

# Drugs under the Constitution

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## 1. Introduction

In this paper, I will analyze the constitutional implications of criminalizing a number of drug-related conducts, including the use and provision of drugs. I will address these issues from the perspective of the different rights at stake, especially the right to autonomy, and discuss *Arriola*,<sup>2</sup> a decision adopted by the Argentine Supreme Court in 2009 which, for a combination of arguments, declares the criminalization of drug possession for personal use unconstitutional.

As I will show, the arguments in favor of holding the criminalization of drug use unconstitutional have implications on the regulation of drug provision which are different from those the Court assumes in *Arriola*. Courts and scholars have invoked the right to autonomy to decriminalize drug use, but have advocated for severe punishment of provision and for compulsory detoxification treatments. To justify this approach, they have oscillated between two images of the drug user which, in fact, are inconsistent: on the one hand, an autonomous agent who pursues her freely chosen life plan; on the other, a sort of automaton with no will who gives in to the influence exerted by the

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<sup>2</sup> Supreme Court, August 25, 2009.

person who shares or sells drugs. This ambiguity is hard to maintain, and forces us to re-evaluate the regime in force.

As an alternative to what I consider unredeemable inconsistencies, I will propose an interpretation of the Argentine Constitution according to which the scope of the right to autonomy is different –wider in one dimension, narrower in another– than the one courts and scholars have tended to defend. Moreover, I will submit that there are other rights involved which provide better justifications for decriminalizing certain drug-related activities, while authorizing specific state interventions that constrain drug use.

In sum, I will present a more complex picture –more sensitive to differences between drugs, and with more rights involved– than the one that has prevailed so far in the discussions on this matter in Argentina. Despite the localism entailed in any constitutional argument, I hope the analysis will be general enough to be applied, *mutatis mutandi*, to other countries.

## **2. The Doctrine in Force**

Article 19 of the Argentine Constitution states:

“Private actions which in no manner offend order and public morality, nor harm third parties, are only reserved to God, and exempt from the authority of magistrates. No

inhabitant of the Nation shall be forced to do what the law does not impose, nor deprived of what the law does not forbid.”<sup>3</sup>

In the last decades, once and again our Supreme Court had to decide whether this provision was consistent with laws criminalizing drug possession for personal use. The first approach taken by the courts was that article 19 did not preclude such laws. This tendency was reversed in 1986, in the *Bazterrica*<sup>4</sup> case, a milestone of the democratic springtime the country was enjoying at the time. In *Bazterrica*, the Court holds that any action which does not entail harm to others is protected under article 19. Carlos Nino, leading advocate of this liberal interpretation of article 19 and a source of inspiration for the Court, claims that this provision prohibits “any legal interference with actions which do not affect the legitimate interests of third parties, even if such actions represent a deviation from certain models of personal virtue and have the effect of self-degrading the person who performs them.”<sup>5</sup>

The reign of *Bazterrica* was brief. In 1989, the Court, packed under Menem’s administration, left aside this precedent and refloated the pre-democratic understanding of article 19.<sup>6</sup> Some 20 years later, another new Court returned in *Arriola* to *Bazterrica*, in particular to the most decidedly liberal opinions in it.

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<sup>3</sup>Translated by the author.

<sup>4</sup>Fallos 308:1392.

<sup>5</sup> Nino, “¿Es la tenencia de drogas con fines de consumo personal una de las acciones privadas de los hombres?”, in Miller, Gelli, Cayuso, *Constitución y derechos humanos*, p. 570, at 573. Translation by the author.

<sup>6</sup>In re *Montalvo*, Fallos: 313:1333.

While I have no doubts that *Arriola* reaches the right outcome, I have elsewhere<sup>7</sup> criticized its argumentative style, and especially its being more concerned with the enunciation of big principles—supported by references to Dworkin, Hobbes, Locke, and Seneca— than with the tailoring of relevant distinctions. Not surprisingly, *Arriola*'s argumentation defects, which I was certainly not the only one to note,<sup>8</sup> have rendered it a poor guide for trial courts, prosecutors, the police, and citizens in general. Basic issues have given rise to different interpretations and inconsistent decisions, and two years after *Arriola* was decided, 54% of all national prosecutions refer to drug use.<sup>9</sup>

Among *Arriola*'s various considerations, the “principle of personal autonomy” occupies a central place. Citing the Inter American Court of Human Rights (one of the Argentine Court's favorite sources), it emphasizes that, as a corollary of that principle, individuals must enjoy the capacity to lead their lives in an autonomous manner, free from undue interference inspired in oppressive attempts to “enlighten their decisions”.<sup>10</sup> Thus, the Court understands that, for the individual to pursue her life plan autonomously, Government must refrain from interfering with conduct that does not harm others, in line with Nino's position on the matter.

