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# Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?

## **Cover Page Footnote**

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## Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?

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According to a recent article published in the *British Medical Journal Open*, the efforts attempting to control the global illegal drug market are failing. Over the past decades in the U.S., drugs such as cocaine, heroin, and cannabis have decreased in their inflation-adjusted price while the purity of such drugs have increased.<sup>i</sup> What is more, the U.S. spends billions of dollars annually attempting to reduce drug use and its negative consequences. In fiscal year 2015, President Obama has requested \$25.4 billion for such purposes, of which \$9.2 billion will be spent on domestic law enforcement.<sup>ii</sup> Nevertheless, in recent years—for example between 2002-2007—there was only a .2% drop in users who depend on, or abuse, illegal drugs.<sup>iii</sup> In addition, in 2010 of the 1,362,028 prisoners sentenced under state jurisdiction, 237,000 (or approximately 17%) were convicted for drug offenses; of the 197,050 prisoners sentenced under federal jurisdiction, 94,600 (or approximately 48%) were convicted for drug offenses.<sup>iv</sup>

These facts provide motivation, I believe, to enquire into a fundamental question with respect to illegal drugs: Why is recreational drug use a crime?<sup>v</sup> We should be careful to note here at the outset that this question is not concerned with the prohibitions involving drug manufacturers or drug sellers; rather, the question centers upon the drug user: Why do we consider the act of using certain drugs as a form of criminal conduct?<sup>vi</sup>

Arguments put forth to justify criminal statutes against drug use are numerous and generally fall into three main categories: Moral perfectionism, harm to self, and harm to others.<sup>vii</sup> I believe harm to others is the strongest rationale of the trio capable of justifying the criminal statutes.<sup>viii</sup> I will, therefore, focus solely on the arguments put forth that drug use should be illegal because it harms others. I will adopt the Harm Principle, first articulated by John Stuart Mill, as the framework to approach this question. The first part of this paper will briefly characterize the Harm Principle and some of the difficulties in using this principle. Next, I will look at what I believe are some of the strongest arguments which the Harm Principle can put forth to justify the illicit status of drugs. In particular, I will claim that increased risks of harm to others and societal harm are the strongest arguments. Increased risks of harm will primarily be approached drawing upon the work of Douglas Husak and several criteria which he puts forth as possible methods of evaluating when risks of harm can be justifiably proscribed. Societal harm will be approached using Joel Feinberg's model of aggregate harm. I will argue that both of these models fail to provide a sufficient rationale to justify the entire scope of the current criminal statutes against drug use.

### **The Harm Principle**

The Harm Principle was formulated by John Stuart Mill in his work *On Liberty*. Mill described his work as examining “the nature and limits of the power which can be legitimately exercised by society over the individual.”<sup>ix</sup> For Mill, a fundamental problem with law hinged upon the tension between liberty and authority. In order to protect liberty while at the same time justifying the coercive nature of law, Mill formulated one, crucial principle: “the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. 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.”<sup>x</sup>

Perhaps we should first get clear on who, exactly, the “others” are which the community is protecting. Mill seems to suggest that, at the very least, the others are members of the civilized community in question. For our intents and purposes, this would apply to any U.S. citizen living under U.S. jurisdiction. We might raise questions here about the status of non-U.S. citizens living in the United States, U.S. citizens living abroad, as well as non-U.S. citizens living outside of the United States; however, I think this restricted notion of the other will allow us to investigate the question at hand without seriously affecting the argument of this paper. We might also be concerned with the status of those whom the others are being protected against (i.e. those who harm the others); however, from Mill’s definition above, we can see that he is only concerned with members of the community in question (“any of their number”). Thus, in our case, we can again restrict this group to U.S. citizens living under U.S. jurisdiction.

We should also note some other major obstacles which face this principle before proceeding. Perhaps the most notable difficulty is to discern whether an action affects only the actor doing the action or society and others. After all, it would seem almost every action of an individual affects society in some manner. Mill was not insensitive to this difficulty. He asked, “How...can any part of the conduct of a member of society be a matter of indifference to other members? No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections.”<sup>xi</sup> In response, Mill argued that only when there is definite damage, or definite risks of damage, does liberty reach its bounds.<sup>xii</sup> Mill provides an example to demonstrate his point. He held that that “If...a man, through intemperance or extravagance, becomes unable to pay his debts, or, having undertaken the moral responsibility of a family, becomes from the same cause incapable of supporting or educating them, he is deservedly reprobated, and might be justly punished; but it is for the breach of duty to his family or creditors, not for the extravagance.”<sup>xiii</sup> What Mill seems to be suggesting is that actions too remote on the causal chain cannot warrant proscription. We will deal with this conception and related problems in more detail below.

