Liberal Neutrality, Autonomy, and Drug Prohibitions
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INTRODUCTION

The most significant trend in the last decade that reflects a shift in the delicate balance between state power and individual liberty is the tremendous increase in the rate of incarceration. The total number of Americans jailed or imprisoned has recently exceeded 2 million, more than triple the rate of 1980. The incarceration ratio of 645 persons per 100,000 is perhaps the highest in the world, and almost certainly will rise in the foreseeable future.1

The single most important factor that has led to this remarkable increase in the prison population is the imposition of increasingly severe punishments for drug offenders. A few statistics tell the story. Since 1980, the incarceration rate for drug offenders has grown by over 1,000 percent. Each year, more persons are jailed or imprisoned for drug offenses than were jailed or imprisoned for all other crimes combined in any year from 1920 to 1970. More than a quarter of all new inmates are sentenced for “drug-only” offenses, without any other violent or criminal behavior. On any given day, more than 400,000 persons are incarcerated for drug offenses in the United States—more than a third of whom have been convicted of simple possession.2 Minorities have borne the brunt of this trend. Although minorities are about as likely as

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whites to use illicit drugs, their rate of imprisonment is grossly disproportionate to their representation in the drug-using population.\textsuperscript{3}

Various strategies have been proposed to retard our excessive reliance on incarceration. Commentators have begun to explore imaginative modes of punishment that do not involve imprisonment.\textsuperscript{4} Many of their recommendations are welcome. But there is little reason to anticipate a reversal of this trend without revisions in the substantive criminal law itself. Citizens in a democratic state must debate whether the conduct for which persons are punished should remain subject to the criminal sanction.

I doubt that criminal punishment for recreational drug use can be justified on grounds that liberals should accept.\textsuperscript{5} My belief is hard to support in light of the enormous number and variety of liberal theories. I will be forced to limit my argument in two important respects. I will confine most of my attention to that class of liberal theories which require the state to remain neutral with respect to reasonable conceptions of the good life.\textsuperscript{6} Still, theorists offer distinct interpretations of what neutrality requires, largely because they construct different defenses of why the state should maintain neutrality.\textsuperscript{7} Therefore, I will focus on a


\textsuperscript{4} See, for example, Michael Tonry and Kathleen Hatlestad, \textit{Sentencing Reform in Overcrowded Times} (New York: Oxford University Press, 1997).

\textsuperscript{5} Three points are needed about my focus on the punishment of recreational drug use. First, I propose no precise criterion to identify when drug use is recreational. Roughly, use is recreational when it is intended to enhance the pleasure or euphoria of the user. Admittedly, the line between recreational and nonrecreational activities is difficult to draw. See Note 21 infra. Second, most (but not all) persons punished for drug use are actually charged and convicted of drug possession. I assume that states tend to punish possession rather than use for evidentiary reasons. Thus, I continue to refer to punishment for drug use. Finally, I do not discuss the justifiability of punishment for other drug offenses, most notably of drug sale.

\textsuperscript{6} There are, of course, many liberalisms. Admittedly, drug prohibitions are more likely to be acceptable on perfectionist than on neutralist modes of liberalism. Still, many of my arguments help to undermine the case for drug proscriptions on versions of liberalism that reject the neutrality constraint.

particular rationale for neutrality. I will restrict most of my attention to attempts to defend neutrality as necessary to protect the autonomy of persons. I will tentatively conclude that this rationale fails to provide a justification for the criminalization of drug use that is acceptable to neutralist liberals. Anyone who shares my starting points has reason to worry that a significant number of persons are being imprisoned unjustly.

For two reasons, I describe my neutralist case against drug prohibitions as tentative. First, the failure of the rationales I will examine hardly proves that no alternative rationale can succeed. In addition, the arguments I will offer are inconclusive. I will suggest that the more respectable reasons for punishing drug users on grounds of liberal neutrality tend to gain their apparent plausibility by making unwarranted generalizations from worst-case scenarios that distort the more typical reality of drug use. Although my case is only presumptive, I hope to take a step toward undermining the justifiability of drug proscriptions generally.

Even though I intend to presuppose rather than to defend the neutrality constraint, the issue of drug proscriptions provides an opportunity to comment on an argument sometimes advanced in its favor. John Rawls refers to the Inquisition in the course of contending that the imposition of a single conception of the good throughout society would require an oppressive use of state power. This allegation about perfectionist states has been challenged. George Sher replies that “our government has long been nonneutral; yet we manage to live in comparative harmony.” Of course, Sher is able to select a number of examples to support his point. But the “we” in his rejoinder could hardly refer to the hundreds of thousands of Americans who have been imprisoned for drug offenses—or to the approximately 80 million Americans who have used illegal drugs at some time in their lives but have managed to evade

8. Of course, many philosophers reject the neutrality constraint. See, for example, Richard Kraut, “Politics, Neutrality, and the Good,” *Social Philosophy & Policy* 16 (1999): 315. Since my project is to critique drug proscriptions on neutralist grounds rather than to defend neutrality, I make no effort to respond to such criticisms.
10. George Sher, *Beyond Neutrality* (Cambridge: Cambridge University Press, 1997), pp. 118–19. Sher admits, however (at p. 121), that “the government acts that are most likely to engender discord are heavy-handed applications of the criminal law.”
prosecution and conviction. Rawls's warning seems vindicated by the sheer number of casualties of the drug war.

Whether drug proscriptions are defensible on liberal grounds depends largely on what liberalism is taken to be. In Section I of this paper, I will present the neutralist liberal case for permitting recreational drug use and discuss its most vulnerable presuppositions and commitments. In Section II, I will critically examine a justification for punishing drug users that is derived from the value of protecting personal autonomy—a value many philosophers have invoked as a basis for adopting the neutrality constraint. I will tentatively conclude that proscriptions of drug use are unjustifiable on neutralist liberal grounds. Although I hope to erode confidence in the justifiability of drug proscriptions generally, I am aware that some philosophers will construe my arguments as providing an embarrassment or even a counterexample to neutralist liberalism. Indeed, the specter of recreational drug use has figured far more prominently in attacks on liberalism than in defenses of it.11

I. DRUG PROSCRIPTIONS AND LIBERAL NEUTRALITY

In this section I will present and critically examine what I call the affirmative case for permitting drug use on grounds of liberal neutrality. The argument itself is deceptively simple and can be expressed in as few as three premises. In most of this section, I will discuss the possible grounds on which neutralist liberals might resist this argument. This discussion will help to identify what a (real or imaginary) drug would have to be like before neutralist liberals might proscribe its use. The issues I will address here do not depend on any particular justification a liberal might provide for adopting a principle of neutrality; I will turn to these latter kinds of issues in Section II. Although I do not pretend to resolve any of the controversies I will raise, I will provide reason to conclude that the affirmative case should be persuasive to neutralist liberals.

The affirmative case is as follows:

(1) The state should be neutral with respect to reasonable conceptions of the good life.

(2) Some of these reasonable conceptions of the good life include the recreational use of drugs. Therefore;
   The state should be neutral with respect to the recreational use of drugs.
   (3) Neutrality toward given conduct is violated by criminal prohibitions of that conduct. Therefore;
   The state should not criminally prohibit recreational drug use.

The first two premises in this affirmative case state, respectively, that reasonable conceptions of the good life are the objects of state neutrality, and that some of these conceptions include the recreational use of drugs. Are these statements acceptable? For present purposes, the controversies raised by these two premises are hard to disentangle. As I have indicated, I intend to assume rather than to defend a principle of state neutrality toward reasonable conceptions of the good life. Still, this assumption does not end all debate surrounding my use of premise (1). Theorists disagree about what a reasonable conception of the good life is. In particular, they disagree about whether and to what extent the satisfaction of tastes and preferences should be included in a reasonable conception of the good life. Unless the satisfaction of some tastes and preferences is included in such a conception, however, there is little basis for believing premise (2)—that some of these reasonable conceptions include the recreational use of drugs. Thus, in the present context, a discussion of premise (1) is inextricably tied to a discussion of premise (2).

What exactly is a conception of the good life (reasonable or otherwise)? Those liberals who identify conceptions of the good life as the object of state neutrality seldom provide a detailed account of what this phrase is designed to encompass. Rawls does not elaborate on his description of a conception of the good as “the ends and purposes worthy of our devoted pursuit.”12 Perhaps his reluctance to offer a wide range of examples of worthy ends and purposes is designed to help support his point: Neutralist liberals allow persons to decide such matters for themselves.