Under this interpretation, numerous actions are excluded from the protection of article 19 because, as Nino and the Court understand it, they harm third parties. Thus, Nino acknowledges that actions such as sharing drugs, inducing others to use them, and using them in public are not protected. These actions, says Nino, are “contagious,” and, along

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<sup>7</sup>“El maximalismo en las decisiones de la Corte Suprema”, *Revista de Derecho Constitucional, La Ley*, Edición 75° Aniversario, 2010.

<sup>8</sup>For a critique of *Arriola*'s argumentative dispersion, see Alberto Garay, “Breve nota a la sentencia dictada en el caso *Arriola*”, *JA* 2009-III, suplemento del fascículo 14, p. 48.

<sup>9</sup> See report by the Ministerio Público de la Nación of December 27, 2011, in file with the author.

<sup>10</sup>*Arriola*, first opinion, par. 17.

with the sale of drugs, can be punished.<sup>11</sup> Along the same lines, Argentine courts that endorsed the more liberal interpretation of article 19 have always endeavor to distinguish public from private use, in order to exclude only the latter from punishment, and have never questioned the criminalization of sharing and selling drugs, among many other drug-related conducts.<sup>12</sup>

The underlying assumption of this approach is that taking drugs is bad. Therefore, any conduct which in any manner induces or at least makes it possible for others to use drugs entails harm to third parties, and deserves no protection under article 19. In fact, using drugs in the presence of another person is enough for the harming effect to take place, and this conduct can be punished for its “contagion effect.”

Nino provides an additional argument to justify “severe” punishment of drug sale and provision in general –*akrasia*, or weakness of will. Nino believes that the existence of this phenomenon provides the basis for certain paternalist measures, such as the obligation to wear helmets or fasten seatbelts. The idea is that, although the individual acknowledges that it is preferable to do so and thus minimize risk in case of accident, laziness, social pressure, or other factors may prevent her from acting accordingly. In such case, the legal obligation backed by a fine helps the individual to strengthen her will and act as she, in the abstract, deems as the better option.

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<sup>11</sup> *Ética y derechos humanos* (1984), p. 441-2; *Fundamentos de derecho constitucional* (1992), p. 312.

<sup>12</sup> In *Arriola*, par. 28 of the first opinion, the Court points out that, pursuant to international covenants, Argentina is under the duty to “assure coordination of prevention and repression of illegal drug dealing, adopting necessary measures to criminalize and regard as intentional crimes accordingly punished with incarceration the growing, production, manufacture, extraction, preparation, sale, distribution ... transportation, importation, and exportation of drugs...” The Court finds such repression fully compatible with decriminalizing drug use. See par. 27 and 28 of the first opinion.

In the case at hand, says Nino, the possibility of *akrasia* and other autonomy defects also justifies “making access to drugs extremely difficult [by] punishing traffic and provision severely, and adopting measures of rehabilitation of drug addicts. The harder the access to drugs, the more opportunities there will be for individuals to become aware of their harmful effects and to ponder if they really value so intensely what they pursue through drugs as to expose themselves to the deterioration of other personal goods. On the other hand, resorting to rehabilitation measures, even compulsorily, does not seem objectionable...”<sup>13</sup>

Also Petracchi, in his opinion in *Bazterrica*, finds the basis for punishing provision, particularly sale, in autonomy defects:

“[N]ot all decisions are made by individuals in a state of mind that entails that they have considered what is best for them after free rational deliberation. The absolute lack of will derived from pathologic dependence. . . impedes ‘free’ decisionmaking, and the State can and must interfere with the activities of others who take advantage, promote, or exploit such states, pushing he who suffers from them to walk through the irreversible paths of certain forms of addiction which lead, with no stops, to an overwhelming death... It is thus unquestionably fair to punish the dealer, for reasons which do not apply to the user (article 83, Criminal Code).”<sup>14</sup>

The article of the Criminal Code Petracchi cites criminalizes assistance to suicide. The argument, then, is that the person who attempts suicide is not punished (nor the one who

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<sup>13</sup> Nino, “¿Es la tenencia de drogas para consumo personal una de las acciones privadas de los hombres?”, *La Ley*, 1979-D-743.

