SUMMARY: Husak, Douglas N.; ‘Recreational Drugs and Paternalism’

Published in: Law and Philosophy, December 1989.

Thesis
Husak argues that the arguments likely to be offered in defence of paternalistic criminal legislation against the use of recreational drugs (CLAURD) are based upon unseen and contentious empirical assumptions. [354] He argues that the criminal justice system, on this account, should tolerate, from a legal standpoint, the use of recreational drugs amongst rational adults. [356]

Clarifications
Husak begins his argument by clarifying several points that may serve to confuse the issue at hand: that of the legal proscription of recreational drug use.

1. Husak assumes from the outset that some forms of state paternalism can be justified. Philosophers who believe otherwise will necessarily reject CLAURD. Husak invites these readers to “construe these criteria as distinguishing bad from worse paternalism.” [358]
2. Whether the worry of drug use causing harm to others is able to justify CLAURD is neither the focus of, nor addressed in detail within the paper. [358-9]
3. Paternalism must not be thought the same as or confused with legal moralism, the view that an activity being immoral is sufficient to prohibit it (legally). The legal moralist would be required to explain why some drugs – alcohol, tobacco and caffeine – are not seen to be immoral, nor prohibited, while others are and should be. [359-60]
4. The harm caused by recreational drugs is often cited as a deciding factor in their criminalisation. However, Husak notes that the illegality of these drugs is a significant factor in their harmfulness. [360]
5. Some might object that the wide variety of recreational drugs (from caffeine to opiates) means that we should not attempt to examine them altogether. The argument given against this position is to say that we must attempt to understand the “general conditions that any activity, including use of a given drug, must satisfy if the paternalistic case against it is compelling”. [361]
6. Finally, Husak describes what Feinberg calls the “garrison threshold.” [361-2] This is explained as the point at which an activity, which might otherwise be considered a private matter, becomes so ubiquitous that it becomes a concern of the wider society and, therefore, the state.

Two Kinds of Arguments
Husak distinguishes two types of arguments against CLAUD: consequentialist and deontological arguments.
Consequentialist Arguments

Consequentialists who support CLAUD generally believe that it is able to produce more utility than decriminalization. However, Husak argues that this fails to account for the frustrated satisfactions of millions who otherwise will derive some pleasure from recreational drug use. [364]

The consequentialist may respond that, either (i) consumers do not really want or enjoy drug use, or (ii) the pleasure derived from drug use is pathological. Regarding the first claim, Husak dismisses these on both economic and philosophical grounds: consumer preferences cannot be ignored, nor can claims of a “rational will” be substantiated separate from one’s genuine desires. [365]

Regarding the pathology of drug use, Husak points out that we must first supply a theory that discerns pathological and non-pathological pleasure. Any attempt to ground such a theory in the immorality of drug-use slides quickly into legal moralism. [366]

Deontological Arguments

The deontological arguments provided against CLAUD are generally centred on the principle of autonomy. Feinberg defines autonomy, amongst other things as “the right to make choices and decisions – what to put into my body, what contacts with my body to permit, where and when to move my body through a public space”. [F: 54] The right to choose what goes into one’s body clearly contradicts CLAUD. [367]

In response to this, a proponent of CLAUD would be required to provide an account of autonomy able to explain why, for example, unhealthy food should not be prohibited, while recreational drug-use should be. Husak argues that one such attempt, which points to the degree of harm caused by the action, cannot solve this problem, as many philosophers consider the decision to commit suicide as protected by the principle of autonomy. [368-9]

Even if this were not the case, the question of what degree of harm is sufficient to override the principle of autonomy and admit paternalistic action is once again based upon questionable empirical assumptions. [369]

Feinberg takes the position that “a person’s right of self-determination, being sovereign, takes precedence even over his own good.” [F: 61] Though, Husak notes, he does not provide a decisive argument for such a strong position. [369-70]

Voluntariness

Feinberg argues that only soft paternalism is justifiable, when an individual’s conduct is harmful to themselves and “substantially non-voluntary”. [F: 12] This is because non-voluntary choices are not autonomous choices and, therefore, state intervention does not violate autonomy. [370]
Voluntariness, on this account, is a variable mix of voluntary and non-voluntary aspects of the decision-making process, understanding that decisions are rarely "perfectly voluntary". He provides the example of Mr. Roe and Dr. Doe:

Roe discusses with Dr. Doe his decision to use a dangerous drug, X:

1. If Roe erroneously believes that X is not harmful, then his decision is non-voluntary.
2. If Roe knows that X is harmful, but wishes to harm himself, then Feinberg thinks this is probably a non-voluntary decision – Roe is not in possession of his full faculties. If this isn’t the case, however, then his decision must be considered voluntary.
3. If Roe understands the risks associated with X, intending no harm to himself, but judging that it is worth gambling due to the pleasure he will receive from X, then this decision seems to be obviously voluntary. [371]

Husak, however, notes paternalism in inter-personal relationships does not necessarily defend paternalism in law or in government. Given that the law must be expressed in general terms, how should it respond to drug use? [371-2]

One option might be for the law to apply to the most common, or most frequent cases. In this case, it seems that the third of Feinberg’s examples would be the most applicable.

