DOUGLAS HUSAK and PETER DE MARNEFFE:
The Legalization of Drugs
Cambridge University Press. 2005.

reviewed by

Kalle Grill, Royal Institute of Technology, Stockholm
Department of Philosophy and the History of Technology

You come home Friday night all stressed out after a hard day's work. Nothing is planned for Saturday morning and you don't feel like socializing. You decide to roll yourself a joint of marijuana and watch a movie, or perhaps you decide to fix yourself a shot of heroin and skip the movie. Should this be allowed? Why? Why not? If it should not be allowed, what is the appropriate response from society? These are some of the issues under discussion in *The Legalization of Drugs*, co-authored by Douglas Husak and Peter de Marneffe. For this forth book in R.G. Frey's *For and Against* series from Cambridge University Press, Husak has taken on the task of defending legalization and de Marneffe the task of criticising it.[i] The book contains many sound observations about the drug debate and about the actual and possible effects of different drug policies. The main weakness of the book is that both authors employ narrow normative assumptions to support their arguments, assumptions that are not well argued for.

In Husak's clear and helpful introductionary chapter a number of conceptual distinctions are made, including the important one between *decriminalization* – making drug *use* not a criminal offence, and *legalization* – making the *production* and *sale* of drugs not a criminal offence (p. 3). De Marneffe employs these same distinctions, but, as opposed to Husak's "criminalization", prefers the common term "prohibition" for the state of affairs in which drugs are not legalized (p. 110). Though de Marneffe states that prohibition is consistent with decriminalization, it is clear that he believes that some kind of punishment for possession is an essential element of efficient prohibition. As for the object of prohibition – *drugs* – Husak notes that since invoking the current legality of a substance will not do for normative discussion of that very legal status, it is hard to find a definition of drugs that excludes such substances as

caffeine, salt, herbs, and even water, without resorting to plainly *ad hoc* specifications. Should we nonetheless come upon a reasonable definition of drugs, we are immediately faced with the problem of distinguishing between recreational and medical use, as it is only the former that anyone wants to prohibit (though the medical use of typically recreational drugs is sometimes prohibited – on dubious grounds). As Husak points out, this distinction is especially hard to maintain in the current state of wide-spread medicalization of general health problems, including poor sexual performance, light depression and excessive sleepiness (pp. 19-22). In light of these difficulties, it makes perfect sense that both authors for the most part restrict their arguments to specific drugs.

Perhaps somewhat surprisingly, the authors agree that hallucinogenic drugs such as marijuana, LSD and even ecstasy should be legalized (and decriminalized) (pp. 184-85). De Marneffe's only concern is with drugs that are evidently and seriously harmful, such as heroin and alcohol. He finds little merit in the popular "gateway hypothesis" that light drugs such as marijuana function as a gateway into use of more potent drugs such as heroin (pp. 178-80). The main reason for this scepticism is that the widespread use of marijuana in the US has not led to a corresponding use of heroin (45% of US high school students have used marijuana, 1,5% heroin)[ii]. The fact that most heroin users have at some point used marijuana does of course not indicate that the use of marijuana somehow causes heroin use, any more than the fact that most US go players have at some point played chess indicates that playing chess causes go playing. De Marneffe points out that currently marijuana is illegal and so switching to more potent drugs does not involve a step from licit to illicit drugs. Partial legalization and decriminalization would likely lead to greater availability but would also move the boundary between legal and illegal use, thus strengthening the possible deterrent effect of prohibition of potentially harmful drugs.

Less surprisingly, the authors also agree that the current US drug policy is excessive in sentencing large numbers of people to long prison terms. They both note that large scale imprisonment entails a great cost in terms of human suffering. Husak also points to the cost of inducing young people to adopt a life of crime, the physical risks of prison life, the long term effects of lessened employability, and the negative impact on families (p. 29). Husak and De Marneffe provide insightful discussion of a wide range of issues, including the positive effects of drug use in terms

of pleasure and mood control, the possible negative effects on health, the "leakage" of drugs to minors when legal for adults, the possible inherent immorality of drug use, the potential reduction of crime resulting from normal business practices in the distribution of drugs were they legal, and the possibility of making risky drugs such as amphetamine safer if legal. It is a strength of the book that these and other issues are discussed by both authors, making use of the for and against format to present two different views on the same subject matter.

