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CAN CRIMINAL LAW BE CONTROLLED?

Darryl K. Brown[*]

OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW. By *Douglas Husak*. Oxford and New York: Oxford University Press. 2008. Pp. x, 231. $49.95.

INTRODUCTION

It is a bizarre state of affairs that criminal law has no coherent description or explanation. We have standard tropes to define criminal law, but they obscure as much as they clarify and are honored in the breach as much as the rule. Crimes, for instance, are defined by wrongdoing and culpability; to be guilty, one must do a wrongful act in a blameworthy manner, that is, as a responsible agent without excuse or justification. And crimes define public wrongs, which are distinct from private wrongs. Further, we criminalize only harmful conduct, or risk-creating conduct, or immoral conduct, or conduct the criminalization of which carries an expressive message of public values. And criminal law's function is to prevent crime, or to achieve justice through retribution, or both. But none of this gets us very far, either as a matter of conceptual clarity or descriptive accuracy regarding our actual collection of criminal laws. Lots of immoral and harmful conduct is not criminal;[1] lots of harmless and morally neutral conduct is criminalized.[2] The concept of "harm" itself so eludes definition that it has been employed to describe all manner of conduct with no tangible or emotional injury, no victim, and no significant risk creation.[3] Similarly with "wrongdoing." Core cases are plain, but the line between public and private wrongs—crimes versus civil wrongs—has no widely shared definition, and no foundation beyond shared intuition. And if one accepts an expressive function for criminal law regardless of the harmfulness of the relevant conduct, the category of "crimes" grows even larger. The standard assumption is that, to be culpable for a crime, one must have a mental state that demonstrates knowledge, awareness, or voluntary will regarding one's conduct and its possible consequences. But crimes with no mental-state requirement abound.[4]

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1. *See, e.g.*, Leo Katz, *Villainy and Felony: A Problem Concerning Criminalization*, 6 BUFF. CRIM. L. REV. 451 (2002).

2. *See, e.g.*, R.A. DUFF, ANSWERING FOR CRIME 47–49 (2007).

3. *Cf.* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

4. *See* JOHN S. BAKER, JR., MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 17–31 (2006), http://www.fed-soc.org/doclib/20070404_crimreportfinal.pdf (compiling a list

The resulting incoherence is widely recognized. Without conceptual boundaries such as criminalization solely of harmful, fault-based, culpable conduct, criminal law can sprawl widely, defying theoretical description as well as practical limits. The problem is not limited to the United States. Take this description from an Australian: "Crime is not a unidimensional construct. For this reason one should not be overly optimistic about a general theory which sets out to explain all types of crime."[5] Consider this from a Briton: "The various definitions of crime . . . lack coherence, they jostle uncomfortably together, overlap, correspond, and contradict."[6] An American offers a comparable view: "American criminal law's historical development has borne no relation to any plausible normative theory—unless 'more' counts as a normative theory."[7] The result is overcriminalization, complaints of which are both widespread and long standing—one can find them at least four decades ago, before the recent growth in federal criminal law.[8] A half-century ago, before recent overcriminalization complaints, a leading Anglo-American criminal scholar concluded we can only define crimes self-referentially as acts "capable of being followed by criminal proceedings, having one of the types of outcome (punishment etc.) known to follow these proceedings."[9] Which is to say, a crime is whatever a legislature says is a crime.

How did this state of affairs come about? At one level, the answer is straightforward: in the modern era, legislatures create crimes, and legislatures do not abide by a consistent set of principles regarding what matters are appropriate for criminalization. They employ criminal law purely instrumentally, as a tool for achieving whatever end majorities choose to pursue. More interestingly, courts have never developed significant constitutional doctrines for checking legislatures' crime-creation choices, even as they developed a range of doctrines to review legislative action in any number of other topics, and in the process of regulating other topics—speech, privacy rights, property and contract rights, rights to fair notice, weapons possession—they have overturned hundreds of criminal laws. Perhaps most surprising, however, is that criminal law theorists have given relatively little attention, until quite recently, to theories of criminalization. If courts and legislatures had sought a source of guidance on how to construct and limit criminal law coherently, they would have had relatively few sources to which to turn.

