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Policy analysis

Drug policy, harm and human rights: A rationalist approach

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ABSTRACT

Background: It has recently been argued that drug-related harms cannot be compared, so making it impossible to choose rationally between various drug policy options. Attempts to apply international human rights law to this area are valid, but have found it difficult to overcome the problems in applying codified human rights to issues of drug policy.

Method: This article applies the rationalist ethical argument of Gewirth (1978) to this issue. It outlines his argument to the 'principle of generic consistency' and the hierarchy of basic, nonsubtractive and additive rights that it entails. It then applies these ideas to drug policy issues, such as whether there is a right to use drugs, whether the rights of drug 'addicts' can be limited, and how different harms can be compared in choosing between policies.

Result: There is an additive right to use drugs, but only insofar as this right does not conflict with the basic and nonsubtractive rights of others. People whose freedom to choose whether to use drugs is compromised by compulsion have a right to receive treatment. They retain enforceable duties not to inflict harms on others. Policies which reduce harms to basic and nonsubtractive rights should be pursued, even if they lead to harms to additive rights.

Conclusion: There exists a sound, rational, extra-legal basis for the discussion of drug policy and related harms which enables commensurable discussion of drug policy options.

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Introduction

The harms associated with drug use (and our control strategies) are incommensurable. . . [D]ecisions about what policy to adopt invariably come down to political (value) judgements about what risks, harms and benefits (i.e. outcomes) matter the most.

Weatherburn (2009a: 337)

With this attempt to separate fact from value in drug policy debates, Weatherburn indicates a fundamental problem in the study of drug policy. How are we to value the various aims and effects of drug policy? Arguments continue to rage over the most appropriate aims and methods of regulating the use of psychoactive substances (Babor et al., 2010; Inciardi, 2008; Mena & Hobbs, 2010; ONDCP, 2010; Rolles, 2009). Most of the arguments on drug policy goals have been framed by approaches that can be termed consequentialist. They turn on what the effects of a particular set of policies are or would be. One side values abstinence (or the reduction of drug use) above other potential consequences. Another puts less priority on abstinence but rather values the reduction of harms to drug users' health. Without a common criterion for comparing

these consequences, we are stuck in a discussion between speakers of incommensurable languages. If we cannot find a basis that can be shared by both sides, it is unlikely that the argument between advocates of abstinence and harm reduction can move beyond repetitive call and contradictory response.

Previous discussions of this philosophical debate have valuably exposed the issues, but have not found a way beyond the impasse. Husak's (1992) interesting book deliberately – and rather curiously – refuses to provide an explanation of the moral rights on which it rests its argument for the right to use drugs. Van Ree (1999) rests his argument for a new right to use drugs on the authority of thinkers such as Mill, Hayek and Rawls. He admits that their liberal principles are not universally recognised as valid, but provides no explanation of why people who do not share them should recognise the right he proposes. MacCoun and Reuter (2001a, 2001b) – who provide an informative discussion of consequentialist versus deontological arguments over drug regulation – state that they have 'no intention of imposing our moral views' (MacCoun & Reuter, 2001a,b: 71). This characterisation of fundamental choices about the aims of drug policy as a question of political tradition or personal preference reduces the possibility that the argument can be resolved. What is needed, therefore, is a basis for thinking about drug policy that helps us to resolve, rather than repeat, this long-running debate.

Human rights can provide this basis. There have been attempts to move drug policy debates onward by arguing that article 12 of the Universal Declaration of Human Rights (enshrining the right to