<sup>14</sup> *Bazterrica*, Petracchi’s opinion, par. 17.

succeeds, of course), but the person who assists or instigates suicide is. The same, according to Petracchi, applies to drugs.

Petracchi also resorts to this image of the user with no will to refute the argument connecting prosecution of drug use and drug dealing. Says the Justice: “Claiming that punishing the user allows reducing demand and therefore the dealer’s business is like asserting that the protection of life creates the conditions that make homicides possible.”<sup>15</sup> According to this analogy, the buyer of drugs is not responsible for the transaction –he is just a passive victim. Moreover, in this case Petracchi is not even referring to the addict, but rather extends the image of the individual with no will to all drug users. The idea is that the dealer must be punished because she takes advantage of the state of defenselessness and lack of will of the user, and profits from harming him.

In sum, under the dominant doctrine there are three types of reasons to criminalize sale or free provision of drugs: first, this action harms third parties because it promotes or makes it possible that they inflict harm upon themselves; secondly, punishing provision is a way of hampering access to drugs, and therefore of forcing the potential user to think it twice before harming herself; thirdly, specifically in the case of sale, the drug dealer makes profit by harming someone whose will is compromised. The first of these arguments also justifies criminalization of public use. The second, that strict, compulsory detoxification measures be adopted. The three of them assume that the drug user is not in command of her actions –she is, rather, a passive victim.

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<sup>15</sup>*Bazterrica*, Petracchi’s opinion, par. 18.

### 3. Some Problems

A drug user who has followed the preceding discussion might experience some perplexity. On the one hand, he has heard that his conduct is inherent to his right to autonomy, and is therefore constitutionally protected from “any legal interference.” On the other, he finds out he can only use drugs in private, or else he might end up in jail; and he must obtain drugs in a black market dominated by mafias, with all the risks and costs this implies, for any form of provision deserves harsh punishment. Moreover, since the State is under the duty to seize all goods illegally acquired, if it finds a drug user in possession of drug, it should necessarily deprive him of that drug and proceed to destroy it. In fact, our disconcerted user will find out that few actions are persecuted by the State’s apparatus with as much eagerness as drug provision.<sup>16</sup> He might find some consolation in the fact that he can get drugs all the same, but he cannot forget that this is so *despite* the State, which devotes vast resources to prevent it.

According to Nino, drug use can be regarded as a central part of an individual’s life plan; this justifies respecting the individual’s decision to harm herself and tolerating potential distress she may cause to others, including to those people who depend on her or are affectively linked to her. But, if this is so, how should we understand all the measures that, we are told, the State can lawfully impose to interfere with drug use?

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<sup>16</sup>See report by the Ministerio Público de la Nación, note 6 supra. Note that I am not counting as a consequence of the doctrine in force that fact that, as this report reveals, 54% of all prosecutions initiated in by the National prosecutor refer to possession of drugs for personal use. Obviously, this fact could be intimidating to the potential user, but I am not attributing this consequence to the prevailing doctrine because this seems to be an anomaly that could be potentially solved. In other words, I am focusing on the effects that necessarily follow from this doctrine, not its deviations or enforcement deficiencies.



As we saw, Nino resorts to the idea of *akrasia* to justify hampering access to drugs, so that the potential user is forced to think it over. However, the disproportion between such goal and the measures that Nino actually tolerates or advocates for is so substantial that the argument loses its grip. How could it be possible that the only way in which an autonomous conduct, part of the agent's life plan, can be performed is by breaking the law to get drugs in the black market? It seems especially problematic that such is the implication of Nino's position, given his commitment to law abiding and his general critique to Argentina's anomy.<sup>17</sup>

The tension is evident. On the one hand, the act of using drugs is presented as autonomous conduct performed as part of a life plan, thus exempted from all interference by the State by virtue of article 19. On the other, the user is portrayed as someone whose will is compromised, with no freedom to decide by herself—not the subject of her own life, but rather the object of the perverse plans of others. If this second portrait was accurate, there would be little space for article 19 in our analysis. Instead, the idea of victim, which the Court certainly invokes,<sup>18</sup> would surface, but such idea would only make sense once we have discarded the assumption of an autonomous agent—and the protection of article 19 alongside.