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of strict-liability federal crimes). *See generally* APPRAISING STRICT LIABILITY (A.P. Simester ed., 2005).

5. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 1 (1989).

6. LUCIA ZEDNER, CRIMINAL JUSTICE 39 (2004).

7. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001).

8. Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967); *see also* SANFORD H. KADISH, *The Use of Criminal Sanctions in Enforcing Economic Regulations*, *in* BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 40 (1987).

9. Glanville Williams, *The Definition of Crime*, 8 CURRENT LEGAL PROBS. 107, 123 (1955).

Into this morass steps Douglas Husak,[10] a leading philosopher of criminal law, with what now probably stands as the most ambitious effort to defend workable normative parameters for criminalization—the baseline from which "overcriminalization" can be measured—and to offer a coherent approach, built on familiar doctrinal terms, for courts and legislatures to employ in defining and revising criminal law. Building on his years of scholarly work on related issues, Husak's book *Overcriminalization* sketches the components of a theory for defining the limits of what sorts of conduct should or should not be subject to criminal punishment. Remarkably, this sort of theory is nearly nonexistent as a matter of common or constitutional law, and even as a theory designed as a policy proposal it has few peers. For the importance and difficulty of the topic alone, as well as the skill with which it is developed, Husak's book is a significant contribution.

Still, it is not clear Husak's effort is a promising one, as a practical matter, to ameliorate the incoherence of crime definition, a point even Husak might concede. Although he builds his theory in part on judicially created constitutional doctrine, Husak offers his thesis foremost as guidance to legislatures, in hopes they will police their own criminal lawmaking by adherence to a clarified set of normative commitments, rather than as a theory of judicial review by which courts might more meaningfully limit criminal lawmaking (p. 131). This is an interesting choice, one that departs from other (less developed) proposals for addressing overcriminalization.[11] It is worth exploring why one would make this choice, given the seemingly dim prospects for legislative self-constraint on crime creation. I will develop one view, in Part II, which suggests that such constraint is only realistically possible with institutional changes in the legislative process. Legislatures' problems are not so much that principles that should limit criminal law lack clarity, but that their institutional structure typically makes principled rather than majoritarian[12] action unlikely. But institutional change is not the only premise for hope of better prospects for legislative reform of criminal law, as I explore below. Democratic politics holds more promise for contraction of criminal law than many, including Husak, imply. Interestingly, that is because some of the terms of Husak's theory of criminalization are already familiar terms of argument in popular criminal law debates. Nonetheless, despite some promise for legislative progress, other questions remain: why have courts not stepped in to limit crime definition constitutionally, and why shouldn't they?

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11. *See, e.g.*, Stuntz, *supra* note 7, at 587–96 (arguing that "[t]he last, and probably best, solution is to increase judicial power over criminal law" through such constitutional doctrines as notice, desuetude, and proportionate sentencing). "[T]wo changes are needed: a change in constitutional law, to grant judges the power to undo too-harsh sentencing decisions by legislatures and prosecutors, and a change in judicial culture, so that judges will exercise that power once they have it." *Id.* at 596.

12. I neglect here for the sake of brevity accounts of legislative decision making that describe nonmajoritarian outcomes. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

In Part III, I will offer a hypothesis about why Husak, unfortunately, probably correctly estimates the minimal role courts could play in addressing the problem of overcriminalization—at least, the problems of overcriminalization that Husak is most concerned about, which means crimes that still lack substantial popular opposition. Husak, to his credit, picks no low-hanging fruit; his focus is on the most difficult arguments of excessive criminalization, especially drug crimes. The nature of those offenses tells us something about why courts are unlikely agents to restrain them, and also about the role of normative theory in constitutional law and political change. In short, courts are less likely to strike down criminal laws without indicia of popular and legislative support for such moves. But when that support exists, legislatures eventually do much of the decriminalization work themselves, reducing the need for judicial intervention. There are, however, pieces of the overcriminalization puzzle that are less amenable to democratic attention than others, and in those instances, courts might plausibly play a more active role even without first taking signals from legislative innovations. Part IV assesses how much a remedy for overcriminalization might affect the related but separate problem of excessive incarceration.

