SUMMARY: Husak, Douglas; ‘Four Points About Drug Decriminalization’

Published in: Criminal Justice Ethics (Winter/Spring, 2003)

Thesis

Husak provides an argument for the decriminalization of drug use, claiming that there exist no good reasons, currently, for the criminalization of drug use. He concludes that, absent such a reason, drug use should be decriminalized.

The Meaning of Decriminalization

Husak begins by stipulating what is meant by decriminalization: that the ‘use’ of a drug would not be a criminal offense and, therefore, protected from state punishment. [22]

This definition, however, needs some clarification:

1. Drug use is rarely directly punished. Almost all jurisdictions punish possession. However, Husak sees this point as unimportant, being simply a reflection of the fact that possession is easier to prove.
2. There is no consensus on what state actions amount to punishment. Some believe fine or enforced treatment to be alternatives to punishment. Husak believes that these alternatives are simply alternative modes of punishment.
3. Decriminalization, on this account, says nothing about what should be done to those who produce or sell drugs.
4. Finally, it should be noted that Husak’s ‘decriminalization’ is not markedly different from what was called ‘prohibition’ when applied to alcohol in the 1920s. He retains the term ‘decriminalization’ on the basis that current drug laws are more punitive than those applied to alcohol in the past. [22]

The Best Reason to Decriminalize Drug Use

Husak believes that, rather than argue for decriminalization, the case the status quo (criminalization) must be made. If no good argument for criminalization can be found, then it follows that we should decriminalize drug use. [23]

Firstly, he notes that this approach does not appeal to some fundamental principle, such as freedom or personal rights. Though some drug prohibitions will violate these and similar principles, this is not necessarily the case for all drugs laws.

Secondly, Husak admits that his argument will be inconclusive. He is unable to show that no argument for criminalization will be a good argument, but aims to discount the best of those arguments that are currently cited in the debate.

Third, the case for decriminalization makes minimal assumptions about justice. Husak assumes that punishment by state must satisfy an extremely high standard of justification and considers this to be an uncontroversial claim.
Criminalization

Husak begins by providing a brief account of criminalization, as it occurs in modern liberal society:

“Most laws limit or restrict liberties. When the constitutionality of these laws is challenged, courts respond by dividing liberties into two kinds: fundamental and non-fundamental. The constitutionality of legislation that restricts a fundamental liberty is subjected to ‘strict scrutiny’ and is evaluated by applying the onerous ‘compelling state interest’ test. Virtually all criminal laws, however, limit non-fundamental liberties, and they are assessed by applying the much less demanding ‘rational basis’ test.” [24]

The rational basis test only requires that the law be substantially related to a legitimate government purpose, which is not required to be the actual objective of the legislation. This means that very few laws will fail the test. Drug prohibitions are generally evaluated according to this test.

Husak argues that criminal law is importantly dissimilar from non-criminal law, in that it results in state punishment. For this reason, he thinks, the rational basis test is not fit for purpose when evaluating criminal laws.

Many philosophers, when discussing drug prohibitions, make reference to the harm principle. But, unlike, say, theft or rape, it is not clear that drug use harms the rights of others. At most, drug use may risk harm to one’s self or others. Husak conceptualizes offenses that create only a risk of harm as inchoate offenses (similar to attempt, solicitation or conspiracy). Unfortunately, there is no current theory that seeks to justify the criminalization of such offenses.

Empirical data suggests that drug use very rarely results in significant harm. If this is contrasted with, for example, attempted murder, the result is different. [24-5]

“Any argument for punishing drug users will be required to justify punishing the many, whose behaviour is innocuous, for the sake of some objective that results in a very tiny percentage of cases.” [25]

Husak also notes that drug prohibitions unduly affect ethnic minorities and the least powerful in society, while these groups are no more likely to be drug users than members of the privileged majority.

Predictions: A Bad Reason to Criminalize

In the final section of his paper, Husak considers one possible argument for the criminalization of drug use: that drug use would drastically increase if it were no longer subject to criminal punishment. This argument, he believes, fails on both empirical and normative grounds. [25]

On empirical grounds, Husak argues that we have no basis upon which to predict the outcome of decriminalization.
We cannot looks purely to economic models of consumption, because there are simply too many variables which decriminalization will affect. Producers of drugs will be required to pay taxes, settle lawsuits and invest in making their products safer in order to minimise the costs associated with lawsuits. This is likely to ensure that drugs remain fairly expensive to purchase and consume, unless the drug is particularly safe and unlikely to cause the producer legal issues. If this is the case, then it seems to justify decriminalization. Additionally, if some drugs are especially dangerous, the threat of legal recourse may mean that they are no longer available, as there are no profits to be made in their production. [26]

Husak also disbelieves that the removal of the non-monetary cost, that of criminal punishment for the possession or use of drugs, is likely to result in a drastic increase in the number of drug users. Empirical data suggests that fear of punishment plays very little role in individuals’ decisions regarding whether to take drugs. Further evidence shows that the severity of punishment for drug use does not show a correlation with lower instances of use. Neither, by comparison, are there higher instances of use in countries with more permissive drugs laws. [26-7]

It is worth noting that Husak’s proposed decriminalization only extends to the state’s ability to punish the use of drugs. He sees no problem with state activity to discourage use through other means, as can non-governmental bodies and private companies and individuals. [28]

Another consideration regarding use after decriminalization is what Husak calls the ‘forbidden fruit’ phenomenon. Essentially, the fact that drugs are illegal may actually make them more attractive to some people, especially the young.

Further, if decriminalization causes some individuals to substitute newly decriminalized drugs for those that are currently legal – alcohol and tobacco – we may see an overall reduction of the harm caused by drug use.

For these reasons, Husak argues that we should avoid making predictions about consumption after decriminalization. Further, predictions about consumption, even if they were much more accurate, do not constitute good reason to maintain drug prohibition. Unless we have a good reason to punish drug use, predicting an increase in use after decriminalization does not provide a good reason to continue to punish it. [29]

“Despite my uncertainty about the further, there is one prediction about which we can be absolutely confident. After decriminalization, those who use illicit drugs will not face arrest and prosecution. The lives of drug users would not be devastated by a state that is committed to waging war against them. Punishment, we must always be reminded, is the worst thing a state can do to us. The single prediction we can safely make about decriminalization is that it will improve the lives of the hundreds of thousands of people who otherwise would be punished for the crime of using drugs for recreational purposes.” [29]
References

Husak, Douglas; ‘Four Points about Drug Decriminalization’ Criminal Justice Ethics (Winter/Spring, 2003) pp. 21-9