

The Harm of Drug Trafficking: Is There Room for Serious Debate?

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In every society there are some acts considered beyond the pale. They are deemed so inherently harmful that they must be criminalized with severe sanctions.¹ Such acts typically include violent deeds like murder, torture, and sexual assault. These core offences are held to have “manifest criminality”²; they are so wrong that it seems absurd to consider the moral legitimacy or practical merits of their prohibition. The legitimacy and/or efficiency of their criminalization is not a matter up for debate. Imagine if someone argued that the act of killing another human should be decriminalized because it unduly restricts the freedom of murderers or because it is too difficult or expensive to enforce or because it does not successfully deter future killings. Most of us would consider such a claim morally repugnant, not worthy of serious consideration.

Illicit-drug trafficking (that is, the production, transport, wholesale, and retail sale of psychoactive substances such as cannabis, opiates, coca, and amphetamines)³ is often considered to be one of these core criminal offences. The seri-

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¹ William Wilson, following George P. Fletcher, calls such acts the “core cases of criminal activity.” See William Wilson, “Impaired Voluntariness: The Variable Standards” (2003) 6 Buffalo Crim. L. Rev. 1011 at 1011. Also see generally George P. Fletcher, *Rethinking Criminal Law* (New York: Oxford University Press, 2000); Douglas Husak, “Crimes Outside the Core” (2003-2004) 39 Tulsa L. Rev. 755 [Husak, “Crimes Outside the Core”].

² According to Douglas Husak, an act is considered to have manifest criminality when “[n]eutral third-parties would be able to recognize the activity as dangerous and harmful without knowing the actor’s intention. The act must manifest the actor’s criminal purpose and typically constitutes an *unnerving threat to the order of community life*.” See Husak, “Crimes Outside the Core,” *ibid.* at 757 [emphasis added].

³ For the sake of simplicity, I describe all such supply-side activities as “drug trafficking.” I acknowledge that in doing so I sacrifice some conceptual accuracy, since in many legal regimes, policy makers, and academics distinguish between various supply-side activities. For a politi-

ousness of the harm of trafficking is frequently described as similar to that of violent crimes—policy makers, academics, and legal officials characterize trafficking as directly and significantly harmful to individuals, communities, and social institutions. Trafficking is considered patently dangerous and hazardous; an act that—regardless of the economic and human costs involved—must be deterred through severe criminal sanction.

This conception of drug trafficking is fairly modern. Trafficking was a lawful activity in almost every legal jurisdiction less than a century ago. In fact, drug trafficking was state-sponsored for much of the nineteenth century. During the first wave of psychoactive drug prohibition in the early twentieth century, the primary rationale for criminalization was not harmfulness, but immorality and deviance. In fact, the harm rationale did not become influential until the 1960s.

There is little contemporary literature on the nature and severity of the harm caused by drug trafficking.⁴ Peter Alldridge, in one of the few articles that seriously explores the wrongfulness of drug trafficking, points out that “drug offences are marginalized from the mainstream study of criminal law and criminal law theory.”⁵ The severe harmfulness of drug trafficking is now considered a truism. Questioning the harmfulness of trafficking is like wondering whether the world is flat or whether the sun will rise in the morning—it is a meritless inquiry.⁶ Thus, contemporary policy makers and legal officials feel no obligation to explain, qualify, or defend the claims of harm they use to justify severe punitive measures against drug traffickers.

It is this outright preclusion of serious debate that inspires my analysis. Following Alldridge, I consider the contemporary treatment of trafficking to be worrisome for the following reason: “on the one hand, very extensive resources are being devoted to the issue of drug dealing and, on the other, it is not clear exactly what is wrong with it.”⁷ There is a disturbing essentialism in play with respect to the significantly harmful character of drug trafficking. Essentialist claims should always provoke some degree of suspicion. Is the harm of drug trafficking really so self-evident?

cal economy analysis that distinguishes between these various supply-side activities see Pierre Kopp, *Political Economy of Illegal Drugs* (London: Routledge, 2004) at 1343.

⁴ Peter Alldridge is one of the few legal theorists to take on this subject. See Peter Alldridge, “Dealing with Drug Dealing” in A.P. Simester & A.T.H. Smith, eds., *Harm and Culpability* (Oxford: Clarendon Press, 1996) 239.

⁵ *Ibid.* at 240.

⁶ In the United States, policy makers pejoratively label those who question the severity of the harmfulness of illicit psychoactive drugs as “legalizers.” See e.g. the various public speeches by Drug Enforcement Administration (DEA) Administrator Karen P. Tandy, online: DEA <<http://www.dea.gov/speeches.html>>.

⁷ Alldridge, *supra* note 4 at 241.

The significant harm caused by an offence such as murder is fairly obvious—it directly, immediately, and non-consensually ends a human life (at least in archetypical cases). The moral legitimacy⁸ and practical efficacy of the state's decision to criminalize acts that count as murder are also fairly obvious (the moral legitimacy and/or practical efficacy of imposing severe sanctions such as capital punishment is, of course, another matter). The same cannot be said for the harm caused by drug trafficking. Even if drug use is harmful, there is no reason to assume that drug traffickers should be held causally responsible for such harm. Trafficking is, at its core, a commercial exchange of goods between two seemingly willing parties. Therefore, it is not self-evident that the state's criminalization of drug trafficking is either morally legitimate or practically reasonable. It is even less obvious that the severe penal sanctions for trafficking offences are either morally legitimate or practically reasonable.⁹ Certainly, neither of these claims can be proven *a priori*.

My aim in this paper is not to advocate the decriminalization of drug trafficking. Instead, I want to suggest that there is room for a reasoned debate on the moral legitimacy and practical merits of its prohibition and on possible alternatives to lengthy prison sentences for drug traffickers. In the first section of this paper, I will analyze possible justifications for the criminalization of human activities. There appears to be a hierarchy amongst such justifications. The concept

⁸ In acquiescence to the bulk of the literature on criminal and political theory, I will frequently refer to the “moral legitimacy” of criminalizing drug trafficking. Nevertheless, most of my underlying arguments hold for both moral subjectivists who deny the existence of objective moral values and non-cognitivists who deny the existence of moral facts. There is certainly good reason to question the practical efficacy of criminalizing drug offences and to wonder whether doing so is either reasonable or efficient.

⁹ Alldridge argues that a “morally defensible criminal law must have a satisfactory account both of what is wrong with drug dealing, and of the sentencing differentials made in drug offences.” See *supra* note 4 at 241. Statistical analyses relating to the criminalization of drug offences are eye opening. For example, in 2003 an estimated 250,900 state prison inmates (constituting 20.2% of all state prison inmates) were held for drug offences. In state prisons, nearly 24% of all black inmates and 23% of all Hispanic inmates were held for drug offences, compared to only 14% of all white inmates. Further, in 2003 an estimated 86,972 federal prison inmates (constituting 55% of all federal prison inmates) were held for drug offences, an increase from 52,782 in 1995. At the end of 2005, the U.S. Federal Prison System was operating at 34% over capacity. Further, in 2002 an estimated 156,000 local jail (typically temporary or short-term holding facilities) inmates across the United States (constituting 24.7% of all local jail inmates) were held for drug offences. Drug trafficking was the most serious offence for 12.1% of all jail inmates, the highest percentage of any offence. In local jails, nearly 16% of all black inmates and 14% of all Hispanic inmates were being held for drug trafficking, compared to only 9% of all white inmates. See Paige M. Harrison & Allen J. Beck, “Bulletin: Prisoners in 2005,” online: U.S. Department of Justice (U.S. DOJ) <<http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf>>; Doris J. James, “Special Report: Profile of Jail Inmates, 2002,” online: U.S. DOJ <<http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf>>.

of harmfulness is the least controversial and most intuitively persuasive rationale for criminalization—the state is sometimes morally and/or practically justified in preventing and prohibiting activities that cause harm to others. Next, I will outline the history of the prohibition of drug trafficking, tracing the evolution of its legal status from state-sponsored to criminal, and its social construction from acceptable to immoral to harmful. Finally, I will briefly reflect on the nature and the severity of the harm caused by drug trafficking. I will attempt to disentangle the harm caused by trafficking from the harm caused by its prohibition.

Inevitably, due to my expansive agenda, I will be unable to do justice to all of the issues and theories considered in this paper. My purpose, however, is not to suggest substantive answers to the problem of drug trafficking, but to provide a prolegomenon to further research and debate. My hope is that this paper will foster debate on some important issues all too often forgotten in the contemporary discourse on the prohibition of drug trafficking.

I. ON THE CRIMINALIZATION OF A HUMAN ACTIVITY

1. The State's Burden of Justifying Criminalization

For the purposes of this paper I will make the following two assumptions. First, that individual freedom should be the default position in political communities and that coercion or criminalization¹⁰ is the exceptional case that must be justified. Second, that it is possible to justify placing limits on human freedom. There are occasions where the state may be morally and/or practically justified in criminalizing particular actions or classes of action. Neither of these assumptions are patently unreasonable and, for better or for worse, both seem to coalesce with the moderate liberalism that underpins political decision-making in North America and Western Europe. Nevertheless, since neither assumption is universally held, it is worth briefly reflecting on them.

Primarily, in contemporary Western political and moral theory it is generally held that the state has the burden of justifying the criminalization of human activities.¹¹ As Joel Feinberg states, “the burden of proof rests on the shoulders of

¹⁰ I understand criminalization to be the state's: (i) unequivocal declaration that an action “should not be done”; and (ii) proscription of “contingent sanctions as supplementary reasons not to do it.” See A.P. Simester & A.T.H. Smith, eds., *Harm and Culpability* (Oxford, Clarendon Press, 1996) at 4. From this perspective, therefore, criminalization always involves coercion since it promises to punish those who do not abide by the state's wishes.

¹¹ This perspective can be traced back to the work of Enlightenment philosophers such as John Locke and Immanuel Kant, who promoted the moral primacy of the rational individual. In the common law tradition, this viewpoint goes back at least to the mid eighteenth century when William Blackstone published his *Commentaries on the Laws of England*. Blackstone wrote, for example, that “[i]n proportion to the importance of the criminal law, ought also to be the case and attention of the legislature in properly forming and enforcing it. It should be

the advocate of coercion.¹² By the “burden of the state,” I do not mean only its legal burden. If a legislative body does not exceed its constitutional authority when it criminalizes an action it might satisfy its legal burden—this does not mean that it satisfies its moral, logical, or practical burden, or that such criminalization is just, rational, or efficient.¹³

A persuasive argument for forcing the state to justify criminalization comes from the liberal philosophical tradition. Proponents of liberalism argue that there must be a general presumption in favour of individual freedom because liberty is fundamental to human flourishing.¹⁴ Douglas Husak calls this presumption the “principle of autonomy,” stating: “Only totalitarians deny that there is a sphere of behaviour beyond state interference ... Someone violates my autonomy by prohibiting me from doing what I have a moral right to do.”¹⁵ This principle is not particularly controversial and is well entrenched in contemporary constitutional and human rights law. It is also a foundational assumption in many Western political and legal theories. Humans function best when they enjoy some measure of individual freedom. My position in this paper adheres to the principle of autonomy, and I shall assume that morality and/or practical efficacy dic-

founded upon principles that are permanent, uniform and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind.” See William Blackstone, *Commentaries on the Laws of England*, vol. 4 (1765-1769) at 2-3.

¹² Joel Feinberg, *Social Philosophy* (Englewood Cliffs, NJ: Prentice-Hall, 1973) at 22 [Feinberg, *Social Philosophy*].

¹³ The state’s requirement to justify criminalization has been constitutionally entrenched in Canada under s.7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”) [*Charter*]. Section 7 of the *Charter* was considered in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 [*Rodriguez*], where Sopinka J. at stated: “Where the deprivation of the right in question does little or nothing to enhance the state’s interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual’s rights will have been deprived for no valid purpose” (594-95). However, the Supreme Court of Canada has held that the state’s constitutionally entrenched burden to justify criminalization is quite low. In *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, the majority held that Parliament must only demonstrate that the harm of an activity is “not *de minimis*” or is “not [in]significant or trivial” and need not show that the harm is “serious and substantial” (para. 133) [*Malmo-Levine*].

¹⁴ See e.g. J.S. Mill, *On Liberty*, ed. by Gertrude Himmelfarb (London: Penguin Books, 1974).

¹⁵ Douglas N. Husak, *Drugs and Rights* (Cambridge: Cambridge University Press, 1992) at 81 [Husak, *Drugs and Rights*]. On the nature of autonomy also see R.P. Wolff, “The Conflict Between Authority and Autonomy,” in Joseph Raz, ed., *Authority* (New York: New York University Press, 1990) 20; Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1990); and Joseph Raz, *Morality of Freedom* (Oxford: Clarendon Press, 1986).

tate that humans should be allowed to do something unless there is *good reason* to prevent them from doing that thing.

