

Bars Are Bad for You: Why Paternalists and Social Welfarists Should Oppose Criminal Drug Laws¹

Abstract: We discuss the crucial, but easily missed, link between paternalism and incarceration. Legal paternalists believe law should be used to help individuals stay healthy or moral or become healthier or morally better. Criminal laws are paternalistic if they make it illegal to perform some action that would be bad *for the actor* to do, regardless of effects on others. Yet, one result of such laws is the punishment, including incarceration, of the very same actors—also clearly bad for them even if meant to be rehabilitative. Therein lies an oddity: paternalist criminal law—and the presumably rehabilitative punishments that serve as responses to infringements of such laws—is meant to help the actor but in fact has the opposite effect on net. Incarceration is particularly problematic on this front as it harms the alleged criminal in ways that go beyond the harm they would have caused themselves. Incarceration also may undermine the actor’s ability to improve his decision-making abilities or his moral character. The effects of the punishment also drift to others—family and friends, as well as business associates, of the punished. Paternalists, inasmuch as they are motivated by beneficence or concern about moral character, must account for all of these costs as threats to well-being and the conditions for acting morally. Given the link between paternalism and incarceration, we propose that if we are to take seriously the problem of over-incarceration in the U.S., we must reconsider the use of paternalism in criminal law; we sketch several alternatives. We believe paternalists should *support* our resistance to incarceration and seriously consider these alternatives.

Introduction

The principle of legal paternalism allows that it is a good reason for a law that the adult person affected by the law is *herself* benefited or least prevented from harming herself, often despite her occurrent desires and choices. Laws prohibiting the sale, purchase, or use, of drugs and laws requiring the usage of seat belts in automobiles or helmets on bikes are examples of paternalist laws. One of us has written elsewhere about why legal paternalism toward competent adults disrespectfully substitutes unjustified judgments for the target agent’s own judgment, regardless of any success it might have in motivating targets not to harm themselves (Glod 2013). He has also argued that paternalists face daunting informational constraints regardless of

¹ We thank the other contributors to this volume, especially those in attendance at the 2016 Workshop in New Orleans, for assistance in thinking through these issues and how best to formulate our view. We also thank Brendan Dooley and Daniel Shapiro for comments on an earlier draft and Chris Surprenant for organizing the workshop and editing this volume.

whether we should be concerned about autonomy as merely a capacity for self-direction (Glod 2015). The other of us has written against paternalism and in favor of harm to others being the *only* justification for laws (Cohen 2014). Here, we argue that legal paternalism involving incarceration for non-violent drug crimes will largely fail to achieve its own objectives. We don’t consider—what also worries us—the unfortunate limits paternalism puts on autonomy. Along the way, we also treat non-paternalistic “social welfarist” arguments that justify incarceration in terms of preventing harm to others. We focus on drug addiction as its criminal prosecution is a notable source of over-incarceration in the United States.² Our thesis is simple: *we ought to have no criminal laws justified by paternalism; ridding our society of such laws would reduce the problem of over-incarceration and paternalists and social welfarists should support their repeal.*

Some critics of drug criminalization are skeptical that paternalism or protection of society against allegedly dangerous drug addicts is the main motive behind drug laws. Consider “broken windows policing,” in which police arrest people who commit relatively minor crimes like vandalism and drug possession because that group of people overlaps with the group of criminals who do significant harm to others.³ Incarcerating them for minor crimes, it is claimed, has the effect of reducing the serious harm some of them would otherwise do. Others maintain that rent-seeking explains the rise and prevalence of criminal laws. Be this as it may, our focus is normative and critical rather than descriptive—we focus on *justifications* for treating drug use as a criminal matter. The above explanations may be correct; nonetheless, concerns about drug addiction’s harmfulness remain a key justification for the criminalization of drugs in the minds of many people beyond law enforcement and this is an audience we are keen to reach. As such,

² To be clear, we are speaking about laws regarding adults only. It is perfectly appropriate to have laws that prevent children from choosing to use drugs.

³ We believe Doug Husak similarly suggested, in a talk, that the real motivation of the War on Drugs is actually a “war on crime.”

we look at the real-life effects that incarceration due to criminal drug laws tends to generate. It would be odd for defenders of such laws to claim that their main concern is with the harm of drug addiction and not consider the ancillary negative effects of those laws.

We proceed as follows. In the first section we explain paternalism and social welfarism. In the second section we consider costs and benefits of criminal drug laws to those who violate them. We continue discussing costs and benefits, but to loved ones and others closely connected with violators and with society at large, in sections 3 and 4. In section 5 we consider some objections and in section 6 we discuss alternatives to incarceration.