The common ground reached by the partial overlap in focus and by the shared rejection of many traditional myths, confusions and misconceptions of drug use could have allowed for an even more interesting debate. Unfortunately, the mostly sober analysis of the empirical facts and of the bad arguments does not quite carry over to the more difficult task of evaluating the remaining *good* arguments for and against prohibition. Husak with rigor exposes the empirical weaknesses of the case for prohibition, including not only such obvious aspects as the relative harmlessness of illicit drugs in comparison with legal activities such as overeating and recreational sports, but also less obvious aspects such as the faulty assumptions that no drug use equals a healthy lifestyle and that more use of illicit drugs would only add to the total drug use with no substitution effects (pp. 103-4). Husak also thoroughly explains that assuming the neutrality of the status quo or invoking public opinion are bad arguments against decriminalization (pp. 25-28, 32-34). These efforts are perhaps warranted by the deplorable state of the current political drug debate. However, Husak is much less thorough when it comes to defending his own normative assumptions.

Husak insists that prohibition should be evaluated according to how well it coheres with the principle that "[t]he state is never justified in punishing someone unless he or she deserves it." (p. 31) Desert is left unspecified, but presumably refusing to adjust to a scheme that reduces overall harm does not entail desert for punishment. The principle of just punishment is supposed to be inconsistent with using the criminal law to reduce harm: "The (assumed) fact that less harm would be caused by punishing someone does not thereby *justify* the punishment or show that it is *deserved.*" (p. 36, emphasis in original) This position is a clear contradiction of consequentialist justifications for criminal law, including deterrence theories of punishment. Husak provides no argument for this position. Instead, he declares that it is "so obvious that I find it hard to

believe that anyone disagrees with it." (p. 31) It is certainly worthwhile to point out that in contrast to other crimes such as theft or assault, drug use or possession are victim-less crimes, and so an important rationale for punishment is lacking (p. 30). This, however, does not establish that there are no other rationales for punishment. De Marneffe for one believes that the harms to children from using heroin and from heroin abuse by their parents justifies the government to take necessary measures against heroin use, including punishment. In support of his position, de Marneffe reasons that "[s]ometimes the government is justified in imposing criminal penalties for conduct that does not directly wrong or harm anyone because this policy is nonetheless necessary to protect people effectively from harm." (p. 130) This consideration may for example justify prohibiting the "private possession of high-powered military weapons." (p. 130) Husak need not agree, but does himself a disfavour by refraining from even discussing the argument from deterrence, choosing instead to make the case for decriminalization depend on a controversial and vague principle of just punishment.

The rhetorical attack on harm reduction is all the more perplexing in light of the fact that Husak explicitly commits himself to this very principle when turning in his concluding chapter from decriminalization to discussing legalization, proposing that "a harm-reduction framework should be applied to assess questions about commercialization" (p. 99). Presumably, harm reduction is acceptable in this context because the regulation of production and sale raises no questions of justice. If so, this must be either because punishment for sale and production does not have to be deserved, or because sellers and producers do deserve punishment. None of these assumptions are argued for and both seem to contradict the spirit of the argument for decriminalization. Admittedly, producing and selling harmful drugs can harm others, but the risk of harm is voluntarily assumed by the buyer, just as it is in cases of selling unhealthy food or instructing in dangerous sports. Some kind of argument is needed to establish that facilitating the risky behaviour of others deserves to be punished, or is even immoral. Lacking such an argument, it is hard to see how Husak's reasoning on the two matters of decriminalization and legalization is coherent.

De Marneffe, like Husak, delivers thoughtful comments on many issues, but gets entangled in complications when he reaches for a higher order principle to underpin his more common-sense consequentialist claims.

