



## On the decriminalization of drugs

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# On the Decriminalization of Drugs

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GEORGE SHER

In his lively and provocative paper, "Four Points About Drug Decriminalization,"<sup>1</sup> Douglas Husak advances two main claims: first, that none of the standard arguments for criminalizing drugs are any good, and, second, that there is little evidence that drug laws deter drug use. In these comments, I will not take up the second claim (though I must admit to some skepticism), but I do want to take issue with the first. My strategy will be, first, to sketch

three pro-criminalization arguments that I take to have real weight; second, to respond to an objection of Husak's that, if sound, would tell against all three of my arguments; and, third, to confront the related objection that we cannot consistently support the criminalization of narcotics without also supporting the criminalization of alcohol.

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## I Three Arguments for Criminalization

I begin with two ritual disclaimers. When I say that there is a good case for continuing to attach criminal penalties to the use of narcotics, I do not mean that that case extends to any particular schedule of penalties or to any special list of drugs. I am sure that many drug sentences, both past and present, are far too harsh. I am also willing to concede that the harms and bads associated with some drugs—marijuana is the obvious example—may not be significant enough to justify attaching even minor penalties to their use. I do think, however, that the harms and bads associated with many other drugs are sufficiently weighty to justify their continued criminalization. The drugs of which I take this to be true include heroin, cocaine, methamphetamine, LSD, and ecstasy, among others.

What, then, are the main arguments for criminalizing these drugs? They are, I think, just the familiar ones: drug users harm themselves, they harm others, and they do not live good lives. At the risk of sounding like an eighth-grade teacher, or a drug czar, I will briefly sketch each argument.

### (1) *The paternalistic argument*

The nature of the harms that drug users risk is of course a function of the drugs they use. Thus, to borrow a point from Peter de Marneffe, heroin harms the user by sapping his motivation and initiative.<sup>2</sup> Also, because heroin is addictive, using it now forecloses the option of comfortably not using it later. By contrast, cocaine and methamphetamine do not have only these effects (though "crack" is by all accounts highly addictive), but their regular use also significantly increases the risk of heart attack and stroke. Furthermore, by drastically enhancing self-confidence, aggression, and libido, these drugs elicit behavior that predictably culminates in high-speed collisions, shootouts in parking lots, and destroyed immune systems. Other drugs have still other destructive effects: LSD can trigger lasting psychosis; ecstasy harms the brain, impairs the memory, and, taken with alcohol, damages the liver; and so on. Thus, one obvious reason to continue to criminalize these drugs is simply that many persons deterred by the law from using them will thereby be spared serious injury.

### (2) *The protective argument*

Just as drug use can harm the user, so, too, can it harm others. Drug use harms strangers by involving them in the collisions, shootouts, and other catastrophes to which the impaired and overly aggressive are prone. It harms

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family members by depriving them of the steady companionship and income of their addicted partners. It harms fetuses by exposing them to a toxic and permanently damaging prenatal environment. It harms children by subjecting them to the neglect and abuse of their drug-addled parents. Thus, a second obvious reason to continue criminalizing drugs is that many persons deterred by the law from using drugs will thereby be prevented from harming others.

### (3) *The perfectionist argument*

Just as there is broad agreement about what constitutes harm, so, too, is there broad agreement about many factors determining both good and bad lives. Most would

agree that it is bad when people stumble through life with a blurred and distorted view of reality; bad when they cannot hold a thought from one moment to the next or follow a simple chain of reasoning; bad when they drift passively with no interest in pursuing worthwhile goals; and bad when they care more about the continued repetition of pleasant sensations than about the needs and interests of those who love and depend on them. Many would agree, too, that it is doubly bad when the reason people live this way is simply because they have squandered the chance to live better. Thus, a third main argument for retaining the drug laws is that many persons whom they deter are thereby prevented from wasting their lives.

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## II Criminalization and the Risk of Harm

There may be other arguments for continuing to criminalize drugs, but the three just mentioned are surely among the most influential. However, although Husak concedes that some such arguments may indeed explain “why rational persons might well decide not to use illicit drugs, or why the state may have good reasons to discourage people from using drugs,” he denies that any of them “provide a justification for *punishing* drug users.”<sup>3</sup> Why, exactly, does he deny this?