1. Paternalism and Social Welfarism Explained

Joel Feinberg writes that, according to the principle of legal paternalism, “It is always a good reason in support of a [proposed] prohibition that it is probably necessary to prevent harm (physical, psychological, or economic) to the actor himself” (Feinberg, 26-27). He distinguishes this from what he calls moralistic legal paternalism, according to which “It is always a good reason in support of a proposed prohibition that it is probably necessary to prevent *moral harm* (as opposed to physical, psychological, or economic) to the actor himself,” as well as a type of perfectionism, according to which “It is always a good reason in support of a proposed prohibition that it is probably necessary for the improvement (elevation, perfection) of the character ... of the very person whose liberty is limited” (ibid, 27).⁴ In this paper, we speak of paternalism in general terms as incorporating the three principles just discussed. We take

⁴ This is what Feinberg calls *Moralistic Benefit-Conferring Legal Paternalism*; it is one of two parts of perfectionism on his view. The other part is what he calls the *Moralistic Benefit-to-Others Principle*. Put together, Feinberg’s perfectionism is about improving the character of everyone in the polity; we are concerned primarily with those whom we would interfere. For more on perfectionism as a type of paternalism, see Dworkin 2005 and George 1993.

justifications for laws to be paternalist if they claim that the law in question will tend to *prevent* physical, psychological, economic, or moral harm to the individuals such laws permit interference with or if such laws will tend to *improve* those individuals physically, psychologically, economically, or morally. This is an intentionally capacious understanding of paternalism, but one we think reasonable.

The most straightforward example of paternalist laws in the US today comprise the so-called “war on drugs.” In 1997, fully 26.9% of those incarcerated by state and federal governments were imprisoned for violating a drug law. The number has fortunately decreased—to 20.5% by 2012, but still leaves 309,100 individuals whose lives—and those of their family, friends, and business associates—were worsened because of laws supposedly meant to help them.⁵ Our basic point is simple and, in our view, oddly overlooked: bringing people into the corrections system will set back their interests, so doing so in order to prevent them from setting back their own interests via drug use is problematic. This is why the capacious understanding of paternalism we work with makes our case more difficult: while we can point out that arresting people sets back their interests, someone might claim that we are too narrowly considering only the things they actually recognize as in their interest and they may too easily ignore the desiderata of making would-be criminals more virtuous and better decision makers. If that claim were right, there might be good reason to continue to maintain paternalist criminal laws. We aim to show, though, that wanting to improve the character and decision-making skills of would-be criminals should lead us to reject those laws.

While our primary concern is with paternalism, throughout our discussion we hope to show that social welfarists also ought to reject incarceration of those violating paternalistic laws.

⁵ All numbers in this paragraph from <http://felonvoting.procon.org/view.resource.php?resourceID=004339>.

In brief, when we discuss social welfarists, we have in mind those who favor laws and legal actions that are aimed to promote the well-being of all individuals in society. (They may or may not also think society itself that can be made better or worse.)

2. Costs & Benefits to those violating laws justified by paternalism

In one of our home states—Georgia—almost 6% of the population is under some form of correctional control.⁶ Nationally, more than one out of every fifty people is under some form of correctional control. As a fifth of our jail and prison populations are incarcerated for drug related offenses, it is reasonable to assume that a fifth of those under correctional control are in that situation because of drug related offenses. While being in prison is, we assume, worse than parole or probation, being under any form of correctional control is being subject to great limits on one’s freedom. For the sake of simplicity, we concentrate on incarceration. Let us explore some of the costs to those who face incarceration.

First, those who encounter the *possibility* of being incarcerated typically face mounting legal and other fees to fight imprisonment. These fees are often enough to wipe out any savings they built up or to put them into debt. Public defenders are often overworked and ineffective at getting their clients absolved or getting them more lenient sentences. More effective attorneys are often expensive, sometimes prohibitively so. The poorest and worst-off are not well equipped to handle these fees or post bail while detained. Those who were relatively successful before incarceration face not only fees but also lost income once they lose their jobs. We should not overlook the fact that some of these costs are incurred by individuals who never face sentencing because found not guilty. Their costs are not typically reimbursed. While we are focusing on the

⁶ In Washington DC, it’s almost half that, but 3% is still exorbitant. Georgia is a startling outlier; the national average is 2.111%. We’ll use 2% here for simplicity. For the numbers, see <http://www.prisonpolicy.org/reports/50statepie.html>.

costs to those incarcerated for violating paternalistic laws and the creep of those costs to those connected to them, the costs of those laws are clearly more widespread. Others have noted, of course, the simple costs of enforcement. We should also not be blind to the clear financial and emotional costs (etc.) to those exonerated.

