

Regulating Vice

MISGUIDED PROHIBITIONS AND
REALISTIC CONTROLS

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The Robustness Principle

MILL AND ADDICTION

John Stuart Mill's harm principle, as interpreted in Chapter 1, is consistent with extensive regulation of addictive substances and activities. Nevertheless, the harm principle rules out prohibition (backed by criminal penalties) of adult participation in vice, as well as prescription-only regimes for drugs. Regulations that are directly motivated at reducing adult engagement in vice also do not satisfy Mill's criterion.

Addiction and self-control shortcomings call into question the relevance or the appropriateness of the harm principle's application to vice. The harm principle will not apply, under Mill's own conception, if vice participants are not "in the maturity of their faculties," or are "in some state of excitement or absorption incompatible with the full use of the reflecting faculty." The harm principle perhaps should not be applied, even when Mill's preconditions are met, if "harms to self" inflicted upon vice participants are quite likely and significant. John Kaplan suggests that the harm principle is both inapplicable and unfitting in the case of drugs:

No nation in the world follows [Mill's] rule regarding self-harming conduct, and the rule is probably unworkable in a complex, industrial society — particularly one that is a welfare state. Mill's principle, moreover, seems singularly inappropriate when it is applied to a habit-forming, psychoactive drug that alters the user's perspective as to postponement of gratification and his desire for the drug itself.¹

At the same time, a refusal to accept the harm principle sets one up to endorse some highly unpalatable policies. Islamic countries legitimately might forbid the eating of pork. (Such a prohibition, Mill wrote, could not even be "censured as religious persecution" because "nobody's religion makes it a duty to eat pork.")² Or it might be made a criminal offense to fail to accept the Roman Catholic religion or for a priest (even a non-Catholic priest) to marry. Puritanical rules against both public and private amusements, including painting your living room yellow, are another possibility. Mill asks, "...if

mankind are justified in interfering with each others' liberty in things which do not concern the interests of others, on what principle is it possible consistently to exclude these cases?"³

To reject the harm principle, then, is to accept that sometimes we can interfere with the self-regarding behavior of other adults. And this is not a principle that people are willing to see consistently applied; so,

... unless we are willing to adopt the logic of persecutors, and to say that we may persecute others because we are right, and that they must not persecute us because they are wrong, we must beware of admitting a principle of which we should resent as a gross injustice the application to ourselves.⁴

Is the harm principle inapplicable or inappropriate when applied to vice policy? The likelihood of severe "harms to self" from engaging in the traditional vices is rather low: the vast majority of participants suffer no serious ill effects from vice-related activities.⁵ Nor do self-control lapses and the nature of addiction altogether negate the force of the harm principle: decisions concerning potentially addictive substances and activities generally cannot be said to be insane or irrational. Indeed, most vice-related decisions appear to be both rational and self-regarding. Many others suggest irrationality or imprecise dynamic inconsistency. Mill's harm principle would allow social intervention with respect to the irrational decisions, but generally it is not possible to know which choices are rational and which are irrational. It simply isn't clear when someone's consumption of a drug or an activity crosses the line from acceptably safe to overly risky or when their indulgence crosses the threshold from "regular" to "compulsive."

The dilemma is as follows: if we reject the harm principle, we establish a precedent to repress all sorts of self-regarding behavior, which is not a practice that anyone supports when it is their own behavior that is being repressed. If we accept the harm principle, then Mill's reasoning suggests that we cannot adopt policies with the primary aim of reducing adult vice — even though many adult vice decisions may well be less than rational and involve serious negative consequences. In the case of drugs, resistance to the generally appealing harm principle tends to come in the form of Mill's near dismissal (in terms of public policy) of the problem of dangerous drugs and the harms that such drugs inflict upon some of their adult users.⁶ We seem to have available only two disagreeable alternatives: (1) accept the harm principle and give up on trying to use public policy to protect adults against dangerous drugs or (2) reject the

³ Mill (1978, p. 84).

⁴ Mill (1978, p. 84).

⁵ This observation appears to be accurate even though prohibition can push vice participation in a more extreme direction: the use of heroin instead of opium or morphine, for instance. See Chapter 4.

⁶ John Kaplan (1998 [1988], p. 93) poses the issue this way: "Probably the central problem with the solution [to our drug predicament] of legalization is that it ignores basic pharmacology. There is such a thing as a dangerous drug...."

¹ Kaplan (1998 [1988], p. 95).

² Mill (1978, p. 83).

harm principle and open the way to treating the self-regarding choices of adults to whatever manner of control garners political popularity.

THE ROBUSTNESS PRINCIPLE

A less disagreeable compromise is available, one that is crafted by Mill himself in his discussion of commodities that can be used both for beneficial purposes and for the purpose of committing crimes. With respect to poisonous chemicals or similar dual-use articles, Mill endorses regulations that aid in deterring the nefarious use, while not being too burdensome upon those consumers with innocent intent. "Such regulations would in general be no material impediment to obtaining the article, but a very considerable one to making an improper use of it without detection."⁷ We saw a similar balancing act applied to Mill's condemnation of prescription-only systems: the requirement of having to first obtain permission from a licensed physician is too onerous a burden to impose upon drug consumers, even though such a requirement would help insulate problematic users from drug misuse.

We should forge a similar compromise when constructing vice policy. Some adult vice-related consumption is harmful and (arguably) less than rational; further, we cannot easily distinguish rational from irrational choice with respect to vice. This leads us to the robustness principle, as described in the introduction. Public policy toward potentially addictive activities should be robust with respect to departures from full rationality. Vice policy for adults should hold up pretty well if everyone is always well-informed and fully rational, and it should work well, too, even if some or many vice-related choices are irrational. We require this robustness precisely because we cannot ascertain how much vice is rational, nor distinguish the rational component from that which flows from a degradation of the reflecting faculties.

A robust vice policy will provide some support for those who are uninformed or struggling with self-control in their decision making. The provision of such support should not impose substantial costs upon those whose vice-related decisions are marked by rationality. One example of a policy that satisfies the robustness principle is a requirement for purchases of heroin, say, to be made with at least three days' notice – where the notice would be revocable by the adult would-be purchaser at any time during the ensuing waiting period. Rational heroin consumers, and even rational addicts, can then assure themselves of a steady supply, but those struggling with self-control issues will not be able to immediately satisfy an unforeseen craving and can cancel an impulsive order when their decision-making faculties are controlled by their more considered selves.

The robustness principle has been fashioned by combining the harm principle with (1) the notion that vice-related choices are particularly likely to fall short of full rationality and (2) the Millian idea that regulations aimed at harmful activities should not impose large costs upon their non-harmful counterparts. Robustness accepts that some drugs (and other vices) are dangerous, and that public policy should aim, in part, to reduce the damage that drugs wreak upon their users. But it does so while also recognizing limits to the harm that the policies themselves can impose on rational drug consumers. Prohibition of drug possession (in personal use amounts) is not compatible with the robustness principle, though many strict controls are acceptable. What the robustness principle demonstrates is that acceptance of those strict controls does not imply that the only governing principle is the logic of persecutors; drugs can be highly regulated without opening the door to legal prohibitions upon pork, or priestly marriages – or drugs.