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privacy) entails a right to use drugs (Hunt, 2004), or by pointing to contradictions between the enforcement of UN drug conventions and the UN Charter or other legal instruments (Barrett, Lines, Schleifer, Elliott, & Bewley-Taylor, 2008; Bewley-Taylor, 2005; Mena & Hobbs, 2010). Given the widespread governmental commitment to such codified human rights (at least in rhetoric, if not so often in practice) and the ongoing development of case law in this area, it is valid for lawyers to continue to extend the application of these standards in the area of drug policy. However, there are two problems with this endeavour. One is that the human rights documents on which it rests may well include some truths that can be taken to be universal, but they are also the contingent results of historically specific conjunctures in international relations (Donnelly, 2003). They are still subject to selective implementation on the basis of power politics (Normand & Zaidi, 2008). The second problem is that attempts to apply human rights law in this area risk descending into narrow legalism, with everything depending on how the wordings of various conventions are interpreted. The former Executive Director of the United Nations Office on Drugs and Crime recently used existing cases to support his argument that the criminalisation of drug possession is justified within international law (Costa, 2010). The judicial interpretation of these cases is disputed by Barrett (2010). Referring, for example, to the decision of the UN Human Rights Committee in the 2007 case of Prince versus South Africa (in which the Committee stated that the prohibition of cannabis can be seen as proportionate and necessary to the achievement of legitimate aims), Barrett argues that the Committee did not carry out an adequate analysis of the proportionality of the harms of cannabis prohibition to the beneficial effects that this prohibition might have. This shows how even decisions that are taken with a common normative basis (in this case, UN human rights law), must take into account the relative values of various potential harms (in this case, the harms of cannabis use against the harm to the religious freedom of the Rastafarian Mr Prince). A sound basis for debate needs a rationally justified grounding for the valuation of harms that lies outside the confines of UN documents (although this basis may be able to support their implementation).

Such a basis can be provided by a rationalist, rights-based approach, drawing on the neo-Kantian arguments of Gewirth (1978), Gewirth (1996). This approach, as Donnelly (2003) notes, has rarely been applied to the justification of universal human rights. This is despite its advantages in not relying on personal preference, political tradition, the international balance of power, or legal argument. Rather, it sets out the reasons why all of us are necessarily committed to the same underlying principles; a commitment to upholding the freedom and well-being that are necessary for human beings to act towards purposes. These principles do not provide an immediate resolution to these debates, but offer a shared basis which enables – and indeed is demanded by – rational communication.

This is the first article to apply Gewirthian ethics to drug policy. It briefly outlines how Gewirth's 'principle of generic consistency' sets up a hierarchy of rights. It then applies this hierarchy to policy issues such as the right to use drugs and the rights of drug 'addicts'. Finally, it applies this approach to a specific drug policy scenario that Weatherburn (2009a) presents as an irresolvable dilemma.

The basis of rights and harms: the principle of generic consistency

In his book, *Reason and Morality*, Gewirth (1978) has provided a sound, universal basis for defining human needs, and therefore for defining rights and harms. His argument is a contemporary development of Kant's categorical imperative: 'Act in such a way that you treat humanity, whether in your own person or in the person

of any other, always at the same time as an end and never merely as a means to an end.' (Kant, 1981[1785]: 36).

Gewirth writes in technical language. I will attempt to lay out his argument here in relatively simple terms. It relies on the dialectical method. This involves building steps in the argument from the initial premise, and showing how it is impossible to deny the initial premise and the subsequent steps without engaging in self-contradiction. The initial premise of Gewirth's argument is that any person who is a prospective, purposive agent needs both freedom and well-being. This is because it would be impossible to act towards purposes without these necessary conditions of agency. The first step that Gewirth builds on this premise is that any person who seeks to act must value such freedom and well-being. As he puts it, '[s]ince agents act for purposes they regard as worth pursuing . . . they must, insofar as they are rational, also regard the necessary conditions of such pursuit as necessary goods' (Gewirth, 1982: 47). Gewirth then argues that every agent must accept, on pain of self-contradiction, that she has rights to the necessary conditions of agency. To deny that she has these rights would be to allow that she can be refused the basis for agency, and therefore to allow that she can arbitrarily have her freedom and wellbeing taken away. The next step is to note that because a person accords these rights to herself on the grounds of being an agent, then she must also, again on pain of self-contradiction, accord these rights to other persons who have the capacity to act towards purposes. Gewirth calls this the 'principle of generic consistency', or PGC. Echoing Kant's categorical imperative, the PGC 'requires of every agent that he accords to his recipients the same rights to freedom and well-being that he necessarily claims for himself' (Gewirth, 1982: 53).