Another difficulty faced by those seeking to employ the Harm Principle is to give a clear definition of what constitutes as harm. This has proved exceedingly difficult. Of notable interest, Joel Feinberg has attempted to give an adequate formulation, arguing that harm is a setback to interest.<sup>xiv</sup> Generally speaking, the idea is that when someone is harmed, they are worse off than they would have been otherwise. This formulation also has its problems which are beyond the scope of this paper.<sup>xv</sup> For our intents and purposes, using a putative conception of harm will suffice. In other words, we will recognize harm when we see it. Thus, although giving a precise definition of harm might be difficult, when we look at a particular case involving drug use and harm to others, we should be able to recognize whether the case in question constitutes as involving harm to others.

A final difficulty in using the Harm Principle, and of notable importance for the purposes of this paper, is to establish how much harm, or how much risk of harm, is sufficient to justify criminalizing an action. This problem is perhaps the most manageable of the three. Joel Feinberg noted two important factors involved in assessing when this is the case: the magnitude of harm and the likelihood that the action will result in harm. The relationship between the magnitude and likelihood of harm and the justification for criminalizing a conduct is spelled out by Feinberg: “the greater the probability of harm, the less grave the harm need be to justify coercion; the greater the gravity of the envisioned harm, the less probable it need be.”<sup>xvi</sup> Feinberg refers to the combination of the likelihood and the magnitude of harm as risk, which is how I will employ the term for the remainder of this paper. To better see the relationship of risk with respect to the likelihood of harm and the magnitude of harm,

consider the following cases which both carry significant risk: (1) Driving 80 mph down a country road at night carries a relatively low probability of causing harm to some other person; however, should a harm occur, the magnitude would be great. (2) Second hand smoke has a high probability of causing harm to others, but the magnitude is relatively low. Attempting to quantify the exact level of risk needed to criminalize harm is beyond the scope of this paper; rather, I will use a comparative approach and examine actions which carry a similar risk to use of illicit drugs.

### **The Harm Principle and Drug Use**

We are now in a position to apply the Harm Principle to test whether drug use causes sufficient harm to others or poses a risk of harm to others significant enough to warrant the current statutes. What is immediately apparent is that in most all cases of drug use there is not direct harm to others. In other words, it is not the case that as a direct consequence of using drug [x] another person [y] is harmed. For instance, in only a few exceptions is it the case that a heroin user, by consuming or injecting heroin, causes direct harm to another person. Husak helps explain: "One possible way to describe this distinction is to say that drug use is *indirectly* harmful to others, whereas these other crimes are *directly* harmful to others. These labels draw the following distinction. Every act of burglary or rape is harmful to others...By contrast, not every act of drug use is harmful to others."<sup>xvii</sup> One notable exception involves pregnant women.<sup>xviii</sup> We should note that this seems to fall outside of the scope of "others" with respect to our definition above. Yet even if we do consider a fetus as an "other", I do not think this is what most people have in mind when they attempt to justify the criminal drug statutes. Should cases such as pregnancy be a major concern, a law specifically oriented towards pregnant mothers using drugs would seem more appropriate than criminalizing the conduct in general.

It seems, then, the strongest arguments which can be brought forth using the Harm Principle must involve risks of harm, where the act of using a certain drug is not in itself harmful, but it raises the likelihood that some other harmful act occurs. In order to approach this rationale, we will look at two general types of harm to others laid out by Feinberg: risks of harm to private persons and risks of harm to the public, society, or state.<sup>xix</sup>

### **Risks of Harm to Others (Private Persons)**

Using the Harm Principle, one can argue that certain activities carry a risk of harm to others which should be criminalized by law. Generally speaking, of the two factors involved in risk, it is the likelihood that some harmful event obtains which is the significant factor in question. Husak helps us spell out this rationale. He holds that such laws "prohibit some conduct *x* because it impermissibly increases the likelihood of harm *y*. Conduct *x* does not invariably harm anyone, but it impermissibly increases the likelihood that a harm *y*...will occur."<sup>xx</sup> Husak proceeds to describe how this might occur: "Sometimes the probability of *y* is raised because the agent who performs *x* is more likely to commit a subsequent harmful act."<sup>xxi</sup> Some clear examples of current criminal statutes which prohibit activities based upon the increased risk of harm include drinking and driving and speeding. For instance, drinking and driving increases the likelihood of a subsequent harmful act (e.g. a car accident). Although the likelihood of a car accident still might remain relatively low at certain blood alcohol content levels, car accidents carry a significant magnitude of harm. Thus, even a slight increase in likelihood might raise the risk of harm to such an extent we deem the action should be prohibited.

