SUMMARY: Husak, Douglas N.; ‘Liberal Neutrality, Autonomy and Drug Prohibitions’

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Thesis

Husak argues that members of liberal states, which accept the need for neutrality between different conceptions of the good, and base this acceptance upon a desire to protect personal autonomy, must find the criminalization of drug use to be unacceptable given their liberal ideals.

Drug Proscriptions and Liberal Neutrality

Husak presents what he calls the affirmative case for permitting the use of recreational drugs on the grounds of liberal neutrality:

1. The state should be neutral with respect to reasonable conceptions of the good life.
2. Some of these reasonable conceptions of the good life include the recreational use of drugs. Therefore;
   a. The state should be neutral with respect to the recreational use of drugs.
3. Neutrality toward given conduct is violated by criminal prohibitions of that conduct. Therefore;
   a. The state should not criminally prohibit recreational drug use. [46-7]

Husak notes, however, that one must consider what is meant by a ‘reasonable conception of the good life’. Some philosophers argue that the satisfaction of tastes and preferences is not constitutive of the good life and, if this is the case, then we might think that premise 2 is faulty. [47]

What is a conception of the good life? Rawls is vague on the subject, but Dworkin is willing to include activities such as ‘beer-drinking’ and ‘television-watching’. Husak is quick to note that Dworkin, therefore, would include not only tastes and preferences, but also specifically references alcohol, which is itself a recreational drug (albeit a legal one). [47-8]

Husak argues that if all tastes and preferences are excluded from what is meant by a conception of the good life, the results are problematically unintuitive. Further, the exclusion of tastes and preferences from the concern of liberal neutrality would mean that all tastes and preferences would be eligible for criminalization. [48]

Husak offers two potential justifications for criminalizing behaviour that is not protected by state neutrality:

1. On utilitarian grounds, the state may criminalize behaviour that is thought to bring about more disutility than utility, though this will often be impossible to confirm.
2. By democratic process, a state may criminalize behaviour if the criminalization is voted for by a democratically elected legislature (and subject to constitutional constraints, such that it does not impede fundamental human rights, discriminate against a particular target class or fail to pass the ‘rational basis’ test). [49]

In the case of tastes and preferences, the consequences of such criminalization are likely to be extremely illiberal. Husak notes that:

“When a criminal statute is enacted, conduct is proscribed, but not always prevented. Inevitably some will violate the statute [...] When violations result in imprisonment, a fundamental right – freedom from incarceration – is infringed. More than a utilitarian gain or a mere “rational basis” should be required to enact and enforce such a law.” [49-50]

Husak’s argument is that, were the state to criminalize certain tastes and behaviours, our freedoms to perform we take for granted, liberals would be quick to find some reason to veto such state action. The most obvious candidate would be liberal neutrality. [50]

We should, therefore, assume that at least some tastes and preferences are constitutive of the good life and, following this, are protected by the liberal principle of neutrality.

If it is the case that some tastes and preferences are to be included in the conception of the good life, then we must consider what reason(s) would be sufficient to exclude a particular taste of preference. Husak provides three prospective accounts:

1. Some tastes and preferences are based upon a material mistake of fact about the object of the preference. A person could be mistaken about the effects of the drug or the associated risks involved. Both of these claims are doubtful. Those who think that people do not ‘really’ enjoy drugs are often attributing their own standards to others, while drug education is significant and widespread. [52-3]

2. The taste or preference is somehow “unauthentic”. Husak discounts this as drug use does, in fact, have a strong claim to authenticity. [53-4]

3. The neutrality constraint should only apply to those conceptions of the good that are reasonable. [54]

Husak thinks that only the third of these accounts is plausible. However, if this is the case, it will be necessary to provide an argument that shows drug use to be unreasonable. Firstly, he begins by adopting a conception of reasonableness, from Rawls’ Political Liberalism, such that persons are reasonable when they “propose principles and standards as fair terms of cooperation and... abide by them willingly, given the assurance that others will likewise do so.” [R: 49]
Next, Husak notes that there are no plausible grounds to suppose that all drug use is unreasonable. There are clearly instances of drug use, legal and illegal, in which no rational principle is violated. [55]

In order to construe drug use as unreasonable, it will need to be shown to create an unacceptable risk to societal cooperation.