The robustness principle parallels more general regulatory approaches that have been developed in recent contributions to behavioral law and economics.⁸ The "asymmetric paternalism" of Camerer et al. (2003), for instance, is a precursor to advocating policies that offer aid to less-than-rational people, while imposing at most small costs upon rational individuals. The advance purchase requirement for heroin is asymmetrically paternalistic; mandatory disclosure of the risks of heroin use by sellers is another policy that meets the robustness principle and is asymmetrically paternalistic. Moderate sin taxes (see O'Donoghue and Rabin, 2003) likewise can satisfy robustness while being asymmetrically paternalistic. Robustness also coheres with the "libertarian paternalism" of Sunstein and Thaler (2003).⁹ Libertarian paternalism accepts that any policy regime will influence individual decisions and suggests that policies be designed in such a way as to push those decisions in the presumably desirable direction – while making it easy for those who desire to head elsewhere to choose otherwise.

The main rationale for the robustness principle lies in ignorance. We can't easily judge when a habit becomes an addiction or when rational consumption involves dynamic inconsistency or shades into compulsion. Therefore we want to avoid a regulatory regime that only makes sense if there is no such thing as vice rationality, or an alternative regime that only works well if everyone makes considered, sober judgments about his or her vice participation. What we tend to end up with when we avoid these extremes is vice controls that offer some assistance to those who are misinformed or struggling with self-control issues, as long as those controls do not impinge significantly upon those who

⁸ See, e.g., O'Donoghue and Rabin (2003), Thaler and Sunstein (2003), Sunstein and Thaler (2003), Camerer et al. (2003), and Loewenstein, O'Donoghue, and Rabin (2003).

⁹ See Vice Squad posts of February 9, 2004, and January 23, 2007.

are rationally vicious. In the realm of adult self-regarding vice, robust public policies can inform, entreat, and induce – but not compel.¹⁰

A robust vice policy regime will stand up pretty well if our knowledge or situation changes, and our knowledge and our situation are constantly changing. Tomorrow we might learn that moderate alcohol consumption has more severe negative health effects than our current understanding indicates. The next day evidence might arise that moderate Ecstasy consumption promotes mental health with little risk of addiction. A robust regime has already taken these possibilities – and their opposites, that alcohol has more benefits and Ecstasy more costs than previously believed – implicitly into account. We are quite unsure about the extent of rationality governing the use of these substances, so robustness instructs us to choose policies that operate effectively whether the case for rational use improves or deteriorates. (This property of hardness in the face of altered circumstances is not exhibited by either broad vice prohibitions or *laissez-faire*.) There might be good reason to adjust even a robust regime at the margins if our understanding of costs and benefits changes, but not to radically revise that regime. Robust rules build-in substantial tolerances for errors in our understanding.

The robustness principle in itself does not characterize “best practice” among drug policies; like Mill’s harm principle, it proposes a necessary condition that a legitimate vice-control regime must meet, but it says little about the overall desirability of a regime that satisfies the robustness condition. Rarely can an individual policy measure be said to be robust or not robust in isolation: robustness is a feature of policy regimes as a whole, not specific rules. Nevertheless, adherence to the robustness principle eliminates those forms of control, such as broad criminalization, that are not respectful of adult informed, rational decision making within the vice arena.

Imposing a robustness standard does not eliminate the need for judgment. When do the regulatory costs imposed upon rational participants become unacceptably high? Advance purchase requirements and moderate sin taxes have already been highlighted as potential components of a robust vice-control policy. But as the restrictions steadily become more stringent – the required lead time lengthens, or the tax rises – eventually these measures will no longer comply with the robustness principle. Identifying a suitable threshold requires analysis and discernment, and the threshold can change as experience accumulates.

Robustness is a useful precept beyond vice policy, particularly where there exist significant departures from perfect information. A major virtue of democracy as a form of government, for instance, is that it is robust with respect to the personal qualities of politicians: democracy operates well when enlightened leaders are at hand, and it also works tolerably (though less well) when

leaders are shortsighted, cruel, or venal. Democracy represents a compromise. Democratic institutions purposely make it harder for exceptional leaders to guide a country in desirable directions, to ensure that a bad person temporarily in charge will not be in a position to inflict enormous damage. A theoretically better system would be one with expansive executive powers when an enlightened leader is in charge but much more limited powers when a mediocre or diabolical person holds the reins. But we cannot easily judge (or agree upon) who is enlightened and who is diabolical, so democracies institute a system of checks and balances that constrain leaders of any stamp. The theoretical benefits of basing the extent of power granted upon the character of the current executive are not available in practice. Similarly, the optimal vice controls that would not interfere with rational adult choices while guiding the decisions emanating from diseased or irrational minds are not viable in practice.

HARM VERSUS ROBUSTNESS: THE CASE OF DRUGS

The main difference between the robustness principle and the harm principle with respect to their ramifications for vice policy is that the robustness principle allows for regulations to be aimed directly at reducing harms suffered by adult vice consumers themselves. Indeed, the robustness principle might require such regulations, on the grounds that their absence could result in a regulatory regime that is woefully ineffective in the face of widespread vice-related ignorance or self-control problems. To aid the comparison between the harm and robustness principles, the discussion here will be restricted to drug policy.

Consider again Table 1.1 from Chapter 1. The strictest controls – most particularly, prohibition of drug possession – are as incompatible with the robustness principle as they are with the harm principle because such strict controls fare poorly when imposed upon rational drug consumers. The differences between the principles are revealed in those settings where Mill specifically rules out the principles that are intended, first and foremost, to restrict adult drug consumption. With respect to (1) regulations on sellers; (2) taxation; and (3) licensing requirements for legal purchases, Mill would permit controls that serve other legitimate ends, even if those controls have the collateral effect of making it harder for people to consume drugs. He would not accept these measures, however, if they were aimed directly at reducing drug use.

The robustness principle, alternatively, would permit the adoption of some controls designed solely to reduce adult drug use. Limiting the number of sellers (or their hours of operation) to render it somewhat inconvenient to procure drugs impulsively, therefore, is permissible under the robustness principle – as long as the restrictions do not become significantly burdensome for those whose drug consumption choices are fully considered. Similarly, buyer licensing (or some other hurdle to drug availability) would not run afoul of the robustness principle, even if the licensing had no other purpose than to reduce

¹⁰ Compare with Sunstein and Thaler (2003).

damage inflicted upon drug users by rendering procurement more arduous. Sin taxes, for Mill, are constrained to be no higher than the revenue-maximizing level. For robustness purposes, such taxes are limited by the burden that they place upon rational consumers. This limit could exceed or fall short of the revenue-maximizing amount.

For further illustration, let's look at the possibilities for regulating heroin under the robustness principle. Heroin use can be immensely dangerous; nevertheless, the use of heroin involves little direct harm to others. (That is, doped-up heroin fiends do not typically go on crime sprees induced by heroin's pharmacological properties. Heroin is a narcotic, a drug that tends to induce listlessness, not violence, though individual responses to heroin vary widely.¹¹) How strict can the heroin regulatory regime be made without violating the robustness principle?