As Husak agreeably acknowledges, his opposition to criminalization is not a matter of deep principle. He emphasizes that he is not a libertarian, and allows that he can easily imagine drugs so harmful that they should be criminalized: “[i]f a drug literally literally turned users into homicidal monsters, we would have excellent reasons to prohibit its consumption.”<sup>4</sup> However, according to Husak, no actual drug satisfies this description because no drug causes harm in more than a small proportion of cases. As Husak points out, “[a]bout 15 million Americans used an illicit drug last year, on literally billions of occasions,” but “[v]ery few of these occasions produced any harm.”<sup>5</sup> Because the antecedent likelihood of harm is small on any given occasion, Husak maintains that there is no “sense of harm . . . that can be invoked to show that I harm someone . . . when I inject heroin or smoke crack. At most, I risk harm to myself or to others when I use a drug.”<sup>6</sup> This is said to undermine the case for criminalization because “[a]lmost no theorist has tried very hard to extend a theory of criminalization to conduct that creates a risk of harm rather than harm itself.”<sup>7</sup>

Although Husak’s official aim in these passages is only to cast doubt on those defenses of the drug laws that appeal to the harm principle, his reasoning can also be extended to the paternalistic and perfectionist arguments. To extend it, we need note only that just as no single occasion of drug use is likely to harm anyone other than the user, so, too, is no single occasion likely either to harm the user himself or to reduce significantly the goodness of his life. Because the (un)likelihood of each effect is roughly equal, the threats that Husak’s reasoning poses to our three arguments seem roughly equal as well. This, of course, makes it all the more urgent to ask whether the reasoning can in fact be sustained.

Whatever else we say, we surely must insist that all reasonable theories of criminalization *do* allow governments to criminalize behavior simply on the grounds that it is too risky. We must insist on this not only for the boring reason that all reasonable theories permit governments to attach criminal penalties to drunk driving, discharging firearms in public places, and innumerable other forms of endangerment, but also for the more interesting reason that any decision to criminalize a form of behavior must be made *before* any occurrence of that behavior for which anyone can be punished. Such a decision must be based on an *ex ante* judgment about how risky the behavior is. Husak can hardly be unaware of this, and so his point can hardly be that we are *never* justified in criminalizing behavior merely on the grounds that it is risky. Instead, I take him to be making only the more modest (but still relevant) point that we are not justified in

criminalizing behavior merely on the grounds that it imposes a risk of harm *that is as small as the risk imposed by a single instance of drug use*.

Should we accept this version of Husak's claim? We might have reason to accept it if the relevant forms of low-risk behavior could all be assumed to be rare, for then the amounts of harm we would tolerate by tolerating them would also be small. However, drug use is of course not rare—Husak puts its frequency at billions of occurrences per year—so even if the risk on any given occasion is small, the total amount of harm must still be large. Even if, say, cocaine users harm no one but themselves in 999 out of 1000 cases, ten million uses of cocaine will still harm non-users ten thousand times. If there is any reason to take this number of harms less seriously when they result from ten million uses of cocaine than when they result from only ten thousand uses of some more reliably harmful drug, I must confess that I do not see what it is. Thus, if criminalizing the more reliably harmful drug to prevent this number of harms to non-users is legitimate—as it surely would be if each harm were on average as severe as the average harm done by cocaine—then criminalizing cocaine to prevent this number of harms must be legitimate too.

Even were prevention of harm to others the only legiti-

mate rationale for criminalizing any form of behavior, the aggregative nature of the harms associated with drug use would pose a serious problem for Husak's claim about risk. However, if, as I believe, the state may also legitimately criminalize behavior for paternalistic and perfectionist reasons, then aggregation will pose problems for his claim in at least four more ways. First, just as the infrequent but serious harms that drug users do to others are bound to add up, so are the infrequent but serious harms they do to themselves. Second, if each use of a given drug does a small amount of harm to the user's brain or heart, then his frequent and repetitive use of that drug is likely to do his brain or heart a lot of harm. Third, even if no single instance of drug use has much impact on the goodness of a person's life, a life entirely given over to drug use may be very bad indeed. And, fourth, just as there can be aggregation within each category of harm or bad, so, too, can there be aggregation across the categories. If the cumulative harm that drug users do to themselves is one reason to criminalize drugs, and the cumulative harm they do to others is another, and the cumulative badness of their lives is still another, then the cumulative weight of the three cumulative reasons must surely be greater than the weight of any single one alone.