This is not to say that criminalization is only morally permissible or practically reasonable in the most exceptional circumstances. A *good reason* is just that, a reason that rests outside the *de minimis* range that is not currently overridden by any other known conflicting reasons¹⁶; it is not so high a standard that individual freedom cannot be periodically or even routinely curtailed for the collective good of the community.¹⁷

Another reason why the justificatory burden of criminalization should lie with the state is that the enforcement of criminal law—and, specifically, the use of incarceration and capital punishment—is the most coercive aspect of a state’s domestic power.¹⁸ Legal theorist Herbert Packer points out that “[t]he criminal sanction is the law’s ultimate threat. Being punished for a crime is different from being regulated in the public interest, or being forced to compensate another who has been injured by one’s conduct.”¹⁹ Likewise, the South African Law Commission, undoubtedly paraphrasing American legal scholar Ernst Freund,

¹⁶ Joseph Raz has called these sorts of reasons “conclusive reasons” and distinguishes them from “absolute reasons”, which can never be overridden by conflicting reasons. See Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999) at 27. My analysis in this paper relies on a “rough and ready” version of Raz’s approach to practical reasoning in *Practical Reason in Norms*.

¹⁷ Most mainstream proponents of liberalism acknowledge that there are limits to human freedom. There is general agreement that the state should, on occasion, forcefully limit this freedom. The primary disagreement among liberal theorists, of course, is *when* the state should limit freedom and for what reasons. There are those, such as anarchists and, to a lesser extent, libertarians, who would disagree that the state can legitimately limit individual freedom. On the contemporary debate on the limits of liberty see e.g. F.A. Hayek, *The Constitution of Liberty* (Chicago: Gateway Editions, 1960); R. Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); and G. A. Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995).

¹⁸ As Norval Morris states, “The real question is this: What is the criminal law good for?” See Norval Morris, “The Overreach of the Criminal Law” (1975) *Acta Juridica* 40 at 42. I mention capital punishment because drug trafficking is (or was until recently) a capital offence in states such as China, Iran, Malaysia, Saudi Arabia, Singapore, Syria, and Thailand. As well, in many U.S. states, the fact that a murder is related to drug trafficking activities is held to be an aggravating factor that justifies a capital sentence. On capital punishment and drug trafficking see e.g. M. Cherif Bassiouni, “The International Narcotics Control Scheme,” in M. Cherif Bassiouni, ed., *International Criminal Law: Crimes*, vol. 1 (Ardsley, N.Y.: Transnational Publishers, 1980) 507 at 522; Ariane M. Schreiber, “States That Kill: Discretion and the Death Penalty - A Worldwide Perspective” (1996) 29 *Cornell Int’l L.J.* 263 at 273-74; and Roger Hood, “The Death Penalty: The USA in World Perspective” (1997) 6 *J. Transnat’l L. & Pol’y* 517 at 530-31.

¹⁹ Herber L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968) at 250.

states: "Not every standard of conduct that is fit to be observed is fit to be enforced through the law, more particularly the criminal law. This means that society should not be willing to utilize its 'most drastic legal weapon' to attempt to correct every type of deviant or antisocial conduct."²⁰ The state has a monopoly over a variety of less drastic social control measures, including taxation, regulatory fines, and tort law. Therefore, the state should be expected to explain why these lesser measures are not appropriate. Further, the existence of effective lesser measures may override any good reason we have for severely criminalizing drug trafficking.

2. Plausible Justifications for Criminalization

If criminalization is only morally permissible or practically reasonable when it is justified by a valid and undefeated reason, the next step is to determine the ways in which a state may justify the criminalization of a human activity. Joel Feinberg has helpfully set out the following taxonomy of justificatory principles for criminalizing human activities:

- (i) Preventing harm to other individuals ("the private harm principle");
- (ii) Preventing harm to beneficial public institutions ("the public harm principle");
- (iii) Preventing offence to other individuals ("the offence principle");
- (iv) Preventing selfharm ("legal paternalism");
- (v) Preventing immorality or sin ("legal moralism");
- (vi) Benefiting yourself ("extreme paternalism"); and
- (vii) Benefiting other individuals ("the welfare principle").²¹

Feinberg does not suggest that any of these principles are either necessary or sufficient to justify criminalization. Nor does he consider any of these principles to be mutually exclusive. He states that "the principles cannot be construed as stating sufficient conditions for legitimate interference with liberty, for even though the principle is satisfied in a given case, the general presumption against coercion might not be outweighed."²² In the following section of this paper I will examine some of these justificatory principles and consider whether they are necessary or sufficient for justifying the criminalization of drug trafficking.

²⁰ South African Law Commission, "Sexual Offences: The Substantive Law" (1999), online: Oliver Schreiner School of Law <<http://www.doj.gov.za/salrc.dpapers.htm>> at 58. For an exact quotation of Freund's statement see Morris, *supra* note 18 at 42; Philip Bean, ed., *Crime: Critical Concepts in Sociology* (New York: Routledge, 2003) at 23.

²¹ Feinberg, *Social Philosophy*, *supra* note 12 at 33-35.

²² *Ibid.* at 34.

(a) Harm Prevention as a Justification for Criminalization

The fact that an action is harmful to others is generally considered a good reason to limit an individual's right to perform such an action.²³ Broadly speaking, most people believe that the more harmful or injurious an action is, the stronger the justification is for prohibiting it. There are two important questions relevant to the concept of harm that are worth considering: (i) is it necessary that an action be harmful to justify its criminalization? (ii) is the fact that an action is harmful in itself sufficient to justify its criminalization?

One of the most influential theories on whether the harmfulness of an activity can justify its criminalization is the "harm principle." In the context of Feinberg's taxonomy described above, the "private harm principle" and the "public harm principle" would both fall under the scope of this general "harm principle." Although the harm principle can be traced back to the writings of Thomas Hobbes and John Locke,²⁴ it was most famously articulated by John Stuart Mill, who advocated it as a normative baseline that should "govern absolutely the dealings of society with the individual in the way of compulsion and control."²⁵ Mill articulates the harm principle as follows:

The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. *That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.* His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise, or even right.²⁶ [emphasis added]

Thus, the harm principle, as articulated by Mill, expressly argues that the only acceptable justification for criminalization is to prevent harm to others. Notice, however, that Mill does not suggest that harm is a *sufficient* justification for criminalization. Harm is only a *necessary* requirement for morally legitimate coercion. Therefore, from the perspective of the harm principle, the fact that an action is harmful does not necessarily mean that this action *should* be criminalized.²⁷ The problem, of course, is that the harm principle provides no guidance for determining which harms justify criminalization and which do not. Richard

²³ As Norval Morris states, "There is agreement that it is a function of criminal law to protect the citizen's person and property." See Morris, *supra* note 18 at 42.

²⁴ See Thomas Hobbes, *Leviathan*, ed. by Richard Tuck (Cambridge: Cambridge University Press, 1996) at 145-147; John Locke, *Two Treatises of Government*, ed. by Peter Laslett (Cambridge: Cambridge University Press, 1988) at 284.

²⁵ Mill, *supra* note 14 at 68.

²⁶ *Ibid.*

²⁷ Bernard E. Harcourt, "The Collapse of the Harm Principle" (1999) 90 J. Crim. L. & Crim. 109 at 114.

Epstein sees this omission as one of several “cracks in Mill’s edifice,” stating: “Mill’s classic statement asserts that self-protection is the sole justification for using either legal or social sanctions. But he does not articulate any test that indicates which sanctions should be imposed under what circumstances and why.”²⁸

The fact that the harm principle fails to consider quantitative or qualitative differences amongst harms is significant. To the extent that different types and levels of harm exist, we can argue that the most trivial harm should be criminalized, or that the severest crime should not, without violating the harm principle. Therefore, the harm principle cannot provide much substantive advice about whether an activity should be prohibited or not. As a result, policy makers and legal officials can exploit the harm principle by lumping all harmful activities into one category—acts that cause harm. They can avow that an act is harmful and count this as sufficient justification for severe criminalization without considering why, how, and to what extent that act is harmful. I contend that this is what has happened in the political and legal treatment of drug trafficking.

Certainly, harm prevention is a compelling justification for criminalization. But within criminal law there is a wide range of sentences, from minor fines to life imprisonment (and in some jurisdictions capital punishment). How are we to appropriately assign sentences to criminal offences if all we know about those offences is that they are harmful in some way? If drug trafficking is harmful, how is it harmful and how harmful is it? Should it be treated like murder, like petty theft, or somewhere in between? Is trafficking so harmful that there can be no reasoned debate about the practical merits of its criminalization? Is the harm caused by drug trafficking, whatever it may be, more effectively deterred by tax policy and/or tort law? My primary objective in the final section of this paper is to reflect on some of these questions.

(b) Other Moral Justifications for Criminalization

There are other plausible justifications, apart from harm prevention, for criminalizing human activities. In Canada, the Supreme Court recently held that the harm principle is not a principle of Canadian law. Departing from the views of John Stuart Mill, the Court ruled that harm is a sufficient justification for criminalization, but that an absence of harm does not bar criminalization.²⁹ The Court listed several offences—including cannibalism, bestiality, cruelty to ani-

²⁸ Richard A. Epstein, “The Harm Principle—And How it Grew” (1995) 45 U. Toronto L. J. 369 at 375.

²⁹ *Malmo-Levine*, *supra* note 13 at paras. 114-135. The majority held: “[W]e do not think that the absence of proven harm creates the unqualified barrier to legislative action that the appellants suggest. On the contrary, the state may sometimes be justified in criminalizing conduct that is either not harmful (in the sense contemplated by the harm principle), or that causes harm only to the accused” (*ibid.* at para. 115).

mals, and incest by consenting adults—that do not cause harm to humans but have been criminalized nonetheless.³⁰ Certainly, this ruling of the Court does not conclusively determine the outcome of my analysis; however, it suggests that there may be good reasons for prohibiting activities apart from their harmfulness.³¹ Therefore, it is worth considering whether there are potential justifications, other than harm prevention, for prohibiting drug trafficking.

Returning to Feinberg's taxonomy above, I shall now consider the other principles that can *prima facie* justify state coercion. Although this paper is not intended to be an exercise in analytical philosophy, I will attempt to illustrate how these justificatory principles are conceptually distinct from the harm principle. While there has been recently significant criticism, much of it justified, of analytical approaches in legal scholarship,³² I would argue that there is a need for conceptual clarity when justifying the criminalization of human activities. If we cannot precisely determine why a person thinks a particular act should be criminalized then we cannot accurately evaluate that person's reasons for advocating criminalization. Further, there is a need to cut through the rhetoric and prevent policy makers from erroneously conflating multiple, often irrelevant, justifications for the prohibition of drug trafficking. This is why Feinberg's taxonomy is so helpful, it provides a clear framework within which one can examine human activities and consider the various distinct ways in which they may be problematic.

The *legal paternalism* principle, and its goal of preventing harm-to-self, is relevant to justifying the criminalization of *drug use*³³; however, logically it does not seem to ground the decision to prohibit *drug trafficking*. Policy makers around the globe have never imposed severe criminal sanctions against traffickers because they fear for the health and safety of those traffickers. In fact, to attempt to jus-

³⁰ *Ibid.* at paras. 117-18.

³¹ Further, many influential legal and moral theorists have held that harm prevention is not the only valid and sufficient justification for criminalization. See e.g. J.F. Stephen, *A History of the Criminal Law of England*, vol. 2 (London: Macmillan, 1883); J.F. Stephen, *Liberty, Equality, Fraternity* (Indianapolis: Liberty Fund, 1993); Harry M. Clor, *Public Morality and Liberal Society: Essays on Decency, Law, and Pornography* (Notre Dame: University of Notre Dame Press, 1996); and Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1968).

³² For a recent overview and critique of analytical approaches in legal scholarship see Nicola Lacey, "Analytical Jurisprudence Versus Descriptive Sociology Revisited" (2006) 84 *Tex. L. Rev.* 945.

³³ There is extensive literature on legal paternalism with respect to drug use and abuse. See e.g. Husak, *Drugs and Rights*, *supra* note 15 at 130-44; Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self*, vol. 3 (Oxford: Oxford University Press, 1986) at 127-134 [Feinberg, *Harm to Self*].

tify the criminalization of drug trafficking using the principle of legal paternalism is to erroneously confuse and/or conflate this principle with the harm principle. It is to contend that drug traffickers should be punished for promoting the self-harm of users—that is, to make an argument from the harm principle using legal paternalism as a premise. I will address this argument in the final section of this paper.