This tension is more apparent when we analyze the arguments presented to justify the criminalization of the sharing of drugs and other “contagious” conducts, in particular public use. Recall that both Nino and the Court endeavor to distinguish public from private use. However, if the individual can autonomously decide whether to use drugs

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<sup>17</sup> This paradox was rightly brought to my attention by Sergio Giuliano. Nino's position regarding anomy can be found in *Un país al margen de la ley* (1992).

<sup>18</sup> *Arriola*, par. 19 of the first opinion.

or not, why should we underestimate her ability to accept or decline an invitation? Why should we be so afraid of contagion and imitation when we are dealing with adults who autonomously choose how to live their lives? After all, to assume that the mere fact that Juana offers drugs to Pablo or uses drugs in his presence is enough for Pablo to decide to use drugs himself suggests that Pablo does not deserve to be treated as an autonomous self; but, if this is so, we can hardly turn around and invoke a right to autonomy to protect, afterwards, his decision to take drugs.

In short, and to borrow a colleague's terminology, shall we treat drug users as agents or as patients?<sup>19</sup> The right to autonomy assumes the former; criminalizing the provision and public use of drugs, as well as compulsory rehabilitation, the latter. Nino and the Court oscillate between the two images, and this does not seem plausible.

#### **4. Mere Decriminalization?**

The Constitution includes various levels of protection of human actions depending on their impact on the interests of others, how important they are for the person who performs them, and their connection with different constitutional values. The lowest level of protection is granting a right not to be criminally prosecuted for that action. But not criminalizing an action does not amount to authorizing it. Absence of punishment does not mean that the State is under the obligation to protect such action from third party interference, much less facilitate or guaranty its performance; it only means that the Constitution prohibits that such action be criminally punished. The grounds for that

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<sup>19</sup>Markovits, "How Much Redistribution Should There Be?", 112 YALE L. J. 2291, 2307-09 (2003).

minimal protection may be diverse. In general, they relate to the fact that the action, while objectionable, is not sufficiently reproachable, or that punishment would be useless, even counterproductive.

It might be thought that it is under that light that we should interpret the Court in *Arriola* when, enigmatically, it asserts (and, literally, underlines) that the decision “in no way entails legalizing drugs”<sup>20</sup>. Judging that the drug user must not be incarcerated does not imply that the State should be committed to further protection of her conduct. Thus, it could be argued, drug use is not an authorized action –it is merely a decriminalized one.

This reading would explain why the Court accepts the intrusive measures described in the previous section, and, in *Arriola*, actually summons the Government to adopt them. It would also explain why the Court insists in describing drug use as a despicable conduct, while it remarks that jail is useless, in this case, from a criminal deterrence perspective<sup>21</sup> and, in fact, aggravates the “disease”. That is to say, this is conduct we do not want, but it does not justify sending someone to jail.

However, such reading would not be correct. As I said, the central argument in these decisions is that drug use is protected by the right to autonomy set forth in article 19 of the Constitution. This entails far more than mere decriminalization: it is an *authorization* –a right to do something in particular, and a State obligation to protect, at least to some extent, such conduct.

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<sup>20</sup> *Arriola*, par. 27 of the first opinion.

<sup>21</sup> The empirical analysis of *Arriola* is singularly weak, as I argue in “El maximalismo en las decisiones de la Corte Suprema”, ob. cit.

To illustrate the point, let us suppose that the conduct in issue is not drug use but abortion in case of rape, a question which has given rise to intense debate in Argentina for years, and which was recently addressed by the Supreme Court.<sup>22</sup> Regarding that conduct, we might think that there are, potentially, three forms of protection,<sup>23</sup> from the lowest to the highest. As a first option, not to criminally prosecute the woman; as a second option, to grant her a right to do it; as a third option, to recognize a right to obtain effective access to the action at stake. In the first option, the assumption is that the action is objectionable, but not serious enough for the woman to face incarceration. In this scenario, there could be no protest if the Government prosecuted, for example, the intervening physicians. At the other end of the spectrum, in the third option, the assumption is that any woman who wishes to have an abortion in such circumstances must be able to do it, and therefore the State must provide the material means –public healthcare– to guarantee it.

The second option is obviously in between. It does not amount to a guarantee of effective access, and accordingly does not entail the provision of free healthcare, but it seems undeniable that the State must nevertheless refrain from, for instance, criminally prosecuting the intervening physicians, and, arguably, must regulate in a restrictive manner objection of conscience.<sup>24</sup> It goes without saying, neither of these two State obligations would make any sense under the first scenario – mere decriminalization. Once we acknowledge we are before an action protected by a right, we might debate if it is a stronger or weaker right, but certain things should be beyond discussion.