### III If Narcotics, Why Not Alcohol?

Given all this, I am unconvinced by Husak's suggestion that the risks associated with drugs are too small to warrant their criminalization. However, another objection to their criminalization—an objection which Husak does not make explicit but which hovers near the edge of much of what he says—bothers me more. This is the objection that every argument that speaks for the criminalization of drugs speaks with equal strength for the criminalization of alcohol. If this objection can be sustained, then those who favor criminalizing drugs but not alcohol—as I do—are simply giving their preferred intoxicant a free pass.

Although the parallels between drugs and alcohol are pretty obvious, it may be useful to make a few of them explicit. To bring these out, we need only remind ourselves that alcohol, too, is famous for causing people to do things that culminate in fiery collisions, parking-lot shoot-outs, and destroyed immune systems; that alcoholics are well known for neglecting their partners and abusing their children; that alcohol creates an environment that is toxic and permanently damaging to fetuses; that being

drunk cuts a person off from reality and prevents him from thinking clearly; and that alcohol harms the brain, impairs the memory, and, taken with ecstasy, damages the liver. We may remind ourselves, as well, that although most instances of alcohol use have no such effects, its use is so common—Americans drink alcohol billions of times per year—that the overall amount of harm and degradation that it causes is very large indeed.

*The reason for treating drugs and alcohol differently will be that we can hold the relevant harms and bads below the threshold by legally permitting one or the other but not by permitting both.*

Given these impressive similarities, the arguments for criminalizing the two intoxicants appear to stand or fall

together. Thus, having claimed that the arguments succeed for drug criminalization, I may seem also committed to the view that they succeed for alcohol. However, because I find a world without beer too grim to contemplate, I want to resist this conclusion if possible. Is there any wiggle room here?

Given the structure of the pro-criminalization arguments, I think there may be. The salient feature of each argument is that it appeals to a kind of harm or bad that is (relatively) infrequent but whose overall total exceeds some crucial threshold. Thus, all three of my arguments leave open the possibility that the reason drugs take us past the threshold is that alcohol has already gotten us part of the way there. It may be the case, in other words, that either alcohol or the use of drugs by itself would *not* produce more harms or bads than a reasonable society can tolerate, but that in combination they would produce harms and bads that surpass the threshold. If anything like this is true, then it will not be at all inconsistent to advocate the criminalization of drugs but not alcohol. The reason for treating drugs and alcohol differently will be that we can hold the relevant harms and bads below the threshold by legally permitting one or the other but not by permitting both; the reason for continuing to

criminalize drugs but not alcohol will be that this is easier and less costly than switching—easier because it avoids divisive legislative battles and the uprooting of entrenched traditions, less costly because it does not require the dismantling of a multi-million-dollar industry.

Is what I have just described anything more than a bare logical possibility? Would the decriminalization of drugs, together with the continued non-criminalization of alcohol, really take us beyond some crucial threshold of harm and badness? I must admit that I do not know. I do not know how to conceptualize the relevant threshold, how to quantify the harms and bads to which it applies, or (therefore) how to decide whether drugs plus alcohol would add up to one legal intoxicant too many. But although I am sure that I do not know these things, I am also sure that those who favor drug decriminalization do not know them either. Thus, as long as there is *some* level of harmfulness and badness beyond which criminalization becomes reasonable, the question of whether we should legalize both intoxicants, or one of the two, or neither will remain unsettled. Although the status quo is not easy to defend, it is not clear that Husak's relaxed alternative is really any easier.

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#### NOTES

1 Douglas Husak, "Four Points about Drug Criminalization," *Criminal Justice Ethics*, 22 (this issue, 2003), pp. 3-11.

2 Peter de Marneffe, "Against the Legalization of Heroin," *Criminal Justice Ethics*, 22 (this issue, 2003), pp. 16-22.

3 Husak, "Four Points about Drug Criminalization," p. 6.

4 *Id.*

5 *Id.*, p. 7.

6 *Id.*, p. 6.

7 *Id.*