

**RETHINKING DRUG POLICY:
AN INTEGRITY PRESERVING COMPROMISE POSITION**

A Thesis

by

AZZURRA CRISPINO

Submitted to the Office of Graduate Studies of
Texas A&M University
in partial fulfillment of the requirements for the degree of
MASTER OF ARTS

August 2006

Major Subject: Philosophy

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Approved by:

Chair of Committee, C. Edwin Harris
Committee Members, Colleen Murphy
Edward Murguia
Head of Department, Robin Smith

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ABSTRACT

Rethinking Drug Policy: An Integrity Preserving Compromise Position. (August 2006)

Azzurra Crispino, A.B., Ripon College

Chair of Advisory Committee: Dr. C. Edwin Harris

The "War on Drugs" has been raging for twenty years without resolution. This work attempts to provide a compromise position between the prohibitionists and the legalizers that preserves the integrity of both positions. This compromise position is necessary to resolve issues of racism, deprivation of civil rights, and other injustices inherent in the policy, on which I elaborate. I show a moral compromise with integrity is not possible without a full elaboration of the moral underpinnings of both sides to the conflict, which is provided. I extend Martin Benjamin's theory of moral compromise with integrity, as found in *Splitting the Difference*, to the public policy arena. I offer a compromise solution to the drug policy question, and answer theoretical objections, including establishing criteria of integrity-preservation, which I show are met by my compromise position.

To my mother,
in reciprocity

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CHAPTER I

INTRODUCTION TO STATUS QUO DRUG POLICY

The issue of how to properly regulate the use of illegal recreational substances – drugs – is one of today’s most pressing. More than four thousand people died in Atlanta, GA, of drug induced or related deaths in the year 2002 alone.ⁱ Drug offenses are responsible for a majority of the people in our overcrowded prison system: “drug offenses account for nearly 60% of the federal prison population and more than 20% of the state inmate population.”ⁱⁱ The federal government spent an estimated 90 billion dollars in 2003 on the war on drugs,ⁱⁱⁱ which does not include the price of prosecuting, convicting, rehabilitating and imprisoning drug users, or expenditures by state governments. Even still, a large percentage of people admit to using or having used drugs in some point in their lives: 47.8% of the population admits to having at some point consumed an illicit substance.^{iv} Are the expenditures to keep people from using drugs justified? Can we afford not to combat the deaths and human suffering caused by drugs use? The issue of whether and how to deter citizens from using drugs is a significant one, which requires philosophical analysis to establish the justification of drug policy, and to make recommendations. Before we can consider a philosophical approach, we have to have a basic understanding of the drug problem. First, we need to

This thesis follows the style of *The Chicago Manual of Style*.

establish exactly what we mean by the term ‘drugs’ in this context. Secondly, we need to further analyze the driving force behind drug prohibition, along with its the harms.

Then, we will be ready to discuss how a philosophical perspective will lead us to some concrete policy recommendations.

A BRIEF DISCUSSION OF DRUGS

In order to critique current drug practices, we must understand the difference between effects intrinsic to human ingestion of certain substances versus negative effects due to drug prohibition. “If there is a single key to understanding America’s ‘drug problem,’ it is recognizing the difference between the costs of drug use per se and the costs of efforts to prevent drug consumption.”^v In order to keep this distinction in mind, every section describing a specific drug is divided into biological and political subcategories: the biological describes problems inherent with drug use; the political section discusses problems best ascribed to the current criminal nature of drug use.

Often, the point of view on drug policy of the person who is reporting the information makes a difference. The “political” subsection for each substance will also include information that is under dispute, along with the source. Generally, those who are best described as “prohibitionists,” or people who wish to keep drug laws primarily they way they are, understand drugs to be more dangerous than those who can be called legalizers. Drug Enforcement Administration (DEA) and other “prohibitionists,” those who want to keep status quo drug laws in place, have a harder stance than legalizers. Legalizers are those who would make legal all currently illegal drugs. The most

common middle stance is that of harm reduction, which is “an alternative approach to drug policy and treatment that focuses on minimizing the adverse effects of both drug use and drug enforcement,” and focuses on “reality-based education” as the main method in decreasing harm.^{vi}

DEFINITION OF DRUGS DISCUSSED

What is meant by the term ‘drug’? From a physiological perspective, by drugs we mean any substance that cause humans to be intoxicated, have psychotropic effects or otherwise alter body functions. Such a definition includes caffeine, nicotine and alcohol, as well as prescription and non-prescription pharmaceuticals, even though we do not ordinarily think of these substances as drugs in our day-to-day lives. Although it would be more objective to view drugs exclusively by their physiological effects, the fact of the matter is that similar substances are treated very differently in political and legal life. If we are to critique the drug problem, then we will have to take a more culturally contextual definition. Within the context of this work, ‘drugs’ will refer to any substance that is currently illegal for possession and consumption within the United States.

BIOLOGICAL CONCEPTION OF DRUGS

A biological view of drug consumption would be primarily concerned with categorizing substances based on the effects these substances have when ingested by the human body. Here is a partial glossary of common terms describing the effects that families of drugs have on the human body (Table 1):

Table 1: Definitions of Drug Types

Stimulant: substances that speed up the central nervous system, enhancing mood, alertness and relieving fatigue. The most common stimulants are nicotine and caffeine.

Depressants: substances that slow down the central nervous system. They also relieve pain by acting centrally on the brain, as opposed to analgesics (such as aspirin) that do so by acting in localized areas. The most commonly used depressant is alcohol.

Opiates: family of depressants produced directly from poppy seeds, or synthetic reproductions of those derivatives.

Hallucinogens: substances that change perception of the user. Types of perception change include: depersonalization (out of body experiences); sensithesia (e.g. “seeing sound”); or, causing the user to sense things not found in objective reality.

Source: Drug Enforcement Administration^{vii}

POLITICAL CONCEPTION OF DRUGS

Because we are concerned with how to properly arrange drug policy, we must understand the parlance both of political and biological characterizations of illicit substances. The Controlled Substances Act of 1970 established a system of categorizing illicit substances by *schedule*, described below (Table 2):

Table 2: Definition of Drug Scheduling

Schedule I

The drug or other substance:

- Has a high potential for abuse
- Has no currently accepted medical use in treatment in the United States and cannot be prescribed by a medical doctor
- Does not meet accepted safety standards for use under medical supervision in the United States.

Schedule II

The drug or other substance:

- Has a high potential for abuse.
- Has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.
- May lead to severe psychological or physical dependence.

Schedule III

The drug or other substance:

- Has a potential for abuse less than the drugs or other substances in schedules I and II.
- Has a currently accepted medical use in treatment in the United States.
- May lead to moderate or low physical dependence or high psychological dependence.

Schedules IV & V

Same as Schedule III, except Schedule IV and V drugs each respectively have a lesser risk of addiction.

Source: Drug Enforcement Administration^{viii}

Within each schedule, every drug is classified as being non-narcotic or narcotic.

For example, Marijuana is a Schedule I non-narcotic substance. Non-narcotics have lesser sentencing penalties than narcotics, but otherwise face the same restrictions as narcotic substances in their same schedule.^{ix}

Critics arguing that the scheduling system hampers doctors' ability to best do their job. Because of the heavy restrictions on the prescription of Schedule II substances, patient advocates argue that doctors avoid prescribing those substances even when they would provide the best treatment options, either because of fear of losing their licenses or to avoid the paperwork associated, since the ability to prescribe a Schedule II substance requires registration and a special prescription pad. Problems associated with the scheduling of specific substances are discussed within the section on that substance. It is important to look at each substance individually, in part because these substances have very different effects. "What's my drug of choice?" rings the chorus to the *Alice in Chains* song "Junkhead" (though fans of the band will recognize that the lead singer's was heroin, as he died of a heroin overdose). Users will often talk of their "drug of choice," a phrase meaning the substance they most prefer to use, and many will not stray away from that drug of choice. At the very least, it would be naïve to expect that users turn to cocaine use (which has megalomaniac effects) for the same reasons they turn to heroin use (which has primarily sedative effects).

DESCRIPTION OF THE SUBSTANCES

MARIJUANA AND RELATED DERIVATIVES

Biological Overview

Cannabis Sativa, more commonly known as marijuana, is the most widely used drug in the United States, with 42.7% of all Americans above the age of eighteen admitting to consuming it at some point in their life.^x Marijuana derives its psychoactive

properties from the level of the chemical THC, which is most concentrated in the leaves and the resin-covered flowers (“buds”) of the plant.^{xi} The level of THC fluctuates in different strains of cannabis, ranging from .5 to 8 percent, giving each strain a different level of potency.^{xii} Marijuana can be grown in the same sorts of conditions favorable to corn. Hashish is the refining of the resin of the cannabis plant, and can yield a THC level as high as 10%, and further refining (sometimes referred to as hashish oil, a misnomer) can yield 20% THC levels.

Hashish and Marijuana are most often smoked, either unadulterated or added to tobacco. Marijuana can also be eaten or drunk in tea, which usually are the preferred methods of ingestion for those taking marijuana for purposes other than to feel a psychotropic effect. Smoking is still the preferred ingestion method in the United States, as eating requires a higher volume of the substance in order to feel any effects. Within ten minutes, the user experiences a psychoactive reaction (“gets high”), which lasts between three and four hours.^{xiii} The high from marijuana is considered quite mild, and is not accompanied by hallucinations, though users may feel drowsy and have impaired reaction times.

Political Overview

As is sometimes the case with currently illegal substances, there is a lack of consensus as to some of the drug’s effects. The DEA classifies marijuana as a Schedule 1 drug, meaning it has no medicinal value and a high potential for abuse. In 1989 “an administrative law judge for the Drug Enforcement Administration recommended that marijuana be placed on a less restricted schedule, one that would allow it to be available

by medical prescription,” although the DEA refused^{xiv}. As Ethan Nadelmann further explains^{xv}:

In 1988, the DEA’s administrative-law judge, Francis Young, recommended after extensive hearings that marijuana be placed under Schedule II, noting both its medicinal value and its relatively low potential for abuse compared to other drugs. That recommendation was rejected by the agency’s director on political grounds.

Marinol (a marijuana derivative that lacks psychoactive properties) is a Schedule II substance, “but scientific studies as well as thousands of doctor and patient reports indicate that most patients find it less effective than marijuana itself.”^{xvi} Medicinal marijuana groups claim the drug is not deadly or carcinogenic and can be helpful as an analgesic, in treating anxiety, nausea, glaucoma, migraines, anorexia, and a myriad of other conditions.^{xvii} If true, this undermines DEA’s insistence that marijuana is potentially harmful and has no medical uses. In return, the DEA claims that marijuana is a highly carcinogenic substance, and that it is a “gate-way” to other, more harmful and deadly substances. Recent studies have also linked habitual marijuana use with increased risk of schizophrenia and other psychoses.^{xviii} As far as the author knows, there have been no reported deaths due to marijuana overdose, though like alcohol, marijuana and already hazardous activities (e.g. driving, industrial work, etc.) are a lethal combination.

HEROIN

Biological Overview

Heroin use is massively on the decline in the United States, with less than one percent of users claiming to have used the drug within the last year.^{xix} This is probably

due to increased fear of the drug due to public figures overdosing on the drug and because of its prolific association with the HIV/AIDS epidemic. Nevertheless, the drug has a rich literary and counter-cultural history, and is featured in such books as *Naked Lunch* by William S. Burroughs, as well as in the film, *Traffic*.

Heroin is a highly addictive opiate and can be ingested through injection, smoking or sniffing. Effects of heroin use last three to six hours, depending on method of ingestion, and include “euphoria, drowsiness, respiratory depression, dilated pupils, and nausea” though first time users can experience severe vomiting.^{xx} The most popular method of using heroin is injection. This is done by mixing powder heroin and a small amount of water in a spoon and heating it from the bottom with a lighter, after which the user aspirates the mixture into a syringe and injects it. After injecting it, heroin users generally experience four stages: “the rush” (euphoria akin to but stronger than sexual orgasm); “the high” (which can last for several hours, although building up a tolerance to the drug causes the high to decrease or disappear entirely); “the nod” (being unaware of one’s surroundings); and “being straight” until withdrawal sets in again. Withdrawal symptoms include “anxiety, restlessness, irritability, drug craving” at first, followed by “running eyes, running nose, yawning, perspiration” and after 16 hours of non-use can include severe lack of appetite, vomiting, abdominal cramps, and cardiovascular collapse. Symptoms of overdose include: coma, convulsions, slow and shallow breathing, and clammy skin. Heroin overdose is potentially fatal.

Of all the heroin derivatives, morphine is chemically the closest, although heroin is more potent: “in equivalent doses heroin is about two-and-a-half times as potent as

morphine because it more easily penetrates the blood-brain barrier,“ though once heroin reaches the brain, it gets turned into morphine.^{xxi}

Political Overview

More so than with other substances we will be discussing, it is important to distinguish between heroin’s intrinsic harm and the harm caused by heroin use in the present legal system. When we think of heroin use, we primarily associate it with needles, whose use leads to HIV, hepatitis B and C, and other blood-borne illnesses. Since it is very dangerous to inject heroin, and it is not the only method of ingestion, why do people choose to inject instead of smoking or snorting heroin? There are two possible answers: building tolerance and black market pressures. It is an intrinsic property of heroin, along with any other substance, that eventually a body will build tolerance to it. Injection is the most efficacious method of delivery and users who can no longer get a high by smoking or snorting heroin prefer injecting. However, injection also gives the best ‘bang for the buck’ in a system where black market pressures dramatically increase the price of heroin, making cost-effectiveness worth the risk. For instance, South American powder heroin ranges from \$50,000 to \$100,000 per kilogram in its impure form.^{xxii} On the other hand, legal morphine costs to hospitals are substantially lower than street costs of heroin, even though the drugs are in most ways very similar. In the history of the United States, morphine was once cheaper than alcohol, so we could easily imagine heroin being that inexpensive.^{xxiii} Lower prices, harm-reductionists argue, would discourage heroin users from injecting instead of

sniffing or ingesting, and decrease the number of heroin addicts allegedly stealing in order to maintain their drug habit.

Heroin purity, or rather what its significance is in terms of drug policy, is also source of controversy. What is undisputed is that heroin purity is on the increase in the last few years, as reported by the DEA:

[T]he nationwide average purity for retail heroin from all sources was 38.2 percent. This number is significantly higher than the average of 7 percent reported two decades ago and higher than the 26 percent recorded in 1991.

There are two ways to look at drug purity. Proponents of legalization argue heroin purity itself is not the problem as much as fluctuations in heroin purity, which cause users to overdose since they cannot establish their usual dosage. Furthermore, harm-reductionists are generally inclined to think heroin itself is not as harmful to the body as prohibitionists believe, so they are generally more concerned with the cutting agents being ingested along with the heroin than the heroin itself. As such, increased heroin purity is probably viewed as insignificant provided it remains fairly stable. In contrast, prohibitionists argue lower purity keeps users from getting addicted. They view heroin purity as more a gauge of how well efforts to keep heroin off the streets are going than necessarily being worried about its effects on users. It is fair to say overdoses are caused both by users not being able to gauge their normal dose because of purity issues and by adverse effects to the cutting agents used to sell heroin more cheaply (e.g. baking soda, rat poison, etc.).

Clean needle exchange programs have also been advocated as a method of making heroin use safer. There is absolutely no risk of catching blood-borne diseases if

the heroin users use a clean needle each and every time they inject the substance into their bodies. In the United States, however, it is against the law to buy a needle of a gauge appropriate for heroin injection. Furthermore, users are unwilling to spend money on needles that they could use to buy heroin. Needle exchange programs, which allow users to exchange dirty needles for clean ones, have become the rallying cry of harm-reductionists.

COCAINE & CRACK COCAINE

Biological Overview

Cocaine (Sherlock Homes' drug of choice) is derived from a few closely related plant substances and has a long history of both legal and illegal uses. The original street cocaine is called 'Bolivian coca' by those who use it and *Erythroxylum coca* species *coca*) to those who study it, though many of its cousins in the *Erythroxylum coca* and *Erythroxylum novogranatense* genus can be used to generate cocaine. Not as powerful as Bolivian coca, *Erythroxylum novogranatense* species *novogranatense* is still the cousin responsible "for 85% of the world's illicit cocaine."^{xxiv} Also in the *novogranatense* genus is *truxillense* (a.k.a. "trujillo"), which was the coca of choice of the ancient Incas. The illicit market has turned its back on Trujillo, although it has a high cocaine content in its leaves, because it is so hard to extract. Instead, Trujillo is primarily grown for and purchased by legitimate buyers with a license, including Coca-Cola and pharmaceutical companies that use coca to make prescription cocaine and other pharmaceuticals. (Coca-Cola still uses the leaves from the coca plant, but does not use any part of the plant that could be classified as cocaine.) All of the plants used to make

cocaine can be grown in hot and arid places, but the prime growing area is the Andes Mountains and other parts of South America. On average, the varying coca plants contain about one percent cocaine matter, which has to be extracted in an involved process taking the leaves from coca paste to cocaine base to cocaine hydrochloride, which is then cut and sold as powdered cocaine on the street. Typical cutting agents include sugars, talcum powder, borax, other local anesthetics or neutral substances.^{xxv} Varying levels of purity and possible reactions to cutting agents are often cited as cause for overdose.

The most popular and efficacious method for ingesting powder cocaine is sniffing, though cocaine's vasoconstrictor properties make it hard to fully ingest the substance through the nasal passages. Users who want to increase the potency of cocaine, either to save money or to overcome their own tolerance, prefer to inject it, leading to the same problems of dirty needles that are common with heroin use. "Cocaine may also be absorbed through genital or rectal application, during which its anesthetic properties can lead to seizure, coma and death."^{xxvi}

When inhaled, the high peaks after twenty minutes and lasts at most an hour and a half. Users feel an intense sense of euphoria, accompanied by indifference to pain and illusions of increased physical strength, mental acuity, and sensory alertness. In higher doses, users can sometimes experience feelings of megalomania, or as some users describe it, "it will make you feel like God." The high is accompanied by increases in heart rate, blood pressure, breathing rate, body temperature and blood sugar. The increased stress on the heart can lead to nephrological and cardiological problems. This

stimulant also decreases appetite and the need for sleep. Long term sniffing of cocaine can also lead to damage in the nasal passages, causing the chronically runny nose.

Sniffing and dilated pupils are the most recognized signs of a cocaine user. Chronic cocaine use can lead to paranoia and formication, a phenomenon wherein the user believes there are ants crawling under her skin, which can lead to self-mutilation in order to 'get to the ants.' However, sporadic use in smaller doses may not be as dangerous, though further research would be necessary to fully support this point.

When cocaine is freebased (the process of freeing the alkaloid from the hydrochloride attachment), it is referred to as crack. Crack, as a derivative of powder cocaine, is much cheaper. Users primarily ingest freebase cocaine by smoking, preferably in a glass pipe, which allows the user to heat crack to its melting and vaporization point, twice that of water. Smoking allows the drug to reach the brain much faster than injecting, leading to a fast, short and extremely intense high. When cocaine is sniffed, it reaches the brain in three to five minutes, when smoked, eight seconds.^{xxvii} Although smoking crack avoids the dangers of injection, it has its own drawbacks: the faster ingestion increases both the likelihood of respiratory failure and cardiac arrest.

Many things about cocaine tolerance, withdrawal and addiction are still unknown or disputed. When crack first became popular, it was believed to be far more addictive than powder cocaine, though more recent research has shown this is not necessarily the case. "Crack appears to be less addictive than nicotine although more addictive than alcohol."^{xxviii} Cocaine tolerance and withdrawal are not well understood. Some research

on tolerance and withdrawal tends to suggest cocaine tolerance can enable users to safely ingest doses that would otherwise induce toxic blood levels leading to seizures, panic attacks and local anesthetic effects. The Office of National Drug Control Policy states: “A tolerance is often developed when a user, seeking to achieve the initial pleasure received from first use, increases the dosage to intensify and prolong the euphoric effects.”^{xxix} A user will not recapture his original high in subsequent use, but may be able to come close. Some research suggests cocaine has kindling effects, wherein the same dose can have increased excitatory effects. The DEA claims that cocaine is “highly addictive,”^{xxx} although other research has suggested the dependence on cocaine is more emotional than physical. Cocaine withdrawal symptoms include depression, irritability, fatigue, and sleep restlessness.

The medicinal properties of cocaine are now fairly undisputed: it is a highly effective local anesthetic and vasoconstrictor, which makes the anesthetic of choice for ear, nose and throat surgery, especially rhinoplasty. At the turn of the 20th century, cocaine was prescribed or purchased as an over-the-counter general panacea; the purchaser most likely confused cocaine’s stimulant effects with recovery

Political Overview

Cocaine is a Schedule II Narcotic in all of its forms, including freebase cocaine. The major political problem involving cocaine is often referred to as the “crack/cocaine disparity,” which is short hand for the sentencing difference between powder and freebase cocaine. The Reagan Administration began minimum sentencing for drug possession, where the sentence would be administered based on which substance and

how much of it one possessed. Within that legislation is a proviso which gives crack a much higher penalty than powder cocaine. As Streatfield reports^{xxxii}:

In 1998 Jesse Helms (Republican, North Carolina) lobbied for a law dictating that, since crack was a hundred times more addictive than cocaine (no one knows where this statistic came from), possession of it should merit a penalty a hundred times greater. Unbelievably, it was passed. Today the penalty for possession of 5 grams of crack (worth about \$350) is a mandatory five years in jail—equivalent to that for possession of half a kilogram of cocaine (worth about \$10,000). And yet, as anyone who knows anything about cocaine will tell you, 500 grams of cocaine, when cooked up, will yield 500 grams – possibly even more—of crack.

As we have previously discussed, an enterprising drug maker can take powder cocaine and baking soda and make crack. The injustice of the crack/cocaine disparity is compounded by the fact that the average crack user is an inner city, African American who is also far more likely to get caught and prosecuted than a white, upper class powder cocaine user.^{xxxiii} Sixteen years after Jesse Helms, a Senator who vehemently opposed Civil Rights Legislation, drew a distinction between powder and freebase cocaine that is simply untrue, African Americans continue to be disproportionately jailed, for much longer periods of time than whites, for what amounts to the same crime. I will discuss this problem in more detail later in this section.

ECSTASY (MDMA)

Biological Overview

What we usually call ‘ecstasy’ is more accurately individuated as MDMA or any substances related. MDMA is a synthetic drug, developed originally as an appetite suppressant, though the military tried unsuccessfully to use it as a truth serum in the

1950s. Ecstasy is a hallucinogen, though not as strong as its chemical cousin, Mescaline, and is a stimulant. Ecstasy is primarily ingested orally in tablets or capsules, but is occasionally snorted or smoked as a powder, and even more rarely injected or taken in suppository form. The drug is most popular with the rave scene, and has in recent years been heavily associated with that subculture.

Within an hour of use, an ecstasy user gets a rush (the slang term for an ecstasy high), which is characterized by pleasure, increased confidence and energy, and feelings of peacefulness, acceptance, closeness, and the need to touch others. MDMA seems to increase the user's serotonin levels, and researchers suspect it may interfere with the body's natural ability to produce serotonin after prolonged use, though no one is certain whether or why this is the case. The serotonin increase probably gives ecstasy its "purported properties of heightened sexual experience, tranquility and conviviality."^{xxxiii}

MDMA has a wide range of both established and suspected negative side effects. The drug suppresses the need to eat, drink and sleep, which can lead to problems of dehydration. Because ecstasy also impairs the body's ability to regulate its own temperature, ecstasy use can lead to heat stroke or hypothermia. The raver subculture has incorporated wearing pacifiers, since sucking on them relieves the teeth grinding and muscle tension the drug causes. More seriously, "ecstasy may cause hyperthermia, muscle breakdown, seizures, stroke, kidney and cardiovascular system failure, possible permanent damage to sections of brain critical to thought and memory, and death."^{xxxiv} The DEA reports an overdose of ecstasy, deadly or otherwise, is "characterized by a

rapid heartbeat, high blood pressure, faintness, muscle cramping, panic attacks, and, in more severe cases, loss of consciousness or seizures.”^{xxxxv}

Political Overview

As with all hallucinogenic substances, the intrinsic effects of this drug are hard to separate from effects the surroundings more likely cause. Because MDMA is primarily ingested at raves, problems related to heat stroke and dehydration are exacerbated by users dancing all night and not feeling their own thirst, though this could occur from dancing all night without ecstasy as well. Furthermore, initiatives to make ecstasy user safer have been squashed by the federal government. The DEA and Congress have closely scrutinized the DanceSafe Initiative, as well as other harm-reductionist projects.

The DanceSafe Project provides a unique service: DanceSafe volunteers set up booths to test ecstasy for contaminant and potency. According to their own website, <www.dancesafe.org>, the group is under intense legal scrutiny and has had to curtail its efforts. The recently passed “RAVE Act” makes it possible for locale owners to be charged for drug use occurring on their premises, whether or not they were aware of it. Many bars have shut their doors to Dance Safe representatives because their presence constitutes prior knowledge of potential drug use, making the owners conspirators. Providing an air-conditioned room and free water in order to prevent dehydration can also land a club owner in jail, even though such measures can help save lives.

Ecstasy is fairly new, and we have yet to learn everything we should about this drug. Specifically, findings have been inconclusive about long-term effects of ecstasy. These may include memory loss and the inability for the brain to produce serotonin,

which can impair sleep and the ability to feel good without the drug, possibly leading to depression. Research seems to be divided between those who support the DEA's classification of MDMA as a Schedule 1 substance and those who want to use it for medical purposes. Towards the latter goal, the FDA gave permission for research on ecstasy "as a possible treatment for post traumatic stress disorder."^{xxxvi} Even if research on the physiological effects of ecstasy occurs, unmotivated by politics, it must still overcome the problem of understanding how the environment affects the drug user before it can claim to tell us anything constructive about this substance. This would be particularly difficult under current circumstances, where the prevailing mindset is that the drug use influences the environment instead of the other way around.