The PGC gives us a stable basis for the analysis of rights and harms to them.¹ It is not dependent on individual, political or cultural preferences, but is universally valid for human agents who rationally must value the conditions they need for purposive action. In this perspective, harms can be seen as acts and conditions that infringe on rights to the freedom and well-being that we all need as agents. Of course, people are capable of denying that we have these needs, and therefore these rights. But any such denial is logically self-defeating. It is therefore entirely unpersuasive when entered into argument.

A hierarchy of rights

Rights are universal, due to our shared capacity for purposive action. But they are also always in competition. The negative right not to have one's actions limited may conflict with the positive right of others to the conditions necessary for action. The right to property, for example, conflicts with the right to life in the case of a rich man who is unwilling to give up some of his goods to help a poor man avoid death by starvation. Gewirth uses the PGC to help resolve such conflicts. The basis of the PGC is found in the necessary conditions of agency—freedom and well-being. Therefore, rights are more fundamental and of greater priority if they are more needful for the creation or maintenance of these conditions. On this basis, Gewirth distinguishes three, hierarchical levels of rights: basic, nonsubtractive and additive.

Basic rights refer to an agent's right to the preconditions of agency. These include life, physical integrity, health and mental equilibrium. Without these preconditions, purposive action is not possible. So agents must value them over other conditions, and must value those of other people as well as their own. The corollary

¹ This is not to say that it is uncontroversial. Many criticisms have been made of each of the steps in Gewirth's argument to the PGC. These objections have been rebutted by Beyleveld (1991).

of basic rights is the concept of basic harms. These are interferences in basic rights, such as killing, maiming and depriving others of the necessary conditions of life (e.g. food, water and shelter). These harms are 'non-arbitrarily harmful because, amid the diverse values different persons may have, as actual or prospective agents, they objectively need the basic goods that are attacked in such ways' (Gewirth, 1982: 233).

Nonsubtractive rights are also based on the agent's capacity for action. But they refer to less serious harms to this capacity than the basic harms listed above. Harms to nonsubtractive rights are those harms which reduce, but do not destroy, the agent's capacity for action. Examples include losses by theft, deception, exploitation and defamation. Gewirth places important qualifications on nonsubtractive rights. They do not apply to losses which could not be shown objectively to harm an agent's capacity for action. For example, if something I do offends you because of your particular beliefs, and that offence is based only on your personal preferences, then I am not imposing nonsubtractive harm upon you. And they do not apply in situations where an institution that is ethically justified by the PGC reduces an agent's capacity for purposive action. Gewirth gives the example of a person who loses an artistic competition. His capacity for action may be objectively damaged by this loss, but, as the rules of the competition are ethically justified, his rights have not been harmed. As we shall see, it is more difficult to apply this qualification to drug regulation than to the Oscars.

Finally, additive rights refer to the 'means or conditions that enable any person to *increase* his capabilities of purpose-fulfilling action and hence to achieve more of his goals' (Gewirth, 1982: 240, *my italics*). As an agent rationally must value increasing her own capabilities to fulfil her purposes, so she must value the increase of the capabilities of others, and so accord them these additive rights. The qualification to these rights is that they can be put aside when they conflict with the agent's own basic, or nonsubtractive rights, or with the ethically justified rules of institutions to which she and these others belong. The PGC entails a duty not to act in such a way that encourages the spread of physically or mentally harmful practices. When the harms of such practices go beyond the immediate participants, then 'legal regulation and even prohibition may be justified' (Gewirth, 1982: 324).

So the PGC sets up a hierarchy of rights, with corresponding harms, and duties to avoid inflicting harms to oneself as well as to others. Harms to basic rights are 'more wrong' (Gewirth, 1982: 236) than harms to nonsubtractive rights, which are in turn more serious than harms to additive rights. The justification of institutions and regulations must also follow this hierarchy. It may be justifiable to impose prohibitions to prevent harms to additive goods (which increase people's capacity for rational purpose fulfilment), but not if these regulations harm rights to nonsubtractive goods (which objectively support rational purpose fulfilment), or – even more importantly – basic goods (which objectively support the very possibility of action). The use of the death penalty for drug law offences is, for example, immediately ruled out. It may – arguably – support temperance (an additive good), but it ends life (a basic right). Less extreme forms of regulation are more complicated, but the PGC gives us a shared, rational basis for their discussion.

