
DRAWING THE LINE

THE HARM PRINCIPLE IN
THE DEBATE ON COCAINE
USE AND TRADE

MASTER'S THESIS APPLIED ETHICS

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ABSTRACT

In this thesis, I question the current prohibition policies of cocaine use, production, and trade. I use John Stuart Mill's harm principle to assess whether this principle could provide arguments for the decriminalization of cocaine use and legalization of cocaine production and trade. I examine this harm principle and propose an alternative interpretation concerning consensual harm and autonomy. Regarding cocaine use, it turns out that it is hard to defend the current prohibition policies on it, as one cannot be certain that cocaine use diminishes one's autonomy. Even if it does, prohibition is not necessarily the right answer. As for cocaine production and trade, the issue meets two problems: first, it is not clear to which extent the current violent nature of the cocaine market is caused precisely *because* of prohibition policies. Therefore, it is incredibly difficult to predict the expected changes in a hypothetical situation of a legal cocaine market. Second, though the cocaine market causes harm that diminishes one's autonomy, people living in such poor, dire circumstances suffer from diminished autonomy to begin with. It can therefore be questioned whether the issue is not only about harm, but about the state's negligence to reduce poverty-related issues as well.

CONTENT

Abstract	iii
Introduction	1
Set-Up	2
Scope	3
Chapter 1: The Harm Principle	5
Mill's Harm Principle	5
Currency of Harm	8
(Non-)Comparative Accounts of Harm	9
The Consensual Harm Principle	14
The Autonomy Notion	18
Decisional Procedure of the Consensual Harm Principle	21
Chapter 2: The Harm in Cocaine	25
A Short History	25
Harm in Cocaine Use	27
Harm in Cocaine Production and Trade	32
Conclusion	39
Literature	42

INTRODUCTION

Ever since chemist Albert Niemann succeeded to isolate the cocaine alkaloid from the coca leaf in 1860, the white powdered drug has been an incredibly popular stimulant to temporarily improve one's energy, confidence and concentration (Robson, 2009). Before the drug was prohibited, cocaine use was even advertised, whether it was to reduce fatigue (Spillane, 2000, p. 81) or to cure a toothache (p. 74). Even though the drug was already prohibited in 1919 in the United States (Robson, 2009, p. 82), the extreme violence did not come until the rise of Colombian drug cartels in the 1970s. Ever since then, cocaine has left a bloody trail from the South American rainforests to the noses of high-class, recreational users in the first world.

For decades, policies on the prohibition of certain types of drugs have been defended, attacked, amended and questioned by scientists, economists, politicians, political philosophers, and ecologists. So far, there has not been an argument strong enough to offer a better suitable alternative than the current prohibition policies with regard to the production, trade, and use of cocaine. Even though the current 'war on drugs' that has been fought for over a century has been incredibly expensive (in the early 1970s, for example, *half* of the law enforcement budget in the United States of America was allocated to the combat of cocaine traffic, Ashley, 1975, p. 206) and inefficient (in 1988 it was estimated that 85% of drug trafficking was never touched, Bertrand, 1990, p. 883), prohibition still seems to win most votes.

The debate about the legalization or decriminalization of cocaine production, trade and/or use is a never-ending, enormous, and utterly complex debate. The debate has always drawn my attention. Reading into the subject, I realized that most of the debate has so far been based on empirical research: the violence of the market; the number of addicts and deaths; the costs of law enforcement versus the costs of treatment – all utilitarian arguments that provide a cost-benefit analysis of a debate that, in my view, cannot be viewed merely from a utilitarian point of view. Firstly, these calculations have so far failed to give sufficiently trustworthy predictions or arguments justifiable enough. Secondly, it requires the assumption that the consequentialist approach is the best approach for this issue and I am not convinced that that is necessarily the case. I therefore wish to approach the debate differently, not from a certain moral theory, but from a principle that questions state intervention. That principle is known as the harm principle; John Stuart Mill's defense on limited state intervention, which he introduced in his book *On Liberty*. Policymakers have often put forth this principle as a valuable approach to assess whether state intervention would be allowed or even necessary, such as the prohibition of smoking in public places (Pels, 2012; Verweij, 2017), the lifting of the mandatory closure of

stores on Sunday (Verplaetse, 2018, pp. 87-88; Claassen, 2011), or the ban on child porn and bestiality (Boogers, 2009). Also, the current policies on cocaine use, production, and trade are *coercive preventive measures*, and these types of intervention are exactly what the harm principle questions. Therefore, I believe that it is useful to assess whether the harm principle can offer a different, but valuable approach for the debate on cocaine use, production and trade.

In this thesis, I extract a part of the cocaine debate by looking at it from the perspective of this harm principle. I choose to start with an examination of what ‘harm’ is exactly. Next, I show against what baseline of well-being the harm should be weighed. Subsequently, I argue that a suitable interpretation of the principle is the interpretation of *consensual harm*. This interpretation assumes that it is not about whether or not harm is done to *others*; it is about whether harm is done *with or without consent*. Concluding, I argue that the consensual harm interpretation of the harm principle is not enough to decide which harmful actions should be regulated by the state. The principle needs an additional notion of autonomy; only when a person’s autonomy is diminished, the harmful act may be regulated by the state. The reformulation that I propose here is quite different from the original formulation of the harm principle by Mill. After having formulated a version of the harm principle that takes consent and autonomy into account, I turn to Chapter 2 and use this interpretation of the harm principle to see whether it provides reasons for questioning state interventions that prohibit both cocaine use and cocaine production and trade. The research question is as follows:

When addressing the cocaine prohibition debate from the perspective of the consensual harm principle, can the principle provide strong enough arguments to defend the decriminalization of cocaine use and the legalization of cocaine production and trade?

SET-UP

In Chapter 1, I discuss the harm principle. This chapter is slightly longer than Chapter 2, for it turns out that to arrive at a plausible interpretation of the harm principle, much needs to be considered. Chapter 2 is an assessment of this interpretation of the harm principle to the particular cases of cocaine use and cocaine production and trade.

To start, I show that before one can discuss different interpretations of the harm principle, one first needs to take a closer look at a number of considerations. These considerations regard fundamental questions on what exactly accounts as harm and which role harm plays in the harm principle. These questions in their turn inevitably lead to issues on well-being and different comparative accounts of harm.

Subsequently, I set out the consensual harm interpretation of the harm principle. This interpretation is introduced by Ben Saunders (2016), who proposes a reformulation of the harm principle that he believes would have been supported by Mill, as it pairs with all of Mill's own examples of the principle and is better equipped to deal with the main challenges that contenders of the harm principle bring to the debate. Saunders argues that much criticism relies upon the hard to draw distinction between self-regarding harm and other-regarding harm, and with his reformulation this distinction is not only clarified, but also deemed insignificant. For with the reformulation, the emphasis of the harm principle shifts to whether or not the harm is consensual.

I then argue that, though the consensual harm interpretation of the harm principle solves some critiques on the harm principle, it does leave the notion of harm too wide. In order to be able to separate harmful conduct from harmful conduct that should be regulated by the state, one needs a notion that harmful conduct that diminishes a person's autonomy is always reason for state intervention. Harmful conduct that does not diminish a person's autonomy might also be allowed to be intervened with, but this would require other determining factors than the harm principle. I conclude with a schematic flowchart that simplifies but clarifies the intention of the consensual harm principle.

I then turn to Chapter 2. While Chapter 1 is of an explorative nature, Chapter 2 is more argumentative. I first sketch the context of and provide background information on the subject at hand by giving a short introduction on the history of cocaine and by clarifying the difference between decriminalization and legalization as discussed in literature. I turn to the first domain of cocaine use and show that the consensual interpretation of the harm principle leads us to argue that from the harm principle perspective it is quite hard to defend the current prohibition and punishment policies on cocaine use. Regarding the second domain, cocaine production and trade, the harm principle interpretation invites for discussions on true consent, autonomy and poverty. I show that the issue is too complex for the harm principle to function as a leading principle, and that this notoriously difficult, immeasurable problem might not be about harm but about poverty.

SCOPE

A few notions on the scope of the thesis help clarify what this thesis discusses and what it does not. I merely talk about cocaine and no other illegal drugs. It requires much more space to discuss all illegal drugs and that is beyond the scope of this thesis. I do not argue that every

drug needs a separate scrutiny, but I do think that including other drugs would require other nuances and emphases in the debate for several reasons. First, some drug (e.g. marihuana) use and/or growth is already legal in some states of the world, which therefore possibly clouds the debate. Second, cocaine production and trade is a quite specific issue in South-American states, whereas other illegal drugs' production and trade are not that specific (and most of all not paired with such violence), and this violence in production and trade plays an important role in the thesis. Thus when reading this thesis, in some cases it is possible to widen the scope of the argument to other drugs than cocaine, but it is not true that all arguments and considerations are seamlessly applicable to every other illegal drug. This also applies to crack cocaine, which is a cheaper and more addictive extract of 'normal' cocaine.

Also, I divide the discussion in two domains: cocaine use, which is mostly concerned with micro level considerations (such as users themselves and third parties in close environments); and cocaine production and trade, which is primarily concerned with discussions on the macro level (as there are much more people involved).

Moreover, even though I recognize that the production of cocaine is incredibly harmful to the environment due to its toxic chemicals, the eradication of rainforests, and its polluting global transport, I do not discuss environmental issues. I simply do not have the space to consider the climate as an important stakeholder, even though it is an important argument in favor of the aim to eliminate cocaine production and trade. I merely turn to harm done to *persons*, not to non-persons (animals and the environment) or future persons.

Lastly, I do not consider the differences per country or continent in policies on cocaine use and cocaine production. Throughout the world, the general policies are similar – namely prohibition – and when they differ (such as differences in duration of prison time for drug possession) these differences are not relevant for the content of the discussion.

CHAPTER 1: THE HARM PRINCIPLE

In this chapter, I examine the implications of Mill's harm principle. It should be noted that I use Mill's formulation and interpretation of the harm principle as a starting point, but at some point I deviate from his interpretation. I argue that Mill's interpretation of harm goes against our intuitive notion of what one would, in general circumstances, regard as harm. I think that one should not 'narrow' the definition of harm in order to make the harm principle plausible (which is what Mill does by separating offensive conduct from harmful conduct). Instead, I recognize that much acts that diminish a person's well-being (which I explain in this chapter) are harm, but that not all harmful conduct should be regulated. This is where I distance myself from Mill's point of view. I argue that the harm principle can only allow state intervention for harmful actions that are non-consensual and diminish one's autonomy. This notion of autonomy is not included in Mill's interpretation. Justifying other ways of harmful conduct cannot be done through the harm principle; the justifications then need to be based on different grounds. Thus I propose a definition of harm that is not only based on the role it plays in the principle, but also on its intuitive definition. These intuitive grounds are also used in this chapter to show illogic outcomes in examples of apparent harmful conduct. By using this notion, I recognize that the principle does not stand on its own, contrarily to what Mill intended.

MILL'S HARM PRINCIPLE

In order to discuss the harm principle with regard to cocaine decriminalization and legalization, one first needs to delve into the harm principle and its many implications, challenges and observations. Let me therefore forget about cocaine for now, start at the beginning and look at the harm principle.

In 1859, in his book *On Liberty*, Mill writes:

The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over *any member of a civilized community* [1], *against his will* [2], is *to prevent harm* [3] *to others* [4] [emphases and numbers added]. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone for which he is

amenable to society is that which concerns others. In the part which merely concerns himself, his independence, is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. (2002, pp. 11-12)

Since then, this principle, commonly known as the harm principle, has been the basis of many discussions on matters of justified state intervention. In short, the harm principle claims that a state may only interfere in an individual's life against the will of that individual, if by doing so it will prevent or reduce harm to others. At first sight, this appears to be a quite simple and straightforward principle. When examined more closely, however, the harm principle gradually changes into a quite complex puzzle that, when trying to be solved or clarified, merely seems to expand to a larger puzzle with every attempt.

