

## Is There Too Much Criminal Law?

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DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (Oxford Univ. Press 2008)

Is there too much criminal law? Are there too many overlapping criminal statutes, covering too much conduct, resulting in sentences that are too long? Douglas Husak says yes, and in this splendid book offers an original and persuasive explanation for why that is so.

His argument for a “minimalist” conception of criminal law takes an elegant form. Chapters 2 and 3, which contain Husak’s theory as to what kind of conduct can legitimately be subject to criminal sanctions, comprise the heart of the book: Chapter 2 considers what he calls his “internal constraints” on criminalization, those derived from within the criminal law itself, while Chapter 3 offers a discussion of what he calls “external constraints,” those that depend on a “normative theory imported from outside the criminal law itself.” (P. 55.) The first and last chapters function as bookends for the argument in the middle: Chapter 1 consists of a freestanding indictment of our bloated, overextended system of criminal justice, while Chapter 4 offers a critique of several alternative theories of criminalization: law and economics, utilitarianism, and legal moralism.

There is so much in this book that is smart and insightful that one is tempted just to sit back and admire it. That would probably not make for a very interesting review, however. Although I will highlight a few aspects of the book that seem to me particularly successful (including Husak’s potent critique of the law-and-economics approach to criminalization), my main focus will be on those areas where I see fault in his intricate argument. My criticisms center for the most part on formal rather than substantive aspects of his theory—not on the conclusions that he draws, most of which I agree with—but rather on the path that he takes to those conclusions. In particular, I take issue with the notion that the first four normative constraints on criminalization that he identifies—even if they are the right ones—can properly be found within the contours of criminal law itself. In addition, I offer several possible revisions to his theory (two constraints that seem to me redundant, another that might have been included but was not) and consider quibbles on several further points.

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## I. SETTING THE STAGE

Husak begins his analysis, in Chapter 1, with a powerful critique of the overcriminalization phenomenon. Piling detail on top of detail, Brandeis-Brief-style, he paints a vivid picture of an American criminal justice system bursting at the seams: A large number of new, broadly reaching, and often overlapping criminal offense provisions have been enacted; police, prosecutorial, judicial, and prison resources have been squandered; and harsh new sentences have been authorized and imposed, impacting not only those who are convicted of crimes but also their families and communities. Arguing that we have “too much punishment” in the sense of both too many crimes and punishment that is disproportionate to the acts committed, he describes a range of doctrinal developments that have contributed to this surfeit of criminalization: outrageously broad conspiracy laws; the increased use of strict liability; newly minted drug, juvenile, white collar, and intellectual property offenses; and a plea bargaining regime that favors the prosecution at every turn. (P. 3.)

This is clearly a subject about which Husak feels passionate, and that passion comes through in his prose. He has, he says, “tried to maintain a sober and academic tone in describing this sorry state of affairs. Still, [he] can barely conceal [his] outrage about what [he] believe[s] to be an injustice of monstrous proportions.” (P. vii.) The unusual combination of philosophical rigor and adversarial zeal makes for a good read.

Indeed, the basic structure of the book reveals Husak to be something of an intellectual risk-taker. One would have expected that the question of overcriminalization would be addressed only after a theory of *criminalization* had been developed first. Analytically, this would have been the safe approach. But it would also have made for a less engaging book. Husak jump starts his analysis with a “presumptive and intuitive” case for his thesis that our system is overcriminalized. (P. 3.) In my view, his gamble pays off. By beginning his discussion in the real world of facts and figures rather than in philosophical speculation, he breathes life into what might have been a dry subject and allows the reader to see why the analysis that follows actually matters.

## II. LOOKING FOR CONSTRAINTS WITHIN THE CRIMINAL LAW

Having set the stage with his presumptive case for overcriminalization in Chapter 1, Husak then turns in Chapters 2 and 3 to the core of the book, a normative theory to distinguish those uses of the criminal law that are justified from those that are not. Such a theory is necessary, Husak says, because “[t]he criminal sanction is the most powerful weapon in the state arsenal; the government can do nothing worse to its citizens than to punish them.” (P. 95.) It is here that most of the theoretical heavy lifting occurs.

The theory consists of seven basic limitations on the criminal law. As noted, he claims that the first four are “internal” to the criminal law in the sense that they

can be derived from within “the general part of criminal law, and from reflection about the nature and justification of punishment. (P. 103.) Any “adequate theory of criminalization,” he says, “must include” these constraints. (Id.)