Second, the stress of prosecution and confinement can take a physical and psychological toll on prisoners, many of whom already suffer from mental health issues. Even hours or days in a local jail may suffice to lead a fearful or drug-withdrawn inmate to take rash action, including suicide.⁷ Recent studies indicate that separation from loved ones and loneliness are worse for one’s health than smoking or obesity, as intimacy is not a luxury but a vital human need (Cacioppo and Cacioppo 2014; Metzner and Fellner 2010).⁸ In many cases, visitation is highly restricted and subject to change at the whim of prison officials. People who have traveled a long way to visit might face last-minute cancellations due to (say) a lockdown. Parties may be separated by thick glass while visiting or only allowed to communicate through computer equipment⁹ and even when they are not, affectionate exchanges are typically forbidden. Conjugal visits, even for married prisoners, are often not allowed for sentences under certain durations. Pets are typically not allowed at all, so someone imprisoned long enough may never get to see a beloved animal again. Prisoners often cannot be furloughed for funerals, so are unable to pay final respects to a friend or family member.

Third, the purely physical hell of prisons can include abuse or humiliation from fellow inmates and prison guards; the constant fear (reasonable!) for one’s safety; low quality,

⁷ See, for e.g., <http://highline.huffingtonpost.com/articles/en/sandra-bland-jail-deaths/> (accessed July 14, 2016).

⁸ This view is also defended in work taking a capabilities approach to political thinking. See, for example, Nussbaum 2003.

⁹ In the DeKalb County (GA) jail, for example, the only communication friends and family have with prisoners is via a video conferencing call—whether they do so from home or from the jail, where computer access is provided.

unappetizing, and unhealthy food; uncomfortable bed and clothing; boredom; crowded and unsanitary conditions; and inadequate access to mental health resources, education, or vocational counseling. Joining a violent and racist gang is often one’s best means of protection from abuse if one has a lengthy sentence, and one is often beholden to the gang once released since failure to abide by its directives can leave one and one’s loved ones at risk of severe punishment.¹⁰

Fourth, confinement brings large opportunity costs with little chance to be productive or earn money. A typical day in prison often involves sitting in one’s cell watching TV, if one is lucky enough to have one. Literate prisoners are allowed to read only approved books and it is unclear how much effort is made to teach illiterate prisoners how to read since education is not a priority at most prisons.¹¹

Fifth, life often fares no better for the prisoner after release, since a loss of social status and opportunities post-incarceration remains. It is often difficult to find a good job—or any job—with a criminal record. A person who committed non-violent albeit morally objectionable crimes in exchange for drugs, such as distributing but not producing or viewing child porn, is a registered sex offender for life, seen as on a par with actual child rapists, and faces tremendous restrictions on where to live and work. Even ex-inmates who had been imprisoned for less serious crimes are treated as second-class citizens merely because they are seen as little more than untrustworthy felons. A diminution of the social bases of self-respect in light of the above is a powder keg for recidivism, something that should concern paternalists who favor incarceration.

Given all of these costs to the incarcerated, there must be some associated benefits—or there is no rationale for criminal drug laws. We take it that the benefit of drug laws to at least one

¹⁰ For more on how prison gangs function, see Skarbek 2011.

¹¹ Some state prison systems do have programs for prisoners to earn GEDs or even Associates degrees, though the latter is rare.

sort of perpetrator—the individual who uses the illegal drug—is to help them not to use the drug.¹² Assuming the drug use is bad for the user, the benefit of imprisonment should be clear: making the drug unavailable so that one has better opportunity to improve one’s health or decision-making abilities, or become morally better. It may also help foster stronger social bonds. Additionally, there are indirectly paternalistic affects when would-be users are deterred from use by the threat of prison. Finally, criminal drug laws are justified in terms of protecting society from the dangers of drug use, a “harm to others” rationale. If these benefits outweigh the costs of drug laws, that would be a strong if not decisive reason to maintain those laws. We submit, though, that the above-discussed costs—not to mention those discussed in the next section—far outweigh any benefits.

Our hypothesis is that for those already motivated to curb their use of drugs, incarceration is unnecessary and that for those not so motivated, incarceration will not help since inmates can often get contraband in prison or return to their habits upon release. Incarceration is ineffective (at best) for the insufficiently motivated and unnecessary (at best) for the sufficiently motivated. That is, *even if* we could somehow avoid the costs discussed above, people who do not want to quit using the illegal drugs they were arrested for using will not tend to benefit from being forced to quit for the duration of their imprisonment, and those who are willing to quit do not need to be imprisoned in the first place. Consider those who are *unmotivated* to give up the self-harmful behavior. Perhaps addiction is always lamentable, but if defenders of incarceration are arguing that people have it within themselves to learn from incarceration, it’s unclear why they would not also believe people have it within themselves to learn from life’s challenges without the additional costs of incarceration. Paternalists can’t have it both ways. People can’t be so lost to