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<sup>22</sup> “F., A. L. s/ medida autosatisfactiva”, 13 de marzo de 2012.

<sup>23</sup> In truth, forms of protection do not fall neatly in just three categories; it is rather a more fluent continuum, as I will later claim. I use the three option framework here just to emphasize difference that could be present at each level of protection.

<sup>24</sup> See Marcelo Alegre, “Opresión a conciencia”, in SELA 2009.

In this sense, although it does not follow from the existence of a right that we must embrace the third option, the State should at the very least refrain from adopting measures which impede or substantially hamper the realization of the conduct protected by this right. If there is a right to have an abortion in certain circumstances, we cannot tolerate that the State prosecute those who perform the actions that are instrumentally necessary for enjoying such right, namely, the physicians performing the abortion.

The analogy to drug use is clear. If we believe there is a right to use drugs as part of our autonomy, we cannot prosecute drug provision, which is instrumentally necessary to perform the conduct protected by such right. The fact that drugs can be found all the same is no valid answer for the State, since that is so despite its attempts to prevent it. Moreover, it could not be claimed that the State adequately protects this right if it pushes the user to the illegal market as the only way to access the drug. True, there is the possibility of growing your own drug, but such activity is also illegal today, and it is not a feasible option for many users, not even in the case of marijuana.

Along the same lines, if I have a right to use drugs as part of my autonomy, this should necessarily imply that I have a right that the State should not seize the drugs I possess in order to use them; but, as I said, the State is under the duty to do so as long as provision is forbidden, since the drug is a good illegally obtained. It would be ironic, to say the least, to claim that there is a right to use drugs, while the substance that makes such action possible is seized and destroyed every time the supposedly legal user is found in possession of it.

It is important to insist that the existence of a right does not entail that the State must guarantee effective access to it. A few decades ago, this distinction would have been put in terms of negative versus positive rights. Such conceptual framework is no longer popular; today, it seems more pertinent to claim, with Holmes and Sunstein, that “all rights are positive.”<sup>25</sup> Although this is undoubtedly true in more than one sense, we should not forget that only in some cases the State must effectively provide the material means required for the enjoyment of a right, while in others it discharges its constitutional duty by doing less than that. As in every case involving scarce resources, we should analyze how important access to the right is in light of the constitutional values involved.<sup>26</sup> For example, the right to education, given its connection to democracy<sup>27</sup> and structural equality of opportunity,<sup>28</sup> clearly entails such further duty, but nothing I have said so far should lead us to think the same applies to drug use. Indeed, I do not believe there is an obligation to provide free drugs or otherwise subsidize access to them. However, it seems to be undeniable that the State is not honoring its duty to protect the right at stake if it prohibits the action that constitutes a necessary antecedent for its enjoyment, namely, drug provision.

For this reason, criminalization of drug provision is inconsistent with the protection of drug use under the right to autonomy. However, until now I have only pointed out that Nino and the Court recognize such right; it is now time to critically assess if they are right. Can we actually consider that there is a right to take drugs as part of our personal autonomy? The following section analyzes this question.

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<sup>25</sup>Holmes and Sunstein, *The Cost of Rights. Why Liberty Depends on Taxes* (1999).

<sup>26</sup> I discuss this issue in *Escasez e igualdad. Los derechos sociales en la Constitución* (2008).

<sup>27</sup> See Thurgood Marshall’s dissent opinion in *San Antonio v. Rodriguez*, 411 U.S. 1 (1973).

<sup>28</sup> Grosman, *Escasez e igualdad*.

## 5. Autonomous Drug Use

Reasons to doubt whether the right to autonomy can protect drug use derive from the very arguments Nino and the Court offer to justify prosecuting provision and public use, and which give rise to the paradoxical situation I described. The right to autonomy presupposes the existence of an agent who is in command of her actions and chooses her life plan with a reasonable degree of freedom. We could hardly deem as free the action of an automaton with no will who is not the subject of his life, but rather the object of someone else's. In other words, if the portrait of the drug user to which Petracchi resorts in order to defend punishing provision of drugs were accurate, autonomy could not be the right involved in this case.