A fortiori, like legal paternalism, *extreme paternalism* and the *welfare principle* are not relevant to the criminalization of drug trafficking. Extreme paternalism is different from legal paternalism in that, while the latter principle seeks to justify the coercion of a person to prevent harm to that person, the former principle seeks to justify the coercion of a person to benefit that person. Thus, while legal paternalism might justify prohibiting A from using certain drugs deemed harmful to A, extreme paternalism might justify forcing A to ingest or inject certain drugs deemed medically beneficial to A. Extreme paternalism is generally held to justify the mandatory education of children. The benefit of education is so significant to children that they should be forced to go to school until a certain age—it is for their own good.

In contrast to legal paternalism and extreme paternalism, the welfare principle seeks to justify the coercion of a person in order to benefit others within the community. This principle provides the traditional justification for mandatory taxation on income and property ownership. It might also coherently justify imposing sin taxes on drug trafficking profits. Nevertheless, to argue that drug trafficking should be prohibited to benefit others in the community is to erroneously conflate and/or confuse the welfare principle with the harm principle—the benefit that one is attempting to promote is the absence of drug-related harm. As such, legal paternalism, extreme paternalism, and the welfare principle can all be set aside for the purposes of my analysis.

The *offence principle* cannot be disposed of so easily. While legal paternalism, extreme paternalism, and the welfare principle are each logically distinct from the harm principle (and designed to address significantly different societal concerns), the logical foundations of the offence principle are substantially similar to those of the harm principle. Both the offence principle and harm principle are designed to prevent people from engaging in conduct that negatively impacts others. The only real distinctions between these principles are the nature and severity of such “negative impact.”

An action is offensive to someone when it causes that person to experience unwanted or unpleasant mental states.³⁴ A common example is the annoyance felt when neighbours play their music too loudly. Conduct that offends us is con-

³⁴ Joel Feinberg, *The Moral Limits of the Criminal Law: Offence to Others*, vol. 2 (Oxford: Oxford University Press, 1986) 1 [Feinberg, *Offence to Others*]. Feinberg lists some common examples of such mental states: “annoyance, disappointment, disgust, embarrassment ... fear, [and] anxiety” (*ibid.*).

duct that we dislike. In most cases such conduct does not “harm” us and we could probably tolerate it, we would just prefer not to. Not surprisingly, conduct that only violates the offence principle is generally considered less serious than conduct that violates the harm principle.³⁵ Clearly, if unwanted or unpleasant mental states count as harms, they are so trivial that they fall within the *de minimis* range.³⁶

Thus, the criminalization of merely offensive conduct is more controversial than the criminalization of harmful conduct. Nevertheless, in most communities there are many merely offensive acts that are criminalized.³⁷ For example, in New York City, over the past decade, there has been a crackdown on activities that violate the offence principle, or, as former Mayor Rudolph Giuliani describes them, “quality-of-life offences.”³⁸ On the other hand, acts that are criminalized for their offensive nature are generally considered trivial and the sanctions for unlawfully engaging in such acts are rarely severe.³⁹

With respect to justifying the criminalization of drug trafficking, the offence principle would most obviously be violated by drug dealing in public spaces. Many communities struggle with this problem. People are too afraid or disturbed to go into drug hotspots.⁴⁰ They are bothered when they have to interact with users strung out on drugs or have to refuse the persistent, and often aggressive,

³⁵ *Ibid.* at 2.

³⁶ See *Malmo-Levine*, *supra* note 13 at para. 133.

³⁷ In the Canadian *Criminal Code*, R.S.C. 1985, c.C-46 [*Criminal Code*], acts that violate the offence principle are generally categorized under the headings of “disorderly conduct” and “nuisances.” See especially ss.173-182. These sections criminalize activities such as vagrancy (s. 179), loitering (s. 175(1)(c)), and public nudity (s. 174).

³⁸ Harcourt states that Giuliani “has implemented a policy of zero-tolerance toward quality-of-life offences, and has vigorously enforced laws against public drinking, public urination, illegal peddling, squeegee solicitation, panhandling, prostitution, loitering, graffiti spraying, and turnstile jumping.” See Harcourt, *supra* note 27 at 110. Most of the activities targeted by Giuliani would violate the offence principle but not the harm principle (with the possible exceptions of graffiti spraying and turnstile jumping).

³⁹ In the *Criminal Code*, *supra* note 37, vagrancy, loitering, and public nudity are all classified as summary offences. Section 787(1) of the *Criminal Code* states: “Except where otherwise provided by law, every one who is convicted of an offence punishable on summary conviction is liable to a fine of *not more than two thousand dollars or to imprisonment for six months or to both*” [emphasis added].

⁴⁰ See e.g. Petti Fong & Frances Bula, “Crackdown targets drug dealers: Police strength tripled in the Downtown Eastside” *The Vancouver Sun* (8 April 2003) A1; Stephen Lock, “Junk Justice” *The Calgary Herald* (2 September 2002) A12; J.A., “Some Label All-Night Deli ‘Drug’ Store” *New York Times* (18 February 1996) CY7; and Catherine Dunphy, “Crack corner: Drugs are turning a vibrant slice of Toronto’s downtown into an urban wasteland” *Toronto Star* (20 February 1999) 1.

solicitations of dealers. Yet the public nuisance caused by drug dealing is clearly not the main reason that drug trafficking has been criminalized in almost every legal jurisdiction on earth over the past century. Further, the offensive presence of drug dealers on street corners is largely a side-effect of the drug control regime itself. Indeed, if drug trafficking only violated the offence principle then the current global drug control regime could never be practically or morally justified.

The final principle in Feinberg's taxonomy is *legal moralism*. Conceptually, the offence principle is closely connected to legal moralism, as the boundary between offensiveness and immorality is fuzzy. One of the core differences between the offence principle and legal moralism is that a merely offensive act is only offensive because of its public character. If this act was done in private, where nobody could observe it, it would no longer be problematic.⁴¹ By contrast, an immoral act is always wrong, regardless of where it takes place.⁴² It is the act itself that is wrong.

After the harm principle, legal moralism is considered, at least traditionally, to be the most persuasive rationale for the criminalization of a human activity. Indeed, the harm principle itself has significant moral underpinnings, as it is generally considered immoral to negligently, recklessly, and/or intentionally engage in an activity that causes harm to others.⁴³ Killing another human certainly violates the harm principle, but it is also generally considered an evil act—an unforgivable sin.⁴⁴

Legal moralism is distinct from the offence and harm principles, however, because it holds that acts that violate certain moral tenets may be criminalized regardless of whether they are otherwise harmful or offensive.⁴⁵ With respect to

⁴¹ Feinberg states: "If public nudity, public defecation, or public married intercourse are judged immoral by most people, it is obviously not because they are thought to be inherently wicked wherever and whenever they occur, but rather precisely because they offend those who witness them." See Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing*, vol. 4 (Oxford: Oxford University Press, 1986) at 15 [Feinberg, *Harmless Wrongdoing*].

⁴² Feinberg states: "the strict moralist typically holds that some harmless infractions of true morality are so heinous as to justify the punishment of the offender as an end in itself." *Ibid.* at 173.

⁴³ *Ibid.* at 13.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* at 173. An interesting argument has been made by twentieth century legal moralists, such as Devlin and Clor, that some acts that are immoral are also potentially harmful because they are corrosive to the social fabric of the community. Homosexual intercourse and pornography are two acts frequently held to fall under this category of moral offences that cause social harm. See Clor, *supra* note 31; Devlin, *supra* note 31. H.L.A. Hart was a strong opponent of this perspective and argued that the amount of moral consensus needed to maintain a society is quite minimal. See H.L.A. Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963). There is no space in this paper to consider Devlin and Clor's

justifying the criminalization of drug trafficking, the argument from legal moralism would likely rely on one of the two following claims: (i) that producing and selling psychoactive substances is an inherently evil and immoral act; or (ii) that producing and selling psychoactive substances is a significant violation of the moral standards entrenched in a particular community.

The former claim is based on the moral realist concept of "true morality," which Feinberg describes as "a system of rational norms that apply equally to all nations and communities, including standards for criticizing the conventional norms that may be established at a given time and place."⁴⁶ Contrastingly, the latter claim is based on the (potentially anti-realist) concept of "conventional morality."⁴⁷ Harry Clor describes conventional morality as the notion that "the civil community has a legitimate interest in discouraging some ways of life and encouraging others."⁴⁸ An act that violates conventional morality is not necessarily immoral per se, but is held to be immoral in the context of a particular human collective.

The debate on whether legal moralism alone can provide sufficient justification for the criminalization of human activities is beyond the scope of this paper. Certainly, many acts are criminalized, at least in part, because of their "immoral" nature.⁴⁹ On the other hand, the ontological and/or epistemological foundations of moral realist concepts such as true morality are far from uncontested,⁵⁰ and, as

claims in full; however, it seems that even if immoral activities can cause social harm as they claim, the severity of this harm is fairly trivial. Thus, the harm caused by immorality could never be a valid reason to rule out debate on the practical merits of criminalization. In fact, it seems that this type of harm should, if anything, prompt extensive debate. Therefore, even if drug trafficking causes social harm because of its immoral nature, this does not count as a significant obstacle to my analysis.

⁴⁶ Feinberg, *Harmless Wrongdoing*, *ibid.*

⁴⁷ Clor, *supra* note 31; Devlin, *supra* note 31.

⁴⁸ Clor, *ibid.* at 103.

⁴⁹ See e.g. s. 172(1) of the *Criminal Code*, *supra* note 37, which prohibits the corruption of children: "Every one who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

⁵⁰ There are various meta-ethical theories that reject the possibility of universal moral norms, including moral relativism and moral pluralism. For example, during the twentieth century, several distinguished philosophers, reacting to the horrors of Hitler's Germany and Stalin's Russia, promoted the concept of moral pluralism. These pluralists claimed, quite persuasively, that there are many equally valid (or, more precisely, incommensurable) ways of living life. In doing so, they put the rational validity and moral force of the concept of "true morality" into doubt. See e.g. Isaiah Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969); John Gray, *Two Faces of Liberalism* (Cambridge: Pol-

moral relativists regularly point out, the conventional morality of a community is constantly shifting (and may itself come into conflict with the conventional morality of other communities⁵¹). Nevertheless, I do not want to contend that upholding moral tenets is never, in itself, a sufficient justification for criminalization. Instead, I want to make the lesser claim that legal moralism is more controversial than the harm principle as a self-standing basis for criminalization. As described above, preventing harm is broadly accepted as a valid reason to permit state coercion. Contrastingly, there is significant disagreement regarding the legitimacy of criminalization based on legal moralism. Further, it is easier to get the members of a community to agree on what is harmful than on what is immoral. Thus, the legitimacy of criminalizing activities on purely moral grounds should be a matter of ongoing philosophical and, more importantly, political debate (if only to evaluate whether the community standards of morality have shifted).⁵² Even if legal moralism can justify criminalizing drug trafficking, it certainly cannot justify shutting down debate with respect to such criminalization.

As stated above, the central aim of my analysis is to determine whether drug trafficking is one of those core offences—like murder and sexual assault—that has the character of manifest criminality. Is drug trafficking so inherently wrong that the moral legitimacy and practical merits of its prohibition should not be considered a matter for serious public debate in the same way that the criminalization of drug use currently is? Having examined Feinberg's taxonomy in full, it seems that the harm principle is the only rationale that could plausibly justify shutting down debate on the practical merits of incarcerating drug traffickers for significant periods of time.

But what counts as harm? Is harm something that we can easily identify? Are some types of harm worse than others? Is harm subjectively or objectively determined? I will attempt to answer some of these questions in the final section of this paper. Such questions are important due to the current rhetorical paramountcy of "harm prevention." Over the course of the twentieth century, the rhetorical power of "harmfulness" has gradually supplanted the rhetorical power of "immorality." It is now considered much worse to hurt someone than to sin. Bernard Harcourt has critically analyzed the practical consequences of this rhe-

ity, 2002); and Sterling Lamprecht, "The Need for a Pluralistic Emphasis in Ethics" (1920) 17 J. Phil., Psych. & Sci. Methods 561.

⁵¹ Thus, with regard to conventional morality, Feinberg states: "If it is conventional morality to which the strict moralist refers, his argument may be dismissed quickly, for there is nothing in the idea of conventional morality as such that commands the respect he wishes. Established rules can be, and often have been, absurd, cruel, or unjust." See Feinberg, *Harmless Wrongdoing*, *supra* note 41 at 173. Also see Berlin, *ibid*.