¹² We realize that some form of moralism may underlie many actual drug laws—and other paternalist laws. Indeed, what motivates the creation of any law is often quite different than its usually touted justification.

addiction that they lack freedom or opportunities to improve, yet magically gain freedom and opportunities to improve through incarceration and its attendant costs. There are probably some people who will claim they were grateful for imprisonment because it forced them to take inventory and get their act together. However, they had to have some motivation to continue to stay clean, so imprisonment was not a *necessary* motivation to steer them in the “right” direction. Perhaps it happened to be the thing that spurred them to change at a given moment, but if so, that is clearly contingent—and there are likely more effective (and respectful) tactics worth exploring, such as those discussed in section 6.¹³

Of course, critics of our position can agree with us that the *current* corrections system is a massive failure at actually *correcting* behavior but insist that this does not mean we should do away with it or with criminal laws—including paternalist laws—that send people into the system. They can insist that we should change the system—which is really a penal system more than anything else—into an appropriately *corrective rehabilitative* system based on good data about what can change incentives. They could conclude, then, that we should not blame paternalistic laws for bad penal practices in the United States. We welcome their proposal of a better alternative. Our point is that in our current system, people found guilty of crimes suffer more from their punishment—especially incarceration—than is usually recognized and that the damage from punishing people for violating paternalist laws tends to outweigh the supposed damage they do to themselves. The same holds for harm to others. We suggest that whatever harm others suffer due to an addict’s habit will be outweighed by the harms they suffer by imprisoning the addict. We tend to think that should be the end of it, but if proponents of

¹³ We should mention the clear direct costs of being on probation or parole. Of course, all of the above remain relevant for those on parole (see https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf). Those on probation or parole may have difficulty finding employment, may have to find time for appointments with correctional officers, and may be confined to certain areas for travel. More attention can and should be spent on this matter given that 1.4% of the American population is on parole or probation.

reformed carceral practices have a developed proposal to improve the U.S. system so that it genuinely helps people without causing harm to others, we can discuss again whether we should punish people for violating paternalistic laws. We don’t think we should, but it is a topic for a later day—a day, we admit, we don’t think will ever come. Let us now look at whether criminal drug laws prevent harm to others on net.

3. The initial drift of Costs and Benefits: family, friends, and neighbors

It is clear to us that the costs to those subject to correctional control far outweigh the benefits. In this section, we suggest that the costs go far beyond those. The costs to family, friends, and business associates of those incarcerated for violating criminal drug laws are also tremendous. Richard Lippke (2016) nicely lays out many of the costs of incarceration that drift to loved ones of prisoners:¹⁴

- lost intimacy
- lost emotional support
- lost income (and other financial benefits)
- lost assistance in raising children or caring for other loved ones
- incurred shame
- increased worry about the imprisoned loved one
- the burden of life with “offenders who are psychologically damaged by their imprisonment” when they are released (Lippke, 9)

To this list, we would add:

- financial costs of visiting loved one, often far away
- financial costs of communication (prison phone calls are often very expensive)
- loss of role models
- incurred stress and concern about the imprisoned

¹⁴ See his first footnote for more sources. Lippke also responds to objections that punishment drift might be appropriate. We find his responses satisfactory. See also Uggen and Stewart 2015.

- incurred view, of child, that parent is a bad person
- incurred view, of child, that they are themselves bad as child of a bad person
- decreased ability to secure a loan

And these costs, to others in the neighborhood of the incarcerated:

- loss of employee or employer
- loss of trusted neighbor

And we ought not forget costs discussed in section 2:

- the financial costs incurred by the imprisoned, whom these people help
- the opportunity costs of the imprisoned, which likely impacts loved ones.

We agree that these “collateral consequences” of legal punishment come “a bit too close to punishment of the innocent to be casually tolerated” (ibid, 2). Our point, though, is not dependent on that claim. Our point is that these costs offset any potential gain. The point of drug offense incarceration is meant to be a net benefit but, as argued in the last section, that is unlikely to be the case. These added costs should further incline paternalists and social welfarists against incarceration.

It might be objected that the imprisoned individual is unlikely to have been a good parent, spouse, friend, or employee, and may have even been abusive or otherwise brought more difficulties to family and friends with their presence. Certainly, spousal and child abusers do frequently have substance abuse problems that might leave them imprisoned or otherwise punished by law. “Fifty percent of batterers are believed to have had ‘addiction’ problems (Faller, 1988);” “A recent survey of public child welfare agencies conducted by the National Committee to Prevent Child Abuse found that as many as 80 percent of child abuse cases are associated with the use of alcohol and other drugs (McCurdy and Daro, 1994)” (Substance Abuse and Mental Health Services Administration 1997, 3). It thus might be thought that maintaining incarceration as a form of punishment for violating paternalistic drug laws is well

worthwhile. There are at least three problems with this view.