Actually, the right to autonomy could be ruled out even if we were not before a drug addict whose free will was severely compromised: it would suffice that the conduct in issue had the effect of substantially limiting future autonomy. Those who find autonomy a central value are nevertheless willing to accept restricting certain actions that, although free, tend to curtail autonomy in a substantial way, especially if they do so for good. This is the reason why liberals in general refuse to allow people to freely choose to sell themselves to slavery.<sup>29</sup> To provide a more contemporary example, the argument

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<sup>29</sup> The classic liberal argument on this issue is John Stuart Mill's: "By selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself.... The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom". (*On Liberty*, 1859, p. 158).

could apply to the autonomous decision to irrevocably waive the right to divorce.<sup>30</sup> In these cases, there are good reasons to believe that the principle of autonomy does not protect such conducts –indeed, it rather provides grounds for their restriction. Limiting freedom can be, on occasions, a way of protecting it.<sup>31</sup>

Therefore, not only when the conduct is not free due to the effects of drugs, but also when it seems likely that drugs will significantly restrict future freedom, arguments based on a right to autonomy lack any strength. The right to autonomy presupposes that the agent is acting with enough discernment as to attribute the action to her in a meaningful way. The argument used by the Argentine Court to criminalize drug provision, in turn, presupposes precisely the opposite: that the drug user is a kind of automaton with no free will.

However, there is no need to pick only one of the two images to portray the drug user. It may be the case that both are to some degree applicable, but refer to different situations. The portrait of the automaton with no free will captures the drug addict whose will, so to speak, has been kidnapped by drugs. Although, as I said, it makes no sense to invoke autonomy here, this extreme situation cannot be generalized to all drug users. Many among them may probably fit better the other portrait, that of the autonomous agent who decides, with reasonable freedom, to take drugs as part of his life plan.<sup>32</sup>

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<sup>30</sup> “Sisto y Franzini s/ información sumaria”, Fallos 321: 92. Similarly, in *Sejean*(1986), the Court defended the possibility of “making a mistake” as a foundation for the right to get a divorce, which right was not part of Argentina’s matrimonial regime at the time.

<sup>31</sup> The classic argument in the area of freedom of speech is Fiss, *The Irony of Free Speech* (1996).

<sup>32</sup> As Neil Levy claims, “The perfectly virtuous agent, who desires only what she judges she ought to, *may* be an ideal agent... but we do not have to aspire to such heights in order to count as autonomous.” Levy, “Autonomy and Addiction”, *Canadian Journal of Philosophy*, Vol. 36, No. 3, September 2006.



Furthermore, portraits of drug users may be far more than two, since it seems mistaken to address the issue of autonomy as an all-or-nothing one. Autonomy is a question of degree. The act of using drugs may be, depending on the case, a more or less voluntary conduct, and constitutional protection based on a right to autonomy should vary accordingly.

However, for this gradual approach to be reflected in concrete regulation, an adequate proxy of how free the decision to use drugs is, and to what extent it will affect future freedom, becomes necessary. This, I believe, may be achieved in a reasonably precise manner by focusing on the drug in issue. Exploring in any detail the characteristics of different drugs is beyond the framework of this paper. It can be noted, however, that there is consistent empirical evidence indicating that users of marijuana do not suffer from addiction or lasting cognitive impairments.<sup>33</sup> At least in the case of this drug, therefore, it seems clear that there are no sufficient reasons to presume across the board that the user has, or will likely have, his free will compromised by the effects of the drug. This means, in turn, that it is not justified to exclude the marijuana user from the full protection of the right to autonomy. Perhaps only in the case of opiates, the withdrawal syndrome is sufficiently intense to evoke the image of the automaton with no free will that Petracchi offers, but it is not necessary to reach that stage for autonomy to be compromised.<sup>34</sup>

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<sup>33</sup>Zimmer and Morgan, *Marijuana Myths, Marijuana Facts*, cited in Husak, "Liberal Neutrality, Autonomy, and Drug Prohibitions", *Philosophy and Public Affairs*, vol. 29, no. 1 (Winter 2000), p. 72.

<sup>34</sup>Husak, *ob. cit.*, p. 73. For a general discussion of the impact of drugs on autonomy, see Levy, *ob. cit.*, and Foddy and Savulescu, "Autonomy, Addiction and the drive to Pleasure: Designing Drugs and Our Biology: A reply to Neil Levy", *Bioethics*, Vol. 20, No. 1, 2006.

In any case, from the fact that the conduct does not fit the right to autonomy it does not follow that criminalization is justified. Article 19 does not protect only autonomous behavior, but rather reaches a wider category: private actions, defined as actions that do not harm others. Actions that are not just private but autonomous are protected, as Nino says, from any State interference; those which are private yet not autonomous enjoy a lesser protection. Thus, as the degree of autonomy of the action decreases, greater interference may be admitted.