⁵² We are seeing this sort of debate right now in North America with regard to the legalization of same-sex marriages, pornography, "soft" drug use, abortion, and prostitution.

torical shift in his article “The Collapse of the Harm Principle.”⁵³ Harcourt contends that “the focus on harm has become so pervasive that the concept of harm, today, is setting the very terms of contemporary debate.”⁵⁴

Certainly, as we shall see in the next section of this paper, the current discourse on drug trafficking and drug use focuses on the harmful nature of these activities. But considering the contemporary paramountcy of harm prevention and the large role that legal moralism played in justifying the initial criminalization of psychoactive substances, it is worth wondering whether arguments that characterize drug trafficking as significantly harmful, akin to violent crime, are moral claims in disguise, a wolf in sheep’s clothing.

II. A HISTORICAL ACCOUNT OF THE PROHIBITION OF DRUG TRAFFICKING

The contemporary global drug control regime has a timeless quality—as if the traffic of opiates, coca, and cannabis has been a scourge that policy-makers around the globe have battled since the dawn of time. Yet in North America and Western Europe, the prohibition of opiates, coca, and cannabis is barely a century old.⁵⁵ The earliest attempts at drug prohibition were city ordinances that prohibited opium use and were enacted in the late nineteenth century.⁵⁶ The earliest national drug control regimes were not established for several more dec-

⁵³ See Harcourt, *supra* note 27. In describing a contemporary temperance campaign in Chicago, Harcourt states: “The campaign focuses on the *harms* that liquor-related businesses produce in a neighbourhood, *not* on the morality or immorality of drinking” (*ibid.* at 110). Harcourt notes that a “similar shift in justification is evident in a wide range of debates over the regulation or prohibition of activities that have traditionally been associated with moral offence—from prostitution and pornography, to loitering and drug use, to homosexual and heterosexual conduct.” (*ibid.* at 109-110).

⁵⁴ *Ibid.* at 112.

⁵⁵ There are earlier, non-Western examples of domestic prohibition regimes targeting drug trafficking. As early as 1729, the Chinese government—enforcing the principles of Confucianism—had issued an edict criminalizing opium use and, in 1796, expanded this prohibition to include trafficking. See C. E. Terry, “The Development and Causes of Opium Addiction as a Social Problem” (1931) 4 *J. Ed. Soc.* 335 at 337; Richard Klein, “Law and Racism in an Asian Setting: An Analysis of the British Rule of Hong Kong” (1994-1995) 18 *Hastings Int’l & Comp. L. Rev.* 223 at 225. According to Maurice Collis, the British merchants in China during this period “thought the Chinese authorities a joke and put their Edicts in the waste-paper basket.” See Maurice Collis, *Foreign Mud: Being an Account of the Opium Imbroglia on Canton 1947* (Whitefish, MT: Kessinger Publishing, 2004) at 198.

⁵⁶ The first local opium ban in the United States was in San Francisco in 1875. See Richard Davenport-Hines, *The Pursuit of Oblivion: A Global History of Narcotics* (London: Norton & Company, 2002) at 14.

ades.⁵⁷ The enactment of these national regimes coincided with the first truly international treaty on drug control, the *International Opium Convention*, which was signed at The Hague in 1912.⁵⁸

For centuries, then, the psychoactive substances now widely targeted by various drug control regimes were all legally available on the open market.⁵⁹ In fact, these substances were once (and to some extent still are) considered to have important medicinal value. Richard Davenport-Hines points out that “many of the chief substances of this illicit business [of drug trafficking] have been used for thousands of years to treat physical pain or mental distress as well as for pleasure.”⁶⁰ These historical facts give rise to an obvious question—what happened?

1. An Age of State-Sponsored Drug Trafficking

Ethan Nadelmann, in a fascinating study on trends in global prohibition regimes, explains that the historical development of attitudes towards drug trafficking has followed “a common evolutionary pattern” found in the attitudes towards other criminalized activities such as piracy and slavery.⁶¹ According to Nadelmann, during the first stage of this evolutionary pattern, “most societies regard the targeted activity as entirely legitimate under certain conditions and

⁵⁷ According to Davenport-Hines, the first federal legislation in the United States was *The Harrison Narcotic Act* (1914), which “provided the model for drug prohibition legislation throughout the Western World.” See *ibid.* In Canada, the *Opium Act* (1908) predated the *Harrison Narcotic Act* and prohibited the trafficking of opium for non-medical use. Thus, in Canada, the prohibition of drug trafficking predated the prohibition of drug use, which did not come into effect until 1911, with the enactment of the *Opium and Drug Act*.

⁵⁸ The Convention was a follow-up to the Shanghai Commission (or International Opium Commission) of 1909, which was designed as a fact-finding meeting. See Vincenzo Ruggiero & Nigel South, *Eurodrugs: Drug Use, Markets and Trafficking in Europe* (London: UCL Press, 1995) at 99. The Commission was proposed by the United States and attended by China, France, Austria-Hungary, Germany, Italy, Japan, Great Britain, The Netherlands, Portugal, Persia, Siam, and Russia. For a first-hand account of the Commission and Convention by one of its key proponents, see Hamilton Wright, “The International Opium Commission” (1909) 3 *Am. J. Int’l L.* 648; Hamilton Wright, “The International Opium Commission: Part 2” (1909) 3 *Am. J. Int’l L.* 828; Hamilton Wright, “The International Opium Conference” (1912) 6 *Am. J. Int’l L.* 865; and Hamilton Wright, “The International Opium Conference: Part 2” (1913) 7 *Am. J. Int’l L.* 108.

⁵⁹ In fact, opium use has been traced as far back as 3100 BC, in southern Mesopotamia. See Davenport-Hines, *supra* note 56 at 30.

⁶⁰ *Ibid.* at 11. In his historical account of psychoactive drug use and prohibition, Davenport-Hines endeavours to explain “how licit medicines became the commodity of the world’s greatest illicit business” (*ibid.*).

⁶¹ Ethan A. Nadelmann, “Global Prohibition Regimes: The Evolution of Norms in International Society” (1990) 44 *Int’l Org.* 479 at 484.

with respect to certain groups of people; states often are the principal protagonists and abettors of the activity.⁶²

Early attitudes towards drug trafficking reflect Nadelmann's model and, during the nineteenth century, the trafficking of substances such as cocaine and opium was considered a legitimate enterprise, sponsored, for example, by the Dutch, Portuguese, American, and British governments.⁶³ Norman Ansley explains that "the earliest European trade in opium is attributed to the Portuguese who traded with China [beginning in] about 1729."⁶⁴ In fact, the British government, which was the main sponsor of opium trafficking between India and China, fought two short wars with China (the Opium War of 1840-42 and the Arrow War of 1858) to maintain its financial interest in the trade, which was threatened by China's prohibition of opium imports.⁶⁵ Subsequently, under the *Tientsin Treaty* of 1858, entered into by the United States, Britain, France, Russia, and China, the trade of opium was legally sanctioned through a tariff system.⁶⁶

2. The Shift from State-Sponsored to Immoral

Nadelmann explains that during the subsequent stages of this evolutionary pattern the targeted activity is delegitimized and redefined as immoral—as a social evil—by policy makers, legal officials, and moral entrepreneurs.⁶⁷ During this

⁶² *Ibid.*

⁶³ See Ruggiero & South, *supra* note 58 at 67 (on Dutch and British involvement in the drug trade); Davenport-Hines, *supra* note 56 at 45 (on Portuguese opium traders); and Norman Ansley, "International Efforts to Control Narcotics" (1959) 50 *J. Crim. L., Criminology, & Police Sci.* 105 at 105 (on the involvement of the British East India Company and American clipper ships in the opium trade).

⁶⁴ Ansley, *ibid.*

⁶⁵ J.B. Brown, "Politics of the Poppy: The Society for the Suppression of the Opium Trade, 1874-1916" (1973) 8 *J. Contemp. Hist.* 97 at 100; Nadelmann, *supra* note 61 at 503. According to Hamilton Wright, the British Indian government had a monopoly on "the growth of the poppy, the manufacture of opium, and its internal distribution and consumption." See Hamilton Wright, "The International Opium Commission," *supra* note 58 at 659.

⁶⁶ The *Tientsin Treaty* ended the Arrow War of 1858. See Ansley, *supra* note 63 at 105; Hamilton Wright, "The International Opium Commission," *ibid.* at 651, 655.

⁶⁷ Nadelmann, *supra* note 61 at 485. The term moral entrepreneur was likely coined by the sociologist Howard Becker. Moral entrepreneurs construct conceptions of deviance within a society. Their aim is to persuade political decision makers to make policy based on particular moral viewpoints. They contend that certain activities or social phenomena are morally problematic and warrant immediate attention and/or decisive action by the state. See e.g. Howard S. Becker, *Outsiders: Studies in the Sociology of Deviance* (New York: The Free Press, 1973).

stage, formal government involvement and support is withdrawn.⁶⁸ Eventually, if the efforts of moral entrepreneurs prove fruitful, there is a gradual criminalization of the activity by domestic governments. International conferences, institutions, and conventions play a “coordinating role” by promoting a standardized state approach.⁶⁹ According to Nadelmann, a “global prohibition regime now comes into existence.”⁷⁰

Western attitudes towards drug use and trafficking began to change in the mid 1800s. Gradually, recreational drug use was stigmatized as a decadent vice and drug addicts as “culprits incapable of self-control.”⁷¹ In Britain, this anti-drug sentiment gained strength during the Opium Wars with China.⁷² In 1874, a group of Quakers founded the Anglo-Oriental Society for the Suppression of the Opium Trade, which relentlessly lobbied the British government to prohibit (and cease its involvement in) drug trafficking.⁷³ By the early twentieth century, the British government had given into public pressure and abandoned its support for the opium trade. In 1906, the British House of Commons unanimously carried the following motion: “this House reaffirms its conviction that the Indo-Chinese opium trade is morally indefensible, and requests His Majesty’s government to take such steps as may be necessary for the bringing it to a speedy close.”⁷⁴

In North America, and especially the United States, the prohibition movement had a broader focus than in Europe, as moral entrepreneurs concerned themselves with a wide variety of activities—including alcohol and tobacco use and prostitution—which they deemed immoral.⁷⁵ Temperance organizations were formed throughout Canada and the United States and their influence was considerable.⁷⁶ They deemed every form of intoxication to be sinful⁷⁷; however, it

⁶⁸ Nadelmann, *ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Davenport-Hines, *supra* note 56 at 62. Davenport-Hines states that addiction “became more closely identified with sin and the self-creation of private hells. Addicts were represented as self-tormenting devils lost in eternal damnation” (*ibid.* at 63).

⁷² Nadelmann, *supra* note 61 at 503.

⁷³ *Ibid.*

⁷⁴ Hamilton Wright, “The International Opium Commission,” *supra* note 58 at 671. According to J.B. Brown, “The [British] Liberal M.P., Dr Rutherford, argued [in 1906] that for every Chinese soul saved for Heaven by the missionaries, the opium trade ‘sent ten to Hell.’” See Brown, *supra* note 65 at 102.

⁷⁵ Nadelmann, *supra* note 61 at 506.

⁷⁶ B.K. Alexander, Anton R.F. Schweighofer & Gary A. Daws, “American and Canadian Drug Policy: A Canadian Perspective,” in Warren K. Bickel & Richard J. DeGrandpre, eds., *Drug*

was opium use—which was held to be a vice of immigrants and an impediment to the spread of Christianity—that was initially targeted for prohibition (for largely xenophobic reasons).⁷⁸

In North America, two “cultural archetypes” developed with respect to psychoactive drugs.⁷⁹ Drug users were considered “dope fiends”—slaves to their drugs and a menace to decent society.⁸⁰ Drug traffickers (or dope peddlers, as they were called during that era) were considered even worse, and were blamed for turning otherwise innocent people into dope fiends. Canadian jurist and temperance advocate Emily Murphy described drug traffickers as the “active agents of the devil,”⁸¹ arguing, with significant rhetoric and flair, that “men and women who batten and fatten on the agony of the unfortunate drug-addict are palmerworms and human caterpillars who should be trodden underfoot like the despicable grubs that they are.”⁸²

3. Trafficking as Harmful in an Age of Prohibition

In less than a century, across much of the Western world, drug trafficking was transformed from a legitimate state-sponsored enterprise to the immoral work of the devil—one of the most despicable acts in civil society. The initial prohibition of drug trafficking in the early twentieth century was primarily justified using the principal of legal moralism. Undoubtedly, moral entrepreneurs in Europe and North America were concerned with the health risks associated with opium use⁸³; however, they seem to have been predominantly driven by the immoral

Policy and Human Nature: Psychological Perspectives on the Prevention, Management, and Treatment of Illicit Drug Abuse (New York: Plenum Press, 1996) 251 at 253. They state that, as a result of these temperance organizations, most psychoactive substances “came to be seen as menaces to personal virtue, social order, and civilization itself” (*ibid.* at 254).