In the quote above, the second sentence ("that the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others", Mill, 2002, p. 11) phrases the principle that Mill defends. Before continuing, a few things in the quote should be noted. I marked four phrases in that quote and discuss them in that order:

[1] *Any member of a civilized community*. Mill states that the principle is only applicable to members of a civilized community. With this, Mill did not only mean to exclude animals and children, but 'barbarians' as well. With barbarians he meant other communities – in other words, non-white, non-European communities (Thorn, 2016). "We may leave out of consideration those of backward states of society," Mill writes, "in which the race itself may be considered as in its nonage Despotism is a legitimate mode of government in dealing with barbarians" (p. 12). Thus conquering other nations is okay, Mill argues, so long as the conquerors do this in order to improve the lives of the people who live there (Thorn, 2016). This illustrates the context in which the principle was composed; Mill was a Victorian and lived in the times of British colonialism. Ironically, he was also an anti-paternalist. That, too, merely applied to his own 'civilized community', for he quite literally used arguments in favor of paternalism (to barbarians) in his argument against paternalism in civilized communities. This specific notion of alleged superiority does not affect the way I discuss the harm principle in this thesis, but it feels rather wrong to ignore this specific part which immediately follows after the quote on the previous page. It raises questions of integrity when only using specific advantageous parts of other's work, while leaving

less appealing parts out. I therefore do not want to exclude this side note that sketches the context of Mill's work.

- [2] *Against his will.* The interventions Mill mentions are *coercive* interventions. A great deal may be said about what exactly constitutes coercion, but to keep it simple I continue with an intuitive notion of coercion, exemplified as follows: a tax rate that a civilian has to pay, but does not agree with, can be regarded as coercion, whereas a civilian being exposed to an information campaign about the dangers of eating too much sugar cannot (Holtug, 2002, p. 359). Additionally, the principle assesses whether *the government of the state* may impose these regulations against one's will. It is generally not concerned with other institutions.
- [3] *To prevent harm.* This requires two notions. First, preventing reasonable *risks* of harm is also included. Mill states that the principle can be applied prospectively as well (Brink, 2018), something that Nils Holtug (2002, p. 359) calls the *ex-ante* version of the principle. Second, in order to agree on what falls under the category of 'preventing harm (risk)', one has to scrutinize what is 'harm'. When is an act harmful? What is harm? The definition of harm is probably the biggest hurdle and has been the basis of the most critique. It is dealt with from the next section on.
- [4] *To others.* The originally formulated principle explicitly mentions harms to *others* as the only legitimate reason for intervention. Interventions to prevent or reduce harm to oneself are not justified, according to Mill. This is where he seems to contradict himself at times, however, as he states that in some instances protecting someone from harming herself *is* allowed. This ambiguity is what the consensual harm interpretation of the principle aims to solve. This interpretation is introduced in the section THE CONSENSUAL HARM PRINCIPLE on page 14.

According to Bernard E. Harcourt (1999), the harm principle is a necessary but not sufficient condition for legal enforcement. This entails that in order to justify the regulation of an act, it is necessary that there is harm, but harm is not the only condition for justifiable law enforcement. Harcourt states that in Mill's view, the principle specifically *excludes* "certain categories of activities from legal enforcement" (p. 114), but does not per se determine what to *include* in the decision which moral offenses to regulate; other constitutional or practical factors determine this as well (p. 114).

The role of the harm principle is twofold. First, it is a way to assess whether or not the government should regulate certain kinds of actions; more specifically, Mill aimed to create a

way to justify that the state should in many cases *not* intervene in the life of an individual. Originally, the harm principle was mostly popular among liberals who found that the principle was useful in order to justify that certain acts that did not harm others, should not be regulated. For example, the harm principle was reignited in the 1950s due to the Report of the Committee on Homosexual Offences and Prostitution, in which the committee stated that “homosexual behaviour between consenting adults in private should no longer be a criminal offence” (p. 25), as in private, the public could not be offended by it (Wolfenden et al., 1957). In his response, Lord Patrick Devlin argued that such “immoral activities” should remain criminalized and defended his argument from his stance on legal moralism: the principle, challenging the harm principle, that states that moral offenses should be regulated *because* they are immoral (Harcourt, 1999).

Second, the harm principle can clarify the academic debate. Many philosophers have tried to get to grips with the complexity of the notions, currencies and considerations of the harm principle; which considerations concerning harm should and should not be taken into account in institutional policy decision-making? What is harm? When is someone harmed? And is every type of harm a justification for state regulation?

According to André Krom (2011), Mill’s principle is a morally neutral, mid-level principle; in itself, it is not a moral principle and is not tied to a specific fundamental moral theory. As the principle is situated between more fundamental moral considerations, it can enable convergence, identify morally or legally relevant characteristics in certain situations, and constrain the scope of more fundamental principles by being more specific. As normative theories on their deepest level are often incompatible, applying normative theories in applied ethical debates is considered undesirable. A mid-level principle can offer a solution. However, one first needs to have a better understanding of the currency of harm and of well-being, before one can establish the exact role and application of the harm principle in contemporary cases.

CURRENCY OF HARM

One of the major objections to Mill’s harm principle is that it does not clarify what exactly is *harm*. A first good step to understand the principle better would therefore be to try and find a notion of harm; a currency through which one can identify it. Schlomit Harrosh (2012) states that harm is inevitably related to human vulnerability (p. 494) and identifies several dimensions in which one can be harmed. She considers humans as conscious, physical, and psychological beings; as rational agents, and as creatures of meaning with the potential to live a fully human

life. And because we are such creatures, we can have 1) negative experiences such as pain, frustration, sadness, anxiety and anger; 2) diseases or abnormal functioning of our organs, perception or emotion, such as lung cancer and being dehydrated; or 3) setbacks of interests, such as loss of property and loss of a loving relationship (p. 494). In other words, harm is not just physical pain that we experience, but can also be emotional distress or a setback in our potentiality to attain certain wants and desires to which we claim rights. It is a state in which our well-being is diminished.

In the next section, I discuss against what this currency of harm should be weighed. This may give us a better image of if and when these currencies of harm may indeed be counted as harmful. First, I shortly discuss a non-comparative account of harm, mentioned by Elizabeth Harman (2009) and Piers Norris Turner (2014). This does not seem to be sufficient for the upcoming debate, and therefore I turn to three comparative accounts of harm, discussed by Thomas Søbirk Petersen (2014). I then argue that, despite its challenges, the counterfactual baseline is the most suitable comparative account of harm that may be accepted for the discussion on cocaine use and cocaine production and trade.

(NON-)COMPARATIVE ACCOUNTS OF HARM

Harman (2009) gives a fairly non-comparative account of harm: if an action causes the person to be in a bad state, that action harms someone. The bad states she mentions concern states that are bad *in themselves*, not because they are a worse state than the person would have been in otherwise (p. 139). She then offers a further account of what she means by bad states, namely “those states that are worse in some way than the normal healthy state for a member of one’s species” (p. 139). This further account actually hints towards a comparative account again (“worse in some way than...”), and in my view seems to lean towards a baseline from mankind (which I explain in the next few paragraphs), but in her essay she sticks to the non-comparative notion of a ‘bad state’. Turner (2014) also points to a more intuitive notion of harm: “harm should be regarded as a general term for bad consequences, and no independent reason to believe that “harm” implies a bad effect of a certain kind or a certain degree of intensity” (p. 320).

These non-comparative notions of harm, however, leave too many questions unanswered. If there is no notion of what being worse off is, how can one know what does and what does not count as harm? Petersen (2014) therefore turns to three comparative accounts of harm to see whether one of the accounts may help us reach plausible conclusions on a baseline. Petersen

specifies harm as follows: “a person P is harmed by an act (or an event) *a* iff, as a result of *a*, P is made worse off in terms of well-being” (p. 200). Two questions then arise: what exactly constitute well-being? And when is someone worse off?

The concept of well-being is a thesis of its own, as there is no widely agreed upon definition of the term. There are defenders of a hedonistic account of well-being, proponents of a preference-satisfaction account, and supporters of the objective-list theory (Petersen, 2014, p. 201; Taylor, 2015, p.75). All have different views on what constitutes well-being. I do not have the space to elaborate on this further. Therefore I use an intuitive, non-moral notion of well-being, which is formulated by psychologist Tchiki Davis (2019) as “the experience of health, happiness, and prosperity. It includes having good mental health, high life satisfaction, and a sense of meaning or purpose.”

I now turn to the second question. What does it mean when someone is worse off? Worse off than what? Or than when? According to Petersen (2014), the question here involves the *type* of baseline that one uses to determine whether someone is worse off (p. 201). He discusses three different theories of the adequate baseline: the temporal baseline view; the baseline from mankind; and the counterfactual baseline. I discuss all three.

The temporal baseline view states that the proper baseline for determining whether or not one is worse off, is a baseline that is *prior* to the act that caused alleged harm or omission. This means that Person P2 harms Person P1 iff by doing (or allowing) act *x*, P2 causes P1’s well-being to be lower after *x* (Petersen, 2014, p. 203). At first sight, this may sound plausible, but the following example illustrates why one has reason to believe that this view is not true.

Break-up

Sarah broke up her relationship with Meredith. Meredith is heart-broken and wants to get back together. A week after the break-up, Sarah realizes she has made a mistake and goes to Meredith’s house in order to make up. Meredith does not know this. On her way, however, Sarah runs into their mutual friend Robin. Robin tells Sarah a lie about Meredith, after which Sarah changes her mind and decides not to make up with Meredith.

Robin does not make Meredith worse off compared to the situation immediately prior to her telling the lie. After all, Meredith and Sarah are broken up and after the lie, they are still broken up. But Robin clearly harms Meredith, even though Meredith did not know that Sarah was about to make up with her. The temporal baseline therefore seems incorrect.

If the temporal baseline is incorrect, a second proposition, then, is the theory on the baseline from mankind, which states that a person is harmed if he or she is worse off than he or she could have been relative to our species' potential to live a fully human life (Harrosh, 2012, p. 493). More specifically, P2 harms P1 iff by doing (or allowing) act *x*, P2 causes P1's level of well-being to be lower than the well-being of mankind (Petersen, 2014, p. 205). This baseline could explain the Break-up case; Meredith, as she is currently suffering from pain, sadness, perhaps even anger and humiliation, is not at the moment living a fully human life (considering I use Harrosh' account of instances in which one does not live a fully human life, which she lays down on page 494 of her article¹). Robin telling Sarah a lie about Meredith results to Meredith still being in this less-than-fully-human-life-state. Robin therefore harms Meredith, for through that act, Meredith's level of well-being is lower than the well-being of mankind. Apart from whether this baseline should be relative or objective – in other words, whether this baseline is compared to *average* well-being for humans or compared to whether *one specific good* of the basic human goods is or is not fully realized (Harrosh, 2012, pp. 205-207) – the baseline fails to provide a satisfactory answer to the following case, based on Petersen's (2014) example:

Superman

Ted has a mutated gene that makes him immune to many diseases. The mutation also slows down his aging process, extending his life expectancy by 20 years. Ted is also a very social guy with lots of friends, a satisfying job and a loving relationship. Ted is unaware that he is genetically different from other humans. A doctor treats Ted for the genetic mutation, after which Ted is genetically equal to other humans.

It does not seem right to say that the doctor is not harming Ted because after the treatment Ted is still living a fully human life. Rather, it would be fair to say that Ted now has less well-being than he would have had, had the doctor not treated him. So even though the baseline from mankind helps us in the Break-up case, it does not do so in the Superman case. In addition, when this baseline is compared to the *average* well-being of humans (when I use the subjective account of the baseline from mankind), consider that Ted is not genetically superior to other humans, but merely has an incredibly good life. When someone breaks Ted's legs, Ted is still

¹ These are the same dimensions from Harrosh (2012) which I described as currencies of harm. However, I do not agree with her next line of argument. Harrosh claims that any of these dimensions cause a person to live a less than human life, therefore all these dimensions are harm. I do not agree that these dimensions of harm necessarily result in living a less than human life. I do use Harrosh' account of dimensions of harm, however, for I think that they provide a fine basis and an intuitive notion of what we would consider harmful.

harmed, even though his life is still much better than the average life of a human (assuming that the average well-being of humans is lower than Ted's well-being because of the fact that a great number of humans live in poor or unsafe circumstances).