I. HUSAK'S THESIS

Much of the literature lamenting overcriminalization cites a range of seemingly silly crimes as examples: the crime of using the "Smokey Bear" image without authorization, disturbing mud in a federal cave, or, more seriously, adult consensual-sex offenses.[13] Others cite statutes that bar potentially more harmful conduct, such as deceptive commercial practices, that nonetheless seem dubious as crimes either because the offenses are defined as strict liability[14] or because they address activity that seems more plausibly (and often is actually) regulated by civil or administrative law.[15] Husak acknowledges these crimes are examples of overcriminalization but spends little time on them because they are rarely enforced. He focuses instead on "laws that actually are enforced with some degree of regularity" and thereby contribute to excessive punishment (p. 35). Again, his focus is on more difficult claims of overcriminalization, primarily drug crimes.

Drug crimes are important because, unlike these foregoing examples, they actually account for a sizeable portion of federal and state convictions and are the basis for a significant percentage of incarcerated offenders who

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13. *See* 16 U.S.C. §§ 4302(1), 4302(5), 4306(a)(1), 4306(b) (2006) (making it an offense to disturb a cave); 18 U.S.C. § 711 (2006) (criminalizing unauthorized use of the "Smokey Bear" name); Sara Sun Beale, Essay, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 761 (2005); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 704 (2005).

14. *See* pp. 20–21 (noting recent statutes that enlarge the scope of criminalization by imposing strict liability).

15. For a random example, see 7 U.S.C. § 195 (2006) (felony for livestock producers' failure to obey order from Secretary of Agriculture). For a partial list, see BAKER, *supra* note 4.

make up by far the largest population of prisoners in the industrialized world or in American history.[16] The more common, colorful examples of over-criminalization would be worrisome if they were ever enforced, but they rarely are (and adult consensual-sex offenses are now mostly repealed and likely unconstitutional).[17] But if drug crimes were abolished as improper uses of criminalization, the criminal-justice system would change dramatically. Husak's other concerns are equally at the center of contemporary criminal practice: broad conspiracy doctrines, various crimes of risk prevention, strict liability offenses (particularly drug-related homicide offenses), and "ancillary" offenses, which criminalize relatively innocuous conduct (such as money laundering or failure to report knowledge of felonies) that is facilitative of other, uncontroversial crimes (p. 20). These are tough cases. These crimes do not address silly or petty activity or unenforced statutes. They have significant support among prosecutors, legislators, and the public. To have effect in reducing these sorts of offenses, a normative theory of criminalization must do one of two things: convince courts to limit legislatures' criminal law policy preferences that have significant public support, or change minds—among legislators and the public—about the wisdom and appeal of such offenses. Either task is a tall order. There is, however, historical precedent for both. I consider that history briefly in Section II.A,[18] but first we should look at the content of Husak's argument that seeks to do this persuasive work.

The components of Husak's argument are not only sensible but to a large degree familiar. Much of what Husak seeks to do is make criminal law live up to the traditional, defining characteristics—such as harm and wrongfulness—that we use, somewhat inaccurately, to describe criminal law generally. Husak argues for two sets of constraints on criminal law: internal constraints, arising from the traditional conception of criminal law itself; and external constraints, which he takes largely from familiar constitutional law doctrine, which is to say, ultimately, from a thesis of the proper limits of state power.