Increased risks of harm are some of the most common arguments evoked against drug use, such as the connections made between drug use and crime. For example, we might put

forth the argument that someone who takes drug [x] is more likely to commit some harmful crime [y]; thus, we can say there is an increased risk of harm from taking drug [x]. As Husak notes, however, the scope of when it is justifiable to criminalize activities which create increased risks of harm has not been clearly defined. In response to this difficulty, Husak has put forth four principles which he argues should be requirements to justify making certain conducts criminal based upon their capacity to increase the likelihood of some harm.

Although I take these to be prima facie principles insofar as they may have exceptions, I believe they offer a meaningful framework for evaluating risks of harm created by drug use.

The first principle Husak refers to as the “Inchoate Principle.” According to Husak, “Conduct *x* should not be criminalized on the ground that it increases the likelihood of harm *y* unless conduct that directly and deliberately causes *y* should also be prohibited.”<sup>xxii</sup> The idea seems most fitting in cases where some act [x] increases the likelihood of a harm [y] indirectly through some other conduct [z]. Suppose, for instance, that we deem drinking and driving [x] as unacceptably increasing the likelihood of a terrible car accident [y]. Often, this risk is indirect; for instance, alcohol can create a certain disposition to drive recklessly [z]. Reckless driving directly causes terrible car accidents. Thus, it would be strange indeed if we prohibited drinking and driving but not reckless driving.<sup>xxiii</sup> With respect to drug use, such reasoning is prevalent. For example, Husak points out that many argue drug use causes an increased likelihood that people become unproductive and lazy, which in turn carries a risk that they might harm society through a reduction of productivity towards the common good. However, neither being unproductive nor lazy are forms of criminal conduct themselves, despite the fact that they directly cause the loss of productivity for the common good.

There may be exceptions to this principle that relate to drug use. For example, having a mental disorder is not criminal, yet it might be the direct cause of many harmful acts. Supposing there to be a drug which throws someone into this state of mind, we might think this qualifies as a reason to criminalize the drug but not the mental disorder itself. This reasoning carries weight and may very well hold for some drugs; however, I am not sure it will hold in most cases under further scrutiny. I think the burden of proof lies upon those attempting to uphold the prohibitions to demonstrate this is the case. There are at least two conditions which should be met for such cases: First, whatever the mental disorder, it would need to carry a significant risk of harm to others. Second, the drug itself would need to carry a certain likelihood that people who use it develop the mental disorder. What is more, by looking at alcohol as a comparative example, I think we have reason to be hesitant that the above objection will work in most cases of illegal drugs. Generally speaking, consuming alcohol seems to carry a similar likelihood that a person will develop a risk-prone mental disorder as do most illegal drugs. Some rationale must be provided, then, as to why we deem such risks associated with alcohol consumption as falling outside the bounds of criminal law while those of the well-known illicit drugs fall within its scope.

The second principle is the “Triviality Principle.” Husak holds that “[c]onduct *x* should not be criminalized on the ground that it increases the likelihood of harm *y* unless *y* is a substantial harm.”<sup>xxiv</sup> By substantial, I take Husak to be referring to the magnitude of the harm. In other words, if the magnitude of the harm is relatively low, then even under conditions where there is a high likelihood of harm, its risk would not warrant criminalizing the conduct. Thus, for example, consider a lazy drug user: Suppose we have the tools to calculate that using drug [x] will *significantly* increase the likelihood of a loss of productivity [z] which causes [y] amount of harm in each instance. Even if the likelihood of harm is high, it would seem in such cases that the magnitude of harm is significantly low—too low, perhaps, to criminalize the conduct.

This principle faces a significant challenge. It may be argued that, although it is true each individual instance carries a small amount of harm, taken as a whole, the aggregate is quite substantial. Much the same reasoning can be applied to littering: An individual case of

littering does not cause much harm to the environment, but taken as the whole the harm can be quite substantial. I will not deal extensively with this challenge here, as it will fall under “societal harm” and be dealt with in the next section.