First, kids could be prohibited from purchasing or possessing heroin, and anyone could be prohibited from selling or otherwise transferring heroin to underage consumers. But if this prohibition is no more effective than current prohibitions on kid purchases of alcohol and cigarettes, then too many kids will be using heroin.¹² So, we must invoke collateral regulations on adults to reduce the porousness of the ban on youth access to heroin. (Such child-protecting measures are consistent with both the harm and the robustness principles.) In particular, adults could face a quantity restriction on how much heroin they can purchase (each month, say). The purpose of this quantity restriction is not to reduce adult consumption but, rather, to prevent a lone rogue adult from supplying heroin to an entire high school. That is, quantity restrictions for adults can be adopted with the intention of helping to police the black market against youth (or ineligible adult) access, under either the harm or robustness principles. Similarly, purchases could be required to be arranged in advance or sales could be made only through mail order with verified delivery to adults so that the heroin equivalent of teenagers waiting outside the convenience store to pay an adult to buy them a six-pack of beer would be foreclosed.

The robustness principle (unlike the harm principle) allows us to go beyond those quantity limits and advance-purchase requirements that help to shield teens from adult drug access. Further quantity limitations – that is, quotas more restrictive than those that would “optimally” preclude youth access – could be adopted as a way of restricting adult usage. These quotas could not be so tight,

¹¹ When heroin is illegal, however, the expense of a heroin habit (combined with the difficulties addicts have in holding regular employment) leads many addicts to engage in crime to raise money for the drug. On the heterogeneity of responses to heroin and other opiates, see Chapter 5 in Carnwath and Smith (2002).

¹² It might reasonably be argued that “even one kid using heroin is too many”; however, a regime of prohibition (for both children and adults) results in a good deal of teen use of heroin, as is evident in both Europe and the United States. So the fact that the child prohibition would be imperfect under a legal regime for adult heroin use is insufficient in itself to deny heroin to adults.

however, as to render it difficult for a rational adult addict to maintain himself in his heroin habit. Quotas that significantly restrict adult addicts would run afoul of the robustness principle, for being too costly upon (potentially) rational consumers. Similarly, using the robustness standard, there is further scope for advance purchase requirements – that is, requirements that go beyond what is needed to police the black market. Even prolonged advance purchase mandates do not impose significant burdens upon considered use. A month-in-advance purchase regulation could be part of a robust heroin policy regime, even if such a rule offered no more of a barrier to black-market acquisition than a twenty-four-hour advance notice requirement.

To implement the quantity restrictions, there must be a method to identify consumers and to keep track of their purchases. Adults would need some sort of credit card–like identification to record their purchases and check the totals against a database. Do all adults automatically qualify for such a card, which is essentially a license to purchase limited amounts of heroin, or are there special conditions that must be met before someone is deemed eligible for a drug license?

In the terminology of Mark Kleiman, the issue is whether the authorization to purchase comes in the form of a “negative license” or a “positive license.”¹³ A negative license is one that is automatically available to all adults; however, someone who creates a public nuisance, drives a car recklessly, or commits another crime under the influence of heroin, or who diverts the heroin to youths, or in any way imposes harms on others through heroin use or distribution, could then have his or her heroin license revoked. In other words, with negative licensing, socially destructive behavior connected with heroin use would result in a prohibition specific to the wrongdoer – a policy that, as we have seen, also is consistent with Mill’s application of his harm principle.

A positive licensing scheme is one where adults must meet other qualifications before they can acquire the credentials to purchase heroin. (Drivers’ licenses include a positive element, in that applicants for such licenses generally must pass road tests, written tests on the traffic law, and vision tests.) In the case of heroin, adults might have to provide evidence that they understand the dangers of its use. As with negative licenses, positive licenses could be revoked for misbehavior, in the same manner in which drivers’ licenses are revoked. A positive licensing scheme involving a test of knowledge of the dangers of drugs is, I believe, consistent with the robustness and harm principles. But a sane adult who understands the risk of heroin cannot be prevented from using it, as “liberty consists in doing what one desires,” and “... no one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk....”¹⁴ Under the robustness principle, adults could face a positive licensing scheme, wherein to receive the right to purchase limited

¹³ Kleiman (1992, pp. 98–101).

¹⁴ Mill (1978, p. 95).

quantities of heroin, they would have to pass a test concerning the risks of use and perhaps the laws surrounding heroin and their license would be subject to revocation if they harmed others through their heroin-related activity.¹⁵

One advantage of a licensing scheme for heroin is that private responses could help keep the costs of heroin misuse low.¹⁶ Employees in sensitive positions might face the absence of a heroin license as a job requirement. Insurance companies might offer lower rates to policy holders who opt to forgo a heroin license.

Abiding by the robustness principle does not imply that private sellers need be countenanced. Heroin could be distributed only through state stores, for instance, and as noted, an advance purchase requirement could be imposed. Advertising could be banned, and the heroin could be subject to a substantial (though not prohibitive) tax.¹⁷ It is requisite to avoid taxes that are so high that incentives to evade the taxes spawn a flourishing black market. Presumably, the advantages of receiving heroin of a known purity would make black-market heroin a very imperfect substitute for the legal supply. As a result, heroin taxes could probably be quite significant, as excise taxes often are for alcohol or tobacco, without generating massive underground sales and without imposing too heavily upon rational consumers.¹⁸

License holders could be given the option to precommit not to purchase any heroin for a period of time, say, one week or even one day, in a binding way. That is, the government could provide a mechanism to help people voluntarily manage the self-control problem that is an obstacle for many drug users, drinkers, or smokers. In moments when their cravings are not intense, individuals might choose to limit their possibilities for future (legal) consumption for a few days, even if they are unwilling to forestall those possibilities indefinitely by relinquishing their license. (Such opt-outs are not uncommon

¹⁵ Incidentally, heroin maintenance programs, in which existing addicts qualify to receive supplies legally, are a type of positive licensing scheme. Maintenance is a quite strict licensing regime, as the "test" for receiving a license requires, not knowledge of the risks of heroin but establishing a verifiable addiction.

¹⁶ Kleiman (1991, pp. 99-100). The extent to which private employers can discriminate in hiring, firing, and promotion decisions on the basis of off-the-job, legal behavior, currently varies by state in the United States. Some states do not allow, for instance, employers to discriminate on the basis of off-the-job smoking or drinking. In the case of the currently illegal drugs, I think that there is much to be said for not extending such a nondiscrimination clause when these drugs first become legally available. In the long run, however, it is possible that the absence of nondiscrimination laws might render rational drug use too onerous to satisfy robustness.

¹⁷ A ban on advertising of a legal good might not satisfy the demands of the First Amendment in the United States, of course, but the point here is to indicate the contours of a drug policy consistent with the robustness principle alone.