Like the temporal baseline, the baseline from mankind does not give us plausible answers. Therefore I need to look for a third option, which is called the counterfactual baseline. Quite some philosophers, such as Joseph Raz (1986)² and Robert Nozick (Lacey, 2014) claim that one ought to embrace this option as the best possible baseline. The counterfactual baseline entails that P2 harms P1 iff by doing (or allowing) an act *a*, P2 causes P1 to be worse-off in terms of well-being *than P1 would have been in the absence of a* (Petersen, 2014, p. 208). So if a person is worse off than when that act would not have occurred, that person is harmed. The counterfactual baseline clearly helps us reach a plausible conclusion in the cases of Break-up and Superman. However, it also faces some challenges that come to the fore when the baseline is tested against issues of beneficence instead of issues of doing harm. This is due to the fact that it follows from the counterfactual baseline that omissions can be harmful as well, even when they would not be classified as such. After all, when I accept the counterfactual baseline, I accept that bringing about more negative welfare also means bringing about less positive welfare³. And when one brings about this less positive welfare, one is doing harm. Petersen's following, third case illustrates this:

No Aloha

Brian has some spare money and decides to book a plane ticket to Hawaii. He only has money for one ticket. As he buys the ticket for himself, he cannot buy a trip to Hawaii for his friend Kayleigh.

It seems quite absurd to say that Brian harms Kayleigh by not getting her a ticket to Hawaii, yet the counterfactual baseline would suggest that Kayleigh experiences *less positive welfare* by not going to Hawaii. After all, had the omission not occurred (so had Brian not refrained from buying her a ticket), Kayleigh would have gone to Hawaii and be better off in terms of

² Though not specifically calling it the counterfactual baseline, Joseph Raz (1986) claims that sometimes, failing to improve the situation of another is also harm, if one denies what is *due* to another. This is a more autonomy-based understanding of the principle. Raz mentions the common misconception that harm is only due when someone is worse off as a result of that act or omission. This is not true, he states, because "one harms another by failing in one's duty to him, even though this is a duty to improve his situation and the failure does not leave him worse off than he was before" (p. 416).

³ This assumption is explained more elaborately by Nils Holtug (2002), *The Harm Principle* from page 369 on, and by Thomas Søbirk Petersen (2014), *Being Worse Off: But in Comparison with What? On the Baseline Problem of Harm and the Harm Principle* from page 210 on.

well-being. The counterfactual baseline cannot explain why the omission of a good deed is not harm. Still, it feels wrong to regard the refraining of such a supererogatory act as harm, as the act is not morally required to be done.

Seana Valentine Shiffrin (2012) proposes another case in which the counterfactual baseline does not seem to provide a plausible answer. She explains the problem of the counterfactual baseline with regard to determinism⁴:

Foot Shoot

Blair and Stacey both have a gun. Blair shoots Joanne in the foot. Because Blair shot Joanne in the foot, Stacey does not shoot Joanne. Had Blair not shot Joanne, then Stacey would have shot Joanne in the head.

If Blair shoots Joanne in the foot (act *a*), and had Blair not done that, Stacey would have shot Joanne in the head and killed her (act *aa*), then Joanne is not worse off than in the absence of act *a*. But it does not seem right to say that Blair therefore did not harm Joanne, because Joanne's foot might still be painfully shattered to pieces. Shiffrin argues therefore that comparative accounts of harm are unfit.

I agree that the last two cases indeed cannot be explained through the counterfactual baseline of harm. Nevertheless, the counterfactual baseline is clearly better suitable than the temporal baseline or the baseline from mankind. The counterfactual baseline does not provide perfect answers for every case that it is challenged with, yet I accept this counterfactual baseline for two reasons. First, in general the justificatory burden for neglecting to avoid harm is higher than the burden for neglecting to grant benefits (Shiffrin, 2012, p. 363), and this baseline seems to be most plausible when I am merely concerned with harm and not with beneficence. As I will show in Chapter 2, issues on cocaine use and cocaine production and trade are not issues of beneficence in any way. Second, the Foot Shoot case is an incredibly extreme and exceptional example. A response to this case could be that Blair and Stacey inflict this harm together, regardless of which person eventually does the harm. It is much more likely in 'normal' circumstances that the absence of *a* (Blair shooting Joanne in the foot) results in a situation in which nobody is shot, not in a situation where someone else shoots Stacey. If these kind of

⁴ Petersen (2014) also discusses a version of this in his analysis. He explores "the closest possible world" (pp. 209-210), but then immediately wonders what that closest possible world would be. We cannot know, therefore we do not know which possible world to compare it to, and thus we cannot determine whether one would have been better off in the absence of that specific act. Perhaps, the alternative act in the closest possible world would have made one even worse off, as is exemplified in Shiffrin's case with Blair, Joanne and Stacey.

extreme cases are the reason that the counterfactual baseline does not do a perfect job, then I choose to bite that bullet and continue with the comparative account of a counterfactual baseline.

In conclusion, even though I understand that the counterfactual baseline does not provide perfect answers, it is strong enough to use as a comparative notion of harm in the coming debate on cocaine prohibition, because these issues concern notions of harm and not of beneficence. Moreover, a better suitable baseline does not exist, or at least has not been found yet, and I will not pretend to have a better alternative. All things considered, the counterfactual baseline does provide us with the most plausible version of a conception of harm and will help us understand instances of harm in the coming debate on cocaine prohibition.

Having laid out a currency of harm and a baseline to which that harm can be weighed, I continue in the next section with an interpretation of the harm principle introduced by Saunders (2016) and supported by Shiffrin (2012). This interpretation focuses on the notion of *consent* in issues of harm. I show that this interpretation turns out to be a useful one from which I can discuss the cocaine prohibition debate.

THE CONSENSUAL HARM PRINCIPLE

Generally, Shiffrin (2012) says, harm on another person is justified if it meets at least one of the following necessary conditions: “that the harm be deserved; that its imposition is necessary to avoid greater harm to the recipient or to others; that its imposition be necessary to vindicate another's right; or that the recipient consents” (p. 362). But, Shiffrin notes, consent alone is not a sufficient justification. This consent should, namely, be motivated by the reasonable idea that inflicting or suffering the harm serves a legitimate and suitably important end (p. 362). In my view, the first three conditions are exactly the legitimate ends that Shiffrin mentions in the last condition about consent.

Shiffrin's notion of consent is supported by the view of Saunders (2016), who, through careful examination and reformulation, arrives at a similar conclusion. Saunders suggests that much of the criticism on the harm principle relies on the fact that is very difficult to distinguish self-regarding harm and other-regarding harm, as hardly any action (and thus hardly any harm) is only self-regarding; a certain action (or harm) almost always causes, in some way, an effect (or harm) to persons other than the person who inflicts the harm upon herself. Other-regarding conduct cannot be the analogy of self-regarding, says Saunders. For if self-regarding conduct is conduct that affects merely the agent's interests, then other-regarding conduct must mean

conduct that merely affects others' interests. But then, actions that affect both oneself and others are in neither of these conducts. He therefore rephrases the principle in such a way that it is still (as Saunders believes) compatible with the harm principle as Mill intended it, but that it is better capable to clarify the self-regarding and other-regarding distinction. He exchanges 'other-regarding harm' for 'non-self-regarding' harm; this way, self-regarding harm still means conduct that merely affects the agent's interests, and non-self-regarding conduct is conduct that is not self-regarding, because it affects others, regardless of whether that conduct also affects oneself (p. 1009). Then, from this revision follows that the principle is actually not concerned with self-regarding and non-self-regarding, but with consensual harm⁵, which can be understood simply as harm inflicted upon someone that did not consent to that harm. After all, in *On Liberty*, Mill sometimes seems to allow interventions in order to protect a person from her own action as well, and not just interventions to protect a person from harm by others. If, for example, that action is crossing an unstable bridge while the person does not know it is about to collapse, then interference in this self-regarding action is permissible because, in Mill's view, the agent cannot (or does not) really consent to what she is doing (Saunders, 2016, p. 1015).

A slightly more detailed account of consent is necessary in order to at least have a working definition. In bioethics, consent is usually described as informed consent, a "communicative transaction between agents" (p. 69) in which an agent has received the necessary information to make an informed decision through individual autonomy whether or not she consents to the action for which her consent is requested (Manson & O'Neill, 2007). For example, after a physician has fully informed a patient about the possible risks and implications of an open-heart surgery, the patient can give informed consent to execute the surgery. If one of the risks of the surgery occurs (if the patient dies, for example), the physician harmed the patient but did not do wrong; had the patient not been informed by the physician, so had she not been fully capable through individual autonomy to be aware of all the risks, the physician may have indeed done wrong. This is a very short account of informed consent, and both in theory and practice consent is seldom this simple. However, it does provide us with a basic idea of what is consent. A list of conditions for genuine informed consent might include the following: consent is only legitimate if the person who consents is a) aware that she consents, b) sufficiently informed about the subject that she consents to, so that she can make informed, reasonable and reflective

⁵ A more detailed explanation of how one arrives at the self-regarding and non-self-regarding distinction, and how from this follows the reformulation as 'consensual harm', I suggest to read Ben Saunders' article *Reformulating Mill's Harm Principle* (2016). Further elaboration on this is beyond the scope of this thesis.

choices, and c) capable to make an informed decision. If a person is misled, lied to, uninformed, or (temporarily) in no capable state to make such a decision, the consent is not genuine.

Thus, Saunders says, Mill’s own account of the harm principle does not always fit the self-regarding/other-regarding distinction. The reformulation of the principle does. This reformulation is as follows: the only justification for interfering in someone’s liberty is to prevent non-consensual harm (p. 1015). Saunders states that “the permissibility of intervention should depend on whether those harmed consent to that harm, rather than on who is harmed” (p. 1029). This better explains why one usually cannot justify intervening with self-regarding actions; an individual normally consents to what she does to herself. But still, it is permissible to intervene when one harms herself (or is about to) when that consent is *not* given. It seems odd to say that a person who is inflicting harm upon herself, has not given consent to herself doing that harm. Still, there are cases in which the agent harms herself due to some “voluntariness-defeating factor, such as coercion or ignorance” (p. 1014). So even though a person has consented to a harm, ignorance or (temporal) incapacity may be reasons for that consent, and in that case interference in this self-regarding action is allowed. One can for example not be aware of the bad state of the bridge that she is about to cross, so another may intervene. Or one may have impaired judgment due to temporal drunkenness and is not fully capable to decide whether she wants to get a butterfly tattoo (Saunders, 2016).

Saunders illustrates the distinction between consensual and non-consensual harm in Figure 1 below.

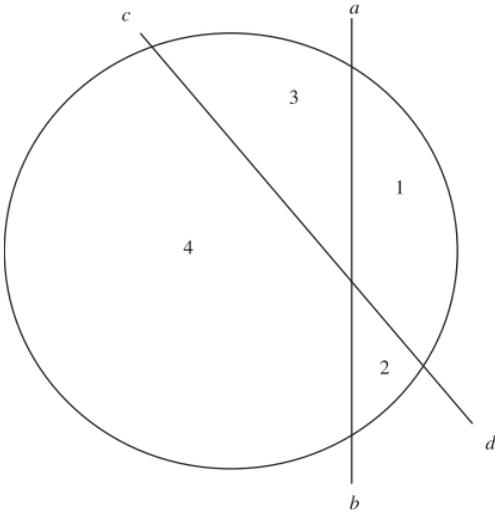


Figure 1. (Non-)self-regarding and (non-)consensual actions. Reprinted from “Reformulating Mill’s Harm Principle”, by Saunders, B., 2016, *Mind*, 125(500), p. 1016.

The circle is the range of actions that a person performs. The a/b-line divides self-regarding actions (areas 1 and 2) and non-self-regarding actions (areas 3 and 4). The c/d-line divides consensual actions (areas 1 and 3) and non-consensual actions (areas 2 and 4). Interference is only allowed when the action is situated in areas 2 or 4; it does not matter whether this action is self-regarding or not, but it does depend on whether the action was consensual.

There are instances when harm is still permissible even though the person has not consented. When a person is not able to give her consent, because, for example, she is unconscious, it is still morally permissible to inflict a necessary, lesser harm if that lesser harm helps to avoid an even greater harm. For example, one may save a drowning person if saving her requires breaking her leg. If one can reasonably expect that the person would, were she able, consent to the harm, harm may be inflicted.

