

# Justifying Hard Drug Prohibition from Soft Legal Paternalism

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## **Abstract**

In this essay, I appeal to the Principle of Legal Paternalism in order to justify the State in restricting individuals' access to drugs. Importantly, instead of providing a separate philosophical defence for Legal Paternalism, I accept the Harm Principle as it is and aim to show that Soft Legal Paternalism, which is perfectly in line with the Harm Principle, is strong enough to justify drug prohibition. By considering the ways in which the decision to take drugs might fail to be genuinely voluntary, my strategy in this essay is to raise the burden for permissible drug use incrementally. While an outright philosophical justification for prohibition remains challenging, I show that the extremely high bar of permissible drug usage warrants access to drugs an exception rather than the normal. As a matter of efficient public policy, the State is justified to

continue current prohibition on hard drugs.

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The Harm Principle (HP) holds that a necessary condition for State to exercise coercion against individuals is to prevent harm to others. The Principle of Legal Paternalism (LP) argues that even in the absence of third-party harms as demanded by HP, the State is still justified to limit personal liberty in order to prevent self-damaging acts. In justifying restriction on individuals' access to drugs, as Hugh LaFollette notes (2002), the State appeals simultaneously to harm to others and harm to oneself. In the former case, the principle at stake, HP, is widely accepted, but researchers struggle to prove 1) harm to others is a direct result of drug use and 2) comparatively, keeping drugs illegal produce less third-party harm than a legalized scheme. In the latter case, while we have overwhelming evidence about the drugs' harm to an individual's physical, psychological and social wellbeing (Wilson 2002), LP as a general principle remains controversial and suffers from a lack of cogent philosophical justification.

For the purpose of this essay, I take HP without objection. I provide several soft LP considerations which are compatible with HP. While none of the consideration is capable of denying individuals' access to drugs conclusively, I argue that each raises the bar of permissible drug use significantly. When taken together, LP justifies current prohibition of drugs as a matter of efficient public policy.

To be abundantly clear, the drugs I refer to are strong hard drugs, as opposed to marginal cases such as marijuana and LSD. Hard drugs<sup>1</sup> are substances that, even in small doses, fundamentally interfere with the natural functioning of body metabolism and brain chemistry, result in physical addiction and severe, irreversible physical harm.

Soft LP concedes to HP that purely self-regarding choices, regardless of consequence, should be left alone, but argues that if the choice is not voluntary, the State is justified to intervene. There are several reasons why a choice might fail to be truly autonomous or voluntary.

1) The choice may not be informed. Say S wants to cut down weight, but mistakenly believes that heroin's sole medical effect is weight-loss. Clearly, S's choice to take heroin is not meaningfully autonomous, as S is not fulfilling the relevant preference (Goodin 2002) of cutting down weight. But how do we know if S is fully informed? Provided that drugs inflicts immense harm to one's self, the very fact that S wants heroin can be seen as a strong prima facie evidence of misinformation, because, statistically speaking, most people, after learning relevant facts, would not want to consume. As Mill concurs, if I see a stranger attempting to cross an unsafe bridge, and there is no time to warn them, I am justified to forcibly stop him from crossing, "for liberty consists in doing what one desires, and he

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<sup>1</sup> I am aware that alcohol and nicotine are technically hard drugs. I will focus, however, only on "strong" hard drugs like heroin because of sheer magnitudes of harm they inflict on human body - an empirical assumption that will be made throughout this essay.

does not desire to fall into the river.” (Mill 2010). In this regard, soft LP warrants some restriction on access to drugs. At the minimum, it calls for better drug education and some sort of regulatory scheme for drug-users similar to but more stringent than that of cigarette, considering the greater harm of drugs.

2) The person might not be equipped with adequate mental faculty. If S is a young child, or insane, or in some other inadequate mental state at the time of action, the State has good reason to intervene in order to prevent unwitting self-harm. This adds to the strength of presumption against drug use, as the harm incurred by drug use similarly can be considered as potential evidence for mental incompetency. To use drugs, S has an additional burden of proof. Moreover, the neurological effect of addiction, which rewinds the reward system in the brain and leaves strong withdrawal effects, significantly curtails S’s mental faculty. I do not argue here that at all times a drug addict is incapable of making a decision. However, when violent symptoms of withdrawal kick in, when the individual suffers from confusion, seizures, and many other physical and neurological deficiencies, I contend S’s mental faculty is so severely deprived that invites intervention. S is making a meaningfully autonomous choice to consume drugs only when they is not affected by violent withdrawal effects. The State now is justified to place stronger restriction on access to drugs.

Opponents might object that initial consent is sufficient and S should not be required to stay “sober” each time they want heroin. What

matters is that before using heroin for the first time, S is informed of the fact that heroin is highly addictive. If S understands ex-ante that the symptoms of withdrawal is so powerful that they would, at that moment, suffer from severe mental deficiency and become vulnerable to harmful decisions, S is nevertheless making a voluntary choice. According to HP then, S must be left alone with heroin.

