Chapter 2: Liberty

Case Study: Drug Laws

At the beginning of his chapter Ian Carter asks: 'Does prohibiting the sale or consumption of drugs restrict liberty? Or does it liberate potential drug addicts by helping them to take control of their lives?'[1] We will take up these questions in this case study, in the light of what we have learned from the chapter, with a specific focus on cannabis.

First, some background information. The use of cannabis for recreational purposes is illegal in most countries in the world, including the United Kingdom, where it is a class B drug. This means that individuals can face penalties of up to 5 years in prison for possession and up to 14 years for supply and production. In 2014, cannabis accounted for 57 per cent of drug law offences within the European Union, which amounts to nearly 1 million offences (EMCDDA 2018). In England and Wales, this figure was 66 per cent—around 118,000 offences (ONS 2015).

The usual justification for laws against recreational drugs is an appeal to the harms that they cause (for one example, see de Marneffe 2015). A 2016 World Health Organization report summarized the evidence relating to both the short- and long-term effects of cannabis usage. 'The most obvious short-term health effect of cannabis is intoxication marked by disturbances in the level of consciousness, cognition, perception, affect or behaviour, and other psychophysiological functions and responses' (WHO 2016, p. 6). Adverse outcomes linked to long-term usage include 'dependence, educational outcomes, the use of other illicit drugs, cognitive impairment, mental disorders (psychoses, depression and other disorders) and suicidality (risk, ideation, attempts and mortality)' (WHO 2016, p. 23). While there is debate concerning the causal relationship here—i.e. whether cannabis usage is *causing* these outcomes or is merely correlated with them—the WHO report argues that the evidence suggests that cannabis does have a causal role in relation to many of these outcomes.

It seems clear that laws prohibiting cannabis restrict citizens' freedom according to negative conceptions of liberty. On what Carter calls the 'impure negative conceptions' this is the case because the threat of punishment deters individuals from using cannabis, changing individuals' option-sets such that taking cannabis is a far less attractive option than it might otherwise be. On the 'pure negative conception' the law restricts freedom by making certain sets of actions physically impossible: in this case, seemingly all sets of actions that involve using cannabis and then undertaking any further actions that one cannot undertake outside of prison or having been levied with a fine, or that involve kinds of work that are impossible to obtain when one has a criminal conviction.

This conclusion might be too quick, however. After all, many people do use cannabis even in countries where it is illegal. For example, according to a 2015 survey, 35.8 per cent of adults

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[1] p. 2 of my version of the chapter.

in England and Wales had used cannabis at some point in their lives, and 9.1 per cent had done so within the last year (EMCDDA 2017). It might seem strange to say that all of these people are doing something that they are unfree to do. The example of laws that are not effectively enforced highlights a difference between the pure and impure negative conceptions. On the pure conception, laws that are not enforced at all do not constrain freedom, since they do not render any set of actions physically impossible. Laws that are only sometimes enforced are a harder case. It is pretty rare to see someone smoking cannabis in public, for example, presumably due to the threat of arrest. But smoking in public without being arrested is often not *impossible*, given the patchiness of enforcement, so people are seemingly still free to do so. Having said this, arrests do occur — and in those cases it seems that the set of actions involving smoking cannabis in public and doing further actions incompatible with arrest was indeed made impossible by the law (combined with its enforcement). In sum, identifying the limits of liberty seems difficult in the case of laws that are not effectively enforced, because it is not actually clear (in advance) what action sets are available.

On the impure conception, laws that are rarely enforced can still constrain freedom, since many citizens will refrain from illegal actions simply because they are illegal, or because they are deterred by the small chance that the law will be enforced upon them. The mere fact of the law prevents these citizens from undertaking these actions. But citizens who are not so deterred and are never punished do not seem to have their freedom constrained by the law. The ineffectiveness of the threat contained in the law nullifies its putative constraint on freedom —except in those cases where the law is then enforced.