The reformulation of Mill's principle expresses Mill's foundational point more clearly, namely that the state should not regulate persons' behavior if those persons have consented to it. It expands the protected sphere in which the state may not interfere. If the principle is interpreted this way, it is much more successful in supporting the examples that Mill gives throughout *On Liberty* (Saunders, 2016, p. 1019)⁶.

When taking consent as the basis of justification for state intervention, one may stumble upon the following. There are some gross harms that the state should prevent, we as a society believe, regardless of whether the victim consents. First, as mentioned before, the response to this could be that the consent must be true. If the consent is not genuine, then interference is permissible. Also, if at first sight the consent really does seem genuine, but there is reason to believe that the consent is in fact defective, one may interfere until it can be determined that the consent was truly genuine. Second, harm that is consented to by an individual who experiences the immediate effects, can still create harm to third parties who did not consent. In that case as well, interference is permissible. Third, Saunders says, "that society may only interfere with an individual's actions in order to prevent (non-consensual) harm does *not* imply that only (non-consensual) harm-causing actions may be interfered with" (p. 1024); harmless actions may be

⁶ In his essay *Bentham* from 1838, Mill himself expresses his preference to focus more on examples than on a principle; he prefers to "say, as ordinary men are content to do, a little more than the truth in one sentence, and correct it in the next" (p. 114), for "as in many things, we must aim at too much, to be assured of doing enough" (p. 114). Mill says this as part of his commentary on Jeremy Bentham's work, which, he says, is often concerned with "impracticable precision" (p. 115). Mill mentions the likeliness of having a proposition with a 'broad boundary', which is then limited and qualified "when applied to practice" (p. 114). Though this is a different essay, we may welcome this view of Mill as an extra incentive to put more emphasis on the examples that Mill proposes than on the exact citation of his harm principle. The consensual harm interpretation of the principle seems then to give back some of the strength to the actual principle itself, by supporting each example that Mill gives.

interfered with in order to prevent harmful (non-consensual) actions if the harmless actions can cause harm to third parties who did not consent (Saunders, 2016).

It is not within the scope of this thesis, but much more can be said about consent. For example, a person does not consent to everything that it is done to him. Some things simply just happen, and most of them are not bad things. If harm may only be inflicted upon us if we consent, then why may benefits be inflicted upon us without our consent? Questions like these invite for a parallel discussion that is not in line with the aim of this thesis, but is important nevertheless. Additionally, Shiffrin (2012) mentions a few more questions for further research: how does consent exactly make a difference? And how much of a difference can it make? (p. 398) For now, I do not address these issues. I return to some issues of consent in Chapter 2.

THE AUTONOMY NOTION

The consensual harm interpretation proves to be a better suitable interpretation of the harm principle as Mill intended it. However, even though I have set a currency of harm, have determined a baseline to set out this harm against, and have agreed on a reformulation of the harm principle, I have still not succeeded to dissolve one large challenge of the harm principle. I have shortly mentioned this challenge before, and it turns out that an elaborate scrutiny of the harm principle has not yet provided me with an answer on it. Namely, even when I accept the harm principle as a principle that is concerned with consent, rather than with who is harmed, it still leaves the notion of harm too wide. Consider the following example:

Hannah Going A-Wall

Hannah used to be a social, friendly woman, but suddenly decides to stop calling her mother. She also stops joining family gatherings and refuses to meet with her friends. She decides she'd rather stay at home all day, watching tv, stay in poor physical shape and eat unhealthy food while watching bad sitcoms from her couch. In other words: Hannah turns into an antisocial person.

If I accept Harrosh' (2012) currency of harm, Hannah's mother and friends have a negative experience as a result of Hannah's behavior. Hannah's mother may experience anger and frustration. Set against the counterfactual baseline, it would suggest that if Hannah had not acted this way, so if she had she not stopped calling her mother, and stopped hanging out with her friends, then her mother would have not experienced this anger, frustration and setback of interest. Her mother would then have been better off. Also, her mother surely would not have consented to this behavior of Hannah, had she been requested to give consent for it. Hannah's

act is a non-consensual, non-self-regarding harm, and from the consensual harm principle interpretation it follows that, in this case, this behavior would not be excluded from allowed state intervention. However, it seems fairly strange, and against our intuition, that such antisocial behaviors should be regulated by the state. Moreover, a religious person experiencing anger from seeing two men holding hands in public, would then also be reason enough to allow state intervention on men holding hands. After all, Mill's intention of the harm principle was to state quite the opposite.

The counterfactual baseline and the reformulation of the principle have failed to solve this problem. The harm principle is still not sufficient to justify state regulations. There are several ways to try and make the harm principle more sufficient. A first response could be to narrow the scope of harm. Mill notes that there is a difference between harm and mere offense (Brink, 2018; Petersen, 2016). Offenses are 'minor harms', and merely serious harms should be regulated by the state. Supporting this, Joel Feinberg (1985) defends an offense principle, which he states is different from the harm principle. Offense is a "*less serious thing than harm*" (p. 2), but serious *wrongful* offenses should also be prohibited by the state. I do not know much about the offense principle, but after a short examination of the principle and after reading Petersen's response to the principle, I argue that it turns out to be incredibly difficult to make a sharp distinction between harm and offense. It is unclear how 'serious wrongful offenses' differ from harm. And as in Feinberg's view serious offenses should also be prevented, I do not recognize how a distinction between offense and harm would help us reach plausible conclusions on which acts should or should not be regulated.

A second response could be that the harms would have to meet a certain 'threshold'; only if the harm is severe enough, the state may intervene. But how do you determine this threshold? Every person may experience harm differently, and thus the same act may for one person be well below the threshold, whereas the act for another may be well above. This, neither, seems to be a plausible solution.

A third response comes from Shiffrin (2012). She argues that certain emotional states are cases of "belief-mediated distress" (p. 392). This belief-mediated distress may indeed be harms, and they may give reasons to try and prevent these harms when present, but that these irrational harms of guilt and shame are self-inflicted and give reasons "*for the sufferer*" (p. 397) to avoid or prevent this harm. This underlying irrationality from which the emotional distress arises may be remedied by offering reasons, counsel, or other forms of therapy. I do not fully agree with her first argument, for not all emotional distress is caused by irrationality or is self-inflicted.

Alternatively, I argue that a notion of autonomy should be embedded in the harm principle if one has determined that the harm was non-consensual. Due to the scope of this thesis I cannot give a full account of autonomy here, but a working definition will suffice. Autonomy is based on the moral value of individual liberty. It is the opportunity to *deliberately* choose from a range of options *uncoerced*, in many shapes and forms; the opportunity to choose what to have for dinner, what music to listen to, what political preferences to endorse. An autonomous person possesses self-chosen goals and relationships. In other words: personal autonomy may be very simply be explained as the ideal that people should have the freedom to live their own lives (Raz, 1986, p. 369). Regulating acts that diminish another person's autonomy is regarded as a fair reason for state intervention because autonomy is an ideal that is considered one of the most important values of an individual's life.

Limiting state regulation to harms that affect a person's autonomy helps explaining cases such as the case of Hannah going A-Wall, or when two men are holding hands in public: Hannah's mother might be experiencing frustration or anger, but she is not affected in her autonomy – she still may live her life as she wishes; and a homophobic or religious person may experience certain emotional distress from seeing the two men, but the act does not diminish that person's autonomous life and individual freedom.

One may wonder why I did not add this notion of autonomy into the currency of harm, limiting the currency of harm so that an act is only harmful if it diminishes one's autonomy. This, however, goes against an intuitive notion of harm. I do not wish to make the notion of harm smaller (as also mentioned before in Mill's own distinction between harm and offense); I merely wish to argue that an act may be harmful, but that not all ways of harm should be regulated. Adding autonomy to the currency of harm, would have put many acts outside the scope of harm, which would have not fitted our intuitive thoughts on the subject.

Combined with the non-consensual harm interpretation, the principle would look as follows:

The only justification for which power may be executed over any member of a civilized community, against his will, is to prevent (or reduce the risk of) non-consensual harm that diminishes a person's autonomy.

Holtug (2002) actually offers a similar version of this formulation of the harm principle, but he criticizes it for two reasons. First, he believes that by adding a notion of autonomy there is a risk that the harm principle is engulfed by a theory of justice, for one cannot talk about

autonomy without talking about justice (pp. 385-386). However, the risk that the harm principle may turn into a subpart of a justice theory is no reason to reject it altogether; with a mere working definition of autonomy one can structure the debate as well.

The second reason Holtug poses is that there are cases in which a person's autonomy is not compromised, but our intuition would tell us that state regulation should be justified nevertheless. This is in fact true. Consider Holtug's case in which a bored housewife lies in the bushes, throwing tiny stones at passing pedestrians. Even though the autonomy of these pedestrians might not be compromised, for they are not affected in their freedom or pallet of life choices, one could still argue that the state should be justified to do something about this peculiar behavior that causes short but significant instances of pain (p. 386).

This is where it becomes clear that this specific interpretation of the harm principle is useful to determine for which acts state jurisdiction is justified *in any case* – any non-consensual harm that diminishes a person's autonomy – but that there is a further notion needed to determine which acts that are harmful but do not necessarily diminish a person's autonomy should *also* be regulated. The formulation would then be:

The state may execute power over any member of a civilized community, against his will, if it is to prevent (or reduce the risk of) non-consensual harm that diminishes a person's autonomy.

This makes the principle stand less on its own. With this formulation, it loses some of its strength, but it is also a more realistic and better applicable interpretation of the principle to use in discussions on permissible state intervention.

DECISIONAL PROCEDURE OF THE CONSENSUAL HARM PRINCIPLE

As stated before, harm may occur in the form of negative experiences such as pain, anxiety or anger; diseases such as lung cancer; or setbacks of interests, such as loss of property (Harrosh, 2012, p. 494). If an action leaves one worse off, so if an action leaves one with any of these negative experiences, diseases or setbacks, whereas would the action have not occurred, one would not be worse off in these terms, then (in line with the counterfactual baseline,) one is harmed. The counterfactual baseline, just as the temporal baseline and the baseline from mankind, does not provide perfect answers when applied to each given case. In cases of beneficence (No Aloha) and in extreme cases of 'collaborative' harm (Foot Shoot) the counterfactual baseline does not provide answers that align with our intuitive notion of harm in those cases. However, its grounds are still strong enough to build on.

The consensual harm interpretation of the harm principle then argues that this harm is only allowed if one has consented to it. The state may only regulate self-regarding or non-self-regarding harms as mentioned above if there was no matter of genuine consent. This (informed) consent is only genuine when the person is aware that she consents, is sufficiently informed to make reasonable and reflective choices, and is capable to make an informed decision. If either one of these is not true, then the consent is not genuine.

Thus the counterfactual baseline clarifies when that harm makes someone worse off, and so, when an action is indeed harmful. The consensual harm principle clarifies the difference between self-regarding harm and non-self-regarding harm. What it does not do, however, is clarify for *which kinds of harm* law enforcement would be justified or not. The consensual harm principle is still too broad. For if all non-consensual harm should be regulated, then (for example) every causation of severe anger or fear would fall under the jurisdiction of state regulation, while the harm principle was originally used to *exclude* many forms of state regulation. Here, a notion of autonomy can help. Only a harmful, non-consensual act that diminishes a person's autonomy may be regulated by law according to the harm principle. If the harmful act is non-consensual but does not diminish a person's autonomy, then it is not clear from this interpretation of the harm principle that state intervention is permissible. In those cases, additional considerations are necessary in order to justify state intervention of that act.