The first of the internal constraints is the idea that criminal liability should not be imposed unless statutes are designed to prohibit a “nontrivial harm or evil.” (P. 66.) I agree with Husak that the requirement of harm should be regarded as the first principle of criminalization. I disagree with him, however, about the proper source of this principle.

According to Husak, several familiar defenses in criminal law—necessity or lesser evils, consent, and *de minimis*—are “unintelligible unless criminal offenses are designed to proscribe a nontrivial harm or evil.”<sup>1</sup> (P. 66.) “None of these three . . . defenses,” he says, “can be interpreted or applied unless each penal statute is designed to prevent a nontrivial harm or evil.” (P. 67.) Put another way, I understand Husak to be asserting that the existence of such defenses *presupposes* the existence of a nontrivial harm constraint.

The connection that Husak draws between the criminalization question and these “general part” doctrines is ingenious and insightful. It provides him with the opportunity to reflect on a whole host of significant issues in criminal law theory. And he is no doubt right that there are interesting parallels between the principles of criminalization and criminal law doctrine. I am not persuaded, however, that reference to criminal law doctrine can *establish* a principle of criminalization. Conceptually, the question of what kinds of conduct should be subject to criminal sanctions properly precedes the question of how various criminal law doctrines found in the general part should be formulated. Ultimately, Husak seems to be attempting to extract an *ought* from an *is*. Current criminal law justification doctrines may well presuppose a nontrivial harm constraint, but that hardly means that the nontrivial harm constraint is correct or justified. In my view, any justification for criminalization must come from some principle *outside* the criminal law, from an independent principle of justice.

Ironically, Husak’s own account demonstrates exactly why the criminalization question ought to precede the substantive criminal law question. Assuming that our positive criminal law is as misguidedly overcriminalized as Husak says it is, there is no reason to think that our legislatures and courts will have done any better a job of creating a just general part. Husak is too careful a scholar not to recognize this problem. He acknowledges the “tension in claiming that we can extract normatively defensible constraints on criminalization from a system of criminal law that has serious normative deficiencies.” (P. 76.) Unfortunately, there isn’t much that can be done to relieve the tension. In my view, the attempt to draw

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<sup>1</sup> Husak seems to be using the term “harm or evil” rather than just “harm” to refer not only to conduct that causes wrongful setbacks to the interests of others (in Joel Feinberg’s phrase) but also to conduct that *risks* causing setbacks to interest. See (pp. 70–71) (quoting JOEL FEINBERG, *HARMLESS WRONGDOING: THE MORAL LIMITS OF THE CRIMINAL LAW* (1988)). It is unclear whether Husak would also allow criminalization of acts that cause harms to *self* or *offense* to others.

foundational principles from the positive law, rather than from fundamental external principles of justice, is essentially a non-starter.

A similar problem of putting the conceptual cart before the horse undermines Husak's account of his second constraint on criminalization, namely, that penal liability not be imposed unless the defendant's conduct is wrongful. Here, Husak draws interesting connections to a collection of excuse defenses. Drawing on the work of Jeremy Horder,<sup>2</sup> he argues that legal excuses (such as insanity or intoxication) "can be understood only against a background of criminal wrongdoing: If the defendant is not guilty of wrongdoing, there is nothing to excuse." (P. 72.)

As in the case of the nontrivial harm principle, I agree with Husak that conduct that is not wrongful should not be subject to criminal sanctions.<sup>3</sup> Once again, however, I do not believe that those principles can be derived from the substance of criminal law itself. As before, I think they must come from external sources, such as Mill's or Feinberg's wrongful harm principles.<sup>4</sup>

My main problem with Husak's third principle—the idea that "punishment is justified only when and to the extent it is deserved" (P. 82)—is whether it should even properly be regarded as a constraint on criminalization. More precisely, I am not convinced that the desert constraint necessarily adds anything to his theory of criminalization not already covered by his principles of nontrivial harm and wrongfulness.

There are three different senses in which Husak talks about the desert constraint. One is simply the idea that an actor, in order to be held criminally liable, should not have an excuse defense, such as insanity or intoxication. This constraint makes sense but seems already to have been covered by his wrongfulness constraint, which, as noted, references Horder's account of excuses. As such, inclusion of this additional constraint would seem to violate the demands of Occam's Razor.