The final two principles deal with causation. Husak’s third principle is the “Remoteness Principle.” He argues “[c]onduct *x* should not be criminalized on the ground that it increases the likelihood of harm *y* unless *x* and *y* are sufficiently proximate.”<sup>xxv</sup> In other words, if an action [*x*] is quite distant in the causal chain connecting the action with the end harm, this might be a good reason to deny that action [*x*] should be criminalized. Generally speaking, to see if some action is the proximate cause of some effect, a foreseeability test is used where we would ask the question: Could harm [*y*] have been reasonably predicted given action [*x*]? Determining whether some action can be considered the proximate cause of an event has caused a considerable amount of debate in jurisprudence. This issue is beyond the scope of this paper; however, a few brief comments should suffice for our purposes: First, we should note that concerns with proximate causation are not the same as those which are concerned with the “cause in fact”, also known as the “but-for” cause. In many cases, we may want to say that had a person not taken a certain drug [*x*], harm [*y*] would not have happened. This would pass the “but-for” test, meaning that without action [*x*], harm [*y*] could not have occurred, but this does not necessitate that it is a proximate cause of the event (i.e. that it was foreseeable). By and large, I think most of the harms which are connected with drug use are too remote on the causal chain to warrant the criminal statutes under this principle. Rather, I think what most people have in mind when they evoke a causation argument is that using drug [*x*] was the “but-for” cause of harm [*y*]. For instance, suppose someone takes drug [*x*]. This causes an addiction, which in turn causes numerous other events to take place, such as the user losing his job and money. At the end of the causal chain, the user commits a robbery and thereby causes harm [*y*]. We might say that drug use was the “but-for” cause of the harm (which will be dealt with more in the next principle); however, in terms of proximity, the use of the drug is quite remote from the actual harmful event.<sup>xxvi</sup> I think it would be a hard case to make that the harm in question was foreseeable, thereby providing a justification for the prohibition against use of the drug. Thus, it seems this principle will come of short of being convincing in most cases.

The fourth principle Husak terms the “Empirical Principle.” He holds “[c]onduct *x* should not be criminalized on the ground that it increases the likelihood of harm *y* unless there is an established causal connection between *x* and *y* in a reasonably high percentage of cases.”<sup>xxvii</sup> The concern here is not how close action [*x*] lies to harm [*y*] on the causal chain, but whether there is a strong causal connection between the two. This is perhaps the most powerful argument brought against drug use in favor of its criminalization, and I think it is what most people have in mind when they say that the use of a certain drug was the “but-for” cause behind some harm. Most commonly, this occurs in the form of arguing that drug use increases the likelihood of criminal behavior. There is certainly a strong correlation between drug use and crime. With respect to violent crime, according to the Bureau of Justice Statistics (BJS), “about 26% of the victims of violence reported that the offender was using drugs or alcohol.”<sup>xxviii</sup> In addition, Norman Miller and Sara Spratt, examining legal issues concerning drug and alcohol addiction, note that more than 50% of murderers were using alcohol, drugs, or both, at the time of their crime.<sup>xxix</sup> With respect to prisoners, the BJS notes “In the 2004 Survey of Inmates in State and Federal Correctional Facilities, 32% of state prisoners and 26% of federal prisoners said they had committed their current offense while under the influence of drugs.”<sup>xxx</sup>

At face value, these statistics make it seem reasonable to argue that, indeed, there is an established causal connection between drug use and criminal activity in a high percent of cases. Nevertheless, looking further into the issue, I think there are substantial objections against this argument. The first important point to call into consideration is what Husak refers

to as the “systemic” effect of drug use leading to crime. According to Husak, this category includes “offenses within dealing hierarchies to enforce normative codes, retaliate for real or imagined crimes of competitors or informers, resolve disputes involving territory or possession of drugs, punish customers who fail to pay debts, and so on.”<sup>xxxix</sup> Thus, part of the problem in obtaining reliable statistic between drug use and crime is that many of the crimes might be drug related in the sense that, if there were not legal statutes making drugs illegal in the first place, such crimes would have never taken place. In addition, the fact that someone involved with drugs happened to be using drugs in a drug-related crime should not come as a surprise. For instance, if a drug dealer commits assault against a client who does not pay, the correlation that the dealer was on drugs at the time of the crime does not necessarily imply causation (that drug use was the culprit causing the crime) or at any rate that drug use was the “root cause”: i.e. that the drug was the fundamental cause or initiator of the criminal act.

Another reason to doubt that drug use, itself, is a significant causal agent in creating an increased likelihood of crime involves what Husak referred to as an “economic effect.”<sup>xxxix</sup> The basic argument here is that the correlation between drug use and crime can to a large extent be explained as resulting from the fact that drug users turn to crime in order to support their expensive drugs habits. Thus, it is not drug use *per se* that causes the criminal activity but rather the limited supply and high costs. These factors—caused largely by the legal sanctions placed upon drugs—result in drug users becoming poor and desperate to continue their habit. For instance, one could imagine that if alcohol were made illegal, there would be alcoholics who would commit crimes to get their drink. That drug users commit crimes in order to raise money for their drug habits is strongly corroborated by the BJS: “In 2004, 17% of state prisoners and 18% of federal inmates said they committed their current offense to obtain money for drugs.”<sup>xxxix</sup>