A flowchart of this decisional procedure would look as follows:

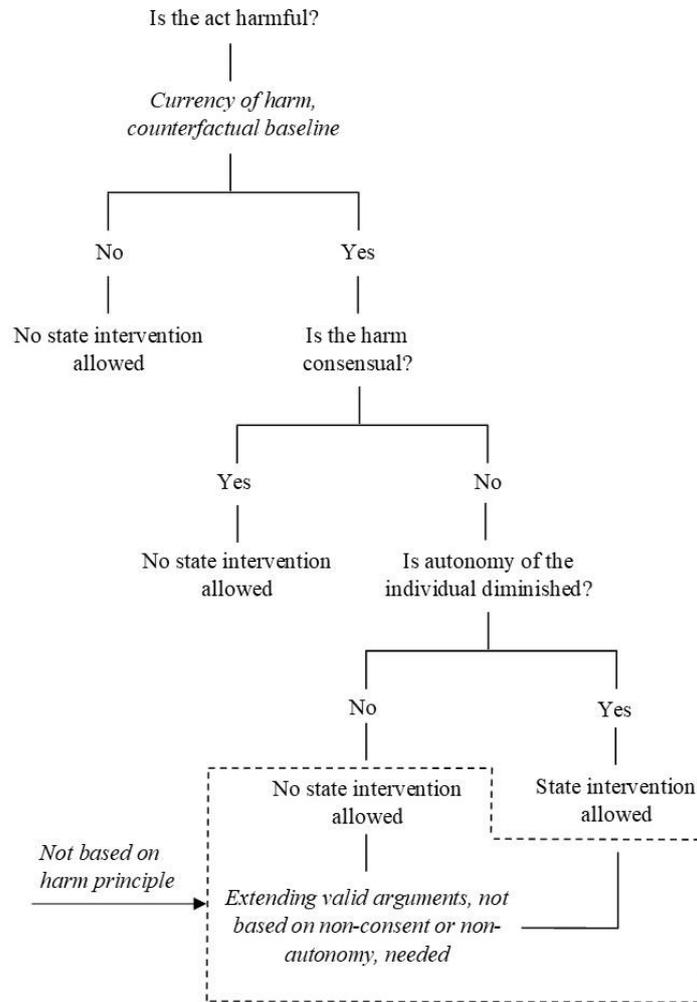


Figure 2. Decisional procedure in state regulation through the harm principle. The dotted line illustrates cases in which autonomy of an individual was not diminished, but other factors may argue in favor of state intervention.

As one can see, the flowchart can function as a guidance to decide whether state intervention is allowed according to the harm principle. It also shows that on some occasions, the harm principle is not sufficient to justify state intervention on certain conduct that does not diminish one's autonomy. That is why the harm principle cannot stand on its own.

Before moving on to Chapter 2, I wish to make a few short comments on the harm principle. Even though I do not agree with Turner (2014) that an intuitive, non-comparative notion of harm is sufficient to clarify the concept of the harm principle, I do agree with his claim that one has expected too much of it. He states that it does not tell us what harm is, but that this was never Mill's intention in the first place. Turner states that one should see it as more of a

statement against paternalism⁷ (p. 301) and “does not make the case all on its own” (p. 326). I state that a principle does not *need* to make the case all on its own in order for it to be a valuable principle. As Harcourt (1999) states, the harm principle may help us make more informed arguments and create a richer structure for the debate on the legal enforcement of morals. Krom (2011) doubts whether the common ground that a mid-level principle is said to offer, is firm enough to stand on by its own. This does not mean that one should reject mid-level principles altogether, he says, but that it is useful to include other factors, such as human causality in a chain of relevant causal factors, and the proportionality of liberty-restrictions, when using the harm principle as a guide for decision-making. I in fact briefly discuss these issues on human causality in and the proportionality of liberty-restrictions in Chapter 2.

⁷ In fact, I doubt whether the principle may be seen as anti-*paternalist* per se, or more as a liberal defense of a small government – after all, it is often said that paternalism is not a case of coercion, or at least not necessarily (Thaler & Sunstein, 2003, p. 175), whereas the harm principle does in fact concerned coercion.

CHAPTER 2: THE HARM IN COCAINE

As I have already mentioned in the Introduction, the harm principle has often been used as a guide for decisions in policy making. Recent examples are policies on smoking in public spaces and the closure of shops on Sundays. In this chapter, I will use my reformulation of the consensual harm principle, with in it a notion of autonomy, to examine whether the harm principle can also function as a guide for decisions on this particular subject, namely on whether state intervention is or is not permissible with regard to cocaine use and cocaine production and trade. I aim to abstain from consequentialist arguments. Before going into the application of the harm principle, I give a short introduction of the history of cocaine. This shows that originally, the drug was not as violent as we have come to know it now.

A SHORT HISTORY

Before the alkaloid cocaine was first isolated from the coca plant in 1859 by the German chemist Albert Niemann (Zhou, 2004, p. 191), the coca plant had already carried important, cultural, and social history among the indigenous population of the Andes. Three thousand years B.C., Inca tribes reduced the effects of living in the thin mountain air by chewing on the leaves of the coca plant, which finds its origin in the Aymaran word ‘Khoka’ (Karch, 1989, p. 1037). The coca plant was also used for numerous ritual, religious and ceremonial purposes, and it was not until the Spanish expedition and conquest of the Incas in 1532 that the plant began to lose a part of its innocence. Spanish conquerors attempted to eradicate the coca use at first, for they did not believe that it had any effects (Ashley, 1975, p. 6) and even claimed that the effects were a result of a pact with the devil (Mortimer, 1901, p. 168) , but after this proved unsuccessful, they decided to exploit the coca growth (Biondich & Joslin, 2016, p. 3).

Three hundred years later, Europe and the United States aroused their interest in coca due to the appearance of an essay by Italian neurologist P. Mantegazza in 1859, describing the numerous medical effects and benefits of the coca leaf such as fatigue reduction and mood improvement (Weil, 1981, p. 368). In that same year, Niemann succeeded to isolate the cocaine alkaloid from the coca leaf. The coca plant contains 14 other alkaloids, but the vast majority of research has since merely focused on the cocaine alkaloid (Streatfeild, 2001).

From 1859 on, cocaine grew quite popular among scientists and physicians; Sigmund Freud was a well-known example of a coca-enthusiast, used it himself for years, prescribed it to his friends and family and claimed that coca was a far less harmful and a far more potent stimulant than alcohol was (Freud, 1984). Coca was added in dozens of wines, soft drinks

(Coca-Cola being the most famous one), and tonics (Spillane, 2000, p. 132), and was used for various medical purposes such as eye surgery (Ashley, 1975, p. 30) and toothache drops (Spillane, 2000, p. 74). Gradually, however, the concerns about the addictive properties and negative side effects on health grew and essentially resulted in the 1906 Pure Food and Drug act in the United States, aiming to regulate the manufacture of the drug (pp. 125-126), and the gradual intensification of cocaine regulation and eventually prohibition in the 1910s and early 1920s (Spillane, 2000, p. 1).

The fact that cocaine was now illegal did little to stop either the production or consumption, however; in the late 1970s, the cultivation of coca plants spiraled in Colombia with the rise of a number of major drug cartels, such as the Medellín and Cali cartels. Colombian drug cartels were estimated to produce between 500 and 800 tons of cocaine each year in the 1990s (Drug Enforcement Administration, 1990). With the rise of these cartels and the increase of usage (mostly in the United States and Europe) came the rise of violence and corruption. Both cartels were dismantled in the mid-nineties, but fragmented into many smaller cartels (McDermott, 2013). Nowadays, the cartels and the additional violence have expanded to other countries in South and Central America, primarily to Mexico (United Nations Office on Drugs and Crime, 2016). In 2016, around 1,400 tons of cocaine were produced globally in that year (United Nations Office on Drugs and Crime, 2018, p. 30). The United Nations on Drugs and Crime (2018) estimated the number of cocaine users worldwide at 18.2 million that year (p. 29).

Before turning to the current cocaine prohibition debate, I wish to clarify two concepts. In all literature concerning drug prohibition debates, there is widespread confusion about what is meant by ‘decriminalization’ and ‘legalization’. First, there is disagreement on whether the decriminalization would apply to drug *possession* or drug *use*. While most punishment is concerned with drug possession, and not on drug use, I agree with Douglas Husak (2014) that decriminalization pertains drug use. For, as he rightfully states, one cannot use drugs without possessing it, and punishment is mostly concerned with possession simply because it is easier to prove (p. 314). Second, it is unclear what this decriminalization means exactly; in some cases it means that drug users should be fined rather than imprisoned, while in other cases it is proposed that drug users should coercively undergo treatment for their use. As it turns out later, it can be argued that the state is allowed to intervene in cocaine use (which is not my stance, but may be argued when one claims that a user’s autonomy is compromised) through enforced addiction treatment, but not through fines or imprisonment. Thus in this particular case, decriminalization can mean the ending of any punishment for drug use, or the enforcement of treatment. In all cases, decriminalization means the ending of fines and/or imprisonment.

Legalization, then, is another issue and concerned with a system in which drug *production* and *sale* are no longer criminal offenses (Husak & De Marneffe, 2006, p. 96). In this case, this would mean that one is allowed to grow coca plants, both for personal use and for commercial purposes, to produce cocaine, and to sell this cocaine to others. The market would then be similar to, say, the tobacco market. Even though the distinction between decriminalization and legalization is not similar in all literature (the majority of the research focuses on decriminalization of cocaine use, while the word used in that literature is often ‘legalization’), in this thesis I use this distinction for clarity and simplicity.

In the next section, I lay out the discussion on what can be concluded on the cocaine use prohibition debate using the consensual harm principle interpretation. In the section thereafter, I shift the focus to the discussion on cocaine production and trade.

HARM IN COCAINE USE

When assessing the harm principle for policy making, it is normally used for hypothetical situations. One examines a current situation in which there might be harm. This is then compared to the hypothetical situation in which the act that causes this harm is regulated, prevented, or prohibited, to see whether this indeed eliminates the (risk of) harm. The use of hypothetical situations *a priori* have the problem that they are *hypothetical*; they are not real and cannot be predicted precisely. This does not necessarily need to be a severe problem, as in some cases it can be expected that the predictions made in the hypothetical situation of state intervention are quite realistic. However, the situation becomes even more complex when the harm principle is used to reexamine a situation in which there already is state intervention. Sometimes, this is fairly straightforward; a somewhat similar example in the Netherlands of the assessment of a situation in which the state is already intervening is the compulsory closure of shops on Sunday. When this law was reevaluated, it assessed a situation of state intervention and it inquired what kinds of harm were occurring due to that intervention (Verplaetse, 2018, pp. 87-88; Claassen, 2011). The fact that the cocaine case is also a situation of existing state intervention, does not pose significant problems in the domain of cocaine use, as the considerations described below are on a small scale and not that dependent on the change of the situation. Even though cocaine use is now illegal, it is still occurring, so in this case I already work in some way with the hypothetical situation. However, it turns out that it is notoriously difficult to form a realistic hypothetical situation on what would happen when cocaine

production and trade would be legalized. I clarify these difficulties in the section hereafter. First, I assess cocaine use.

As explained in Chapter 1, the consensual harm principle interpretation with in it a notion of autonomy can be understood as follows: *the state may execute power over any member of a civilized community, against his will, if it is to prevent (or reduce the risk of) non-consensual harm that diminishes a person's autonomy.*

Let me now see whether through this interpretation of the harm principle, criminalization of cocaine use is justified. I do this by assessing the schematic display of the decision procedure in Figure 2 on page 23 to see whether I arrive at a conclusion that state intervention is justified or at a conclusion that state intervention, at least according to the harm principle perspective, is not justified. As I said before, for the sake of the argument it is not too relevant whether I assess this situation of cocaine use through the current situation or the hypothetical situation; the basic considerations of cocaine use remain the same. If one were to talk about the expected increase in the number of cocaine users, it might be important to speak of the current situation and the hypothetical situation, but as this thesis is not concerned with such consequentialist arguments, it does not matter here.

Consulting the figure on page 23, the first question would be whether there are harmful acts involved. Imagine Barney, a recreational user who uses cocaine sometimes when he goes out with friends. Barney does not experience side effects of cocaine; he is not addicted, as he regularly goes out with his friends without using cocaine, and he has not experienced negative effects on his health from his sporadic use. His use has not affected any personal relationships. In this case, there seems to be no harm done⁸. However, a logical response would be that these cases may exist sometimes, but that in other cases there are doubtless signs of harmful conduct. Imagine that Andrew at first, like Barney, is also a recreational user with no clear effects of his usage. At some point, however, the cocaine use starts affecting personal relationships between Andrew and his environment. Andrew shows signs of addiction. He becomes an unfriendly, antisocial person. He stops calling his mother, he breaks up with his girlfriend, and he does not show up at family gatherings. Also, Andrew experiences some negative side effects on his health. It shows that these acts may indeed be acts of harm; Andrew might experience sensations such as abnormal functioning of organs, frustration, anger or other strong emotions, and the loss of his romantic relationship. Andrew's environment, such as his mother and his ex-

⁸ I realize that it is blunt to say that no harm is involved in this recreational use, as harm to the environment plays a role here, too. Also, one might reasonably argue that Barney indirectly contributes to the harm done to cocaine workers in the cocaine trade market; Barney enables this harm to happen. However, this is beyond the scope of this thesis.

girlfriend, may also experience sensations like pain and sadness. Thus, there is harm. Andrew harms himself and his close environment.

