Douglas Husak, Overcriminalization. The Limits of the Criminal Law


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Overcriminalization is an ambitious book. It not only offers a description of the current sorry state of affairs of the criminal law in the United States and a persuasive explanation of the wrongness of this condition (Chap. 1), but it also develops the foundations of a normative theory of criminalisation that may retard this situation (Chaps. 2 and 3) and discusses why this account fares better than alternative theories (Chap. 4). There is too much criminal law and philosophers have not said much about it. Douglas Husak’s excellent book begins to remedy this.

Husak’s book opens with a convincing discussion of the phenomenon of overcriminalisation and the problems related to it. Husak exposes with clarity how a system characterised by overcriminalisation puts at stake basic principles of the rule of law by making people unaware of what types of conduct are criminally proscribed; precluding them from having adequate notice of some of their legal obligations; and, ultimately, by undermining one of the main goals of the system of law, namely, to guide people’s behaviour (p. 11). Overcriminalisation also breaks principles of legality by making the criminal law outsource from non-criminal branches of the law (p. 13), which runs the serious risk of making the criminal law even less intelligible for the layperson and making its limits dependent on the limits of spheres of law that are beyond its proper domain. Despite these and other reasons to be worried about overcriminalisation, Husak emphasises—guided by “the peculiar American penal context” (p. 14)—that the principal reason to be troubled by having too much criminal law is that it produces too much punishment. That is the most urgent source of injustice on which the book focuses.

A pertinent question, then, is how it is that too much criminal law produces too much punishment. The beginning of the explanation is obvious: more criminal law produces more punishment because it expands the types of actions that are subject to criminal liability (p. 20). However, a more thorough explanation needs to consider other less obvious elements of the reality of the penal process. Among these elements, Husak rightly emphasises the great levels of discretionary power enjoyed by the police and prosecutors, which, combined with the common use of plea bargaining, end up convicting and
(disproportionately) punishing more defendants (pp. 21–24). Overcriminalisation feeds these powers and mechanisms of the penal process and exacerbates the problem of unjust punishment.

One of the many interesting contributions of Husak’s first chapter relates to the sharpening of the conceptual apparatus theorists have to address the penal law. Husak proposes to demarcate a normative line between core and peripheral offences of the criminal law (p. 34). Offences at the core share those characteristics that are important from the point of view of justice, whereas crimes at the periphery are problematic because “they lack the features or characteristics that most theorists regard as crucial if impositions of criminal liability are to satisfy our principles of justice” (p. 34). The most notable case of analysis is that of strict liability, which in Husak’s model is left at the periphery of the criminal law—and consequently, as a normatively dubious element of the criminal law—because it dispenses with an element that is at the core of what most commentators consider normatively significant, namely mens rea (on strict liability offences see Husak’s discussion of the thin-ice principle at p. 75). It is those offences located at the periphery that we should primarily worry about when it comes to the overexpansion of the criminal law.

Husak’s suggestion of how to draw the line between what is at the core and what is at the periphery of the penal law is attractive. Rather than advancing the traditional distinction between them based on philosophically less conclusive categories, like legal history, tradition or shared intuitions (not that history, tradition and intuitions are not valuable from a philosophical point of view), Husak proposes a normative criterion based on the notion of justice (p. 34). However, this proposal is not particularly helpful in the absence of a more thorough account of justice. The closest Husak gets to offer that account is his reference to what ‘most theorists’ consider as central to our principles of justice. This does not suffice and that renders Husak’s account problematic not only because it is oblivious to disagreement among theorists about the content and implications of our principles of justice—in principle, theorists as well as judges and legislators act out of considerations of justice, and still their judgements about the implications of their considerations differ—but also because it makes principles of criminalisation depend on the majority’s agreement on matters of justice. This is in tension with Husak’s doubts about the democratic rationale for giving legislatures broad authority to enact criminal law (pp. 102, 124 int. al).

Let us now consider the seven constraints that Husak proposes to limit the criminal law:

1. Criminal liability may not be imposed unless statutes are designed to prohibit a nontrivial harm or evil (66ff.).
2. Criminal liability may not be imposed unless the defendant’s conduct is in some sense wrongful (73ff.).
3. Punishment for a criminal law violation can be justified only to the extent it is deserved (82ff.).
4. The burden of proof in justifying criminal statutes is placed on those who want to enact them (100ff.).
5. Criminal statutes are to pursue substantive state interests (128ff., 132ff.).
6. Criminal statutes are to directly advance those interests (128ff., 145ff.).
7. Criminal statutes are not to be more extensive than necessary to achieve those interests (128ff., 153ff.).

Two preliminaries are in order. First, and as we shall see, some of these constraints derive from doctrines of constitutional law. However, these constraints are to be
understood as limits directed not to the judiciary but to the legislature (p. 131). Second, Husak claims that these constraints are not sufficient to justify criminal statutes, so there are circumstances in which each constraint is satisfied and still we may obtain an unjustified penal statute (p. 92, fn. 167). This caveat is not minor, since it protects Husak’s model from any objection that demands more substantive accounts of the key concepts of harm, evil, desert and harm.