Husak's first set of internal constraints is indeed familiar. Criminal statutes should address only nontrivial harms or evils, should criminalize only wrongful conduct (pp. 55, 65–67), and should impose punishment only on offenders who deserve it, in proportion with their desert (pp. 55, 82–83). Giving content to any of those notions, however, as Husak concedes, is fraught with difficulty. A prominent definition of harm, for instance, is a

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16. For worldwide data on incarceration rates, see Int'l Centre for Prison Studies, World Prison Brief, http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/ (last modified Feb. 4, 2008) (ranking the United States as having the highest incarceration rate in the world at 760 per 100,000 population and relying on U.S. Bureau of Justice Statistics data). For historical data back to 1971 showing the rise in American incarceration rates by state, see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1985, at 532 tbl.6.30 (Timothy J. Flanagan & Edmund F. McGarrell eds., 1986).

17. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

18. *See infra* Part II; text accompanying notes 37–42.

wrongful setback of others' legitimate interests.[19] But that definition requires theories of wrongful conduct and of moral rights or some other source to define cognizable interests. And wrongfulness is grounded ultimately in shared, specific intuitions about what conduct is wrongful. Given the contentious debates about the wrongfulness of many sorts of activities, that is a judgment for which courts are often ill suited until widely shared social views emerge, and that is thus best left to legislatures. But, as we will see, Husak is uncomfortable leaving judgments about wrongfulness to majoritarian views, which presents us with the difficult prospect of hoping legislatures will sort valid, shared intuitions about wrongfulness from majoritarian judgments about the same.

The final internal constraint takes a different form. From the longstanding premise that criminal law requires special justification because it imposes distinctive penalties—penalties characterized by hard treatment and censure—Husak posits a presumptive right not to be punished (pp. 55, 92–100). That right is built on an implicit account of the state, a topic to which Husak concedes he gives limited attention (p. 120). A liberal state, on this view, needs good reasons to impose hard treatment and censure on citizens and thereby infringe fundamental liberty interests. Those reasons come from properly constructed criminal laws, defined in terms of harm, wrongfulness, and desert, components that limit state power as well as provide notice and embody fairness. By culpably committing harmful wrongdoing, one's right not to be punished is overridden by the state's justified power to punish (pp. 96–98). But for the project of constraining decisions about criminalization, Husak infers from the right not to be punished a burden of proof on those who propose new criminal prohibitions (p. 100). Punishment requires special justification, and that justification must come from a set of reasons beyond merely majoritarian preferences—reasons found in the harm, wrongfulness, and desert requirements.[20]

Positing a limited right not to be punished provides Husak with an analogy to doctrines that protect other constitutional rights, on which he builds the remaining constraints of his account, which are not implicit in traditional criminal law but are grounded instead in views of personal liberty and state power in liberal democracies. If we accept the right not to be punished as important but not fundamental—a familiar constitutional law distinction—that points naturally to the constitutional doctrine of intermediate scrutiny as a framework for regulating criminal law.[21] A legislature could criminalize

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19. *See* p. 71 (discussing 1 JOEL FEINBERG, HARM TO OTHERS 34, 144 (1984)).

20. Pp. 102–03 ("[J]udgments about overcriminalization are normative and presuppose a baseline. . . . [T]he preferences of the majority as expressed through democratic procedures should not be used to identify this baseline.").

21. Fundamental interests are protected by strict scrutiny, a level of review that commonly overturns state attempts at regulation, which Husak labels "*too* radical" because it "might come close to obliterating the criminal law altogether." *See* pp. 126–27. It is too radical, in fact, because it entails a great infringement on legislative decision making, when the criminal-law context is one in which legislatures have always had wide leeway; hence the odds of courts stepping in under the guise of any doctrine to obliterate criminal law are nil.

activity only if the government interest in doing so is *substantial*, the prohibition *directly advances* that government interest, and the government's objective is *no more extensive than necessary* to achieve its purpose (pp. 128, 132). Again, these components are borrowed from a familiar constitutional doctrine of judicial review. American courts have experience applying these limits in contexts such as gender discrimination.[22] But Husak concludes that courts are not institutionally competent to make the substantive judgments this doctrine requires in the context of criminal law—judgments on "whether noncriminal approaches to given problems are less restrictive than criminal solutions, whether particular kinds of conduct merit condemnation, whether statutes serve important expressive functions, whether given coordination problems are important and require state action, and the like" (pp. 130–31). He may well be right about that, in part because of the difficulty of giving specificity to his initial set of constraints, i.e., what counts as harm or as wrongdoing.