LSD, PCP, AND OTHER HALLUCINOGENS

Biological Overview

Although a totally synthetic version of LSD (lysergic acid diethylamide) has been available since the 1950's, widespread use has been curtailed by strict controls on LSD's precursor chemical, ergotamine tartrate. Pure LSD is not generally found on the streets because its chemicals decompose too quickly and because it is usually adulterated in order to produce it more cheaply. If it were available, pure LSD is clear or white in color, an "odorless crystalline material that is soluble in water."^{xxxvii} LSD users ingest it by mouth or through the skin, on paper blots, tablets, capsules or rarely with a dropper when it is available in liquid form. The liver metabolizes the substance, and it is expelled during urination within twenty-four hours of use.

LSD's main effect is to make its user hallucinate, or to "trip." The hallucinatory effects normally begin within an hour or less of ingestion, reach their highest intensity two to six hours, and fade within twelve. Acid's hallucinatory effects include temperature sensitivity, out-of-body experiences, change in time perception, fascination with everyday objects, and a feeling of deep meaning from quotidian occurrences. Other side effects include pupil dilation, increased heart rate, chills, nausea, and trembling. LSD users quickly develop a fairly high tolerance and cross-tolerance, wherein users will find themselves experiencing a higher tolerance to other hallucinogens as well as LSD.

The main problem with LSD is when a user has a bad trip, "the result of a failure to comprehend that reality has not changed, merely its perception while under the influence."^{xxxviii} Having a sober guide who has been through the experience before helping a first time user, as well as the user's mental state prior to and while ingesting acid, greatly influences the trip. Rarely do LSD users die directly from the substance, but their actions or reactions to panic or a hallucination can. Direct effects of LSD use are dilated pupils, lowered body temperature, nausea, goose bumps, profuse perspiration, increased blood sugar, and rapid heart rate."^{xxxix} There are no long term known side effects of LSD use, "though psychosis has been reported in a few cases" and flashbacks (tripping without a new dose of LSD) are common. These are somewhat more dangerous because the user is not immediately aware of the hallucination but rather thinks he is going crazy, or may perceive the hallucination is real, both of which could lead to fatal consequences. Since studies seem to suggest flashbacks only occur in

repeated users, it is very possible the user would realize the hallucinations were due to past drug use instead of madness (or not realize they were hallucinations at all).

Realistically, the largest danger of LSD use comes from purchasing street-LSD that actually contains a completely different substance, such as rat poison or strichnine.

PCP (phencyclidine) is the designer knock-off of LSD, so to speak, and is sometimes passed off as its more expensive relative. PCP is usually smoked, either added to marijuana, oregano or another leafy green substance, though it can also be eaten or snorted. Surprisingly, it does not cause strong tolerance or withdrawal symptoms. The major difference between PCP and LSD, and its biggest danger, is that PCP “can result in mood disorders, acute anxiety, paranoia and violent behavior,” and can also substantially increase the strength of the user, creating an artificially strong and violent person. Although some of the hallucinations of PCP resemble those of LSD, PCP is unique in that “it can produce psychoses indistinguishable from schizophrenia.”^{x1} Other hallucinogens include mescaline (mushrooms), ketamine and peyote. The use of these hallucinogens is rather rare, and their effects are very similar to LSD. These other hallucinogens have not been as thoroughly researched as PCP and LSD, and therefore withdrawal and addiction symptoms are not as widely known.

Political Overview

When LSD is consumed in a safe and friendly environment, the drug is fairly harmless, since so much of the trip is dependent on the ambient circumstances. Of course, contemporary research of LSD users primarily occurs through emergency room reports when someone has done something dangerous or illegal while under the

influence, or perhaps has had negative effects due to drug contamination. These stories cause much of the perception that LSD is a dangerous substance.

Hallucinogens are not generally addictive, do not cause withdrawal symptoms, and may have some use in psychotherapy, which would undermine the reasoning behind their Schedule I status. Religious use of peyote, common among American Indians, is protected under the First Amendment, though use for recreational purposes is still a criminal act. Once again, the main dangers of these drugs come from adulteration of the substance, which is far more likely to occur in street conditions, whereas the purer forms of these substances are actually less harmful. Furthermore, there is reason to believe the sort of safety precautions taken by American Indians achieve could be duplicated for other users.

PCP is perhaps single-handedly responsible for the widespread belief that drugs are crimogenic, which we will discuss in more detail later in this chapter. PCP use has been linked to violent and psychotic episodes, leading the public to believe that all hallucinogens, and perhaps all drugs, are likely to cause people to lose their sense of reality and become dangerously violent. Fortunately, PCP use is not very popular: only seven million people report ever having used it, in comparison to approximately twenty four million who have used LSD.^{xli}

INHALANTS

Biological Overview

We refer to using household substances in order to feel a psychotropic effect as inhalant use. Inhalants come in four categories: volatile solvents (e.g. glue); aerosols

(e.g. hairspray); anesthetics (e.g. nitrous oxide or “laughing gas”); and volatile nitrates (e.g. butyl nitrate, which is found in room deodorizers). Abidinsky reports that effects of inhalant use are usually like drinking alcohol, though usually include lightheadedness. Long term effects are rather minor: building tolerance and withdrawal symptoms are unlikely, though long term users can experience headaches, muscular cramps and abdominal pain. More rarely, long-term use can damage the kidneys, liver, and the brain. On the other hand, the DEA reports are far more pessimistic:^{xlii}

The chronic use of inhalants has been associated with a number of serious health problems. Glue and paint thinner sniffing produce kidney abnormalities while the solvents toluene and trichloroethylene cause liver damage. Memory impairment, attention deficits, and diminished non-verbal intelligence have been related to the abuse of inhalants. Deaths resulting from heart failure, asphyxiation, or aspiration have occurred.

Abidinsky also reports possible deadly consequences of inhalant use. However, he stresses death is more directly attributable to the following factors than to inhalant use per se: strenuous exercise immediately following inhalant use; the method of inhalation (e.g. repeated inhalation from a plastic bag is likely to lead to asphyxiation); or sniffing in unsafe locales, such as on top of buildings.

Political Overview

Inhalant use is hard to prevent because it centers on household substances whose primary sale is not drug related. Some communities have tried making the sale of substances likely to be used as inhalants illegal for those under the age of eighteen. This strategy seems to be ineffective, in part because a user can simply purchase the item in the next town, but also because adults do not generally see the need to control access to

these items in their home unless they have very small children. The most effective way of decreasing inhalant use seems to be through education.

BARBITURATES

Biological Overview

Barbiturates use refers to use of any drug derived from barbituric acid.

Barbiturates are medically used as anesthetics, anticonvulsants, sedatives and hypnotics, and, in veterinary medicine, for euthanasia. They are unique in the following regard: “unlike opiates, barbiturates do not decrease, and may actually increase, reaction to pain;”^{xliv} expectation of the drug’s reaction has a marked effect on the users reaction; and, they are generally used in a polydrug combination to take the edge off stimulant use.

The main danger of barbiturate use is that users will develop a tolerance to them. This is rather dangerous, because “the margin between an intoxicating dosage and a fatal dosage becomes smaller with continued use,” and even smaller when barbiturates are used in conjunction with alcohol. Furthermore, alcohol use may cause the user to forget the previous dose of barbiturates, and if they dosed up again, closer to the fatal edge. In fact, a polydrug combination including barbiturates “can be extremely dangerous, even fatal.”^{xlv} Long-term use can lead to permanent inebriation and loss of cognitive capacity.

Political Overview

Barbiturates are not of a major concern when used alone, but they are in the context of polydrug use, which is the next topic of discussion.

POLYDRUG USE

Biological Overview

Using multiple drugs at the same time is referred to as polydrug use. Polydrug use is popular because drug users can create cocktails to offset negative effects of a specific drug. For instance, some heroin users like to inject a speedball, or a mix of cocaine and heroin, because the two drugs work on different parts of the brain and the combinatory use increases the intensity of the experience. Polydrug use is particularly dangerous, because certain drugs can have synergistic effects, making the combination more dangerous than the sum of its parts. Also, one drug may mask another's effect, and the user cannot tell as easily how much he or she is inebriated. Furthermore, polydrug use can have unexpected and dangerous consequences, especially when mixed with legitimately used prescription drugs.

Political Overview

As we have already discussed, one of the primary dangers in streets drugs is the users' inability to gauge the purity of the substance(s) they are ingesting. Polydrug use compounds this problem, because there are multiple substances whose purity is suspect being used at the same time. Furthermore, since these drugs are illicit, there is very little research discussing their possible interactions, either with other illicit drugs or with legitimate prescription medications the illicit drug user may be taking at the same time as their recreational use. For instance, taking barbiturates and antihistamines (allergy medicines) at the same time can be extremely dangerous.^{xlv}

Erowid.com, a progressive harm-reductionist website that provides a space where users can post about their drug use experiences, has a specific section for polydrug use. Posters on erowid are encouraged to give their weight, the drugs they used along with dosages, their sex, and other pertinent background information about their drug experience. Erowid's project is a great start, but it nevertheless lacks consistency and reliability in the subjects' reports.

GENERAL PROBLEMS WITH THE DRUG WAR

To this point, we have discussed problems that are primarily associated with one substance or with one method of ingestion. Now, I would like to highlight some problems that are more intrinsically tied to the drug war itself. As we have already discussed in the previous section, the Scheduling system the DEA uses to categorize specific substances is more politically than scientifically motivated, and is perhaps misleading and impeding to doctors. In this section, I will discuss how the drug war discriminates based on gender and race; how it undermines property rights; its effects on the basic institution of the family; and, how it limits access to higher education.

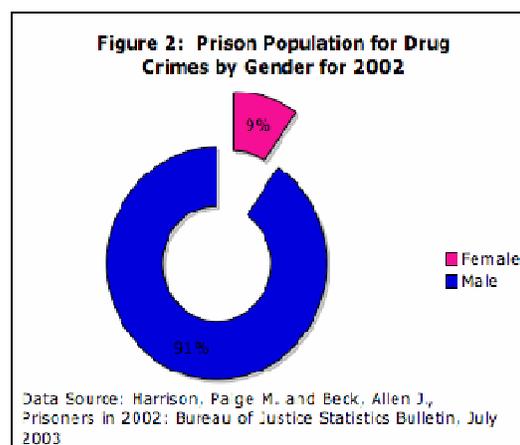
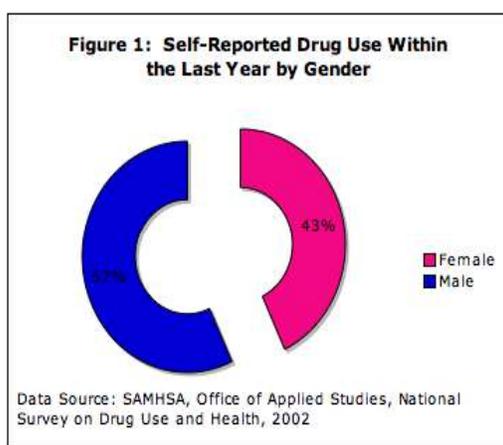
Discrimination

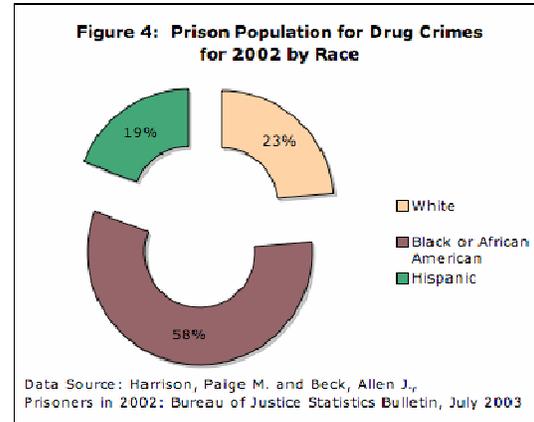
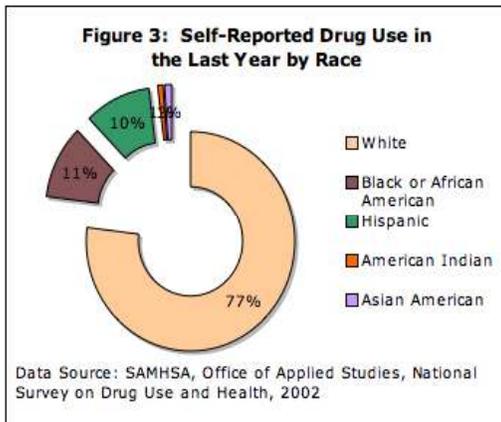
The issue of how the drug discriminates against men and against African-Americans is a complex one, so I will attempt to treat it both fairly and succinctly. In a perfect world, the demographic breakdown of the drug using population would be roughly the same as the demographic breakdown of the population incarcerated for drug

related crimes. My approach will be to compare the demographic breakdown of people who admit to using drugs to that of those incarcerated for drug crimes. The demographics for those who admit to using drugs will be taken from the National Institute on Drug Abuse (NIDA), that each year conducts the National Survey on Drug Use and Health (NSDUH, formerly known as the National Household Survey on Drug Abuse). The NSDUH is “the primary source of statistical information on the use of illegal drugs by the U.S. population.”^{xlvi} It is the only nationwide epidemiological analysis of self-reporting drug use. The study has some limitations, such as its inability to reach certain subsets of the population, specifically the homeless and those without a telephone, who may more likely to use drugs than the rest of the population. The NSDUH does, however, have the distinct advantage of not attempting to find out about drug use solely from those who have suffered negative consequences because of their use (i.e., emergency room reports of people who are overdosing, or police reports of drug use while committing other crimes). My approach will be to show that there is a discrepancy between the demographics of those who *admit* to using drugs in the NSDUH and those who are *incarcerated* for using drugs.

There are some limitations to this approach. First, the NSDUH does not report drug use based on class distinctions, so I will be unable to discuss whether the poor are more affected by drug laws than the rich, though one can extrapolate from other aspects of the justice system that this would be the case. Secondly, the NSDUH does not distinguish between use of powdered cocaine versus use of crack cocaine in its demographic findings, making discussion of the crack/cocaine disparity limited.

Thirdly, there is a temporal restriction to be considered. The NSDUH asks detailed questions about the age of the participants, their gender, race, and about drug consumption patterns, specifically whether the subject has used any (and which) drugs in the past month, past year, and in their lifetime. Being that we wish to gauge the *current* drug problem (thereby excluding lifetime drug use questions for the time being), while at the same time not limiting ourselves exclusively to addicts (who would be far more likely to have used a substance in the last month), the best barometer of current drug use for our purposes will be the breakdown of those admitted to drug use within the last year. Since the last published results of the NSDUH are for 2003, I will compare the demographics of those who admitted to using drugs in the last year to the population of those incarcerated for drug crimes in the year 2002, thereby providing a snapshot of “drug users in 2002” vs. “people incarcerated for drug crimes in 2002.” The Prison statistics are taken from the *Bureau of Justice Statistics Bulletin* “Prisoners in 2002.”^{xlvii}

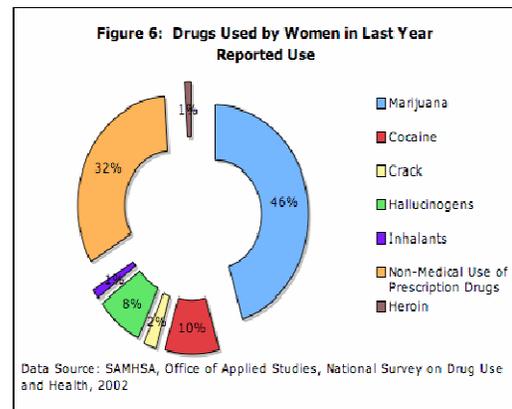
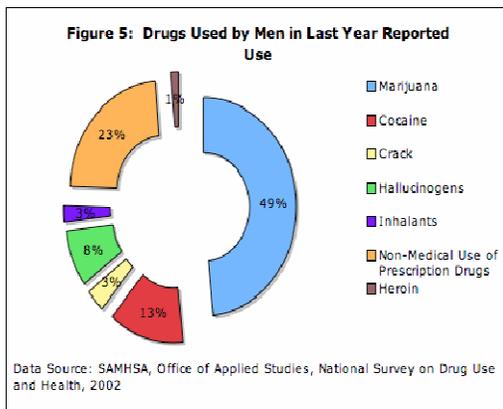




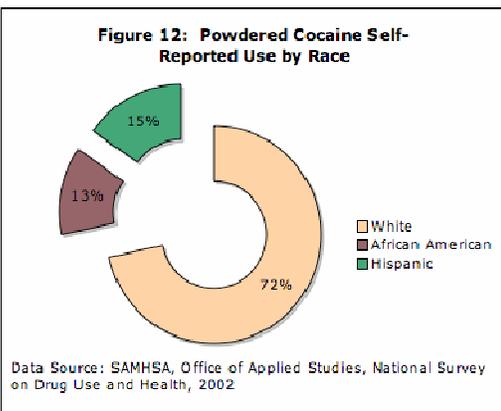
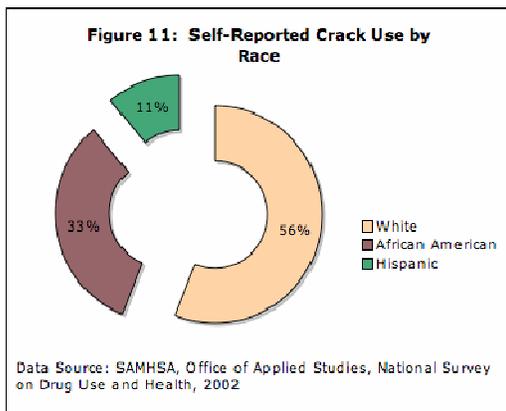
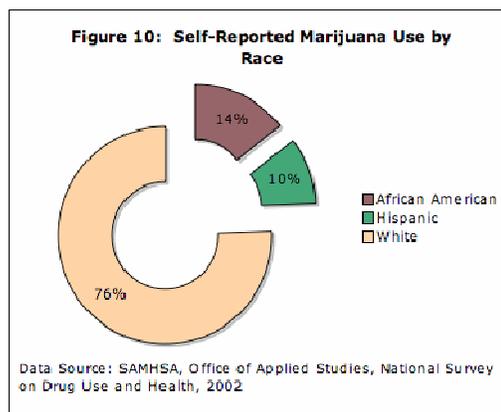
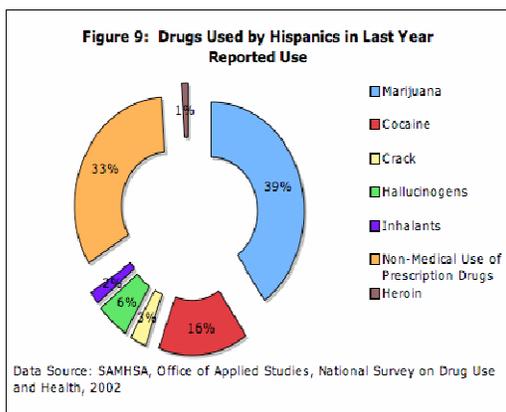
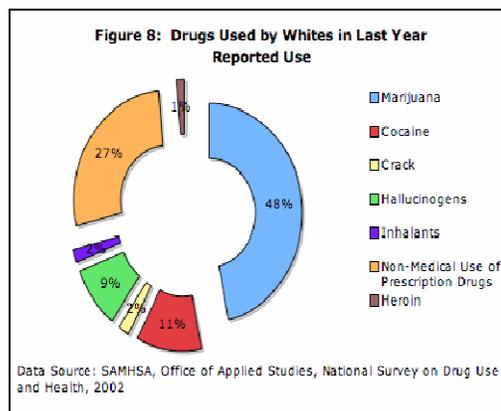
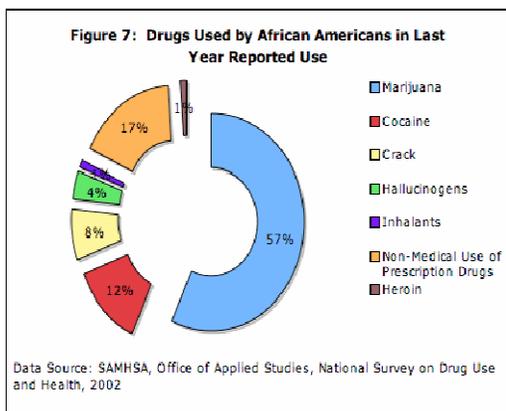
In some ways, Figures 1-4 speak for themselves. It seems clear that men are disproportionately incarcerated for drug crimes, as are African-Americans. However, a proponent of the fairness of drug laws could quickly reply “but that’s because men and African-Americans have as their drug of choice substances that carry stiffer penalties.” If this were the case, it would raise the issue as to whether these drugs carry stiffer penalties because they are more dangerous, or if there is an underlying issue of racism that has caused these drugs to seem more dangerous simply because they are more likely to be used by a certain subset of the population.

However, as we can see in Figures 5 and 6, women are actually less likely to use marijuana, which carries the lesser sentence, than men, but the numbers are not so radically different to justify the difference in incarceration rates. It may be the case that women are less likely to be involved in drug trafficking or dealing, but they are also

more likely to be involved in prostitution as a way to procure drugs. If men are more involved in drug trafficking and not merely users, this still requires an explanation.



Most surprisingly, more Whites use crack-cocaine than African Americans. A larger percentage of African-Americans use crack-cocaine than Whites, but overall, more Whites use crack-cocaine than blacks, leaving us with little justification for the difference in the prison statistics. The racial breakdown of drug use and prison statistics is available in Figures 7-12.



These findings, as shown in Figures 7-12, are not unknown, although they are somewhat underreported. Steven Jonas writes in response to the discrepancy between self reported use and prison statistics he reported upon in 1995 (similar to the ones above a decade later):

It is ironic that because of its highly limited and selective targeting, even if drug war violence were useful in permanently changing human drug-use behavior, since it directly affects White users to a much lesser extent than it affects non-White users, the drug war could not possibly have much impact on illicit drug use in the U.S. population as a whole. That is, unless it were thought that by locking up non-Whites use among Whites could be controlled and reduced. The drug war does serve to create a set of self-fulfilling prophecies that are central to the racism that is central to U.S. politics. For example, in a vicious downward spiral of thought, policy and action, law enforcement efforts contain the outdoor, street illicit drug trade to non-White neighborhoods, even though the majority of use is among Whites. Thus politicians when assailing the illegal drug trade are easily able to paint it “black” in the public mind, without ever having to say so in so many words, even though it must be primarily a White phenomenon.^{xlvi}

Compounding this problem are the already discriminatory aspects of the justice system.

If someone is caught for possession on the street, chances are they already have a criminal record for curfew violations or other juvenile offenses, where there is more prosecution among minorities than among Whites. When someone who already has a record, even a minor one, is sentenced for drug crimes, they are likely to receive tougher sentences. Nevertheless, these data clearly show the current drug policy to be inherently discriminatory.

DRUGS IN THE WORKPLACE

One of the major controversies with regard to regulating drug use has to do with drug use in the workplace. The history of temperance movement began when companies

became responsible for workmen's compensation, and started being concerned with their workforce being sober while on the job. In some ways, the history of drug policy is rooted in the workplace, so it makes sense that drug use would continue to be an issue there. Specifically, the problem is balancing the interests of employers, who want a healthy and productive workforce, with the privacy interests of their employees, who may not wish to submit themselves to pre-employment or random drug testing. Drug testing can usually be distinguished by three factors: when it occurs (whether it is pre-employment or during employment); frequency: whether it is random, always obligatory or only required when other factors indicate possible drug use; and, whether it is done with the knowledge and consent of those being tested.

For employers, the issue is one of productivity loss, which in turn spells out massive decreases in profit. "Three of ten workers nationwide are impaired from substance abuse ... Compared with nonabusers, the average substance abuser has three times as many accidents, five times as many health claims, and five times as many absences, and is 30 to 40 percent less productive."^{xlix} Even if one is skeptical of such statistics, the truth remains that in certain sectors, drug use and abuse can be a major hindrance to productivity. The potential for workmen's compensation suits due to lost limbs or other industrial accidents that may be caused primarily by drug use is enough to make employers want to take significant measures to deter their employees from such use. Other reasons can include:

- (1) to fight the "drug war" by weeding out users and curbing drug use;
- (2) to insure safety by revealing conditions that pose a serious threat to co-workers or the public;

- (3) to maintain an unimpaired and effective work force;
- (4) to identify those who will be unable to work in the future;
- (5) to reduce the costs of employee health care plans; and
- (6) to maintain public confidence in the integrity and trustworthiness of their operations.”^l

The privacy concerns of employees are also significant. Drug testing requires either giving urine or blood specimen. Giving a blood sample is both the more accurate, more costly and more invasive test, and is not the preferred method of testing. When a urine sample is used, precautions must be taken to prevent drug-free substitutions of the urine sample or other falsification or altering methods. Thus, laboratories may require the sample to be taken under direct observation or under other methods of surveillance. “The additional psychological intrusion of urinating on demand, under surveillance, is not minimal.”^{li} Personally, I once took a pre-employment urinalysis drug test. In my case, I was told to urinate on demand in a bathroom where it was not possible to flush the toilet, or more problematically, to wash one’s hands. This was to prevent the possibility that I would dilute my urine sample. I was also told by the nurse administering the test that previous attempts to substitute the urine, by someone carrying a vial of someone else’s urine on their person and submitting that sample would fail due to the specimen receptacle’s ability to test for urine temperature. Furthermore, my urine could possibly be tested for hormones or other tests to authenticate that the urine was actually mine. Since certain prescription drugs, non-prescription drugs and foods can cause false positives on urinalysis, I was also told that I may be contacted by a physician who would ask me more detailed questions about my eating habits and my prescription and non-prescription drugs that I must answer in order to complete the drug test, in case

I had ingested a substance that might cause a false positive. I do not believe my experience to have been unusual.