Assessing the flowchart of the harm principle decision procedure, the next step would be examining whether this harm was consensual. Andrew himself may have consented to recreational cocaine use at first, but now, his addiction may be forcing him. Assessing the conditions of genuine consent, one may argue that when Andrew is addicted, he is not capable anymore to give informed consent to his own acts, as he is not in control. As I have shown before, when consent by a person may be a result of ignorance (for example, if Andrew does not know the health risks he is imposing upon himself) or incapability (for example, because Andrew is severely addicted to cocaine), this consent is actually not valid. Though it is very hard to be sure, there is reason to believe that the harm that he is imposing upon himself is non-consensual. Also, Andrew's environment does not consent with his drug use if that drug use means that Andrew damages his relationships; his mother, for example, is affected by his behavior too, and she surely did not consent to Andrew being this unfriendly person. Thus, this seems to be a matter of non-self-regarding, non-consensual harm (considering that non-self-regarding harm can be harm that affects both oneself and others, as explained before on pages 14-15).

Now arises the question of autonomy. Is the autonomy of Andrew compromised by his cocaine use? And is Andrew's mother's autonomy harmed by Andrew's conduct? As for Andrew, it may be a quite strange thought to say that Andrew as an autonomous person affects his own autonomy, but let us say that he can. One may argue that Andrew's autonomy is not compromised, as he still possesses the capacity to choose from a range of options how he wishes to live his life; he merely chooses options that lead him to omit in investing in his relationship with his mother and that negatively affect his health. One can say that Andrew has the right to live this kind of life. He is still an autonomous person. Regarding Andrew's mother, even though she is harmed, her own autonomy is not affected by her son's behavior; she is not limited in her own choice options in how to pursue her own goals and she may still live her autonomous life. From this, one can conclude that the harm principle alone cannot provide a compelling argument why cocaine use may be punished by the state. As I have mentioned before, and as one can see in the figure of the decisional procedure on page 23, this does not necessarily mean that state intervention is not allowed in any case. However, the burden of proof now lies at the other side; as the harm principle does not seem to defend state intervention, one would need to provide other arguments than ones based on consent or autonomy to defend the current cocaine use prohibition.

The former section ended at the ‘down-left’ part of the figure on page 23; as there was no autonomy diminished, the harm principle did not provide arguments to prohibit cocaine use. However, one may also disagree with me and say that Andrew is not an autonomous individual anymore due to his cocaine addiction. This would lead to the ‘down-right’ part of the figure. Andrew is not capable anymore to live his life according to the values of individual autonomy; due to his addiction he is actually not living his life as he wishes. Thus, if one claims that Andrew did not give true consent, and he is imposing health risks and bad personal relationships upon himself because he is severely addicted to cocaine, and this changes him into a non-autonomous person, the state may interfere. Also, one could argue that the autonomy of Andrew’s mother is indeed diminished, as perhaps the goals of her individual life greatly involve maintaining a nourished, close, and involved relationship with her son. She might be so severely affected by her son’s behavior that she does not live the autonomous life that she wishes anymore.

However, in the Hannah Going A-Wall case on page 18, I stated that Hannah’s mother was not diminished in her autonomy by her daughter’s behavior. Yet Hannah’s mother may experience the same harmful sensations as Andrew’s mother. Why would one person be diminished in her autonomy in one case, and would another, who experiences the same harm, not be diminished in another case? As a response, one can say that both Andrew and Hannah’s mother are affected in their autonomy. But then, one would have to argue that any negative effects experienced from antisocial behavior, regardless of the cause, diminishes one’s autonomy and that all such behavior should be regulated by the state. This seems very odd to argue, even though this is how the current policies are. Hannah is allowed her antisocial behavior but Andrew is not, because Andrew’s behavior is *possibly* caused by his cocaine use.

Also, and this is where I try to make my point clear, if one argues that there are matters of diminished autonomy in this case, whether it be Andrew’s autonomy or the autonomy of his environment, there are two responses to the claim that state intervention is allowed. First, from the fact that the harm principle would allow state intervention in some cases of non-consensual, non-autonomous acts that may have followed from cocaine use, it does not necessarily follow that the state may prohibit cocaine or may punish Andrew for his cocaine use. It is merely reason to say that the state may interfere with Andrew’s addiction. Some steps seem to be missing here; how is prohibiting cocaine the logical answer to the best way to help Andrew return to his own autonomous state? For one thing, even if cocaine is illegal, as it is now, it is still quite easy to acquire. Criminalization currently does not seem to do its job well, as prohibition does not keep him away from his addiction. Also, the question is if *punishment* is

the right answer. Many options are available to prevent or undo this state of non-autonomy; options that, too, or even more, have the goal to make an addict like Andrew more autonomous, without taking away his full autonomy by incarcerating him. Exploring these options would require an assessment of the effectiveness and justification of prevention and punishment (education versus legal fines or incarceration), and of the difference between coercion and stimulation (enforced addiction treatment versus health care programs). This is, unfortunately, beyond the scope of this thesis, but it does pave the way for further scrutiny on the ways in which the state may intervene in cases of cocaine use.

Second, on a more empirical note, even if one would argue that either Andrew or Andrew's environment is compromised in his or her autonomy, that state intervention is therefore allowed and that punishment and cocaine prohibition are the best solution to help addicts return to their autonomous states, then one would have to admit that current policies on drugs seem to be at least fairly arbitrary if I compare it to similar markets. Though the numbers are a bit outdated, they do illustrate the ambiguity; in the United States, each year, tobacco kills 15 people per 1000 users, whereas illegal drugs (so not just cocaine) kills 2.6 people per 1000 users on a yearly basis (U.S. Census Bureau, 2002, p. 122). Obesity (not a similar market, but a 'dangerous' one nevertheless) kills 11 people per 1000 at-risk persons (Huemer, 2004). Yet the consumption of tobacco, or excessive amounts of food, is not prohibited by law. Then why is cocaine? I do not think that the differences between cocaine and tobacco are so major that it is justified to send a cocaine user to jail and offer a smoker another one.

To sum up, it is quite hard to determine whether state intervention would be justified in the case of cocaine use, for there are many factors to consider; one would have to determine if a cocaine user gives genuine consent to her self-inflicted harm, and if not, whether an addicted person is truly autonomous. Also, one would have to consider whether Andrew's environment (who most likely does not consent) experiences diminishment of autonomy. The discussion shows that the harm principle would only allow for state intervention if one would argue that a cocaine user is not autonomous, or that third parties involved lose part of their autonomy, and even in that case, it does not necessarily follow that the appropriate form of state intervention is prohibition and punishment for disregarding that law. And that is interesting, considering that in 2016, over 45,000 people in the United State were serving a jail sentence for drug possession (Bronson & Carson, 2019, p. 21). Further scrutiny on this issue is beyond the thesis' scope, but it at least shows that it is quite hard to defend the current prohibition and punishment policies on cocaine use. And if one accepts that no one's autonomy is diminished but state regulation should be allowed anyway, then it is the task of that arguer to find arguments other than

arguments about consent or autonomy to make a case for state intervention. This should be strong case indeed, considering the incredible number of drug possession arrests. Simultaneously, the harm principle does not provide solid enough arguments that complete decriminalization (so no punishment or coercive treatment whatsoever) is the best alternative, for the harm principle does show that one's autonomy can be diminished, and that state intervention in that case might be justified.

A further consideration for this discussion may point at the relationship between cocaine use and cocaine production; one could argue that even though Andrew and his environment are not diminished in their autonomy, by using, Andrew contributes to the cocaine violence in the cocaine production and trade chain. And those cases of violence clearly diminish the autonomous states of some of those stakeholders in the production and trade domain. This seems to be a case of enabling harm (Barry, Lindauer, & Øverland, 2014)⁹ and a question of causality; how far can one look back in a causal chain of acts and consequences? And are such far-reaching consequences reason for intervening in an act that may have started this causal chain of actions? These are notoriously difficult considerations and beyond the scope of this thesis.

HARM IN COCAINE PRODUCTION AND TRADE

In its essence, the issue of harm in the domain of cocaine production and trade is paradoxical. I am looking at a situation in which the state is already excessively intervening in a certain act, namely in cocaine production and trade. Therefore it is extremely difficult to form a realistic hypothetical situation how the cocaine market would look like, had it been legal. Moreover, cocaine has been illegal longer than it has been legal; it was discovered in 1860, and was prohibited merely 60 years later. The scale of production and use then was not even a fraction of the current numbers in the market. Therefore, it is hard to use those years in history as a realistic reference for the hypothetical situation. It cannot be determined whether the harm occurring now is caused by the cocaine market or by the prohibition policies. I do not know, and this is what makes the situation so intangible. The harm principle is actually reassessing its own value. As I will show, this leads the discussion into a vicious circle. But before I make this clear, I use the decisional procedure flowchart in Figure 2 on page 23 to assess whether state intervention would be allowed in the current situation.

⁹ Barry, Lindauer and Øverland (2014) explain the differences between allowing, enabling and doing harm, where enabling harm is more stringent than allowing harm, but less so than doing harm. It is interesting to explore this further, but is not within the scope of this thesis.

The issue of harm in the domain of cocaine production and trade is undoubtedly much more complex than the issue of cocaine use. It involves more stakeholders, more aggravating circumstances, but also perhaps more extenuating circumstances. Therefore I think it is wise to first shortly name the most common stakeholders in the case of cocaine production and trade, but without getting into too much detail, to prevent complicating the matter too much. I divide the stakeholders into two groups: people working in the cocaine production and trade chain (such as local farmers who grow the coca plant; workers in cocaine processing labs in the rainforests; drug traffickers in the countries of production and the countries to which the drugs are transported; and drug bosses), whom I from now on call ‘cocaine workers’; and third parties (such as locals of South-American communities who are not directly involved in the drug chain but who are affected nevertheless; and family members of cocaine workers). The government is also a key actor, primarily because it is the institution that is currently prohibiting the production and trade and is taking measurements to combat the illegal market. I do not include the government in the two groups, because I do not assess the government through the decisional procedure figure; I merely point them out as an important actor in the issue.

I realize that the following description of the issue is fairly incomplete. The numbers of stakeholders is much too great, and so are their differences in interests. This section should therefore be considered as an explorative attempt to apply the harm principle to the debate on cocaine legalization, but not as an attempt to offer readymade solutions to the problem of current cocaine prohibition policies.

I once again turn to the flowchart in Figure 2 on page 23 and use it as a guidance to reach plausible conclusions based on the harm principle concerning the decisional procedure. Perhaps the easiest question of this exploration is the question whether there is harm involved in the case of cocaine production and trade. Drug-related violence has been, unfortunately, an every day’s business in many South-American communities. Corruption, bribery, abduction and murder are a few of the most extreme but not rare examples of harm related to the cocaine production and trade (De Waal, 2018). The Drug Policy Alliance (2019) estimated the number of people killed in Mexico’s drug war alone at over 200,000 since 2006. Drug cartels fight for their share in the cocaine market and do so by using (extreme) violence (Worrall, 2015) both to each other (the first group of cocaine workers) and to innocent citizens and family members of cocaine workers (the second group). Third parties may experience fear, as the adjacent violence happens inside the communities as well. Also, they may become innocent victims, suffering from the violence that they do not have a direct relation to. They may lose loved ones by the drug violence, or they may experience a setback of interests such as loss of a safe neighborhood,

or loss of (their relationship with) their family members who are active in the cocaine market. All of these experiences are harm. There is no need to get into more detail than this; that it is a harmful market is clear enough, just as that this harm affects both cocaine workers and third parties. Also, these acts are so clearly harmful that one does not need to delve in the comparative counterfactual baseline to see whether these acts count as harm. Any comparative account of harm would tell the same tale.