Less reticence is found in Ronald Dworkin. He construes a “conception of the good life” as a view about “what gives value to life.”13 In addition to the philosopher’s staple of “contemplation,” Dworkin’s examples of activities that might give value to life include “television-

watching” and “beer-drinking.” These examples are instructive, as they indicate that even the most mundane activities can form part of a person’s conception of the good. Thus, Dworkin includes the satisfaction of at least some tastes and preferences. If so, there is good reason to conclude that he would allow recreational drug use to be included in a conception of the good life. In fact, Dworkin does include recreational drug use, since the alcohol in his example of beer is a drug.\footnote{Although no entirely adequate definition of “drug” exists, any respectable candidate would include alcohol. Perhaps the most commonly cited definition is “any substance other than food which by its chemical nature affects the structure or function of the living organism.” See Gerald Uelmen and Victor Haddox, eds., Drug Abuse and the Law Sourcebook (New York: Clark Boardman Co., 1988), p. 1–1.}

Apart from the position of leading liberals on this issue, what general reason can be given to include the satisfaction of at least some tastes and preferences within a conception of the good life?\footnote{In indicating that the satisfaction of some tastes and preferences should be included in a conception of the good life, I leave open the possibility that such satisfaction is valuable because of a psychological experience that is contingently produced. See Thomas Scanlon, “Value, Desire, and the Quality of Life,” in Martha Nussbaum and Amartya Sen, eds., The Quality of Life (Oxford: Clarendon Press, 1993), p. 185.} The best answer, I think, is that to exclude the satisfaction of all tastes and preferences would lead to counterintuitive results by exempting from the neutrality constraint much of what we value and believe should be protected by a theory with genuinely liberal credentials. My decision to eat pizza rather than fruit, to wear a blue shirt rather than a green sweater, to drink red wine rather than white, or to grow a mustache rather than shave, are typically based solely on my tastes and preferences. Neutralist liberalism would look extraordinarily illiberal if these sorts of decisions were unprotected and thus became eligible for criminalization.

And many of these activities almost certainly would become eligible for criminalization if they were unprotected by the neutrality constraint. I want to pause to consider why this is so. Neutralist liberals have tended to say little about the conditions that must be satisfied in order to criminalize those activities to which the neutrality constraint does not apply. In all likelihood, however, these conditions are minimal. Suppose that the state were not required to remain neutral about the satisfaction of any tastes or preferences. Suppose further that the only reason persons eat pepperoni rather than broccoli is because they prefer its taste. On
this assumption, what conditions would have to be met in order to criminalize and thus imprison persons for eating pepperoni?

Different answers could be given. One answer is utilitarian; the state would be justified in criminalizing any activity (to which the neutrality constraint did not apply) that creates a net balance of disutility over utility. This constraint on criminalization may seem substantial. The main difficulty, however, is that no one has the slightest idea whether more utility than disutility would be promoted by proscribing pepperoni.\(^{17}\) A case can be made in favor of the proscription; after all, not much can be said on behalf of pepperoni except that many people enjoy its taste. But this is mere conjecture about the utilitarian scales.

A second answer—the answer actually given in our legal system—is to defer to the democratic process. A legislature should be allowed to criminalize the act of eating pepperoni in the unlikely event that it actually decided to do so. Of course, majorities are subject to constitutional limitations. Inasmuch as no “fundamental rights” are burdened and no “suspect class” is targeted, however, the only constitutional constraint that would have to be satisfied by this hypothetical proscription is the “rational basis” test.\(^{18}\) Very few statutes fail this test. Since the judgment that pepperoni is unhealthy to eat is rational, and the state has an interest in protecting health, it is clear that this hypothetical proscription has a rational basis. Thus, the state would be free to imprison persons for eating pepperoni.

Each of the foregoing answers is remarkably illiberal. When a criminal statute is enacted, conduct is proscribed, but not always prevented. Inevitably, some persons will violate that statute. Pepperoni will still be consumed—albeit illegally—whatever the legislature may say. When violations result in imprisonment, a fundamental right—freedom from incarceration—is infringed. More than a utilitarian gain or a mere “ra-


\(^{18}\) The constitutional limits on the authority of states to enact criminal legislation contained in the “fundamental rights,” “suspect class,” and “rational basis” doctrines are described in Lawrence Tribe, \textit{American Constitutional Law}, 2nd ed. (Mineola: Foundation Press, 1988).
tional basis” should be required to enact and enforce such a law. Each criminal law that deprives persons of their fundamental right to be free from incarceration should meet more exacting standards than the foregoing answers provide.¹⁹

No political philosopher should acquiesce when hundreds of thousands of persons lose their right to be free from incarceration simply because a legislature has a utilitarian ground or a rational basis to imprison them. More specifically, no liberal should be happy if his version of liberalism allowed persons to be imprisoned for the crime of eating pepperoni. If liberalism is to be identified by the kinds of activities it protects, this hypothetical proscription serves as a better test case than pornography or abortion to decide whether a particular theory qualifies as liberal. Neutralist liberals have seemed not to worry, however, about how little protection is extended to the satisfaction of any tastes and preferences to which the neutrality constraint is thought not to apply. I suspect that this lack of concern is explained by the fact that contemporary Western states have shown virtually no inclination to criminalize such activities as the consumption of unhealthy foods.²⁰ Thus, persons tend to take such freedoms for granted, and there is no practical urgency to devise a rationale to protect them. By contrast, constant vigilance is needed to safeguard the particular freedoms (such as speech) that are threatened by the state. One can only imagine, however, the uproar from both political philosophers as well as the public that would greet proposals to put people in jail for eating unhealthy foods such as pepperoni. I am confident that liberals would scramble to find some basis within their theory to condemn such an outrageous law.

The most obvious such basis, of course, is to apply the neutrality constraint itself. That is, the conception of the good that persons are allowed to pursue under neutralist liberalism should include the freedom to eat whatever foods we like. This conclusion is crucial for my overall argument about drug use. Unless the satisfaction of some tastes and preferences is brought within the scope of conceptions of the good life, drug use for recreational purposes, like the consumption of food for the

¹⁹. For a defense of this position, see Sherry Colb, “Freedom from Incarceration: Why Is This Right Different from All Other Rights?” New York University Law Review 69 (1994): 781.

²⁰. States were not always so reluctant to proscribe foods. See Alan Hunt, Governance of the Consuming Passions: A History of Sumptuary Law (New York: St. Martin’s Press, 1996).
sake of its taste, is unlikely to receive any liberal protection. To be sure, some persons have sought to defend the use of given drugs by reference to their supposed positive contributions to such goods as spirituality and artistic creativity. Such defenses of drug use should not be rejected out of hand. At the very least, these efforts reveal the difficulty of categorizing any activity as purely recreational. Still, I believe that such positive effects capture only a very small part of the explanation for why the use of many illicit drugs is so pervasive. The popularity of marijuana and cocaine is no more mysterious than the popularity of chocolate. Most persons use illicit drugs because they enjoy their effects, not because they hope to become more spiritual or creative. That is, most use of drugs such as marijuana and cocaine is recreational. In any event, this is the particular motivation to which my inquiry is directed; I ask whether the neutrality constraint offers any protection to the use of drugs for the purpose of gaining pleasure or euphoria.

The more difficult issue, I think, is not to decide whether the neutrality constraint applies to the satisfaction of any tastes and preferences, but to determine whether recreational drug use will qualify for liberal protection once the satisfaction of some tastes and preferences is included within the scope of conceptions of the good life. Admittedly, the good life does not require the satisfaction of all tastes and preferences. I make no effort to provide a comprehensive list of the various kinds of tastes and preferences that need not be satisfied with a conception of the good life. Once we concede that the satisfaction of some tastes and preferences qualifies—such as a taste or preference for pepperoni—the more productive strategy is to search for possible reasons to exclude a taste or preference for drugs. I will briefly consider three such reasons, and argue that each fails to provide a persuasive basis for exempting all recreational drug use from a conception of the good to which the neutrality constraint applies. In general, these reasons provide no more jus-

21. Difficulties in distinguishing recreational from nonrecreational drug use make it easier rather than harder to argue that drug use qualifies for protection under the neutrality constraint. Protecting most other purposes for which drugs are used—medicinal or religious purposes, for example—should prove less difficult for neutralist liberals. If marijuana has a medical use, the arguments for keeping it unavailable to patients are feeble. George Annas, “Reefer Madness—The Federal Response to California’s Marijuana Law,” New England Journal of Medicine 337 (1997): 434.

22. For further discussion, see the collection in Christoph Fehige and Ulla Wessels, eds., Preferences (Berlin: Walter de Gruyter, 1998).
tification (and frequently less justification) to exempt recreational drug use from the scope of liberal neutrality than any number of other tastes and preferences which, I have suggested, should receive protection from a theory with genuinely liberal credentials. Without a persuasive basis for disqualifying this particular taste or preference, I conclude that recreational drug use is entitled to protection from neutralist liberals.23

Consider some of the familiar reasons to exempt the satisfaction of a given taste or preference from a conception of the good life to which the neutrality constraint applies. Perhaps the best such reason is that some tastes and preferences are based on a material mistake of fact about the object of the preference. A mistake is material when the person would change his taste or preference if he came to learn the truth. Might recreational drug use be disqualified on this basis? This possibility cannot be dismissed. There are two grounds on which a taste or preference for, say, cocaine might be based on a factual error. First, the person may be mistaken about whether the use of cocaine will produce the desired psychological state of euphoria. Second, the person may be mistaken about the risks of cocaine—in particular, its health hazards or potential for addiction.