Husak also uses the desert constraint to introduce into his analysis the idea that the conduct criminalized must somehow implicate the interests of the public at large and not merely those of individuals. As Husak puts it, "not all wrongdoing makes persons eligible for punishment imposed by the state. *Private* wrongdoing . . . does not render persons deserving of state punishment." (P. 83.) I certainly have no quarrel with this point. But I do not understand why it is not enough, following the work of Antony Duff and Sandra Marshall,<sup>5</sup> simply to incorporate

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<sup>2</sup> See generally JEREMY HORDER, *EXCUSING CRIME* (2004).

<sup>3</sup> My own account of wrongfulness in the criminal law can be found in STUART P. GREEN, *LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME* 39–46 (2006).

<sup>4</sup> See generally FEINBERG, *supra* note 1; JOHN STUART MILL, *ON LIBERTY* (Edward Alexander ed., 1999) (1859).

<sup>5</sup> See generally R. A. DUFF, *ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW* (2007); S. E. Marshall & R. A. Duff, *Criminalization and Sharing Wrongs*, 11 *CAN. J. L. & JURIS.* 7 (1998).

the notion of “publicness” into the concept of harm. Under this approach, Husak’s nontrivial harm or evil constraint would be rewritten to specify that criminal liability should not be imposed unless statutes are designed to prohibit a nontrivial harm or evil *that affects or implicates the public interest*. My criticism here, once again, is formal rather than substantive.

A similar formalistic problem bedevils a third aspect of Husak’s desert constraint. According to Husak, “punishments may be undeserved when they are excessive. The desert constraint underlies the principle of proportionality. . . .” (P. 83.) In other words, Husak seems to be saying that a theory of criminalization should take into account not simply *whether* given conduct should be subject to criminal sanctions, but also the *extent* of those sanctions. Once again, I am in full agreement with him on this point. But I am not convinced that the “amount of punishment” question is not also covered by the wrongfulness and harmfulness constraints. In general, I would think that the more wrongful and harmful a given type of act, the greater the amount of punishment it deserves.

The inclusion of the desert constraint highlights a deeper ambiguity in Husak’s theory. Most of the time he is focused on whether a legislature should authorize criminal penalties with respect to a certain kind of conduct—a crime type. His theory is thus characterized as a “decision procedure for justifying criminal *laws*.” (P. 55 n.3, emphasis altered.) Other times, however, he seems concerned with whether a prosecutor or judge or jury should apply criminal penalties to a specific defendant in a particular case, a crime token. Thus we have the inclusion of the desert constraint.

The two inquiries are related, of course, but they are nevertheless distinct. Legislatures are obliged to consider, prospectively, the extent to which certain kinds of harm and wrong are associated with certain types of conduct in the usual or typical case. They do not concern themselves with whether there might be excuses that diminish the desert of individual defendants in individual cases. That is precisely the sort of thing that prosecutors, judges, and juries look at, however. On the other hand, prosecutors and judges need not typically make judgments about whether an act is sufficiently harmful or wrongful to justify criminal penalties of a certain severity; that judgment has already been made for them by the legislature. Thus, there are some elements of the criminalization inquiry that are relevant to legislatures, but not to prosecutors, judges, and juries, and other elements that are relevant to prosecutors, judges, and juries, but not to legislatures. As far as I can tell, Husak’s account seems to conflate these two distinct sets of decision procedure into one.

I am more impressed by Husak’s fourth internal constraint, which he calls the burden of proof constraint. This constraint is framed as follows: “Because punishments implicate and potentially violate important rights—the right not to be deliberately subjected to hard treatment and censure by the state—the burden of proof should be placed on those who favor criminal legislation.” (P. 100.) In explaining exactly what he has in mind here, Husak offers a helpful and typically engaging example:

Suppose the state decides to curb the problem of obesity by criminalizing the consumption of doughnuts. If we assume that the liberty to eat doughnuts is not especially valuable, the state should need only a minimal reason to dissuade persons from doing so. Clearly, the fact that doughnuts are unhealthy provides such a reason. This reason might justify *noncriminal* means to discourage consumption—increased taxation, bans on advertising, educational programs, and the like. But the interests implicated by a *criminal* law against eating doughnuts are much more significant. Persons not only have an interest in eating doughnuts but also have an interest in not being punished if and when they disregard the proscription. This latter interest is far more important than the former, and qualifies as a right. (Pp. 101–02.)