A third and perhaps most significant reason why we might call into doubt the causal connection is that, even supposing that drug use was a significant causal factor in crimes committed under the influence of drugs, there is a low likelihood that drug users actually commit crimes. Husak explains:

Theorists who believe that drugs cause crime must explain why relatively few users of recreational drugs become criminals. Although the majority of criminals may be drug users, the majority of drug users are not (otherwise) criminals. Continued criminality is more predictive of drug use than continued drug use is predictive of criminality. Approximately 14.5 million people use an illicit drug each month. Only a tiny fraction is arrested for crimes, although no one knows how many commit offenses that are undetected. The fact that only a small minority of drug users resort to criminality raises a serious difficulty for those who conclude that LAD [laws against drugs] satisfies the conditions for justified anticipatory legislation.<sup>xxxix</sup>

Thus, taking into consideration the factors noted above, I believe we have reason to doubt that this principle sufficiently establishes a justification for the drug statutes.

Using the four principles outlined by Husak help develop an account for when it is justifiable to criminalize actions which cause substantial risks of harm. As we can see, however, this argument faces considerable challenges if we are to be convinced. Nevertheless, there remains a strong case to be made that it is actually harm to society in general which justifies laws against drugs.

### **Societal Harm**

According to Husak’s triviality principle, we should not criminalize risks of harm when the individual harm of each act is insignificant. Nevertheless, should we add each individual act



together, the aggregate harm to society can be quite significant. Thus, perhaps societal harm provides a convincing rationale to criminalize the risks of harm created by drug use.

Societal harm, as argued by Feinberg, is a harm of public interest. Feinberg defines public interest as “a ‘common,’ or widely shared, specific interest.”<sup>xxxv</sup> It is a common interest which nearly all members of society have, for example, avoiding epidemic sicknesses, providing a sustainable environment in which one can live, and having economic prosperity. Acts can be considered harmful to society even if an individual act is relatively harmless itself. For instance, a single act of littering causes little harm. Nonetheless, the sum total of harm caused by all the individual acts in a given time might end up being quite substantial. If the aggregate of the harms push us past a certain unacceptable level, then we have a strong reason to prohibit such acts. Feinberg refers to these types of harm as “aggregate-harm.”<sup>xxxvi</sup> Thus, in the case of drugs, one might argue that although each individual use of a certain drug causes a small amount of harm, the aggregate is substantial enough to warrant the criminal statute.

Since we are dealing with drugs already proscribed, it is not enough to merely take current aggregate to see whether we are past the unacceptable threshold. If one were to argue that even with the current proscriptions we are past the threshold, this would not be problematic, as this person would certainly not argue we should remove the prohibitions; however, even if we think that the current aggregate is below the threshold, we must ask a further question: What would happen to the aggregate level should we lift the prohibition on drugs? This involves that we make a prediction about how many people would participate in the activity (taking the drug in question) and project the change in the level of aggregate harm. We should take careful note here, then, that the current level of aggregate harm need not be past the threshold to justify proscribing an activity. For instance, for many illicit drugs, we might say that currently the aggregate harm is lower than the threshold required to justify proscription; however, should the drug in question be made legal, the aggregate might swell to an unacceptable level. Therefore, one seeking to justify the criminal status of drugs according to societal harm must convincingly argue that either drugs currently cause an unacceptable level of aggregate harm or would cause an unacceptable level if not proscribed. The later argument is what one might call the ‘epidemic scenario.’ The argument runs that if drugs were to be decriminalized or legalized, it would result in an epidemic of societal harm.

Overall, societal harm seems to carry some weight at first glance; however, as we shall see, I believe it faces significant challenges. First, since there is no objective threshold which determines when there is enough societal harm to justify criminal sanctions, we must rely on comparative cases. Such cases do exist, and I think they leave us open to doubt the aggregate level is high enough to warrant proscription. In addition, I believe there is also reason to doubt an epidemic scenario on a scale which would push us past the aggregate threshold would occur.

First, let us examine the argument that the current aggregate level of harm created by illicit drug use warrants its criminal status. This claim is open to doubt primarily on the grounds that there exists other activities which cause a greater aggregate harm which are not themselves proscribed. Most notably, this is the case with alcohol, which is interesting given its affinity with drug use and crime. It seems fairly uncontroversial that the amount of aggregate harm caused by alcohol is higher than that of most illicit drugs. Even if we assume that alcohol causes considerably less harm on average per user than most illicit drugs, the aggregate must still be far greater given that more people use and abuse alcohol than any illegal drug. But what is more, there is evidence that alcohol is one of the most socially harmful drugs in widespread use. For instance, recent research attempting to quantify the harm to society from substance abuse was conducted in Scotland. The study found that “[t]here was no stepped categorical distinction in harm between the different legal and illegal substances.”<sup>xxxvii</sup> On a scale of 0-3, the researchers averaged the scores of all users. The social

harm of alcohol was averaged at 2.70 coming in second only to heroin at 2.72. Other notable drugs included cocaine, which had a social harm score of 2.33, and cannabis which scored at 1.61, second to last behind magic mushrooms which had a score of 1.60.<sup>xxxviii</sup>