Focusing on the case of heroin, de Marneffe argues that any policy that accepts or leads to heroin use will also lead to substantial heroin *abuse*, simply because of the extreme pleasure involved in using the drug and the resulting tendency of users to become indifferent to their own present and future opportunities as regards other things than continued use. Heroin abuse by adults is in itself a serious problem on any standard account of the good life. However, de Marneffe focuses his argument on the effects of heroin use and abuse on children. Children may suffer both from the negligence of their heroin-using parents, and from their own use (as adolescents) leading to depressed motivation for education and social development (pp. 112-13). De Marneffe recognizes that legalization need not extend to minors, but argues that greater general availability and use will lead to greater opportunities for minors to acquire the drug, and greater temptations to use it. In a worst case scenario depicted by de Marneffe, a child neglected by his heroin-using parents escapes pressing emotional and academic challenges in adolescence by developing his own heroin habits (p. 115). As for the negative effects of prohibition, de Marneffe argues that many of them can be mitigated by greater respect for civil liberties by enforcement agencies, more effective information campaigns about the dangers of overdose, allowing medical use, and implementing a "gradual and proportionate system of penalties" (pp. 119-122).

Having stated the consequentialist case for heroin prohibition, de Marneffe shuns away from outright consequentialism, dropping a few critical remarks on one specific version – hedonistic utilitarianism (pp. 123-24). Rather than simply acknowledging that the exact import of the consequentialist arguments depends on one's general moral outlook, de Marneffe attempts to defend a full-fledged contractualist moral theory, according to which "the risk of lost opportunities that some individuals would bear as the result of heroin legalization justifies the risks of criminal liability and other burdens that heroin prohibition imposes on other individuals." (p. 124) It is not quite clear where this justification comes from, especially since de Marneffe frequently invokes the idea of people having reasons to prefer one situation or other as a primitive, unexplained normative notion. While "individuals" is put in the plural in the just quoted passage and elsewhere, de Marneffe claims that his account is non-aggregative. The central claim is that "the worst risk to *some individual* under heroin legalization is worse than the worst risk to *some individual* under prohibition" (p. 125, emphasis added). Presumably then, we

are to be concerned with single individuals and the expected value for them resulting from different policies, as measured in terms of opportunities. The thesis might be that a government policy is justified if and only if it improves the prospects of the worst of individual without making any other individual even worse off. Alternatively, the thesis might be that a policy is justified if and only if the improvement of the prospects of some one individual resulting from the policy is greater than the improvement of the prospects of any other individual resulting from any alternative policy. Either way, the theory is extreme in its disregard for aggregate outcome. Should prohibition lead to great suffering and loss of opportunity in the aggregate (from punishment and impure drugs for example), this has no bearing on the justifiability of prohibition. De Marneffe calls his theory individualistic, but this is an individualism that ignores the interests of all individuals except one. It is not clear why we should accept this theory, or why it is less problematic than consequentialism. It is also unclear how this theory is to be applied, since someone is certain to suffer a great loss and someone to gain a lot, whichever policy is adopted. How do we compare the risks of a life destroyed by heroin to the risks of a life destroyed by prison? Do we focus exclusively on probability? If so, why does a slight difference in probability of loss or gain for one person outweigh the losses or gains of a great number of people? In sum, de Marneffe's contractualist theory does little to add to the force of his argument for prohibition.

There are certainly worthwhile topics that are not covered in the book and that could have been given more room at the expense of explaining and applying principles. For example, it would have been interesting if the authors had extended their thoughtful discussion of the pros and cons of prohibition to the more constructive investigation of how drug policy could be designed to best protect de Marneffe's neglected heroin-using adolescent, without sending either him or Husak's well-adjusted drug users to prison. Could, for example, the sale of now illicit drugs be restricted to government controlled stores open 8-10 Monday mornings and serving only sober customers? Could perhaps the sale of tobacco be restricted to the same stores? What would be the benefits and drawbacks of such a design? De Marneffe assumes without argument that if drugs were to be legalized, they would be sold in stores and marketed just like alcohol and tobacco are now (p. 111, p. 115). Husak is more open-minded in this regard, but limits himself to suggesting that different kinds of

legalizations should be tried out in order to collect more empirical data (p. 105).