As an element in the criminalization decision procedure, this seems to me a helpful addition. In deciding whether to criminalize particular kinds of conduct, legislatures should consider not simply whether they are harmful and wrongful, and therefore worthy of proscription, but also exactly what it would mean to back up such proscriptions by means of liberty-infringing criminal sanctions.

### III. LOOKING FOR CONSTRAINTS OUTSIDE THE CRIMINAL LAW

Chapter 3 offers a second set of constraints to supplement the first. These constraints derive from what Husak acknowledges is an admittedly controversial political theory about the conditions that “must be satisfied in order to justify infringements of the right not to be punished.” (P. 120.) Here, in appealing to considerations outside the body of criminal law itself, I believe Husak’s theory is on generally firmer footing than in Chapter 2.

Husak argues, first, that before a legislature can enact a penal statute, it must identify a substantial, and legitimate, state interest. The concern here is, as he acknowledges, “closely related” to the question raised by the harm or evil constraint. (Pp. 132–33.) But the focus is somewhat different. Much of the discussion here concerns whether the harms and wrongs caused by the putatively criminal act are the proper concern of the public. For example, everyone can agree that the state has a legitimate interest in preventing physical harms (such as those found in murder, rape, and assault), preventing forced transfers of property rights (such as those found in theft), and, perhaps more controversially, enforcing solutions to coordination (or collective action) problems. The harder issue is whether the state has a legitimate and substantial interest in expressing its disapproval of such kinds of conduct. This question, of course, lies at the core of punishment theory.

In this connection, Husak gives us an interesting account of the Supreme Court case of *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.<sup>6</sup>

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<sup>6</sup> 478 U.S. 328 (1986).

(P. 142.) The case involved a First Amendment challenge to a Puerto Rico statute that prohibited casino gambling-related advertising when aimed at locals but allowed it when aimed at tourists. In upholding the constitutionality of the statute, Husak says, the majority simply deferred to what it imagined to be the objectives of the legislation, making no serious effort to assess whether the state had a genuinely substantial interest in enacting the law. (P. 143.) His theory shows why such an approach is unacceptable. As he explains:

A minimalist theory of criminalization places the burden on the state to defend penal legislation. We must do our best to identify the real objective of the legislature, assessing the accuracy of our description by examining the degree of fit between means and ends. Only then can we determine whether this interest is sufficiently important to qualify as substantial and thus capable of overriding the right not to be punished. (P. 144.)

Husak then turns to the second of his external constraints: not only must we determine whether a particular statute serves a substantial state interest, we must also ask “whether the law directly advances that interest.” (P.145.) Speaking of the demand for empirical evidence that the legislative purpose will actually be served, Husak says, “[i]t is hard to think of a single innovation that would have a more profound impact on the phenomenon of overcriminalization. At the present time, persons may be subjected to hard treatment and censure, despite the complete lack of evidence that the statute in question will attain its objective.” (P.145.)

Here again the strength of Husak’s analysis, and much of the interest of the book, lie in his willingness to apply his theory to complex questions of public policy. Husak is particularly masterful in discussing the almost complete lack of evidence that drug laws advance their stated purpose—presumably, deterring citizens from using illicit drugs. He draws on his encyclopedic knowledge of the literature in this area to explain why such proscriptions likely fail to achieve such a goal. (P. 147.) For example, he explains that, in enacting drug laws, legislatures fail to take into account the extent to which prohibitions on certain drugs will: cause users to switch to other drugs (the substitution effect); make the use of certain drugs more attractive to certain users (the forbidden fruit effect); and, through incarceration, exacerbate the criminogenic tendencies of those who would otherwise be short-term users. (Pp. 147–48.)

Finally, Husak offers the third of his external constraints—namely, that the challenged offense be no more extensive than necessary to achieve its stated purpose. (P. 153.) Under this rule, the state must consider the possibility of alternative means of achieving its statutory purpose and must determine that there is no equally effective alternative that is less extensive than the statute in question. Among the concerns that Husak raises here is that criminalization might be overinclusive—that it might apply to conduct that does not actually cause, or risk, the harm or evil that the law is meant to proscribe. As he explains, offenses of risk

prevention, especially those involving proscriptions of drugs and guns, are particularly vulnerable to such a charge. (P. 154.)