In response, I point out that human preferences are dynamically inconsistent. It is dubious in principle that present-self can meaningfully commit future-self to a self-damaging decision that they may not later alter. In fact, many addicts regret and want to quit. Their ability to fulfil such preference, however, is terribly restricted, because of the way drugs physically change their brains. Most people who get into heroin never come out clean (inferred from Wilson 2002). Importantly, this response can be seen as a departure from HP because it essentially argues that even a fully voluntary self-regarding decision may allow intervention. Supporters of this argument like to point towards Mill's objection to slavery, who argued that "the principle of freedom cannot require that he should be free not to be free" (Mill 2010). If the total abdication of liberty is not permissible, it seems that the partial abdication of liberty warrants at least partial restriction. I argue that the loss of liberty in drug addiction is even greater than voluntary slavery. Note voluntary slavery is, after all, a contract, which could always be revoked. Certainly, if the State is willing to enforce such contract, the cost of running away from one's master is exceptionally high. Nevertheless, because the free will inside one's head can never be

denied by a contract, a slave always retains the freedom to be free again (as a matter of fact, throughout history many slaves broke free from their bondages, and, through the use of their unfettered free will, contributed tremendously to the society). In contrast, physical addiction gets into one's head and forever chains the user to its chemical stimulus. With current technology, treating addiction is paramount to treating cancer. There is no cure. Some might argue a slave loses control in all aspects of life, but addiction only forces one thing upon the individual, namely, drug-taking. However, the truth is that drugs consume people completely. Addicts lose interests in all other areas of life and desire nothing but drugs. Addicts steal, sell their bodies, and lie to loved ones ? maybe a lucky few still work normal jobs ? but whatever they do, they do it with the sole purpose to obtain money for more drugs. In a rare moment of clarity, they regret but their brains are far too damaged to materialize any dissent. Consequently, if voluntary slavery is not permissible, drugs are too not permissible.

Hard-boiled defenders of HP might discard Mill<sup>2</sup> and accept voluntary slavery as permissible. By and large, the arguments for such extreme accounts of individual freedom appeal to notions of self-ownership and human beings as inviolable ends-in-themselves (Nozick 2013). Bound by deontological constraints, the State must respect the choices and life plans individuals make for themselves,

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<sup>2</sup> It is tricky but possible to reconcile Mill's position with HP. Yet such attempts inevitably allow my previous argument for restriction on drugs. For brevity, I omit these considerations.

even if such choices will in the future restrict the autonomy of their later selves. Suicide is often cited as an example here. By choosing to commit suicide, an individual annihilates his or her future autonomy once and for all. Yet it seems difficult to justify State prohibition on suicide. Similarly, if we are truly serious about the diversity of values among people, it is unimaginable that someone would genuinely hate freedom and enjoy obeying commands. S might have a well-thought-out life philosophy which values addiction and disdains liberty. For such a person, it seems we have no more ground to deny drugs from them, lest we propose a stronger LP which directly challenges HP<sup>3</sup> (Feinberg 1971).

Fortunately, it is safe to claim that such person is extremely few and far between. Crucially, the criteria for which access to drugs should be granted depends on subjective values, which is challenging and costly to verify externally. Even if the State designs some questionnaire which identifies those who do not care about liberty, others can easily emulate the attitude as an excuse to get drugs, without really believing in a single a word of it. In other words, they take drugs but never consented to be harmed and enslaved by addiction. (In fact, one can think of the extensive network of support and counselling against suicide precisely as the filter mechanism to prevent false consent to suicide.) All in all, the liberty gained by the few is outweighed by the loss of liberty for those who are wrongly allowed drugs. Law necessarily involves trade-offs (Husak 2003). In rear-end collisions, for example, the rear-end driver is almost always

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<sup>3</sup> Again, doable, but unfit for the length of this essay.

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held 100% at fault legally, whereas in reality, many other parties are often to be blamed. We design such law simply because the cost of determining precise responsibility is not worth the benefit. Similarly, in conclusion, I argue that while uncontroversial forms of LP fail to justify total restriction philosophically, as a matter of efficient legislation, the State is justified to continue current prohibition of drugs.



## References

- [1] Boss, Judith A. (2008). *Analyzing Moral Issues*, New York, McGraw-Hill.
- [2] Feinberg, Joel. (1971). "Legal Paternalism," *Canadian Journal of Philosophy* 1.1: 105- 24.
- [3] Husak, Douglas N. (2003). "Legal Paternalism." *The Oxford Handbook of Practical Ethics*: 387-412.
- [4] Mill, John Stuart. (2010). *On Liberty*. London, Penguin.
- [5] Nozick, Robert. (2013). *Anarchy, State, and Utopia*. New York, Penguin.
- [6] Shapiro, Ian. (2010). "Limits of the Neoclassical Synthesis." *The Moral Foundations of Politics*. Yale University, New Haven. Open Yale Courses.
- [7] John Stuart Mill, 'Freedom of Action'.
- [8] James Q. Wilson, 'Against the Legalization of Drugs'
- [9] William F. Buckley Jr, et al. 'The War on Drugs is Lost'
- [10] Robert E. Goodin, 'Permissible Paternalism: Saving Smokers From Themselves'
- [11] All in Hugh LaFollette (ed.) *Ethics in Practice: An Anthology*. 2nd edition. Blackwell Publishing, 2002. Pp. 287-312.

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