Prohibitionists have alleged that drug users are guilty of both kinds of mistakes. Those who characterize the pleasure of drugs as “deceptive” accuse users of the first kind of error.24 Recreational drug users, according to this school of thought, do not really enjoy drugs. The motivation for drug use is rarely explained in the same terms as other recreational activities, but is widely attributed to peer pressure, boredom, alienation, immaturity, depression, or some other human pathology. Those who dissent, and publicly proclaim that drug use is fun, are subjected to ridicule and denounced as irresponsible.

This strategy to exempt recreational drug use from the scope of liberal protection is highly implausible. Drug users are just as likely as users of any number of consumer items to enjoy the object of their preference. Of course, persons who admit to having lost all pleasure from the drug they consume can be identified. But there is no evidence that such per-

23. Joel Feinberg recounts a case in which a sane and informed adult decides to use a drug because “I’ll get a lots of pleasure first, so much pleasure in fact, that it is well worth running the risk of physical harm.” Feinberg describes this case as “easy”—as “the litmus test example for distinguishing the paternalist from the liberal.” Joel Feinberg, Harm to Self (Oxford: Oxford University Press, 1986), p. 133.
sons represent a majority, or even a significant minority of the users of a given drug. The tendency to generalize from worst-case scenarios is prominent here. I suspect, however, that persons who describe the pleasures of drugs as deceptive do not really take themselves to be making an empirical claim. As C. L. Ten has warned, “where we disapprove of an activity, or cannot appreciate it, we tend to think that the agent himself derives little benefit from it.”

A second and more probable kind of material mistake of fact is that users are not adequately informed of the dangers of drugs. But information about the hazards of illicit drugs is more widely disseminated than information about the risks of any number of foods, consumer items, dangerous recreational activities, and even drugs prescribed for medicinal purposes. Illicit drug users are almost certainly more knowledgeable of the risks they take; few adolescents today are spared from drug education programs in schools. In any event, many prohibitionists have admitted that better drug education will not reduce the incidence of illicit drug use because ignorance does not cause such use.

A second and very different reason to exempt the satisfaction of a given taste or preferences from a conception of the good life to which the neutrality constraint applies is that the taste or preference is somehow “unauthentic.” Several possible grounds might be invoked to show that a taste or preference is unauthentic, and thus unprotected by liberal neutrality. The main difficulty, I think, is to avoid a model according to which preferences are authentic only when they are formed ex nihilo. For present purposes, the challenge is to explain why a taste or preference for a given drug might be less authentic than a taste or preference for any number of objects to which the liberal constraint applies. This challenge, I believe, cannot be overcome. To be sure, some preferences are created by conditioning or manipulation. These causal processes,


26. Even if they are fully informed, some commentators have alleged that users do not really appreciate these risks; users often succumb to rationalizations and psychological fallacies to explain their behavior. See Robert Goodin, No Smoking (Chicago: University of Chicago Press, 1989), pp. 20–24.


however, are unlikely to play a substantial role in creating a preference for illicit drugs. After all, no advertising for marijuana or heroin has ever taken place. The fact that the pleasurable effects of drugs have a physiological basis, coupled with the realization that drug use is prevalent in virtually all societies and even among animals, help to establish these preferences as relatively authentic. In short, a taste for drugs, unlike, say, a taste for perfume, has a strong claim to authenticity.

Neither of the foregoing reasons provides a persuasive basis for denying that drug use can be included in a conception of the good life. I can think of only one plausible reason to disqualify such a preference. That is, I can think of only one plausible reason to include the satisfaction of a preference for pepperoni, but not the satisfaction of a preference for alcohol or cocaine, in a conception of the good life. The neutrality constraint does not apply to all conceptions of the good, but only to those that are reasonable. Perhaps recreational drug use is unreasonable under some or all circumstances. No brief discussion can be expected to settle this issue. This challenge, like others, is difficult to meet in the absence of a detailed argument designed to show that drug use is unreasonable.

What burden must such an argument satisfy? In order to begin to answer this question, one must understand the motivation for confining the neutrality constraint to only those conceptions of the good that are reasonable. This qualification is not intended to deny liberal protection to conceptions of the good that are silly, unhealthy, or wasteful. No neutralist liberal could approve of the use of the penal sanction to coerce persons to be nonfrivolous, healthy, or efficient. Instead, the motivation for this qualification is to distinguish neutralist liberals from anarchists. Liberals must impose some limitations on the conception of the good that persons are allowed to pursue; they are not resigned to impassivity when persons pursue a conception of the good that includes a preference for murder or rape. Why does the satisfaction of these victimizing

31. Many neutralist liberals exempt the distribution of “primary goods”—things persons want whatever else they may want—from the requirement of neutrality. Sometimes, liberals indicate that the neutrality constraint applies only “so far as is possible.” See Dworkin, “Liberalism,” p. 127. Or they restrict neutrality to permissible conceptions of the good—to “those that respect the principles of justice.” See Rawls, Theory of Justice, p. 193.
preferences not qualify for liberal protection? Perhaps the best answer is that such conduct is unreasonable. Persons are reasonable, according to the conception I adopt here, when they "propose principles and standards as fair terms of cooperation and . . . abide by them willingly, given the assurance that others will likewise do so."32 More succintly, reasonable persons "cooperate with others on terms that all can accept."33 On this account, drug use is reasonable if it is consistent with a commitment to abide by fair terms of cooperation.

I see no ground on which to condemn all recreational drug use—licit or illicit—as unreasonable. An adult who uses alcohol or cocaine in his home, for example, does not violate any principle that rational persons would accept as establishing fair terms of cooperation. What principle might he violate? Instances of his conduct need not harm anyone, victimize anyone, infringe anyone's rights, or undermine fair standards of interaction.34 In these crucial respects, the conduct of the recreational drug user differs fundamentally from that of the murderer or rapist.

The only viable strategy to condemn the recreational use of a drug as unreasonable is to construe it as creating an unacceptable risk to fair terms of cooperation. In other words, drug offenses must be conceptualized and evaluated as instances of what are called inchoate, anticipatory, or nonconsummate offenses (such as attempt, conspiracy, and solicitation). According to this view, use itself is not the evil that drug proscriptions are designed to prevent. Instead, the evil to be prevented is some further harm that drug users are more likely to inflict on others. Undoubtedly, some recreational drug use in some circumstances—for example, substantial alcohol use while driving—would threaten fair terms of cooperation. Rational persons would demand assurance that others not subject them to this risk. But a categorical prohibition of alcohol is not needed to achieve this purpose. Fair terms of cooperation are preserved by regulating the time, place, and circumstances under which alcohol may be consumed. Similarly, a categorical prohibition of each of those drugs currently classified as illicit seems equally unnecessary for this purpose.

32. Rawls, Political Liberalism, p. 49.
33. Ibid., p. 50.
34. Hence drugs consumed for recreational purposes differ importantly from drugs consumed to enhance performance. An athlete who breaks the rules by using a drug to improve his competitive abilities may undermine fair terms of cooperation.
Of course, this conclusion is hard to demonstrate. The criteria by which a neutralist liberal should decide whether a given imposition of risk is reasonable are tremendously controversial. Clearly, however, some such criteria are needed if liberalism is to remain liberal. After all, virtually any kind of conduct creates some level of risk. Moreover, evidence that the use of a drug would be likely to undermine a commitment to abide by fair terms of cooperation might be far more plausible for some drugs than for others. To this point, my discussion has treated all drugs as relevantly similar for purposes of deciding whether their recreational use qualifies for protection under the neutrality constraint. But little imagination is needed to suppose that a given drug might be so detrimental to terms of cooperation that its use would be intolerable under any circumstances. Works of fiction describe such drugs vividly. No state should be required to bear the risk that a Dr. Jekyll might consume the potion that turned him into the homicidal Mr. Hyde. No drug literally turns users into monsters. But a plausible basis for claiming that a given drug is too risky to qualify for neutralist liberal protection is that persons who use it become significantly more likely to commit crimes that victimize and violate the rights of others.