Other than the psychological trauma and embarrassment caused by obtaining the sample, critics also worry about the privacy concerns of what else can be obtained by the urinalysis. Using someone's urine samples, "tests can reveal such conditions as the use of contraceptives, pregnancy, epilepsy, manic depression, diabetes, schizophrenia, and heart trouble."^{lii} Currently, there is no legislation limiting what tests can be run once someone has given a urine sample, nor is there legislation controlling the distribution of results. Additional tests other than drug testing can 'legitimately' be run in order to authenticate the source of the urine as being genuine. Potentially, employers could use the excuse of drug testing to reject otherwise good candidates for work in order to avoid hiring persons whose medical conditions may cause increased insurance costs after they are hired.

People who refuse to be subjected to drug testing, either for religious or privacy concerns, find themselves severely hampered in their ability both to obtain and to keep a job. Currently, the federal government requires both pre-employment testing and random drug testing for any job considered "safety sensitive," a term extended to include more and more positions. Many companies, including Wal-Mart and other major employers, require pre-employment drug testing for all their potential employees. Some companies, in order to decrease their insurance costs, have begun to refuse employment to individuals who have consumed tobacco products in the last year. These companies require a drug test to show that one has not consumed nicotine as well, although nicotine

use is legal for those over eighteen years of age. Recent court rulings have upheld a company's ability to require such a test, even for nicotine use. It is foreseeable that in the future, those refusing to subject themselves to a drug test, even if they do not use drugs, could find themselves very hard pressed to find employment.

The efficacy of drug tests to solve for the problems employers are most concerned about is seriously in question. Because of how long certain substances remain in the body, even a confirmed positive on a drug test will only establish that the worker was exposed to the substance, but not whether she is a drug abuser or was ever even intoxicated. For instance, marijuana remains in the system for about a month after being ingested, but other drugs, such as heroin, cocaine and LSD, only remain in the system for two to three days. Urinalysis does not conclusively show whether someone was impaired while on the job, nor does it screen against a potential drug abuser of hard drugs if a person can abstain for a few days prior to the test. Colloquially, users who know they may be subject to random drug testing are sometimes called "Friday evening users," since this avoids the possibility of a positive test if they are required to give a sample Monday morning. Urinalysis is not generally accurate for showing whether alcohol is in the system, even though employers would obviously be concerned about employees drinking on the job. Products claiming to mask drug use or otherwise fool urinalysis tests are available on the market. Drug testing agencies have begun testing for tell-tale chemicals in those products, and consider proof of having consumed them as a positive result on drug tests as well, even though consumption of such products is not illegal or otherwise restricted.

The federal government actively encourages businesses not legally required to test employees to do so anyway as part of its anti-drug use agenda. As stated in the White House's National Drug Control Strategy, "because anyone using drugs stands a very good chance of being discovered, with disqualification from employment as a possible consequence, many will decide that the price of using drugs is just too high."^{liii} The price may also be too high for companies, most of whom receive information on whether drug use is efficacious from manufacturers of drug tests and not other companies in their industry. The ACLU reports few if any companies have assessed whether drug testing is cost-effective for them, and that previous reports of the efficacy of reducing cost based on drug testing may be overstated.^{liv}

CRIMOGENIC NATURE OF DRUG USE

One of the ways current drug policy is justified is by arguing for the crimogenic effect of drug use. Those in favor of status quo drug laws argue use of currently illegal substances, especially crack-cocaine, heroin and methamphetamines, directly lead to increased crime. People in favor of decriminalization or legalization argue that the current criminal nature of drug laws is responsible for much of the crimogenic effect that drug use currently has, not the drugs themselves. The dispute is largely based on differing interpretations of empirical factors, such as the physiological effect of specific substance use, and the impact of the black market on criminal activity. In this section, I will outline the argument on both sides.

CRIMOGENIC EFFECTS ARE MORE DIRECTLY ATTRIBUTABLE TO THE DRUG WAR

Proponents of this view argue most of the crimogenic effects of drug use are more directly attributable to the drug war than to the drugs themselves. Most who hold this view do so in large part because they understand the use of the substances in question not to be as deleterious as currently believed. For example, in the beginning of their discussion on the crimogenic effects of drug use, Duke and Gross state:

[a] lthough we think the evidence is inconclusive, we think that the use of heroin and cocaine in a free market system would adversely affect the quality of the lives of the users and those around them in a way not appreciably different than does alcohol use. Roughly the same proportions of users would become abusers, and their abuse would be approximately as crippling to life's other enterprises as the abuse of alcohol.^{lv}

As I have explained in the previous section, there is quite a bit of discrepancy in understanding the physiological effects of drug use that underpins both of these views, and it is difficult to resolve this discrepancy. A resolution is made even more difficult by the argument that it is not drug use that leads to increased violence and paranoia, but rather drug withdrawal, which would be less likely to happen unwillingly to a drug user in a decriminalized context. Proponents of such a view argue that the paranoia, irritability and violent behavior associated with drugs such as cocaine, are more readily attributable to users who experience withdrawal symptoms due to lack of availability of the drug, rather than the drug use itself.^{lvi}

There are two primary reasons that current drug laws lead to an increase in crime: the extralegal status of drug users and activities associated with the black market. Drug users whose only extralegal interaction having to do with the purchasing of drugs

are required to associate with the criminal element in order to obtain the substances, and this increased contact can lead to other illegal activities. Prostitution is a prime example of association with drug dealers leading to other illegal activities: women who cannot afford their habit are drawn into prostitution, and then find it hard to escape either lifestyles as the lifestyles become intertwined. Furthermore, drug users are disenfranchised from legal recourse of disputes by their extralegal status, whether those disputes are associated with drug use or not. Disputes over drug sales and consumption, such as dealing with purity, price, or out-right substitution of household substances for a drug (such as selling baking soda and calling it cocaine), cannot be dealt with through legal channels, and as such are far more likely to be resolved in a violent manner. Because drug users fear being discovered and prosecuted for their illegal activity, they are less likely to turn to legal channels when crimes are perpetrated against them, thereby making them targets for theft, rape, and other crimes.

There are many criminal aspects of the drug war that may be directly attributable to the black market, both directly and from crime that is primarily funded from drug profits. Black market forces keep drug prices high, requiring drug users to turn to extralegal means in order to support their habit. Inner-city children are lured into the drug trade by the massive profits available there, especially in places where legal employment is neither as profitable nor as available.^{lvii} Currently, all of the money generated by drug sales fuels many extralegal activities of drug cartels or extralegal employment. For example, it is generally understood that guerilla fighters in Columbia are funded primarily through drug revenue. On a domestic front, the revenue generated

from drug sales is used to undermine law enforcement operations, such as its use in bribing officials in order to grease the wheels of distribution, which undermines the rule of law generally. Furthermore, this money has to be laundered out of the United States.

This has two effects: it deprives the US economy of the revenue, since it is normally laundered abroad, and their money laundering generates a tremendous amount of illegal activity, further undermining the rule of law. Should decriminalization occur, Duke and Gross argue, the money that is currently laundered out of the United States and used to undermine government efforts would instead be invested, thereby giving a further boost to the economy.^{lviii} Since many of the neighborhoods most heavily involved in drug sales are economically impoverished, redirecting monies into legitimate businesses in those areas could also alleviate crime, as legal economic opportunities would become more readily available, which could also have a positive effect in fighting crime.

DRUG USES INHERENTLY CRIMOGENIC

As stated earlier, proponents of the crimogenic view understand drug use inherently to increase violence and instances of other crime. For them, anything that might lead to increased use would therefore increase violent crime. James Inciardi and Christine Saum, who propose that decriminalization would increase crime, argue:

First, removing the criminal sanctions against the possession and distribution of illegal drugs would make them more available and attractive, and, hence, would create large numbers of new users. Second, an increase in use would lead to a greater number of dysfunctional addicts who could not support themselves, their habits, or their lifestyles through legitimate means. Hence crime would be their only alternative. Third, more users would mean more of the violence associated with the ingestion of drugs.^{lix}

In direct opposition to Duke and Gross, Inciardi and Saum argue that increased use of cocaine is directly related to increased violence and crime. They argue that cocaine use leads to a state of psychosis, where users experience states of heightened paranoia, which lead them to misinterpret events so as to support their delusions, leading them to believe that they are acting in self-defense against actions committed against them, when such an offense is not actually being committed. Furthermore, users may ingest cocaine or other substances on purpose in order to loosen their inhibitions before committing other crimes. The authors agree with Duke and Gross concerning cocaine withdrawal's effects, but do not see it is the dominant cause for cocaine-related violence. Cocaine users are more likely to have crimes perpetrated against them, not because of their extralegal status, but rather because their increased irritability and paranoia makes them more likely to misreact to situations, thereby leading others to react to them in a violent way. "As victims of homicide, the cocaine users may have provoked violence through their irritability, paranoid thinking, and verbal or physical aggression – all of which are among the psychopharmacological effects of cocaine."^{lx}

Inciardi and Saum argue pro-decriminalization proponents misunderstand the causal chain in how drug users become involved in crime. Rather than drug users turning to crime because of high costs of drugs, people who are already involved in criminal activities also turn to drugs, and then continue their illegal careers.

Additionally, drug users engage in illegal behavior to fund both their drug habit and their daily expenses, the latter of which would not be alleviated by lowering of drug prices.

This means that drug decriminalization would not decrease crime in that context, either.

The authors conclude:

With legalization, violent crime would likely escalate; or perhaps some types of systemic violence would decline at the expense of greatly increasing the overall rate of violent crime. Moreover, legalizing drugs would likely increase physical illnesses and compound any existing psychiatric problems among users and their family members. And finally, legalizing drugs would not eliminate the effects of unemployment, inadequate housing, deficient job skills, economic worries, and physical abuse that typically contribute to the use of drugs.^{lxi}

Date Rape

The three illicit substances most often used for purposes of aiding sexual assault are ketamine, GHB (Gamma Hydroxybutyrate) and rohypnol.^{lxii} Users ingest all three substances willingly for recreational purposes, but they are also often used unwillingly (“slipped”) for the purposes of date-rape (drug-facilitated sexual assault).^{lxiii} Although the three substances differ chemically and in terms of effects, they are similar in that they all cause the user to have dissociative effects and anterograde amnesia, which make them ideal for sexual assault. Although GHB can be made in a home laboratory, the primary way all three of these substances make their way onto the street market is through diversion from legitimate use.. All of the substances end up on the street market when by being diverting from the pharmaceutical supply lines in Mexico, Latin America and Europe, where some of these substances are legally permissible for medical purposes, to cure insomnia or as a preanesthetic. The Hoffman-La Roche company is the sole manufacturer of rohypnol, and the majority of GHB found in the U.S. is made in one of three Mexican factories. Ketamine is manufactured more widely, as it is primarily used for veterinary purposes because it works safely and effectively on a wide

variety of species. Often, street-level ketamine is stolen from veterinary clinics, and is diverted from legitimate human supply lines in Mexico and South America. Due to problems of reporting, as well as how quickly these substances are metabolized, exact information on how many instances of drug-assisted sexual assault occur in the United States every year is difficult to ascertain. It is also worth mentioning that alcohol is often used as a date-rape drug, or as the delivery method for the above substances (which added to an alcoholic drink without the user's knowledge).

IMPACT OF THE DEBATE

Whether one understands drug use to be inherently crimogenic or not has a great impact on how they view the right way to both approach and justify drug policy. Specifically, whether one believes drug use inherently increases crime has an impact on whether one views drug laws as being paternalistic or not. If drug use is directly related to increasing of other crime, then combating drug use may be justified solely in terms of crime prevention, have nothing to do with keeping people from harming themselves, as the debate is sometimes cast.

GENDER AND DRUG USE

As we have discussed previously, the drug war is sexist in that women are far less likely to be prosecuted for their drug use than men are. This may be due to a variety of factors: men may be more involved with riskier enterprises such as dealing; women may be better able to convince a prosecutor not to charge them or to agree to drug treatment instead of being charged; or be better able to convince a judge that their use is better

treated with rehabilitation than with a prison term. Although this discrepancy is worrisome, it does reflect the general trend that men are far more likely to be incarcerated than women. Hence, there is a good possibility that a woman who is charged with drug use has no prior criminal record, as opposed to her drug using male counterpart.

One way, however, in which women are discriminated against in the drug war has to do with drug use during pregnancy. There have been recent moves to place further criminal sanctions on drug use by a pregnant woman. If a law is only aimed at the pregnant, and men cannot become pregnant, then this law is fundamentally sexist. Laws against pregnant drug use fall into three categories, as described by Sue Mahan:^{lxiv}

- a) narcotics laws: extending already extant narcotics laws “so that women can be charged with delivering a controlled substance to a minor when the recipient is a fetus or a newborn infant.”
- b) criminalization laws: new laws “that specifically define behaviors such as fetal endangerment or fetal abuse”
- c) informant laws: “require health care workers or other treatment providers to report suspected or actual drug use by pregnant women.”

All three of these strategies are potentially problematic. Critics have argued that extending extant laws can undermine abortion rights by granting personhood status to fetuses. The general reply to this is that these laws only go into effect when the woman in question has already passed the legal date before which she can still have an abortion in her state. Some states, like New York, allow late second trimester and early third trimester abortions, so it is a possibility the above-defined narcotics laws might be enforced against women who are not planning on carrying the child to term or may not be aware that they are pregnant. Proponents of these laws argue that the intent of these

laws is to prevent drug use by women who have decided to carry the fetus to term. Both narcotics laws and criminalization laws that make it against the law to deliver a baby that tests positive for narcotics, however, further criminalize narcotics consumption by the mother at a time when the fetus is not yet a newborn. As philosopher Paul Logli writes, “the state’s compelling interest in potential human life would allow the criminalization of acts which if committed by a pregnant woman can damage not just a viable fetus but eventually a born-alive infant. It follows that, once a pregnant woman has abandoned her right to abort and has decided to carry the fetus to term, society can well impose a duty on the mother to insure that the fetus is born as healthy as possible.” Logli argues the potential cost to the eventually born-alive infant and “the lack of a fundamental right or liberty interest in the use of psycho-active drugs” trump the privacy interests of the mother.

Although there is no liberty interest in drug use, there is a liberty interest in not being targeted unfairly. As happens all too often, racism, class-bias and sexism combine in the case of sanctions against pregnant women who are drug using or considered high risk. “Women who are routinely subjected to drug testing or the testing of their newborns are likely to be poor and either black or Hispanic” and receiving prenatal care from public facilities. More wealthy women who are seeking prenatal health care through their own insurance companies or from a private facility are far less likely to be submitted to drug testing or to have their children submitted to drug testing without their consent or express permission: “Such tests raise the issues of discrimination, consent, and confidentiality. They often target women who cannot afford prenatal care or who

can afford only to go to public hospitals or clinics. These women are labeled ‘high risk’ and are tested routinely without their consent. Those who can afford private care remain effectively insulated from this form of state intrusion.’^{lxv}

Although consumption of both illegal drugs and legal drugs (such as nicotine or alcohol) can cause severe damage to an infant, laws against consumption by a pregnant woman are primarily targeted against the so-called ‘crack mom.’ This is counter-productive in several ways. First, it does not help the majority of the infants we wish to protect by not targeting fetal alcohol syndrome, which can result in some of the same abnormalities in infants as prenatal narcotics use. Although fetal alcohol syndrome is far more widespread than crack use during pregnancy, it is almost never treated as a criminal problem. Rather, alcoholic pregnant women are encouraged to seek help in a medical setting, and are generally treated as someone suffering from a medical condition instead of a person who is involved in a criminal offense. Secondly, criminalizing use by pregnant women villainizes the ‘crack mom’ as an unfit mother and generally a bad person instead of acknowledging that she most likely suffers from past abuse (psychological or physical) and has been negatively affected by societal problems other than her crack abuse. This leads the ‘crack mom’ to be “much more likely to face censure than a pregnant alcoholic or even a pregnant woman who ingests powdered cocaine through her nose” (Mahan). In turn, this further marginalizes these women from the social safety net that would be most effective in helping her stop her drug use and otherwise seek prenatal care for her unborn child to avoid a possible run-in with the law. Third, focusing on the crack mom fails to bring attention to the real problem: “although

having a crack-abusing mother certainly is a problem, the magnitude of other problems faced by infants in the lowest socioeconomic levels of the United States is much greater. The high rates of infant mortality and low birth weight babies born in the United States are both a symptom and a result of the quality of life in U.S. society.”^{lxvi}

FINAL REMARKS

In this chapter, I have given an overview of how status quo drug policy affects both users and non users, and what sorts of injustices and problems plague the current policy, in the hopes to be able both to understand the problem and to be able to construct a philosophical solution to it. There is much controversy surrounding the issue of drug policy, and by outlining most of it, I hope to have persuaded the reader that it is not possible to settle the issue merely by looking at empirical matters. An underlying philosophical understanding of the issue is needed in order to be able to provide policy initiatives.

NOTES

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Oddly, no national statistic of deaths directly related to illegal drug use and overdose exist. The only nationalized mortality statistics include under the "drug" category deaths due to accidental overdose of household items, mortality due to prescription drug interactions, and other legal or accidental drug use leading to death.
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- iii. White House Drug Policy, "National Drug Control Strategy Fiscal Year 2003 Budget Summary." Available online at: < <http://www.whitehousedrugpolicy.gov/publications/policy.03budget/index.html> >.
- iv. Substance Abuse and Mental Health Services Administration. *Overview of Findings from the 2003 National Survey on Drug Use and Health* (Rockville, MD: Office of Applied Studies, NSDUH Series H-24, DHHS Publication No. SMA 04-3963, 2004).
- v. Steven Duke and Albert Gross, *America's Longest War: Rethinking Our Tragic Crusade Against Drugs*. (Los Angeles: J.P. Tarcher, 1999), 1.
- vi. Drug Policy Alliance, "Mission Statement." Available online at: < www.drugpolicy.org >.
- vii. The full text of the Controlled Substance Act of 1970 and its amendments is available at: < <http://www.usdoj.gov/dea/pubs/csa/812.htm#a> >.
- viii. For the full text of the Controlled Substance Act of 1970 and its amendments, see: < <http://www.usdoj.gov/dea/pubs/csa/812.htm#a> >.
- ix. The legal distinction between narcotics and non-narcotics appears to be pretty arbitrary. The full distinction can be found through the Drug Enforcement Agency, U.S. Department of Justice, at: < <http://www.usdoj.gov/dea/pubs/csa/802.htm> >. Basically, a narcotic is defined as anything derived from opium, coca, poppy, or ecgonine.
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< <http://oas.samhsa.gov/nhsda/2k2nsduh/html/Sect1peTabs1to110B.htm#tab1.35b> >.
- xi. THC is "an isomer of tetrahydrocannabinol (Delta9THC)." For more information, please see the Marijuana fact sheet on the National Institute on Drug Abuse (NIDA) website: < <http://www.drugabuse.gov/Infobox/marijuana.html> >.
- xii. Howard Abadinsky. *Drugs: An Introduction* (New York: Thompson Learning, 2001), 146-148.
- xiii. Abadinsky, *Drugs*, 148.
- xiv. Abadinsky, *Drugs*, 149.
- xv. Ethan A. Nadelman. "The Future of an Illusion." *National Review*, Sept. 27 2004, 42.
- xvi. Nadelman, "Illusion," 43
- xvii. Janet E. Joy, Stanley J. Watson, Jr., and John A Benson, Jr., ed. *Marijuana and Medicine: Assessing the Science Base* (Washington, D.C.: National Academy Press, 1999). Available for download: < <http://www.nap.edu/html/marimed/notice.html> >.
- xviii. David M. Fergusson, et. al., "Tests of Casual Linkages between Cannabis Use and Psychotic Symptoms," *Addictions*, 2005:100.
- xix. SAMHSA 2002.

- xx. Abadinsky, *Drugs*, 83.
- xxi. Abadinsky, *Drugs*, 77.
- xxii. Drug Enforcement Administration. "Fact Sheet on Heroin." Available online at: < http://www.usdoj.gov/dea/concern/heroin_factsheet.html#4 >.
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- xxiv. Dominic Streatfield, *Cocaine: An Unauthorized Biography*: (London: Picador, 2001), 2.
- xxv. Abadinsky, *Drugs* 106.
- xxvi. Abadinsky, *Drugs* 107.
- xxvii. Duke and Gross, *Longest War*, 75.
- xxviii. Abadinsky, *Drugs*, 113.
- xxix. Office of National Drug Control Policy, "Fact sheet on Cocaine." Available online at: < <http://www.whitehousedrugpolicy.gov/publications/factsht/cocaine/index.html> >.
- xxx. Drug Enforcement Agency. "Facts About Cocaine." Available online at: < http://www.usdoj.gov/dea/concern/cocaine_factsheet.html >.
- xxxi. Streatfield, *Cocaine* 237.
- xxxii. For a great treatment of the average life of a crack addict and dealer living in a crack house, see Philippe Bourgois, *In Search of Respect: Selling Crack in El Barrio* (New York: Cambridge University Press 1995).
- xxxiii. Abadinsky *Drugs* 144.
- xxxiv. Drug Enforcement Agency. "MDMA Factsheet." Available online at: < http://www.usdoj.gov/dea/concern/mdma/mdma_factsheet.html >.
- xxxv. DEA, "MDMA Fact Sheet"
- xxxvi. John Cloud. "Ecstasy: Where the Feds Disagree." *Time*, Nov 9th 2001.
- xxxvii. Abadinsky, *Drugs* 134.
- xxxviii. Abadinsky, *Drugs* 136.
- xxxix. Drug Enforcement Agency. "Fact sheet on LSD," available online at: < http://usdoj.org/dea/concern/lsd_factsheet.html >.
- xl. Drug Enforcement Agency. "Fact sheet on PCP," available online at: < www.usdoj.org/concern/pcp_factsheet.html >.
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- xl. Abadinsky *Drugs* 84.
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- i. Judith Wagner DeCew, "Drug Testing in the Work Place." *Hastings Center Report*, 24, no. 2 (Mar/Apr 1994).
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- liii. American Civil Liberties Union, "Drug Testing: A Bad Investment," (Washington, D.C.: American Civil Liberties Union, 1999).
- liv. ACLU "Drug Testing."
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- lvii. For further discussion of this point, see *In Search of Respect*.
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CHAPTER II
MORAL UNDERPINNINGS OF
THE LEGALIZER AND PROHIBITIONIST POSITIONS

In Chapter I, I analyzed in detail the status quo of drug laws. In doing so, I showed that there are great injustices occurring in current policy, such as the undermining of civil rights and the overwhelmingly racist application of the laws, as seen in the discrepancy between the user population and the prison population. I also highlighted the factual uncertainty regarding the effects of the substances on the user, the possible link between crime and drug use, and the efficacy of policies to deter drug use. Such conflicts bespeak a deeper moral difference between the legalizers and the prohibitionists.

In this second chapter, I will outline the moral arguments underpinning the two positions. I wish to reconstruct the arguments on both sides as justly and as strongly as I am able, in order to lay the groundwork for a compromise position between the two sides. Such a compromise should both preserve the integrity of the compromising parties and lead to stronger policy recommendations. I will outline the requirements for a more efficacious policy in Chapter III. Previous attempts at compromise positions, such as harm reduction (described in Chapter I), have failed to gather sufficient support. This is because harm-reductionists have not taken the moral underpinnings of both sides into consideration. I do not believe it is possible to offer a policy initiative without first

philosophically analyzing the underlying moral principles. Following the reconstruction of the arguments for and against drug prohibition, I will also critically analyze the two positions.

I would like to make one final note about the deep controversy involved in the empirical evidence. It is my belief, which is outside the scope of this thesis, that so much factual disagreement in this debate is due to individuals making a decision based on their underlying moral understanding, which in turn leads them to find empirical evidence supporting those conclusions. Nevertheless, it is the case that both sides have a very different understanding of the “realities” of drug use and drug policy, which shape their views. Whether it is because they select the facts to bolster their moral view, or, because they form their moral views in an attempt to suit the facts, does not change the importance of understanding the underlying moral issues.

MORAL ARGUMENT FOR LEGALIZATION

In *Drugs and Rights*, Douglas Husak says that his “central concern is to identify the *moral rights* of adult users of recreational drugs.”^{lxvii} Rather than making an exclusively negative case against current drug policy based on the failures of the current prohibition system, he makes a positive case for the right to use recreational substances. He presupposes a general liberal framework but strives to remain within the bounds of current presuppositions instead of embracing an uncompromising libertarian view. Husak rejects argumentation based on consequentialist or utilitarian concerns, preferring to discuss the right to drug use in terms of the right to happiness, interpreted as an

extension of the right to autonomy. He also answers arguments based on addiction as a factor decreasing an agent's autonomy, arguments based on paternalistic considerations, and arguments stemming from virtuosity. I will begin by outlining his positive view and then consider Husak's replies to standard prohibitionist arguments.

HUSAK'S POSITIVE VIEW

Husak's basic argument for the existence of a right for adults to use recreational substances begins with an argument from autonomy and the right to pursue one's happiness, which includes a right to recreation. Husak's presumption of a general liberal framework entails a certain protected sphere of personal liberty. This framework is closely tied to his general notion of autonomy, roughly meaning the ability of an agent to choose a path to her own goals and individual happiness. In the general liberal context, actions are constrained by considerations of the autonomy of others; the immorality of an action is not a consideration, provided the action does not undermine the autonomy of another. Because discussion of autonomy is contentious, and those who disagree with this claim will simply choose a different understanding of autonomy, Husak does not ground his arguments in a specific theory of autonomy nor in a conception of the philosophy of law, though he does presume a general understanding of both autonomy and liberalism.

Husak does not begin from a specific theory of autonomy because "someone who is antecedently convinced that persons have or lack a given moral right will use this conviction to reject arguments in favor of a general principle of autonomy that entails he

is mistaken.”^{lxviii} In discussing such a general principle, he considers several possibilities. Plausible conceptions of autonomy may allow for degrees of autonomy or may draw a bright line demarcating autonomous action from non-autonomous action. A conception of autonomy may be *purely formal*, entailing that “any decision, regardless of its content, can qualify as autonomous, as long as it is made in an appropriate way.”^{lix} Formulations of autonomy may also be *substantive*, focusing on the content of the decisions such “that some particular decisions cannot qualify as autonomous, no matter how they are made.”^{lxx} Formal autonomy allows for degrees of autonomous action, whereas substantive views generally consider actions antecedently autonomous or non-autonomous.