¹⁸ Legal access to opioids would likely induce a shift away from heroin use toward less potent drugs, such as opium; the introduction of opioid bans frequently has instigated a shift in the other direction, toward heroin use, just as alcohol prohibition in the United States instigated a shift from beer to more potent spirits.

in the regulation of gambling.) Or, users could choose a license that permits them some heroin but an amount less than the legal quantity limit.¹⁹

With the robustness principle as the basis of drug policy, therefore, a very restrictive regime over heroin could be implemented. Children could be forbidden from acquiring drugs, and adults could be required to be licensed before purchasing limited amounts of heroin. Commercial sales and advertising could be prohibited, and significant sin taxes could be imposed. Adults who wanted to acquire heroin, and whose past use had not resulted in any wrongful conduct, would have a safe and legal means to do so.

Alternatively, an extremely liberal policy toward addictive goods such as heroin would not be countenanced under the robustness principle. (This is opposed to the situation with the harm principle, under which *laissez-faire* would be a consistent policy.) The requirement that public policy lead to tolerable results in the face of significant departures from rationality suggests the necessity of aiding actual and potential addicts with their self-control. Licensing, taxation, and advance-purchase requirements for some addictive goods, then, might be near requirements imposed by the robustness principle and not just consistent with it. Information provision about addiction treatment options (such as now occurs in the form of phone numbers for help with problem gambling printed on lottery tickets) and even publicly subsidized access to treatment are other policies that might be necessary to reduce the harms suffered by less-than-rational users.

Any or all of the specific policies toward heroin, including buyer and seller licensing, mandatory waiting periods, and tests indicating the understanding of dangers, might prove to be a bad idea. The simultaneous adoption of a whole array of such policies, before any small-scale testing, is almost surely a bad idea, with undertones of intricate, utopian-style reforms that smack of the worst sorts of social engineering. In presenting elements of potentially robust policy regimes, I have been offering illustrations, not suggestions. My suggestion is that we adopt the robustness principle as a guide to our vice policies. With that guide in place, experimentation across communities and nations will reveal the specifics of workable (and robust) regulatory mechanisms.

COMPARING ROBUSTNESS TO OTHER VICE POLICY REGIMES

The robustness principle states that a vice regulatory regime should work well irrespective of the precise extent of rationality or addiction associated with vice. Such an approach could be mistaken, in at least two directions. It could be that we should adopt whatever policies are needed (potentially including

¹⁹ Further, taxes could be repositioned from being ad valorem or specific to consisting of a single, annual license fee. See O'Donoghue and Rabin (2003).

prohibition) to combat compulsive vice consumption, independently of how those policies affect the rational users (who may not even exist). Or it could be that we should let adults fend for themselves, that we shouldn't be willing to impose upon rational vice consumers just because others are weak.

(1) Ignoring the interests of rational vice participants

To think more about the possibility of a vice-control regime that ignores the interests of putatively rational consumers while discouraging irrational vice, consider an "ideal" ban. This vice ban works cheaply and efficaciously and is fully complied with. Such a ban eliminates all of the $3\frac{1}{3}$ standard vice concerns, addiction and internal harms as well as the problems posed by kids and externalities. The question of the desirability of such a ban amounts to asking whether we would be better off if alcohol (or heroin, gambling, or prostitution) never had been discovered or invented. I find it hard to answer "yes" to any such question. All of these vices have their passionate defenders. All of these vices have their opponents, too, some of whom would be quite happy to conclude that the world would be a better place with one fewer vice. John Kaplan opens his fine 1983 book, *The Hardest Drug: Heroin and Public Policy*, with a paragraph outlining the massive ills attributable to heroin; he concludes the paragraph with the summary sentence, "Heroin never should have been invented."²⁰

One complication, however, is that we can't be sure about what activity people would substitute toward in the face of such an efficacious ban. Would the elimination of heroin cause more people to abuse prescription drugs, to sniff glue, or to smoke crack? In the case of prostitution, theologians such as Augustine and Thomas Aquinas reluctantly supported the practice as a "lesser evil": they thought that rape, divorce, and the keeping of mistresses would be spurred by the unavailability of prostitution.²¹ So even for an ideal ban, vice prohibitions may be unwise, or at least I am much less willing than John Kaplan to state unequivocally that the world would be a better place in the complete absence of a specific vice. Once we add in all the ways in which a real-world prohibition differs from our idealized version (see Chapter 4), including violent black markets, police corruption, and the discouragement of research into beneficial vice impacts, then I become even less confident that we can identify a vice ban that actually makes the world better off relative to a legal, controlled (robust) alternative. The best case for a prohibition, I think, can be made for a vice with a very small and not very committed following, so that a ban on legal production might be enough essentially to eliminate the

market, without the need for overt enforcement. (As fashions change, though, today's unpopular vice might become tomorrow's fad.) For any vice with a sizable constituency, a ban in practice will not eliminate the market, and then the legal, taxed, and regulated alternative begins to look better. And the regulatory regime option does not require arresting individuals whose only real crime, it seems, is to have different tastes than the majority. Nor does the robust alternative open the door to all manner of repression of unpopular pursuits.

The currently legal vices illustrate that prohibition is not required to adequately address the $3\frac{1}{3}$ standard vice concerns of kids, externalities, addiction, and harms to nonaddicted adult participants. (This observation is not meant to suggest that all is optimal with respect to the regulation of legal vices, or that the current regulatory regimes are consistent with the robustness principle.) Consider tobacco and alcohol. Amazingly complex regulations governing the production, distribution, and use of these substances have evolved. By and large, such regulations are obeyed (at least when some enforcement is applied), with significant taxes collected. When it is clear that a vice-related problem is being underaddressed, as was true in the past of drunk driving (and I believe to some extent remains so), the political process adjusts. Alcohol and tobacco policies in the United States are not even particularly contentious, relative to the universe of governmental affairs, from public education to national security. A legal, regulated regime for prostitution and drugs could yield similar outcomes. Problems with these vices will not be eliminated through movement to legal policy regimes, but the overall consequences will be tolerable (and desirable relative to the prohibition alternative), while their regulation will become nothing extraordinary, just prosaic planks in the deck of public policy.

Or perhaps the currently illicit vices (including, in the United States, some drugs, prostitution, and Internet gambling) are so different from today's legal vices that attempts to regulate them outside of a prohibitory regime will prove disastrous. It even could be the case that a robust regime requires prohibition in the case of heroin and cocaine, in that any legal availability for recreational use would impose tremendous costs upon multitudes of kids and irrational adult consumers. Likewise, prostitution providers and their customers might be put in extreme peril via a policy of legal regulation. That is, while robustness specifies that a policy regime work well regardless of the extent of rational vice participation, working well must be judged relative to the policy alternatives. Perhaps any legal, regulated regime works so poorly in comparison with even an ineffective and costly prohibition that the ban is required by the robustness criterion.

Why do I think that legal, regulated regimes will work for the currently illegal vices? First, there is nothing inherently special about the addictive properties of illegal drugs relative to the legal alternatives. For many (perhaps most) individuals in various settings, no doubt some forms of consumption

²⁰ Kaplan (1983, p. ix).