It is impossible to do justice to the voluminous literature on the alleged link between drugs and crime. Since I have scrutinized this rationale for drug prohibitions elsewhere, I will only summarize a few of my reservations here. In particular, it is important to remain clear about the data that are material in assessing the hypothesis that a given drug causes crime. The more telling statistic is not the percentage of criminals who use drugs, but the percentage of drug users who commit crimes. Theorists who contend that drug use should be punished because it causes crime must explain why relatively few of the approximately 80 million persons who have used illicit drugs in the United States have ever become criminals. Smokers of marijuana—the most frequently used illicit drug—may actually be underrepresented in the criminal population. Moreover, an adequate understanding of the

causal contribution of drugs to crime must exclude those economic and systemic offenses that would not have occurred were drugs not proscribed in the first place.\textsuperscript{38} Even a number of influential prohibitionists have admitted that the enforcement of drug offenses may actually cause more crime than it prevents.\textsuperscript{39} The hypothesis that drug use itself creates aggression and criminal activity—that drugs have a psychopharmacological link to crime—has little empirical support when researchers control for other variables such as the effects of culture.\textsuperscript{40} Drug use in other countries is not nearly so closely correlated with violent criminal activity, undermining the hypothesis that drug use has a psychopharmacological link to crime.\textsuperscript{41}

To my mind, however, the best reason to doubt that recreational drug users should be punished because of their tendencies to commit crimes is that the causal link between drugs and crime is too remote. As a general matter, conduct that creates a risk is more reasonable as it becomes increasingly remote from whatever harm it ultimately risks. The concept of remoteness, as used in causal contexts, is admittedly vague and imprecise. Still, once psychopharmacological accounts of the link between drugs and crime are set aside, one must be distressed at the degree of remoteness between drug use and the ultimate evil of crime that obtains in rationales for punishing typical drug users. Bennett, for example, contends that drug use must be prevented because, inter alia, it causes crime.\textsuperscript{42} Why punish ordinary drug users who show no inclination toward criminal activity? Bennett answers that the “non-addicted casual” drug user “remains a grave issue of national concern,” even though he “is likely to have a still-intact family, social and work life” and “to ’enjoy’ his drug for the pleasure it offers.” Nonetheless, he continues, this cas-


\textsuperscript{39} James Q. Wilson, for example, writes, “It is not clear that enforcing the laws against drug use would reduce crime. On the contrary, crime may be caused by such enforcement.” See his “Drugs and Crime” in Michael Tonry and James Q. Wilson, eds., \textit{Drugs and Crime} (Chicago: Chicago University Press, 1990), p. 522.

\textsuperscript{40} See, for example, Jeffrey Fagan, “Intoxication and Aggression,” in Tonry and Wilson, eds., \textit{Drugs and Crime}, p. 241.


\textsuperscript{42} Bennett, \textit{National Drug Control Strategy}, p. 7.
ual drug user should be punished severely, because he is “much more willing and able to proselytize his drug use—by action or example—among his remaining nonuser peers, friends, and acquaintances. A nonaddict’s drug use, in other words, is highly contagious.” As I understand this rationale, problem-free drug users should be punished because they might be imitated by others who must be deterred because their experimentation may lead to an increase in the ultimate evil of crime. This causal link between casual drug use and crime, I submit, is too remote to justify the criminal sanction.

Unless some other basis can be found on which to condemn recreational drug use as unreasonable, I tentatively conclude that neutralist liberals should accept the first two premises in the affirmative case for permitting drug use. These liberals should believe that a reasonable conception of the good life to which the state should be neutral might include the recreational use of drugs.

Additional difficulties with the affirmative case arise with premise (3). According to this premise, the state is not neutral toward conduct that it criminalizes. On one level, this premise seems beyond controversy. Admittedly, liberals have quarreled about which means of promoting a conception of the good life are precluded by their commitment to neutrality. In particular, they have disagreed about whether the neutrality constraint disables the state from enacting taxes to discourage given conduct, from financing educational programs to teach persons the dangers of specified activities, or from offering various incentives, such as subsidized housing, on condition that recipients behave in approved ways. In addition, they have divided over whether and to what extent neutrality constrains the private sector—to preclude drug testing as a condition for employment, for example. These questions are crucial for purposes of identifying the details of a drug policy that is optimal from the perspective of liberal justice. Fortunately, however, these difficult issues need not be resolved here. If neutrality creates any constraint on policy at all, it precludes the state from imposing the terrible power of the criminal sanction. In this respect, punishment has a unique and special status among all of the various devices a society may employ to discourage given kinds of behaviors. Or so I will suppose. Whatever else

43. Ibid., p. 11 (emphasis in original).
44. For a basis to differentiate some of these forms of state action, see Colin Macleod, “Liberal Neutrality or Liberal Tolerance?” Law and Philosophy 16 (1997): 529.
neutrality may require, I will assume that it limits the authority of the state to enact coercive legislation.

On another level, however, the third premise in the affirmative case is enormously controversial. For two distinct reasons, liberal neutrality may have no direct implications for the justifiability of particular instances of criminal legislation. First, liberals disagree about what features of a political system must conform to the neutrality constraint. Rawls, for example, applies neutrality to the basic structure of a modern constitutional democracy, and thus to the larger structure of social institutions within which laws are enacted. This form of “structural liberalism” does not require that each particular criminal statute must satisfy the neutrality constraint in order to be justified.

Whether the application of neutrality to the basic structure of a constitutional democracy would offer any degree of protection to recreational drug use is complicated and unclear. This question cannot be answered without identifying the content of the particular rights that would be included in a constitution that conformed to the neutrality constraint. Of course, a right to use drugs is unlikely to be explicitly included in any such constitution. But this concession does not settle the matter; rights to marry or to use contraceptives are equally improbable candidates for explicit inclusion. A legal system might afford constitutional protection to such behaviors by broadly interpreting some other right. Similarly, decisions about what foods to eat or what clothes to wear, to return to my earlier examples, would only be protected by an expansive interpretation of some general constitutional right. Many questions about the scope of constitutional protection afforded to such conduct are unexplored in our legal system, mainly because contemporary liberal states have rarely sought to punish them. No case law exists about issues that have never been addressed. Thus,


46. See Peter de Marneffe, “Liberalism, Liberty, and Neutrality,” Philosophy & Public Affairs 19, no. 3 (Summer 1990): 253. He suggests that constitutional neutrality is compatible with drug proscriptions, but legislative neutrality is not. He may be correct, but neither claim is as clear as he supposes.

47. The best candidate, of course, is the right to privacy—even though privacy itself may not be an enumerated right.

48. According to Laurence Tribe, it seems “preposterous” that courts would not apply a heightened level of scrutiny to assess the constitutionality of laws that burdened the
the constitutional status of drug use cannot be resolved without a theory to interpret and apply the several rights that would be included in a constitution that satisfies the demands of neutrality.49

The third premise in the affirmative case—that liberal neutrality has direct implications for the justifiability of criminal prohibitions—is enormously controversial for a second reason. Even those who reject “structural liberalism” tend to apply the neutrality constraint not to particular laws, but to rationales for laws. This strategy is designed to avoid an objection that otherwise is devastating to liberal neutrality. According to this objection, virtually any action by the state has the effect of favoring some conceptions of the good over others. Liberals need not concede, however, that no state can be constrained by neutrality. Instead, this constraint should be construed to require justificatory rather than consequential neutrality. In other words, although the state may enact laws that have the effect of favoring some conceptions of the good over others, it may not enact laws in order to favor some such conceptions.50

Even though justificatory neutrality preserves the bare possibility of satisfying neutrality, it raises yet another host of difficulties. Most any law—certainly drug proscriptions—can be supported by a multiplicity of rationales. If state neutrality precludes only justifications for laws rather than laws themselves, one and the same statute might or might not conform to the neutrality constraint depending on the reasons that are advanced on its behalf. To make matters worse, the quest for the rationale of a law seems no less elusive than the quest for legislative intent. Different legislators may have a variety of reasons for voting in favor of a given statute. Some may support drug proscriptions for reasons that fail the test of liberal neutrality, while others may have reasons that pass that test. In light of these phenomena, how can anyone pretend to have identified the rationale of a law? Justificatory neutrality seems to impose no real limitation on the authority of the liberal state.

Jeremy Waldron has offered the most plausible response to this pre-

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dicament. He proposes to understand the doctrine of liberal neutrality “as a basis for each lawmaker to evaluate his own intentions . . . rather than as a doctrine for evaluating legislation as such.”\textsuperscript{51} Alternatively, he suggests that liberal neutrality might “be seen as a constraint on the reasons we deploy in our reconstruction of the justification of some rule we support (whatever its original intention was).”\textsuperscript{52} According to either of Waldron’s helpful proposals, the neutrality constraint does not pass judgment on law per se, but only on the rationales that legislators or citizens are permitted to employ in defense of a law.\textsuperscript{53}

Suppose that Waldron’s response is acceptable. Should liberals who subscribe to the neutrality constraint thus reject premise (3) in the affirmative case for permitting drug use? This conclusion, I think, would be hasty. Perhaps the gap between the evaluation of the rationale of a law and the evaluation of the law itself can be bridged. Liberals should struggle to decide whether any plausible rationale for drug proscriptions can satisfy the neutrality constraint. I have already responded to several such rationales. I invite liberal neutralists to defend some alternative basis for punishing persons whose conception of the good life includes the recreational use of drugs. Identifying and evaluating such rationales is the challenge that both friends and foes of liberal neutrality must undertake. Again, I cannot prove that we will never find a rationale for drug prohibitions that satisfies the test of justificatory neutrality. In the absence of such a rationale, however, liberals are entitled to make an inference about drug proscriptions themselves; they are warranted in believing that these laws reflect rationales that violate neutrality. I tentatively conclude that the affirmative case in favor of permitting recreational drug use on grounds of liberal neutrality is sound.