Now, however, things get complicated. The next question is the question of consensual harm. I first discuss the group cocaine workers. A first inclination would tell us that many cocaine workers, whether it be farmers or drug traffickers, have consented to participating in the cocaine market. Rather than growing coffee plants, farmers choose to grow coca plants. Growing coca plants makes significantly more money than coffee or cassava plants (Jurna, 2018). One may expect that most farmers, at least to a certain extent, are aware of the risks that this decision entails. This implies that they consent to the risk of harm. Also, it can be expected that a part of the cocaine workers might not only be in it for the money, but they also value the social status, the power, and the excitement that comes with it. They might consider this social status as a legitimate end that makes them consent to the risks of danger. Consensual harm lies in area 3 of the figure on page 16 of Saunders' consensual harm interpretation; consensual harm is in the protected sphere of individual harm and would allow no state intervention. It may be compared to a person entering a boxing match with the knowledge that there is a risk that his contestant punches his nose and breaks it.

However, I doubt whether most cocaine workers actually consent. The conditions of genuine consent are: that a person knows what he consents to; that he is capable to make an informed decision; and that he risks this harm in order to serve a legitimate and suitably important end. Imagine Julian, a 34-year-old cocaine trafficker. He lives in a poor community in one of the rural areas of South Colombia. His biggest concern in life is providing for himself, his parents, his wife and his five-year-old daughter. He knows that the cocaine market is a violent one, and that he is risking his own safety and that of his family, but for him cocaine trafficking is one of the few ways in which he can make enough money in his community. It could be possible that Julian is not capable to make this informed decision because he might be ignorant of his other options; in the environment that he grew up in, drug dealing could have been quite normal. If he has lacked proper education growing up, it could very well be possible that the cocaine market was, for him, a 'logical decision' due to his upbringing and family ties. Regarding another condition of consent, his important end to consent to the risks of harm is likely providing for himself and for his family. One can either say that this shows that Julian

therefore consents; he realizes the dangers, but he aims to serve the important end of providing financially. However, one can also argue that this consent is coerced in the way that he feels as if he has no other choice but to participate in the cocaine market, for he is afraid that he is not able to earn the similar amount of money in another, legal market. It is very well possible that quite some cocaine workers would prefer working in a legal environment if they would make the same amount of money. The same goes for coca farmers, for example; some say that coca is the only crop that makes enough money to live from (Jurna, 2018). The motivations behind the participation in the cocaine market would require much more anthropological research, for which I do not have space here. It seems as if a further account of consent is needed as well; I doubt whether one can give true consent when there are no other (reasonable) options to choose from, but this is not part of the working definition of consent I described in Chapter 1. The working definition of consent seems unsatisfactory here, but I do not have the space to elaborate on it further. It also seems to directly relate to the notion of autonomy, which is concerned with the opportunity to choose from a range of options. In any case, it is clear that it is impossible to determine whether all cocaine workers are truly consenting to the risks of harm that they face by participating. Most likely some do, and some do not.

The second group, third parties such as community locals and family members of cocaine workers, experience negative effects of the cocaine market. It should be noted that in the cocaine production and trade domain, cocaine use may also be present, so some harms might be similar to the harms described in the previous subchapter. It should also be clear that the absolute majority of these people does not consent to the harm or risks of harm that they encounter. Thus regardless of whether the cocaine workers themselves consent, then, there are stakeholders in the case of cocaine production and trade that did not consent to the risks of harm.

Therefore, one can turn to the figure on page 23 again and continue with the discussion about autonomy. This is where the discussion seems to face a vicious circle due to two things: the fact that it is doubtful whether people living in dire circumstances lead truly autonomous lives; and the fact that I assess a situation in which there already is state intervention. I explain both below.

Some of these cases clearly diminish a person's autonomy; if a person is murdered, there is little autonomy left to talk about. In other cases, however, it is harder to be so sure. First of all, there are many different forms of harm, done by many different people, in an enormous, complex, and global market. I take just one example to see whether something sensible can be said about autonomy. Say that Julian indeed encounters harm from his work; a cocaine 'colleague' threatens to hurt him or his family if Julian does not do as told, namely smuggle a

couple of kilos of cocaine across the border. One could say that Julian's autonomy is diminished. He does not have an array of choices to choose from; he cannot live life as he wishes, for he is forced to perform this illegal act. However, one can wonder whether Julian actually was autonomous in the first place. Before he decided to join the cocaine market, he was not able to provide enough money for his family. Without enough money to provide for the basic necessities of life, can one be truly autonomous? I doubt that one can. Living in such rural, poor areas in the outskirts of a third-world-country leaves a person with a diminished autonomy to begin with. Before the cocaine work, Julian was not free to live his life according to his wishes either. More money does not automatically mean more autonomy, but it can definitely contribute to it, especially when it concerns situations in which the money provides for important and basic necessities. Entering the cocaine market might have actually *increased* his autonomy, for now he was able to provide for his family. With this increased autonomy came the risk of losing more of it. It seems as if the problem is not that there is harm, or that people's autonomy is affected because of the cocaine market; the problem seems to stem from issues of extreme poverty and citizens seeing the cocaine trade as a dangerous, but only solution. Most cocaine workers (in the lower layers of the cocaine hierarchy) have few other financial options to make enough money to get by. It is hard to believe that many cocaine workers truly consent to the harmful conduct that inherently associated with the cocaine business. But these people do not live autonomous lives to begin with. Poverty is also harm doing, and a diminishment in one's autonomy. The state should therefore recognize *those* diminishments in autonomy, non-autonomy due to (extreme) poverty, instead of arguing that the cocaine trade is the major instigator of the harm and spending excessive amounts of money fighting a battle on something that might have been instigated by their own prohibition policies. This money would much be better spent on aims to reduce poverty.

Let me turn to my notion that the cocaine violence might have been instigated by the government's own policies. After assessing the currency of harm, consent, and autonomy, one can conclude that there indeed instances of non-consensual harm that diminish a person's autonomy. Therefore, state intervention would be legitimate. However, it is unclear whether current state interventions, namely the prohibition of its production and trade, is the best form of state intervention. There are reasons to believe that the prohibition in fact reinforces the violence. Is the cocaine market illegal because it is so violent, or is the cocaine market so violent because it is illegal? Illegal markets are often inextricably linked with danger. If one looks at similar, legal markets, violence is much less an issue, which would imply that the illegality is an important contributor to the violence. There is no space to explore the estimations of what

the cocaine market would look like if it were a legal market, and this is where the discussion seems to stall. But I expect that that exploration would provide much more answers or would at least expose the tension field in debating about something that is illegal, without knowing whether it is true that the illegality was actually the most important cause of the related violence. I am very inclined to think that the *illegality* of the market is precisely the main reason that the market is so violent; if only because similar drug markets (such as tobacco, alcohol, and medicine) are far less violent. However, the fact that I am inclined to think that is not enough reason to argue that legalizing cocaine production and trade would cause a decrease in violence. The issue is an immeasurable dilemma, and the harm principle does not seem to provide answers on it.

Following the decisional procedure flowchart has brought the discussion to a halt. Therefore, I now discuss other notions of the issue that do not directly follow from the flowchart, but are related to the harm principle nevertheless. To start, I have not elaborated on the exact ways in which prohibition by the state induces the violence. The government may strengthen the violence in two ways: by prohibiting the cocaine production and trade *and* by using violence *themselves* to enforce that same prohibition. In their efforts to combat the cocaine market, the government also uses (sometimes severe) violence. Even if one argues that state intervention is justified, why and to what extent then may the state use violence to combat violence? This invites for a further, separate discussion on causality, and the proportionality of the use of violence to eradicate violence, for which I do not have space here. However, it is an important aspect of the discussion.

Another thing to consider is the fact that every societal activity diminishes some people in their autonomy. For example, a person may be hit by a train, may not survive a plane crash, or may die on a construction site. But the usual response to these accidents or deaths are not that these activities should thus be prohibited, but that these activities should be regulated in order to prevent as much harm as possible. Prohibition is often not the right answer and I severely doubt that in this case it is. It might be relevant to further inquire how much harm there should be in order for prohibition to be the best policy. This touches ground with more consequentialist considerations, which I do not investigate further.

Moreover, an immensely complex underlying consideration is the causal chain of actions. Not every act that has certain negative consequences should be regulated. Nearly every act, whether good or bad, has consequences, either good or bad. It is hard to say how far one can extend this chain of causality; at some point, it would seem as if one should prohibit a person from buying roses if those roses were grown with toxic pesticides that hurt the environment,

picked by exploited migrant workers, delivered from the other side of the world, and created a massive carbon footprint¹⁰. A person cannot be held responsible for all these consecutive actions, but at the same time she is partly the cause of those actions. This also happens in the case of cocaine use and production; if a person buys cocaine, she is partly causing the violence to occur, but she cannot be held responsible for all violence, as others have also performed certain actions. This discussion requires a scrutiny of causality, moral responsibility and the differences between doing, allowing and enabling harm.

In sum, in the case of cocaine production and trade prohibition, the consensual harm principle has functioned as a starting point for entering this immense debate, but is too limited to provide more than a first conclusion. The consensual harm principle would argue that state intervention is justified, for there is non-consensual, non-autonomous harm. However, it does not provide insights on what kind of state intervention is justified. Also, it turns the discussion into a vicious cycle, as people might not be autonomous to begin with and as it is incredibly hard to predict the hypothetical situation of a legal cocaine market. Current prohibition policies seem to dramatically fail to give back people their autonomous states. Even worse, they might in fact contribute to the diminishment of people's autonomy by encouraging violence within the market by keeping the drug illegal and by not aiming to tackle poverty issues. Rather, it seems wise to focus more on poverty-related issues that increases a person's autonomy, for poverty is also harm and harm that diminishes a person's autonomy. Investing in policies to reduce poverty might improve people's autonomous states, provide them with more options, reduce their supposition that the violent cocaine trade is their only option, and enable them to have the option to choose other, safer, less violent jobs.

¹⁰ This example is borrowed from the NBC television-series 'The Good Place' (2019, January 10), where actor Ted Danson explores how performing a seemingly good act can lead to many bad consequences.

CONCLUSION

The debate about the legalization or decriminalization of cocaine production, trade and/or use is a never-ending, enormous, and utterly complex debate that has been defended, attacked, amended and questioned extensively. So far, there has not been an argument strong enough to offer a better suitable alternative to the current prohibition policies with regard to the production, trade, and use of cocaine, even though current prohibition policies are incredibly costly and apparently inefficient. Most of the debate on cocaine prohibition is based on empirical research that provides a cost-benefit analysis of a debate that, in my view, cannot be viewed merely from a utilitarian point of view. I therefore approached the debate differently, not from a certain moral theory, but from a principle that questions state intervention: the harm principle. The harm principle has been the starting point for many policy decisions by the government.

In this thesis, I have used the consensual harm interpretation of the harm principle, with in it a notion of autonomy, to explore whether it can help reach plausible conclusions on the current criminalization of cocaine use and the prohibition on cocaine production and trade. First, I have set out a thorough exploration of the harm principle. I started with a currency of harm; namely that harm can be physical pain, emotional distress, or a setback in our capacity to obtain certain wants and desires to which we claim rights. These physical pains or emotional distresses lower a person's well-being and count as harmful when a person would have been better off in the absence of the act that caused these physical pains or emotional distresses. This is called the counterfactual baseline. I then reformulated the harm principle so that it stated that the state may only regulate self-regarding or non-self-regarding harms if there was no matter of genuine consent. As it turned out, this still kept the notion of harm too wide; any instance of non-consensual harm should, according to this version of the harm principle, be regulated by the state. Therefore, I embedded a notion of autonomy into the formulation, which eventually led to the following formulation of the harm principle:

The state may execute power over any member of a civilized community, against his will, if it is to prevent (or reduce the risk of) non-consensual harm that diminishes a person's autonomy.

This specific interpretation of the harm principle is useful to determine for which acts state jurisdiction is justified *in any case* – any non-consensual harm that diminishes a person's autonomy. Harmful conduct that does not diminish a person's autonomy might also be allowed

to be intervened with, but this would require other determining factors than the harm principle. I then proposed a schematic flowchart that supported the decisional procedure of the harm principle, addressing the currency of harm, consent, and autonomy.