²¹ See, for example, "Prostitution in the Middle Ages: Prostitution and the Canon Law," on Deceameron Web, at http://www.brown.edu/Departments/Italian_Studies/dweb/society/sex/prostitution.shtml; and for Aquinas in particular, see Dever (1996).

of opioids, methamphetamine, or cocaine are more addictive than alcohol or nicotine. For other people, the addictive calculus runs in the opposite direction, while the personal and social costs of addiction tend to be lower under a legal regime. Second, when cocaine and heroin were legal, they caused problems, of course, but problems that appear smaller to similar problems today under prohibition. Habitual cocaine use in the United States is more common today, in both absolute and per capita terms, than in the peak pre-prohibition years.²² For opiates, the per capita extent of addiction may have been similar or even greater circa 1900 than now, but the shift to heroin and injection, along with the marginalization that comes with illegality, have raised the costs of today's opiate addiction.²³ "It is hard to deny that opiates have become a far greater social problem since the passage of the Harrison Act."²⁴ Third, the pre-prohibition era for narcotics before 1914 in the United States was one of near free availability, not a system with significant taxes or controls. Information disclosure about the ingredients in patent medicines was not required until the Pure Food and Drug Act of 1906, and hence many people habitually consumed substances that they did not know contained cocaine or opiates. The 1906 act led to greatly diminished use of opiates, as informed consumers found such drugs less attractive than did those who didn't know what they were imbibing. (This response to new information was later paralleled by the remarkable 50 percent decline in smoking prevalence in the United States in the generation following the Surgeon General's Report of 1964.) Drugs such as heroin, methamphetamine, and cocaine can be amazingly reinforcing, such that occasional use converts to habitual use. That very property makes these drugs quite unpopular in overall terms: most people quite rightly want nothing to do with recreational use of these dangerous substances. The chaotic, unhealthy, and unrewarding lives of drug addicts are a persuasive form of counteradvertising, and when legalization takes the trade out of the black market and ensures information provision about the hazards, there is little reason to think that large increases in abusive drug consumption will increase. Finally, the illegal drugs generally have close analogues (such as some antidepressants) rather easily available legally with a prescription, so already a type of regulated supply is in place, lowering

²² See MacCoun and Reuter (2001, pp. 183-204).

²³ Addiction is hard to define, so it should not be surprising that statistics on the number of addicts are full of uncertainty. Nevertheless, one estimate is that at the pre-prohibition opiate use peak around 1900, there were some 250,000 opiate addicts in the United States; today's estimates for U.S. heroin addicts are on the order of 900,000. (The number of heroin addicts pre-prohibition was very small.) By this reckoning, the number of opiate addicts has increased by a factor of 3.6 between 1900 and 2000, which matches the extent of U.S. population growth: from 76 million in 1900 to 273 million in 2000. Persons addicted to diverted pharmaceutical opioids would make the comparison of today to 1900 even less favorable. For the 250,000 opiate addicts figure in 1900, see Musto (1999, p. 5). Courtwright (1982, p. 9) suggests that "there were never more than 313,000 opiate addicts in America prior to 1914."

the additional risks of across-the-board liberalization.²⁵ That prostitution can be made available legally without irreparable tears in the social fabric is currently being demonstrated in many places, from Australia and New Zealand to Switzerland, Germany, and rural Nevada. A similar point applies to Internet gambling, many forms of which are at least quasi-illegal in the United States, but legal in much of the rest of the world.

(2) *Near laissez-faire*

In contrast to prohibition, the opposed alternative of letting adults look after themselves is pretty close to John Stuart Mill's harm principle position. Potential vice participants should be well-informed about the likely consequences and dangers from indulgence, and issues concerning kids and externalities must be addressed. Once these preconditions are met, *laissez-faire* advocates would suggest that the public response to any residual self-regarding vice activity is essentially exhausted. (As we have seen, a Millian vice regime nevertheless can be quite strict, through policies that reduce externalities or that serve other legitimate goals while secondarily inhibiting vice.) The difficulty with this argument, I have maintained, is the affinity of addiction to disease and the problem with vice self-control even among nonaddicts; in Mill's terms, vice consumers might often be in some state "incompatible with the full use of the reflecting faculty" — and hence at least partially exempt from the deference that generally should be paid to adult self-regarding decisions. In an unregulated market, vice producers will have strong incentives to try to target the self-control shortcomings of their potential consumers; sellers will have a pecuniary interest in encouraging addiction.

Robustness's main advantage over *laissez-faire* is that it is, well, robust. If it turns out that rationality always and everywhere prevails, then *laissez-faire* is presumably superior to robustness. But importantly, not by much. Robustness limits the costs that can be imposed on all of those rational vice participants. Further, if *laissez-faire* really is a first-best strategy, competing jurisdictions that impose differing robust regimes will eventually reveal that fact — while in the meantime the departures from those first-best free-market policies will not be very costly, given the criterion of robustness.

If some adults are not rational in their vice-related choices, then robustness begins to look better than *laissez-faire*. Even in this case, however, it might be argued that we should deal with the problematic folks after they reveal themselves, rather than treating everyone like a child or an addict just because some people eventually will prove to be childish or addicted. Frequently, sole

²⁵ Judge Richard Posner notes the current availability of legal close substitutes to illegal drugs in his blog post of March 20, 2005, available at www.becker-posner-blog.com/archives/2005/03/, accessed March 5, 2007.

reliance upon after-the-fact, ex post measures is not the best way to conduct public policy.²⁶ Punishments are costly to carry out; if an ounce of prevention can be purchased cheaply, it often is a wise buy. Licenses, car registration, and insurance are required of would-be drivers in advance, even though we could simply wait and fine or otherwise punish dangerous drivers after their identities are divulged through their accidents. Drunk driving is illegal, despite there being no direct public interest in a driver's blood alcohol content: the social concern is with safe driving, not with whether the motorist is sober. Thomas Hobbes noted that individuals typically and uncontroversially apply the same preventive approach to their private affairs, despite opportunities for the application of after-the-fact measures: "... when taking a journey, he arms himself, and seeks to go well accompanied; when going to sleep, he locks his doors; when even in his house he locks his chests; and this when he knows there be Lawes, and publike Officers, armed, to revenge all injuries shall be done him..."²⁷ After-the-fact punishments are frequently unavailable, and even when they are available, complementing them with some before-the-fact controls is often sensible.

Again, the robustness-based vice exemption from our usual deference to adult self-regarding behavior is only a partial exemption. Preemptive controls hold the potential to be extremely oppressive, as Mill noted: "The preventive function of government... is far more liable to be abused, to the prejudice of liberty, than the punitive function; for there is hardly any part of the legitimate freedom of action of a human being which would not admit of being represented, and fairly too, as increasing the facilities for some form or other of delinquency."²⁸ Those policies that help guide vice decision making in the direction of rationality will become very expensive (in terms of the welfare of rational vice producers and consumers) if they establish substantial barriers to informed use. Unless we are absolutely certain that there is no such thing as rational, informed vice consumption, significant impediments are unwise. That is not to say that an unfettered vice marketplace is a good idea.