That leaves his proposal as a set of principles legislatures should voluntarily abide by, a prospect, Husak concedes, that "[p]erhaps" means a theory of criminalization "is unlikely to achieve anything of practical significance in the real world" (p. 131). In that case, his account serves "as a powerful tool of criticism among scholars and citizens alike" (p. 131). A theory of criminalization, in other words, is most likely to have effect as a basis for persuasive argument in scholarly and public debate and thereby eventually democratic processes, and in this way it might eventually help influence legislatures by shifting public and elite opinion.

This is an interesting observation—one might say concession—for Husak. On the one hand, he recognizes that, to limit the process of criminalization that has always (since legislatures took over crime definition from common-law judges) been handled by legislatures with relatively few limits from courts, we need something other than legislatures acting in accord with democratic preferences. "[T]he preferences of the majority as expressed through democratic procedures should not be used to identify [the] baseline" by which we determine whether criminalization is *over*criminalization, because majorities may well endorse criminalization that is excessive by some normative criteria, as is probably the situation with respect to drug crimes to which Husak objects (p. 102). If there is a difference between what the government can regulate and what it can criminally punish people for, "we should be less persuaded by the familiar democratic rationale for vesting broad authority in legislatures to enact criminal laws. . . . [A] demanding test of justification must be applied to all penal legislation" (pp. 102–03).

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22. Husak references the origins of this judicial doctrine primarily from commercial-speech cases such as *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). P. 128 n.30. But this approach to intermediate scrutiny has also been developed in a line of gender-bias cases under the Equal Protection Clause. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973). For a brief discussion of this gender equality doctrine, see GOODWIN LIU ET AL., AM. CONSTITUTION SOC'Y FOR LAW & POLICY, KEEPING FAITH WITH THE CONSTITUTION 54–57 (2009), *available at* www.acslaw.org/pdf/ACS_KeepFaith_FNL.pdf.

Husak, in other words, wants legislatures to act in accord with principle rather than majoritarian will when it comes to criminal law; he wants legislatures to act less like legislatures and more like (our ideal version of) courts. Legislatures, not courts, should apply the "demanding test of justification" to their own legislative products.

II. Legislatures and Crime Definition

How can one expect legislatures to abide by a set of commitments that require rejection of democratic preferences? Husak does not address theories of legislative action and institutional design. That is not to be faulted. His focus is primarily the philosopher's task of contributing new arguments to a normative debate. But it is worth considering how such a normative account might have some effect within existing institutional arrangements.

There are models of legislative action that describe legislatures as doing something other than directly translating majoritarian preferences into policy. We might divide those models roughly into two categories. The first, represented by much of public-choice analysis, posits that sometimes there is no coherent majority preference among multiple options, and that voting and other procedural rules, along with legislative practices such as log rolling, affect outcomes generally and frequently produce nonmajoritarian outcomes in particular.[23] The second source of nonmajoritarian features are the sort described in the *Federalist Papers* 10 and 51: deliberate efforts to moderate majoritarian outcomes through structural choices such as separation of powers, and government through elected representatives rather than direct democracy.[24] Features of legislative process described in contemporary literature, such as the range of "vetogate" mechanisms like committee power within legislatures, further explains means to limit majority preferences.[25]

The first model is a largely descriptive one but pessimistic in its implications; it suggests the difficulty (at best) of designing legislatures to consistently achieve majoritarian outcomes. The second, more affirmative vision of nonmajoritarianism posits good reasons for limiting populist outcomes and endorses countervailing influences of, for instance, interest-group competition and public-minded reason. Both are relevant to a thesis about how legislative design affects criminal law, but the second should be more important. The first suggests that some criminal statutes, like all cate-

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23. For an overview, see Farber & Frickey, *supra* note 12.