Husak notes that:

"Drug users who labour under misconceptions about the risks of harm should be educated rather than permanently restrained; if they persist after having been warned, their behaviour corresponds more closely to Feinberg’s third example than to his first. And almost never does a person take drugs in order to harm himself." [372]

It would, thinks Husak, be absurd to enforce CLAUD on the basis of a small number of users who are misinformed, under-informed or desire to harm themselves. [372-3]

"To base legal policy on this small minority is to generalize from a “worst case” scenario. If I am correct that the overwhelming majority of drug use corresponds to Feinberg’s third example, there is little reason to believe that paternalistic interferences with drug consumption can be justified on the ground that such use is non-voluntary." [373]

This is not to say, however, that one should simply generalize from the majority cases. Such generalizations, Husak says, are incompatible with a commitment to preserve the moral autonomy of persons. Deontologists, therefore, are much more likely to oppose CLAUD, as the non-voluntary use of drugs by some is insufficient to warrant the prohibition of drugs amongst those whose use is voluntary. [373]
**Addiction**

A familiar and serious argument in favour of CLAUD is that drug-users, in some cases, run the risk of becoming addicted to the drug. If this is the case, paternalism may be justified, as addiction render drug use non-voluntary. [374-5]

Husak provides three potential interpretations of what it means for a substance to be addictive:

1. If users develop a *tolerance*, requiring progressively greater dosages to produce the same effect.
2. If users afford it a *psychological centrality* relative to their other interests.
3. If users develop *physical dependence*, and undergo withdrawal symptoms when the drug becomes unavailable. [375]

Neither of the first two interpretations is able to support drug prohibition, as neither is sufficient to render drug use as non-voluntary. However, the third interpretation seems to be a stronger case. If the cost of overcoming withdrawal is too high, then it seems that users will be unable to stop taking the drug, and their use will no longer be voluntary. [375]

If we accept this, one obvious conclusion would be that existing drug laws are flawed, as many illegal drugs are, in fact, non-addictive. [376]

There is, however, a problem, which Husak notes with the notion of non-voluntariness resulting from addiction. Non-voluntariness is a criminal defence, yet we do not, currently, accept addiction as a legal defence in cases of drug-use.

> “The fact that the drug use of addicts is deemed voluntary for the purposes of imposing criminal liability should at least give pause to those who would conclude without hesitation that addiction renders drug use non-voluntary, and thus justifies interference.” [376]

In addition, the fact that a substance is addictive, and that addiction can render drug-use non-voluntary, does not, in fact, legitimize CLAUD. Non-voluntariness is a necessary, not sufficient, condition for paternalistic interference. It is possible, Husak thinks, that a rational person could choose to take a drug, knowing that he will become addicted to it. [376-7]

Husak next deals with the comparison that might be drawn between addiction and voluntary slavery. Given that addiction may be “permanent and irrevocable”, it seems that any philosopher who decries the notion of voluntary slavery may also feel strongly about proscribing addictive drugs. He provides four reasons to should that CLAUD in the case of addictive substances is substantially weaker than that for prohibiting voluntary slavery:

1. Unlike slavery, no one becomes addicted to a drug upon using it for the first time. The fact that addiction is a gradual process, leaves much more opportunity to reconsider one’s decisions.
2. Not all users of addictive drugs become addicts.
3. Addiction is almost never continuous or permanent. Many, drug users will eventually abandon their use as they age or their interests change.

4. There is a tendency to exaggerate the pains of withdrawal. Husak quotes Kaplan as noting that heroin addicts, for example, often go through withdrawal and enjoy periods of voluntary or semi-voluntary abstinence. [377-8]

Husak concludes his discussion of autonomy with the following summation:

“Many arguments for CLAUD depend upon controversial empirical assumptions that are seldom explicitly articulated, raise “threshold” questions uncongenial to deontological moral philosophy, and generalize from “worst case” scenarios that fail to conform to the reality of typical drug use. Even if the autonomy principle does not protect a person’s ‘freedom to be unfree’, the fact that a drug is addictive is hardly a decisive reason to embrace CLAUD.” [378]

**Personal Integrity**

In the final section of the paper, Husak considers an alternative to Feinberg’s position, proposed by John Kleinig. Kleinig endorses the ‘Argument from Personal Integrity’:

“Where our conduct or choices place our more permanent, stable, and central projects in jeopardy, and where what comes to expression in this conduct or these choices manifests aspects of our personality that do not rank highly in our constellation of desires, dispositions, etc., benevolent interference will constitute no violation of integrity. Indeed, if anything, it helps to preserve it.” [K: 68]

Husak notes that it is extremely difficult to know what a person’s ‘permanent, stable, and central’ projects or desires are, and that any attempt to interfere on this basis will be at risk of error or abuse. [379] Yet Husak admits that there is something attractive about Kleinig’s view in certain cases, those in which it is fairly certain that a person is working against their own interests and priorities. [380]

There are, however, two difficulties with Kleinig’s view:

1. What kind of general law can be warranted? Husak argues that Kleinig provides no indication or example of legislation his argument would support.
2. The fact that drug-use may interfere with the long-term projects of some individuals does not legitimize prohibiting drug-use amongst those whose projects are unaffected. [380]

Husak concludes that Kleinig’s view does not fare any better than Feinberg’s autonomy-based view. Therefore, unless some advance is made regarding the empirical questions that are raised surrounding the harm of drug use and the thresholds at which such hard warrants paternalistic intervention, Husak concludes that there is little philosophical support for CLAUD.
References


Feinberg, Joel; *Harm to Self* (Oxford University Press, 1986)

Kleinig, John; *Paternalism* (Rowman & Alanheld, 1983)