First, while we are certainly in favor of policies to reduce child and spousal abuse, maintaining paternalistic laws against drug use is unlikely to help in doing so. It is clear that alcohol is more of a problem than currently illegal drugs. “Probably the largest contributing factor to domestic violence is alcohol. All major theorists point to the excessive use of alcohol as a key element in the dynamics of wife beating. However, it is not clear whether a man is violent because he is drunk or whether he drinks to reduce his inhibitions against his violent behavior” (Labell 1979, 264; cited in Substance Abuse and Mental Health Services Administration 1997, 4). Hence, little is to be gained by current drug prohibitions. Importantly, though, “[r]esearch also indicates that women who abuse alcohol and other drugs are more likely to become victims of domestic violence (Miller et al., 1989)” (ibid, 3). If this gives support to paternalistic legislation against drugs—and alcohol—as designed to help the women who would presumably be abused if they drink or do drugs, it also amounts to blaming the victim. It seeks to prevent women from being abused by stopping *them* from drinking alcohol and using drugs. Compare: we can prevent women from being raped by stopping *them* from wearing short skirts and blouses with revealing bust lines. This line is worrisome. It is not the woman who is to blame if she is raped and it is not the woman who is to blame if she suffers spousal abuse. The rapist and abuser are to blame. Criminal laws against rape and abuse are clearly appropriate.

There is one final issue with the idea that the correlation between alcohol and drug use on the one hand and domestic violence on the other should be addressed with paternalistic laws against the former. Simply put, while “a substantial proportion of people who abuse their partners also abuse substances,” “[m]ost people who abuse substances don’t abuse their

partners.”¹⁵ Hence, we can expect a criminal law preventing substance use to harm a great many people who would not have abused anyone.

Our last claim is hardly novel. Any law can affect people that would have done no harm whether or not the law was instituted. Still, criminal drug laws are especially prone to this problem. Here, though, our point is that these laws have tremendous negative impact on many people, not just those directly cited for violating the laws. The effects so clearly drift to the family and friends of those punished for violating the laws that it seems unimaginable to think justice requires such penal law. It is also worth noting the racially disparate effects of drug laws. Though most people that violate drug laws are white, most people who are imprisoned for such violations are not (Chin 2002). Wealthy or middle class white neighborhoods have drug users though those users are seldom arrested.

4. Costs and Benefits to society as a whole.

In section three, we discussed how punishment of those that violate laws tends to drift on to their loved ones and neighbors. Of course, there are also broader societal costs involved that should be noted. To begin, there is the obvious cost of enforcement. Domestic spending alone on enforcement of drug laws in the US has been greater than nine billion dollars annually since 2014.¹⁶ Interdiction and international costs add almost five and a half billion annually.¹⁷ Ending the so-called “war on drugs,” in other words, would provide an immediate \$14.5 billion savings/year. That savings could translate into lower tax bills for the average taxpayer or

¹⁵ <http://www.opdv.ny.gov/professionals/abusers/excuse2.html>, accessed November 23, 2016.

¹⁶ https://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/fy_2016_budget_summary.pdf.

¹⁷ We also spend more than 11.5 billion annually on “prevention and treatment” (ibid). One might think that number would increase if we decreased the amount spent on enforcement, but for reasons that will become clear below, we suspect this is mistaken.

additional dollars for rebuilding infrastructure or some other useful purpose. Everyone should welcome that, particularly paternalists and social welfarists motivated by beneficence.

As we already discussed, those incarcerated for violating paternalistic laws lose their employment when in prison and likely have a more difficult time getting hired when released. That means they have fewer opportunities to bring their productive abilities to bear on the economy. They may thus suffer significant financial difficulty or receive state aid. They are prevented from increasing their income (at least in legal ways) and so prevented from buying goods and services from their neighbors, whose businesses thus do less well than they might. These opportunity costs are significant, though we can't provide good estimates.¹⁸

The enforcement of drug laws, notoriously, has clear and significant unintended consequences. Those who sell illegal drugs are driven “underground” and a black market emerges. Disputants in black market exchanges cannot seek the aid of police or a state court system and are thus more likely to carry weapons than they might if the market was legal. Violence is thus higher because of these laws. This also means the costs of drugs will be higher as availability is limited and traders must expend more effort to import and/or transport their goods. There are also interesting and unclear consequences for the quality of the drugs. On the one hand, some will point out that the drugs sold might be less pure or tainted as unscrupulous criminal types are involved. On the other hand, there is clear incentive to make the drugs purer and more efficient at delivering the desired effect. Someone risking legal prosecution for importing, transporting, buying, or using a drug, wants the drug to be as easy to carry in a concealed manner as possible and as potent as can be (Thornton 1998). If one can get the same reward using one gram of a drug as they can using 10 grams, there is a clear advantage. To take

