BOOK REVIEW

Douglas Husak, Philosophy of Criminal Law: Selected Essays (Oxford: Oxford University Press, 2010) xiii, 458 p.*

There are several different ways to think about how philosophy might intersect with substantive criminal law (or with any other area of substantive law, for that matter). One way is prescriptive and proceeds from the abstract to the particular: begin with your preferred philosophical theory about duties, obligations, rights, and wrongs – consequentialism, perhaps, or Kantianism – and reason from that theory to conclusions about what the substantive criminal law ought to look like. By way of illustration, you might apply your favourite philosophical theory to a particular criminal law doctrine – for example, the nature of consent or the defence of necessity – and draw conclusions about whether the doctrine is coherent and justified. On this approach, philosophy is applied to criminal law in order to provide guidance about the sort of normative principles the substantive criminal law ought, ideally, to embody.

Alternatively, one might proceed from the particular to the abstract, beginning with the assumption that the substantive criminal law is more or less coherent as it is and reasoning backwards to see which philosophical theory, if any, concerning duties, obligations, rights, and wrongs is reflected in it. On this approach, the goal would not be to propose changes to the substantive criminal law, although such proposals might emerge along the way. Rather, the goal would be to identify the philosophical commitments of the criminal law by paying careful attention to what the substantive criminal law actually says. This approach is broadly descriptive in nature.

Douglas Husak's important work in criminal law theory combines elements of these two approaches in interesting and illuminating ways. Although he has his preferred philosophical theories (he is a deontologist and subscribes to a modified version of retributivism about punishment), his starting point is typically the result of reflections on actual criminal law doctrine and practice. So, in that sense, his methodology reflects the descriptive approach sketched above. On the other hand, Husak also believes that the goal of philosophy of criminal law is primarily prescriptive in nature. As he puts it, '[T]he object of the philosophy of criminal law (or of criminal theory), as I construe it, is to defend

* All subsequent page references are to this text.

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proposals to improve the content of the substantive criminal law' (1). Collections of essays rarely speak with a single voice, and often lack a unifying theme or argument. There is, however, a clear thread that ties together the papers collected in *The Philosophy of Criminal Law*, and that is an emphasis on both descriptive and prescriptive aspects of criminal law theory, an emphasis that is reflected in each essay in this impressive collection.

Husak is perhaps best known for his work on the limits of criminalization and the legalization of drugs. Neither issue figures prominently here. This is not an oversight. As Husak notes, although the collection primarily reflects recent work with which he is largely in agreement, it does not cover ground that is already covered in *Drugs and Rights* (Cambridge UP, 1992), *Legalize This!* (Verso, 2002), *The Legalization of Drugs* (Cambridge UP, 2005), or *Overcriminalization* (Oxford UP, 2008). Readers hoping to learn more about Husak's views on why drugs ought to be legalized or about how he understands the moral limits of the criminal law sanction will have to look elsewhere.

What Husak has given us is a collection of papers discussing the basic components of criminal liability: the doctrines of *actus reus* and *mens rea*, criminal defences, and punishment. The collection is, appropriately enough, divided into four parts: 'Criminal Liability,' 'Degrees of Culpability,' 'Defenses,' and 'Punishment and Its Justification.' It also contains a very helpful introduction, 'Reflections on Criminal Law Theory.' In what follows I'll briefly discuss four of Husak's essays that to my mind raise some fundamental issues in criminal law theory.

The first essay in the collection, 'Does Criminal Liability Require an Act?' is a classic. In it, Husak argues that the standard interpretation of the *actus reus* requirement – namely, that there can be no criminal liability without a voluntary act – does not accurately reflect actual criminal law doctrine. According to Husak, there are several ways in which the act requirement fails. First, there is the fact that criminal liability is sometimes imposed for omissions; that is, for failures to act. But more importantly, there is the fact that the presence or absence of a voluntary act does not seem to be what is at the core of the *actus reus* requirement. Cases in which an individual is found not to be responsible for a particular state of affairs may involve the absence of an act. But when that is the case, it is more properly the accused's inability to exercise control over the proscribed state of affairs that relieves her of responsibility. Husak therefore argues in favour of a control requirement, according to which an individual should be held liable for bringing about a prohibited state of affairs only if she was in a position to exercise control over the occurrence of that state of affairs. This is an attractive proposal and surely marks an improvement on the volitional accounts of Austin, Holmes,

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and Michael Moore, although more work is required in order to pin down what the notion of appropriate control amounts to. For example, is an addict in control of her drug-taking behaviour? Does it make a difference whether the addict is happy to be an addict; that is, whether she identifies with or endorses her drug-taking behaviour? (I suspect it might.) The control requirement may also have consequences that some find unpalatable. For example, Husak notes that according to the control requirement there is no reason, in principle, why some individuals should not be held criminally responsible for their status. All the same, Husak's formulation and defence of the control requirement constitutes a real step forward in debates about the *actus reus* requirement, since it shifts attention away from issues concerning acts and voluntariness to issues concerning an accused's ability to make a difference in the world either positively by doing something or negatively by refraining from doing something. And there is good reason to think that that ability is what the criminal law, in its reliance on the *actus reus* requirement, is at bottom trying to track and understand.