24. The Federalist No. 51, at 291–92 (James Madison) (Clinton Rossiter ed., 1999). The paper argues in part that we can guard against governmental oppression "by a division of the government into distinct and separate departments" and against oppression by "a majority . . . united by a common interest . . . by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable." *Id.*; *see also* The Federalist No. 10 (James Madison).

25. Vetogates refer to opportunities for legislators to kill a bill without formally voting on it. *E.g.*, William N. Eskridge, Jr. et al., Legislation and Statutory Interpretation 70 (2d ed. 2006).

gories of legislative products, may not reflect majority preferences and, indeed, that coherent majority preferences may not exist on some policy options. With respect to some statutes, that undermines the general view that criminal law's dysfunction is largely a function of populist politics. On the other hand, the first model could help explain, to some degree, the disconnect between some criminal justice policies and survey data on public preferences regarding specific policies, which often document more moderate views than criminal law and punishment policy reflect.[26] The second model, however, lends legitimacy and a long pedigree to strategies to moderate populist pressures on criminal lawmaking through structural or procedural changes in legislative process. The Constitution's drafters consciously and extensively sought to hinder quick government action based on majoritarian preferences (or passions) through a range of features including separation of powers and indirect election of the president and senators. Contemporary analogues, such as using commissions to structure legislative proposals,[27] work on the same premise that normatively preferable outcomes can be achieved by institutional designs that limit direct popular influence.

Such questions of how to maximize the practical prospects for achieving his goals is not Husak's focus. But the tension between the goals of his theory and his proposal for its achievement nonetheless suggests an equivocation on the feasibility of any criminalization theory. It is constructed like a doctrine that courts apply, but it is one he suspects courts are unlikely (and perhaps incompetent) to adopt. It is nominally directed at legislatures, but it amounts to a directive that they should not act in the manner in which they are mostly designed to act, viz., in accord with majoritarian preferences. That dilemma is not unique to Husak's theory; it is the central reason that explains why the problem he tackles is so intractable, and why we have never had a rigorous limitation on criminal-law creation. Courts cannot do it, and legislatures cannot either.

Unless, perhaps, those institutions change, and do so fairly substantially. For criminalization theory to gain some influence in legislatures, we need those bodies to adopt the sort of agenda-setting mechanisms that temper majoritarian pressures—and some minority pressures, including prosecutor lobbying for expansive criminalization[28]—that are familiar mechanisms with regard to a wide range of other legislative topics. Elizabeth Garrett has given much attention to "framework legislation" adopted by Congress on a variety of policy topics to structure its decision making in ways that reduce the likelihood of some legislative outcomes and increase the odds of others by, for

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26. *See, e.g.*, JULIAN V. ROBERTS & MIKE HOUGH, UNDERSTANDING PUBLIC ATTITUDES TO CRIMINAL JUSTICE (2005); JULIAN V. ROBERTS ET AL., PENAL POPULISM AND PUBLIC OPINION: LESSONS FROM FIVE COUNTRIES 21–34 (2003); PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995).

27. For a discussion of some of the mechanisms regulating legislation on the federal budget, trade, and military-base closures, see Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 723–28 (2005).

28. For a prominent argument on the power of prosecutors as lobbyists on criminal-justice issues, see Stuntz, *supra* note 7.

example, insulating bill drafters from partisan pressure, reducing the role of committees, and limiting amendment possibilities.[29] Rules governing the budget process,[30] congressional decisions to close military bases (which assigned initial choices to an independent commission and limited Congress's authority to change those decisions),[31] and "fast-track" trade legislation that curtails Congress's involvement in trade agreements negotiated by presidents are some examples.[32] Use of the United States Sentencing Commission to redesign federal sentencing policy is another, less successful attempt to "depoliticize" hot-button policy making; it was created with just these sorts of goals in mind.[33] Minnesota's sentencing commission, on the other hand, was much more successful at contributing to the state's moderate incarceration policy.[34]