¹⁸ The best available work here seems to be Anderson 1999. His 2011 follow up puts the total annual cost of crime, net of transfers from victim to criminal, at \$1.7 trillion (209). Thanks to Frank Stephenson for the source.

one example, while “the estimated adjusted prices [of powder cocaine] experienced a modest but continuously gradual decline ... estimated purities increased to a much higher degree – increasing from the 55 to 65 percent purity level in 2001 to the 70 to 80 percent region in 2006” (Fried et al 2008, 9). Societally, there seems less concern about the possibility of more potent drugs than the possibility of more tainted drugs,¹⁹ but those with a paternalistic desire to end drug use should be very concerned with increased purity and these other costs.

It would be a mistake to think the problems discussed in this section concern only those involved in the drug trade. There are always spillovers when one encourages policies that incentivize the use of guns and violence. Innocent bystanders can be hurt. There are also clear beneficiaries of such laws: for example, police departments get more funding to combat drug use and police officers might get better salaries than they otherwise would. With increased prohibitions and the rise of a black market, there are also increased possibilities for officers to work with those in the black market for remuneration “under the table.” This does *not* help most police officers who face increased risks in the more violent world created by prohibition. It helps those in the black market who bring in substantial personal incomes (untaxed), but not those with genuine medicinal uses for drug (or who simply want to responsibly use it recreationally). In short, when we have policies that encourage black markets, we likely help the careers of gang leaders, opportunistic police officers, corrections officers, and district attorneys and other prosecutors who have more work on their hands. None of this helps the rest of us.

The rest of this should be predictable: we get a rise in gangs or other organized crime groups, they dominate their crime-ridden and economically underdeveloped neighborhoods, leaving others with fewer opportunities for social and income mobility as young people

¹⁹ Those in drug enforcement, on the other hand, might be less worried about impure or tainted drugs. As one officer has indicated, those sold bad drugs have ways of making their displeasure known to their dealers.

(predominately minority men) see joining gangs, rather than applying for legal jobs or attending community college, as their best opportunity to rise or have social affirmation. This also likely leads to poor schools, ill-equipped to educate local children, as teachers may opt for lower salaries elsewhere rather than work in gang controlled environments—whether or not they are actually more dangerous.

On top of all of the costs thus far discussed—which may seem limited to local communities—there are costs to the entire country. First, all of the increased criminal activity and economic costs just discussed would permeate the nation. Organized crime figures in New York might have dealings with others in Florida, for example. Loss of purchasing power in Georgia means loss of business for those in Silicon Valley, for another example. The problem is clear. But we want to discuss another, non-financial cost, given that some paternalists argue for criminal drug laws on the grounds of the *moral* harms they cause.

There are tremendous psychic costs of being citizens of what Justice Sotomayor calls the “carceral state.” With those, typically poorer and minority people, “who are routinely targeted by police ... [we should] recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but” (dissenting opinion in *Utah v. Strieff*). This cost is, on its own, too high. Increased surveillance reduces privacy and makes more people feel as if they are not trusted and as if they cannot trust their neighbors. Civil asset forfeiture and the militarization of police cause the same problem. These intrusions of liberty and privacy do not merely compromise the ability of the targeted to develop morally virtuous characters, let alone have basic self-respect as a free and

equal member of society—they also compromise the characters of those who would intrude without a second thought.²⁰

Some may think these problems only exist for those “routinely targeted by police”—and that we, overwhelmingly white male academic types, have nothing to worry about. Ignoring the obvious injustice present in such thinking, we would also note that a social environment with these problems is also likely to foster a dangerous status quo bias whereby we unreflectively become conformists, thinking it’s only “bad people,” “poor people,” or “people of color” that have a problem and that it’s a problem of their own devising, such that their lives would go better if only they would abide by the law. We hear this sort of claim far too often—“Don’t do the crime if you can’t do the time!”—sometimes with a smugness, usually with a seeming lack of understanding that the likelihood of someone being subject to correctional interference is directly correlated with where they were raised. Such attitudes are morally problematic and represent a condescending dismissal of the less privileged as being incapable of moral equality.