“Drug offenses must be conceptualized and evaluated as what are called inchoate, anticipatory, or nonconsummate offenses (such as attempt, conspiracy, and solicitation). According to this view, use itself is not the evil that drug proscriptions are designed to prevent. Instead the evil is some further harm that drug users are more likely to inflict on others.” [55]

Importantly, many kinds of conduct carry some level of risk. Therefore, strict criteria must be proposed which will set an appropriate level of risk, above which proscription is justified, whilst remaining sufficiently liberal and neutral.

Many do believe that there is a correlation between drug use and crime. However, Husak provides reason to doubt this. He notes that there is little empirical support for this kind of claim when other variables are controlled. [57]

Husak provides a further consideration: that the causal link between drugs and crime is too remote. “As a general rule,” he claims, “conduct that creates a risk becomes more reasonable as it becomes increasingly remote from whatever harm it ultimately risks.” [57]

Bennett contends that even casual drug use, which does not lead to further crimes, should carry severe penalties, as drug uses is “highly contagious”. [B: 11]

Husak replies:

“As I understand this rationale, problem-free drug users should be punished because they might imitated by others who must be deterred because their experimentation may lead to an increase in the ultimate evil of crime. This causal link between drug use and crime, I submit, is too remote to justify the criminal sanction.” [58]

Husak, therefore, (“tentatively”) concludes that liberals who are concerned with neutrality between differing conceptions of the good life should accept premise 2 of the affirmative case, agreeing that some reasonable conceptions of the good life include the use of recreational drugs. [58]

Moving on to the third premise of the argument, that criminalizing behaviour fails to be neutral towards it; Husak briefly considers some problems for neutrality in the liberal state. However, he quickly concludes that, at least, neutrality precludes the state from imposing criminal sanctions. [58]

“Whatever else neutrality may require, I will assume that it limits the authority of the state to enact coercive legislation.” [58-9]

There remain, however, two further potential objects to the third premise:
1. Liberal neutrality may make no claims regarding criminal legislation. Husak looks to Rawls’ ‘basic structure’ of society, noting that it does not necessarily preclude anti-drug legislation, and that any right to consume recreational drugs will depend on a broad interpretation of another, more fundamental right. [59]

2. Neutrality is often interpreted to be justificatory, rather than consequential. This is because almost all legislation will have the effect of favouring one conception of the good over another. Liberals, therefore, look to the rationale given for laws to be neutral. This, of course, is problematic, as many different rationales are possible for a single law, some of which may and may not pass the neutrality test. [60]

In response to this second problem, Jeremy Waldron suggests that liberal neutrality should not evaluate laws, per se, but to the people who vote for and uphold them. [W: 151]

Husak argues, however, that this does not excuse liberals from appraising drug prohibition laws. Instead, they must ask themselves whether there are any plausible rationales for the legislation able to satisfy the neutrality constraint. [61]

In conclusion, Husak makes the tentative claim that drug use should be permitted on the basis of liberal neutrality, though admitting that he has not disproven the possibility of a neutral rationale for proscription. [61]

**Autonomy and Drug Prohibitions**

There are different reasons given by philosophers for liberal neutrality. These will provide differing results as to what is entailed by neutrality. Husak sets out to discuss only that liberal neutrality which is grounded in a commitment to personal autonomy, and how this related to the prohibition of drugs and the punishment of users. [62]

“Although the state should be neutral toward the conception of the good life that persons choose, it should not be neutral towards choice itself. Choice is valuable and worthy of respect when it is autonomous, but not otherwise. If the choice to use drugs for recreational purposes is autonomous, and autonomy is valuable, the state would have reason to allow drug use. But if this choice is non-autonomous, liberals who derive the importance of neutrality from the value of autonomy would exempt drug use from the scope of protection under the neutrality constraint.” [62]

In fact, thinks Husak, if drug use is non-autonomous, this may give some liberal philosophers scope not only to exempt it from state protection, but even to punish drug users, if it can be shown to protect autonomy. [62-3]

Husak's strategy in what follows is to determine what would be the necessary features of a conception of autonomy, such that it rendered drug use non-
autonomous and, therefore, not protected by liberal neutrality. He believes that any such conception of autonomy will be extremely unattractive. [63-4]