Three responses might be available to continue justifying the illicit status of drugs as a societal harm. First, one could argue that alcohol should, in fact, be illegal. I will not deal with this response as I do not believe most people actually hold it. If one were to use this line of reasoning, the issue would hinge upon the grey area of when there is sufficient harm to criminalize an activity. Second, one could argue that lifting the prohibitions on drug use would push us past the acceptable level of aggregate harm. I will deal with this criticism shortly. Finally, George Sher put forth the following argument, noting the parallels between illegal drugs and alcohol and stating that the arguments for criminalization of the two seem to stand or fall together: “the reason drugs take us past the threshold [referring to the permissible level of aggregate harm] is that alcohol has already gotten us part of the way there. It may be the case, in other words, that either alcohol or the use of drugs by itself would *not* produce more harms or bads than a reasonable society can tolerate, but that in combination they would produce harms and bads that surpass the threshold.”<sup>xxxix</sup> Ultimately, I think this argument stands or falls with the “epidemic scenario”, since this argument implies that should illicit drugs be decriminalized or legalized, then we would pass the harm threshold.

This brings us to the final argument we will examine in favor of the laws against drug use. It is a common argument in defense of the prohibitions: If drug prohibitions are removed (the argument is also commonly applied to decriminalization policies as well), the aggregate level of harm will exceed the acceptable threshold. In other words, by legalizing drug use, there will be a surge in the number of users which will significantly increase the aggregate harm. This argument, however, faces a significant challenge. Husak argues that there is simply no empirical data supporting the idea that should proscriptions be removed, a large amount of people would turn to drug use. He references a work by Robert MacCoun and Peter Reuter, which found that few people said they abstained from drugs, or quit after using drugs, for legal reasons. If this is true, it implies that we should not expect a significant change in drug use should the prohibitions be lifted. In turn, we should not expect a substantial increase in the current level of aggregate harm.

Part of the problem with the argument noted above is a lack of empirical evidence to support one side or the other. A recent case, however, corroborating the argument that use levels would not significantly change can be seen by looking at a decriminalization policy implemented by Portugal. A brief word about the policy: It is not a policy of legalization. Furthermore, drug trafficking is still criminalized. Possessing “for one’s own consumption” any of the well-known illicit drugs constitutes as an administrative offense, not a criminal offense. Administrative offenses can result in a fine between 25 euros and the minimum national wage; however, Glen Greenwald, reviewing the policy, notes “but such fines are expressly declared to be a last resort. Indeed, in the absence of evidence of addiction or repeated violations, the imposition of a fine is to be suspended.”<sup>xl</sup> Thus, despite not being legalized, users do not face harsh legal penalties. The effect on usage rates has been surprising and gives us reason to doubt what most supporters of criminalization argue. From 2001 (when the policy was implemented) to 2007, those aged 15-19 saw a slight decrease (2-3%) while those aged 20-24 saw a slight to mild increase (8-9%) in terms of their lifetime prevalence rates (how many people have consumed a certain drug over the course of their lifetime).<sup>xli</sup> Overall, then, there was only a slight increase in drug use by those aged 15-24. Granted, this policy was one of decriminalization and not of legalization; however, the “epidemic scenario” argument is commonly applied to both policies. This is not to say that if the argument fails with respect to decriminalization, then it also must fail with respect to legalization, but I believe this data gives us reason to doubt that an epidemic scenario would take place should drug use prohibitions be lifted altogether.<sup>xlii</sup>

## Conclusion

This paper sought to investigate whether the Harm Principle could provide a sufficient rationale to justify the current drug proscriptions. A few points are worth reviewing: Increased risks of harm are one of the most significant arguments used to justify the proscriptions against drug use. Using several principles laid down by Husak, I believe it evident that it is difficult to construct a wholly convincing argument that drug users create a risk of harm significant enough to justify the criminal statutes. Furthermore, the argument that drug users create enough social harm to justify the prohibitions also faces severe challenges. Thus, the Harm Principle does not provide a conclusive argument that drug users should face criminal sanctions.