Following a formal notion of autonomy, drug use is autonomous insofar as the choice to use drugs is autonomous. Borrowing from Gerald Dworkin and Harry Frankfurt, Husak posits that perhaps a formal notion of autonomy can best be formulated “by interpreting autonomy as a *capacity* possessed by persons” that is exercised when a choice is made such that “a person’s second-order preferences are congruent with his first-order desires.”^{lxxi} Second-order preferences are reached upon reflection of first-order desires. First-order desires are initial desires; second-order desires are the desires about those desires. For example, my desire for chocolate cake is a first-order desire. A second-order desire would be to want celery, which is better for you, as opposed to the delicious chocolate cake. The same distinction holds, *mutatis mutandis*, for preferences as well. Under such a formulation, drug use is autonomous if “adults who want to use drugs can, after critical reflection, want to want to use drugs.”^{lxxii} As long as the critical

reflection is autonomous, then the choice to use drugs is autonomous, even if that choice may lead to actions that would not be autonomous under a substantive view.

Following a substantive notion of autonomy, Husak argues that drug use is autonomous in that it *increases* self-control by allowing the user to be alert or relaxed when she wants to be. For example, I might drink a cup of coffee to remain awake while grading or to have an alcoholic drink to unwind after a long day at work. The ability to control one's moods by consuming a substance is, in his view, an increase in personal autonomy. It might be argued that this decreases an agent's capacity for self-control because she need not internally control her moods. This does not mitigate that the agent has a wish to be alert, and is able to align that wish with the reality of alertness, which increases her overall happiness. However, Husak acknowledges that purely substantive notions of autonomy may not consider drug use an autonomous choice. This is both because the agent lacks autonomy after ingesting the drug and due to the likelihood of addiction. Users of alcohol may recall situations in which they did not want to be drunk anymore but were unable to be sober. From those experiences, they may extrapolate that drug use would be worse. They would argue that it is not possible to autonomously choose to ingest a substance that would subsequently decrease their ability to make autonomous choices. Furthermore, this drug use could lead to addiction, which may decrease autonomy. In the next section, I will consider Husak's objections to the view that drug use is addictive and that it inherently decreases autonomy.

Other than arguing that substantive notions of autonomy can beg the question as to whether drug use is autonomous, Husak does not provide an argument as to why

formal notions of autonomy are philosophically superior to substantive notions. Certainly a substantive notion of autonomy could be created that would establish the increase in autonomy from the user's ability to alter her moods at will is more than the loss of autonomy from the possibility of addiction and the drug's effects following ingestion. One practical reason for preferring formal notions of autonomy with regard to drug use is that any substantive formulation would necessarily have to be based on empirical considerations of the drug experience. Part of the reason for a philosophical approach to drug policy is to avoid getting mired in the empirical uncertainties outlined in Chapter I. Purely formal notions of autonomy do not require an empirical grounding to establish whether the decision for an action is reached autonomously and so would avoid the empirical debate entirely.

Even arguing from a formal notion of autonomy, Husak recognizes that certain limitations ought to be placed on recreational drug use. He states:

Recreational drug use should be proscribed whenever a person has a special opportunity to harm others, and the impairment of judgment or reflexes impermissibly increases the likelihood that an accident will occur. For this reason, no one should be permitted to fly a plane, perform surgery, or use firearms while under the influence of mind-altering drugs. Undoubtedly other examples could be added to this list.^{lxxiii}

Another possible addition to this list is an example mentioned by Feinberg in his *Harm to Self*, namely when a small settlement is under attack by a foreign force and every citizen's participation is required for the community as a whole to survive. I think that Husak would argue that, provided a community is not in a situation where any amount of

recreational pursuit would significantly harm the individual and the community as a whole, then drug use should be considered akin to any other recreational activity.

If Husak has established the right of adults to use drugs based on considerations of autonomy, then any negative effects of use could not rightfully be considered ‘harms’ in a harm-principle consideration. I will discuss his distinction between deleterious effects and harm in the next section. Assuming adults have the right to use drugs recreationally, Husak states:

If adults have a moral right to use drugs recreationally, someone can demonstrate *ad nauseam* that their conduct has deleterious consequences upon others, without showing that these consequences count as harms that can support criminal liability. In the absence of an independent reason to believe that an action is morally impermissible, its adverse effects on others are not sufficient basis to conclude that it is harmful and thus eligible for criminal prohibitions.^{»lxxiv}

If he has successfully shown that adults have a moral right to recreational drug use, then any direct or indirect negative consequences of use are not harmful and should not be within the purview of criminal sanction.

REPLIES TO PROHIBITIONIST ARGUMENTS

Having established a positive argument as to why drug use is autonomous, Husak considers some objections to the prohibitionist framework. The first is that it is an *ad hoc* limitation to autonomy. One of the recurring arguments in the legalization debate is that there is not much difference between alcohol and tobacco, which are legal, and drugs that are not. Husak specifically wants a justification because he thinks that it is not fair or principled that some individuals’ recreational choices, such as drinking alcoholic beverages and tobacco smoking, are given preferential treatment over those of

other drug users. Husak argues that if one does not already presuppose the current criminal system, then there is no principled way to distinguish between legal and illegal substances. Usually people claim that currently illegal recreational drugs are more addictive or more harmful, but nicotine is just as addictive as all other substances, and more people die because of alcohol related deaths than because of deaths related to other drugs.

The second of Husak's objections that I will consider is that prohibitionists often conflate harm and disutility when they claim that drug use is harmful. Husak defines harm as negative consequences that befall someone because of a purposeful action of an agent, whereas negative consequences happen without purpose and without an agent. If someone breaks my arm with a baseball bat, that agent has harmed me. A similar claim cannot be made if a ladder accidentally falls over, causing me injury. The harm debate becomes even more complicated because it is partially contingent upon whether the agent causing the harm had a right to the action which nevertheless caused my negative consequences, or was doing so wrongfully. In establishing whether an action can correctly be defined as harmful, we first ask whether there was an agent purposefully executing the action that caused my deleterious effects. Next, we ask whether the agent had a *right* to that action. If he did, then even if he did purposefully engage in that action, it is still not technically considered harm, but a mere negative consequence. To illustrate this point, Husak imagines someone who opens a store that drives my own shop out of business. Negative consequences occur, but I have not been harmed by the

store opening. Even though the competitor purposefully opens the store we cannot say he is harmed by his action because he has a right to it.

At this point the prohibitionist might claim that although drug use does not constitute harm in a general liberal way, it is still too risky an activity to be allowed. The third objection of Husak's that I will consider is that some risky activities are allowed, whereas drug use is not, and he seeks a principled reason as to why drug use should be excluded. For instance, mountain climbing, motorcycle riding, and boxing are legal recreational activities, whereas drug use is not. Husak claims that a principled argument as to why drug use should be prohibited when these other activities are not requires establishing a threshold of risk, and whether illegal drug use crosses that threshold. He argues it does not. If drug use is indeed so risky, it should be up to the individual agent to establish that for herself and choose to abstain from the activity. He does state that laws making certain activities safer, such as seatbelt or helmet laws, are legitimate. The mere existence of risk is not sufficient to completely prohibit an activity. The importance of the risky activity in question also plays a critical component. For instance, driving without a seatbelt is generally not something anyone would list as being important to their way of life, whereas drug use plays an important role in many lives. Husak claims that laws prohibiting driving without a seatbelt are more legitimate, both because those laws do not preclude a behavior that is a strong player in personal happiness, and because seat belt violations merely incur a civil penalty, not a criminal penalty.

The fourth of Husak's objections I will consider is the argument that drug use is inherently addictive and hence it decreases autonomy. The choice to use drugs may be autonomous initially. The prohibitionist argues drug users cannot autonomously choose to use drugs if they are addicted to them. Since drug use implies the possibility of addiction, the prohibitionist can claim that this risk is enough to criminally prohibit use. The state cannot allow citizens to risk becoming addicts, since addiction is inherently autonomy decreasing. Husak replies to this objection in two parts. First, he points out that addiction does not necessarily indicate illegality; nicotine use is substantially more addictive than LSD use, yet the former is legal and the latter is not. The question is not merely one of addiction. Secondly, he argues that the risk of addiction cannot be considered a legitimate reason to prohibit drug use. Because he is trying to avoid the empirical and consequentialist debates, Husak wants to establish philosophically the properties a drug must hypothetically possess in order for addiction to it to always overcome the user's autonomy. This argument leads him to show that no current drug holds these properties, although he leaves open the possibility that future drugs may. In his view, it is possible to have autonomous and addictive drug use, but the argument leading to this conclusion bears closer scrutiny.

In order to talk about whether or how addiction can undermine autonomy, we require a working definition of both of these concepts. The question can perhaps best be understood by asking, "can someone deprive themselves of their own autonomy? And if so, does addiction cause that sort of deprivation?" Husak at this point presumes a formal definition of autonomy because under a substantive definition one can simply

presuppose that drug use is not autonomous. Substantive definitions of autonomy allow for the exclusion of certain actions as non-autonomous, regardless of how the decision for that action is reached. Formal definitions of autonomy consider actions autonomous insofar as the decision for that action is reached autonomously. Husak's line of attack is first to define addiction, then to discuss whether the pain of withdrawal is enough to be a legal excuse in the eyes of the law. He defines addiction as a matter of degree, based on the following factors:

1. A subjective awareness of compulsion to use a drug or drugs, usually during attempts to stop or moderate drug use.
2. A desire to stop drug use in the face of continued use.
3. A relatively stereotyped pattern of drug-taking behavior.
4. Evidence of neuroadaptation (that is, tolerance and withdrawal symptoms)
5. Use of the drug relieve or avoid withdrawal symptoms.
6. The salience of drug-seeking behavior relative to other important priorities.
7. Rapid reinstatement of the syndrome after a period of abstinence.^{lxxv}

As I have discussed in the previous chapter, drug addiction is a hard concept to define. The only possible aspect he omits is whether a user has experienced negative consequences due to his drug use. Since this aspect of addiction can be question-begging as to whether the harm is caused by the drug itself or the current penal nature of drug use, leaving it out is not unreasonable.

Next, Husak considers whether the withdrawal symptoms that a drug addict suffers constitute the level of pain that a person of reasonable firmness could not overcome, which is the current legal standard for coercion to a criminal act. Coercion relates to Husak's central argument in that coerced actions are unproblematically considered non-autonomous, and his central argument stems from autonomy. At least in

applying the United States penal code, courts have ruled that the pain of addiction is not enough to consider a drug user to be coerced by the drug's withdrawal symptoms and therefore excuse him from criminal liability for his drug use. Also, the user is responsible for having caused the pain in the first place by choosing to ingest the substance.

Leaving the responsibility and agency question aside, Husak asks what would happen if a terrorist were to construct a substance that caused the pain of heroin withdrawal and forced its victim to take it unless she agreed to do the terrorist's bidding. Would the agent be excused from the subsequent criminal act the terrorist forced her to do? The current legal standard would most likely say no because the pain is not so severe that a person of reasonable firmness could not withstand it. This result is also supported by the fact that people do quit using drugs voluntarily and without help for varying periods of time. In short, if the pain of withdrawal is the only reason one would not be able to quit using drugs, that is not enough to consider the user coerced. She could withstand the pain or seek treatment. According to Husak, "unless some basis other than the pain of withdrawal can be used to explain why addicts are powerless to stop, I conclude their continued use of cocaine is autonomous. If the justifiability of paternalistic interference requires that the choice of the agent is nonautonomous, users should be not prohibited from consuming cocaine for their own good."^{lxxvi} As long as the user can be considered to have a second-order wish to continue to use drugs, the choice is autonomous and should be protected.

Having rejected that addiction is coercive and hence autonomy defeating, Husak is now ready to discuss the question of whether drug use is enslaving. The liberal tradition holds that a human being lacks the right to sell himself into slavery. This is not to say that I have committed a crime if I try to sell myself into slavery, but rather that I have entered into a contract that is null and void because it violates autonomy. Since criminal sanction carries a stronger penalty than merely voiding a contract, Husak argues that criminalizing the ability for a user to become enslaved to drugs should carry stronger restrictions than those required for the voiding of a contract. As such, if it is possible to show that addiction does not even come close to the same severity as slavery, then it would not be enough to nullify a contract, much less provide enough justification for criminal sanctions.

Husak points out several discrepancies between becoming addicted to drugs and choosing to enter into a contract of slavery. Once someone becomes a slave, she immediately surrenders to a situation, whereas the 'surrender' to addiction necessitates repeated use. There is an intermediary stage wherein one can choose to stop use before he becomes addicted. Secondly, slavery as a contract is irrevocable, whereas addiction does not have to be permanent, as evidenced by the fact that people do stop using drugs. Thirdly, once I contract myself into slavery, it is inevitable that I will in fact become a slave. The probability of becoming addicted to any recreational drug is not a certainty. Fourthly, slavery is a continuous state, whereas drug use and addiction are not. Heavy drug users will often stop using drugs for a period of time, if just to lower their tolerance. Even while someone is addicted, she is not constantly in thrall to withdrawal; a slave is a

slave for every minute. Husak ends this argument by noting that comparing drug addiction and use to slavery trivializes and demeans the plight of real slaves, both historical and contemporary.

Husak's final objection to the prohibitionist framework is to deny the legitimacy of arguments for the prohibition of drugs based on the immorality of drug use. First, he rejects the view that drug use is inherently immoral. Secondly, he argues that any framework under which drug use would be deemed immoral is too stringent to be used as a basis for law under a liberal framework. He rejects the view that the altering of consciousness is, *ex nihilo*, wrong or immoral. Rather, it is the harm stemming from such an altered consciousness that is the potential problem. These possible harms are covered by extant legislation against violence or theft. Husak argues that a view requiring citizens to be virtuous is too restrictive a basis for a legal system. Many activities, such as television watching, do not make for a *good* citizen, but this does not mean such activities ought to be criminalized. Prohibitionists argue that drug use is immoral, and hence should be illegal, based on the Augustinian idea that it is best to abstain from pleasure. To state that pleasure is something to be avoided, or that it has no moral virtue in and of itself, stems from an ideal of human excellence and human virtue. The ascetic trend in the discussion of rights is part of the reason theorists do not defend happiness-as-pleasure.

A second reason is that "recreational activities are nonaltruistic and self-indulgent" in a way that freedom of speech or religion is not.^{lxxvii} Although happiness or pleasure may be self-indulgent, it is nevertheless one of the major (if not the major)

motivations in human behavior. Regardless of whether one wants to endorse a partially ascetic ideal or not with regard to her ideal of a human life, it is nevertheless the case for Husak that a notion of how to arrange one's life optimally is not the correct criterion for a criminal prohibition. The notion of drug use as an *immoral* act, as opposed to merely imprudent or unwise, stems from such a virtuous ideal. Certainly, these views justify criticisms of the drug user's decision to ingest certain substances or enter into certain altered states. However, it is not the role of government to organize persons in such a way as to meet a virtue ideal, but rather to organize communal life insofar as it is necessary for people to exist in cooperation.

SUMMARY

Husak presumes a general liberal framework and argues that the choice to use drugs is indeed autonomous and should be protected under that framework. He rejects views that consider drug use immoral or incompatible with a virtue ideal as being too stringent a restriction on the organization of political life. He argues that the reason that drug use is not currently considered a protected right is because most rights frameworks are not concerned with pleasure as being an integral part of the autonomous choices we make. Rather, those frameworks are usually concerned with less frivolous rights, such as freedom of religion. Nevertheless, the ability to engage in recreational activities, of which drug use is just one, is an important aspect of being able to chart one's own course through life. Political communities ought to be arranged in order to facilitate cooperation, not to force citizens to be the best persons they can be, but the persons they

choose to be. Insofar as drug use does not violate the harm principle, it should be protected as an autonomous decision.

CRITICAL ANALYSIS

For the most part, I find Husak's arguments to be persuasive. I have one theoretical objection to his arguments, and a few questions with regard to implementation. My theoretical objection is that it seems as though Husak is conflating the right to pursue happiness and the right to recreation. Although recreation is a subset of happiness, it cannot be considered a right of its own accord. The right to recreation is not universal across all contexts. Suppose a nation's very survival is a pressing issue. In such a case, to talk about the 'right' to recreation seems preposterous. In such a situation, even the pursuit of happiness must take a backseat to the ability of the individual or the community to function and propagate. Since his argument for drug use as an extension of autonomy rests on the right to recreation, a careful explication of when the right to recreation may be presumed is needed. Nevertheless, I think it can be presumed such a right would exist in our own society.

The remainder of my objections regard the application of his work to current policy. First, I think Husak does not fully consider all of the ramifications of impairment in the duration of the drug experience. Even if the choice to enter an altered state is autonomous, while perception is altered, one will perceive and react to the world differently than those nearby, making it unpredictable. Whereas most recreational

activities can be terminated at will, it is not possible to cease a drug experience in the same way one can stop watching television.

Because potency, dosages, and metabolisms vary, it is not always possible to predict the extent or duration of the drug experience. In case of an emergency or a change in environmental conditions, it is possible for the user to find himself unable to react to a situation rationally for long periods of time. This is both inadvisable to the user and possibly to those surrounding him. Individually, this may not be an issue, but on the aggregate level may be unwise for the community. At the very least, these sorts of considerations would imply that a position espousing a graduated legalization would be preferable.

Furthermore, Husak's treatment of drug use tends to lump most substances together without considering that most users have a drug of choice. It may be the case that in a situation where some of the currently proscribed substances are legalized, the average user would not feel her autonomous choice greatly limited. I may prefer to smoke opium but be content that smoking marijuana will still reach my goals of recreation and relaxation. If a substantial number of users would be satisfied by partial legalization, then full-scale legalization may be neither required nor desirable.

Thirdly, the use of some hallucinogens may need to be restricted in some way akin to seatbelt laws or the requirement of a license to drive a car. Especially because hallucinogens have different effects based on mood, environment, and psychological factors, a policy requiring users to ingest the substances in a controlled environment or be evaluated for factors of increased risk of psychotic reactions may be justifiable.

MORAL ARGUMENTS FOR PROHIBITION

Prohibitionists believe that it is not outside the scope of law to legislate against recreational drug use. This position is primarily held by policy makers and some social scientists, such as Inciardi (whose work I discussed in Chapter I). Philosophically speaking, prohibitionist moral underpinnings are generally reconstructed by legalizers in an attempt to show the view is not as strong as that of the legalizer. This may very well be the case. The prohibitionist position is a view held by many, especially by people in a position of power when it comes to shaping public policy. A policy solution that has any chance of being implemented must take into account the framework of the prohibitionists, and give their objections weight, if it is to garner their support. In this section, I will borrow strongly from the work of Paul Smith, whose primary motivation is to discount these arguments. I will also attempt to bolster them as strongly as I am able. Because the arguments against the legalizer position will become useful in the reconstruction of the prohibitionists' positive argument, I will consider those first and then move on to discussing Smith's reconstruction of the prohibitionist stance.

REPLIES TO LEGALIZER ARGUMENTS

The first argument prohibitionists make against the legalizer position is that it does not take the impact of hallucinogens seriously enough. One of the major arguments legalizers use is that the use of psychedelics is not addictive but illegal, and cigarettes are very addictive, but are legal. The prohibitionist will reply that drug use, especially psychedelic use, changes the way the user perceives the world around her in a substantial

way. While under the influence, the user interprets the events around her in way that is fundamentally different from the way someone who is not under the influence of drugs would do so. Cigarette smoking does not have this effect. Alcohol impairs motor control and may heighten certain moods, but a drunken person is in control of some of their faculties, and their sense perception does not change very much. Even if a drunken person is not in full control of their faculties, she can sleep off the effects and be reasonably sober in the matter of hours. By contrast, someone who is having a hallucinatory experience cannot snap out of it or sleep it off. If the hallucinogen is strong enough and if a large enough dose is ingested, an acid trip can last for days, and in extreme cases, even weeks. This may not be the usual experience, but it is a possibility. It is not possible for a person to decide, “I need to not be hallucinating now” and cease to do so, which is an important difference between drug use and recreational activities such as mountain climbing or riding a motorcycle. This consideration impacts both harm to self and harm to others considerations, because while under the influence the user may make non-autonomous decisions that are harmful to both the self and others.

The second prohibitionist argument I will consider has to do with the temporal aspect of the drug experience. Legalizers will sometimes compare the fatality rates of recreational activities that are legal to death rates due to drug use in order to show drug use is not as deleterious. One major difference, however, is that recreational activities not related to drug use can be stopped at any time. I can stop a motorcycle and get off if necessary, but it is not possible to stop and pause a drug experience. The only example

otherwise is skydiving, since once I jump out of the plane, I am forced to continue falling until I land. This is one of the reasons why skydiving carries such heavy restrictions, including mandatory training and an instructor supervising the jump.

Especially for someone who has never had a drug experience and does not understand what it would be like first hand, allowing people to put themselves into such a situation in an unsupervised environment seems preposterous on face. With alcohol, the community takes steps to limit possible harms, such as laws stating you cannot buy alcohol from a store after a certain hour, but can be served by a bartender who has a legal obligation to discontinue serving the drinker if she has gotten too inebriated. Harm-reductionists would reply that it would be possible to copy this model for alcohol use, but the skeptical prohibitionist would come back with the rejoinder that currently illegal drugs are consumed in such a way as to make that harder to legislate than alcohol, which is already bad enough.

The argument that alcohol use is already bad enough and that currently illegal substances would cause society to cross some critical threshold is the third argument I will consider. It may be the case that opening the floodgate, so to speak, to other substance could cross some critical threshold from which a community may not be able to recover. This may not be the case, but combined with a primarily negative understanding of the drug experience, it is enough to create a general feeling of unease when it comes to any legalization position. Legalizers often make the rejoinder that under any principled view, based on chemical and physical properties of the substances, alcohol would be illegal and marijuana legal. Prohibitionists do not want to understate

the reality that alcohol is a destructive and sometimes deadly force in society. But, because of its historic place in society, it gets preferential treatment. Most societies discovered the means to develop alcoholic beverages, and the practice of drinking alcohol has been ingrained to such a degree that it is not possible to eradicate it. To the agents who would rather smoke marijuana than drink alcohol, this may not seem fair, not to mention an infringement on their autonomous choice in how they enjoy themselves. The prohibitionist would reply this is not a full infringement on happiness, since other choices are still available (i.e. drinking alcohol). When balanced against the good of the community, this small infringement is justified under the prohibitionist view.

The fourth prohibitionist argument is one from consistency, especially regarding pregnant women. Criminalizing use of certain drugs by pregnant women would be a law that is necessarily aimed to a certain class of citizens. Even if one avoids the complication of how to keep pregnant drug use legal without interfering with abortion rights, there is still the reality that a law would have to be passed preventing pregnant women from engaging in a recreational activity that would be legal for other women and all men. It seems intuitively plausible that laws that only apply to a certain subset of citizens are illegitimate. At the same time, this must be balanced against concerns of the suffering children may have from the in utero drug use of their mothers.

We do have laws that regulate the behavior of certain professionals, but that is different from having laws specifically aimed at pregnant women. For instance, a lawyer is required to be licensed in order to practice law. Practicing law is a public act, which is very different from having restrictions on pregnancy, which is a private state. It

seems intuitively problematic to have a system under which laws would have to be passed specifically targeting pregnant women. Even if the law were written with the “born-alive” rule (that a woman could only be prosecuted for delivering a baby that showed signs of pre-natal drug use), it would set a dangerous precedent. Any concerned feminist should balk at the concept of a law targeted only at women simply because they are pregnant. It is not far-fetched to think that this sort of legislation could snowball into eroding the protection pregnant women have in terms of already extant discrimination, such as being denied job opportunities due to their pregnant state.

The fifth prohibitionist argument is also an argument from autonomy, but interpreted differently from the way that the legalizer would interpret it. Husak argues that drug use increases autonomy by allowing people to change their moods, such as by having a drink to unwind. Although this may allow the user to align their wish to be relaxed with their current state, it is also the case that while the person is under the influence of the drug, there is a loss of autonomy. When someone says, “I wouldn’t have done that if I hadn’t been drunk,” we understand what he means and do not doubt that he means it. Assuming that illegal drugs have a stronger effect than alcohol, and possibly a longer lasting one, while the person is under the influence of that drug, she has temporarily lowered her autonomy.

It is not in the best interest of the community, which values autonomy, to allow the autonomous decision to temporarily lower one’s autonomy, even if that can be seen as increasing long-term autonomy. Husak argues individuals do not have a responsibility to the community to always be at their best as neighbors, parents, and

other obligations. But, perhaps individuals do have an obligation to be reasonably autonomous at any given time. Television watching, one of Husak's examples of something people do instead of achieving a higher aspiration, does not put me into a mental state. I can still react if a fire breaks out and I need to get out of my house and help my neighbor escape from the fire. Husak will counter that no individual is required to be at a constant state of readiness. But in Feinberg's example of the settlement that is under attack and needs every person to fend off the attack, it can be argued that the individual has an obligation to defend the settlement and not do anything other than help defend. The prohibitionist might argue that ordinary citizens have an obligation to the community not to put himself in situations where he is not fully autonomous, or at least not for long periods of time or consistently. Since people can sober up from alcohol, and alcohol's effects are not as strong, prohibitionists argue that drinking would be an acceptable loss of autonomy while effects from harder drugs would not be.

Another way to think about this would be to say that although the legalizer does not consider the negative consequences of increased drug use as a 'harm' (in the sense that there is no intent to cause harm and no one is deprived of already existent rights), these aggregate infelicities, when coupled with other societal factors, might push us to the point of Feinberg's example of the settlement under attack. If enough people use drugs to a high enough degree that the level of productivity decreases so much that the community grinds to a halt, the aggregate effect would be a negative consequence to the community, even if that consequence would not be philosophically understood as a harm in the same sense that the harm principle is understood.