In Chapter 2, using this harm principle interpretation on the domain of cocaine use, I showed that it is quite hard to determine whether state intervention would be justified in the case of cocaine use, for there are many factors to consider; one would have to determine if a cocaine user gives genuine consent to her self-inflicted harm, and if not, whether an addicted person is truly autonomous. However, the discussion showed that the harm principle would only allow for state intervention if one would argue that a cocaine user is not autonomous, and even in that case, it does not necessarily follow that the appropriate form of state intervention is prohibition and, when disregarding this prohibition, punishment. If one would claim that a cocaine user is not autonomous, then I argue that a better way to improve that user's autonomy could be enforced treatment or education. Though I could not elaborate on those forms of regulation here, it did show that alternatives are possible. In any case, it is quite hard to defend the current prohibition and punishment policies on cocaine use. Then again, though the harm principle definitely provided compelling arguments to question the prohibition, it did not necessarily provide strong enough arguments to claim that full decriminalization of cocaine is the best alternative. The principle falls short here.

Regarding the second domain, cocaine production and trade, the consensual harm principle has functioned as a starting point for entering this immense debate, but it became clear that it is too limited to provide more than a first careful conclusion. Also, the discussion faced two challenges: the fact that I assessed a situation in which state intervention already is in place; and the fact that it could be argued that people living in such poor circumstances do not live fully autonomous lives to begin with.

As for the first challenge, I discussed the difficulties of assessing a situation through the harm principle in which there already is state intervention. It turned out is very challenging, if not impossible, to predict a plausible hypothetical situation in which there is no state intervention in the cocaine market. This complicated the matter as a whole, for I could not compare the current situation to a hypothetical one. I noted that it is not clear what the cause of the current violent nature of the market is; is it so violent because it is illegal or is it illegal because it is so violent? I am inclined to think the former, but the harm principle did not provide any conclusions on that.

Regarding the second challenge, following the decisional procedure of the harm principle, it could be argued that state intervention is justified, for there is non-consensual, non-

autonomous harm. In the case of the second stakeholder group (third parties), the claim that there is non-consensual, non-autonomous harm is quite irrefutable. It is more complex, however, in the case of the first stakeholder group (cocaine workers). One can disagree on whether cocaine workers truly consent to the (risks of) harm that they encounter, when they do not necessarily have other options to prevent (extreme) poverty. And even if one would say that cocaine workers consent, many of the harms that occur definitely diminish one's autonomy. However, this is where the discussion seemed to sink into a vicious cycle; I showed that it could be argued that these people, sometimes living in dire circumstances and seeing the cocaine market as their only job opportunity to get by, do not lead autonomous lives to begin with. People who live in such poverty are, in general, not fully autonomous. And current prohibition policies of the state on this cocaine market do not give back people their autonomous states. Even worse, the government might in fact contribute to the diminishment of people's autonomy by encouraging violence within the market by keeping the drug illegal *and* by using severe violence herself. Therefore I argued that it seems wise to focus more on poverty-related issues that would increase a person's autonomy, enabling them to perhaps choose other, safer, less violent jobs. Reducing poverty is also a state's job and seems to be intrinsically linked.

I showed that the criminalization of cocaine use could not be defended by the harm principle, and that the issue of cocaine production and trade turns into a vicious cycle about diminished autonomy and uncertainty in hypothetical situations. The immense, notoriously difficult issue might not just be about harm but about poverty. The harm principle has questioned the current policies, but has not provided arguments strong enough in itself to vouch for full cocaine decriminalization and legalization. The issue is too complex for the harm principle to go that far. But in any case, prohibition does not seem to be the right answer.

LITERATURE

- Ashley, R. (1975). *Cocaine - Its History, Uses and Effects*. New York, N.Y.: St. Martin's Press.
- Barry, C., Lindauer, M., & Øverland, G. (2014). Doing, Allowing, and Enabling Harm: An Empirical Investigation. *Oxford Studies in Experimental Philosophy*, 1, 1–34.
- Bertrand, M.-A. (1990). Creation of an International Anti-Prohibitionist League in the Field of Drugs. *Hofstra Law Review*, 18(3), 881–891.
- Biondich, A. S., & Joslin, J. D. (2016). Coca: The History and Medical Significance of an Ancient Andean Tradition. *Emergency Medicine International*, 1–5.
- Boogers, R. (2009). *Moralisering in het hedendaagse strafrecht*. Universiteit van Tilburg. Retrieved from <http://arno.uvt.nl/show.cgi?fid=97128>
- Brink, D. (2018). Mill's Moral and Political Philosophy. In *Stanford Encyclopedia of Philosophy* (Winter 2018 ed.). Stanford University. Retrieved from <https://plato.stanford.edu/entries/mill-moral-political/#HarPri>
- Bronson, J., & Carson, E. A. (2019). *Prisoners in 2017*. Retrieved from <https://www.bjs.gov/content/pub/pdf/p17.pdf>
- Claassen, R. (2011). *Het huis van de vrijheid*. Amsterdam: Ambo.
- Danson, T. (actor). (2019, January 10). The Book of Dougs [TV show]. In K. Whittingham (director). *The Good Place*. New York, N.Y.: NBC.
- Davis, T. (2019). What Is Well-Being? Definition, Types, and Well-Being Skills. Retrieved from <https://www.psychologytoday.com/us/blog/click-here-happiness/201901/what-is-well-being-definition-types-and-well-being-skills>
- Drug Enforcement Administration. (1990). *The Drug Enforcement Administration (DEA) 1990-1994*. Retrieved from https://www.dea.gov/sites/default/files/2018-07/1990-1994_p67-76.pdf
- Drug Policy Alliance. (2019). Drug War Statistics. Retrieved from www.drugpolicy.org/issues/drug-war-statistics
- Feinberg, J. (1985). *Offense to Others: The Moral Limits of the Criminal Law*. New York, N.Y.: Oxford University Press.
- Freud, S. (1984). Über Coca. *Journal of Substance Abuse Treatment*, 1(3), 206–217.
- Harcourt, B. E. (1999). The Collapse of the Harm Principle. *The Journal of Criminal Law and Criminology*, 90(1), 109–194.
- Harman, E. (2009). Harming as Causing Harm. In M. A. Roberts & D. T. Wasserman (Eds.),

- Harming Future Persons* (pp. 137–154). Dordrecht: Springer.
- Harrosh, S. (2012). Identifying Harms. *Bioethics*, 26(9), 493–498.
- Holtug, N. (2002). The Harm Principle. *Ethical Theory and Moral Practice*, 5(4), 357–389.
- Huemer, M. (2004). America's Unjust Drug War. In Bill Masters (Ed.), *The New Prohibition* (pp. 133–144). St. Louis: Accurate Press.
- Husak, D. (2014). Why We Should Decriminalize Drug Use. In *Ethics in Practice: An Anthology* (pp. 314–322). Hoboken, N.J.: John Wiley & Sons, Incorporated.
- Husak, D., & De Marneffe, P. (2006). *The Legalization of Drugs*. Cambridge: Cambridge University Press.
- Jurna, N. (2018, August 31). De werkelijke prijs van een lijntje coke. *NRC*. Retrieved from <https://www.nrc.nl/nieuws/2018/08/31/de-route-van-cocaine-a1614856>
- Karch, S. B. (1989). The History of Cocaine Toxicity. *Human Pathology*, 20(11), 1037–1039.
- Krom, A. (2011). The Harm Principle as a Mid-Level Principle? Three Problems from the Context of Infectious Disease Control. *Bioethics*, 25(8), 437–444.
- Lacey, A. (2014). *Robert Nozick*. Hoboken: Taylor and Francis.
- Manson, N., & O'Neill, O. (2007). *Rethinking Informed Consent in Bioethics*. Cambridge: Cambridge University Press.
- McDermott, J. (2013). 20 Years After Pablo: The Evolution of Colombia's Drug Trade. Retrieved from <https://www.insightcrime.org/news/analysis/20-years-after-pablo-the-evolution-of-colombias-drug-trade/>
- Mill, J. S. (2002). *The Basic Writings of John Stuart Mill: On Liberty, the Subjection of Women and Utilitarianism*. New York, N.Y.: Modern Library.
- Mortimer, W. G. (1901). *Peru History of Coca, "The Divine Plant" of the Incas*. New York: J. H. Vail and Company.
- Pels, D. (2012, January 16). Het huis van de vrijheid. *De Volkskrant*. Retrieved from <https://www.volkskrant.nl/cultuur-media/het-huis-van-de-vrijheid~b4d3bd0a/>
- Petersen, T. S. (2014). Being Worse Off: But in Comparison with What? On the Baseline Problem of Harm and the Harm Principle. *Res Publica: A Journal of Moral, Legal and Social Philosophy*, 20(2), 199–214.
- Petersen, T. S. (2016). No Offense! On the Offense Principle and Some New Challenges. *Criminal Law and Philosophy*, 10, 355–365.
- Raz, J. (1986). *The Morality of Freedom*. Oxford: Oxford University Press.
- Robson, P. (2009). *Forbidden Drugs* (3rd ed.). Oxford: Oxford University Press.
- Saunders, B. (2016). Reformulating Mill's Harm Principle. *Mind*, 125(500), 1005–1032.

- Shiffrin, S. V. (2012). Harm and its moral significance. *Legal Theory*, 18(3), 357–398.
- Spillane, F. (2000). *Cocaine: from medical marvel to modern menace in the United States, 1884-1920*. Baltimore, M.D.: Johns Hopkins University Press.
- Streatfeild, D. (2001). *Cocaine: An Unauthorized Biography*. New York, N.Y.: Picador/St. Marten's Press.
- Taylor, T. E. (2015). The Markers of Well-Being: A Basis for a Theory-Neutral Approach. *International Journal of Wellbeing*, 5(2), 75–90.
- Thaler, R., & Sunstein, C. (2003). Libertarian Paternalism. *American Economic Review*, 93, 175–179.
- Thorn, O. (2016). Mill “On Liberty” - Freedom & Empire | Philosophy Tube. Retrieved from https://www.youtube.com/watch?v=_wF2aIQM4M8
- Turner, P. N. (2014). Harm and Mill's Harm Principle. *Ethics*, 124(2), 299–326.
- U.S. Census Bureau. (2002). *Statistical Abstract of the United States 2001: Health and Nutrition*. Washington, D.C. Retrieved from www.hcfa.gov/
- United Nations Office on Drugs and Crime. (2016). *World Drug Report: Chapter 1. Cocaine*. Retrieved from http://www.unodc.org/doc/wdr2016/WDR_2016_Chapter_1_Cocaine.pdf
- United Nations Office on Drugs and Crime. (2018). *Analysis of Drug Markets*. Retrieved from https://www.unodc.org/wdr2018/prelaunch/WDR18_Booklet_3_DRUG_MARKETS.pdf
- Verplaetse, J. (2018). *Beginselen van samenleven: handboek ethiek en rechtsfilosofie*. 's-Hertogenbosch: Gompel&Svacina.
- Verweij, M. (2017). Actief antirookbeleid is morele taak van overheid. *Nederlands Tijdschrift Voor Geneeskunde*, 161, 1–3.
- Waal, M. de. (2018). De enorme verlokking van het witte goud. *NRC*. Retrieved from <https://www.nrc.nl/nieuws/2018/08/31/de-enorme-verlokking-van-het-witte-goud-a1614892>
- Weil, A. T. (1981). The Therapeutic Value of Coca in Contemporary Medicine. *Journal of Ethnopharmacology*, 3, 367–376.
- Wolfenden, J., Adair, J., Cohen, M. G., Curran, D., Demant, V. A., Linstead, H., ... Whitby, J. (1957). *Report of the Committee on Homosexual Offences and Prostitution*. Retrieved from <https://discovery.nationalarchives.gov.uk/details/r/C1386377>
- Worrall, S. (2015). How the Cocaine Trade Affects Everyone's Life. Retrieved from <https://news.nationalgeographic.com/2015/08/150812-cocaine-drugs-cartel-narcotics->

mexico-ngbooktalk/

Zhou, S. L. G. X. (2004). *Smoke: A Global History of Smoking*. London: Reaktion Books.