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<sup>i</sup> Dan Werb, Thomas Kerr, Bohdan Nosyk, et al, "The Temporal Relationship between Drug Supply Indicators: an Audit of International Government Surveillance Systems." *BMJ Open* (2013) 1

<sup>ii</sup> Executive Office of the President, Office of National Drug Control Policy, National Drug Control Budget: FY 2015 Funding Highlights. (March 2014) 2.

<sup>iii</sup> See, Michele Alexandre, "Sex, Drugs, Rock & Roll and Moral Dirigisme: Toward a Reformation of Drug and Prostitution Regulations," *UMKC Law Review*, 78.1. (2009) 108.

<sup>iv</sup> U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Prisoners in 2011*, by Ann Carson and William J. Sabol. NCJ 239808. (Washington D.C. 2012)

<sup>v</sup> The term recreational is employed chiefly to avoid the debate over whether or not drug use can be justified in terms of certain health benefits or as vehicles of self-discovery, religious experience and the like. The "health benefits" argument is most exemplary in drugs such as marijuana, in which medicinal purposes, such as mitigating the effects of glaucoma or treating certain forms of epilepsy, are argued for. The argument that drugs can be vehicles of self-discovery or religious experience has been employed particularly in reference to psychedelic drugs such as LSD. Such arguments, if true, certainly carry more force than does the recreational case, which is precisely why I think it germane to examine the legal status of drugs in light of this argument: if the argument holds for recreational purposes, it certainly holds for the others. This approach was also used by Douglas Husak. See, Douglas N. Husak, *Drugs and Rights*, (New York: Cambridge University Press, 1992).

<sup>vi</sup> It is worth pointing out that federal drug proscriptions in the United States are relatively new statutes. Before the Food and Drug Act of 1906 and the Harrison Act of 1914, no federal laws existed regulating the use or sale of drugs. Although it was by no means the case that drug use was a condoned act, there were no criminal prohibitions. To give an idea of how accessible certain drugs were, James Inciardi, reviewing the history of drug laws in the U.S., noted "in the 1904 Sears catalog...heroin, barbiturates, and necessary injection paraphernalia were all advertised." See James Inciardi, "Alternative Perspectives on the Drug Policy Debate," in *The Drug Legalization Debate*, James A. Inciardi, Ed, 2nd ed, (Thousand Oaks, California: Sage Publications, 1999) 11. For a brief overview of the history of drug laws in the United States, also see David A.J Richards, *Sex, Drugs, Death and the Law: An Essay on Human Rights and Overcriminalization*. (New Jersey: Rowman and Littlefield, 1982) 158-165.

<sup>vii</sup> For more, see George Sher, "On the Decriminalization of Drugs," *Criminal Justice Ethics* 22.1 (Winter 2003) 30-31. Sher refers to these as: the perfectionist argument, the paternalistic argument, and the protective argument. For a summary of the moralist argument see Richards, 168-177. For an overview of the paternalist (harm to self) argument, see Husak, *Drugs and Rights*, 71-144 and Richards, 182-185.

<sup>viii</sup> Moral-perfectionists tend to focus on worries such as the loss of self-control and the erosion of the moral character with respect to drug use. Although I believe these are significant worries, they often collapse into a concern about harm to others. For example, a lack of self-control seems problematic largely because of certain harmful consequences which seem more likely given that an agent lacks self-control. Somewhat related, the harm to self model is generally concerned with detrimental effects which

certain drugs have upon a drug user, such as the user's well-being. However, here too, I think these worries often collapse into a concern about harm to others. For instance, it could be held that someone who harms their own health by drug use also harms society by requiring medical resources which they would not have needed otherwise. This discussion is merely meant to motivate why I selected the harm to others model. It might very well turn out that the moral-perfectionist model or the harm to self model can produce stronger arguments in favor of the criminalization of drugs with respect to the drug user. Nonetheless, even if this should turn out to be true, I do not believe it significantly affects the thesis of this work since the concern is solely whether a harm to others model provides a rationale for the statutes. A few legal cases also corroborate the idea that harm to others is the strongest rationale. For instance, *State v. Kantner* involved the constitutionality of a law prohibiting possession of marijuana. Justice Levinson's dissent provides support for the idea that drug prohibitions are justified because drug use causes harm to others. In fact, he seems to support the adoption of the Harm Principle as the sole justification for any criminal statute. Levinson held "This principle that the State's power to restrain private conduct is limited by the need to show social injury was recognized by this court in *State v. Lee*, 51 Haw. 516, 521, 456 P.2d 573, 577 (1970): '[W]here an individual' conduct, or a class of individuals' conduct, does not directly harm others the public interest is not affected and is not properly the subject of the police power of the legislature.'" See *State v. Kantner*, 493 P.2d 315 (Supreme Court of Hawaii 1972) (Levinson J., dissenting).