Those of us who grew up in relative affluence are too likely to have an attitude like this that is corrosive to liberal democracy. It’s also an attitude that simply assumes might makes right and implicitly accepts that what the state says is illegal is, in fact, immoral. As Frédéric Bastiat (1801-1850) observed, “We all have a strong disposition to consider what is legal to be legitimate... many people mistakenly consider all forms of justice to be founded in law” (*The Law*, 111). This bias is unfounded, of course. It may or may not be that drug use or addiction is typically immoral—we doubt it, but won’t argue that here—but we know all too well that law can be used to criminalize activities that are clearly moral (miscegenation, for example) and can

²⁰ As Kristin Bell suggested to us, an additional concern here is that the sort of system engendered may (sometimes does) lead to an inversion of values wherein those in communities where incarceration hits hardest come to see going to prison, for drug offenses of otherwise, as a badge of honor. Selling drugs that are not good for you may then be seen as honorable. More generally, acting badly is seen as good.

encourage activity that is clearly heinous (slavery, for example). Encouraging some to think of themselves as morally superior to others is always risky²¹ and never likely to improve a polity.

5. Further Objections

Critics may raise a couple objections at this point. First, they might claim that fewer people today are imprisoned for drug possession than twenty years ago, so we’re presenting a straw man. Indeed, violent crime in the U.S. has declined since the early and mid-1990s. If the tide is turning against large prison sentences, mandatory minimums, and three strikes laws that may have helped reduce violent crime but no longer serve a good purpose, then we are harping on social problems that are now largely getting solved through efforts to ease the burden on victimless criminals. We claim, though, that too many people are still imprisoned for mere drug possession. A system that continues to allow those people—likely disproportionately the most vulnerable and worst-off—to remain imprisoned needs reform. Moreover, many people who commit nonviolent crimes against others (e.g., theft, distribution of child pornography) and so (arguably) warrant incarceration only act criminally because they cannot easily access drugs made artificially costlier or more difficult to find due to illegality. That is, the artificially higher cost of the drugs they seek leaves them ready to commit real crimes. Legalized, the prices of those drugs would decrease and crimes committed to support a drug habit would decline.

A second, almost opposite, objection is that drug addiction remains a serious problem affecting wide swaths of the population, and we need to incarcerate users not so much for their own purported benefit but in order to deter would-be users. This is the “indirect” paternalism mentioned above. We are skeptical of this objection for two reasons. First, evidence suggests that

²¹ It also risks the creation of “moral panics” with people worked up over chimeras like roving gangs of dangerous drug addicts. Those who panic are complacent when states use the law to oppress people engaged in non-threatening (to others) activities, including the abuses of power mentioned above.

“swift and certain” punishment is a more effective deterrent than long and harsh drug sentences (e.g., Nagin 2013). Second, and more importantly, it seems clear from the discussion above that the harms of such a deterrent system would far outweigh whatever harms are associated with drugs themselves. The myth of widespread addiction may motivate the call for deterrence.²² According to the book *Chasing the Scream* (Hari 2015), only 10% of drug users are actually addicts, few of them are dangerous, and most people stop using drugs without any treatment. Of course, there are different models of addiction, but regardless of which (in particular, a disease or habit model) is more accurate, addiction is not so all-consuming that addicts completely lack the ability to improve themselves or seek help or treatment.

Drug addicts do not lack choice altogether, but even if some of the worst were ciphers, it is hard to believe incarceration helps *them*. Someone who cannot function in the outside world will not magically start functioning in prison. Addicts in prisons suffer greatly from withdrawal or find ways to feed their habits. Prisoners in many facilities can get drugs and other contraband, or spend their limited prison capital trying to attain them. Either way, it’s not clear how incarceration would help someone so addicted to a drug that they were unable to choose against using it. Critics might argue that incarceration forces these addicts to dry out, something they might never have done on the outside. While this might help the addict stay clean in prison, it does not address how making him “go cold turkey” improves his ability or willingness to make better decisions once free again (nor recidivism upon release). His lack of drug use is not due to a reason he endorses nor an incentive he values. Mere behavior modification is unlikely to be a recipe for turning the hardcore addict of the disease model into the self-motivated, responsible person paternalists—and all of us—prefer him to be. For similar reasons, penal laws are a poor

²² Its also a perfect example of a moral panic.

choice for helping people be better qua moral beings. An individual that merely acts because of external constraints does not thereby become a better person.

6. Alternatives

We argued above that incarceration would be ineffective for those lacking motivation to quit harmful addictions. Incarceration would also be unnecessary for those who *do* have sufficient motivation. For those people, providing alternative opportunities more attentive to their freedom and well-being would be sufficient. We now sketch a non-exhaustive list of alternatives to incarceration (from worse to better) as an invitation to skeptics to explain why they would be less effective than imprisonment. We suggest them with a caution that we should not assume without good evidence that imprisonment is most effective. We are not claiming any of these alternatives are panaceas. There are no panaceas, but we should not add harm in the name of speculation that we are thereby reducing it overall. Some of these are also paternalistic, though perhaps requiring less invasiveness in the life of drug users. We are not endorsing these, but merely putting them forward as alternatives that would create less harm than incarceration.