This argument has a deontological basis, in that it is concerned with logically justified values and duties. But Gewirth criticises formal deontological approaches which value rules but cannot specify the content of these rules in relation to their consequences (such as Kant's [1799] idea that a lie should not be told even if it would prevent a murder, because lying itself is wrong). Deontological arguments are usually contrasted with consequentialist approaches, such as utilitarianism. Gewirth specifically rejects utilitarian calculation as a basis for judging between potential actions and policies. Utilitarianism discusses the content of rules by arguing that doing good should be preferred to doing evil, and then

multiplying the numbers of people to whom good or evil is done by the amounts of each that are done. It provides the basis for many important discussions of drug policy (e.g. Babor et al., 2010; Boyum & Reuter, 2005). But it has no underlying basis for defining what is good, and what is evil. The PGC provides a formal, logically necessary set of rules. But it also enables the consequences of following these rules to enter the discussion of how to resolve conflicts between them. It 'combines the axiological substantive content of moral duties with a formal consideration of consistency or mutuality' (Gewirth, 1982: 203). In this way, it bridges the divide between deontological and consequentialist justifications for drug policy that has been identified by MacCoun and Reuter (2001a, 2001b).

A right to use drugs?

From this discussion, the question will inevitably arise: is there a right to drug use? The answer is fairly easy in the case of drugs that are used to save life, or reduce pain. These support basic goods. It is necessary to be alive and to be free from severe pains in order to be able to pursue your purposes. But is there a right to use drugs non-medically?²

It would be possible to construct an argument that there is no such right. It could consist of two claims. The first is that drug use is inherently harmful to the ability to guide one's conduct rationally. The second is that, as there exists a right to be protected from harm to our rational capabilities, it is also right that institutions exist that protect us from drug use by forbidding it. There is therefore no right to drug use.

Of course, there are several problems with this argument. The first is that drug use is not always harmful to the capacity for rational action (Kalant, 2010; Levy, 2006). Indeed, drug intoxication may be one of those intended purposes for people who find it pleasurable. Even if a minority of users become dependent on drugs, and others may suffer other forms of cognitive impairment, it seems that the vast majority of people who have ever used illicit drugs (a large proportion of the populations of most developed nations; UNODC, 2009) have done so without causing lasting damage to their capacity to act towards intended purposes, and this includes some very senior politicians (Anthony, Warner, & Kessler, 1994; Obama, 2004). The idea that drug use is necessarily irrational and pathological is a 20th century accretion to the traditional notion of addiction (Alexander, 2008) and to the related development of drug prohibition. Before the modern era, it was not thought that the use of pleasure-giving substances necessarily compromised autonomy or free will. More recent developments in brain science have shown that certain substances have specific effects on the brain which may affect the choices their users make (Kalivas & Volkow, 2005; London, 2009), but then so do other common experiences such as eating, sex, bereavement, isolation and falling in love (Aron et al., 2005; Graybiel, 2008; Lieberman, 2007). Even people who fit the DSM-IV diagnostic criteria for dependence may have chosen to follow a way of life which offers them the rewards of activity, company and a recognised identity (Davies, 1997). None of us are always the best judges of our own interests. All of us have acted in ways which we might not have chosen in retrospect. To single out drug use as necessarily and uniquely harmful to reason (and so specifically worthy of prohibition) is to fall for the 'myth of the demon drugs' (Alexander, 2008: 173). Individual rationality is at all times bounded and ambiguous. Drug use is one activity amongst

² Current controversies over the medical use of cannabis show how hard it is to draw the boundary between medical and non-medical use of drugs. For this discussion, the currently illicit drugs will be treated as if they had no medical value, as this provides the strongest test of whether there is a right to use them.

many that may cloud our judgement. This does not mean that it is inevitably either symptomatic or causative of irrationality.

As this claim fails, so the second claim (that institutions based on these claims are justified in forbidding drug use) also fails. So the answer to the question of whether there is a right to drug use appears to be yes. But it is a rather small yes. People may rationally choose to experience the effects of psychoactive substances, even if they have no objective need for them. The ability to do so falls within the category of additive goods. It increases their capacity to fulfil their own purposes. Purposes cannot be chosen for other people without conflicting with their rights under the PGC.