⁷⁷ Davenport-Hines, *supra* note 56 at 165.

⁷⁸ Nadelmann, *supra* note 61 at 506; Brown, *supra* note 65 at 102. Nadelmann states that the use of opium “was perceived as symbolic of the immigrants’ decadence and as a potential weapon that could be used to undermine American society” (*ibid.*). During the 1890s this attitude was expanded to target cocaine as well and “both medical and lay comment in the USA became more hostile to both suppliers and users The cocaine habit was reconceived as a vice.” See Davenport-Hines, *ibid.* at 165.

⁷⁹ Alexander *et al.*, *supra* note 76 at 255.

⁸⁰ *Ibid.* at 255.

⁸¹ Emily Murphy, *The Black Candle* (Toronto: Coles, 1922) at 44.

⁸² *Ibid.* at 7.

⁸³ Alexander *et al.*, *supra* note 76, claim that psychoactive drugs were considered repugnant by moral entrepreneurs for a great deal of reasons, including “as the cause of widespread ill health” They go on to state: “Historians and sociologists speculate about why Americans and Canadians reacted so violently against drug use during this period. Although cocaine

character (the wickedness) of drug peddling. The real problem with drug trafficking—the reason it was criminalized—was that it promoted intemperance, sloth, sexual misbehaviour, and a variety of other sins.

In the past half-century, however, there has been a discernible shift in the types of reasons used to justify the prohibition of drug trafficking. This change seems to be part of a larger trend. As noted above, Bernard Harcourt has argued that there has been, since the 1960s, a general rhetorical shift from *moral sanctity* to *harm prevention* in the state's justification of criminalization, stating: "In a wide array of contexts, the proponents of regulation and prohibition have turned away from arguments based on *morality*, and turned instead to *harm* arguments."⁸⁴ [emphasis in original] With respect to drug trafficking, whereas previously this act was considered deviant and immoral, it began to be labelled as harmful and dangerous. Legal officials started describing drug trafficking offences as "grave,"⁸⁵ "harmful,"⁸⁶ and "serious."⁸⁷

and the opiates were widely used both medicinally and recreationally, and although severe addiction and overdose did occur, these drugs were not a problem for the great majority of the population. There was no evidence that, on balance, these drugs did more harm than good to society" (*ibid.* at 255).

⁸⁴ Harcourt, *supra* note 27 at 110. Whereas in the past policy makers justified prohibition firstly on moral grounds and secondly on grounds of harm, the converse is now the case. The moral rhetoric remains; it is simply less prevalent. See e.g. William J. Bennett, the former U.S. drug czar under George H.W. Bush, who states: "Drugs are the great lie, the Great Deceiver. ... I've seen what I can only describe as the face of evil. Those people who doubt there is evil in the world need to travel a few weeks with me on the drug circuit." See W. Bennett, "Teaching Moral Values can Reduce Chemical Dependency," in C. Cozic & K. Swisher, eds., *Chemical Dependency: Opposing Viewpoints* (San Diego: Greenhaven Press, 1991) 235 at 235.

⁸⁵ See e.g. *United States v. Rhodes*, 779 F.2d 1019 at 1029 (U.S. C.A.) (1985) (holding that "large-scale drug trafficking is a grave offence and Congress chose to impose severe penalties for it"); *United States v. Vargas*, 1990 U.S. Dist. LEXIS 8119 at 6-7 (1990) (holding that "[d]rug trafficking presents a grave threat to society that Congress has sought to remedy by enacting relatively severe penalties in the *Controlled Substances Act*"); and *R. v. Oakes* [1986] 1 S.C.R. 103 at para. 80 (holding that "[t]he objective of protecting our society from the grave ills associated with drug trafficking is, in my view, one of sufficient importance to warrant overriding a constitutionally-protected right or freedom in certain cases").

⁸⁶ See e.g. *United States v. 2526 Faxon Ave.*, 145 F. Supp. 2d 942 at 953 (U.S. Dist. Ct.) (2001) (holding that "[t]he gravity of the offence and the harm caused to the community (aiding a large-scale drug trafficking operation) is self-evident."); and *R. v. S. (C.)*, 1997 CarswellOnt 4214 at para. 29 (Ont. Ct. J.) (eC) (noting the "the incalculable harm caused to the community by drug trafficking").

⁸⁷ For example, *Santos-Melitante v. Gonzales*, 2005 U.S. App. LEXIS 26784 at 5 (2005), is just one case of many where the U.S. Court of Appeal characterized drug trafficking crimes as "presumptively 'particularly serious crimes'." Also see e.g. *R. v. Golden*, [2001] 3 S.C.R. 679 at

Between the 1960s and the 1980s there was a second wave of drug control legislation in North America.⁸⁸ Unlike the initial drug control laws of the early 1900s, these new policies primarily targeted drug trafficking (although drug use, of course, remained illegal).⁸⁹ These statutes gave broad investigative powers to law enforcement agencies and significantly increased the severity of sentencing provisions.⁹⁰ Drug trafficking is now one of the most widely and severely criminalized activities on earth. Drug trafficking is prohibited in virtually every domestic legal jurisdiction.⁹¹ And in almost every jurisdiction the sanctions for trafficking illegal drugs are among the most serious of all criminal offences.⁹² The three

para. 20 (holding that “[d]rug trafficking is recognized as a serious crime”); *R. v. Silveira*, [1995] 2 S.C.R. 297 at para. 173 (holding that “[d]rug trafficking is a serious crime”).

⁸⁸ In Canada the new drug control legislation was the *Narcotic Control Act of 1961* [NCA]. In the United States, the new drug control legislation was the *Comprehensive Drug Abuse Prevention and Control Act of 1970* [CDAPCA], and specifically Title II of the CDAPCA, the *Controlled Substances Act*. Both the Canadian NCA and the American CDAPCA were intended to be the legislative implementation of Canada and the United States' duties under the *Single Convention on Narcotic Drugs*.

⁸⁹ According to Michael Blanchard and Gabriel Chin, the CDAPCA “mitigated the criminality associated with drug use while simultaneously stiffening penalties for drug trafficking.” See Michael D. Blanchard & Gabriel J. Chin, “Identifying the Enemy in the War on Drugs: A Critique of the Developing Rule Permitting Visual Identification of Indescript White Power in Narcotics Prosecutions” (1998) 47 *Am. U.L. Rev.* 557 at 600.

⁹⁰ In Canada, the NCA increased the maximum penalty for various trafficking offences from 14 years to life imprisonment. See *NCA*, *supra* note 88, ss. 4(1)-(3).

⁹¹ For an interesting comparison of drug use and trafficking laws in selected European countries see Nicholas Dorn & Alison Jamieson, “Room for Manoeuvre: Overview of Comparative Legal Research into National Drug Laws of France, Germany, Italy, Spain, the Netherlands and Sweden and Their Relation to Three International Drugs Conventions” (London: DrugScope, 2000), online: Asian Harm Reduction Network <http://www.ahrn.net/library_upload/uploadfile/manoeuvre.pdf>. Dorn and Jamieson state: “It might be thought that all modern states have approximated their drugs legislation. This turns out to be generally true of legislation in relation to trafficking” (*ibid.* at 1). One reason for the relatively standardized treatment of drug trafficking offences around the globe is the 1988 *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, online: United Nations Office on Drugs and Crime (UNODC) <http://www.unodc.org/pdf/convention_1988_en.pdf> [1988 Convention]. Paragraph 4(a) of the 1988 Convention mandates the following state response to drug trafficking: “Each Party shall make the commission of the offences established in accordance with paragraph 1 [supply-side offences] of this article liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation.”

⁹² In Canada, for example, s. 5 of the *Controlled Drugs and Substances Act* dictates that anyone who traffics in “substances included in Schedule I or II [which includes, among other substances, heroine, cocaine, and even cannabis (when more than 3 kg)], is guilty of an indictable offence and *liable to imprisonment for life*.” See *Controlled Drugs and Substances Act*, 1996

main conventions of the international global drug control regime are among the most widely adopted of all international treaties.⁹³ Many state governments and law enforcement agencies have devoted entire branches to controlling illicit drugs.⁹⁴

C.19 ss. 5(1)-(4). Clearly, not all convicted drug traffickers receive life imprisonment. In 1996-1997, while approximately two-thirds of convicted drug traffickers received a prison sentence, the median sentence length was four months. See Sylvain Tremblay, "Illicit Drugs and Crime in Canada" (Juristat, 1999).

⁹³ The three central components of the international drug control regime are the 1961 *Single Convention on Narcotic Drugs*, the 1971 *Convention on Psychotropic Substances*, and the 1988 *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*. As of January 1, 2005, 180 states were parties to the *Single Convention*, 175 states were parties to the *Convention on Psychotropic Substances*, and 170 states were parties to the *Convention against Illicit Traffic*. See UNODC, "Monthly Status of Treaty Adherence" (1 January 2005), online: UNODC <http://www.unodc.org/unodc/treaty_adherence.html>. By way of comparison, consider that there are a total of 192 member states in the United Nations. See United Nations (UN), "List of Member States," online: UN <<http://www.un.org/Overview/unmember.html>>.

⁹⁴ See e.g. the Office of National Drug Control Policy (ONDCP) (<http://www.whitehousedrugpolicy.gov/>) and the DEA (<http://www.dea.gov/>) in the United States; the Drug Enforcement Branch of the Royal Canadian Mounted Police (RCMP) (http://www.rcmp-grc.gc.ca/drugenf/drugs_e.htm) in Canada; and the Scottish Drug Enforcement Agency (<http://www.sdea.police.uk/>) in the United Kingdom. The U.S. DEA was established in the 1970s by the Nixon administration. Richard Nixon's message to Congress on March 28, 1973, advocating the restructuring of U.S. drug control efforts and the creation of the DEA, illuminates the rhetoric of the drug control discourse during this period. Thus, it is worth citing at length:

Drug abuse is one of the most vicious and corrosive forces attacking the foundations of American society today. It is a major cause of crime and a merciless destroyer of human lives. We must fight it with all of the resources at our command.

This Administration has declared all-out, global war on the drug menace. As I reported to the Congress earlier this month in my State of the Union message, there is evidence of significant progress on a number of fronts in that war. ...

Seeking ways to intensify our counter-offensive against this menace, I am asking the Congress today to join with this Administration in strengthening and streamlining the Federal drug law enforcement effort. ...

Two years ago, when I established the Special Action Office for Drug Abuse Prevention within the Executive Office of the President, we gained an organization with the necessary resources, breadth, and leadership capacity to begin dealing decisively with the "demand" side of the drug abuse problem—treatment and rehabilitation for those who have been drug victims, and preventive programs for potential drug abusers. This year, by permitting my reorganization proposals to take effect, the Congress can help provide a similar capability on the "supply" side. The proposed Drug Enforcement Administra-

These new anti-drug measures were largely justified through claims that significant harms are caused by drug trafficking—economic, social, health, and so on.⁹⁵ The revised aim of policy makers was harm prevention.⁹⁶ In the United States, the view that drug trafficking is devastatingly harmful reached its peak in the late 1980s when, according to Douglas Husak, “a majority of Americans identified drugs as ... [the] nation’s greatest concern, surpassing crime, the environment, taxes, the homeless, education and the deficit.”⁹⁷ American politicians responded to this widespread public panic and, in 1990, William Bennett, drug czar under George H.W. Bush, declared that “drugs remain ... our gravest domestic problem.”⁹⁸

The harm prevention rationale for psychoactive drug control continues to dominate the discourse. John P. Walters, drug czar under George W. Bush, recently avowed: “The goal of drug laws, after all, is not just to penalize, but to keep people from harming themselves and others.”⁹⁹ Likewise, in Canada, the Office of Alcohol, Drugs, and Dependency Issues (OADDI), in outlining “Canada’s Drug Strategy,” stated that “[d]rugs affect every country of the world. Problems associated with substance abuse, production of illicit drugs, and drug trafficking *cause harm to individuals, families, and communities.* [emphasis added]”¹⁰⁰

In fact, political claims regarding the harms of drug trafficking have become increasingly brazen. The production and sale of recreational psychoactive drugs for commercial gain is now considered as harmful as violent crime. In the United States, the Office of National Drug Control Policy (ONDCP) recently stated that drug trafficking is a “serious enterprise, *akin to violent crime.* It terrorizes commu-

tion, working as a team with the Special Action Office, would arm Americans with a potent one-two punch to help us fight back against the deadly menace of drug abuse. I ask full Congressional cooperation in its establishment.

See Message from the President of the United States Transmitting Reorganization Plan No. 2 of 1973, “Establishing A Drug Enforcement Administration,” H.R. Doc. No. 93-69 (1973), online: U.S. Government Printing Office <<http://www.access.gpo.gov/>>.