<sup>ix</sup> John Stuart Mill, *On Liberty*, (New York: Barnes and Noble, 2004) 1

<sup>x</sup> *Ibid*, 10

<sup>xi</sup> *Ibid*, 85

<sup>xii</sup> *Ibid*, 87

<sup>xiii</sup> *Ibid*

<sup>xiv</sup> See Joel Feinberg, *The Limits of the Criminal Law: Harm to Others*, Vol 1. (New York: Oxford University Press, 1984). For a critique of the Harm Principle, see Nils Holtug, "The Harm Principle," *Ethical Theory and Moral Practice*, 5 (2002) Holtug analyzes several plausible versions of the Harm Principle in order to flush out a way in which harm can be adequately defined without failing to provide a sufficient protection for liberty. Holtug argues that no such plausible version exists.

<sup>xv</sup> With respect to legally demarcating what constitutes as harm, see Dennis J. Baker, "Constitutionalizing the Harm Principle," *Criminal Justice Ethics* 27.2 (2008). Baker, arguing that the Harm Principle should be constitutionalized as the only legitimate principle to deprive people of liberty by means of penal detention. He holds that actions deserve to be punished when they aim to bring about bad consequences for others. For Baker, the wrongfulness and harmfulness of the action (and this includes the potential harmfulness that can result from an action) must be taken into consideration.

<sup>xvi</sup> Feinberg, 191.

<sup>xvii</sup> Husak, *Drugs and Rights*, 180.

<sup>xviii</sup> For an overview of this problem, see Frank E. Vandervort, "Legal Rights of Fetuses and Young Children," in *Principle of Addictions and the Law: Applications in Forensic, Mental Health and Medical Practice*, Norman S. Miller, ed. (New York: Academic Press, 2010) 229-251. In *State v. McKnight*, 352 S.C. 635 (2003), for instance, McKnight was convicted of child abuse and sentenced to prison for using a drug which caused the stillbirth of her child.

<sup>xix</sup> Feinberg, 11.

<sup>xx</sup> Husak, *Drugs and Rights*, 181.

<sup>xxi</sup> *Ibid*.

<sup>xxii</sup> *Ibid*, 184.

<sup>xxiii</sup> An interesting, related case is that we might also say it is certain cognitive impairments which lead to the increased likelihood of some harm (e.g. a terrible car accident occurring). Nonetheless, to my knowledge, there are few laws which address the problem that old age leads to a loss of certain cognitive abilities, which could also cause an unacceptable risk of harm.

<sup>xxiv</sup> Husak, 186.

<sup>xxv</sup> *Ibid*, 189.

<sup>xxvi</sup> We might also say the drug use was the "root cause" of the harm. The root cause is the initial cause leading to some outcome or effect, but as with the "but-for" cause, this does not imply that a root cause is a proximate cause.

<sup>xxvii</sup> Husak, 193.

- <sup>xxviii</sup> U.S. Dept. of Justice. Office of Justice Programs. Bureau of Justice Statistics. *Drugs and Crime Facts*. By Tina L. Dorsey. NCJ 165148. (Washington D.C. 2008) 7.
- <sup>xxix</sup> Norman S. Miller and Sara Spratt, "Addictions and the Law," *Principle of Addictions and the Law: Applications in Forensic, Mental Health and Medical Practice*, Norman S. Miller, ed. (New York: Academic Press, 2010) 22.
- <sup>xxx</sup> U.S. Dept. of Justice, *Drugs and Crime Facts*, 9.
- <sup>xxxi</sup> Husak, *Drugs and Rights*, 198.
- <sup>xxxii</sup> See *Ibid*, 200.
- <sup>xxxiii</sup> U.S. Dept. of Justice, *Drugs and Crime Facts*, 5.
- <sup>xxxiv</sup> *Ibid*, 198.
- <sup>xxxv</sup> Feinberg, 223.
- <sup>xxxvi</sup> *Ibid*, 193.
- <sup>xxxvii</sup> Mark Taylor, Kirsty Mackay, Jen Murphy, et al, "Quantifying the RR of Harm to Self and Others from Substance Misuse: Results from a Survey of Clinical Experts across Scotland," *BMJ Open* (2012) 1.
- <sup>xxxviii</sup> *Ibid*, 3.
- <sup>xxxix</sup> Sher, 33.
- <sup>xl</sup> Glenn Greenwald, *Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies*. (Washington D.C.: Cato Institute, 2009) 3.
- <sup>xli</sup> *Ibid*, 11-14.
- <sup>xlii</sup> I think it is also important to attempt to take into account the harms caused by proscriptions with respect to drug use and balance these against the harms caused by drug use in any aggregate mode.