Despite Husak's ambitious attempt to develop a comprehensive set of constraints on criminalization, there is at least one factor that finds its way only partially, and then not explicitly, into his theory. I have in mind the *costs* of criminalization. A proposed criminal statute might directly advance a substantial state interest and be no more extensive than necessary to achieve such purpose, and yet its costs might still outweigh its benefits. Certainly the enactment of overinclusive legislation, and the consequent effect of chilling socially beneficial, or at least socially neutral, conduct counts as costs of criminalization. But there are other costs as well, less explicitly acknowledged. All forms of criminalization entail costs in terms of investigation, prosecution, adjudication, and punishment.<sup>7</sup> Sometimes these costs are direct, such as paying salaries to police, prosecutors, public defenders, judges, prison guards, and probation officers. Other times they are indirect, such as when family members suffer because a parent or spouse is in prison, or when an offender has difficulty finding a job after release from prison.<sup>8</sup> But the costs of criminalization also vary from crime to crime. For example, given the unusually heavy costs of prosecuting crimes such as welfare fraud, which fall mainly on the poor, we might decide that such legislation is not worth whatever benefits it might entail. As a result, we might decide to decriminalize.

#### IV. COMPETING ACCOUNTS OF CRIMINALIZATION

Having developed his own theory of criminalization in the middle chapters, Husak then offers, in the final chapter, a critique of several alternative theories of criminalization: law and economics ("L&E"), utilitarianism, and legal moralism. My focus here will be on the first of these alternative theories.

L&E scholars like Richard Posner claim that "[t]he major function of criminal law in a capitalist society is to prevent people from bypassing the system of voluntary, compensated exchange—the 'market,' explicit or implicit—in situations where . . . the market is a more efficient method of allocating resources than forced exchange."<sup>9</sup> Given detection, apprehension, and conviction rates of considerably

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<sup>7</sup> See generally Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323 (2004).

<sup>8</sup> Regarding indirect costs of criminalization, such as stress on families, single parents, stigma, harm to family dynamics, diminished earning potential, increased juvenile delinquency, and increased risk of abuse, see generally INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Maurer & Meda Chesney-Lind eds., 2002); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, in PRISONS 121 (Michael Tonry & Joan Petersilia eds., 1999).

<sup>9</sup> See P. 181 (quoting Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985)). Perhaps the first scholar to offer an economic theory of crimes was Gary S. Becker, in *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). Becker's main focus was on the optimal level of criminal enforcement.

less than one hundred percent, simply requiring a defendant to compensate the victim for his loss after it has occurred is normally inadequate to serve as a deterrent. We need, in Posner's words, "to impose additional costs on unlawful conduct where the conventional damages remedy alone would be insufficient to limit that conduct to the efficient level."<sup>10</sup> Guido Calabresi and Douglas Melamed called these supra-ordinary sanctions "kicker[s]."<sup>11</sup> In the context of criminal law, we call such kickers "punishment."

Husak is highly critical of the L&E approach. Like other retributivist theorists,<sup>12</sup> he points out the pointlessness of postulating an "implicit market" that is "bypassed" when offenders intentionally murder or rape one another. (P. 184.) And he focuses on the inability of L&E to explain the singular role played by the concepts of culpability and blame in criminal law. He demonstrates the inability of L&E to explain, for example, why criminal law systems universally punish murder more severely than manslaughter and manslaughter more severely than negligent homicide. There is certainly no reason to assume that intentional homicide necessarily requires more deterrence than unintentional homicide. The reason we punish intentional homicide more severely than unintentional homicide is simply that the former is the more culpable act and therefore *deserves* more punishment than the latter.

Husak does not stop with what has become the standard retributivist critique of the L&E approach, however. He develops an argument that takes on L&E on its own turf. If there is any set of criminal offenses for which the L&E approach might make some sense, it is surely acquisitive offenses like theft and fraud. Unlike those who kill in a heat of passion, many thieves probably do make calculations about the costs and benefits of their conduct. Yet Husak offers a sophisticated argument showing why, even in the context of theft, the L&E approach is deeply flawed. (P. 183.)

First, he argues that, if promoting efficiency were the sole aim of the criminal law, it is hard to see why we would want to criminalize cases in which the thief values the good stolen more than its owner. (Id.) On their face, such transactions would seem to be efficient. For example, a poor person without other means of transportation may well be able to make better use of a wealthy person's rarely-driven "backup" vehicle than the wealthy person himself. The transfer of such property, even when involuntary, would seem to reflect a net social benefit. And this is true even in situations that would not be recognized by the defense of necessity or choice of evils.<sup>13</sup> L&E scholars respond that such thefts are not in fact

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<sup>10</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 164 (1977).