However, in some circumstances, drug use may cause harms to the rights of others. Again, the hierarchy of rights applies. Drug use, as an additive right, cannot be rationally justified where it leads directly to harm to more basic rights. This is why the yes given to question above is so small. If my right to use drugs conflicts with your rights to retain your property, or to your own health, then that right to drug use is superseded.

Some proponents of abstinence might argue that, in practice, this rules out the right to drug use. They could argue that drug use inevitably leads to theft (or to higher taxation to pay for treatment and imprisonment of drug users) or other harms to others. But these are matters that can be tested empirically, rather than being left at the level of assumption. And empirically it can be shown that, in very many cases, use of psychoactive substances does not lead to crime, treatment or harms to others. Even drugs that are considered more dangerous, such as cocaine and heroin, have many users who do not cause or suffer these types of harm (Cohen & Sas, 1994; Shewan & Dalgarno, 2006; Warburton, Turnbull, & Hough, 2005; Zinberg, 1984). For these users, drug use expresses their additive rights and does not harm any basic or nonsubtractive rights.

If there is a (limited) right to use drugs, then it follows that absolute prohibition of the production and trade in these substances cannot be justified. Institutional limitations on freedom are only justified to the extent that they support the hierarchy of rights that Gewirth establishes. Some restrictions on the trade in drugs should probably remain in place. Commercial promotion and advertising of drugs would predictably lead to increased use and related harms, as it has for alcohol (Babor, 2010; MacCoun & Reuter, 2001a, 2001b). As this involves a conflict between the additive rights of shareholders to make additional profits and the basic rights to health of their potential customers, the prohibition of such promotion would be ethically justified. The appropriate method for enabling availability whilst limiting the associated harms will vary between different substances. It may include some of the mechanisms, including medical prescription, pharmacy sales and sale through licenced outlets, that are already used for licit psychoactive substances (Rolles, 2009). Careful research will be needed to find the right balance of regulation in order to enable the expression of the additive right to use drugs whilst avoiding harms to nonsubtractive and basic rights.

Do 'addicts' lose rights?

This discussion of rights to drug use has assumed that we are dealing with use by people who have full agency, and who therefore share the same rights as other agents under the PGC. But what about people whose agency may be compromised by the consequences of their drug use? Do they lose some of their rights as their agency is limited? Does this open the door, for example, to forms of coercive restriction and treatment, in order to protect and re-establish the agency that has been damaged by drug use?

To answer these questions we need to consider what agency is and in what ways drug use may damage it. For Gewirth (1978), agency depends on two conditions: freedom and well-being. He

defines action that is free as 'under the agent's control in that he unforcedly chooses to act as he does' (Gewirth, 1978: 27). Drug use is often seen as involving some form of compulsion, indicating an inability to choose one's actions freely. For some, this compulsion can be shown in diagrams of brain activity, which show the body's natural reward system being significantly altered by prolonged drug use, therefore creating a physical inability to choose not to use drugs. These pictures show us the brain disease of addiction (London, 2009). Other have pointed out that addiction still lacks 'a truly uniform set of symptoms and a distinct site, source and course of pathology that are necessary and sufficient for the presence of disease in addiction' (Reinarman, 2005: 312). The reduction of addiction to neurobiology is over-simplistic (Kalant, 2010). It rests on a false dichotomy between the enslaved, diseased addict and the purely autonomous, abstinent self (Albert, 2010).

If we see drug dependence, not as a disease in itself, but as a symptom of various kinds of dysfunction in the complex motivational system (West, 2001), then we can set it alongside other kinds of intellectual impairment when considering how to treat those people who display this symptom. The impairments that are related to drug use and dependence include (depending on the drug and the user) delayed reactions, poor judgement, low speed and/or accuracy of information processing, weak visual spatial ability, poor physical coordination, anxiety and damaged short and long-term memory (Ksir, Hart, & Ray, 2006). These are similar to symptoms that are commonly experienced by people who are born with intellectual impairments, or who acquire them through illness or accident. People with reduced intellectual capacities do not lose their rights to the conditions of agency (Connolly & Ward, 2008).