UK laws against cannabis are not completely unenforced, of course, so it seems safe to say that they do constrain liberty at least to some degree on all conceptions of negative freedom. The extent to which a law constrains negative freedom will partly depend on the severity of the punishments associated with it. In the UK, police usually give a verbal 'cannabis warning' the first time someone is found to possess cannabis, and then issue a fine for a second offence. All negative conceptions of freedom recognize that these sanctions constrain liberty less than imprisonment. Even laws with such minor sanctions can have other major effects on cannabis users' freedom, however, since they make it impossible for them to buy in a legal environment. Users cannot simply buy cannabis from an off-licence. They must deal with people often engaged in other, sometimes serious, criminal activity. This is perhaps the most significant effect of drug laws on cannabis users' freedom, within their day-to-day lives.

The fact that a law restricts liberty obviously does not mean that it is unjust. After all, all (enforced) criminal laws restrict liberty according to the negative conception. This restriction on liberty does need to be justified, however. As we have seen, the usual argument in favour of bans on cannabis appeals to the harm that it causes to users. At least two kinds of objection can be pressed against this justification. First, many are unconvinced that the harms of cannabis are sufficient to warrant prohibition, especially when the treatment of cannabis and other drugs is compared to the way that other harmful or dangerous activities are treated in

law. For example, Professor David Nutt, a former chief of the UK Advisory Council on the Misuse of Drugs, published a paper in 2009 comparing the risks of ecstasy use and horse-riding, in which he pointed out that the latter caused many more deaths and serious injuries than the former. He suggested that a stronger case can be made for banning 'equasy'—'a condition characterised by gaining pleasure from horses and being prepared to countenance the consequences especially the harms from falling off/under the horse' (Nutt 2009, p. 4)—than for banning ecstasy and other drugs such as cannabis.

The second kind of objection appeals to the liberal concern with paternalism. Liberals generally oppose restricting people's liberty in their own interests, on the grounds that it disrespects their capacity to choose for themselves and to act as the judges of their own interests. This idea is reflected in Mill's 'harm principle', according to which state interference in people's choices is only justified in order to prevent non-consensual harm to others. In response, a defender of cannabis prohibitions might reconstrue the argument in their favour as being about harms to others, such as to users' family or friends, or to society more generally. This would require them to provide compelling empirical evidence for these claimed consequences of cannabis use. Alternatively, they might argue that paternalism is sometimes permissible, in particular when it protects people from actions that actually undermine their capacities for rational decision making. The harms of drug-taking are special because they actually involve people no longer being able to judge their own interests or to make good decisions. This argument might be particularly strong in the case of young people, who have not yet reached the full maturity of their faculties (de Marneffe 2005). If the reason that we generally reject paternalism is to do with the value of autonomous decision making then that value might actually justify paternalism in certain cases.

We have considered this defence of paternalism as an argument that seeks to justify drug laws despite the fact that they restrict liberty. But similar arguments might be used to defend the stronger claim that such laws do not in fact restrict liberty after all. This claim would involve appeal to a positive conception of liberty. The basic idea is that using cannabis is incompatible with individuals' autonomy or self-realization, and thus laws that prohibit it actually protect individual freedom. Such laws stop people from becoming addicted, losing their autonomy, failing to realize their true purposes, and so on. This kind of argument undercuts the need for a harm-based justification, since the apparent liberty-based objection to the laws is removed. Instead, the justification for the laws is itself based on liberty. Precisely how this argument goes will depend on the precise positive conception that one adopts.

The 'purely positive' view identified by Carter in his chapter says that liberty equates to the actual achievement of self-realization, the carrying out of one's true purposes (as identified by the theorist). An advocate of this view could hold that taking drugs like cannabis is simply a bad thing to do, a bad way of life, and therefore is not something that anyone can 'truly' desire. Liberals are unlikely to be attracted to this kind of view, however, since it seems to justify forcing people to act in whatever ways the theorist judges best, in the name of

freedom. This is the classic worry about positive liberty articulated by Isaiah Berlin (2002). Further, it seems implausible in any case to think that there is a single way of life that is best for everyone, or that self-realization would consist in the same activities for every person.

The positive-liberty-based argument in favour of drug bans need not make use of such an extreme conception, however. Instead, it might appeal to the liberal idea of autonomy, and in particular to the idea that freedom requires agents to be able to make rational choices, unconstrained by impulses, addictions, or impairments to their mental capacities. One could draw on the evidence presented by the World Health Organization to argue that cannabis undermines this ability. One notable element of that evidence is that 'heavy cannabis use during adolescence is associated with more severe and persistent negative outcomes than use during adulthood' (WHO, p. 41). Thus, prohibitions on cannabis use might be particularly justified with regard to the way that they protect the mental capacities, and thus the freedom, of young people, who stand at risk of having their autonomy stymied for the rest of their lives due to their adolescent drug-taking. Such an argument is likely to be even stronger for drugs like heroin, where the empirical evidence linking them to the loss of autonomy is less disputed.