To improve the quality of criminal lawmaking, recent and existing models suggest a practice of originating crime bills in a specialized commission of the legislature—a state-crime or law-reform commission. The American Law Institute once served an equivalent function when it presented the Model Penal Code ("MPC") to states, which set the agenda for a decade-plus of criminal-code reform. Most states altered some MPC provisions and rejected portions of the proposal, but use of the MPC as a starting point nonetheless shaped legislative criminal lawmaking for the better, though only for a time. To sustain a thoughtful, moderate criminal lawmaking process, legislatures need institutional structures like crime commissions, and perhaps statutory statements defining a substantive account of criminal law—much like Husak's criteria—against which crime proposals should be measured.[35]

Legislative structures of this sort may or may not be enough to turn legislatures from their long-standing tendency toward expansive criminal law. But there is a longer track record for hope on this front than is often recognized. American legislatures in fact have long traditions of *decriminalization*, mostly on the sorts of conduct that majorities eventually came to have some sympathy with deregulating. The list is substantial: legislatures led the way in decriminalizing adult consensual sex; distribution of contraception; many gambling offenses; alcohol prohibition; certain firearm crimes; and varieties of offenses of expressive conduct including cross-

29. Garrett, *supra* note 27.

30. *Id.* at 723–24.

31. *Id.* at 725–26 (discussing the Base Realignment and Closure Act).

32. *Id.* at 727–28.

33. *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 717–18 (2005) (describing a legislator's hopes that the commission will reduce the risk of Congress "politicizing the entire sentencing issue" (internal quotation marks omitted)); *id.* at 757 ("[T]he U.S. Sentencing Commission is universally recognized to be an ineffectual agency that has done little to change the tough-on-crime politics of sentencing at the federal level.").

34. *See* Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978–2003*, 32 Crime & Just. 131 (2005).

35. For further thoughts on this idea, see Darryl Brown, *History's Challenge to Criminal Law Theory*, 3 Crim. L. & Philosophy 271 (2009).

dressing, distributing sexually explicit literature, public war-policy criticism, and contraception deregulation (as well as mere advocacy of deregulation).[36] Recently, two legislatures, New Jersey and New Mexico, repealed the death penalty (a reform several states took in the mid-nineteenth century). The law reform commission model has succeeded in aiding repeal of lower visibility crimes. Such commissions in Virginia[37] and New Jersey,[38] for example, in recent years have been used by legislatures to prompt repeal of little-used criminal statutes. Much the same is true with respect to some important criminal-procedure rights. Some legislatures enacted statutory exclusion rules as remedies for illegal searches before the Supreme Court required that remedy for states as a matter of constitutional law, and legislatures have funded access to DNA analysis for innocence claims, banned racial profiling in police investigations, protected various forms of suspect privacy, and regulated wiretapping and coercive interrogation techniques; forty-five states granted right to counsel by statute by the time of *Gideon v. Wainwright*.[39]

Much of this track record of decriminalization and regulation might be described as largely reflecting changed majoritarian preferences. But if so, it suggests majoritarian preferences, and legislatures, are capable of moving *in favor* of more limited criminal law (and a less intrusive criminal enforcement process). Still, what legislatures have been less inclined to do is lead rather than follow public opinion on decriminalization of the sort of difficult cases Husak focuses on: drug crimes; broad conspiracy doctrines; harsh sentences on many crimes; and a wide range of broad, preemptive offensives that expand criminal liability beyond crimes that even arguably fit criminalization criteria such as Husak's. Unless institutional-design features can prompt legislatures to move from this criminalization pattern, it seems unlikely we can hope for legislatures to address the most difficult examples of expansive criminalization, at least anytime soon. On the other hand, popular support for reform even of drug-crime policy is not inconceivable. Budget pressures and limits on prison capacity have lately prompted some consideration of further decriminalizing (and then taxing) marijuana,[40] and decriminalization of medical marijuana has won support through popular

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36. For a discussion of these decriminalization histories and a list of sources, see Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 235–41 (2007).