(3) Harm minimization

Alongside prohibition and laissez-faire, harm reduction or harm minimization presents another alternative to robustness in governing vice. In the cases of illicit drugs and commercial sex (see Chapters 4 and 6), policy reforms that reduce harms often simultaneously comport well with robustness; however, in a rigorous accounting, robustness and harm reduction must eventually diverge. A harm reduction approach ignores the conceivable benefits of vice, while

²⁶ See Chapter 5 in Leitzel (2003).

²⁷ Hobbes (1970 [1651], p. 85).

²⁸ From *On Liberty*; Ryan (1997, p. 116). I employed both this quote and the previous passage from Hobbes in a similar discussion in Chapter 5 of Leitzel (2003).

robustness allows for the possibility that such benefits might be substantial and hence aims to make those benefits available. Millions of seemingly normal American adults currently risk arrest by buying and consuming marijuana. They apparently believe that their personal gains from marijuana use are sufficiently great to justify that risk, and robustness accepts that they might well be right. Harm reduction ignores user views about the benefits of pot, though it might counsel decriminalization or legalization to reduce the overall harms tied to marijuana and its regulation.

A strict harm reduction policy does not make sense if there are any potential benefits to be had. To illustrate this claim, imagine once again a world in which all people are perfectly law abiding. Consider the regulatory approach to ketchup, under the notion that one in one thousand ketchup consumers will spill his ketchup and badly stain his new trousers. Prohibition of ketchup would be a harm-minimizing strategy, by eliminating the nasty stains. Prohibition would also require essentially no resources to implement and enforce, given our assumption of lawful behavior. But it would be an extremely costly policy in terms of the benefits of ketchup that must then be forgone by 999 of every 1,000 would-be customers.

The reason that harm reduction and robustness tend to go together in the cases of illicit drugs and prostitution is that the current prohibitions are themselves the primary sources of most dimensions of harm associated with these vices. Robustness does not countenance adult vice prohibition, and harm reduction around drugs and prostitution likewise requires less punitive policy regimes than those that currently hold sway in the United States. With reasonable (robust) policies in place, however, further harm reduction may well not point in a desirable direction — just as reducing highway speed limits to thirty miles per hour is not necessarily a good idea, despite the possibility such a reform offers of reduced rates of fatal automotive accidents. Further, once a robust regime is implemented, it becomes harder to know what additional measures would promote harm reduction: the elimination of the vice ban also eliminates the main catalyst of harm. All of the remaining policy alternatives harbor risks, and the accounting of relative risks is uncertain; some risks are more obvious or direct than others. A currently legal vice — smoking — provides an example. An increased tax on cigarettes might induce more consumers to purchase loose tobacco and roll-their-own cigarettes, while the resulting increase in unfiltered smoking could raise health costs.

(4) Medicalization

One further challenger to robustness, also associated (like harm reduction) with a sort of public health approach to vice policies, consists of prescription-only regimes for drugs. If a prescription is easy to obtain, and acquisition requires only knowledge of the risks of drug consumption, then a prescription

system is a form of buyer licensing consistent with robustness. If such a licensing scheme is desired, there is no need to involve physicians, as nonmedical professionals can be trained to provide the requisite information and ensure that it is understood. In general, a prescription regime, though, is intended to imply that recreational use of drugs will not be countenanced: the prescriptions are reserved not for all informed adult would-be consumers, but only for those already suffering from addiction. These types of prescription systems are neither robust, nor, in the case of drugs for which significant demand for recreational use exists, harm minimizing. And as with harm reduction, prescription-only legal availability of drugs performs poorly relative to robust regimes if there is the possibility of beneficial recreational use.²⁹

Another medical approach to vice control, one that can be combined with prescription-only drug access, is the provision of treatment "on demand" to drug and alcohol abusers.³⁰ Easy availability of treatment might be a requirement of a robust regime toward heroin or alcohol, for instance. This is true even though the success rate of most treatments tends not to be all that impressive, at least if success is measured by putting an end to an individual's problematic drug or alcohol use. Nevertheless, treatment can greatly reduce the social costs of drug and alcohol abuse, even as it falls short of bringing about a significant fall in the number of drug or alcohol abusers.³¹ And in comparison with treatments for other ongoing medical conditions, drug and alcohol treatment meets the typical standards. A 1997 U.S. National Academy of Sciences report noted that "Extensive research has shown that treatment for addiction is as effective as treatments for other chronic, relapsing medical conditions."³²

Within a regime of drug prohibition, the ready availability of treatment cannot in itself satisfy robustness. Most drug and alcohol users — with the exception of heavy smokers — are satisfied consumers in no need of treatment. Robustness requires legal access to drugs for adults, though it may also require information provision of treatment options, and easy access to those treatments that are available.

(5) *Expedience or caprice*

Actual vice policy in general does not reflect any of the approaches compared previously. Vice policy making in practice might even be characterized as

²⁹ Prescription-only regimes are not necessarily a good idea for "nonvicious" drugs, either; indeed, a case can be made for rolling back the prescription-only approach to many drugs in the United States. Like the interpretation of the Mann Act that ended up prohibiting noncommercial, consensual interstate travel by lovers (see Chapter 4), the invention of "prescription-only" nonnarcotic drugs appears to have been unintended by those who wrote and passed the relevant 1938 legislation; see Temin (1979).

³⁰ Massing (1998) makes a strong case for a large increase in the availability of drug and alcohol treatment in the United States.

³¹ See, e.g., Reuter and Pollack (2006).

³² *Dismissing the Myths about Addiction: Strategies to Increase Understanding and Strengthen*

irrational, in that the array of benefits and costs of a vice, and how these differ among control regimes, do not seem to be given much notice. Rather, features that seem to be of minor import for the theoretical comparison of the desirability of various controls exert enormous influence over vice policy.

Overall popularity is of foremost importance. All else equal, more popular drugs, for instance, will have an easier time avoiding punitive controls — a result that is at least consistent with a recognition that the costs associated with prohibition tend to be higher for more popular substances. Legions of drinkers protect alcohol from prohibitionist pressure, while the declining number of smokers in the United States contributes to the adoption of stricter controls on smoking.

Moneyed interests, of course, also are politically influential. A drug produced by a major pharmaceutical firm seems to stand a better chance of legality, at least via prescription, than unpatentable drugs that can be produced in your basement. Pills based on the main active ingredient in cannabis are patented pharmaceutical companies and legal in the United States, while (unpatentable) marijuana is not eligible for legal acquisition at the federal level for medical uses, even by prescription. The connection of a vice with a respected institution — church, police, industry — will add to the vice's own respectability. In many places with otherwise strict gambling controls, church-sponsored gambling (including bingo) is legal and accepted. One the other hand, existing state revenues or private profits that might be threatened by a new drug or vice are a source of tougher legislative scrutiny.

The personal characteristics of those who are perceived as typical drug users traditionally have been instrumental in shaping policy. The introduction of gin to England was not controversial until price declines in the early eighteenth century made the distilled spirit available to poorer people; likewise, the temperance movement in the United States was spurred by the availability of cheap whiskey to the masses in the early part of the nineteenth century. The first U.S. federal vice prohibition applied to smoking opium, which was largely the province of Chinese immigrants working in the west. (The opium that formed the essential ingredient in the elixirs taken by the middle class went untouched at the time.) The prohibitions on marijuana and cocaine gained political currency in part through perceived associations with Mexicans (in the case of pot) and African Americans (in the case of coke).³³ The decline in smoking prevalence during the past fifty years has rendered cigarette consumption in the United States to be a lower-class vice, helping to stoke the calls for stricter controls.