II. AUTONOMY AND DRUG PROHIBITIONS

The difficulties I have examined with the affirmative case for permitting drug use arise whatever rationale a political philosopher may devise for adopting a principle of neutrality. But neutralist liberals have offered


\textsuperscript{52} Ibid., p. 151 (emphasis in original).

\textsuperscript{53} Some theorists claim that justificatory neutrality is satisfied “if some significant number of the citizens initiating, framing, and pressing the policy are sincerely moved by neutral justifications.” Harry Brighouse, “Neutrality, Publicity, and State Funding of the Arts,” \textit{Philosophy \& Public Affairs} 24, no. 1 (Winter 1995): 35, 39.
various accounts of *why* the state should remain neutral.\textsuperscript{54} Different reasons for neutrality point to different conceptions of what neutrality entails. If the value of moral pluralism provides the rationale for neutrality, for example, the state would have reason to preserve a diversity of lifestyles.\textsuperscript{55} Other defenses of neutrality, however, might provide no reason for the state to enhance diversity. Thus, liberals can ill afford to be neutral about the justification of neutrality itself; neutrality on this level would deprive them of the most promising basis for evaluating competing claims about the specific demands that neutrality makes. In this section, I can discuss only one of many possible defenses of neutrality. I will examine what a liberal should be inclined to say about the punishment of drug users if he defends his commitment to neutrality by appealing to the value of personal *autonomy*.\textsuperscript{56}

The concept of autonomy can be put to diametrically opposed purposes in debates about the justifiability of drug proscriptions. Autonomy might be (and has been) invoked in attempts to show both why such proscriptions *are* and *are not* justified. Each line of argument is relatively straightforward. Although the state should be neutral toward the conception of the good life that persons choose, it should not be neutral toward choice itself. Choice is valuable and worthy of respect when it is autonomous, but not otherwise. If the choice to use drugs for recreational purposes is autonomous, and autonomy is valuable, the state would have reason to allow drug use. But if this choice is nonautonomous, liberals who derive the importance of neutrality from the value of autonomy would exempt drug use from the scope of protection under the neutrality constraint. Since nonautonomous choices lack value, the state has no reason to allow persons to make such choices. Indeed, a finding that drug use is nonautonomous might provide a reason not only to exempt it from the scope of liberal protection, but also to punish drug users. The punishment of drug use may protect auton-

\textsuperscript{54} Dworkin, for example, derives his commitment to neutrality from a more basic principle of equal concern and respect. See Dworkin, “Liberalism.”


\textsuperscript{56} Although I regard this rationale as plausible, I do not focus on it because I am persuaded of its success in justifying liberal neutrality. As Waldron has recognized, this defense requires the liberal to show that an infringement of autonomy “has a certain dis-value which is both independent of, and of a greater order of moral concern than, the dis-value in people’s autonomous decision-making that the moralistic legislator may be trying to avoid.” See Waldron, “Legislation and Moral Neutrality,” pp. 162–63.
omy by reducing the incidence of consumption among persons who already use drugs, while also deterring prospective users.

Clearly, the foregoing rationales for and against punishing drug users are doubly controversial. First, they require an explication of the nature of autonomy. Second, they require a reason to categorize drug use as autonomous or nonautonomous. Each of these two controversies is formidable. In combination, they are potentially overwhelming. An argument that drug use is autonomous or nonautonomous is only as plausible as the conception of autonomy on which the argument relies.

To make matters worse, I am skeptical that any definitive answer to the question of whether drug use is autonomous or nonautonomous is likely to be forthcoming. My skepticism is not simply a product of uncertainty about the details of the conception of autonomy that any such argument must presuppose. My skepticism is reinforced by my belief that, on any sensible conception of autonomy, the extent to which a given choice is autonomous is almost certainly a matter of degree. I would anticipate that given acts of recreational drug use will tend to exhibit some features of autonomous choice, while lacking others. If the neutrality constraint is construed to protect only autonomous choice, the liberal must decide not merely whether, but also to what extent autonomy is exemplified by an act of drug use before it qualifies for protection.

How should one begin to decide to what extent drug use is autonomous or nonautonomous? Of course, philosophers have reached no consensus about the nature of autonomy. Several distinct conceptions have been defended, each of which has been explicated in very different ways.57 In what follows, I will hazard a few generalizations about autonomy that I hope may be acceptable to most philosophers. For the most part, however, I will try to avoid commitment to any specific account of the nature or value of autonomy. Instead, my strategy will be to try to identify what an account of the nature and value of autonomy would have to be—and what the properties of a particular drug would have to be—in order for liberals who derive neutrality from autonomy to endorse drug proscriptions. I will contend that a conception of the nature and value of autonomy that would support criminalization is not likely to be attractive to philosophers. Liberals who base the neutrality con-

straint on the importance of autonomous choice would tend to reject an account of the nature and value of autonomy that would allow drug users to be punished.

Before I pursue this strategy, it is instructive to point out that many particular conceptions of autonomy that have been defended by philosophers clearly imply that drug use is autonomous. Joel Feinberg, for example, writes that “the kernel of the idea of autonomy is the right to make choices and decisions—what to put into my body, what contacts with my body to permit, where and how to move my body through public space, how to use my chattels and physical property, what personal information to disclose to others, what information to conceal, and more.”58 Since drugs are “put into [the] body,” drug use is unquestionably autonomous on this conception. I will not, however, rely on a specific conception of autonomy such as that of Feinberg; I know of no argument that should convince philosophers that such a conception is sound. Although I think the fact that drugs are “put into the body” is significant, I do not pretend that it is dispositive.

Moreover, a familiar motivation for providing an account of autonomy virtually guarantees that drug users are autonomous. Kant, for example, sought a conception of moral autonomy to ground a basic respect due to all persons. Thus, Kant construed autonomy as a property of the will of virtually every adult human being, not as a characteristic that some persons have and others lack in virtue of their behavior. If so, the fact that some persons use drugs and others do not is no more relevant to the question of whether they are autonomous than is the fact that some persons eat yogurt and others eat ice cream. Insofar as a conception of autonomy is designed to explain why all adult human beings have moral obligations and/or are worthy of moral respect, there is almost no basis to argue that drug users lack autonomy.

Some very different kinds of accounts make it equally hard to fathom how a normal human being could fail to be autonomous, whether or not he indulges in recreational drug use. Consider, for example, hierarchical accounts that identify autonomy with a capacity. Suppose that what “is crucial to being autonomous [is] the capacity to raise the question of whether I will identify with or reject the reasons for which I now act.”59

58. Feinberg, Harm to Self, p. 54.
Even the use of the most addictive and dangerous drugs rarely deprives persons of this precious capacity. In fact, the existence of the capacity to raise such a question is required to explain why many drug users desire to quit—even if they are unsuccessful.

Other conceptions, however, have the potential to show that drug use can be nonautonomous. These accounts depict autonomy as a kind of achievement that is attained by some but not all persons. Consider the influential account of Joseph Raz, according to which persons are autonomous to the extent that they “make their own lives.” Some kinds of choices contribute to this achievement, while others do not. Philosophers have defended very different views about what is involved in making one’s life one’s own. Initially, it may seem that the life of a person who uses drugs for recreational purposes can be a product of his own creative efforts—no less than that of a person who attends baseball games or reads philosophy journals. For the most part, I believe this initial impression to be correct. Later in this section I will critically discuss the phenomenon of addiction, which provides the most plausible reason to believe that drug use is an impediment to self-authorship. At this point, however, I want to pursue a distinct line of thought. Even though drug use may be just as much a person’s creative effort as almost any other activity, drug proscriptions might promote what Raz describes as the conditions of autonomy. That is, a state that allows drug use may retard the conditions under which persons are likely to develop into autonomous agents.

I can think of two reasons why a state that allows drug use might undermine the conditions of autonomy, and two opposing reasons why such a state might enhance these conditions. In what follows, I will briefly discuss each of these four reasons. Since these reasons pull in opposite directions, it may seem that the question of whether the liberty to use drugs ultimately helps to establish or to damage the conditions of autonomy has no definitive answer. Moreover, in addressing this question, it may be important to distinguish among different drugs, as

seems to believe, however, that drug addicts may lack autonomy because “autonomy should have some relationship to the ability of individuals, not only to scrutinize critically their first-order motivations but also to change them if they so desire” (ibid., p. 16).

some have a greater potential than others to inhibit the conditions of autonomy. Still, in light of the final consideration I will examine, I will conclude that drug proscriptions are more likely to destroy than to create the conditions of autonomy.

First, consider why the freedom to use a given drug might not promote the conditions of autonomy. A person who is author of his own life must possess the appropriate mental abilities to effectively choose what life to lead. If drugs substantially impair these mental abilities, they may render users less able to make meaningful choices. Stories of persons whose intellectual faculties have been devastated by drugs are a staple of prohibitionists. Antidrug advertisements compare “brains on drugs” to eggs in fry pans. Should some recreational drug use thus be banned? Admittedly, many recreational drugs impair mental abilities while the user is under their influence. The more important question, however, is the extent to which these impairments persist after the immediate effects have subsided. Here is an important potential argument against allowing recreational drug use, the success or failure of which depends mostly on empirical research.