<sup>11</sup> Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1126 (1972).

<sup>12</sup> See, e.g., Claire Finkelstein, *The Inefficiency of Mens Rea*, 88 CAL. L. REV. 895 (2000).

<sup>13</sup> The classic case involves *D*, a hiker, stranded in a snowstorm, hungry, cold, and without food or shelter to sustain himself, who breaks into an empty ski lodge and consumes various canned goods and uses firewood. Even if the hiker never reimburses the owner for his loss, there has still been a net gain in terms of social utility. The ski lodge owner uses his property only when he is on

efficient because of “secondary” costs, such as the costs of security and of avoiding victimization.<sup>14</sup> But Husak calls them at their bluff, pointing out that such claims are nothing more than *ipse dixit*, an “article of faith.” (P. 183.)

Second, Husak argues that the idea that the function of criminal law is to protect markets is one that seems to apply only, or at least primarily, in capitalist societies, and that the task of justifying the criminal law is “no less onerous when economic activity is controlled by the state.” (P. 184.) He points out the peculiarity of supposing that “the basic principles of criminalization will differ radically depending on the fundamentals of political economy.” (Id.)

Finally, he takes issue with Posner’s qualification of the L&E theory to the effect that coercive transfers of wealth are inefficient only when they are “pure.” (Id.) According to Posner, a transfer of wealth is pure only when it is “not an incident of a productive act.”<sup>15</sup> In response, Husak points out, quite rightly, that plenty of lawful business activity involves transfers of wealth that are involuntary from the standpoint of the losers, and that Posner never offers a satisfactory account of how to distinguish such transfers from the illegal ones. (P. 184.)

Husak’s critique of the L&E approach to criminal law seems to me a powerful one. Clearly, any account that focuses single-mindedly on the goal of efficiency will be inadequate to explain or justify the complexities of the criminal law. However, the choice need not be between focusing exclusively on costs and benefits (as the economists would have it) and ignoring them entirely (as retributivists like Husak would do). Economic analysis, and particularly the idea of punishment as a kicker, can at least provide a useful element in a hybrid theory of criminal law, one which takes account not only of retributive aims, but of deterrent ones as well.

## V. THREE QUIBBLES

In an argument as sustained and complex as Husak’s, there are bound to be points with which a reader will want to quibble. I offer three such quibbles here.

First is Husak’s claim that the “absence of a viable account of criminalization constitutes the single most glaring failure of penal theory as it has developed on both sides of the Atlantic.” (P. 58.) While I agree with him that the rationale for criminalization has often been neglected in the literature on criminal law theory, particularly in comparison to the rationale for punishment, I am nevertheless puzzled by his statement. What is arguably the single most significant work in Anglo-American criminal law theory in the last half century—namely, Joel

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vacation. He can easily replace the goods lost without any significant reduction in his standard of living. The goods made it possible for *D* to prevent death or serious illness.

<sup>14</sup> See Fred S. McChesney, *Boxed In: Economists and Benefits from Crime*, 13 INT’L REV. OF L. & ECON. 225 (1993); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967).

<sup>15</sup> Posner, *supra* note 9, at 1196.

Feinberg's *Moral Limits of the Criminal Law*<sup>16</sup>—is a work that focuses explicitly on the criminalization question. Husak is hardly unaware of Feinberg's contribution; he cites Feinberg as much or more than any other scholar in the field and explicitly acknowledges his debt to his methodology. (P. x.) So how can Husak say that there exists no viable account of criminalization? Presumably, Husak does not regard Feinberg's theory as a true theory of criminalization. He may be right, but he never really explains why this is so. In addition, he fails to give sufficient attention to Jonathan Schonsheck's earlier full-length study of the subject, entitled *On Criminalization*.<sup>17</sup>

A second quibble is as follows: in his discussion of the amount of criminal law on the books, Husak cites one "theorist" who estimates that there are approximately 300,000 federal regulations enforceable through civil or criminal sanctions.<sup>18</sup> (P. 10 n.24.) Although there is some ambiguity about exactly what is meant by federal "regulation," the estimate is by almost any measure baldly overstated. Two more recent, systematic, and likely accurate estimates suggest that the number of federal criminal offenses is somewhere in the neighborhood of three or four thousand.<sup>19</sup>