Husak groups these seven constraints in two categories: internal constraints—constraints that emerge from within any respectable model of the criminal law and punishment (constraints 1–4, considered in Chap. 2)—and external constraints—constraints derived from non-criminal sources, mainly constitutional law (constraints 5–7, considered in Chap. 3). An important part of Husak’s project is to persuade us that these constraints do not emerge from esoteric doctrines. I think he succeeds in this. From giving attention to the general part of the criminal law—more specifically, to doctrines of criminal defence—Husak derives the two-first constraints of his theory. Familiar justificatory defences are unintelligible “unless criminal offenses are designed to proscribe a nontrivial harm or evil” (p. 66). Consider the lesser evil type of defence: a defendant has a justificatory defence when his conduct sought to avoid harm or evil that is greater than the harm or evil that the law defining the charged offence sought to prevent. We cannot make sense of this defence without endorsing a constraint on the criminal law that claims that statutes must be designed to prohibit nontrivial harm or evil.

The third constraint also derives from traditional parts of the criminal law, in this case from normative theories of punishment. Any decent theory of punishment must embrace the idea that offenders are justifiably punished only when punishment is deserved. In turn, an account of the conditions under which someone deserves punishment cannot be advanced without considering the content of the criminal law. Thus, Husak concludes, normative theories of punishment have implications for a theory of criminalisation.

Husak puts these principles to work by showing how they would limit the enactment of a large number of *mala prohibita* offences. The most interesting discussion takes place when he considers the quandaries that emerge in hybrid offences, which combine both *mala prohibitabita* and *mala in se* elements (106ff.). Problems arise when someone commits a hybrid offence (like statutory rape or drunk driving) without having committed a *mala in se* (e.g., an individual X has consensual sex with Y who is beneath the legally defined age of consent and X knows, and it is true, that Y is mature enough to provide rational and responsible consent). In this example the wrongness constraint has been violated, since X has committed an offence without having done anything wrong (other than break the law). As a consequence, a statute that allows punishment without resort to the wrongness constraint is rendered unjustified by Husak model.

However, it seems that even if we grant that cases such as these violate the wrongness constraint, the question of whether such a violation really makes hybrid offences unjustified still remains unanswered. In our example it seems plausible to claim that punishment of X is unjust because X has done nothing wrong. It is also plausible to say that X has a certain type of defence that should be accepted in court: X violated the law but not the substantive juridical good that the law is supposed to protect. However, whatever plausible alternative we adopt, none of these claims should be confused with rendering that law unjustified. Whether or not X’s punishment is justified is a matter different from—and to a
large extent, independent of—the question whether the law that allows X’s punishment is justified. That law in itself does not seem to violate the wrongness constraint as, in principle, it requires committing both the *mala in se* and the *mala prohibita* elements of the general offence. The injustice of the example emerges not necessarily from the law, but from the punishment of X who has contravened only the *malum prohibitum*. If this is correct, then the wrongness principle is less effective in limiting the criminal law than Husak believes.

More generally, it seems to me that if the concepts of harm, evil, etc., are going to do the job that Husak wishes then a more substantive account of the content of these terms needs to be offered. The invocation of the caveat considered above, or the idea that no theory of criminalisation can deny the centrality of these concepts, will not do the trick (see p. 91). Different accounts of desert, harm, etc., will surely produce different results in our theories of criminalisation, and some of these theories may justify many current *mala prohibita* offences. Without an account of these key concepts Husak’s principles lose an important part of their potential.

In order to ground the fourth principle, Husak introduces one of the most distinctive elements of his theory, which is also crucial to the justification of the three external principles of his model. Husak proceeds by picking out two particularly problematic aspects of the practice of punishment—deprivation and stigma—and argues that given that “ordinary utilitarian reasons do not allow the government to infringe” our interest in not being subject to deprivation and stigma, “we have reason to countenance a *right not to be punished*” (p. 92, italics in the original). From the value we assign to the interests protected by the right not to be punished—and notice that this right is different from the less overarching right held by the innocent not to be punished—Husak derives the fourth principle of criminalisation: the onus to justify trespassing on the right not to be punished lies with the would be trespasser, that is, with the state. (Whether or not this is really an internal constraint of the criminal law is a contentious matter—although perhaps irrelevant.)

There is a question here—which I shall not discuss—about the legitimacy of deriving the existence of the right not to be punished from a mere rebuttal of utilitarian considerations. However, even if we grant the existence of this right and accept the way Husak derives its existence, there is an important drawback to the argument. Although the model permits instances of justified punishment—when the right not to be punished is infringed but not violated—Husak’s analysis makes this right to be implicated by any piece of penal legislation and by any token of punishment that may exist (p. 102). This means that were all the necessary and sufficient conditions of just punishment satisfied, Husak’s model would still contend that there is a right that is being implicated. There is nothing incoherent or obviously mistaken in this, but it certainly has some uncomfortable consequences. Husak understands that “actions *implicate* a right when they are contrary to that right” (p. 95, fn. 183, italics in the original). If we assume that any state of affairs in which rights are implicated is one that is less preferable to one in which no implication of rights has occurred, then legislatures are, other things equal, in a better state of affairs before enacting a criminal statute than after, even if the statute under discussion is justified.