Does this autonomy-based positive liberty argument actually justify prohibition, however? After all, if we are conceding that autonomous individuals are the best judge of their own purposes and interests (at least once they are adults) then we presumably have to allow that this might include drug-taking —especially since the evidence on the long-term effects of cannabis use is still contested and inconclusive. An appeal to positive liberty might therefore justify something less than a ban. For example, governments could give information about the effects of cannabis, alerting their citizens to the best evidence. They could also provide rehabilitation and other kinds of support for those who wish to stop using drugs. These kinds of policies arguably would protect positive liberty better than an outright prohibition. If these policies are deemed insufficient in the case of teenagers, on the grounds that their capacity for autonomy is not sufficiently developed to enable them to make an autonomous choice in favour of drug-taking, then cannabis use could be made illegal only for those below a certain age.

The points in the previous paragraph lead us to another central debate concerning drug laws, which focuses on the distinction between legalization and decriminalization. Legalisation involves permitting the manufacture, sale, possession, and use of recreational drugs, while decriminalization only involves removing criminal sanctions for drug use and possession in small quantities. In other words, if cannabis were decriminalized then it would still be illegal to manufacture and sell it, but users would not be punished. Several countries around the world have decriminalized cannabis, including three Australian territories, Austria, Belgium, Italy, Portugal, and many South American countries. Interestingly, in Germany, possession remains illegal, but consumption is legal, on the basis of it being considered self-harm.

The positive liberty argument for drug laws does not seem to justify punishment for cannabis use. Douglas Husak (2005, p. 28) claims that 'punishment is the most terrible thing a state can do to its citizens', and it therefore requires a compelling rationale. Yet punishing users of cannabis does not seem like a proportional way to promote positive liberty. It seems better to use less restrictive means —i.e. to protect negative liberty as far as we can, even when promoting positive liberty. Decriminalizing cannabis, while still prohibiting and punishing manufacture and sale, might well promote autonomy just as effectively as punishing use, especially when combined with public education about cannabis's dangers. Indeed, such a policy would seek to ensure that those who still choose to use cannabis are making an informed choice that might itself be an expression of their autonomy.

Of course, the actual consequences of decriminalizing cannabis and other drugs are difficult to predict. For example, Jonathan Wolff (2011, p. 78) points out that we face various questions to which we do not know the answer, such as 'how existing drug dealers will respond to the loss of market opportunities. Will they start to engage in robbery with violence?' Husak in effect sidesteps these kinds of concerns by starting with the question of whether there is a justification for *criminalizing* drugs, and arguing that there is not. But Wolff notes that this is problematic when one is advocating legal changes. From the point of view of legislators and officials we have to start with the laws we already have, and justify alterations from them. Uncertainty about the consequences of such changes, and the possibility that negative effects could follow, makes politicians reluctant to act. 'Change is harder to justify than keeping things as they are, given that change is bound to have unanticipated consequences' (Wolff 2011, p. 79). This might be justified by appeal to a precautionary principle, according to which we should not take risks for uncertain reward.

This sort of response would not satisfy advocates of liberalization, who would point out that drug criminalization is not simply a passive status quo but involves the state daily pursuing and punishing large numbers of citizens. Drug laws constitute ongoing constraints on freedom and should not simply be taken for granted. We should only persist with those laws if there is a strong argument for criminalization, not merely because they happen to be the laws we currently have (Husak 2005). The normative default should always be non-criminality, and justification must be provided for keeping things illegal. Further, if laws were never changed in the face of uncertainty about the consequences then they would never change at all. Husak appeals to these considerations to argue forcefully against the kind of status quo bias that Wolff says is inherent in real-life political decision making. In practice, however, Wolff is surely right that drug law liberalization will not come to pass merely because lawmakers become convinced of the force of philosophical arguments, but only if the existing law no longer commands the respect of sufficient numbers of citizens to remain viable.

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