Turning to issues having to do with *mens rea*, Husak considers, in 'Willful Ignorance, Knowledge, and the "Equal Culpability Thesis": A Study of the Deeper Significance of the Principle of Legality,' what in Canada would be called the doctrine of wilful blindness. Husak is critical of this doctrine, at least when it is used to circumvent statutory *mens rea* requirements involving knowledge. Wilful blindness, courts repeatedly tell us, can substitute for knowledge (see *R v Sansregret*[1] and *R v Briscoe*[2]). But why? Wilful blindness is a mental state that is distinct from recklessness. But wilful blindness is also a mental state that is distinct from knowledge. As the Supreme Court put it in *Sansregret*,[3] a wilfully blind person is 'a person who has become aware of the need for some inquiry [but] declines to make the inquiry *because he does not wish to know the truth*.' Moreover, if wilful blindness did describe the same mental state as knowledge then there would be no need for the doctrine of wilful blindness in the first place. The Crown would simply argue that the accused knew, for example, that there were drugs in his suitcase, thereby obviating the need to appeal to the doctrine of wilful blindness, or 'almost knowledge,' in the first place. Consequently, since wilful blindness and knowledge are by definition distinct mental states, they must describe distinct *mens rea* elements. So again, why allow the substitution of the one, wilful blindness, for the other?

1 [1985] 1 SCR 570 [*Sansregret*].
2 [2010] 1 SCR 411.
3 Supra note 1 at 584 [emphasis added].

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Here is a thought. Even if the two *mens rea* elements are distinct, it might all the same be argued that wilfully blind accuseds are just as culpable as accuseds possessing genuine knowledge and so ought to be held criminally liable for crimes requiring a *mens rea* of knowledge. Husak calls this the 'equal culpability thesis,' and it is a thesis that he emphatically rejects. As he argues, even if we suppose that a murderer and an attempted murderer are equally culpable – that is, that they possess the same *mens rea* – it is surely implausible to conclude that they should both be held responsible for the crime of murder. To do so would, among other things, offend basic principles of fairness. Thus, what Husak adds to the debate about wilful blindness is a consideration of the principle of legality, or the rule of law. His claim, in brief, is that 'fidelity to the principle of legality requires resistance to analogical reasoning in the enforcement of the criminal law' (223). And from this Husak concludes that the principle of legality should not be construed to allow liability to be imposed when the particular *mens rea* required by statute *or its equivalent in culpability* is present. Rather, the principle of legality should be construed to allow liability to be imposed only when the particular *mens rea* required by statute is present *simpliciter*. This is interesting, since it suggests that a dispute internal to the substantive criminal law might be resolved by appeal to abstract principles concerning punishment, legality, and the rule of law.

Husak's point is in part prescriptive: where a legislative body has made it clear that a given crime requires a *mens rea* of knowledge, courts should not attempt an end-run by substituting a distinct and lesser form of *mens rea* for the statutorily required one. But Husak's concern also has a practical dimension and goes back to his worries about over-criminalization and the legalization of drugs. Since, in the United States at least, the equal culpability thesis is primarily employed to secure convictions in drug possession cases, it has the effect of broadening the criminalization of drugs and associated behaviours. Husak's solution is simple enough: the appropriate legislative body should draft a new and less serious offence that criminalizes wilfully blind possession and imposes on wilfully blind defendants a duty of reasonable inspection. The result, in his view, would be a clearer and fairer approach to the doctrine of wilful blindness in the context of possessory offences. To my ear, this is a proposal that makes good sense.

'Why Punish the Deserving?' focuses on retributivism and punishment. Although Husak is a retributivist, he does not discount consequentialist reasoning entirely. His point in this essay is that, while desert matters to the justification of punishment, so do consequences: punishment imposes costs on individuals and on society. If punishing the deserving would bankrupt a country's treasury then that is surely a

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reason for not doing so. Husak therefore concludes that there must be an 'extra-desert' component to punishment and suggests that this component is best understood as the reasonable expectation that the punishment will reduce crime.