Husak claims that drugs are autonomy-conferring by allowing people to change their moods at will. One counter-argument the prohibitionist could make is that part of how we build autonomy is to learn how to cope with mood swings and to change our moods and preferences without having to rely on an external source. This is the same sort of argument people make when counseling patients with depression: medicinal solutions should only occur in conjunction with therapy. It is best to learn how to compensate without the medication after the therapy. Later in this chapter, I will discuss how the legalizers and the prohibitionists place different value on the ability to use substances to alter moods. Hiking may provide internal pleasure, but it is an external activity one engages in, instead of changing one's body to provide that pleasure. To allow a substance to change the mental state may seem like cheating in some way. The deeper philosophical presupposition, however, remains: that there is an underlying true self that is drastically altered by drug use, and that this self needs to be protected in order to protect autonomy. This presupposition, that the authentic self can be replaced by a false drug self, seems a hold-over from Cartesian dualism, and may need to be further developed. I will go into this argument in a bit more detail at the end of this chapter. This sort of underlying supposition may be part of the motivating factor in the prohibitionist view.

PROHIBITIONIST POSITIVE VIEW

In his article, Smith evaluates some general arguments that are used to justify drug prohibition. Because he is a legalizer trying to show that these arguments are

illegitimate, in the following section I will hold to the structure of (1) giving Smith's construction of the argument (2) giving Smith's objections to the argument and then (3) giving my own replies to those objections in order to make the prohibitionist argument stronger. The first argument he considers is that of legal paternalism:

The law should prohibit voluntary self-harm (legal paternalism).
 Drug use risks self-harm.
 Therefore, the law should prohibit drug use.^{lxxviii}

This argument is rejected by stating that it is outside the scope of a liberal framework to legislate against self-harm. He makes some of the same arguments Husak does, namely, that there are other risky activities that cause self-harm that we do not legislate against, such as skydiving, mountain climbing, etc. It may be important to note at this point that in the work *Harm to Self*, Joel Feinberg discusses legal paternalism at length. One of the conclusions that he reaches is that presumptively blamable paternalism (hard paternalism) should be rejected as a justification for law, provided it is the *only* motivation for passing a specific legislation. However, just because a certain legislative act has hard paternalistic justifications does not mean that it should be rejected on its face, as long as the other justifications for passing the law are legitimate on their own. It is indeed the case, though, that part of the prohibitionists' motivations is to protect people from unduly harming themselves. In the prohibitionist context, this argument is additionally tempered by the belief that drug use is addictive, deadly, harmful and does not add value to the life of the user. It is not just that the drug experience is harmful and deadly, but that it is harmful and deadly in a way that does not rationally seem worth the risk, in a way that mountain climbing or sky-diving do. The legalizer would reply that

this choice should be left up to the agent, but the prohibitionist feels at some level that the choice to use drugs cannot be considered to rationally add value to the life of the user in such a way as to overcome the harmful effects.

The second argument Smith considers is an argument from legal moralism; that we should legislate against immoral acts even if those acts are not harmful to other agents. The usual rejoinder here is that immoral acts must harm another agent in order to be immoral, and so Smith reconstructs the argument in two distinct ways to discuss how immoral action can still be immoral, even if it does not harm others. The first is the argument from Kantian duties to oneself, namely:

One has a duty to respect one's own rationality and autonomy.
 Drug use undermines one's rationality and autonomy.
 Therefore, drug use is morally wrong.^{lxxix}

Smith then provides some counter-arguments to this argument, which I shall outline and attempt to answer. The first, on which he does not elaborate, is that it is problematic to consider that we have duties to ourselves. It is outside the scope of this paper for me to try to enumerate what it would mean to have duties to oneself. one may consider the prohibitionist position to presuppose that citizens qua citizens have certain responsibilities to themselves insofar as they live in the political sphere and their actions impact those of others. His second argument is that currently legal drugs (alcohol and tobacco) also undermine rationality and autonomy in the same way that currently illegal drugs do, so this argument does not hold. However, this does not take into consideration the prohibitionists' acknowledgement that alcohol and cigarettes are already dangerous but are historically protected because of their role in society. Prohibitionists have

already taken strong stances in decreasing availability and trying to decrease use of both alcohol and tobacco, through legal drinking ages, restrictions on when alcohol may be sold, and tax hikes on cigarette purchases. The threshold argument I discussed earlier also plays a role, in that the prohibitionist can argue that tobacco and alcohol use are already morally wrong but must be permitted; to add already illegal drugs would cause an additional immorality from which we may not be able to recover.

Smith's third legalizer counter-argument to the argument from autonomy is that Kant himself acknowledges that it is not irrational to consider that someone may autonomously decrease their own autonomy, and that this is permissible as long as the loss of autonomy the agent has is not permanent. At this point, the prohibitionist can make an additional threshold argument. First, some users do indeed suffer such damage from drug use that they lose permanent autonomous faculties. Secondly, let us consider why permanent loss of autonomy is important. It is because we wish the person to be able to return to a state of autonomy to be able to function as a citizen and have a meaningful life. If a substantial portion of my time is spent in a non-autonomous state, the prohibitionist can argue this is close enough to a permanent state of non-autonomy to be problematic. Coupled with an understanding of the drug experience as not being worthwhile, it just does not seem problematic to legislate against this semi-temporary and repeated loss of autonomy. Adding the view that the drug experience is not euphoric long term and will cause harm to the user, it just does not make sense to the prohibitionist to permit this sort of behavior.

The second type of argument appealing to the immorality of drug use is an

argument based on the appeal to the ideal of human excellence. Smith states the argument as follows:

The law should promote virtue, prohibit vice (legal perfectionism)
 Drug use is stupefying, dehumanizing, degrading, a vice, a character defect, not a good life.
 Therefore, the law should prohibit drug use.^{lxxx}

The standard legalizer counterargument to this is that we do not come into political life to achieve human excellence, but rather to co-exist in cooperation. But why is this cooperation important if not to provide the necessary conditions to achieve human excellence? Once we have established a political life such that cooperation for survival is established, the only other reason to stay together is to provide people the ability to pursue their individual goals towards their own excellence. The legalizer will reply that the agent should have the ability to pursue drug use as part of that excellence. But, the prohibitionist's view of the drug experience does not consider it to be part of that excellence, and incompatible with the achievement of other human excellences. Perhaps then the argument from human excellence should be restated as follows: it is permissible for political society to allow some immoralities or behaviors that are not compatible with human excellence, such as adultery, insofar as those behaviors do not undermine the possibility of achieving other human excellences. Combined with a negative understanding of the effects of drug use and the history of tobacco and alcohol use, this allows the prohibitionist to state that currently illegal substances should remain proscribed, because these substances undermine the ability of agents to achieve other human excellences in ways other immoral acts do not.

The third type argument Smith considers is one from community values.

Smith's own structuring of this argument is not as strong as it could be. I will provide the following type of argument, suggested by Smith:

The state should maintain the necessary conditions for the achievement of community values and well-being.

This includes an understanding of the citizen as a person who possesses the necessary conditions to be able to engage fully in political life. In extreme cases, this may require the citizen to be not just available but actively involved in the defense of the state and its values.

Drug use drastically restricts the ability for the citizen to be engaged in this activity.

Hence, drug use should be proscribed.

The legalizer may dispute this notion of citizenship as being too stringent and not compatible with a general understanding of liberalism. To sort out this dispute would require more analysis than is appropriate here. I will just say that this understanding of citizenship is part of the prohibitionist framework must be considered as part of our political deliberation.

SUMMARY

The prohibitionist perspective advocates a strong notion of citizenship, wherein the citizen is strongly required to engage in political life. Drug use is not compatible with that ideal, and should be proscribed. The prohibitionist values autonomy, but understands the notion as being important because it is necessary for the citizen both for her own ends and for the ends of the community. Because of the temporal loss of autonomy following drug use, and the possibility of addiction, the prohibitionist does not view drug use as being compatible with this understanding of autonomy.

CRITICAL ANALYSIS

From my own philosophical perspective, the arguments from the legalizer perspective are more convincing. In the next subsection, I will discuss the differences in political and metaphysical underpinnings of both views. Let me just say here that I find the presuppositions held by the legalizer more convincing. Specifically, I do not believe that it is the role of government to provide the necessary conditions for human excellence, but rather that the role of political life is to protect life, liberty, property and the pursuit of happiness. However, it is the case that the prohibitionist views are held by people who are currently in a position of power when it comes to shaping policy, and should be given weight in their own regard in political life. It may be the case that the arguments taken individually are not strong enough to fully justify the prohibitionist position, but taken together they may form a cohesive stronger whole. It was my aim in this chapter to analyze the moral underpinnings of both positions as strongly as I am able in order to be able to establish a compromise position in the next chapter that will provide a stronger policy initiative than has previously been achieved. The prohibitionist may make some presuppositions as to the nature of political life and citizenship that may seem overly stringent to a liberal, but their point of view is reflected in political life and must be considered when establishing a compromise position.

FURTHER VALUE DIFFERENCES BETWEEN THE TWO VIEWS

Throughout this work, some fundamental differences have been evident in the arguments outlined. Although the prohibitionist's primary moral value is the preservation of the necessary conditions to achieve virtue, and the legalist's primary moral value is the preservation of formal autonomy, both sides also formulate and prioritize other concepts differently. In this section, I am going to outline some of these underlying value differences. Specifically, their formulations of pleasure, virtue, self-control and the role of the community are different, or prioritize differently. The differences I am about to discuss may have been evident all along, but perhaps not explicitly stated or discussed in as much detail. They are value differences in the sense that both sides of the debate value these concepts, but may understand them differently or place different emphasis on them. It is important to look at these differences because they help to explain in part why the two sides find it so difficult to reach a common ground from which to agree on policy recommendations. Any compromise position must be able to take these further differences into account in order to garner the agreement of both sides. It is important to recall that some of these differences in formulations may actually only be differences in the prioritization of these views. Another way to think about these differences is that the varying formulations and prioritizations of these concepts shape the world-view of the adherents of both positions. Although these differences are not as fundamental to the two positions as the core moral values outlined earlier, they do constitute differences that are important to the adherents of each view. Compromise with integrity should preserve the ability for adherents of

each position to continue viewing the world after the compromise roughly as they did before it.

PLEASURE

The prohibitionist and the legalizer prioritize the value of pleasure differently. Even a stringent prohibitionist would not deny the value of pleasure in quotidian experience. Nevertheless, pleasure for its own sake is seen as an overly hedonistic goal. There is also the fear that mere pleasure is a possible temptation from the virtuous life. This is not to say that prohibitionists suppose that pleasure is never a good, nor something to be avoided at all costs; rather, pleasure is seen as possibly being a temptation and hence dangerous. To know whether a particular pleasure should be pursued, one must first establish whether the pleasurable activity is consistent with the virtuous life and then allow oneself to enjoy it. The legalizer considers pleasure a good (though not the only good) to be achieved. That is not to say legalizers are hedonists or eschew virtue, but they place a higher value on pleasure than the prohibitionists do. The underlying justification for autonomy in this view is that each individual conceives her own happiness. No one else may determine what is pleasurable for me, both because of epistemic concerns (someone else cannot know what will make me happy) and ethical concerns (others ought not dictate what should make me happy).

This underlying disagreement about pleasure makes it hard for each side to understand the point of view of the other. It also impacts what both sides consider to be reasonable or rational. The prohibitionist does not consider drug use reasonable because

it gives mere pleasure at the risk of undermining the possibility for a virtuous life. It is precisely the sort of pleasure that tempts human beings away from loftier goals. A rational person would avoid such temptation, and if this is rational for one, it is rational for all. Following this line of thought, the lawmaker is required neither to encourage nor permit irrational action, thus justifying the prohibition of recreational substances. The legalizer, who believes that what constitutes happiness cannot be established *a priori* through reason, views this argument as an illegitimate impediment to pleasure, which as stated earlier is a major component of her happiness. To the extent that she values autonomy for the ability it confers on her to seek her own individual happiness, her autonomy is undermined if drug use or other pleasurable actions are proscribed.

SELF-CONTROL

Earlier in this chapter, it was argued the prohibitionist considers using drugs to alter moods a loss in self-control, whereas the legalizer considers the ability to alter moods at will an increase in self-control. This may be due to different metaphysical presuppositions. The legalizer considers the self to be one embodied system. Suppose I am tense and wish to relax. I consider two options: meditation and a stiff drink. Meditation, through breathing techniques that lead to endorphin release, leads me to relax. The alcoholic drink, through chemical effects, also causes me to relax. There is no distinction to be drawn between the two activities, at least with regard to pleasure. (Meditation may have other attributes alcohol does not have with respect to other values). Both meditation and an alcoholic drink cause relaxation through a chemical

reaction in my system, although the chemicals may be different and may have been caused by different actions. In using either, I achieve my desire to be relaxed.

The prohibitionist, on the other hand, presupposes a dichotomy between the mind and the body. For her, meditating allows the agent's mind to overcome the weaknesses of the body, returning both to a relaxed state. She may even disagree with the notion that meditation has relaxing effects because of chemical reactions. Consuming a stiff drink does cause the body to relax, she would admit, but does so in a way that undermines the mind. This is both because of the physical effects of the substance and because having a drink to relax robs the mind of a chance to exercise its will over the body.

When the legalizer argues that both drug use itself and the potential choice to use drugs confers autonomy, the prohibitionist is baffled. Autonomy, for the prohibitionist, is measured by self-control (by which he means control of the mind over the body). Recreational drug use clearly undermines self-control, and hence autonomy. The prohibitionist may be willing to grant the permissibility of pleasure for its own sake, so long as it does not undermine self-control (e.g. television viewing). If the pursuit of pleasure must undermine self-control, it is only permissible to allow substances or actions that undermine self-control as little as possible. This may be part of what legitimizes alcohol use for the prohibitionist but not the use of other substances. This is not to say the prohibitionist would deny the legitimacy of using prescribed substances to help a patient with depression. The legalizer also values someone who is able to mentally change her moods without relying on the use of a substance. The two sides

differ on how much value and legitimacy they place on using physical substances to alter moods and how that plays into their notion of self-control.

VIRTUE

Throughout this work, I have argued that the prohibitionist values the achievement of virtue, but I have remained silent on the characteristics of said virtue. An explanation of what it means to lead a virtuous life would take me rather far a field from the current issue, but I would like to make one comment on the sense of virtue held by the prohibitionist. For the prohibitionist, virtue is a real concept, which we grasp through reason. Different individuals may instantiate virtue differently, but they still reflect the same core notion. Individual legalizers, including Husak, may or may not agree on this last point. Regardless of how legalizers as a whole stand on the ontological status of virtue, they unanimously would agree that arguments for public policy ought not stem from considerations of virtuosity for three reasons. First, arguments from one notion of virtue infringe upon the protected sphere of individual freedom, which liberalism ought to protect. Secondly, the existence of such a virtue, or what characteristics it may possess, is shaped by personal metaphysical and moral views, and is thus outside the scope of public reason. Arguments from non-public reasons cannot be accepted by all citizens and are therefore illegitimate for shaping public policy. Finally, if such a notion of virtue does exist, and it can be reached by reason, then every individual is capable of reaching it on her own. Individuals can be persuaded to do so without appeal to force, either through education or the strength of cultural norms

shaping their habits and practices. Civil penalties and taxes, which deter the user but do not incarcerate him, may be more legitimate than the use of coercive legal force. The prohibitionist would reply that those who do not recognize that virtue exists and can be reached are mistaken and need to be guided towards virtuous action if they are not capable of reaching it on their own, with the use of coercive force if necessary. Please note that both the legalizer and the prohibitionist value virtue, but do so differently. Certainly the legalizer would want to be virtuous. She understands virtue as including pluralities, and that drug use can be compatible with being virtuous. Or, she may believe virtue should not play a prominent role in establishing law. The prohibitionist values the role of virtue in shaping public policy more than the legalizer. He may admit to a plurality of virtues, but simply believe drug use to be incompatible with any notion of virtue.

COMMUNITY

Now that I have made some of the previous presuppositions more explicit, it may be easier to understand why the prohibitionists and the legalizers differ so widely on the questions of legitimate use of government coercion with regard to recreational drug use. The prohibitionist and the legalizer both believe political life is comprised of free and equal rational beings, who congregate for a variety of reasons. After the cooperation necessary for survival, the prohibitionist views communal life as existing primarily to allow humans to coexist in order to achieve virtue. The legalizer believes they coexist to achieve happiness. The prohibitionist believes in the existence of one rational notion of

virtue. The legalizer necessarily presupposes a plurality of ways to achieve individual happiness. They both value choice, but the prohibitionist believes certain choices to be unreasonable and thus legitimately proscribed by the political community. For the legalizer, the only legitimate justification for proscribing an action is that it strongly undermines the autonomy of another.

SUMMARY

If compromise between the legalizers and the prohibitionists is to be possible, it must find common ground in the moral underpinnings between the two views. Having stated how the prohibitionists and the legalizers view pleasure, reason, virtue, and the community differently helps explain why it is so hard to reconcile the two views without a theory of integrity-preserving compromise. Such a compromise must take the differences in these underlying views into account. This will require both sides to acknowledge that the other's presuppositions are legitimate and worthy of respect. A compromise position must allow each side to retain their own presuppositions with regard to their underlying points of view. Both sides may be required to bend these presuppositions in order to accept a compromise solution, but the presuppositions must be acknowledged, respected, and valued as legitimate. Insofar as either side is required to bend these presuppositions in order to accept a compromise initiative, both must do so as fairly as possible. I will discuss these notions further when I establish requirements for a compromise with integrity.

NOTES

- lxvii. Douglas Husak. *Drugs and Rights* (Cambridge: Cambridge University Press, 1992), 3
- lxviii. Husak, *Rights* 82.
- lxix. Husak, *Rights* 83
- lxx. Husak, *Rights* 83
- lxxi. Husak, *Rights* 84.
- lxxii. Husak, *Rights* 84.
- lxxiii. Husak, *Rights* 231
- lxxiv. Husak, *Rights* 165.
- lxxv. Husak, *Rights* 105.
- lxxvi. Husak, *Rights* 116.
- lxxvii. Husak, *Rights* 67.
- lxxviii. Paul Smith, "Drugs, Morality and the Law" *Journal of Applied Philosophy*, (Vol. 19, No. 3, 2002).
- lxxix. Smith 6.
- lxxx. Smith 6.

CHAPTER III

THEORETICAL CONSIDERATIONS OF BENJAMIN'S THEORY OF COMPROMISE

In Chapter II, I outlined the moral underpinnings and underlying presuppositions of both the legalizer and prohibitionist positions. The legalizer's core moral notion is that of autonomy, understood in the context of a general liberal framework. This notion of autonomy is a *formal* one, wherein a decision is autonomous just in case it is reached in an appropriate way. The prohibitionist's core moral notion is preserving the community, which includes a thick notion of citizenship as the ability of the person to fully function in political society. This thick citizenship is necessary both for the citizens to reach their own goals and for them to aid in the achievement of the goals of the community. Another way to conceptualize this core moral principle is the preservation of the necessary conditions for the achievement of virtue for each citizen in the community.

I will introduce Martin Benjamin's theory of moral compromise, in the hopes of reconciling the legalizer and the prohibitionist positions into a compromise position. In this chapter, I will define the compromise position, discuss theoretical objections to moral compromise, outline Benjamin's requirements for moral compromise, and provide an example of a moral compromise solution.

BENJAMIN'S THEORY OF MORAL COMPROMISE

In *Splitting the Difference: Compromise and Integrity in Ethics and Politics*^{lxxxi}, Martin Benjamin argues there is a necessity for compromise in ethical issues. This is an unusual claim. Most ethical theorists consider compromise, at least on a theoretical level, as something to be avoided. The presupposition is that the goal of ethical theorizing is to find one theory that will resolve all ethical disputes. Benjamin argues that in an increasingly pluralistic society with competing ethical theories, finding one ethical theory that will resolve the conflict is unlikely. Having an entire community adhere to this ethical theory is most likely impossible. As such, compromising on ethical issues is necessary because of this ethical pluralism. Benjamin's project is to outline how moral compromise can be achieved with integrity, so that neither party to the conflict loses the advocacy of their moral point of view. This needs to be accomplished fairly, while still resolving the practical or policy issue at hand. In the next section, I will introduce Benjamin's theory of moral compromise.

EXPLANATION OF MORAL COMPROMISE

In order to understand Benjamin's position, several distinctions about compromise need to be outlined. The first is the difference between a synthesis position and a compromise position. Suppose both parties begin by adopting two different perspectives, and during the course of their conversations they both independently choose to adopt a synthesis position. This would not be considered a compromise under Benjamin's view. Rather, both parties would choose to embrace a tertiary position as

preferable to their own initial position. What Benjamin means by compromise can roughly be understood as neither of the two parties getting what they truly want, but resolving to abide by an agreement that preserves their integrity. I will discuss the integrity-preserving aspects of compromise in detail later in this work.

The second distinction Benjamin makes is between non-moral and moral compromise. This distinction is important to Benjamin's work, because there is established literature in mediating non-moral compromises, which he wishes to extend to the moral realm. Non-moral compromise can arise in any situation where there is a conflict between two parties. For example, let us suppose I wish to go see a movie and go to a restaurant with a friend. My friend in turn wishes to go see a different movie and go to a different restaurant. Either of us could choose to go to the movie and restaurant we individually prefer by ourselves, but we both would prefer to have the company of the other in these activities. One possibility for a non-moral compromise would be if we go see the movie I want to see, and then go eat at the restaurant my friend prefers, or vice versa. Or, we may decide to go see my movie and eat at her restaurant today, and see her movie and eat at my restaurant next week. (Note that if we both independently decided we preferred to go to a third movie and a third restaurant, we would be adopting a synthesis position, and not a compromise position). Compromise in the non-moral realm is relatively painless compared to compromise in the moral realm, because there is a deeper level of advocacy when it comes to moral positions. For instance, establishing a compromise position regarding abortion or the death penalty is much more complicated than compromising on a movie and dinner date.

The third distinction in compromise positions is the difference between compromise as process and compromise as outcome. Compromise as process is the manner in which we reach a compromise solution. The content of a compromise position, once it is reached, is called compromise as outcome. The two may appear separately or together. An example of compromise as process would be two parties to a conflict agreeing on a mediator and certain guidelines as to how the conflict is to be resolved. Both parties would agree to abide by whatever solution is reached in the course of the process. Another example of compromise as process might be two roommates living in a college dormitory, arguing over various issues, who agree to sit down with their resident advisor and agree to discuss their issues in a certain way, and to abide by whatever solution they reach during the process. Compromise as process is best understood when the following occurs:

parties to this process try to see matters from the other's point of view, engage in various forms of give-and take discussion, and are prepared, at least in principle, to make concessions for the sake of coming to terms. In doing so they acknowledge each other's viewpoints as having some claim to equal respect and consideration.^{lxxxii}

Part of the underlying consideration in a compromise as process situation is that both parties go into the process with mutual respect for each other. This means that they agree to the outcome of the process because they acknowledge the other side has claims that are as legitimate as their own. An example of achieving a compromise as process but not as outcome would be a situation in which the two parties agreed to be bound by the outcome of the process, even if neither party felt the outcome was a fair or full

compromise. This may occur for the sake of avoiding some more negative end and as a way of preserving the equal claim of the other.

Benjamin illustrates compromise as outcome with the following example. There is a conflict between all the reporters who wish to cover war footage, and the military's concern is for the safety of the reporters and the security of tactical information. A compromise as outcome in this situation would be to let in a few select reporters who agree to share their footage with their colleagues. Such a compromise can be achieved without going through the process of compromise. It is still a compromise position because it meets the criterion of "not everyone gets what they want, but everyone gets something they can live with" of compromise. It is important to note that the distinction between compromise as process and compromise as outcome does not indicate that the two are mutually exclusive.

Finally, I would like to note there can be a plurality of compromises. Compromises, both as outcome and as process, are not absolute entities. For any conflict, there may be multiple, equally beneficial compromise solutions. For instance, the resident advisor may establish different guidelines for discussing their conflict, or a different reporters may be chosen to obtain the war footage. Because Benjamin is advocating a pluralistic framework, this is not problematic under his view. Now that I have provided an understanding of what Benjamin means by compromise, I am ready to discuss his requirements for a compromise position.

BENJAMIN'S FIVE REQUIREMENTS FOR COMPROMISE

Benjamin outlines five criteria that are to be met in order for a compromise with integrity to be both possible and advisable. This is not a list of necessary and sufficient requirements, nor is it necessarily exhaustive. However, the more a conflict meets these five criteria of compromise, the more likely it is that a compromise position is needed, and also that it will be reached.^{lxxxiii} Benjamin argues that in his experience in practical ethics mediating compromises in the health sphere, the more these requirements are met, the more likely a compromise position is to be achieved. Specifically, these criteria will help establish that both parties are entering into the compromise with mutual respect for the views of the other, which is important in maintaining integrity in the compromise position.

The first criterion for a successful compromise is **factual uncertainty**. Factual uncertainty will be the case in almost all conflict situations, even if this uncertainty is not immediately obvious. The ubiquity of factual uncertainty is due both to the moral theory-ladenness of observation about facts, and the general uncertainty present in any conflict. When factual uncertainty is present, it is not possible to get to the bottom of an issue and resolve it on a purely empirical level. Factual uncertainty may be the case in instances of moral uncertainty as well, since 'facts' require interpretation and ordering, which is often dependent on ethical commitments.

The second criterion Benjamin outlines is one of **moral complexity**. This criterion is met when both parties in the conflict are arguing from deeply held, equally

valid, irreducible and irreconcilable moral views. For example, in the abortion debate, pro-choice advocates argue from the moral principle that a woman should have full control over her own body, whereas pro-life advocates argue from the sanctity of the life of the unborn fetus. These moral principles cannot be reduced to one general principle, nor can they be (easily) reconciled. I will come back to this issue in more detail when I discuss Benjamin's paradigm case of resolving a moral conflict through compromise in the next section.