The lowest level of protection is decriminalization: at the very least, any private action, that is, any action that does not harm others, is protected from criminal punishment. Article 19 does not admit that an action which is harmless to others should be punished with the most severe form of State interference. However, other types of interference affecting the individual's ability to perform a private action may be justified, as long as they are linked to the fulfillment of specific State obligations. In the next section, I will analyze which such obligations could be.

## **6. The State Obligation to Protect Health**

Does the right to autonomy include a right to commit suicide or let yourself die? The grounds of *Bazterrica*, to which *Arriola* refers, suggest so; but such an assertion has never been made as holding of a Supreme Court decision. In 1993, in *Bahamondez*,<sup>35</sup> the Court was precisely faced with such issue, but chose not to address it. The case dealt with the situation of a Jehovah's Witness who needed a blood transfusion but refused it

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<sup>35</sup> Fallos 316:47.

for religious reasons. Since this attitude would likely lead to the patient's death, the hospital resorted to the courts for guidance –should it let him die, or forcefully give him blood? By the time the case reached the Supreme Court, the case was moot, for the patient had recovered without the transfusion. The majority of the Court preferred to refrain from deciding the substantive issue, precisely because the case had become moot.<sup>36</sup> In dissent, and arguing that it was essential to provide guidance for future cases, some Justices chose to declare that the patient's will had to be respected. The matter has never reached the Supreme Court again. A Court of Appeals, in a similar case (*Gallacher*<sup>37</sup>), followed the dissenters in *Bahamondez* and let the patient die for her religious beliefs.<sup>38</sup>

The dissenters in *Bahamondez* and the Court of Appeals in *Gallacher* stressed the fact that the reasons to reject the treatment were religious. While for some judges the relevance of the religious motives related to freedom of religion, for others the key was that there could be no doubts that the decision was genuine –autonomous– because it was in line with the life plan the patient had generally and stably embraced. Under this second reading, religious beliefs were not relevant in themselves, but were rather an indicator of the robustness of the patients decision. This seems to be in line with the claim I made above that the more autonomous the decision, the stronger the constitutional protection it deserves. In cases where the person's autonomy is substantially compromised by drug use, arguments in favor of allowing self-harming conduct are weak. As I said, protection from “any State interference” only reaches

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<sup>36</sup> This seems a clear example of the “passive virtues” cherished by Bickel in *The Least Dangerous Branch*, and more recently by Sunstein, in his profuse defense of minimalism.

<sup>37</sup> “Dr. Gallacher s/ autorización”, Cámara Nacional Civil sala G, 1995. ED, 1995, 164-651.

<sup>38</sup> In *Gallacher*, the patient had two young children, which circumstance had been mentioned by the dissenters in *Bahamondez* as a relevant one when citing American precedents, but which was not present in that case.

actions which are both private and autonomous; as the action becomes less autonomous, the State obligation to protect health gains power.

The right to health has been the star of social rights judicial enforcement in Argentina since the late 90s, and courts have frequently insisted on the existence of a correlative State obligation to take positive action to protect health, whether providing medicines, financing treatments –not only in the country, but also abroad<sup>39</sup>, renovating hospitals, or producing vaccines. In the face of such a robust right, the State cannot remain a passive bystander when someone is inflicting severe harm upon himself.

What should the State do in such situation? As I said, constitutional protection of private actions prohibits that a person be incarcerated as long as her conduct does not harm others. But other, milder forms of State intervention are not only permitted, but even mandatory. The intensity of such measures shall depend upon two factors: the degree of autonomy of the person, which determines to what extent Article 19 protects this conduct, and the degree of harm the person is causing to herself, which determines the strength of the State's duty to protect health.

If the drug in issue is one whose use fits the right to autonomy, the level of interference tolerated under article 19 must be similar to the regulation tobacco or alcohol –namely, severe restrictions on advertising, public campaigns, heavy sale taxes, and the like, but probably nothing else. Marijuana, as I claimed, belongs in that category. However, in the case of more harmful and autonomy-restricting drugs, more intense State interference is permissible, even required. Such interference may consist, depending on

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<sup>39</sup> I criticize the decision that declares that the Government has to pay for medical treatments abroad in “El control de las políticas sociales”, in press.

the circumstances, in seizing and destroying the drug, prohibiting provision, and, in the worst cases of addiction, compulsory detoxification treatments.