⁹⁵ Harcourt, *supra* note 27 at 112.

⁹⁶ *Ibid.*

⁹⁷ Husak, *Drugs and Rights*, *supra* note 15 at 9.

⁹⁸ William Bennett, *National Drug Control Strategy* (Washington: Office of National Drug Control Policy, 1990) at 9, reprinted in Husak, *Drugs and Rights*, *ibid.*

⁹⁹ ONDCP, “Who’s Really in Prison for Marijuana?” at 7, online: The White House <http://www.whitehousedrugpolicy.gov/publications/whos_in_prison_for_marij/whos_in_prison_for_marij.pdf>.

¹⁰⁰ OADDI, “Canada’s Drug Strategy” (Minister of Government Works and Public Services Canada, 1998), online: Health Canada <http://www.hc-sc.gc.ca/ahc-asc/alt_formats/hecs-sesc/pdf/pubs/drugs-drogues/1998_cds_sca/strategy_e.pdf> at 2.

nities and destroys lives. That policymakers would require ... stringent punishment for trafficking offences *should come as no surprise to anyone who understands the drug trade* and the magnitude of the damage it inflicts on our society. [emphasis added]"¹⁰¹

What is worrisome about this ONDCP statement is that the nature of the harm caused by trafficking is not explained (rather, there are only vague references to terrorized communities and destroyed lives, and no distinction made between the harm of trafficking and the harm of drug use). Instead, the grievously harmful character of drug trafficking is held to be patently obvious to anyone who understands the drug trade. In fact, policy makers almost never seek to explain the nature of the harm caused by drug trafficking. They may quote statistics regarding the social and economic costs or overdose and addiction rates of particular psychoactive substances¹⁰²; however, these are the harms of drug use and/or abuse in certain highly particularized and largely unexamined contexts. It does not necessarily follow that drug trafficking per se does or always will cause such harms. Policy makers make no attempt to explain the causal relationship between the act of drug trafficking and evidence of drug-related harm. Therefore, the prohibition of drug trafficking has become self-referential and, thus, self-justifying. The notion that drug trafficking is, by nature, devastatingly harmful is now so deeply ingrained in contemporary society—especially amongst policy makers, law enforcement agents, and moral entrepreneurs—that it is no longer up for debate. It has become one of the truisms of our age.

Consequently, in contemporary society there is no room to ask whether policies such as mandatory minimum sentences and life imprisonment are morally justified and/or practically prudent, or whether incarcerating hundreds of thousands of people, often poor and disadvantaged ethnic minorities, for producing and selling psychoactive substances is a good or reasonable thing to do. The harmfulness of drug trafficking is played as a trump card—an absolute reason for criminalizing trafficking that can never be overridden by conflicting considerations. We are in a never ending “War on Drugs” and trafficking is the enemy. But what exactly does this enemy look like, and why is it our enemy? Even assuming that harm prevention is a valid and sufficient reason for criminalizing drug

¹⁰¹ *Supra* note 99 at 14. Consequently, the ONDCP held that “[t]hose who traffic in illegal drugs, who prey on our nation’s youth with poisons that destroy bodies, minds, and futures, should find no refuge in the criminal justice system. Long prison terms, in many cases, are the most appropriate response to these predators” (*ibid.* at 7).

¹⁰² The accuracy of such statistics is questionable, as they are supported by evidence that is largely anecdotal. The UNODC has acknowledged that “[f]ew comprehensive and internationally comparative studies have been undertaken to measure the cost of drug abuse to society.” See UNODC, “Economic and Social Consequences of Drug Abuse and Illicit Trafficking” (1998) at 15, online: UNODC <http://www.unodc.org/pdf/technical_series_1998-01-01_1.pdf> [UNODC, “Consequences of Drug Abuse”].

trafficking, is it really true that the social and economic harms caused by contemporary drug control policies can never override this harm prevention justification? These are the questions that I will consider in the final section of my paper.

III. THE HARM OF DRUG TRAFFICKING

1. Some Notes on Methodology

(a) *Hypothesizing a Drug Control “State of Nature”*

The goal of my analysis in this section is to consider whether drug trafficking itself is harmful, not whether drug trafficking under the current drug control regime is harmful. This is an important distinction. I want to look at the activity of drug trafficking as if its criminalization had never taken place. I want to hypothesize that we are in a “state of nature” or “original position” with respect to drug laws.¹⁰³ Imagine that there are no domestic or international drug control laws and no bureaucracies, jobs, or economic institutions that depend on the drug control infrastructure. We are policy makers at the original debate on whether drug trafficking is so harmful that it should be subject to criminal law sanctions.

There is good reason to engage in such a thought experiment. It would be absurd if the harms associated by drug control regimes were successfully used as a justification for maintaining those regimes. Some might argue that there should be severe penalties for drug crimes because individuals involved in the drug trade are responsible for the death of law enforcement agents. Alternatively, some might argue that organized and violent criminal networks are involved in drug trafficking and, therefore, that prohibition must be maintained to fight these criminal enterprises. Since 9/11, this argument has been renewed in the linkage

¹⁰³ The hypothetical of the “state of nature” was made famous by Thomas Hobbes. The state of nature is the imagined condition of human society before the foundation of the political state and its monopoly on the legitimate use of physical force. See Hobbes, *supra* note 24. John Rawls devised the hypothetical of the “original position” as an updated version of the state of nature, which he used to determine what principles of justice would be inherent to a society premised on free and fair cooperation. Individuals in Rawls’ original position, like those in Hobbes’ state of nature, have no political community or society. Further, they are under a “veil of ignorance” that blinds them to all of the material facts about themselves and their standing in society. This prevents them from knowing how they may personally benefit from any political rules or social policies. According to Rawls, it is only from this position that we can determine which principles of justice should be adopted. See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

between drug production and supply as a funding device for terrorist groups.¹⁰⁴ Such arguments are all troublingly circular, and a regime of decriminalization or legalization would arguably reduce, if not completely eliminate, most of these worries. If we want to cogently evaluate the moral and practical justifications for drug prohibition we cannot get sidetracked by harms stemming from the prohibition regime itself—we must put on theoretical blinders.

Therefore, certain “consequences” of drug trafficking, which are normally considered harmful, will not be considered in my analysis. These consequences include, for example, the murder of law enforcement agents by drug traffickers; the murder of drug traffickers by other drug traffickers; the link between trafficking and large, violent criminal enterprises; the link between trafficking and terrorist organizations; the harm caused when drug traffickers encourage drug users to break *drug* laws; and the harm caused when drug traffickers themselves violate *drug* laws.

(b) The Concept of Harm

Harm is a commonly used term that does not seem especially nebulous; however, the concept of “harm” is more complex than one might initially suspect. What is it to say that someone is harmed by the actions of another?

Primarily, harm seems to have an inbuilt relational character to the extent that it presupposes a *harmer* and a *harmee*—that is, someone or something that causes the harm and someone or something that is harmed.¹⁰⁵ If A cries, “I was harmed!” it makes sense to ask how A was harmed and by whom. As well, as we all know, harm has a patently negative character. To speak of harm is to speak of damage or impairment, not of benefit or advantage. But when does damage or impairment to an individual constitute harm to that individual? Is there a minimum conceptual threshold for what can count as harmful? Joel Feinberg defines harm as “the violation of one of a person’s interests, an injury to something in which he has a genuine stake.”¹⁰⁶ *Prima facie*, Feinberg’s definition of harm is persuasive. Something is harmful only when it impairs a human good or interest. If X is bad for A, it makes little sense to say that Y harms A because Y impairs X. This definition of harm is not entirely helpful, however, since, as we shall see below, determining whether X is in fact *good* or *bad* for A is often a matter of significant debate.

¹⁰⁴ UNODC, “2005 World Drug Report: Volume 1: Analysis,” online: UNODC <http://www.unodc.org/pdf/WDR_2005/volume_1_web.pdf> [UNODC, “2005 Drug Report”].

¹⁰⁵ For the purposes of this paper, I will only consider harm with respect to humans and the social institutions of humans and will not investigate whether other animals and things—sentient, alive, or otherwise—can be *harmer*s or *harmee*s.

¹⁰⁶ Feinberg, *Social Philosophy*, *supra* note 12 at 26.

2. On the Potential Harms Caused by Drug Trafficking

The Canadian OADDI has claimed that there are a wide variety of harms associated with drug use, including harms that are:

[P]hysical, psychological, societal, and/or economic. ... Physical harm includes death, illness, addiction, the spread of diseases such as HIV/AIDS and hepatitis, and injury caused by drug-related accidents and violence. Psychological harm can include fear of crime and violence and effects of family breakdown. Societal harm refers to breakdown of social systems. Economic harm includes the large-scale impact of the illegal drug trade and enforcement efforts as well as economic harm to individual users and society, including costs of decreased and lost productivity, workplace accidents, and health care.¹⁰⁷

If these are some of the possible harms associated with drug use, how can they be attributed to drug trafficking? There seems to be three different categories of harm that could be caused by drug trafficking: (i) the indirect harm of consequential crime caused by drug users; (ii) the indirect harm to social and economic institutions; and (iii) the direct harm to users. I have ordered these alleged harms in what I consider to be their increasing order of severity. *Prima facie*, each of these harms, if established, would satisfy the harm principle and, therefore, might provide a valid and sufficient reason for criminalizing drug trafficking. On the other hand, there may be conflicting considerations that override the justifications provided by any or all of these alleged harms.

(a) *Indirect Harm of Consequential Crime Caused by Users*

The first type of harm potentially linked to drug trafficking can be quickly disposed of. This is the claim that drug trafficking should be criminalized because it promotes drug-related crime amongst drug users. The first premise of the argument seems to have two alternative formulations: (i) that as drug users become addicted and desire more drugs they will resort to criminal activity to fund their needs; and/or (ii) that drug users, when high, are in an uncontrolled state where they are likely to cause harm to others. The second premise of the argument is that drug traffickers are causally responsible for the drug-related harm caused by users, since they sell users a substance that, in some facet, encourages them to engage in crime and cause harm to others. The conclusion is that drug trafficking should be criminalized due to the drug-related crime caused by many users.

With respect to the first premise of the argument, it seems clear that much of the crime and harm caused by addicted and/or high drug users is the result of the drug control regime itself.¹⁰⁸ It is the stated goal of many policy makers and legal officials to raise the cost of illicit-drugs so that it is more difficult for users to

¹⁰⁷ OADDI, "Canada's Drug Strategy," *supra* note 100 at 4, n.2.

¹⁰⁸ Alldridge, *supra* note 4 at 242-43.

purchase them.¹⁰⁹ One result, of course, is that users who cannot afford illicit drugs through legitimate employment will turn to crimes such as theft to fund their use of these drugs.

The second premise of the argument—that traffickers are causally responsible for the damage or harm caused by drug users when they are under the influence of or addicted to psychoactive substances—seems questionable on its face. Should traffickers be held causally responsible for the harm caused by drug users solely by virtue of the fact that they sold them an addictive and/or psychoactive substance? The particular drugs sold to a user by a trafficker are not necessarily a causally significant condition of any harm caused by that user. Many drug users cause no crime or harm despite their drug use and/or abuse. Further, many drug users would cause significant crime or harm regardless of their drug use and/or abuse. Of course, there are circumstances where the drugs sold by a particular trafficker to a particular user either cause or facilitate that user to harm others or break the law. But does this mean that all drug traffickers should be “tarred with the same brush”?¹¹⁰

If so, then such an argument can also be made with respect to car dealers. Should they be held causally responsible for the harm caused by drivers who buy cars from them (for example, through accidents caused by speeding, racing, dangerous driving, driving under the influence of alcohol, and so on)? The most significant difference between the two arguments is that, while in the case of car dealers it is the commodity itself (the car) that causes the harm (through car accidents), in the case of drug traffickers, drugs are not used to commit the harm but instead create a mental state whereby harm is more likely to occur. Intuitively, this latter sort of argument seems persuasive in the context of alcohol-related domestic violence. Clearly such violence is tragic and unacceptable. The question is whether liquor stores and bars should be held morally and legally liable for this violence, and, if so, to what extent. While an affirmative answer to this question may be plausible, it is certainly not a question that can be answered *a priori*, with little to no serious debate.

One can pedantically point out that almost any action is causally related to a harmful consequence. But for a legal system (and society at large) to function effectively there must be reasonable limits placed on the scope of causal responsibility. The causal responsibility of drug traffickers for the harm caused by drug users likely falls into the penumbra.¹¹¹ There are numerous issues with respect to

¹⁰⁹ See e.g. The White House “National Drug Control Strategy Update” (February 2005) at 39, online: The White House <<http://www.whitehousedrugpolicy.gov/publications/policy/ndcs05/ndcs05.pdf>>.