Although Benjamin refers to the third criterion as **scarcity of resources**, it might be best understood as **incommensurability** or **mutual exclusiveness**. Benjamin is theorizing about moral compromise from cases of non-moral compromise, such as people arguing over a specific resource. Take the example of a divorce, where both parties wish to own the same house. It might be possible to sell the house and split the profits, but perhaps both the husband and the wife wish to own the house for sentimental reasons. It is not possible for both the wife and the husband to separately own the house. This is what Benjamin means by scarcity. Understood more broadly in the moral context, this is a requirement that it is not possible for both parties to get what they want at the same time.

The fourth criterion Benjamin considers is the existence of a **continuing cooperative relationship** between both parties. A cooperative relationship is desirable for a successful compromise because it presupposes the existence of shared and mutually respected values. A continuing relationship reminds the parties there will be other situations requiring their mutual cooperation that will be undermined if this situation is

not resolved, which motivates them to find a compromise solution. Furthermore, the two parties may find themselves in a similar conflict in the future. The resolution to this conflict may help resolve future conflicts. If the parties do not have to cooperate in the future, they will have less reason to resolve this conflict. In the case of individuals, establishing the existence of a continuing cooperative relationship is relatively straightforward. In the policy case, it is harder to see how we can guarantee the existence of mutually shared values and a willingness to reach a compromise. Recall that any parties to a policy-level moral conflict will be members of the same political community, which is a type of continuing cooperative relationship. Specifically, both parties would be ruled by the same system of laws, and will be interested in maintaining the efficacy and fairness of that system. For a policy-level compromise, being in the same political community helps ensure the existence of shared values and a wish to resolve the conflict.

The final criterion is that of **immediacy**, or that immediate action is required for resolving the issue. A theoretical debate about a hypothetical situation in ethical philosophy can rage for decades (or longer) but situations requiring moral compromise require more immediate action. If it is possible to freeze the situation to convince both parties to embrace one solution, then compromise would not be necessary. When suspending judgment and action is not an option, then “compromise may be better than settling the matter by rank or by force or by simply leaving it unresolved.”^{lxxxiv} Passing laws takes time. In a policy situation, it may seem that leaving the matter unresolved for a time while we find the best ethical theory to resolve the dispute is not unreasonable. If

substantial time has passed without reaching a synthesis position, then compromise would offer a better solution than trying to establish an ethical theory to resolve the issue.

In the next section, I will enumerate Benjamin's paradigm example of moral compromise with integrity. I will show how meeting the requirements of (1) factual uncertainty, (2) moral complexity, (3) incommensurability, (4) the existence of a continuing cooperative relationship and (5) immediacy will make this compromise possible, necessary and desirable.

BENJAMIN'S PARADIGM CASE

Benjamin's paradigm case of moral compromise involves a nurse and a doctor who work in an intensive care unit. Nurse Lehman and Doctor Chapman are involved in the care of a young female patient in a coma. She has not left a living will, and her parents are too distraught to make their own decision about how to proceed with her care. The nurse would like to see a less aggressive treatment for the patient, whereas the doctor would like to continue with the most aggressive treatment. Although both have non-moral reasons for their positions, the nurse's arguments primarily stem from notions autonomy and quality of life. She is the same age as the patient, and she herself would not want to continue her existence with such a low quality of life. The doctor argues from the inherent value of human life, and that the purpose of medicine is to prolong life, not to give into death.

This case meets Benjamin's five criteria quite nicely. There exist several instances of factual uncertainty that, if resolved, could tip the balance either way. The nurse does not know whether the patient would feel the same way she does regarding quality of life. The doctor does not know the chances of survival for the patient, let alone of full recovery. The second criterion is that of moral complexity. As stated earlier, both parties are arguing from moral presuppositions. The doctor's view that the sanctity of human life ought to be preserved is a moral value, as is the nurse's argument that quality of life should be considered. These conflicting moral values cannot be easily resolved, nor can they be reduced to one moral value, which could then be applied to the conflict. Both are both core values that must be respected.

The third criterion is that of incommensurability. Since it is not possible to both continue aggressive treatment and cease it, this requirement is met. The fourth criterion is that of a continuing cooperative relationship. The nurse and the doctor have both worked in the intensive care unit for quite some time. Neither wants the other to leave the ward, as turn-over is a concern. They have mutual respect for each other, and neither is willing to resolve the issue by rank alone. Furthermore, a case like this one may occur in the future. Establishing a compromise solution in this situation will aid them the next time. The final requirement is that of immediacy. If no decision is taken, aggressive treatment will continue and the nurse's concerns will not be addressed.

Having seen how the paradigm meets the five criteria and how this makes compromise both necessary and plausible, we are now ready to establish the compromise position. There are several steps in reaching a compromise implicit in Benjamin's

account. The first is acknowledging mixed motivations. Both the nurse and the doctor need to acknowledge they argue from morally charged positions, though not exclusively so. The nurse is arguing from values of autonomy, but she is also concerned with the overall utility of the ward. She is right that by focusing care on this patient, others are not receiving the same quality of care they would otherwise. The nursing staff is exhausted from continuing the aggressive treatment on this patient and trying to care for the other patients. Nurse Chapman may also be frustrated with her inability to help the patient. The doctor is arguing from the inherent value of human life and the definition of the medical profession as an institution devoted to the prolongation of that life. She may also be motivated by the inner pride she receives from successfully battling death. Recognizing mixed motivations is important for the compromise model because “self-knowledge of this sort is likely to reduce self-righteousness and generate a greater willingness” to compromise.^{lxxxv}

By acknowledging that her own view is not perfect, each party is better able to go through the next step in the compromise model. Both parties need to give a fair hearing to the opposing view points, as well as critically reassessing the underlying reasons for her own view. This requires being prepared to revise previously held positions based on new factual information, ideas, or moral theorizing. This is not to say that either party will be required to completely abandon her previous position, though either may do so if she wishes.

The next step towards reaching a compromise position is for each party to internalize the debate. Internal moral deliberations require ordering differing moral

principles such that some principles get preference over others, as is the case in external moral deliberations. In being engaged in a persuasive moral dialectic, each realizes the other is arguing from values that she herself holds, but not to the same degree of importance. “If both parties are able to internalize the debate and to respond to it with the full, not entirely consistent, self rather than just an aspect, the prospects of an integrity-preserving compromise are greatly enhanced.”^{lxxxvi} The way I reorder my own moral principles in order to come up with my viewpoint can then be extended to resolving a moral conflict with another. Professional mediators are successful because they cultivate the ability to internalize the debate. One way to help achieve moral compromise is to study this practice in greater detail, and critically assess what education and tools professional mediators use in order to replicate their results in the moral arena.

In Benjamin’s paradigm case, this appears as follows. Although the nurse is not arguing from a position of the inherent value of human life, she nevertheless agrees that this is an important value. She would not have entered into the medical profession if she did not believe in an inherent sanctity of life, but she prioritizes this value differently from the doctor. The doctor, in turn, also values autonomy, quality of life, and the utility of the ward. She believes that in this case, the sanctity of human life is more important.

The next step in the compromise is to draw on moral and empirical concepts both parties agree to, which are external to the conflict. For instance, both the nurse and the doctor have the longevity and well being of the intensive care unit in mind, which includes keeping turnover low. If the nurses feel Doctor Chapman is merely pulling

rank in resolving the issue, they will lose respect for her and possibly transfer to another ward. Both the doctor and the nurse value fairness and equality in resolving conflicts. There may be other points of empirical and moral agreement in this situation that are not fully explicated but nevertheless help shape the compromise position. Please note that later in this work when I establish the requirements for moral compromise with integrity at the public policy level, I will refer to drawing on neutral political concepts which are external to the conflict. This is a more stringent requirement than Benjamin's original requirement, since he only states that it is necessary to draw on mutually agreed upon concepts that are external to the conflict. I will discuss this in further detail in Chapter IV.

We are now ready to unveil the compromise position between Nurse Lehman and Doctor Chapman suggested by Benjamin. This is only one of many possible compromise positions. The suggestion is to continue the aggressive treatment for a specific amount of time after which the patient will be reevaluated based on mutually agreed upon medical criteria reflecting whether the patient's prognosis has improved. If the patient has shown a critical amount of improvement based on the criteria, then the aggressive treatment will be continued. If she does not, less aggressive treatment will be pursued, and resources will be reallocated towards helping other patients.

Now that we have seen the compromise position, we are ready to evaluate whether it has preserved the integrity of both parties. Recall that earlier Benjamin focused on understanding how we resolve moral conflict within ourselves, through the process of internalizing the debate. Part of Benjamin's argument is that within the

context of our own personal narrative, integrity “requires that we place much greater weight on some plausible moral convictions and commitments than on others.”^{lxxxvii} By recognizing that others could do so differently, I can see how my own commitments play into the situation but are not lost in the resolution. Nurse Lehman can see how she herself values the sanctity of human life, which makes it easier for her to see how Doctor Chapman also values autonomy and the utility of the ward, just not to the same extent. In seeing that the doctor holds some similar values, it is easier for her to see how the compromise position preserves her own values. The same is true for the doctor as well.

Both parties have a commitment to tolerance and mutual respect. A compromise position is better able to meet these commitments than either side pushing her own position on the other. Benjamin distinguishes between what each party *believes* ought to be done in a given situation, versus what each party *judges* ought to be done in a given situation. She still believes her side has the better arguments, but judges a compromise position will be able to meet her commitment to tolerance and mutual respect better than her own view would. Deliberation includes the moral and empirical disagreements and agreements made in the compromise process. Integrity is preserved provided that each party can agree to *judge* what ought to be done in either situation as a position that preserves enough of her core values, as well as the added shared principles between the two, to be acceptable. Nurse Chapman and Doctor Lehman built a compromise position by focusing on how they both valued tolerance and mutual respect. Neither party was interested in resolving the situation by merely pulling rank. Both were willing to admit that the other held different views that were nevertheless reasonable. In the process of

compromise, they focused on how the other party shared some views with her own, although perhaps understood the view differently or placed a different level of importance upon it.

Due to Benjamin's theory being explicated primarily through interpersonal conflict and not conflicts at the policy level, it is not necessary for him to fully articulate how precisely each party will know whether integrity is preserved. In the interpersonal cases, each party can critically reflect upon her personal narrative and her own ordering of core principles to then see whether those principles are still reflected in the compromise position such that she is comfortable with the judgment. At this point in the discussion, it is important merely to note how the five requirements for compromise, as well as the process of building the compromise, helped make sure compromise with integrity was possible. I will come back to the deeper question of knowing whether integrity is preserved in a compromise position in the next section.

THEORETICAL OBJECTIONS TO THE COMPROMISE FRAMEWORK

The first theoretical objection to Benjamin's view that I will consider is that a compromise that is integrity-preserving is theoretically impossible to achieve. The question of preserving integrity within the context of a compromise arises because "each is agreeing to act in accord with a plan that apparently deviates from her basic values,"^{lxxxviii} otherwise she would have already adopted the plan as her own and compromise would not be necessary. The word 'compromise' itself implies this multiple meaning. A spy who says her cover has been compromised, for instance,

means her cover has been betrayed or breached. Benjamin considers Ayn Rand's objection that any compromise on basic principles is a betrayal to both the agent and to the basic principles.^{lxxxix} Rand acknowledges compromise without betrayal is possible in non-moral situations, or where the two parties agree on basic principles. An example of this might be a buyer and a seller agreeing to compromise on a set price. The two agents both agree to the basic principles of capitalism and enter into a compromise in order to achieve their own egoist ends. A similar negative view of compromise is held on the opposite political spectrum by the Commune-Blanquists when they argue Frederick Engels is wrong in his willingness to compromise with factory owners.^{xc}

Clearly, there are ways in which to compromise is seen as lacking integrity, either to oneself or to one's principles. What both the negative sense of compromise as betrayal and the positive sense of compromise "have in common is the idea of making concessions or scaling back goals or principles."^{xc} If compromise with integrity is to be possible, there must be a way to demarcate between the positive and the negative sense of compromise. The difference for Benjamin is that in the positive sense of compromise, the following two conditions hold: (1) the concessions occur in the context of a disagreement between two parties who both view the position of the other with respect. Each party believes the position of the other to hold some moral legitimacy; (2) the concessions are more or less mutual, even if not to the same degree or scope. The two conditions do not hold for the negative notions of compromise, but do hold in the positive sense.

The skeptic might argue a compromise could meet these two criteria, but still fail to preserve integrity. How precisely is one to know whether integrity has been preserved, especially in the policy case? First, an understanding of integrity needs to be established. Benjamin begins by describing the ways in which a person lacks integrity. The first example is the moral chameleon, who abandons her view in order to avoid conflict. The second is the opportunist, who abandons his views to maximize short-term personal gain. The third is the hypocrite, who lacks congruence between her beliefs as stated and her behavior, leading to a lack of an inner core. The fourth is the weak-willed individual, who does not have the strength to follow his convictions against adversity others would reasonably overcome. The fifth is the self-deceiver, who lies to himself about the lack of congruence between his principles and his actions. The final example is the victim of external force, who would like to follow her principles but is forced not to do so by an external agent. If compromise is to be integrity-preserving, it must avoid these pitfalls by ensuring (1) one side is not in a position to be threatened by the other or made to back down; (2) effects of any personal gain to either party are minimized; (3) there is congruence between the espoused view and what occurs; (4) no self-deception occurs; and (5) neither party is being coerced. Avoiding these pitfalls will require establishing guidelines in the compromise process. When individual parties are present, they can be trusted to have a strong sense of integrity, which will lead them to eschew solutions that are not integrity-preserving.

Avoiding the above pitfalls can help preserve integrity, but there is another way to do so as well. Within the context of a personal narrative, maintaining integrity also

involves retaining your own worldview. At the policy level, this can be done by using the explication of underlying moral and metaphysical viewpoints, like the ones established at the end of Chapter II. Knowing how each party conceptualizes key aspects of the conflict helps to preserve those underlying notions. A compromise solution that is able to account for underlying differences with respect would be better able to preserve integrity than one that does not consider those differences. If integrity is preserved, then both parties should be able to continue viewing the world according to her own principles, even after the compromise is reached.

Although preserving integrity is important, Benjamin argues preserving integrity must be a secondary goal of moral theorizing. He views integrity as a value of *form*, in the sense that one is said to act with integrity insofar as he acts in adherence to his stated principles. This congruence does not dictate the *content* of the principles by which he acts. Under this view, an assassin who commits despicable acts can do so with integrity, if the core values she espouses are immoral. Thinking of integrity as mere congruence to stated ideals is contentious. Benjamin is borrowing from the work of Harry Frankfurt, who views integrity as self-integration.^{xcii} Frankfurt's theory of integrity places only formal constraints on what an agent may do and still be said to be acting with integrity. As long as the actions of the agent are integrated with his principles under certain formal constraints, he is said to act with integrity. Other conceptions of integrity include an additional moral requirement, excluding the possibility of acting from immoral principles with integrity.

To fully engage in the debate between Frankfurt and other theorists is beyond the scope of this paper, but some concerns must be answered. One question for Benjamin's view is why preserving a formal notion of integrity is morally important. If it is possible to have integrity with respect to immoral principles, then why be concerned about preserving integrity at all? One answer Benjamin could give is that preserving integrity is important to the agent entering into the compromise, for moral or psychological reasons. For instance, an agent may be willing to entertain a compromise position only after she has been convinced her integrity will be preserved. Integrity would then be a practical consideration for the theory of compromise, more so than a moral one.

Please note that Benjamin espouses a purely formal notion of integrity, but my reworking of his theory does not. Later in this work, I will espouse a legitimacy requirement to integrity-preservation, which leads me to espouse a more substantive notion (since I require that the principles adhered to with integrity are indeed moral). Benjamin may have shied away from a more substantive understanding of integrity because preserving a thicker notion of integrity is a more stringent requirement than preserving formal integrity. This opens him to the question of why preserving integrity is important at all, if integrity is not a moral notion and is compatible with immoral actions. More substantive notions of integrity, including my reformulation, constrain integrity so that it is not compatible with immoral actions. Hence, it is easy to see why preserving integrity is important.

My integrity-preserving compromise stems from principles that are already deemed moral, so it is not possible adherence to them with integrity to lead to an

immoral compromise position. First, I articulated precisely how both the prohibitionists and the legalizers are arguing from moral principles in Chapter II. Secondly, one of the requirements for integrity-preservation in Chapter IV is the Legitimacy Requirement, which requires the moral concepts going into the compromise position be legitimately moral principles. Meeting the formal restraints of integrity as a second-order principle in this case will still preserve integrity in a moral way, handling some of the possible objections to Frankfurt's larger view. For the rest of this work, when I refer to preserving integrity, I will mean integrity as a secondary moral value constraining actions as interpreted under other primary values of morality. I will come back to the discussion of integrity-preservation in Chapter IV.

The second theoretical objection I would like to consider is that of the moral theorist, who believes there is a fact of the matter as to whether one action is moral and another is not. Under this view, there are objective moral truths, which we discover through reason. It is a verifiable matter whether a moral belief is true or not, so there is no need to compromise between a true moral belief and a false one. The sort of pluralism that Benjamin advocates is likely to cause us to step away from the 'right' notion of underlying morality. It is outside the scope of this work to fully consider the realist debate regarding morality here. Benjamin's work is predicated on the context of reasonable pluralism in a democratic society. Someone who rejects a reasonably pluralistic framework will not agree with the desirability of integrity-preserving moral compromise. One possible answer to the realist's objection may be suggested by John Rawls in his 1985 article, "Justice as Fairness: Political not Metaphysical."^{xciii}

Supposing that there is a political fact of the matter that there will be reasonable pluralism in a democratic system, then establishing compromise with integrity is an important part of the democratic process. It is outside the scope of the compromise position to claim it has discovered truth, or established the one true way to reconcile the conflict. The compromise position claims to show one way to resolve the conflict such that both parties could reasonably agree to it with integrity.

The third theoretical objection I would like to consider is the problem of interpreting and adjudicating a compromise position. When judges and citizens interpret a law or a policy, they do so both based on the text of the legislation and on the underlying moral principle and stated goals. Due to the underlying moral plurality of a compromise position, interpretation and adjudication of the compromise position may be more problematic than interpreting a non-compromise position. I would like to provide two replies. First, it is often the case in democratic societies that legislation is passed without a firm theoretical underpinning. Judges and citizens are used to reconstructing the moral underpinning as part of their deliberations, even if there is no singular moral underpinning present at the time of the policy is framed. Secondly, a commitment to moral pluralism in a democratic society may be understood as the primary underlying motivation of any policy, regardless of whether it is a compromise position or not. Assuming that we fully embrace the reasonable pluralism extant in democratic societies, then there is a way in which this objection misses the point of political deliberation. It may be preferable to have a policy that is understood as expressing only one moral principle, but in reality this is often not the case. Especially in situations where a

compromise position may be the only solution, or the only solution that does not unfairly subjugate one side of the debate to the moral understandings of another, this may be a necessary evil of modern political life. Either way, it would be unfair to attribute this problem exclusively to a theory of moral compromise with integrity.

Another possible adjudication concern is how to decide between two different compromise positions. Recall that Benjamin's account presupposes the possibility of a plurality of equally legitimate compromise positions. Suppose there are two compromises deemed equally good by both parties, except that the first has a better chance of being implemented effectively, and the second is more integrity preserving. Which compromise to prefer in such a situation (if either) is going to be largely dependent on the context of the public policy. For instance, if the compromise position is being espoused to halt armed conflict, it may be necessary to eschew integrity-preservation in favor of a compromise that will be effective. In a situation where matters are less pressing, integrity would be a more apposite concern than efficacy. It is not possible to antecedently adjudicate between the two compromise positions outside of the context in which the compromise takes place. This is a strength for Benjamin's theory, not a weakness, because it reflects the uncertainty in real-life policy situations and the need for flexibility.

In summary, I hope to have shown that compromise is both possible and wanted within the context of a reasonably pluralistic democratic society. Integrity must be understood as a constraint on a compromise position, but not its overarching goal. Integrity as a constraint on a possible compromise position is in turn constrained by

other primary moral principles, which in a democratic society include a commitment to reasonable pluralism. Having finished the discussion of the theoretical aspects of applying Benjamin's theory to public policy, I am ready to discuss the actual application.

NOTES

lxxxii. Martin Benjamin, *Splitting the Difference: Compromise and Integrity in Ethics and Politics* (Lawrence, Kansas: Kansas University Press, 1990). A careful reader may note I do not review critical literature on Benjamin's work. Unfortunately, this is because Benjamin's work has not received the critical attention it deserves. It is my sincere hope this work may bring more critical attention to it.

lxxxii. Benjamin, *Splitting* 5.

lxxxiii. Benjamin, *Splitting* 32.

lxxxiv. Benjamin, *Splitting* 31.

lxxxv. Benjamin, *Splitting* 33.

lxxxvi. Benjamin, *Splitting* 34.

lxxxvii. Benjamin, *Splitting* 30.

lxxxviii. Benjamin, *Splitting* 36.

lxxxix. Benjamin, *Splitting* 20.

xc. Benjamin, *Splitting* 14.

xcii. Benjamin, *Splitting* 12.

xcii. Cox, Damian, La Caze, Marguerite, Levine, Michael, "Integrity", *The Stanford Encyclopedia of Philosophy* (Fall 2005 Edition), ed. Edward N. Zalta, available online at: <http://plato.stanford.edu/archives/fall2005/entries/integrity/>. I would also like to thank Professor Colleen Murphy for pointing out to me that this was a contentious part of Benjamin's view.

xciii. John Rawls, *Collected Papers* (Boston: Harvard University Press 2001), 388-414.

CHAPTER IV

SUMMARY OF THE COMPROMISE WITH INTEGRITY

In Chapter III, I analyzed and laid out the theoretical framework requisite for extending Benjamin's integrity-preserving compromise to the policy level. In this chapter, I will use the theory of integrity-preserving compromise in order to establish a compromise solution between the legalizers and the prohibitionists. I will first articulate requirements for a compromise to be deemed successful. Then, I will establish the compromise position, and show how it meets the requirements for success.

REQUIREMENT FOR A SUCCESSFUL COMPROMISE POSITION

The two requirements for a successful compromise I will outline are integrity-preservation and efficacy with regard to the problems outlined in Chapter I. I begin with integrity preservation.

INTEGRITY-PRESERVATION

In the section discussing theoretical problems with Benjamin's framework, I already began the discussion of integrity. I outlined why integrity must be considered a second-order principle placing formal constraints on the compromise. Benjamin's theory is primarily oriented towards individuals whose acceptance or rejection of a compromise based on integrity is in the context of their own narrative, which means Benjamin can rely on the individual's own intuition as to whether her integrity is indeed

preserved or not. At the policy level, the theory must ensure integrity is preserved in a moral way. I suggest a simple test to quantify the intuition of integrity preservation. Let us suppose that Agents A and B represent morally conflicting views on an issue, and we are attempting to assess whether a certain compromise position is integrity-preserving. Agent A went into the compromise position espousing certain core values, let us refer to them as C_1 and C_2 for convenience. Agent B goes into the compromise position espousing some core values let us refer to them as C_3 and C_4 . These core values lead to conflicting courses of action. This may be because the core values are mutually exclusive, conceptualized differently or prioritized differently. In other words, C_1 and C_3 could be the same values interpreted differently. During the compromise process, A and B both come to realize that as part of living in the same political community, they both uphold neutral political principles, let us refer to them as P_1 and P_2 . We can then say that the compromise in question is integrity preserving provided that the following three conditions hold:

- (1) The aggregate gain in P_1 and P_2 is greater than the aggregate loss in C_1 and C_2 from the point of view of Agent A, and of C_3 and C_4 from the point of view of Agent B. Let us call this the **Advantage Condition**;
- (2) The core concepts C_1 , C_2 , C_3 , C_4 , and the political principles P_1 and P_2 are morally legitimate constructs (i.e. not racist, sexist, espoused purely for short term selfish gain, etc.). Let us call this the **Legitimacy Condition**;

- (3) The net loss in the core concepts is not substantial enough to undermine those concepts from the perspective of the agent such that the concepts no longer hold meaning. Let us call this the **Concept Preservation Condition**.

Benjamin himself does not espouse these criteria, although I do not believe he would consider them to be incompatible with his view. Rather, because he is more concerned with actual embodied agents who are entering into the compromise situation, his primary focus was on convincing those agents they would be able to still keep their integrity while compromising. Presumably, they each understood their own personal narratives enough to be able to judge for themselves whether the compromise position would be one that *should* be rejected and would not require these criteria.

Several objections may be made to my conditions. The first objection is that “aggregate gain” is not a quantifiable concept. My first reply is that I am trying to capture the sorts of deliberations that go into the intuition that one’s integrity is preserved. This conceptualization should frame the debate in key ways, even if an actual calculus is not feasible. My second reply is that I do not intend there to be an actual benchmark by which we can say that the neutral values are increased by five units, whereas the core values are decreased by three, and hence the compromise position is integrity preserving. I presume that the person entering into the thought experiment will be able to establish an ordinal quantity of gain and loss, even if a cardinal quantity is not feasible. This sort of quantification problem is certainly not new in political philosophy. For instance, trying to quantify exact gains or losses in the utility principle is a similar problem. Situations could arise such that the aggregate gain in political principles is

equivalent to the loss in core values. It may be that this sort of instance is a borderline case. The analysis I intend here is to consider just how much the concept is strengthened or weakened in political society. For instance, a law banning wire-tapping without a warrant under any circumstance would increase the neutral political value of privacy. Exact quantification of the privacy gained in a specific political context may not be possible. But it would be feasible to place this gain in ordinal ranking against the possible loss of celerity in the court system, which could decrease if warrants are always obligatory.