Is this a mere philosophical anxiety? I do not think so. Consider an anti-terrorism bill under discussion for enactment. Let us assume that this bill includes an inchoate offence, and that, were it to be enacted, the law would be justified (Husak rightly accepts that many inchoate offences are and can be legitimate). Justified laws can still be controversial, and grant that the anti-terrorism bill is so. Given lack of unanimity in the discussion, and for the sake of prudence, legislators justifiably opt not to pass the bill. They are uncertain whether
the bill will pursue the aims they want it to pursue—but ex hypothesi they are wrong—and given that any enacted law implicates rights, which is worse that not implicating them, legislators decide not to pass the bill. As a result we end up missing a criminal statute that a legislature would be perfectly justified to enact; perhaps they should enact it. Husak’s position that we all have a right not to be punished and then that all criminal law is contrary to that right can easily have practical undesirable effects in the legislative deliberative processes, especially when we move beyond the most obvious *mala in se* into offences that still could and should be justified. In certain circumstances—which I do not take to be particularly abnormal—Husak’s model may restrict overcriminalisation at the cost of favouring undercriminalisation.

What about the external principles? Husak grounds them on the constitutional weight the right not to be punished should have. At this point, he offers suggestive and insightful thoughts on the striking lack of principled constraints that constitutional law imposes today on the penal law in the United States, and the “incredible power wielded by majorities in the criminal domain” (p. 124). Husak claims that “[o]utside the narrow range of fundamental liberties […] it is only a slight exaggeration to say that the state can decide to criminalize almost anything” (p. 124). In short, he shows how constitutional law and its permissiveness toward the criminal law is one of the features that has allowed overcriminalisation. Notwithstanding, it is from this area of law that Husak derives the last three principles of his model.

Husak proceeds by considering the type of scrutiny to which laws that are constitutionally contested are subjected. If the law under consideration puts at stake a fundamental right, then a test of strict scrutiny is applied—that is, a challenged law will be upheld “only if it is necessary to achieve a compelling government purpose” (p. 123, italics added). If the contested law challenges a non-fundamental right, then a rational basis test is applied—that is, “the challenged law will be upheld if it is substantially related to a legitimate government purpose” (p. 123, italics added). The question is what kind of protection the right not to be punished—the right that each criminal statute implicates—should be afforded. Husak argues that we should not use the rational basis test when considering the legitimacy of criminal statutes because it provides a very weak protection to the right not to be punished. Since many legitimate state interests fall well beyond the business of the criminal law, then this test will not do the job of retarding overcriminalisation. However, Husak does not agree with the idea of using the stricter test either. Although he “sympathize[s] with the proposal to apply this test to each criminal law” (p. 126), mainly because it “would best promote [his] minimalist agenda”, he does not pursue it because it would be a too radical alternative that “might come close to obliterating the criminal law altogether” (p. 127). Instead, and influenced by constitutional doctrines of commercial speech and anti-discrimination on the basis of gender, he allows an intermediate level of scrutiny to be applied to each criminal law. According to this intermediate test, the interest the state has in the enactment of the criminal statute under discussion must be *substantive* (fifth principle), the statute must directly advance that interest (sixth principle) and the statute must not be more extensive than necessary to achieve that interest (seventh principle).

Husak’s argument in favour of the intermediate test is not utterly convincing. He claims that “[p]recious few laws survive strict scrutiny” (p. 127) and its application in the penal sphere would “prove a recipe for paralysis” (p. 127). We should rather provide the right not to be punished the same level of protection as those rights that are relevantly similar to it. What this argument must entail is that the interests involved in this right are not as fundamental as the interests involved in fundamental rights like free speech and freedom of
association which do receive a strict scrutiny test. I agree with Husak that there is no uncontroversial criterion to establish a hierarchy of values (p. 98) and that the relative importance of the right not to be punished, for that very reason, will remain controversial. However, in advancing an intermediate test rather than a strict one, Husak makes a strong but, in my opinion, unclear case for that hierarchy. On what grounds can we claim that the right not to be punished—and the cluster of interests it protects—deserves less protection than free speech, freedom of association or liberty of conscience? I am not suggesting that an argument cannot be offered, but that argument is missing in Husak’s account, all of which ultimately undermines his choice of an intermediate level of scrutiny.

These comments, however, should not cast shadow over this outstanding book. Overcriminalization falls within the best tradition of the philosophy of the criminal law, finely combining empirical and contextual awareness with sophisticated normative analysis. Despite the heated passions that discussions of criminalisation bring about, the tone of the book is always constructive and moderate, and the clarity and scholarship of Husak’s prose contributes enormously to this superb work. Husak’s subtle, insightful and thought provoking ideas on criminalisation should certainly motivate theorists, legislators and practitioners to explore and develop further this crucial and timely issue.

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