¹¹⁰ Alldridge, *supra* note 4 at 242.

¹¹¹ On the concept of the “penumbra” versus the “core” and the theory of the open texture of rules see e.g. H.L.A. Hart, “Positivism and the Separation of Law and Morals” (1958) 71

foreseeability, risk, and intervening actions that must be considered.¹¹² If we are justified in holding traffickers legally responsible for such harm it is only subject to significant and ongoing debate. Clearly, this category of harm cannot justify the current attitudes towards drug trafficking—that it is so harmful that serious public debate is pointless and absurd.

(b) Indirect Harm to Social and Economic Institutions

The argument that drug trafficking is harmful to various social and economic institutions seems to dominate the modern political discourse. It is also more persuasive than the claim that trafficking should be criminalized because of the drug-related crime caused by drug users. The first premise underpinning this category of harm (that is, the “public harm principle” as per Feinberg’s taxonomy) is that drug trafficking turns otherwise productive individuals into drug abusers and/or addicts—into unproductive burdens on society. Consequently, social institutions are needlessly overused and important and limited economic resources are wasted. The second premise is that since everyone has a significant interest in these social institutions and resources, any harm or misuse of these institutions or resources constitutes harm to the public at large.

Typical examples of social costs and/or wasted resources stemming from drug use include: (i) the high cost of addiction treatment; (ii) the strain of overdoses, injection-drug-related diseases such as HIV, and “lifestyle” ailments on the health-care system; (iii) a lack of economic productivity by users, causing a drain on the tax base; and (iv) the needless use of government social-welfare schemes such as unemployment insurance, welfare, and subsidized housing.

Not surprisingly, then, when added up, the alleged costs of drug use on society are enormous. In the United States, Barry McCaffrey, drug czar under the Clinton administration, argues that “each year drug use ... costs our society \$110 billion in social costs.”¹¹³ In Canada, the OADDI claims that “[t]he health, social, and economic costs of alcohol and illicit drugs to Canadian society in 1992 was estimated to be a staggering \$8.89 billion. This figure represents the most optimistic cost; the actual number could be significantly higher.”¹¹⁴ On the other hand, in Canada, of the \$8.89 billion in social costs attributed to drug use, alcohol use represents \$7.52 billion and illicit-drug use represents only \$1.37 billion.¹¹⁵ This, of course, may be seen as a good reason to continue criminalizing

Harv. L. Rev. 593; H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994) at 124-136.

¹¹² For a classic treatise on the nature of legal causation see H.L.A. Hart & Tony Honore, *Causation in the Law*, 2d ed. (Oxford: Oxford University Press, 1985).

¹¹³ Harcourt, *supra* note 27 at 176.

¹¹⁴ OADDI, “Canada’s Drug Strategy,” *supra* note 100 at 27.

¹¹⁵ *Ibid.*

illicit drugs. If such drugs are decriminalized then it is likely that they will be increasingly used and abused and, therefore, that the social costs of drug use on society will rise above current levels.¹¹⁶ Nevertheless, this leaves the question of what to do about the sale of other legal but potentially harmful commodities that place a high cost on society. For example, fast food, cigarettes, automobiles, and alcohol all place a significant burden on the health-care system.¹¹⁷ What makes drug trafficking so different from the sale of other commodities?

Regardless, the social cost of drug use appears to be significant and could *prima facie* justify state intervention of some sort. On the other hand, any attempt to justify the contemporary drug control regime using the public harm principle raises fundamental moral and political questions. Does everyone in a society have an obligation to be a productive member of that society? Likewise, does everyone in a society have an obligation to minimize their economic burden on society? Should those who place a significant economic burden on society be subject to criminal sanctions and other restrictions on their freedom? Are we so sure about the answers to these questions that we are willing to unequivocally and unquestionably support the current drug control regime? The fact that an activity has a disproportionately high social cost may be a morally and practically justifiable reason for criminalizing or regulating that activity; however, this argument is most persuasive when the limitations placed on human freedom are trivial—consider, for example, the requirement to wear a seatbelt while driving. And it certainly seems beyond question that the limitations placed on human freedom by the contemporary global drug control regime are anything but trivial.

The claim that drug trafficking should be criminalized because it encourages users to cause harm to social and economic institutions also raises some important questions with respect to causation. Should drug traffickers be held causally responsible for the non-productivity and ill-health of drug users? Are all users non-productive and unhealthy? If not, should drug traffickers only be held responsible if they know, or reasonably should know, that the person buying drugs from them is likely to be a burden on social institutions or the economy? Is a drug trafficker who only sells drugs to successful and wealthy corporate lawyers, executives, and celebrities at all responsible for the misuse of social-welfare institutions? Certainly, at least from a taxation and social institutions standpoint, these drug users do not place a harmful burden on society.

¹¹⁶ See *e.g. supra* note 109 at 7.

¹¹⁷ On the social harm caused by alcohol and tobacco see Alldridge, *supra* note 4 at 246. While the costs of alcohol and cigarettes and automobile accidents and pollution are well known, the costs associated with fast-food consumption remain uncertain. See James O. Hill & John C. Peters, "Environmental Contributions to the Obesity Epidemic" (1998) 280 *Science*, New Series, 1371; Vaclav Smil, "Eating Meat: Evolution, Patterns, and Consequences" (2002) 28 *Pop. & Dev. Rev.* 599.

Regardless, the fact that drug trafficking indirectly causes harm (even significant harm) to social and economic institutions can never justify shutting down debate about the moral legitimacy and practical consequences of criminalization. In fact, this harm to social and economic institutions argument makes ongoing debate necessary, as it is inherently an argument based on cost-benefit analysis, which cannot be coherently made *a priori*. It is possible that the costs of a criminal-law regime designed to deter a costly activity could exceed the costs caused by the activity itself. If so, then decriminalization or legalization and regulation might produce less net social and economic harm than outright prohibition.

Indeed, the cost of maintaining domestic drug control regimes is staggering. For example, in the United States, the White House's National Drug Control Strategy budget for 2006 was \$12.4 billion.¹¹⁸ To what extent did this \$12.4 billion reduce the social harm caused by trafficking? Could such funds be more effectively allocated under a harm reduction model that promotes decriminalization and medical treatment? These types of questions must be continuously posed if the public harm principle is to provide a coherent rationale for criminalization. Thus, while preventing harm caused to social and economic institutions may be a valid and sufficient reason for criminalizing drug trafficking, it could never be a reason to shut-down debate on the merits or legitimacy of prohibition.

(c) Direct Harm to Users

Does drug trafficking cause direct harm to drug users? Does the act of A selling heroin to B constitute A harming B? There are good reasons for responding in the affirmative. Quite simply, as Peter Alldridge points out in his analysis of the harms caused by drug trafficking: "addicts may lead unpleasant lives or die."¹¹⁹ However, if drug trafficking is harmful to drug users, why are so few users complainants against traffickers?¹²⁰ This question raises a second, more important

¹¹⁸ ONDCP, "National Drug Control Strategy: FY 2006 Budget Summary" (2005) at 1, online: The White House <<http://www.whitehousedrugpolicy.gov/publications/policy/06budget/06budget.pdf>>. The 2006 budget is an increase of 2.2% or \$268 million over the 2005 budget. The DEA alone had a budget of \$2.1 billion in 2005. By comparison, the budget of the DEA was only \$65 million in 1972. See DEA, "DEA Staffing & Budget," online: DEA <<http://www.dea.gov/agency/staffing.htm>>. Considering these figures, it is not surprising that "[t]he United States has claimed the leadership of the global anti-drug wars." See Davenport-Hines, *supra* note 56 at 15.

¹¹⁹ Alldridge, *supra* note 4 at 244.

¹²⁰ Norval Morris describes drug trafficking as a "complainantless" crime but not a "victimless" one. Morris states that "[f]rom a criminological perspective these areas of attempted criminal control are certainly not 'victimless'; rather they are 'complainantless'. No one identifies himself as a victim of the criminal's depredation, no one comes to the desk at the police station saying 'protect me from this criminal', the police telephone lines are silent. If there is a

question. What exactly constitutes direct harm to users? As described above in the section on “The Concept of Harm,”¹²¹ to harm someone is to impair or violate their interests. But, as also noted above, there is much debate about what constitutes an actual human interest. Is an interest what an individual desires (a subjective interest) or what is *actually* beneficial for that individual (an objective interest)? Does such a distinction even make sense? Feinberg contends that the term “interest” is generally interpreted narrowly and distinguished from the term “desire,” stating that “[a] person is often said to ‘have an interest’ in something he does not presently desire. A dose of medicine may be ‘in a man’s interest’ even when he is struggling and kicking to avoid it. In this sense, an object of an interest is ‘what is truly good for a person whether he desires it or not.’”¹²²

Feinberg contends that one advantage of distinguishing between desires and interests is that “it permits us to appraise harms by distinguishing between more and less important interests.”¹²³ Intuitively, it makes sense that actions that interfere with interests that are widely considered to be important to humans—for example, our interest in preserving our property, health, and life—are more severely criminalized than actions that interfere with interests that are deemed less important and often considered mere *desires*—for example, our desire to use psychoactive substances on a recreational basis. Nevertheless, as Isaiah Berlin famously pointed out in his essay “Two Concepts of Liberty,” it is one thing to say that actions that harm or interfere with non-essential, base, or subjective desires are relatively unimportant and another thing to say that they do not constitute harms at all.¹²⁴ It is also a matter of epistemological and ontological controversy as to whether there is an objective basis for determining which interests are in fact fundamental to humans and which are not. While we can (and probably should) allow for qualitative differences between harm to various types of human interests, there is a strong argument to be made that if we take human freedom seriously we must say that a harm constitutes any action that interferes with or damages either *fundamental* or *non-fundamental* interests. The argument goes that in defining harm we should interpret the term “interest” broadly to include both what is good for us and what we think is good for us. As Berlin has persuasively argued, to do otherwise is to risk promoting some of the worst forms of totalitarianism and political oppression.¹²⁵

unifying theme in this moral overreach of the criminal law, it is that it deals with complainantless crimes.” See Morris, *supra* note 18 at 41.

¹²¹ See text accompanying footnote 106.

¹²² Feinberg, *Social Philosophy*, *supra* note 12 at 26.

¹²³ *Ibid.*

¹²⁴ See Berlin, *supra* note 50.

¹²⁵ *Ibid.*

One other initial point must be made about the concept of “harm”—we must distinguish *harm* from *hurt*. If we define harm as the violation or infringement of a human interest then the difference between harm and hurt becomes apparent. An individual is *harmed* from the moment that her or his interests are violated, but is not *hurt* until she or he is aware of this violation. There may be cases where the interests of an individual have been violated although that individual is not actually aware of this harm. As Feinberg states, “having one’s interests violated is one thing, and knowing that one’s interests have been violated is another.”¹²⁶ An individual may be robbed while asleep and should be considered harmed from the moment of the theft; however, that individual is not hurt until she or he becomes aware of the theft.

Thus, all hurts are harms but not all harms hurt.¹²⁷ While a harm is the actual damage or interference to an individual’s interest (whether fundamental or non-fundamental), a hurt is the perception by the harmed individual of the damage or interference to that interest.¹²⁸ This point is important in the context of my analysis because the conceptual distinctions between desires and interests and hurts and harms has been alternatively blurred and exploited by policy makers seeking to justify the criminalization of drug trafficking. By virtue of their support of the contemporary drug control regime, they impliedly prioritize the prevention of *harm* to what they consider to be *fundamental* interests and downplay the importance of *hurt* in relation to the harm of *non-fundamental* interests or desires. They also impliedly support the argument that a drug user may desire a fix but that this fix is not really in the interests of that user. Not having this fix may significantly *hurt* the user but it does not *harm* her or his fundamental interests. Further, they impliedly contend that denying a drug user her or his fix by criminalizing psychoactive drugs is actually in the user’s best interest. The user would acknowledge this if she or he was not ravaged by physical and mental addiction.

Likewise, with respect to drug traffickers the argument goes that while drug traffickers do not necessarily *hurt* drug users they always *harm* (or threaten to harm) their fundamental interests. Users may desire and actively seek out illicit drugs, but such substances also significantly harm their health, their employment, and their relationships with family and friends. These are all fundamental interests. Policy makers hold that drug traffickers should be held legally accountable for drug-related harm to such interests.

¹²⁶ Feinberg, *Social Philosophy*, *supra* note 12 at 27.