The second objection one might make is specifically to the Advantage Condition. Why is it precisely that the gain in the neutral principles must be greater than the loss in core values? Recall integrity is understood as congruence between an individual's stated convictions and her actions. Adherence to the neutral political principles is important to the individual, because they reflect her public advocacy but they are not as important to her as her core moral values. She defines herself as integral insofar as she acts in congruence to her core moral values not her political principles. Her core moral values are much closer to her deliberations than the political principles, because these are the principles by which she has decided to set her moral compass. As such, a very large loss in her core principles in order to achieve a very small gain in neutral political principles would not maintain her integral advocacy. It would be difficult for her to justify to herself to agree with the compromise position. She would prefer to leave the matter unresolved but preserve her moral advocacy.

Perhaps a loss in both core moral values and political principles could be justifiable under certain circumstances. If the need for compromise were great enough, would it be acceptable to reach a compromise that led to a loss in both core values and political principles? Presupposing sufficient need entails the existence of a reason to prefer any compromise over leaving the matter unresolved. Depending on the details of the case, one side may feel the overwhelming need to achieve *some* compromise position would be a coercive force pushing her to accept a compromise regardless of whether it preserved integrity. The existence of such a coercive force would place that situation outside the scope of the present work, because integrity cannot be guaranteed in circumstances of coercion.

Another possible requirement, which is not formalized, is that A's loss of core principles be roughly equal to B's. The reason I do not make this a formal requirement is that it will be considered as part of whether the compromise position is fair at all. Benjamin's own work implies the requirement that both parties have a roughly equal loss in core principles in the compromise position. Part of the preservation of integrity in a compromise position is the knowledge that the other party is also making similar concessions, which makes one's own concessions more palatable.

These requirements are supposed to outline precisely how compromise may be integrity-preserving. Some compromises will not be integrity-preserving, and should be rejected, based on considerations of integrity. I wish to capture what precisely it is about those compromises that makes them illegitimate. The main argument stems from acknowledging that the core values espoused by both parties in the conflict are the moral

principles most important to them (at least regarding the current conflict). The individuals who espouse one side or another of the debate also have allegiance to certain political principles due to the fact that they live in the same political society. But those general political principles are not part of the conflict to be resolved, as presupposed by the fact that they are *neutral* principles. So, from the point of view of either party to the compromise, the net gain in the political principles is not as important as the net loss of the core values.

One point of clarification is needed about the moral legitimacy of both the core values and the neutral political principles. Just as defining integrity is a complicated issue best understood by what undermines integrity as opposed to what preserves it, so too with moral legitimacy. The example Benjamin gives of what is not a morally legitimate principle and could not be part of a compromise position is the interest of a rapist who wishes to rape a particular woman multiple times. One “compromise” position would be to let her be raped once, since that would be fewer times than the rapist desires, but still closer to her wish not to be raped at all. However, the rapists’ interest in wanting to rape the woman is not morally legitimate *prima facie*. As such, it cannot be considered in a possible compromise position. What precisely qualifies as a legitimate moral principle may vary depending on the political context of those who are using this procedure of moral compromise. For instance, in a more sectarian democracy certain religious principles may be considered morally legitimate, whereas in a secular democracy that same principle would not be legitimate. Part of the process of applying

this theory of moral compromise is to legitimate the core moral values and neutral political principles during the process of the thought experiment.

Another aspect of preserving integrity deals with the moral and metaphysical underlying views, which I discussed at the end of Chapter II. Assuming that the conflict one is trying to resolve at the policy-level entails the possibility of such a discussion, it can be very helpful in preserving integrity in the compromise position. One possible additional consideration for a successful compromise is whether both parties can continue to view the world the way they did before they entered into the compromise position. If something about the compromise completely eradicates their underlying world view, that compromise would also lack integrity.

Having answered some possible objections to my criteria of integrity preservation, I want to quickly test these criteria against some real examples of alleged “compromise” positions. These are compromise positions that would not be integrity preserving. The goal is to see whether the integrity-preserving conditions do in fact exclude them.

Let us first consider the policy initiative under which all drugs except crack cocaine are immediately legalized. From the point of view of the prohibitionist, this would completely shatter her core values. First of all, the immediate effect of all of these drugs being made legal all at the same time would wreak great havoc in the community according to her, and she is deeply interested in the well-being, continuity and stability of the community. Secondly, this presumptive compromise position would include the legalization of substances that she believes are not compatible with the

necessary conditions of human excellence. The immediate legalization of all these substances would, from her perspective, lead to massive deleterious effects on the community. She supposes that agents would suddenly be hallucinating in greater numbers, and act unpredictably while under the influence and that there would be an increase in addiction and crime rates. She should reject this position, even if it were the case that the aggregate gain to the political principles is ordinarily greater than the loss to her core concepts. For example, it may be that such a policy would be more efficacious in increasing fairness, speeding up due process, or other political neutral values. However, the fact that her morally legitimate core values would be so drastically undermined means that she would not be able to accept such a compromise and still preserve her integrity. As such, the compromise position is not integrity-preserving and should be rejected.

The second example I wish to consider is remaining with the status quo. This would fail to meet the Advantage Condition, since the aggregate gain in P would not be greater than the loss in C, but merely equal to it. The third example would be to keep the status quo, but also criminalize cigarettes and alcohol in addition to extant prohibitions. Although this might increase fairness, a neutral political value, and answer the objection made by many legalizers that their drug of choice is just as valid as the legal drugs of choice, this gain in the neutral political value would not be greater than the loss of the legalizer's core value of autonomy. Under this view, it may be the case that I have a drink after work to unwind as a way of reaching my autonomous goals. To further limit my ability to align my desire to be relaxed with the ability to do so by having a drink

would be a great loss to the core value of autonomy as understood by the legalizer. Even though fairness, a neutral political principle, would be increased, the net gain in fairness would not be enough to counterbalance the net loss in autonomy. Hence, the legalizer position should view this compromise as lacking integrity, and reject it.

I hope that by outlining these integrity-preserving criteria, I have captured the intuition individuals have of whether their own autonomy is preserved. In interpersonal conflicts, this will be useful in better allowing individuals to adjudicate whether a compromise is integrity-preserving or not, and hence whether it should be accepted. At the policy level, these criteria should frame the discussion of whether a compromise position is integrity preserving or not. Compromise positions that are borderline with regard to these criteria may exist, which makes it difficult to assess whether they are integrity preserving. Depending on the details, antecedently adjudicating whether to accept the compromise may not be possible. The desiderata of these arguments was to outline clear conditions for integrity-preservation such that these borderline cases are not the only cases of compromise we consider, and to show in detail precisely how compromise with integrity is possible.

EFFICACY

Having outlined the criteria for meeting the integrity condition, I am now ready to discuss the efficacy condition. In Chapter I, I outlined some major problems associated with status quo drug policy. A compromise position should be able to ameliorate these problems, at least partially. They are:

- (1) reducing discriminatory aspects of drug policy, which currently incarcerate disproportionate numbers of racial minorities and men;
- (2) reduction in crime rates, whether those crimes are more directly attributable to drug policy or to drug use itself. This includes, but is not limited to, violent crimes and substance assisted sexual assaults;
- (3) increasing individual's protections with regard to civil liberties, including mandatory pre-employment drug screening;
- (4) decreasing the danger to babies due to their being exposed to dangerous drugs in utero, as well as combating the decrease in civil liberties that expectant mothers suspected of drug use face;
- (5) decreasing the number of addicts; and
- (6) decreasing deaths and other physical harms related to drug use.

In addition, an efficacious policy must be one that could feasibly be put into place and followed. Although a compromise position may not be able to solve for all of these evils, these are the markers that should assess whether the compromise solution is successful. In the hospital case, Benjamin established medical markers of recovery for the patient that would decide whether continuing aggressive treatment is justifiable. The above criteria for the efficacy condition are similar markers for the health of the compromise position.

Having now established the desiderata for a compromise position, we are ready to begin the thought experiment of establishing a compromise solution between the legalizer and the prohibitionist position.

BUILDING THE COMPROMISE SOLUTION

In my previous discussion of Benjamin's paradigm case, I outlined three steps in the process used to establish a compromise position. This thought experiment will follow the same steps in building a compromise solution between the legalizers and the prohibitionists. The first step in compromise building is for both sides to acknowledge their own mixed motivations. Recall that the core moral value for the legalizer is autonomy, understood as the ability for individuals to follow their individual path to happiness. Autonomy is constrained by a general liberal framework, that an individual's autonomy must not interfere with another's. Specifically, the legalizer espouses a formal notion of autonomy, wherein an autonomous action is understood as one that is chosen autonomously. Insofar as the procedure for choosing an action is autonomous, so is the action under the legalizer's view. The role of political life for the legalizer is to organize the community so that cooperation is possible, because cooperation is necessary to achieve our own individual happiness.

The core moral value for the prohibitionist is the preservation of the underlying necessary conditions for human excellence. This includes a thick notion of citizenship wherein the citizen is someone who is fully able to engage in political life. Under this notion the role of political life is to provide the conditions necessary for survival, and once those are met, for achieving human excellence. The mixed motivations on both sides are more speculative. The legalizer is most likely moved by her own wish to experience drug use legally, either for self-exploration or hedonism. The prohibitionist's mixed motivation is fear of the possible negative effects of these substances. Another

possible mixed motivation for the prohibitionist may be a wish to excuse the negative behaviors of addicts or users that are close to her by blaming the drugs ingested instead of the user who did something wrong. Prohibitionists may also be motivated by their individual religious views that may contribute to their view of drug use as immoral. At the policy level, this step is not as useful as it is at the individual level. The underlying reason for this step is for each side to acknowledge that their own views are imperfect, in order for each of them to fully embrace ethical pluralism. In the following step of the compromise model, a commitment to ethical pluralism will be presumed.

The next step in building the compromise is for both sides to internalize the debate. The prohibitionist certainly values autonomy, but in her own view understands autonomy as a substantive notion, which precludes certain actions from being autonomous, regardless of how the agent chooses them. The prohibitionist internalizes the debate and acknowledges that, although she herself disagrees, the legalizer does believe that it is possible to make an autonomous decision to consume illicit substances. As she continues to be concerned that this will lead to a substantive loss of autonomy following the ingestion, she is rightfully hesitant as to precisely which drugs should be permitted initially in the compromise. In her newly acquired commitment to ethical pluralism, she acknowledges that drug use is different for different individuals, and that it may be possible for certain people to autonomously choose to consume certain substances, just as she autonomously chooses to drink occasionally. The legalizer comes to understand the concerns of the prohibitionist with regard to the incompatibility of drug use and the necessary conditions for achieving human excellence. The legalizer

himself believes that drug use helps him achieve human excellence as he understands it. But, he acknowledges that drug use can be a potentially destructive force in many lives, and that this mitigates the necessary conditions for human excellence. He may not believe that it is the role of political life to make sure those conditions obtain. In his newly acquired respect for the prohibitionist's view, he accepts the moral legitimacy of the position.

The third step in building a compromise position is to draw on outside principles. This step will be the most important in the thought experiment. The process of establishing a compromise position between two conflicting moral views is to draw on outside concepts that are neutral to both parties. This is done in order to shape and constrain the compromise position. It is important that the concept(s) be something that can be endorsed by both parties and that both parties would find neutral to the conflict.

INTRODUCTION AND JUSTIFICATION OF THE NEUTRAL POLITICAL

PRINCIPLES

Because I am attempting to build a compromise position with regard to public policy, I am going to focus on political conceptions that are inherent to our political system. Benjamin only requires that the compromise position draw on outside considerations. I am adding the additional requirement that the compromise position draw on neutral political principles. This is important for three reasons. First, because adherence to these neutral political principles is part of what establishes integrity. Both sides to the conflict adhere to these neutral political principles, and continuing to do so

preserves their integrity as well as adherences to their core moral values. Since I am espousing a more substantive notion of integrity than Benjamin, establishing that these principles have a certain moral quality helps establish that integrity with regard to these principles is justified. Second, that these be *neutral* political principles is important, because otherwise it could seem as though drawing upon them to establish the compromise skews the compromise position in favor of one side over another. Third, it is important that these be neutral *political* principles because the only continuing cooperative relationship between the two parties in the conflict is that they are both members of the same political community. Drawing on political principles inherent in their political deliberations helps ensure these are principles to which both sides do in fact adhere.

The neutral political concepts I will be using are a general understanding of justice and fidelity to the rule of law. First I will discuss the general understanding of justice. To give a full definition of justice in this work would be impossible. Justice, in this context, will be defined as a general understanding of the fairness of a legal system, including the notions that like crimes beget like punishments, the likelihood of being prosecuted for a crime should be the same for all citizens regardless of race or gender, and that once the perpetrator of a crime has finished their sentence, they are rehabilitated into society.^{xci}

The second concept I will consider is fidelity to the rule of law. It is a neutral concept, in that it does not specify the *content* of laws, but is more concerned with the *structure* of a legal system, that is to say, how laws are written and enforced. Fidelity to

the rule of law does not presuppose any stance on drug laws. This concept will require further explication. Joseph Raz^{xcv} distinguishes between a broad sense of the rule of law, “that people should obey the law and be ruled by it”^{xcvi} and a narrow sense of the rule of law, “that the government shall be ruled by the law and subject to it.”^{xcvii} The general and the narrow sense interplay amongst each other, for adherence to the narrow sense builds the sort of system which individuals will respect, obey, and be ruled by it. Chapter I offered a detailed explication as to how current drug policy undermines the rule of law as understood in the more general sense. This includes the bribing of officials by drug dealers, and the collateral effects of the black market, including the need to resolve conflict through extralegal and often violent means. Although others argue that increase in drug use would lead to an increase in violent crime, it is nevertheless the case that the status quo situation undermines the rule of law versus a world where drug use did not exist at all. As discussed in Chapter I, both sides believe that their side provides the best solution to the crime problem, which implies both sides are committed to the rule of law in the general sense. The general understanding of the rule of law is increased when the specific requirements of the rule of law are met. If a compromise position is congruent with specific requirements of the rule of law, and thereby strengthens the general rule of law, then both sides should agree to it (at least insofar as the gain in the strength of the rule of law is not mitigated by the loss in their own core moral values).

In *Morality of Law*, Lon L. Fuller outlines eight requirements for the internal morality of law. For my purposes here, it will be sufficient to think of the internal

morality of law as the requirements for the robustness of a legal system. He does not say that each law or policy under that system ought to meet all eight requirements, but that the system as a whole should. Drug laws and drug policy are a substantial part of our legal system, and as I have stated earlier, undermine the rule of law in the general sense. A large percentage of U.S. citizens have used illegal substances, with complete disregard to the legal system. As Fuller himself states, “a disregard of the principles of legality may inflict damage on the institution of law itself, even though no immediate harm is done to any individual.”^{xcviii} In this sense, breaking the law hurts the legal system even if the crime does not directly harm another individual. If it is possible to shape the policy in such a way that it adheres to Fuller’s eight requirements, then that would increase the robustness of the system as a whole.

Fuller’s eight requirements of the law are developed by thinking of all the possible ways a ruler might fail to make law, and recounting the eight requirements for a system of law whose purpose is to shape human conduct to the governance of laws. This presupposes certain key aspects of human nature, namely, that human beings are the sorts of creatures that make plans for their future happiness, and are capable of shaping their behavior based on the requirements of a legal system. The eight desiderata are, at minimum, an understanding of what a legal system requires for it to be efficacious in shaping behavior.^{xcix} The first requirement is generality, roughly that there must be rules in order for people to have their conduct guided by them. This is different from the requirement that the rules be impartial, apply exclusively to general classes, or not be concerned solely with specific people. It might best be understood as “to subject human

conduct to the control of rules, there must be rules.”^c The second requirement is that of promulgation. One cannot follow a rule if she does not know that the rule exists, so laws have to be publicized. Note that the extent to which rules are promulgated will vary by the rule: rules that already map onto the current morality of the society will not need to be promulgated as much as rules which run completely counter to it. Also, it may be necessary for certain legislation not to be promulgated, for example because of national security reasons. Nevertheless, the legal system as a whole in general needs to be promulgated. The third requirement is that laws be prospective, as opposed to retroactive. It is not possible for behavior of a citizen today to adhere to laws passed tomorrow. Exceptions requiring retroactive laws may occur, but primarily to fix infelicities in other legislation. A system of only retroactive laws would not make sense because it could not guide behavior.

The fourth requirement is that laws be clear enough to be understood and followed. The fifth requirement is that laws be consistent, and the sixth that compliance with the laws is possible. A system of laws should be constant, or not change too frequently, so citizens will have confidence in the laws. If laws change too frequently, then it is possible any law might change at any given time, which undermines the rationale for following it. The eighth and final requirement is that there be congruence between the laws as they are stated and as they are enforced. Now that the general understanding of justice and the specific requirements of the rule of law have been enumerated, I am ready to build the compromise position between the legalizers and the prohibitionists.

THE COMPROMISE SOLUTION

The first aspect of building a compromise solution is motivation for each party to enter into the compromise. Legalizers want change, so they will be eager to come to the bargaining table. Prohibitionists, outside of this thought experiment, are hesitant to support any additional permissibility to current drug laws, because they believe it would send the message that drug use is morally permissible, as opposed to merely legally permissible. When the prohibitionist, who wants a robust legal system and is on board with the project of the rule of law, understands that adherence to the rule of law is just as important as having congruence between what is moral and what is legal, then perhaps she would be more willing to consider the possibility of policy change. Although Fuller does not discuss drugs specifically, he states that when “laws prohibiting the sales of contraceptives are kept on the books as a kind of symbolic act, with the knowledge that they will not and cannot be enforced, legal morality is seriously affected.”^{ci} It is easy to see a correlation between contraceptives and drug use in this example. Having these laws on the books, so to speak, merely to have the government disapprove of immoral behavior of drug use but knowing the law will not be enforced for the majority of citizens undermines the rule of law. Having already internalized the debate and accepted the equal moral legitimacy of the legalizer’s position, this additional motivation from the rule of law should be persuasive to the prohibitionists to consider some concessions.

Drug laws are already consistent with some of Fuller’s eight requirements. Drug laws are already general, and promulgated through education programs and

advertisements, meeting the first and second of Fuller's requirements. Skipping retroactivity for a bit, let us discuss Fuller's fourth requirement of clarity. Drug laws will most likely never meet the requirement of clarity. During my research, I had a very hard time establishing precise penalties for possession of specific substances by weight, or when federal (as opposed to state and local law) was applicable. Because it is hard to demarcate drugs based on their effects, listing chemical compounds is the norm, which makes for laws that are hard to read and understand. Lack of clarity is sometimes used to give judges more discretion in particular cases. Substantially increasing the clarity of drug laws is most likely neither possible nor desirable.

Fuller's third requirement is that laws be forward-looking and not retroactive. Considerations of retroactivity will lead me to the first part of my compromise solution, relating to how drug laws effect funding in post-secondary education. Avoiding retroactive laws includes a prohibition against adding additional punishment to someone who has already been sentenced for a crime. Such additions to sentence are one way to describe current legislation requiring anyone who has been convicted of a drug crime to disclose this information on their application for financial aid (FAFSA) and being excluded from receiving such aid. Many of those currently affected by the policy are individuals who were convicted of drug crimes prior to the law going into effect, which subjects them to retroactive penalties. As more citizens are prosecuted for drug crimes, a smaller portion will have the retroactive impacts of this law. Already, many individuals convicted of drug crimes now unable to qualify for federal grant and loan monies were sentenced for those crimes after the law went into effect.

Repealing this law is the first aspect of my compromise solution. Considerations of retroactivity, combined with the general understanding of justice, show that funding for post-secondary education should not be contingent on whether or not a citizen has been convicted of a drug crime. Excluding potential students who have been previously convicted of a drug crime makes it more difficult for those citizens to receive higher education, which in turn decreases their possible ability to rejoin society as full members. These are individuals who at this point have already served their time, and did not have as part of their sentence the inability to go back to school to receive higher education. Persons who were actually caught and convicted of drug crimes were most likely already disadvantaged and disenfranchised. Making it cost prohibitive for people who have been convicted of crimes to subsequently fund a secondary education means it is less likely they will be able to reinsert themselves into a political community. If the initial reason these individuals turned to drug use was to overcome a sense of disenfranchisement, they are more likely to go back to using drugs. Deprived them of an education will lead to fewer chances of creating an income, which in turn increases the likelihood of a return to drug dealing or other extra legal activities as a way to support themselves.

Fuller's fifth requirement is that laws be consistent. By consistency, Fuller means that laws be non-contradictory, or not contain infelicities that require breaking one law in order to follow another. Combined with the general understanding of justice, the requirement for consistency can be bolstered to capture the general notion that like crimes should receive like punishments. This general understanding will lead to the

second aspect of my compromise position, eradicating the crack/cocaine disparity.

Recall from Chapter I that the crack/cocaine disparity is based on misinformation that does not take into account that powdered cocaine is used to make crack. Having a legal distinction between the two substances cannot be legitimated. I also showed in Chapter I that crack has been billed as a “black drug,” even if the empirical evidence seems to show more Whites use crack than African Americans. Nevertheless, it is a fact African Americans are disproportionately prosecuted and jailed for crack possession and sales. When the racist applications of these laws are considered, which also undermine a general understanding of justice, it is clear the crack/cocaine disparity needs to be eliminated. Recall the penalties for crack-cocaine are a hundred fold those for powdered cocaine (possession of 5 grams of crack is equivalent to possession of 500 grams of powdered cocaine). Status quo attempts at change have been unsuccessful, I believe because they have attempted to decrease the penalties for crack to be on par with those for powdered cocaine. Instead, in this compromise solution I suggest increasing penalties for powdered cocaine tenfold, and decreasing the penalties for crack-cocaine ten-fold, so that the penalties for 5 grams of powdered cocaine and five grams of crack cocaine will both be equal to current penalties for 50 grams of powdered cocaine. This solution is optimal because it increases penalties for cocaine, which is a dangerous drug of great concern for the prohibitionists, while at the same time eradicating a disparity that is not justifiable in the legal system.

The next requirement I will discuss is Fuller’s eighth requirement, of congruence. As already discussed, there is great discrepancy between the demographics of those who

admit to using drugs, and those who are incarcerated for drug crimes. This is problematic for individuals in both the over- and the under- represented groups. Individuals belonging to the proportionally overrepresented groups are far more likely to be incarcerated for their crimes and suffer the stigma and other problems associated with incarceration, which is not to their advantage. The members of the underrepresented groups are also negatively impacted because the risk of being caught with illicit substances is so minimal that it does not function as any sort of effective deterrent against using those substances. Whatever policy initiative is set forth as a compromise solution, it should be a policy that is capable of being congruently enforced by officials, so it can shape behavior for the whole of the population instead of certain subsets of it.

The matter of congruence is a very complicated one. Poorer people are more likely to deal and buy drugs on the street, where it is more likely they will be caught doing so. Racial minorities, as I have noted before, are more likely in every aspect of the criminal justice system to be passed onto the next step than whites, and the same may hold for men over women. Initiatives to try to prosecute more privileged or white citizens for drug crimes would most likely involve more investigative work, which is expensive and time consuming for a police department. Furthermore, catching users and dealers who are primarily conducting deals outside of the public eye may require policies that would further undermine civil rights. Dealing with this aspect of drug policy would require a detailed policy initiative. I will only say here that increasing congruence between the laws as written and the laws as they are enforced such that the laws apply equally to all must be a stated goal in the compromise position, even if I

cannot spell out precisely how this is to be achieved. It may be the case that lifting other restrictions allows for a more equitable distribution of justice system resources such that this would be more feasible.

One way to make such a reallocation possible is to legalize marijuana. For a variety of reasons, no genuine compromise position could occur without the legalization of marijuana, at least from the perspective of the legalizer. The evidence seems pretty clear that marijuana is on par with alcohol and cigarettes when it comes to physical effects. The combination of possible medical benefits (medicinal marijuana), low risk of addiction, and small impairment makes marijuana the best drug to legalize. So why has marijuana legalization not occurred already? Certainly part of it has to do with misconceptions (or disagreements) about the empirical facts of the matter with regard to marijuana, as outlined in Chapter I. Some of it may be concerns over the so-called “gateway drug” properties often attributed to marijuana: that users who get used to smoking it will subsequently turn to harder drugs. What is really at issue, morally speaking, from the perspective of the prohibitionist is relinquishing the presupposition that if something is immoral it also ought to be illegal, combined with an empirical understanding of marijuana as being far worse than cigarettes and alcohol. But, if legalizing marijuana is understood as a part of a compromise position, as opposed to a position they should endorse as their own, I think it would be more acceptable. Within the context of trying to resolve the dispute without pulling rank and considering with respect the moral arguments on the other side, I believe that prohibitionists could come to appreciate the differences between their own positions and that of the legalizers within

a context of respect, which would allow them to accept the compromise position as public policy while still keeping their own moral position intact. I will discuss whether this maintains the integrity of the prohibitionist in more detail in section addressing the successfulness of the compromise.

Both prohibitionists and legalizers are concerned with whether policy change would increase or decrease crime, which I take to mean that both sides of the debate value the rule of law in the general sense. However, they are usually polarized in trying to show whether the correlation between drug use and violent crime holds in order to support their own sides, instead of focusing on the ways in which they could work together. One such example is when currently illicit substances are given to an agent unwillingly for the purposes of sexual assault. Legalizers are advocating the right of users to choose to use drugs, not to ingest them against their will or knowledge, so they are generally not concerned with discussing date-rape drugs. They agree it should be against the law for anyone to be forced to ingest a substance against his will, without his knowledge or consent. (This need not require a neutral principle, although both autonomy and a general principle of liberalism would entail this view.) Very rarely do legalizers speak in sufficient specificity about individual substances to have to disambiguate between recreational and forced use of the same substance. Prohibitionists are usually more concerned with showing how ingesting substances leads to violent crime so that they can justify drug prohibition, and are less concerned with the date-rape situation. When they are concerned, they tend to think the use of date-rape drugs gives added weight to the argument that drug use leads to crime. They tend to believe drug

use is bad, so if drugs just went away, then date rape drugs should also go away, without considering the distinction between willful and forced use in terms of policy implications. This is precisely because the debate is framed with regard to answering objections to legalizers. Both sides of the debate should be concerned with the use of currently illicit substance to aid in other crimes, in general because it undermines the rule of law by facilitating crimes (not to mention the harm done to the victims of date-rape, both women and men). Specifically, legalizers who are trying to argue that drug use can be an autonomous and protected choice want to delineate the choice of users versus the lack of choice implicit in ingesting a substance without consent.