My final quibble involves Husak's discussion of my own work. Husak seeks to show how his theory of internal constraints—requiring harm, wrongdoing, and desert—would apply to the category of offenses known as *mala prohibita*. He takes issue with my attempt to show that punishment may be deserved when persons commit crimes of this type. (P. 117.) He focuses in particular on my claim that tavern owners who violate a local ordinance that prohibits Sunday alcohol sales act wrongfully because they obtain an unfair advantage over those tavern owners who comply with the ordinance—and thereby cheat.<sup>20</sup> Husak asks:

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<sup>16</sup> Feinberg's monumental effort comprises four volumes: HARM TO OTHERS, *supra* note 1; OFFENSE TO OTHERS (1985); HARM TO SELF (1986); and HARMLESS WRONGDOING (1988).

<sup>17</sup> JONATHAN SCHONSHECK, ON CRIMINALIZATION: AN ESSAY IN THE PHILOSOPHY OF THE CRIMINAL LAW (1994).

<sup>18</sup> The source of the estimate seems to have been as follows: A prominent white collar criminal defense lawyer named Stanley Arkin made the estimate in remarks at a conference on white collar crime held at George Mason University in October 1990. Arkin's estimate was reported in an article by another practitioner who was present at the conference. See Thomas B. Leary, *The Commission's New Option That Favors Judicial Discretion in Corporate Sentencing*, 3 FED. SENT'G REP. 142, 144 n.10 (1990). Leary's article, in turn, was referred to by Professor John Coffee, in his oft-cited article, John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 n.94 (1991).

<sup>19</sup> See JOHN S. BAKER, JR., THE FEDERALIST SOC'Y FOR LAW & PUB. POL'Y STUD., MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION (2004), available at [http://www.fed-soc.org/doclib/20070404\\_crimreportfinal.pdf](http://www.fed-soc.org/doclib/20070404_crimreportfinal.pdf); TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW (James A. Strazzella rpt., 1998).

<sup>20</sup> Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1589–90 (1997).

[W]hy do their profits not simply represent the fruits of capitalistic competition; what is the basis for describing the advantage gained by those establishments that sell alcohol on Sunday as an “unfair” case of “cheating”? Green’s account may explain the wrongfulness of a few offenses, such as paying subminimum wages to employees. But the particular example of the *malum prohibitum* regulation he selects probably has less to do with fair competition than with an attempt to enforce religious morality. Persons who break this law are not free riders who exploit a system of mutual forbearance by taking a privilege they withhold from others who are similarly situated. Again, they would allow (even though they would not prefer) all taverns to sell alcohol on Sundays. (Pp. 117–18.)

I believe that Husak misunderstands my point. It is not that Sunday closing laws are *intended* to ensure fair competition. My point is rather that one who fails to comply with such laws, when his competitors do comply, *prima facie* engages in unfair competition. From a moral perspective, the precise content of the rule is essentially irrelevant, the way it is in football, which requires ten yards for a first down. Ten yards may or may not be the rule that best furthers the underlying goals of athletic prowess and spectator enjoyment, but it *is* the rule, and violating it (say, by moving the ball after the whistle has blown) constitutes cheating. Provided that the rule itself does not unfairly promote the interests of one individual or group over others,<sup>21</sup> I see no problem in saying that violation of such a rule constitutes a moral wrong.

## VI. CONCLUSION

There is so much in this book that is smart and well-informed and reasonable that one feels churlish to focus on the negative. Such, however, is the nature of book reviews. I have focused on a number of points at which I believe Husak loses his otherwise sure footing, particularly in his central case for constraining criminalization. Such focus should not be understood as diminishing the importance of his achievement.

Some scholars make their mark as counter-punchers, criticizing the views of others and offering incremental changes to existing theory. Husak is as good as anyone at critique. But this book offers much more. He has taken on as big and as important a set of issues as there is in the philosophy of criminal law and has developed a lucid, closely argued, and highly original theoretical approach to their

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<sup>21</sup> Admittedly, the violation of Sunday closing laws was probably not the best example of a reasonable *malum prohibitum* offense. Imagine an industry in which the norm is staying open for business six days a week. If one were an observant Jew or Seventh Day Adventist, and therefore prohibited from working on Saturdays, one would, in fact, be unfairly disadvantaged by a law that prohibited opening on Sundays since one would be able to compete only on the other five days of the week.

resolution. The book stands as a significant milestone in an already distinguished career.