¹²⁷ *Ibid.*

¹²⁸ Feinberg points out that “[w]e must include in the category of ‘hurts’ not only physical pains but also forms of mental distress. Our question is whether, in applying the harm principle, we should permit coercion designed to prevent mental distress when the distress is not likely to be followed by hurt or harm of any other kind.” *Ibid.*

Thus, so the argument goes, the drug trafficker can be differentiated from the fruit vendor or the dairy farmer or the car dealer. These suppliers sell goods that are both desired by and are in the actual interests of consumers (or, at least, are not of obvious disinterest). Although all of these commodity providers engage in commercial transactions with consumers who want or desire their commodities, what makes drug trafficking *sui generis* is that the desires (or non-fundamental interests) of illicit drug consumers are generally the polar opposite of their true fundamental interests.

But, as Peter Alldridge wonders, “why is it that the consent of the [drug] user is not regarded as a relevant consideration?”¹²⁹ Is someone really harmed when they consent to such harm? If drug users decide to promote their non-fundamental interests or desires ahead of their fundamental interests, who are we to interfere? People routinely jeopardize their fundamental interests for what are generally considered non-fundamental interests—mountaineers and other extreme athletes do this when they risk life and limb for the sake of an adrenaline rush. The presence of consent is the main reason why the criminalization of assisted suicide remains a matter of significant debate while the criminalization of murder does not.¹³⁰ What makes the consent of drug users so different? At a minimum, shouldn’t consent be considered a mitigating factor that can reduce the moral taint and legal consequences of trafficking?

A possible response to this consent argument is that psychoactive substances such as heroin are extremely addictive and, therefore, that an addicted user lacks the free will to consent to the direct harm caused by the substances sold by traffickers.¹³¹ In my view, the argument from addiction is fairly persuasive and points to what is likely the most problematic aspect of drug trafficking—the *exploitation* of addicts.

Exploitation occurs when someone uses another individual as a tool for personal benefit. A exploits B if A takes advantage of B, to B’s detriment, in the pur-

¹²⁹ Alldridge, *supra* note 4 at 244.

¹³⁰ See e.g. Rodriguez, *supra* note 13; Mollie Dunsmuir & Marlisa Tiedemann, “Euthanasia and Assisted Suicide in Canada,” online: Library of Parliament <<http://www.parl.gc.ca/information/library/PRBpubs/919-e.pdf>>; and Jocelyn Downie, *Dying Justice: A Case for Decriminalizing Euthanasia and Assisted Suicide in Canada* (Toronto: University of Toronto Press, 2004).

¹³¹ Consider the World Health Organization’s (WHO) definition of “substance dependence” as a “chronic and relapsing behavioural disorder, caused by repeated and often prolonged and/or heavy use of psychoactive substances. It is characterized by the continued use of these substances despite physical and mental problems, strong desire to take the substance(s), difficulties in controlling substance use, neglect of other activities and interests in favour of using or seeking the drug, increased tolerance and sometimes a withdrawal syndrome once drug use is abruptly ceased.” See WHO, “What is Substance Dependence?,” online: WHO <http://www.who.int/substance_abuse/about/en/MSBcurrentfactsheet.pdf>.

suit of A's interests or desires. It seems plausible to argue that all traffickers of addictive psychoactive substances exploit consumers who are addicted to those substances. The financial benefit gained by drug traffickers is clearly enormous. Despite the ubiquitous criminalization of drug trafficking, demand for illicit drugs remains high.¹³² The United Nations Office on Drugs and Crime (UNODC) reports that the rate of illicit-drug consumption has increased significantly since the 1970s.¹³³ Not surprisingly then, the profits generated by illicit-drug trafficking are incredible.¹³⁴ Richard Davenport-Hines points out that drug trafficking is not merely profitable in comparison to other *illicit* businesses, but is one of the most profitable enterprises on earth, stating: "The international illicit drug business generates \$400 billion in trade annually, according to recent United Nations estimates. That represents 8 per cent of all international trade. It is about the same percentage as tourism and the oil industry."¹³⁵

¹³² According to the United Nation's "2005 World Drug Report," an estimated 200 million people between the ages of 15 and 64 (or approximately 5% of the global population) used an illicit psychoactive substance during the past year. See UNODC, "2005 Drug Report," *supra* note 104 at 5. By comparison, the UNODC states that the number of people using illicit drugs "remains significantly lower than the number of persons using licit psychoactive substances (about 30% of the general adult population use tobacco and about half use alcohol)" (*ibid.*).

¹³³ UNODC, "Consequences of Drug Abuse," *supra* note 102 at 8.

¹³⁴ The gross profit margin for cocaine and heroin is approximated at 93% to 98% of the retail value of these drugs. According to the UNODC, "one gram of 100 per cent pure cocaine retailed for \$4.30 in Colombia; its final retail price in the United States was between \$59 and \$297." See UNODC, "Consequences of Drug Abuse," *ibid.* at 12. The drug related statistics used throughout this paper should be taken with a grain of salt as they are notoriously unreliable due to the clandestine nature of drug trafficking and consumption as well as the lack of international comparative standards (*ibid.* at 1, 3).

¹³⁵ See Davenport-Hines, *supra* note 56 at 11. Also see Kopp, *supra* note 3 at 17. The global heroin market alone is worth approximately \$107 billion (Kopp, *ibid.*). The UNODC notes that the "most frequently found figures in the literature range from \$300 billion to \$500 billion a year and seem to be the most reasonable estimates." UNODC, "Consequences of Drug Abuse," *ibid.* at 3. As a further point of reference, consider that the value of the international illicit-drug trade significantly exceeds the value of the iron and steel, the motor vehicle, and the textiles and clothing industries (UNODC, "Consequences of Drug Abuse," *ibid.* at 4). More recently, Antonio Maria Costa, the Executive Director of the UNODC, wrote: "The global retail market for illicit drugs is estimated at US\$320bn. For all the caveats that one may put on such a figure ... it is still larger than the individual GDPs of nearly 90% of the countries of the world." See Antonio Maria Costa, "Preface" in UNODC, "2005 Drug Report," *supra* note 104 at 2. Thus, Costa does not exaggerate when he states that drug trafficking "is not a small enemy against which we struggle. It is a monster" (*ibid.*). If drug trafficking is a monster, it is one that is difficult to kill. As Ethan A. Nadelmann states:

[T]here may be no greater example of the capacity of a transnational activity to resist the combined efforts of government than the persistence of illicit drug

Much of this profit appears to come at the expense of addicted drug users. In fact, the transaction between dealers and addicts may be better characterized as “blackmail” than as a voluntary commercial exchange based on free will or consent.¹³⁶ As Peter Alldridge states, “Once a person is addicted to a particular drug, whenever she is denied it she confronts its withdrawal symptoms, which can be very unpleasant.”¹³⁷ According to Alldridge, the argument can therefore be made that

a dealer threatens an addict with whatever the withdrawal symptoms are for the drug in question. This is a serious physical or psychological threat. If the addict does not buy, she suffers the harm. The immediate drug dealer, the one who deals with the user, deploys that menace to assist him in selling the drug to generate profits.¹³⁸

To the extent that drug traffickers use the addictive nature of their commodity to dominate addicted drug users, drug trafficking is a significantly problematic commercial enterprise.¹³⁹ Alldridge argues that the drug “addict is the victim of exploitation, not a participant in it. ... The vice is no longer to be found in the relationship between the user and the drug, but is in the relationship between the user and the supplier.”¹⁴⁰ Thus, preventing drug traffickers from exploiting drug users addicted to harmful (or potentially harmful) psychoactive substances seems to be a valid and sufficient reason for criminalizing drug trafficking, indeed the strongest reason there is for criminalizing drug trafficking.

The question, then, is whether this reason is so strong as to constitute a trump card in any debate regarding the moral and practical legitimacy of the contemporary drug control regime. Is the prevention of the exploitative harm caused by trafficking an “absolute reason” for criminalization—that is, a reason that can

trafficking. Unlike currency counterfeiting, no particular expertise or resources are required to produce, smuggle, or sell many of the illicit drugs. Unlike slaves, illicit drugs are easily concealed by producers, smugglers, dealers, and consumers. And unlike piracy, slavery, and counterfeiting, drug trafficking produces very few victims who have an interest in notifying criminal justice authorities. Drug prohibition laws, like prohibition laws against prostitution and gambling, can powerfully affect the nature of the activity and the market, but they cannot effectively deter or suppress most of those determined to participate in the activity.

Nadelmann, *supra* note 61 at 512.

¹³⁶ Alldridge, *supra* note 4 at 247-49. On blackmail generally see Leo Katz, “Blackmail and Other Forms of Arm-Twisting” (1993) 141 U. Penn. L. Rev. 1567; George P. Fletcher, “Blackmail: The Paradigmatic Crime” (1993) 141 U. Penn. L. Rev. 1617.

¹³⁷ Alldridge, *ibid.* at 247.

¹³⁸ *Ibid.* at 247-48.

¹³⁹ Fletcher, *supra* note 136 at 1626.

¹⁴⁰ Alldridge, *supra* note 4 at 249.

never be overridden by conflicting considerations? In my view, it is not. The various harms caused by drug trafficking, including the exploitative harm identified in the previous few paragraphs, should not be conflated with the harms of other activities such as murder or sexual assault.¹⁴¹ Certainly, there are deleterious side effects arising from drug trafficking that can and should be deterred—but not at all costs.

Further, the serious and direct harm caused by traffickers who exploit users does not constitute a direct harm that necessarily stems from the commercial sale of psychoactive substances. Instead, such harm only arises when traffickers sell *addictive* substances to *addicts*. The contemporary drug control regime fails to make this distinction. It is illegal to sell substances such as cocaine, heroin, and cannabis to anyone and everyone, regardless of whether they are addicted. One possible counterargument, which is frequently targeted at cannabis by labelling it a “gateway drug,” is that users will always face a significant risk of addiction and that anti-drug laws are designed to be preventative and proactive. I acknowledge this point; however, it seems that an appeal to risk reduction leaves arguments for the severe, blanket criminalization of drug trafficking in a vulnerable position. How much risk is too much? When do the costs of minimizing the risk outweigh the benefits? These are both questions that must be open for debate.

IV. CONCLUSIONS

My aim in this paper was to determine whether drug trafficking is an inherently harmful act and, if so, whether the type of harm produced by drug trafficking is comparable to the harm caused by violent and manifestly criminal offences such as murder and sexual assault. It has become axiomatic to contend that drug trafficking is an activity with deep social, economic, and political impact. Innumerable people around the globe have their lives negatively altered, in some facet, by drug trafficking and its criminalization. Some psychoactive substances have the potential of directly harming users and indirectly harming society at large. This is a point that few would dispute. This does not necessarily mean that drug traffickers should be held morally and legally responsible for all of these harms. There are significant causation issues that must be addressed by any advocate of criminalization.

¹⁴¹ As Hart states with respect to the act of killing, not the crime of murder, “very few factors appear to us to outweigh or make us revise our estimate of the importance of protecting life. Almost always killing, as it were, *dominates* the other factors by which it is accompanied, so when we rule it out in advance as ‘killing’, we are not blindly prejudging issues which require to be weighed against each other.” The few factors that may justify killing another human being, such as self-defence and other forms of justifiable homicide, by definition do not apply in the case of murder (since they are recognized defences to this crime). See Hart, *The Concept of Law*, *supra* note 111 at 133.

It seems, however, that there is sometimes significant direct harm caused by drug trafficking, largely due to its proclivity for exploiting drug addicts. Preventing this harm, as well other indirect harms, is a *prima facie* valid and sufficient reason for criminalizing or, at least, regulating the production and sale of addictive psychoactive substances. Nevertheless, the harm caused by drug trafficking is different and significantly less severe than the harm caused by violent crimes such as murder, torture, or sexual assault. Primarily, despite their addictive qualities, drugs are not physically forced on users but are injected or ingested by users themselves—drug dealers do not usually thrust syringes full of heroin into users' arms when they are not paying attention. Thus, there needs to be some consideration given to the fact that drug users generally consent to the harms of psychoactive substances (at least prior to addiction) while rape and murder victims, by definition, do not.

Although there may be many good reasons for criminalizing drug trafficking, some of which have been considered above, these reasons, even when taken together, do not justify characterizing drug trafficking as a manifestly criminal activity. There is no reason to preclude serious debate on the moral legitimacy and practical merits of the drug control regime as a whole or, perhaps more importantly, on the specific criminal law policies that incarcerate a vast number of traffickers. Quite frankly, selling heroin has more in common with selling fast food, beer, and cigarettes than killing or assaulting someone. To equate trafficking with violent crime is to erroneously devalue the moral and/or social significance of the harm caused by violent crime. Such an approach also presents itself as a cognitive barrier to innovative harm reduction strategies addressing the serious problems relating to drug abuse.

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