The first alternative is a temporary mandatory rehabilitation program coupled perhaps with work-release. The patient might be required to spend a few weeks at a drug treatment center where she would have access to the resources necessary for overcoming her addiction. As she shouldn't have to lose her job over this, arrangements should be made accordingly. But objections remain. Perhaps she doesn't want to discontinue using the drug and functions well with it.²³ Perhaps she objects to the treatment methods at the rehab facility. For instance, some people think 12-step programs are ineffective or even counterproductive (e.g., Johnson 2011).

²³ If drugs are decriminalized, perhaps those who go through a mandatory rehab program but choose to continue using should then be free to do so without further confinement.

And of course, there are some functioning addicts, so the assumption that they need “treatment” may be biased and lead to their resentment.²⁴

A better alternative is to decriminalize drug possession and use with civil penalties such as fines rather than imprisonment. Perhaps (the threat of) getting hurt financially will motivate some people not to use drugs, and the fines paid by those caught could fund drug treatment programs. However, this would seem to work only for those people who don’t have strong preferences to use, or who have a strong motivation to quit. Those are not the people who most concern paternalists. If addicts have a fairly inelastic demand for drugs, they might be willing to pay even heavy fines, which just leaves them poorer. Moreover, for fines to be effective they must be significant and will thus hurt some people. People who don’t pay them can end up in ... well, jail or prison. People who are well off may simply pay the fines and continue to use the drugs—thus not, on the paternalists’ view, being helped. Of course, with these latter sort of users, one wonders why it matters that the law is intended to help them—they continue to function on their own, even if only because they are wealthy.

A better alternative yet is to legalize drugs but tax them, using the revenues for drug treatment programs for the willing. Poorer addicts who can’t afford the taxes might resort to crime, so the taxes might be progressive and indexed to a person’s reported wealth or income. Those below a certain financial level will pay little to no tax. Whether this approach could overcome corruption, paternalists may not find the alternative satisfying since many will pay the higher tax without curbing their drug use, which harms them more than if there were no tax.

Paying people to stop self-harm is better still. Concerned parties can provide resources to those willing to accept the offer; this would arguably be cheaper, or at least more efficient, than

²⁴ See Brecher 1973 about eminent heroin addicts. Also Kaplan 1983 and Zinberg 1986. Thanks to Daniel Shapiro.

the criminal drug laws assessed above. Drawbacks to this approach include the fact that people might bluff when they don't really intend to use drugs, and some people might simply not be willing to accept even the maximum of what others are willing to pay. Again, however, it is unclear how any attempt to help the unwilling can work if they are unmotivated to end their addiction. For those who are willing, commitment devices such as StickK.com are an option. A person who wants to quit drugs can make a public bet with a referee. He gets rewards if he succeeds, including public acknowledgment of his success, but he has to pay a penalty (often a promised amount held by the referee to be given to a group he despises, such as the Republican National Committee) if he fails and also face the shame of publicly admitting his failure.

Whatever the merit of the above approaches, we think the root issue comes down to bonding and civil society. Addiction is often a symptom of perceived isolation (Hari 2015), so friends, family, and community groups (churches, clubs, etc.) can try to look after those who need help through informal norm enforcement that is sometimes crowded out by legal institutions trying to perform these tasks. Critics might be skeptical that such mechanisms can be effective at helping those who want help, but the question to ask is what institutions can promise better results given incentive alignment and local knowledge of the addict's situation and personality. In addition, voluntary treatments like cognitive-behavioral therapy can teach skills to those who are motivated to learn healthier ways to cope with stress, anxiety, or depression.

Again, none of these approaches are guaranteed to work. But paternalist and social welfarist critics of these approaches are ill-placed to regard incarceration as a better option. At this point, skeptics might consider settling for letting people fail and living with that as a lamentable cost of freedom. It is a fallacy to assume that the best realizable liberal order will or should be problem free. Bad things will happen and people have to choose how to respond to

bad things—and they won’t always respond in the healthiest of ways. Doing nothing may seem like an unsatisfying approach, but given the costs associated with incarceration, we should not be tempted by action biases. “We must do something” is no excuse for making people’s lives worse in the name of supposedly making their lives better.

Conclusion

As liberals, we believe that demands on the worst-off to be free and equal morally accountable members of the political community generate a corresponding obligation on society to at least not punish them for crimes that generate only self-regarding harms. In our highly imperfect world, this means rights to indigent legal defense should they nonetheless be charged with crimes. More ambitiously, we argue that nobody should be charged with crimes that are self-regarding. Legal punishments, and laws more generally, should not have paternalistic rationales in a liberal society, and one reason is because such laws tend not to benefit the very people paternalists intend the laws to benefit. Indeed, they tend to harm many others beyond those incarcerated.

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