There is a strong case for seeing people who display the symptoms of dependence as experiencing a form of disability, rather than as essentially criminal or diseased (Sullivan, 2007). Various forms of risk-taking can lead to specific types of disability. Is a person who damages their brain in a motor racing accident any more of an agent than someone who has become dependent on drugs? We should not base our response to people who suffer from such disabilities on partial, non-rights based judgements of the behaviours that led to these disabilities. Rather, we should consider the implications of the disability for the person as an agent, and the responsibilities and duties that these entail.

Free autonomy (defined as the capacity to govern one's own actions) is only one of the two elements of agency that is considered as necessary by Gewirth. The other is well-being. Without the right to life, physical integrity and human dignity, freedom alone cannot afford a person the ability to act towards purposes with some hope of success (which is the basic right that all agents must rationally accord to each other). So all interventions in the lives of persons who display the symptoms of dependence must pay attention to their need for well-being, as well as to the degree of autonomy of which they are capable. Responses which fail to respect the person's physical integrity (such as compulsory prescription of substances such as naltrexone) or the need for freedom and well-being in other areas of their life (such as compulsory incarceration for the purpose of treatment) therefore conflict with the PGC and are not justifiable.

Rather, the response to people who are unable to control their drug use should be to support them to increase their agency. As other authors have written, in the context of other types of intellectual disability:

[rights] stipulate that individuals with a disability are entitled to certain services and consideration from others so that they can act in accordance with their own life goals. In view of the fact that they may lack some of the necessary requirements for effective agency, they are entitled to receive assistance from the state, its agencies and members of the community to act

in pursuit of their goals. This is not a matter of charity; it is a question of having a basic human right to a minimally satisfying level of existence (Connolly & Ward, 2008: 106).

Persons who lack the basic goods required for agency (including drug users who lack freedom to the extent that they are unable to control their own choices over drug use) may need support of various levels of intensity and duration. But this support should always have the goal of increasing their level of agency. Interventions towards other goals (e.g. reducing the total costs of harm estimated to be caused by drug users) risk treating the person as means to the ends of other people, and so abusing their rights.

Institutions that base their action on rights (which are the only rationally justifiable institutions) must respect the rights both of drug users and of the recipients of drug users' actions. Carter and Hall (in press) argue that this implies that people who are dependent on drugs have a right to effective treatment, to access harm reduction measures and to receive effective medical treatment for other conditions. It also implies that dependent drug users should receive no automatic exemption from punishment for any other crimes that they commit, as they retain responsibility for their actions. If they do commit such crimes, then offering them a treatment alternative to an otherwise justified criminal sanction may offer a way to limit the infliction of penal pain whilst also more effectively protecting potential victims from future offences (Schaub et al., 2010; Stevens, McSweeney, van Ooyen, & Uchtenhagen, 2005).

Comparing harms for harm minimisation

The PGC leads to a rational acceptance that drug policy should aim to limit objectively verified harms to rights. Recently, a debate has broken out over whether minimisation of harm can be seen as the principle aim of drug policy. As we have seen, Weatherburn argues that harm is too vague and unmeasurable a concept to provide the central aim of drug policy. He argues that all drug policy approaches have some harms, and implies that it is impossible to choose between them. He argues that '[t]his is not a job for researchers: it is a job for politicians and the public at large' (Weatherburn, 2009a: 337). Others might reply that politicians and the publics they lead do not have a great track record in choosing realistic or even worthwhile aims for drug policy. The scope for political manoeuvres and ideology to affect these choices is huge (Stevens, 2011). Researchers are unlikely to make progress on this issue by retreating from debate about what drug policy is for.

In her response to Weatherburn (2009a), van Beek accepts that drug related harms may not be directly comparable, but writes that we still need an 'overarching principle' to inform us what the goals of drug policy should be (Van Beek, 2009: 342). As Weatherburn (2009b) points out, she does not tell us what this principle is. My argument in this article is that Gewirth's PGC provides it. By defining the harms that we are trying to reduce as harms to the necessary goods of agency, and in providing a sound rational basis for this definition, the PGC makes harms commensurable. It provides value judgements that are capable of being tested and are open to public discussion. If we need to choose between policies that have different effects in producing and reducing harms, we can refer to whether these harms affect basic, nonsubtractive or additive goods. Policies which harm goods which are more needful for agency are to be rejected in favour of policies that harm goods that are less needful.