Before continuing, Husak briefly notes that philosophers such as Feinberg, Kant and Dworkin have all proposed conceptions of autonomy that would clearly allow for the permissibility of drug use. However, other accounts, such as that put forward by Raz, treat autonomy as something to be attained and, thus, may call this into question. [64-5]

Further, Husak considers the possibility that prohibiting drugs may promote Raz’s conditions of autonomy. [R: 369] That is, allowing drug use may make it more difficult (or impossible) for agents to become autonomous. He provides reasons for and against:

1. Against:
   a. “A person who is author of his own life must possess the appropriate mental abilities to effectively choose what life to lead. If drugs substantially impair these mental abilities, they may render users less able to make meaningful choices.” Many drugs do impair mental faculties while the agent is under their influence, but empirical data will show whether impairments persist long-term. [66]
      i. Husak’s response is that this is to generalize form a worst-case scenario. Prolonged mental impairment is not typical of the majority of drug users.
   b. “Perhaps immoral choices are not autonomous, or perhaps whatever autonomy is exhibited in immoral choices lacks value. On either variant, if recreational drug use were morally wrongful, efforts to create the conditions under which autonomy has value would not allow drug use.” [67]
      i. Husak’s response is simply to state that he knows of no arguments that support the notion that recreational drug use is morally wrong, and so cannot reply, nor see any reason to suppose this to be the case.

2. For:
   a. A person who is the author of his own life must have “an adequate range of options from which to choose.” What an adequate range of options consists of is hard to say, but Husak argues that, in the case of recreational drugs, the options are likely to be other drugs. Given this, it seems like our current laws, in which only alcohol, tobacco and nicotine are lawful, it seems we should be persuaded to increase that range. [68]
      i. Husak notes, however, that this does entail that all drugs should be legalized, as with each legalization, the case for the next will become weaker as the range of options increases. [69]
b. Coercion is “enormously destructive” to the conditions of autonomy. The punishments associated with recreational drug use are currently so severe as to severely limit, to the point of eradicating the autonomy of users. Husak notes that, “the state can hardly be justified in destroying the autonomy of users in the guise of creating the conditions of autonomy.” [69]

It is Husak’s conclusion that the case for is stronger than that against. Therefore, the prohibition of recreational drugs is likely to be detrimental, rather than beneficial, in creating or promoting the conditions of autonomy. [69]

Moving on, Husak addresses the question of whether drug use itself might be beneficial or detrimental to autonomy. He provides one reason to think that it may be the former:

“Typically, persons have little control over their moods. For the most part, moods are conditions that we have rather than objects of our choice. Moods just ‘come over us’; we frequently find ourselves lethargic in the morning, and tired in the evening. The recreational use of drugs enables us to change our moods in desired ways at given times and places.” [70]

In this respect, Husak believes that drug use may increase our levels of self-control and, by inference, our autonomy.

However, the obvious response to this position is that addiction, if and when it occurs, will do much more to limit the self-control and autonomy of users. While what it means to be addicted is a matter of some debate, Husak imagines a drug user, Betty, who is addicted to drug X – attempting to quit and relapsing frequently. [70-1]

The best answer, thinks Husak, as to why Betty's addiction makes her non-autonomous, is that it is analogous to instances of duress. That is, if a villain threatens to break Sue's leg unless she assists in a bank robbery, we say that she has “no choice” but to do so. This is false; Sue could suffer the broken leg, but what we mean is that we do not blame her for her subsequent action. [71]

Husak thinks that Betty's situation may be similar. If the effects of withdrawal are so severe, we might say her condition is one of “internal duress”. [71-2] However, there are two problems with this:

1. This fails to account for the compulsive behaviour exhibited by many drug users, even when no withdrawal symptoms are present. Additionally, many former addicts relapse, though they are no longer experiencing withdrawal.
2. The pains of withdrawal are probably not sufficient to support the judgement that Betty cannot quit. Not only this, many illicit drugs do not result in withdrawal symptoms when their use stops. [72]

If addicts are non-autonomous, it is likely that this is due to something other than an unwillingness to experience withdrawal.
Despite these reservations, Husak concedes that there is something non-autonomous about Betty’s situation, if only to progress the argument towards the discussion of criminalization. Despite the existence of drug addicts, liberal neutrality should still preclude the criminalization of drug use. [73-4]