I can hazard only a very brief reply that barely probes this line of argument. The crux of my response is that any rationale for drug prohibitions which is based on accounts of persons who suffer substantial and enduring psychological impairments from recreational drug use involves an unwarranted generalization from worst-case scenarios. Whatever may be true of rare and exceptional cases, there is no evidence that the typical drug user suffers any measurable amount of damage to his mental faculties. Perhaps the best way to support this claim draws from longitudinal studies of drug users. The most well-known such study indicates that adults who once had been moderate drug users—who were more numerous than either heavy users or abstainers—are presently “the psychologically healthiest subjects, healthier than either abstainers or frequent users.” Compared to moderate users, abstainers “show some signs of relative maladjustment.” To be sure, the psychological profile of adults who had been heavy drug users during adolescence raises some concerns about their mental faculties and thus about their

61. Ibid., p. 373.
63. Ibid., p. 625.
ability to “make their own lives.” Even here, however, the degree of psychological maladjustment is not extreme, and actually preceded the initiation of drug use. As more persons who once experimented with drugs age and mature, better data on the long-term effects of drugs are bound to become available.

Evidence of cognitive impairment caused by the consumption of marijuana, the most frequently used illicit drug, provides no basis for alarm. After an extensive review of the literature, two commentators have recently concluded that “it does not appear that long-term marijuana use causes any significant permanent harm to intellectual ability.” Admittedly, however, new evidence to the contrary—which shows that a given drug causes substantial and irreversible mental impairment among a significant percentage of users—would provide a reason to proscribe that drug in order to deter its use and thus to help create the conditions under which persons are likely to become autonomous agents.

A second reason to suppose that the liberty to use drugs is destructive of the conditions of autonomy has two variants. Perhaps immoral choices are not autonomous, or perhaps whatever autonomy is exhibited in immoral choices lacks value. On either variant, if recreational drug use were morally wrongful, efforts to create the conditions under which autonomy has value would not allow drug use. But is recreational drug use immoral? Prohibitionists frequently allege that the recreational use of many types of drugs is inherently wrongful. Curiously, these allegations are almost always reserved for those recreational drugs that happen to be illicit; few moral reservations are expressed about the recreational use of alcohol or caffeine. Even so, I concede that these allegations deserve a reply. Philosophers would like to respond to the arguments of drug prohibitionists. Unfortunately, arguments in support of the immorality of drug use are almost never produced; this judgment is simply put forward as a kind of brute moral fact or incontrovertible moral intuition. In the absence of an argument for this conclusion, a reply is hard to fashion. I confess to bafflement about allegations of the inherent wrongfulness of the recreational use of drugs that do not depend on the empirical effects such use tends to cause.

64. Ibid., p. 626.
65. Morgan and Zimmer, Marijuana Myths, Marijuana Facts, p. 79.
66. For further discussion, see Husak, Drugs and Rights, pp. 64–68.
Next, consider two reasons why the freedom to use a given drug might promote the conditions of autonomy. First, a person who is to be the author of his own life must have an adequate range of options from which to choose.67 Deciding when a range of options is adequate is extraordinarily difficult. As Raz acknowledges, a range of options may be inadequate even though it allows persons to choose their own long-term commitments and projects. "It is equally unacceptable," he writes, "that we should not be able to decide on trivia such as when to wash or when to comb our hair."68

Does the freedom to use a given drug for recreational purposes help to improve the adequacy of a range of options? The greatest obstacle in answering this question is to identify those activities that qualify as the same type of activity as recreational drug use. What exactly are the lawful alternatives available to the recreational user of, say, heroin? If the comparison class consists of all recreational drugs, the range of competitive activities, consisting mostly of alcohol, seems meager. But if the comparison class consists of all recreational pursuits—including, for example, movies and croquet—the range of competitive activities is enormous. Surely the underlying spirit of liberalism allows persons to decide for themselves when one option is a viable alternative to another. The disappointed user of LSD who complains of a diminution in the conditions of autonomy because of criminal proscriptions is unlikely to be satisfied when he is assured that his range of options remains adequate, since he is free to seek a "runner's high." No argument should persuade him that his disappointment is philosophically misguided.

Thus I tend to believe that the range of alternatives available to the recreational drug user consists of other drugs, rather than all other recreational pursuits. If so, at what point does the range of options become adequate? As more and more proscribed drugs become permitted, the case for extending the permission to additional drugs becomes increasingly weak. The goal of ensuring that persons have an adequate range of options from which to choose does not require that all drugs be al-

67. Raz, Morality of Freedom, p. 373.
68. Ibid., p. 374. Raz denies, however, that "all pleasures contribute to one's well-being." Some pleasures "have no bearing on my life as a whole" and thus are not "relevantly connected to how one's life goes." See his Ethics in the Public Domain (Oxford: Clarendon Press, 1994), p. 7.
allowed for recreational purposes. But it does provide a reason to expand the alternatives beyond their present range.

In determining whether the loss of a given option makes the remaining class inadequate, Raz draws a helpful distinction between eliminating a choice for those already committed to it, and failing to have made that choice available in the first place.\(^69\) I am prepared to believe that the absence of an extensive lawful market in recreational drugs has inhibited pharmaceutical companies from perfecting new substances with such euphoric benefits and so few side-effects that existing recreational drugs would have suffered the same fate as the horse and buggy. But this failure does not have the same impact on the conditions of autonomy as would have resulted if many persons had already become enamored of the new substances that would have been perfected. In any event, Raz’s distinction may have little relevance to the present issue. The fact that cocaine and heroin have been proscribed throughout most of this century has not deterred millions of adults from using them. Proscription has not resulted in prevention.

The final and by far the most powerful reason to believe that drug proscriptions retard the conditions of autonomy is that coercion itself is enormously destructive of these conditions.\(^70\) The severe punishments presently inflicted on recreational users of illicit drugs all but obliterate their autonomy.\(^71\) No effect that drugs may have in undermining the ability of typical users to make their own lives could be nearly as destructive of their autonomy as the punishments imposed upon them. I concede that the state may take reasonable steps to discourage the use of drugs that inhibit the development of the conditions of autonomy. But the state can hardly be justified in destroying the autonomy of users in the guise of creating the conditions of autonomy. For this simple reason, I conclude that drug proscriptions do more to undermine than to enhance the conditions of autonomy.

Having briefly addressed how the freedom to use drugs might promote or inhibit the conditions of autonomy, I now turn to the issue of

\(^69\) Ibid., p. 411.
\(^70\) Ibid., p. 418.
whether drug use itself might enhance or undermine autonomy. Does drug use per se contribute or interfere with one’s ability to create his life? Since there is a widespread tendency to believe that the recreational use of drugs is destructive of self-control, and thereby of autonomy, I will begin by making a quick case for the contrary point of view. I have described the kind of drug use I want to assess as simply recreational, but a somewhat more specific observation about the motivation of many recreational drug users is now required. I contend that drug use actually increases the self-control of many persons, and thus tends to promote rather than to undermine their ability to be the authors of their lives. My explanation is straightforward. Typically, persons have little control over their moods. For the most part, moods are conditions that we have, rather than objects of our choice. Moods just “come over us”; we frequently find ourselves lethargic in the morning, and tired in the evening. The recreational use of drugs enables us to change our moods in desired ways at given times and places. Perhaps the most familiar examples are caffeine in the morning to combat sleepiness, and alcohol after work to induce relaxation. Illicit drugs function similarly. The use of drugs, licit or illicit, can increase a person’s ability to control his mood and thus to make his own life.

But the more likely reaction, I am sure, is that drug use, at least, illicit drug use, makes persons less able to be the authors of their lives. The best reason for this conclusion is that some drugs are addictive. The persistent use of these drugs gives rise to strong feelings of compulsion. Once addicted and compelled to use drugs, a person appears to have lost much of his ability to create his own life. But does addiction really undermine autonomy? Unfortunately, the concept of addiction is no less mysterious than that of autonomy itself.72 No criteria have proved entirely adequate to differentiate addiction from weakness of will. Moreover, addiction, like autonomy, certainly admits of degrees; some persons are more addicted than others. Even if we had a clear conception of addiction, we still would have to decide not only whether but also to what extent addiction deprives persons of their autonomy. Thus, attempts to assess the impact of addiction on autonomy are tremendously controversial.

Despite these formidable problems, I will assume that the phenomenon of addiction is readily applied to examples such as the following. Consider the case of Betty, a frequent and habitual user of drug X. Betty's chronic binges have caused enormous strain on her family, her career, and, ultimately, her health. After a long period of denial, she finally expresses her resolve to overcome her problem. During a brief period of sobriety, Betty adopts several precommitment strategies to minimize the likelihood of relapse. She voluntarily ingests a substance that makes her sick when she consumes X. She carefully avoids the environmental cues that give rise to her craving. Still, her binges resume. Betty is ashamed and embarrassed and again pledges to quit. This pathetic cycle is repeated over and over. Even without a detailed conception of addiction, I think it is fair to say that Betty is addicted to drug X.