Weatherburn presents a specific policy choice as an example of the impossibility of choosing between harms:

One policy cuts public drug dealing by 20% but encourages needle sharing and results in many innocent teenagers being

stopped, searched and questioned by the police. The other policy reduces needle sharing and minimizes the number of innocent teenagers stopped searched and questioned by the police, but, as a consequence, produces a higher level of drug trafficking and drug-related loitering in and around areas that have methadone clinics. Which policy should we adopt? (Weatherburn, 2009a: 337)

Leaving aside the point that there are policies available that have been shown to reduce needle sharing without leading to higher rates of drug dealing and loitering (Independent Working Group, 2006; Kerr, Macpherson, & Wood, 2008; Rhodes & Hedrich, 2010), here is a policy dilemma that cannot be resolved by reference to international conventions. Gewirth's hierarchy of rights, in contrast, offers us a way to solve it.

The first hypothetical policy increases needle sharing and so predictably will lead to higher rates of infectious disease, serious illness and death. These are harms to the basic goods of life and physical integrity. It also leads to harm to the nonsubtractive rights of local teenagers to go about their daily lives without police interference. Public drug dealing is not itself a harm to rights, but may lead to other harms, such as fears amongst local residents that mean they are less able to make use of public spaces in their area. This is a harm to the nonsubtractive rights that these people have to use public spaces to fulfil their own purposes. So one type of nonsubtractive harm to one group of people is hypothetically prevented by harming the basic and nonsubtractive rights of other people. With no further empirical evidence of harms, the PGC would lead to a clear choice not to pursue this policy.

Turning to the second of Weatherburn's policies (which is basically the obverse of the first), we can see that it reduces harms to the basic rights of drug users and to the nonsubtractive rights of local teenagers, whilst affecting some nonsubtractive rights of local residents. Again, in the absence of other empirical information on the consequences of these policies, the choice is clear. The PGC supports policies which favour the protection of basic rights over those which protect nonsubtractive rights. Therefore this hypothetical second policy that reduces needle sharing (and therefore the risk of death) must be preferred to one that protects the rights of citizens not to be confronted by the sight of drug users.

Conclusion

Of course, arguments over drug policy are not always carried out on rational grounds. The moral value of 'purity/sanctity', which is much more common amongst conservatives than liberals (Haidt & Graham, 2007), has long been influential in determining drug policy. Ambiguous people and substances are often categorised as dirty (Douglas, 1966), and so to be avoided and excluded. Douglas has shown how these types of value shape the moral choices of both pre-modern and modern societies.

However, just because such quasi-religious judgements have been important in shaping drug and other policies, this does not mean that we should accept their continuing influence. Arguments over drug policy, as any argument does, presuppose that the discussion is based on reason. Gewirth has shown how the offence caused by one person's practices to another person's moral sensibilities cannot rationally be used in justifying the infringement of people's rights to the necessary goods for action.

In this article, I have argued that Gewirth's approach provides a sound, rationally justified basis for the debate over drug policy. It is an approach that bridges deontological and consequentialist approaches. It does not rule policies out without paying attention to their consequences. But it does provide – as utilitarian approaches cannot – a rational basis for choosing between consequences. This

approach will not replace attempts to extend the application of human rights law to protect the rights of drug users. It can, however, supplement them by showing that these rights are not just contingent upon interpretations of UN documents, but are also rationally necessary.

This article has only begun to apply this approach to drug policy. There is much debate to be had as to how the consequences of drug policies relate to the rights protected by the PGC. It may be the case that ideology will continue to dominate drug policy. But I hope to have shown that there is a logical, extra-legal basis for these discussions. Drug policy debates need not be seen as a merely matter of personal preference, political tradition, technocratic calculation or legal interpretation. They are an arena for rational and ethical argument.

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