Husak does not in this book consider whether drug prohibition is paternalistic and potentially problematic on that account, though he has done so elsewhere.[iii] De Marneffe, however, provides a clarifying account of to what extent prohibition is in harmony with classical liberal principles. He reasonably claims that prohibition is neither *moralistic* nor *perfectionist*, since the reason for prohibition is to protect adequate opportunities, a neutral liberal good (pp. 132-39). Prohibition is, however, *paternalistic*, in that it limits the liberty of individuals for their own good (p. 139). De Marneffe refreshingly does not assume that paternalistic policies are automatically illegitimate or wrong, even prima facie. Instead, he proposes that limiting a person's liberty is justified if the person is better off that way, or in his terminology if "the good reasons there are for this person to prefer her situation when her liberty is limited in this way outweighs the good reasons there are for her to prefer her situation when her liberty is not limited in this way" (p. 141).[iv]

De Marneffe takes the strongest argument against paternalism to be the fact that people generally can control whether or not they themselves act to promote or demote their well-being (as opposed to whether or not others do so), and so most often do not have strong reasons to prefer paternalistic interference. Adding to this, there is the positive value of autonomy or self-direction. De Marneffe seems to concede that, in light of these arguments, it may be that paternalism directed towards mature adults is always undesirable, all things considered (p. 142-45). This does not affect his argument for heroin prohibition, since the people who benefit the most from prohibition are not mature adults, but rather adolescents, whose ability to promote their own good is supposedly weaker and whose self-direction is supposedly less important.

De Marneffe notes that the anti-paternalist argument from control is weakened by the fact that potent drugs such as heroin are often addictive. Even so, he does not think that the benefits for mature adults justifies prohibition. The different rationales provided by benefits to adults and benefits to children are kept strictly separate from each other. Prohibition is said to be "unjustifiable by its benefits to fully mature adults even though it is justifiable by its benefits to young people." (p. 153) In considering possible rationales on a one by one basis, de Marneffe adopts the standard idea that paternalistic policy should be evaluated according to what is the

main or true reason for the policy.[v] While common, this is a strange way to evaluate policy. It would seem that the benefits of prohibition for mature adults could provide a *contributory reason* for prohibition, even if it does not in itself provide a *sufficient reason*.[vi] De Marneffe does not help himself to this argument for prohibition, perhaps because of his commitment to the individualistic theory for policy evaluation.

   The Legalization of Drugs is a good example of how philosophical method, rigor and open-mindedness can be excellent tools for clarifying important policy issues. It is also an example of how philosophical fascination with abstract moral principles and ambition to provide all-encompassing frameworks can disrupt such projects and confuse the subject matter. One may wonder whether applied ethics is at its best when it avoids philosophy proper. This may be too radical. Concern with undeserved punishment and concern with the effects of legalization and decriminalization for the most unfortunate are both perfectly valid in the context of drug policy, and should be expressed and analyzed. However, such work is more fruitful when performed in an open-ended way, without commitment to narrow normative assumptions.

---

[i] Husak's contribution is essentially a refinement of his recent argument for decriminalization in *Legalize This! the case for decriminalizing drugs*, London: Verso 2002.

[ii] According to the US National Institute of Drug Abuse.

[iii] "Recreational Drugs and Paternalism", *Law and Philosophy* 8 (1989), pp. 353-381.

[iv] De Marneffe has refined his position on paternalism in "Avoiding Paternalism", *Philosophy and Public Affairs* 34(1) (2006), pp. 68-94.

[v] See for example Joel Feinberg, *Harm to Self*, Oxford: Oxford University Press 1986, pp. 16-23.

[vi] This is in fact pointed out by Husak in "Recreational Drugs and Paternalism", p. 359.