What results is a mixed view: individual desert is a necessary but insufficient condition for punishment. For punishment to be all-things-considered justified, it must satisfy two criteria: it must be deserved and it must contribute to crime reduction. Being a mixed theory, it is likely to make both consequentialists and retributivists unhappy. All the same, there is reason to think that Husak's view is perfectly compatible with certain familiar and important versions of retributivism. It is often said that the core retributivist idea is that there must be a necessary connection between punishment and wrongdoing, that – as Kant puts it in *The Metaphysics of Morals* – punishment must be inflicted on a criminal only because he has committed a crime.[4] From this it might be thought to follow that no other considerations can be relevant to the question of whether a particular punishment ought to be imposed on an individual. But this is too quick. For Kant goes on to say that a criminal 'must previously have been found *punishable* before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens.'[5] Here Kant seems to be explicitly contemplating the possibility that there might be reasons *not* to punish a criminal who otherwise deserves punishment and that such reasons might depend on the consequences that punishment might have for others. Moreover, in his famous discussion of necessity, Kant concludes that 'the deed of saving one's life by violence is not to be judged *inculpable* (*inculpabile*) but only *unpunishable* (*impunible*).'[6] But this seems to be the extra-desert thesis in another guise: one who acts to save his life by violence is deserving of punishment, but for other reasons (having to do with the state's lack of standing to punish) punishment is unjustified.[7] So perhaps Husak's is a retributivism that retributivists can live with after all.

The most controversial essay in this collection is surely 'Rapes without Rapists: Consent and Reasonable Mistake.' Co-written with George C. Thomas, this essay defends the idea that in order to understand what makes mistakes about consent reasonable we must first look at empirical

4 Immanuel Kant, *The Metaphysics of Morals*, translated by Mary Gregor (Cambridge: Cambridge University Press, 1991). Page citations are to volume 6 of the Prussian Academy edition of Kant's works, upon which Gregor's translation is based. These page numbers appear in the margin of Gregor's translation.

5 Ibid at 6:331.

6 Ibid at 6:234.

7 See also Kant's comments, ibid at 6:334, about what the sovereign is entitled to do in order to prevent the dissolution of the state.

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data about how consent is typically expressed in sexual circumstances. And according to Husak and Thomas, the empirical data is messy. As Husak and Thomas note, consent to sex is often given non-verbally or indirectly, and studies have suggested that many women (and men) who eventually consent to sex often engage in token resistance beforehand. Moreover, many individuals also engage in what Husak and Thomas call compliant or unwanted sex – which is not to say that such sex is coerced sex. (Many things that we do are unwanted – we might not want to go to work, for example, or to the dentist – but it is a stretch to say that when we do such unwanted things we are coerced into doing them.) Thus, according to Husak and Thomas, an individual can consent to unwanted sex. The upshot? 'If a substantial portion of men as well as women engage in token resistance to sex, a man who mistakes his partner's behaviour as sexual might very well believe that her subsequent 'no' is a token resistance like one he has used himself or encountered previously in women' (244). And this, suggest Husak and Thomas, could help to explain why a man might mistake real resistance for token resistance and assume that consent has been given.

But what makes such mistakes reasonable ones? Here Husak and Thomas are less helpful. According to them, a mistake as to consent is reasonable when it is based on the totality of the circumstances. In other words, Husak and Thomas 'see no reason to privilege or exclude *any* material evidence of consent from consideration by the jury. The active response of the participants should not be the sole basis from which evidence of consent should be derived' (249). In addition to such active responses, the jury should also be entitled to consider empirical generalizations and social conventions about how individuals typically behave when they engage in non-coercive sex.

It is important to realize what Husak and Thomas are not claiming. They are not claiming that men's *beliefs* about how consent is expressed determine whether a mistake regarding consent is reasonable. Rather, Husak and Thomas's claim is that how consent is, in fact, expressed may be relevant to determining whether a mistake regarding consent is reasonable. It goes without saying, of course, that issues surrounding consent and mistaken belief in consent in the context of sexual assault are notoriously difficult, and not surprisingly, critics have voiced a number of objections to the view.[8] One might argue that the concept of reasonableness is, at bottom, normative rather than statistical and thus that reflections on empirical matters are largely irrelevant to the question of whether I have acted reasonably toward you. In addition, one might

8 See e.g. Joan McGregor, *Is It Rape?* (Burlington, VT: Ashgate, 2005).

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argue that empirical generalizations about consent that leave women vulnerable to unpunishable sexual assaults – in other words, to rapes without rapists – ought to be discounted for that very reason. Both worries seem to me to be legitimate ones. However, even if one is not convinced by Husak and Thomas's claims in this essay, they seem to me to be claims that are worth thinking about all the same.

In addition to the issues touched on in the essays discussed above, Husak also discusses, among other things, the supposed priority of justification to excuse, the role played by motive in assessing criminal liability, the phenomenon of strict liability, the existence of so-called partial defences, and the *de minimis* defence to criminal liability. Each discussion repays careful attention. As I indicated above, what makes these essays hang together, and what makes them worth reading both individually and as a whole, is Husak's focus on the descriptive and prescriptive aspects of criminal law theory. It is refreshing to read a theorist who combines philosophical sophistication with an extensive understanding of substantive criminal law. The result is a rewarding collection of essays that illuminate and challenge one's understanding of what criminal law is and what it can and ought to be. We should be grateful to Husak for writing these essays in the first place and for bringing them together in this collection.

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