Husak provides both an empirical and a normative line of reasoning in favour of this position:

1. The empirical argument states that addicts who are like Betty represent worst-case scenarios that do not represent the majority of drug users.
2. The normative argument states that autonomy is not properly valued if one generalizes from a worst-case scenario in order to criminalize drug use. [74]

Relatively few drug users become addicted, and so are unlikely to have their autonomy called into question in this manner. If we imagine that the drug Betty is addicted to is alcohol, then we can see that the majority of users do not become addicts and, in fact, enjoy their drug use legally and socially. If we generalise from Betty’s case and proscribe alcohol, we would severely limit the autonomy of all those who drink alcohol but are not alcoholics. [74-5]

Husak widens his thought experiment:

- **Betty**: is an alcoholic and is unable to quit. She is non-autonomous.
- **Beverley**: is a social drinker and enjoys alcohol in moderation. She is autonomous and will not become addicted.
- **Beth**: does not drink alcohol. If Beth were to drink alcohol, she would become addicted and non-autonomous. The only way to avoid this is to criminalize alcohol.

The argument for criminalization, therefore, is that the autonomy of both Betty (who will be punished for her addiction) and Beverley (whose tastes and preferences are frustrated) will be sacrificed in order to protect the autonomy of Beth. [75]

Importantly, Beth is unlike four other kinds of non-users:

1. Many non-users would not try drug X even if it were permitted.
2. Many would try drug X and come to resemble Beverley rather than Betty.
3. Others would resemble Beverley rather than Betty, even if the drug were not permitted.
4. Finally, others would resemble Betty rather than Beverley, even if the drug were not permitted.

Beth is importantly different from each of these cases, in that she would become a user of X and would become addicted in a possible world in which X is permitted relative to that in a possible world in which X is proscribed. Husak calls this the **criminalization difference**. [76]
Husak believes that the criminalization difference is particularly hard to estimate in the case of particular drugs, but that, for example, the statistic for marijuana is unlikely to be higher than that of alcohol. [76]

In the case of cocaine and heroin, perhaps, it is not as clear what the result would be. But Husak points out that the current data surrounding their use is gravelly skewed by the current climate of prohibition. Not only this, but the availability and legality of other drugs will have a significant impact on the criminalization difference for all others. [76-7]

Moreover, data suggests that very few of the total number of citizens who have tried either cocaine or heroin have become habitual users. This lends support to the empirical claim that Beth’s is a worst-case scenario, which is not representative of drug use as a whole. [77-8]

Moving now to the normative claim, Husak distinguishes two accounts of autonomy:

1. **Consequentialist** accounts claim that autonomy is a value to be maximised.
2. **Deontological** accounts claim that autonomy functions as a constraint on the proscriptions a state may enact. [78]

Any account that wishes to sacrifice the autonomy of some over others, such as in the case of Betty and Beverley, must be consequentialist.

> “It is important to become clear about the kind of trade-off that would be involved in a decision to proscribe the use of drug X in order to protect Beth’s autonomy. Trade-offs might be *intrapersonal* or *interpersonal*. Although each kind of trade-off is worrisome, the former seems far less problematic than the latter.” [78-9]

If the autonomy of a person is to be maximised throughout her life, then it may sometimes be curtailed in order to produce more autonomy overall. However, in the interpersonal case, such as that given above, the autonomy of Betty and Beverley is sacrificed not for the sake of their greater autonomy, but to protect the autonomy of another (Beth). [79]

This is not to say that interpersonal trade-offs are never justifiable. If the criminalization difference were sufficiently high, then we can see that they may be required. However, Husak notes that liberals have tended to view autonomy in much the same way as rights, meaning that it is doubtful many liberal philosophers would be happy to accept the consequentialist account. [79]

Husak concludes that neutralist liberals have both empirical and normative reasons to disbelieve that proscriptions on drug use will protect autonomy.

**Conclusion**

To sum up, Husak has argued that recreational drug use ought to be legally permissible on the grounds of liberal neutrality, especially when neutrality is grounded in a commitment to personal autonomy. Further, absent any decisive
arguments against his position, Husak claims that liberals should be highly critical of the current laws and punishments associated with the criminalization of drugs.

References


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