It would seem that Betty's addiction has rendered her relatively nonautonomous; she has lost much (although hardly all) of her ability to make her own life. Although I will eventually concede that this judgment about Betty is correct, I believe that we should be cautious before confidently proclaiming that Betty lacks autonomy. We should want to know more about what it is about her addiction that makes her unable to be the author of her life. Exactly why should we agree that Betty "can't quit"; why should we suppose that she has "no choice" but to persist in her use of drug X? No answer has proved altogether satisfactory.

Perhaps the best answer to the question of why Betty can't quit—in principle, at least—conceptualizes her addiction as analogous to instances of duress. Consider the case of a villain who threatens to break Sue's leg unless she assists a bank robber by driving a getaway car. We say that Sue has "no choice" but to assist the villain. Constrained literally, of course, this statement is false; Sue could choose to suffer the broken leg. The statement that she has "no choice" is a normative judgment about her blame, and expresses no deep insight into the metaphysics of free will. When we say that Sue has no choice but to drive the getaway car, we mean that the available alternatives are so unpalatable that we do not blame her for what she chooses to do.

The judgment that Betty "can't quit" might be analyzed similarly. Suppose that Betty is faced with the choice of using or not using drug X. Suppose further that she would suffer if she does not use X. This suffering might ensue because some addictive drugs give rise to withdrawal symptoms when their prolonged use is discontinued. There is no
a priori reason why the pain of withdrawal could not be of comparable severity to that of a broken leg. If so, we might characterize Betty's condition as one of "internal duress," and exempt her from blame for choosing to persist in her drug use. We express this normative judgment by saying that Betty has "no choice" and "can't quit."

There are two formidable difficulties, however, in adopting a model of internal duress to understand Betty's inability to stop using drug X. First, this model is unlikely to explain her behavior. The desire to avoid the pain of withdrawal fails to account for why patterns of consumption among users of many drugs tend to be so compulsive. Many users experience a craving, and succumb to drug use, even though no withdrawal symptoms take place. Explanations of drug use that emphasize the desire to avoid withdrawal distort the phenomenology of addiction from the perspective of most addicts. In particular, this model cannot begin to explain why former addicts frequently relapse. Many former addicts resume their drug use, even though they have abstained for a sufficient period of time to no longer suffer any symptoms of withdrawal.

In addition, the pains of withdrawal from existing illicit drugs are probably insufficient in severity to support the normative judgment that Betty is not to blame for choosing to persist. Of course, we lack a precise measure of how severe a pain must be in order to support the normative judgment that a person has "no choice" but to do what is required to relieve it. Still, withdrawal pains from few if any existing drugs seem to qualify. Clearly, the foregoing rationale has no conceivable application to those drugs that do not give rise to unpleasant withdrawal symptoms. Hallucinogens, such as LSD, provide the clearest examples. Cessation of use—even prolonged and extensive use—simply does not involve withdrawal. Only slightly more troublesome is the case of marijuana. Even high-dose users of marijuana rarely experience withdrawal. Those symptoms that occur are mild and transitory; their severity is almost certainly less than or equal to that of persons addicted to caffeine. In such cases, a model of internal duress cannot begin to explain why Betty is nonautonomous.

74. See Lester Grinspoon and James Bakalar, Psychedelic Drugs Reconsidered (New York: Lindesmith Center, 1997).
75. See Zimmer and Morgan, Marijuana Myths, p. 28, especially footnote 12.
76. Ibid., pp. 28–29, especially footnotes 13 and 21.
The situation is not very different if drug X is cocaine. Even when smoked as crack, the cessation of cocaine does not cause especially intense physical withdrawal symptoms;\textsuperscript{77} heavy users who quit typically experience mere anxiety and irritation.\textsuperscript{78} Nonetheless, cocaine use tends to be extraordinarily compulsive, and heavy users often persist despite adverse consequences. These findings about cocaine led some researchers to draw a distinction between two alleged \textit{kinds} of addictions—psychological and physical.\textsuperscript{79} I am unclear, however, how the phenomenon of psychological addiction is helpful in providing an explanation of why Betty “can’t quit” that would enable us to understand why her use of cocaine has undermined her autonomy. The label “psychological addiction” does nothing more than to describe her compulsive behavior; it does not explain \textit{why} she behaves as she does.

Opiates may be the only illicit drugs that give rise to withdrawal symptoms of sufficient severity that addicts might be said to have “no choice” but to persist in their use. Even in these cases, however, the empirical evidence is far from conclusive that addicts suffer from internal duress. The severity of heroin withdrawal is frequently described as roughly comparable to the symptoms of a one-week flu or a bad cold.\textsuperscript{80} At worst, these symptoms include some combination of vomiting, chills, diarrhea, nausea, irritation, insomnia, headache, and the like. Reasonable minds may differ about whether the unwillingness to endure these symptoms supports the judgment that heroin addicts have “no choice” but to persist and thus have lost significant amounts of their autonomy.\textsuperscript{81}

Perhaps addiction undermines autonomy for some reason other than that the severity of withdrawal symptoms gives rise to internal duress. In any event, in what follows I will concede rather than further question the critical point that Betty is largely nonautonomous. My central concern is to explore the implications of this concession for neutralist liber-

\textsuperscript{77} See Craig Reinerman and Harry Levine, eds., \textit{Crack in America} (Berkeley: University of California Press, 1997).

\textsuperscript{78} See Jerome Platt, \textit{Cocaine Addiction} (Cambridge, MA: Harvard University Press, 1997), Chap. 3.


\textsuperscript{81} For further thoughts, see Douglas Husák, “Addiction and Criminal Liability,” \textit{Law and Philosophy} 18 (1999): 655.
alism. My general strategy is to challenge how this concession might be thought to provide a good reason to criminalize the use of the particular drug X to which Betty is addicted. I will argue that a liberal state that adopts the neutrality constraint in order to protect autonomy probably lacks sufficient reason to criminalize the use of illicit drugs, despite the existence of nonautonomous addicts like Betty. My argument has two parts. The first is largely empirical; the second is mostly normative. The empirical component is that Betty represents a worst-case scenario to which few recreational drug users conform. The normative component is that autonomy is unlikely to be properly valued in a liberal theory that generalizes from cases such as Betty’s and proscribes the use of X from well-intentioned attempts to protect autonomy.

I begin with the empirical component. How are most drug users unlike Betty? My main reply to this question does not cite those persons whose frequent drug use is equally compulsive and self-destructive, but who differ from Betty by “identifying” with their drug use. As Harry Frankfurt has pointed out, some drug addicts identify with their first-order desire to use drugs.82 That is, they lack a second-order desire to quit. The fact that some addicts identify with their drug use casts doubt on the judgment that their lives are not their own creation. I do not, however, rest my case on examples of “willing addicts.” The more obvious reason to believe that few recreational drug users resemble Betty is that relatively few users of any given drug ever become addicted.83 Suppose that drug X is alcohol. I assume that neutralist liberals oppose the proscription of alcohol use, notwithstanding the plight of alcoholics like Betty. The most compelling (principled) reason to oppose the prohibition of alcohol is that the vast majority of users are social drinkers who do not become addicted and lose much of their autonomy.

Consider Beverly, a mature social drinker whose use of alcohol exemplifies none of the self-destructive characteristics of Betty’s. She has consumed moderate amounts of alcohol on a fairly regular basis for much of the past thirty years. She continues to enjoy the way it makes her feel and the role it plays in her social life. The prohibition of alcohol

83. See the discussion in Morse, “Hooked on Hype.” Nicotine may be an exception to this generalization.
certainly cannot be justified as a means to protect Beverly's autonomy. To the contrary, prohibition would undermine her opportunity to satisfy a taste or preference that I have argued is part of her conception of the good life. The prohibition of alcohol would, I think, disregard Beverly's autonomy. A proponent of prohibition must be prepared to disregard Beverly's autonomy in order to attain some further objective. That is, prohibition would sacrifice Beverly's freedom to pursue her conception of the good in order to achieve some alleged greater good.

What greater good could possibly justify this sacrifice and disregard of Beverly's autonomy? The answer cannot be that the use of alcohol must be punished to protect Betty's autonomy. Betty is already an addict. A prohibition of alcohol would result in punishing Betty as well as Beverly; Betty's addiction would not constitute a defense for her crime of use. Punishment would only further diminish her autonomy; it would drastically reduce her remaining opportunities to make her own life. It is hard to see how punishing Betty for her addictive use of alcohol could be defended as a means to protect her autonomy.