In fact, in such extreme cases, we might not even face a private *action*. The concept of action presupposes a degree of will which the extreme addict may have lost. In such scenario, therefore, article 19 no longer seems applicable. However, even if we rule out article 19, there is still a “residual” right to decriminalization that protects the extreme addict. As in the case of permissible interference in the less autonomous forms of drug use, the justification for this right to decriminalization is rooted in the right to health.

One of the opinions in *Arriola*, Carlos Fayt’s, puts us in the right track. Fayt’s argument is simple, and can be summarized as follows: 1. Drug users suffer from an illness. 2. The State is under the obligation to protect health. 3. Incarceration does not cure said illness: it makes it worse. 4. Ergo, the State cannot incarcerate drug users. As I said, I think that treating all users as people suffering from an illness is a mistaken generalization. But it is undeniable that some –the extreme addicts– are. To them, the right to health argument is fully applicable. The addict who cannot stop using a drug that is killing her has a right to be free from prosecution not because she has a right to use drugs –in this case, she does not–, but because her right to health bars the State from treating her in that way.

Someone might argue that, since it is impossible in practical terms to distinguish sale to addicts from sale to non-addicts, we had better prohibit sale in general. However, as I mentioned, the problem of addiction seems to be circumscribed to certain drugs. Of course, sale of such drugs might be criminally punished. After all, in such cases there is

no right to autonomy involved, and therefore the State has no reason to refrain from preventing access to the drug; quite the opposite.

## 7. Conclusion

Rights, like children and books, have a life of their own. When, in the turbulent 80s, the more liberal Argentine scholars and judges defended that drug use could not be criminalized, they set the basis for a way of interpreting the Constitution that today, despite some hesitation and resistance, seems dominant. However, as I argued in this paper, the implications of that interpretation are not necessarily the ones its authors foresaw. If my argument is correct, article 19 (“the master beam of Argentine law,” according to one of the opinions in *Arriola*<sup>40</sup>) has a wider scope than the doctrine in force acknowledges, and, in conjunction with other relevant rights, imposes an approach to drugs which defers from the present one.

Specificities of drug regulation depend upon a detailed analysis, free from improper generalizations regarding different drugs, and backed up by robust empirical data. Although such an analysis is beyond the scope of this paper, it is worthwhile going through the main conclusions I reached. They, I believe, should determine the guiding principles of such regulation.

In some cases, using drugs is an autonomous action which, as such, deserves full protection under the right to autonomy. I find no reasons to exclude use of marijuana

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<sup>40</sup>Zaffaroni’s opinion in *Arriola*, par. 12.

from this category –certainly not at a general level. This not only implies that the action cannot be prosecuted, but also that the State must refrain from preventing or substantially hampering its performance. Criminal prosecution of provision, in these cases, is inconsistent with such obligation. However, measures such as those imposed on tobacco and alcohol may be enforced, including provisions regarding to whom, when and where this drug can be sold. Restrictions on certain forms of public use may be admissible as well, like in the case of tobacco, not for fear of the contagion effect – which, I claimed, could only apply if we assumed that autonomy was compromised–, but because we might be concerned about the effect of smoke on other people’s health.

In turn, when the characteristics of the drug at stake allow us to presume in general that its use restricts autonomy, protection from State interference decreases accordingly. The State is under the obligation to prevent harms to health. To the extent that a self-inflicted harm is not the consequence of an autonomous decision in which affecting health is an inevitable consequence of a freely chosen life style, the State should endeavor to prevent it by hampering access to the drug and limiting the opportunities of using it. In extreme situations, compulsory treatments may proceed.

Yet in no case is the criminalization of drug use constitutionally acceptable. Even when the drug restricts autonomy, its use is protected under article 19 –not as autonomous conduct, but as a private action harmless to others. Several forms of State interference are consistent with this lower protection, but criminalization is not. The highest level of State interference is only acceptable when a conduct seriously affects others.

Finally, there are cases in which the use of drugs does not even qualify for this lower protection reserved for private actions, because the depth of the addiction prevents us from considering the conduct in issue an action in the relevant sense. Here (but only here) enters Petracchi's automaton. Once in this stage, and having ruled out article 19, reasons to exclude criminalization derive from the duty to protect health. These reasons, which were already present in cases where autonomy was moderately compromised, become compelling when the automaton is concerned. It would be a mistake, however, to generalize from worst case scenarios, and to model the regulation of such a complex and nuanced phenomenon as drugs on the basis of an exception.

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