Horrific crimes and high-profile deaths also have been common drivers of drug policy. Astounding claims for crimes committed under the influence of marijuana or cocaine preceded those bans in the United States, and the 1986 death of renowned college basketball player Len Bias precipitated a

³³ Musto (1999, pp. 5–8, 219–20).

further crackdown on coke. The Swiss absinthe ban (later adopted by other nations) was motivated by the 1905 murders of a pregnant woman and her two young daughters by her husband. The murderer was a very heavy drinker who consumed an extraordinary amount of alcohol both the day before and day of the murders. His two glasses of absinthe were literally a drop in the bucket of his imbibing, but a petition to ban absinthe was drawn up in the wake of the murders, and eventually succeeded; the Swiss ban lasted almost a century.³⁴

In short, the predominant approach to vice control is neither robustness nor some other principled guide such as harm minimization or medicalization; rather, political expedience seems to rule the roost, the lone survivor once principles are eschewed. In the United States in recent decades, expedience has generally meant that perceived new drug threats are met by an enhanced version of the current prohibition: more severe penalties, a widening of the prohibition to encompass precursors, paraphernalia, or devices to confound drug tests, and additions to the list of controlled substances.

New modes of consumption of old drugs can attract the same prohibitory impulse. In the mid-2000s some bars around the world began to offer "alcohol inhalers," in which about half a shot of alcohol is vaporized and mixed with oxygen. It takes about twenty minutes to consume this half-a-shot via inhalation, and that is also about how long it took for alcohol inhalers to be banned, from New South Wales, Australia, to Suffolk County, New York, and various U.S. states. These bans were adopted in the absence of any evidence of increased harm from alcohol inhalation relative to alcohol drinking. The almost reflexive prohibitory response to a new vice isn't entirely devoid of reason, of course, given the large social costs that new vices often have entailed. But strict, nonprohibitory regulatory regimes can control these social costs, without bringing on the many downsides of prohibition, including overriding the liberty of individual adults to make their own decisions in self-regarding matters without fear of arrest.

The reflex toward prohibition is far from universal, however. If the previously mentioned factors line up favorably – if the middle-aged upper middle class is the major consumer of the vice and if respected institutions are prominently involved – then the control regime can be excessively indulgent. Some prescription drugs popular with relatively wealthy individuals have become common and frequently abused without attracting prohibitory interest.

The general absence of a principled approach to vice regulation means that vices tempt us into unthinking controls, which can lead to the extremes of being overly harsh or overly obliging. The large swings in vice policy noted in the introduction also result from the lack of a principled approach to vice

control. Without some mooring, vice control is led by fears and prejudice, and it always seems to be your vice, not mine, that requires restraint.

ROBUSTNESS AND THE PUBLIC SPHERE

Robustness aims to be protective of kids and addicts, while simultaneously protecting rational adult vice participation. But the adult vice participation that it protects is vice conducted in private. A robust regime does not require that injecting heroin in public be tolerated; nor does it necessitate legal public drinking, pot smoking, or, for that matter, cigarette smoking. Publicness serves as a transmitter of external costs. If legal public vice activities are too hard on children, addicts, or anyone else, then these behaviors can rightly be controlled.

Robustness thus permits (and perhaps, in some instances, requires) suppression of vice in the "public square." Gambling must be allowed under a robust regime, but slot machines and lottery ticket sales can be restricted to out-of-the-way, though not terribly inaccessible, venues.³⁵

In the case of pornographic images or obscene utterances, public display and public consumption are almost the same thing. By the time you recognize an image or epithet as obscene, you have already "consumed" it. So social control over pornography or verbal obscenities in the public sphere does not violate the robustness principle (though in the United States some controls would run counter to the First Amendment). Again, this does not make any claim for the overall soundness of any given control: robustness is a necessary feature of desirable vice policies but not a sufficient condition. Whether the harms from any involuntary exposure to public porn or expletives are significant enough to require prohibition under a robustness regime is debatable.

In some locales in the United States, it is difficult to lead a sort of "average," everyday existence without significant exposure to alcohol or gambling – in the form both of advertisements and of commercial sales. This constant exposure, or constant deliberation to avoid exposure, can be particularly trying for alcoholics or pathological gamblers in recovery or those battling self-control problems (while also being distasteful to those with moral objections to alcohol or gambling). A robust regime can restrict this exposure, as long as it does not impose too heavily upon rational vice consumers. And again, it is even possible that restricted exposure is required by robustness, if the additional harms inflicted through uncontrolled exposure are significant.

Public manifestations of vice legitimately can be controlled under the robustness standard. Many nations, states, and localities have adopted so-called public smoking bans that apply to indoor smoking in restaurants and other private workplaces. But restaurants are not fully in the public sphere: in market

³⁴ See the Vice Squad posts of July 30, 2004, and August 23, 2005. The U.S. ban on sales of absinthe only applies to those varieties with detectable amounts of the compound thujone; see the Vice Squad post of May 11, 2007.

³⁵ Compare this with the "sumptuary" regime toward the lottery described by Clotfelter and Cook (1989, pp. 241–49).

economies, restaurants are privately owned and operated. Restaurant customers and workers are volunteers. (This is much different than the situation facing some visitors to public buildings such as courthouses or motor-vehicle offices.) Vice controls imposed upon restaurants cannot easily be justified based upon the “publicness” of these spaces.

Robustness applies to overall vice policy regimes, however, including controls over privately conducted vice. If people are addicted or routinely “undercount” their future health in their current decisions, then regulations that increase the representation of future selves in private decisions or counter-addictive tendencies might make sense. In my estimation, broad public smoking bans that apply to private bars and restaurants do not satisfy robustness, by being too constraining upon those whose decisions to eat or work in smoky environments are fully rational. Nevertheless, many other smoking-related regulations for restaurants would not be so imposing, while potentially being beneficial to those who undervalue (from their own long-term point of view) their future health. Mandated nonsmoking areas within private bars or restaurants, for instance, do not seem to violate the robustness principle.³⁶

³⁶There is a brief return to smoking regulation in restaurants in Chapter 5. See also the Vice Squad post from October 23, 2003.

Prohibition

Prohibition is one social response to vice. Prohibition, however, doesn't go far in characterizing a policy regime. Precisely what is prohibited? In the case of drugs, is possession prohibited? Sale? Manufacture? Purchase? Marketing of related paraphernalia? In the case of prostitution, is all prostitution prohibited, or just streetwalking? Is soliciting illegal? Are clients (buyers, johns) engaging in a criminal act? Is it illegal for someone to “live off of the proceeds” of prostitution? Once it is clear precisely what behavior is prohibited – and it might not be all that clear – there is still the issue of how intensely the prohibition is policed, and what sanctions are imposed on those who are found to be in violation. Swimming is prohibited in Lake Michigan off the promontory near where I live, but lots of swimming takes place there during the summertime despite the ban, and sometimes publicly paid lifeguards are on duty in areas where, officially, swimming is banned. In the Netherlands, possession and sale of cannabis is officially illegal, but government licensed “coffee shops” openly sell marijuana and hashish. The term “prohibition” connotes uncompromising rigor, but prohibitions themselves range over the full spectrum from very lax to very strict controls.