Regardless of ideological lines, people in general should be concerned with the use of illicit substances for the purposes of sexual assault. One solution to this problem, which is not currently being pursued, would be to establish trade agreements with Mexico, Latin America, and the Hoffman-La Roche company (manufacturer of rohypnol) to convince them to switch to using and manufacturing different substances to treat these conditions that do not have the same possibility for date-rape. This may be an expensive proposition, and it may require establishing international agreements such that the United States would be willing to provide more expensive medicines we use instead of these three substances in trade for discontinuing production and use of them. It may be possible to conduct research on adding another substance to ketamine (such as dyes or a taste or smell agent) that would still be safe for animal consumption that would at least let someone who had been “slipped” ketamine that this was the case.

A hard-line legalizer position would disagree with this position initially. GHB and ketamine, and to a lesser extent rohypnol, are used willingly for recreational purposes. Someone who believes that recreational drug use is a citizen's rights based on considerations of autonomy will believe the user has a right to use GHB, ketamine and rohypnol recreationally, though obviously would not have the right to cause someone else to ingest it against his will. Any mind altering substance, especially alcohol, can be used for the purposes of sexual assault, and the legalizer could argue, as Husak does with regard to currently illicit drug use in general: "Why should her preference in recreational substances be permissible when mine is not, when they both allow for the possibility of sexual assault?"

Benjamin's understanding of the internalization of the debate is useful here. By beginning with rule-of-law considerations, and understanding that certain recreational substances run a higher risk of being used for the purpose of perpetrating sexual assault, I believe the legalizer can come to agree that restrictions on ketamine, GHB and rohypnol are more justifiable than restrictions on marijuana, and to be willing to accept increasing penalties, drug enforcement initiatives, and trade agreements that would substantially decrease the supply of these three substances as part of the compromise position.

One of the unique features of Benjamin's compromise in the hospital case is the way it incorporated temporal aspects into the compromise position. Recall that the final compromise between the nurse and the doctor included setting up specific markers that would be reassessed after a period of time, and at that time based on those markers, the

policy would be re-evaluated. The final addition I would like to make to the compromise position is to re-evaluate the situation after five years based on the markers of whether overall crime previously attributed or correlated to drug use has decreased, the rate of addiction, and the death rate have improved. This aspect of the compromise position would ensure Fuller's constancy requirement would be met, since citizens going into the compromise would know these laws would last for at least five years, which would indicate they should be followed, but still give leniency towards re-evaluations. After five years, and based on the results of the efficacy markers as it becomes available, possible additions to the compromise position would include legalizing hallucinogens (which are the next safest substances) or scaling towards a more prohibitionist policy, such as by increasing penalties or possibly re-criminalizing marijuana.

SUMMARY OF THE COMPROMISE SOLUTION

Recall that all of the following are only for adults:

- (1) Repeal the requirement for disclosure of drug crimes for receiving financial aid for college;
- (2) Increase the penalties for powder-cocaine and decrease the penalties for crack-cocaine until the crack/cocaine disparity is abolished;
- (3) Make a commitment to increasing congruence in the enforcement of drug laws;
- (4) Legalize marijuana;
- (5) Decrease the availability of GHB, ketamine and rohypnol through international treaties and veterinary research, as well as make it easier to detect these substances if they are ingested inadvertently;

- (6) Re-evaluate the situation after five years based on the efficacy markers.

Depending on the re-evaluation, reassess drug policy. Possibilities at this point include legalizing hallucinogens or scaling back to a more prohibitionist position dependent on the findings.

CRITERIA FOR A SUCCESSFUL COMPROMISE MET

In the first section of this chapter, I outlined criteria for knowing whether the compromise solution I have outlined should be deemed successful. The first set of criteria is whether the compromise is integrity preserving, the second is whether it would be efficacious with regard to solving certain important harms associated with current drug policy. I move now to a discussion of how integrity is preserved.

INTEGRITY-PRESERVATION

When it comes to meeting the integrity criterion, the first condition is the Advantage Condition, which states that the aggregate gain in the neutral political principles must be greater than the aggregate loss in the core principles espoused by each of the compromising parties. For the legalizer, the core value of autonomy is espoused. Although there is less of an increase in autonomy under the compromised position than in full (or mostly full) legalization, there is still an increase in autonomy as understood by the legalizer over the status quo, so there is actually not an aggregate loss in the core value for the legalizer over the status quo, though there is an aggregate loss over the proposed position. However, I think it is pretty clear that there would be an increase in

autonomy as understood by the legalizer in the compromise position over the status quo. A citizen, after the establishment of the compromise position, would be able to make choices towards her own goals that were not previously available to her. Although there would be a loss in the core value of autonomy *vis-à-vis* the full legalizer position, this situation is preferable. The legalizer, having internalized the concerns of the prohibitionist, could come to understand how immediate and full legalization would wreak so much havoc as to undermine the rule of law. As such, the gain in the efficacy of the rule of law should meet the stated criteria such that the integrity of the legalizer is in fact preserved. For the prohibitionist, the core values are concerns for the welfare of the community, and preserving the necessary conditions required for human excellence. I will go into more detail with regard to the welfare of the community in the efficacy condition below, since much of that discussion could be understood as markers of community welfare. The second core value, preserving the possibility of human excellence, will decrease for the prohibitionist. The compromise position is going to include an increase in consumption of marijuana, which the prohibitionist understands as not being a behavior conducive to reaching the highest pinnacles of human achievement. However, the decrease in the possibility for human excellence is less than the increase in the general and the specific understandings of the rule of law, so this criterion is met.

The second condition, the Legitimacy Condition, is that the principles being espoused are legitimate, and they are for both the legalizer and the prohibitionist. Although it may be the case that individuals who could represent the legalizer or the prohibitionist framework may choose to accept the compromise position for selfish,

short-term goals (e.g. “I can at least smoke weed now, that’s good with me!”), it is not the case that the positions *have* to be comprised and understood based on short-term and selfish goals, which is enough to meet the requirement.

The third consideration is the Concept Preservation condition. As I stated earlier, for the legalizer the compromise position is an improvement over the status quo, even though it is less than what they would prefer under ideal circumstances. As such, they would view the compromise position as an increase to their ability to make autonomous decisions with regard to which substances to ingest, and they would believe their core concept was preserved. For the prohibitionist, the question is whether the core value of human achievement would be preserved. Even in the worst-case scenario, wherein a substantial part of the population became heavy marijuana users, people would still be able to achieve human excellence. They might be less motivated to do so, and happy to merely lounge around enjoying their substance ingestion, but the possibility for human excellence would still exist. In current society, I have the choice to sit around watching bad television or train myself for a triathlon; after the compromise position is put in place, I would have the choice whether to smoke a lot of marijuana or train for a triathlon. Individuals would still have the possibility of excellence, though it may be the case they would choose to squander the opportunity. However, it is not as though the conditions making human excellence possible would decrease, although the likelihood of human excellence actually obtaining for those people who chose to use the substance may decrease (unless of course they considered human excellence as being in part understood by their ability to consume drugs). Nevertheless, that decrease is not enough

to warrant saying that there would not be any possibility for human excellence, so the core value is preserved.

Although not explicitly stated as a requirement for integrity-preservation, another key aspect to the discussion are the variances in other moral values both parties hold. Recall that at the end of Chapter II, I outlined how the legalizers and the prohibitionists differ in their conceptualizations and prioritization of pleasure, virtue, self-control, and the role of the community. These are not core moral values, and so are not subject to the integrity-preservation criteria. Nevertheless, they are important underlying moral aspects of the world-view of both the legalizers and the prohibitionists. A discussion of whether and how these conceptualizations change and are preserved following the compromise position is necessary in establishing the efficacy and integrity-preservation of the compromise position with respect to drug policy. I did not make this a formal requirement of establishing integrity preservation at the policy level because in other compromise positions it may not be as important as it was in this case. Also, antecedently adjudicating how these moral values compare to the core moral values outside the context of the actual compromise would be very difficult, so making a consideration of these values a formal requirement of establishing integrity-preservation at the policy level outside the context of an actual compromise would be too arduous a requirement. I will note that in other compromise positions at the public policy level, considering how the underlying moral values interplay should be a strong consideration. I move to it now with respect to drug policy.

The first underlying difference between the two views dealt with pleasure. Following the compromise, the legalizer will be pleased that there are will be more pleasure-inducing options open to her. Marijuana, the most commonly-used, currently illicit, pleasure-inducing substance will now be a legally recognized option for her. Following the internalization of the debate, the prohibitionist will have come to recognize the legitimacy of the legalizer's prioritization of pleasure, even if he himself disagrees. The prohibitionist can still continue to view pleasure as possibly distracting to the achievement of virtue. But, just as in his daily life he enjoys pleasurable activities, he can come to understand marijuana consumption as playing the same role in the life of his fellow citizens. His concerns about the dangers of pleasure are still address by the more stringent restrictions on cocaine and the most commonly-used date rape substances. Additionally, the compromise position includes a critical reassessment of the policy after five years. If the dangers of pleasure are as pronounced as the prohibitionist fears, the ramifications of this will be noticed during this critical reassessment. The compromise position can be recalibrated accordingly. Knowing his concerns will be addressed should help assuage the fears of the prohibitionist. It is also possible the prohibitionist may of his own free will come to place a slightly higher prioritization in his view for pleasure. He may also continue to prefer a more ascetic lifestyle. He will still be free to abstain from drug consumption, and associate socially with those who share his views.

VIRTUE

The core moral value for the prohibitionist is the preservation of the conditions necessary for each citizen to achieve virtue. Previously, I discussed how this core moral value was preserved in the compromise with integrity. After agreeing to the compromise, the prohibitionist can continue to presuppose a realist notion of virtue. He may even continue to believe any drug use is incompatible with achieving virtue, but he will recognize that legalizing some drug use does not make it impossible for virtue to be achieved. He may become involved in drug-abstinence campaigns for youth and adults to convince them of his view. However, he will have judged the legalizer has an equally legitimate claim to conceptualize virtue differently than he does, that the compromise position allows her to achieve virtue as she understands it, and why this is valuable.

For the legalizer, the process of internalizing the debate has given her a better understanding of the prohibitionist perspective. She will respect that the prohibitionist is facilitating her choice to do something he believes is not virtuous. This may make it more palatable for her to deal with, for example, seeing advertising campaigns attempting to change her mind about drug use (which may otherwise be annoying to her following the policy change). Individuals may even change their minds over time through dialogue on the issue, if they so choose. Prohibitionists may even come to find that more people are willing to listen and live by the prohibitionist notion of virtue when they feel they have a choice in doing so, instead of being forced to comply with a certain notion of virtue through criminal sanctions.

SELF-CONTROL

Recall that the prohibitionist considers self-control as entailing the mind exerting control over the body, whereas the legalizer conceptualizes self-control as the ability to make her desire for alertness or relaxation become a reality. Both sides will continue to evaluate self-control as they did before the compromise was implemented. Because of the internalization of the debate, the legalizer will understand that the prohibitionist values internal self-control more than she does. She may come to value the prohibitionist's position more than she did before, and act accordingly, but she does not have to do so if she does not wish it. The prohibitionist may still conceptualize and prioritize self-control in the way she did before as well. Acknowledging the differences between how the other side conceptualizes self-control helps both to understand why the compromise was necessary and desirable. Because they are members of the same political community, understanding the underlying differences presupposed by both sides may help them to establish consensus or compromise positions in other areas. Understanding these key differences and prioritizations with respect to self-control could help build consensus about other key issues, for example the controversy about abstinence-only education.

COMMUNITY

Prior to the compromise position, the prohibitionist viewed communal life as existing primarily to allow humans to achieve virtue, whereas the legalizer believes communal life is important to achieve individual happiness. Both are concerned with the stability of the community, since it is necessary to achieve both of their disparate goals. Part of the efficacy requirement for the compromise condition (which I will discuss in the next section) includes considerations of community stability. Insofar as the compromise position is able to increase stability and decrease crime in the community, it will help both the legalizer and the prohibitionist, even as they conceptualize the reasons for communal life differently. I move now to the discussion of the efficacy requirement for the compromise position.

EFFICACY

Having finished a discussion of the integrity criterion, I am now ready to discuss the efficacy criterion. The first efficacy requirement I discussed is whether my compromise position would decrease the discriminatory aspect of current drug policy. In eliminating the crack-cocaine disparity and having a commitment to congruent enforcement, some of the problems related to racism in the current system would be alleviated, though most likely some of them would still persist. Increased awareness in the difference between how individuals are treated in the justice system based on their race and gender, alongside with laws that better capture both the harms and the realities of drug possession and trafficking should go some of the way towards ameliorating the

problem. Recall that with regard to efficacy, my criteria is merely whether the situation is improved, not whether the problem is resolved fully. The second efficacy requirement was whether the overall rate of crime would decrease. First, I believe that my compromise position would be very efficacious in decreasing drug-facilitated sexual assault, which is a serious crime. Secondly, the legalization of marijuana, the most commonly used (and thus purchased) illegal substance should cut substantially into black market trade. Many users may choose to ingest marijuana legally instead of using other drugs, such as hallucinogens or MDMA, and not run the risk of being caught with those drugs. Because police departments would no longer have to be concerned with enforcing marijuana laws, they would be able to more thoroughly go after other drug crimes, increasing the likelihood of deterring users and dealers. Because the drugs that are traditionally thought of as being crimogenic would remain against the law, there should be no increase in drug crimes related to them (assuming those theories are indeed true and drug related crime is not in fact more aptly attributable to the drug war than the drugs themselves). There may be a slight decrease if realigning drug enforcement patterns allows for more busts and a decrease in the use of and addition to those substances. Making higher education more easily available to former drug users and traffickers would make it easier for them to be reintegrated into society instead of having to resort to crime after they are released from prison, which may also lead to a slight decrease in overall crime rates. The likelihood of increased crime rates due to the likely increase in consumption of marijuana is negligible. There could be a possible increase in traffic related crimes, as increased consumption could lead to more people driving

under the influence. I am confident that within five years, public information campaigns on the dangers of driving while intoxicated and police enforcement of laws against intoxicated driving would be able to reduce instances of drug-induced traffic accidents to close to current levels.

The third efficacy consideration was increasing the protection of civil liberties, specifically dealing with the problem of drug testing in the work place. Legalizing marijuana would have the effect of drastically changing how these tests are done and whether they are required. First of all, it would be less acceptable for employers to test employees on whether they had consumed marijuana if it were legal. Some companies would still continue to do so, in the same way that some companies currently restrict employment to persons who do not consume tobacco products. Overall, pre-employment drug screening would decrease, due to the following consideration. As I cited earlier, marijuana stays in the system for roughly 30 days, whereas other substances are not detectable in a blood or urine sample for more than a week. Potential employees who are aware of this would easily be able to abstain from those substances for a few days, and be virtually guaranteed to pass the tests. Employers would come to realize this is the case, and most likely move only to having random drug testing once someone has been hired, or only testing employees in the case of an industrial accident, which would reduce the number of people who would have to go through mandatory pre-employment drug tests.

The fourth marker is whether in utero exposure to drug use would decrease, as well as problems related to women being tested for drug use in order to receive public

aid and the possibility of incarceration if they are found to have drugs in their body. Under a system in which marijuana is legal, one of the questions would be whether separate legislation would be required, making consumption of it illegal by pregnant women, and whether such legislation would also apply to cigarettes and alcohol consumption. I do not know how the compromise position would affect this scenario, but it is one of the markers that would be followed during the five-year test phase period to see whether other drugs should be legalized, whether the compromise position should stay as is, or whether a move closer to the status quo legislation should be pursued.

The fifth marker is whether there is a decrease in the number of people who are addicted to drug use. This may be a somewhat controversial marker, as some people might argue that whether someone chooses to become a drug addict is their own autonomous choice and should not be a consideration in another individual's ability to use drugs at all. Nevertheless, following the establishment of the compromise position, the most likely effect would be an increase in marijuana consumption and a decrease in the recreational use of cocaine (powder and crack), ketamine, rohypnol and GHB due to increased enforcement in all subsets of the population and decrease availability of the latter substances. Because marijuana is less addictive than all of the other substances mentioned, it should be the case that the overall rate of addiction would decrease.

The final criterion for the efficacy requirement is whether drug related casualties would decrease. Part of the compromise position during the five years of testing would have to include a better way to measure this impact. Currently, there are no national statistics available for the number of deaths directly attributable to currently illegal

substances, as drug related death statistics include deaths due to accidental toxin overdoses (e.g. drinking Drano). There should be a measurable decrease in drug trafficking under the compromise position, as drug dealers would no longer be able to sell marijuana (due to its being legal) and GHB, ketamine and rohypnol (due to the distinct lack of availability for these substances). This may in turn lead to fewer casualties, as a decrease in drug trafficking and black market crime would decrease the need to turn to violent resolution of conflicts occurring in extralegal settings.

CRITICAL INSIGHT INTO POLICY LEVEL APPLICATIONS

There are two major objections I can foresee to my extension of Benjamin's work into the policy arena. The first is to inquire as to whether Benjamin's framework was necessary, or if a policy recommendation could have been established without the compromise framework. First, the compromise framework is necessary to establish integrity-preservation on both sides. Without this context, neither side of the debate would have been interested in softening their own position for fear of losing their own integrity. Merely beginning with considerations of justice and fidelity to the rule of law would not have the same results as using those principles as neutral concepts within the context of a compromise position. The context of compromise helps to frame the discussion such that both sides of the debate understand these neutral concepts are not being used to change their own positions, but rather to help shape a compromise position. Preserving integrity is key because it ensures both parties will feel comfortable with entering into a compromise, and because of the moral value of integrity. Second,

the process of compromise is crucial for the efficacy of the project. Recall that harm-reductionists, who have hailed themselves as espousing a compromise position, have failed to garner sufficient support to establish policy change. This is because their view fails to take the underlying moral considerations into account. Using the compromise model avoids this pitfall. Third, the internalization of the debate is fundamental for securing a successful policy recommendation. Without the mutual respect and the understanding that both sides value the same concepts, but prioritize and conceptualize them differently, a position could not have been established. Merely applying considerations from the rule of law would not have been nearly as efficacious. Both parties would have believed the other was attempting to use the rule of law to change their position instead of viewing these considerations as part of their already existing political values. The reprioritization of the rule of and the other values is necessary in order to use this concept to establish policy recommendations.

The second major objection has to do with establishing the neutral political principles used in establishing the compromise position at the policy level are indeed neutral. Recall that Benjamin himself does not require the use of neutral political principles. I argue it is important these principles be *neutral* in order to make sure the compromise position is fair. I also argue these concepts need to be *political* because the only existing continuing relationship between the two parties in the compromise position is that they are members of the same political community. Establishing a compromise position in a public policy arena requires reaching out to political concepts both sides find neutral and extant in their political life. Whatever political concept is used should

be neutral to the conflict, but apposite enough to it to successfully constrain the debate or add considerations to it such that a compromise solution can be reached. But how exactly is one supposed to establish that the political principle used in establishing a compromise to the conflict is indeed neutral?

Let us suppose that, following the thought experiment, someone who held a polarized view on the issue but did not fully consider the thought experiment saw the compromise solution. The fact that they are not party to the thought experiment is important, because that means this individual has not internalized the debate and come to understand the importance of compromise. This advocate of one position is at heart more interested in getting his way, and is not convinced by the gains made by a compromise solution as a compromise (that is, the fact that the conflict is not resolved through pulling rank, and that the other side whose moral underpinnings are legitimate is also being represented). One argument such a person might make (let us call him Stubborn) is to ask, “why did the thought experiment presume *this* neutral principle, as opposed to another that would have better benefited my position?” Or, if Stubborn were very much set in his ways, he might say, “how is this a *neutral* principle at all, considering that its application leads to a view that is very different from mine?” Part of my work in setting up the thought experiment establishing the compromise position was to show why precisely the rule of law was a neutral political concept that would be useful in framing the debate. I hope to have shown in my compromise position that fidelity to the rule of law was indeed both a neutral political concept and a useful one in establishing the compromise position. Nevertheless, it may still be the case that in other

compromises, other possibilities for neutral concepts (such as public reason, reciprocity, or decreasing disenfranchisement) might have led to different compromise positions, more in line with Stubborn's point of view.

Looking beyond my application of Benjamin's theory, it may be the case that finding political principles that are both removed enough from the debate to be neutral but close enough to the conflict to be useful may be difficult. Choosing a non-neutral principle could introduce bias into the compromise model. For instance, some theorists have argued that constraining the debate to arguments from public reason too stringently reduces arguments of non-secular citizens. If public reason were to be used as a neutral political principle, these sorts of considerations could cause bias to inadvertently be brought into the compromise. Within the context of the thought experiment, which as a type of argument is sometimes considered inherently biased to the intuitions of the person engaging in it, this could be especially problematic. Once again, the lack of embodied agents advocating each position, and would perhaps be better able to critically assess the possibility of an allegedly neutral political concept to actually favor one side or another. Supposing someone wanted to use my extension of Benjamin's framework to establish a compromise in a different public policy domain, how would she establish the political principles she used to establish the compromise were indeed neutral?

One possible solution to this problem is to frame Benjamin's theory (with my additions) within the context of a larger political theory that accurately and systematically described the political concepts already existent in our political life, or with which citizens should reasonable agree. This might be done in one of two ways.

The first would be an anthropological survey, which would outline which political concepts did in fact shape moral decisions in public policy. Supposing such an anthropological assessment was done accurately, we would know which political concepts are usually used. It would be fair to assume that using those concepts again in a compromise position would preserve neutrality.

An anthropological survey, however, is not sufficient. Let us suppose someone is trying to establish a compromise on the public policy level who lives in an imperfect political state. Specifically, some of the political concepts used to shape public policy are not in fact neutral, and imply grave injustices. For instance, suppose the society in question presumed that marked inequalities between the sexes were natural and right, and should be preserved. A feminist entering into a compromise position in such a context would be rightfully outraged if such a concept were used as a 'neutral' political concept under which her compromise should be constrained. Clearly, an anthropological survey of all the possible neutral political principles would not be sufficient to establish the principles in question were indeed neutral.

The second possibility for establishing neutral political concepts would be to ask which concepts citizens could reasonably agree to, were they given the hypothetical choice to do so. In this case, the neutral political concepts used to constrain the conflict would *already* be established as being fair and an already existing part of political theorizing prior to the conflict. This would substantially limit (if not completely negate) the possibility of bias. One such framework would be John Rawls' theory of justice as fairness. Applying Rawls' greater framework to this problem, and in turn using

Benjamin's theory to support justice as fairness, is obviously a larger task than I could entertain here. I would like to make a few quick comments as to why such work should be undertaken. Benjamin's theory is deeply committed to reasonable pluralism, in resolving both intrapersonal moral conflicts and in the public policy arena. It would take some work to show how this is so, but it is plausible that Benjamin's work would be compatible with Rawls'. In turn, compromise as integrity may be able to provide aid in concrete applications of Rawls' theory. Rawls' theory would be able to anchor Benjamin's in order to avoid questions of whether the political concepts used to build a compromise position are actually neutral and useful. Other larger political theories that also take reasonable pluralism as being an inherent part of democratic regimes might also be explored. Any political conception that takes seriously the reality of reasonable pluralism is going to require a deeper philosophical analysis of moral compromise with integrity with regard to public policy. I believe I have shown exactly how Benjamin's theory can be extended to provide such an analysis, not just for drug policy, but for any conflict occurring at the public policy level.

NOTES

xciv. This excludes convicted felons, who lose the right to vote and serve on juries for the rest of their lives.

xcv. I will be using both the work of Lon L. Fuller and Joseph Raz to discuss the rule of law. I wish to use an understanding of the rule of law that is philosophical, but at the same time remains neutral to theoretical debates within the field, that is, the debate between natural law theorists and legal positivists. Raz and Fuller have very little disagreement with regard to the requirements of making a legal system robust, i.e. the requirements of the rule of law. Most of the disagreement stems from whether those requirements lead to a moral legal system or an efficacious one, and other sorts of considerations. Recall that Fuller is a natural law theorist. As such, he does not consider the question of whether a legal system exists to be separate from whether it is moral. Rather, his view of a legal system is that it exists in varying degrees of robustness and morality. As such, meeting his requirements more fully increases the robustness of the legal system.

xcvi. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press 1979) p. 212.

xcvii. Raz, *Authority* 213.

xcviii. Lon L. Fuller, *The Morality of Law* Revised Edition (New Haven: Yale University Press 1964), 221.

xcix. Fuller himself refers to the eight desiderata as the internal morality of law, and argues that a legal system meeting the requirements will have a certain moral character. The dispute is outside the scope of this work, but I would like to note that although Fuller would argue the internal morality of law is not *merely* requirements of efficacy, that the requirements do address efficacy.

c. Fuller, *Morality* 47.

ci. Fuller, *Morality* 153.

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VITA

Name: Azzurra Crispino

Address: Department of Philosophy

314 Bolton Hall

College Station, TX 77840

Email: azzurracrispino@mac.com

Education: A.B., Philosophy, Ripon College December 2001

M.A., Philosophy, Texas A&M University August 2006

Publications: “Deterrence of Harm to Self: An Analysis of Online Rhetoric”

Book Chapter in *Real Drugs in a Virtual World: Drug Discourse and Community Online*, ed. Edward Murguía, et. al., forthcoming from Lexington Books, 2006.