine, and methamphetamine. Undoubtedly, it is inconsistent in principle to allow for the sale of alcohol but not marijuana, LSD, psilocybin mushrooms, and other drugs with demonstrably less social harm. Another possibility, which cannot be explored because there's no viable precedent, is that legalizing the production of addictive drugs could lead to safer outcomes. The manufacturers of dangerous

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<sup>59</sup> Redonna K. Chandler et al, "Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety." US National Library of Medicine, the National Institute of Health. 14 January 2009, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2681083/>.

<sup>60</sup> Legalizing goes a step beyond decriminalization, which ceases prosecution, in that the state imposes regulations on the sale, transportation, and use of a substance (usually creating a special tax).

drugs, under state regulation, could be held legally-accountable if their products failed to meet standards of purity. Just as the state regulates the production and sale of alcohol, the state could regulate now-illegal drugs.

To summarize my discussion of drug policy, were it found that a substance violates the Harm Principle, this would only justify confiscation, mandatory treatment, and other administrative steps. Second, unless alcohol and tobacco become illegal to sell and manufacture, the right to produce and sell drugs should apply for those substances determined to be equivalent or lower in potential harm. A different position one could take is that the sale and production of *all* drugs (including alcohol) should be prohibited; unfortunately, this would spur a series of further regulations (diet, transportation, lifestyle) on activities with similar or greater social harm. In being consistent with impositions on liberty, as a neutral state must, the society would become illiberal. Instead, the neutral liberal state should recognize that a life which includes drug use is a reasonable pursuit because users do not harm others to a degree that justifies criminal punishment.

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