Attempts to gauge the effects of a vice prohibition require not only specifying the precise nature of the prohibition and its enforcement but also the relevant alternative policy regime. Furthermore, the impact of a ban in one locale depends on the policies pursued in other jurisdictions. The relatively liberal regulatory regime on cannabis and prostitution in the Netherlands, for instance, generates a good deal of vice tourism, and Las Vegas was put on the map thanks to its comparative tolerance of vice.

To be concrete, consider a drug prohibition where manufacture, trafficking, and sale are all illegal, and where all these activities have appreciable enforcement efforts arrayed against them with significant penalties applied to violators. Assume that drug purchase and possession, too, are illegal, though the penalty for these offenses may or may not be severe. Essentially, the typical regime currently applied to marijuana in most U.S. states is the style of prohibition that I have in mind; this regime violates the robustness standard, of course, by being much too punitive toward potentially rational adult marijuana consumers.

Table 1.1: John Stuart Mill as drug czar: a capsule summary of drug policy screened through the harm principle^a

Prohibitions of manufacture or possession: These would not be allowed for any drug that offered even the remotest hope of benefiting (or failing to damage) someone.^b Individuals who had previously harmed others while intoxicated, however, could be subject to a specific prohibition. Kids could be prohibited from using drugs. Further, those “doped up” at the time of attempted purchase could justly be refused service, just as bartenders can refuse to serve intoxicated customers, on the grounds that such patrons are “in some state of excitement or absorption incompatible with the full use of the reflecting faculty. . . .”^c

Prohibitions on sales: Some drugs, such as marijuana, can rather readily be produced at home. In such cases, legal markets for the drug are not required, as the ease of home preparation protects the liberty of adults to consume the drug. If sellers are “indispensably required” for procuring the drug, however, then prohibitions upon sales are unallowable infringements on liberty.^d The Maine laws or national alcohol Prohibition in the United States, which outlawed sales but not purchases or consumption of alcohol, were inconsistent with individual liberty. Mill believed that in the case of alcohol legal sales were a near necessity for consumption. But in general, prohibitions on sales are a close call. Buying and selling is a public act and hence not a species of self-regarding conduct. Trade can be prohibited without violating individual liberty, as long as there exist accessible alternative channels through which consumers can acquire drugs.

Regulations (short of prohibition) on sale: Many controls are allowable and potentially desirable, including registration of sales for the purpose of crime control, sanitary or worker-safety regulations, licensing of sellers, and opening hours restrictions. Limiting the number of sellers simply as a means to discourage consumption (as opposed to being an aid in enforcing other regulations) is an infringement on the liberty of potential purchasers, however.^e

Prohibitions or regulation of advertising: Such restrictions on sellers, who have a pecuniary interest in intemperance, may be justified. But private individuals can freely advise or induce other adults to use drugs.^f

Mandated provision of health and safety information: Warning labels and other information concerning risks can be required. As Mill notes with respect to an obligation to label poisons, “the buyer cannot wish not to know that the thing that he possesses has poisonous qualities,” and “liberty consists in doing what one desires.”^g

Special taxation: This is not justified if the goal of the taxation is to reduce consumption.^h If the goal is the collection of necessary government revenue, however, then drugs could and should be taxed, up to the point of maximum revenue collection.ⁱ

Prescription-only regimes: To make drugs available only by prescription generally cannot be countenanced, as a prescription regime places too great a burden upon those who have legitimate, including recreational, uses for the drugs.^j Some “nonrecreational” drugs involve externalities that might justify a prescription regime, however. In particular, antibiotic use harms others by contributing to the buildup of resistant strains of pathogens; so, antibiotics could be subject to a prescription regime as a means of countering socially excessive use.

License requirements for legal purchase or use: If the conditions for qualifying for a license are that the buyer or user indicate he or she understands the risks involved in consumption, or the conditions might aid in the enforcement of other legitimate regulations, then such a licensing system would not fall afoul of the harm principle. But a licensing system for adult buyers could not be adopted simply as a means of reducing consumption.

Regulating intoxicated behavior: Prohibiting an intoxicated person from engaging in certain types of activity (such as driving under the influence) is not a violation of individual liberty, if the behavior presents a definite risk of harm to others. Public intoxication might justifiably be regulated — Mill notes that many acts that are not harmful in themselves can nevertheless be restricted in public manifestations.^k Private intoxication, however, cannot be prohibited, at least for those adults with no prior record of harming others while intoxicated.

^a In the United States, “drug czar” is the informal sobriquet for the person who heads the Office of National Drug Control Policy.

^b See Mill (1978, p. 95).

^c Mill (1978, p. 99).

^e Mill (1978, p. 95).

^f Mill (1978, pp. 97–8). In the United States, a broad advertising ban for a legal product might be construed as being inconsistent with First Amendment protection of the freedom of speech.

^g Mill (1978, pp. 95 and 96).

^h Mill (1978, p. 95).

ⁱ Mill (1978, p. 100). Strictly speaking, Mill’s injunction that goods like alcohol should be highly taxed is consistent with but not a consequence of his harm principle — it stems from other considerations of desirable public policy. Mill’s general support for free trade, too, is not a consequence of harm principle reasoning.

^j Mill (1978, p. 96) is explicit on this point.

^k Mill (1978, p. 97).

When the health of nonconsenting others is damaged by an individual’s drug taking, as by secondhand smoke, then legal controls are justified. Whether the actual damage to health caused by secondhand smoke (or similar remote health effects from other drug use) is sufficiently direct or certain, given current evidence, is less clear; certainly, the extent of exposure matters, and would make intervention more justified in those places where nonsmokers are involuntarily subjected to frequent exposure of relatively high concentrations.³⁹ Where such effects exist, regulations are not inconsistent with the harm principle — though the regulations should not be more restrictive of individual choice to use drugs than is necessary to prevent the negative external health consequences.⁴⁰ Cigarette purchase and consumption must be allowed, while smoking legitimately can be banned in some public areas.

Kleiman’s remaining types of external costs (drains on common resources, risk-spreading and cross-subsidy effects, leading others to use drugs, or

³⁹ Controversy over the dangers of secondhand smoke was reignited with the 2003 publication of a study in the *British Medical Journal* that indicated no link between lung cancer or heart disease and exposure to secondhand smoke. See “Claim That Passive Smoking Does No Harm Lights Up Tobacco Row,” by Sarah Boseley, *The Guardian*, May 16, 2003, p. 1 (international edition).

⁴⁰ Again, I am invoking “the principle of the least restrictive alternative”; see Pope (2000, p. 431) quoting Dworkin (1988, p. 126).