Instead, the argument for criminalization is not that punishment is justified to protect the autonomy of Betty, who is already addicted—or the autonomy of Beverly, who will never become addicted—but rather to protect the autonomy of yet a third person I will name Beth. Although Beth does not use X at the present time, she is described by the following counterfactual: Beth would become addicted to X (and thereby lose much of her autonomy) unless the use of X were criminalized—but not otherwise. Thus, the greater good that allegedly justifies the punishment of addicts and nonaddicts alike is the goal of preventing persons like Beth from becoming addicts and losing much of their autonomy if the use of X were permitted. The argument for criminalization is that the autonomy of both Betty and Beverly should be sacrificed in order to protect the autonomy of Beth. Can this trade-off be justified? Even a relatively small probability that a nonuser of X will come to resemble Betty is troublesome, since the extent to which Betty's use impairs her autonomy seems far greater than the extent to which Beverly's use enhances her autonomy. What progress can be made in deciding whether and under what conditions a neutralist liberal should accept the foregoing trade-off and proscribe the use of X?

Notice the statistic that is most relevant to the inquiry. Beth is unlike four other kinds of nonusers of X. Many nonusers would not try X even
if its use were permitted. Many other nonusers who would try X would come to resemble Beverly rather than Betty if its use were permitted. Still other nonusers who would try X would come to resemble Beverly rather than Betty if its use were proscribed. Finally, other nonusers who would try X would come to resemble Betty rather than Beverly if its use were proscribed. Beth might be confused with one of these four kinds of nonusers, but her dissimilarity from each is crucial. Beth is a nonuser who would become addicted to X (and thus come to resemble Betty rather than Beverly) if and only if its use were permitted. Thus, the statistic that is most relevant to the inquiry is the increase in the number of nonusers who would become users and would become addicted in a possible world in which X is permitted relative to that in a possible world in which X is proscribed. I will call this statistic the *criminalization difference*.

How can the criminalization difference possibly be estimated in the respective cases of marijuana, cocaine, and heroin? Isn’t the criminalization difference much higher for each of these illicit drugs than for alcohol? In the case of marijuana, the answer is almost certainly negative. Almost no users of marijuana remotely resemble Betty in having lost significant amounts of their autonomy. There is no reason to believe that any nonusers would come to resemble Betty and lose their autonomy if marijuana proscriptions were repealed. I am at a loss to identify any greater good related to the protection of autonomy that could possibly justify the punishment of persons who use marijuana.

But wouldn’t the decriminalization of the use of cocaine and heroin lead to substantial increases in the number of addicts like Betty? The answer is unclear. I will mention only two of several problems that plague attempts to estimate the criminalization difference in the case of these two illicit drugs. First, the effects of drugs on users are not simply a function of pharmacology. These effects are also a function of the set of drug users and the *setting* of drug use. I cannot begin to describe here how expectations, mood, personality, and cultural conditions contribute to the effects of drugs. I conclude only that one cannot simply attribute to a given illicit drug the effects that persons who use it today

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84. Studies consistently indicate that the vast majority of nonusers of illicit drugs express little interest in experimentation, even if they were legally free to do so.

tend to experience in our climate of prohibition. If this climate were
altered, these effects would be likely to change dramatically. This real-
ization creates enormous complications. If the effects of drugs in the
present climate of prohibition should not be used to estimate the crim-
inalization difference for cocaine or heroin, what climate should be
used? In other words, what set and setting should provide the norm or
baseline by reference to which the criminalization difference should be
calculated? I have no answer to this difficult question.

The second problem in estimating the criminalization difference for
cocaine or heroin is as follows. The greater availability of some of those
drugs that are currently prohibited would be likely to change the pat-
terns of consumption of many of those drugs that are currently permit-
ted. The particular drugs that persons consume, and the effects these
drugs have on their lives, are almost certainly a function of what other
drugs are available to them. As Ethan Nadelmann has noted, “one of the
silver linings on the black cloud of greater drug use under different legal-
ization regimes is the prospect that less dangerous drugs would drive
out the more dangerous ones.”86 Thus, permitting persons to use a drug
that is relatively safe, such as marijuana, may actually decrease the crim-
inalization difference for more dangerous drugs such as cocaine and
heroin—as well as for alcohol. No one can hope to identify the criminal-
ization difference for a given drug X without knowing what drugs are
available to compete with X.

In light of these two problems, what can be said about the likelihood
that decriminalization will lead potential users of given illicit drugs to
become addicted and thus lose much of their autonomy? Conjectures
about the criminalization difference involve speculative inferences from
our actual world. Since the concept of addiction is so muddled, it is hard
to know what empirical evidence would best undermine allegations that
users of given illicit drugs are more likely than drinkers of alcohol to lose
their ability to create their own lives for significant periods of time. Still,
the following data must be taken into account when evaluating the two
illicit drugs typically regarded as the most addictive. According to the
most recent Household Survey on Drug Abuse, only 9 percent of the 1.1
percent of respondents who ever have used heroin have done so in the
past year. Comparable facts for cocaine are even more difficult to dis-

count. Less than 1 percent of all persons who ever have used cocaine have done so in the last month. That is, 99 percent of those who ever have experimented with cocaine are not habitual users today.\textsuperscript{87} A large proportion of frequent users quickly progressed to lower levels of consumption or quit completely. Generally, illicit drug use is concentrated in a very specific part of the population—persons aged 16 to 28. Soon thereafter, most persons “mature out” of their illicit drug use.\textsuperscript{88} In short, the vast majority of persons who ever have tried cocaine or heroin have stopped using them; most did so without treatment. These are not the data that one would anticipate if the criminalization difference for cocaine or heroin were very high.

I conclude that for the most well-known illicit recreational drugs, the criminalization difference is probably low. This quasi-empirical claim, of course, does not prove that proscriptions of drug use cannot be justified in order to protect the autonomy of the Beths of the world. Thus, I move to a normative consideration. How must the value of autonomy be conceptualized in order to justify the trade-off in question? Fortunately, I need not produce a detailed account of the value of autonomy in order to begin to answer this question. Instead, I need only distinguish two different kinds of accounts. According to consequentialist accounts, autonomy is a value to be maximized. According to deontological accounts, the value of autonomy functions as a constraint on the proscriptions a state may enact. Any attempt to justify drug prohibitions that generalizes from the plight of Betty and disregards the situation of Beverly in order to safeguard the autonomy of Beth is almost certainly committed to a consequentialist account of the value of autonomy. If such accounts are inferior to their deontological competitors, any suggestion that the autonomy of the Beverlys and the Bettys of the world should be sacrificed in order to protect the autonomy of the Beths will fail.

It is important to become clear about the kind of trade-off that would be involved in a decision to proscribe the use of drug X in order to protect Beth’s autonomy. Trade-offs might be intrapersonal or interpersonal. Although each kind of trade-off is worrisome, the former seems

\textsuperscript{87} Household Survey on Drug Abuse (1996).
\textsuperscript{88} See Gerald Bachman, et al., Smoking, Drinking and Drug Use in Young Adulthood (Mahwah: L. Erlbaum Associates, 1997).
far less problematic than the latter. Perhaps the autonomy of a given person is a good to be maximized throughout her lifetime. If so, the autonomy of a person may sometimes be infringed to enhance her subsequent ability to create her own life. In the present context, however, the trade-off is interpersonal—the autonomy of Beverly and Betty is sacrificed not for the sake of their greater autonomy overall, but to protect the autonomy of a different person.

No one should insist that interpersonal trade-offs of autonomy are never justifiable. At some threshold, if the criminalization difference were sufficiently high, such trade-offs would be necessary. Still, interpersonal trade-offs are antithetical to a liberal tradition in which autonomy is highly valued. On this matter, liberals are likely to think of the value of autonomy in much the same way that they have thought about the value of rights. Liberals should demand more than a simple net gain of autonomy throughout society before they allow the sacrifices exacted by these interpersonal trade-offs. A theory that conceptualizes the value of autonomy (or the value of rights) as a good to be maximized throughout society is not easily recognizable as liberal. A theorist who subscribes to the neutrality constraint should be very skeptical of such trade-offs, especially if the criminalization difference is as low as I have suggested. I conclude that neutralist liberals have both empirical as well as normative reasons to resist invitations to protect autonomy by enacting proscriptions of recreational drug use.

CONCLUSION

I have defended a presumptive case in favor of permitting persons to use drugs for recreational purposes in a liberal state that requires neutrality toward reasonable conceptions of the good life—especially when the neutrality constraint is derived from the value of personal autonomy. Despite the several respects in which my arguments may be vulnerable, I hope to have provided reason to believe that a neutralist liberal should not allow the state to punish persons whose conception of the good includes the recreational use of drugs. In the absence of a rebuttal to my arguments, liberals who espouse neutrality should have a ready solution to the crisis of incarceration with which I began. They should think that significant numbers of persons recently imprisoned are being punished
without justification.\footnote{89} Why have they been so silent on this issue? The
time has come for neutralist liberals to be more vocal in opposing this
massive injustice.

\footnote{89. If the “war on drugs” is unjustifiable, why does it continue to be waged? No single
answer can be given. An important factor, however, is the financial gain to law-enforce-
ment agencies that assign a high priority to the apprehension of drug offenders. See Eric
Blumenson and Eva Nilsen, “Policing for Profit: The Drug War’s Hidden Economic