37. *See id.* at 243 n.100.

38. *See id.* at 251 n.136.

39. 372 U.S. 335 (1963). For discussion of these trends and citations to sources, see Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 839–50 (2004) (recounting history of congressional regulation of wiretapping); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004) (arguing that legislative trends through the Warren Court era suggest that the Court's criminal-procedure decisions can be fairly described as mostly majoritarian); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 800–04 (2006) (summarizing criminal-procedure legislative developments).

40. David Crary, *Bad Times May be Good for Pot Legalization Push*, S.F. CHRON., June 21, 2009, at A8; Eric Bailey, *Taxing Pot Could Become a Political Toking Point*, L.A. TIMES, Feb. 24, 2009, at B1.

referenda in several states.[41] Those are modest changes or indicators to be sure, but in the context of America's history of decriminalization they suggest the possibility for legislative action that moderates drug-crime policy with the support of, rather than in spite of, public opinion.

III. Courts, Constitutional Law, and Crime Definition

Barring that shift in the legislative arena, the next option for reducing overcriminalization is courts, the institutional player in which Husak places little hope but other scholars, in particular William Stuntz, have suggested is a more plausible alternative (if only because, in his view and others, legislatures seem so unlikely to change their ways).[42] Stuntz's suggestions for how courts might take on the regulation of criminal law, while much less developed than Husak's book-length treatment, are interestingly different in their doctrinal structure than Husak's approach. I won't explore that contrast here. Instead, I'll suggest briefly why judicial regulation of criminal law on Husak's terms might not be as completely implausible as Husak himself seems to believe.

Despite the familiarity of the basic terms of Husak's account of criminal law—harm, wrongdoing, desert—the criminal-law theory on which he builds is, relatively speaking, fairly young, and that youth may explain its lack of influence in judicially created constitutional law. The influential articulation of the harm principle dates at least to John Stuart Mill's 1859 work *On Liberty*, which prompted a response a few years later from Sir James Stephen on its implications for criminal law (of which Stephen disapproved).[43] But Mill's focus wasn't on criminal law per se—he spoke of government power more generally—and normative criminal law theory remained fairly dormant in building on that argument, or any other, for roughly a century, during which time scholars mostly wrote treatises[44] rather than working out strong normative theories of the scope, limits, and rationales of criminal law. That began to change in the mid-twentieth century with

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41. *See* Bill Piper et al., Drug Policy Alliance, State of the States: Drug Policy Reforms: 1996–2002, at 42 (2003), *available at* www.drugpolicy.org/docUploads/sos_report2003.pdf (listing state-law changes on medical marijuana and other drug policies, including referenda in nine states approving legalization of medical marijuana). For results since 2002, see Ballotwatch, http://www.iandrinstitute.org/ballotwatch.htm (last visited Aug. 10, 2009).

42. *See* Stuntz, *supra* note 7, at 587–98.

43. James Fitzjames Stephen, Liberty, Equality, Fraternity and Three Brief Essays 162–63 (1873).

44. *See, e.g.*, Francis Wharton, A Treatise on Criminal Law (8th ed. 1880); Joel Prentiss Bishop, Commentaries on the Criminal Law (7th ed., rev. and enlarged 1882). *But see* Francis Wharton, Philosophy of Criminal Law (1880).

scholars such as Wechsler, Kadish, Hart, and others;[45] one manifestation of that normative work was the MPC.[46]

Criminal-law theory as a sustained normative account has been under development for only about fifty years, not necessarily a long time to permeate scholarly, popular, and judicial culture. In that time there were dramatic developments to which normative criminal theory had to respond. The first was the shift, starting roughly in the 1970s, from the consensus around a discretionary, nominally rehabilitative sentencing policy that had dominated practice for several decades to a much harsher regime built on deterrent and incapacitative rationales, at the same time that retributivist theories regained ground among scholars and some public officials.[47] Those shifts required a substantial reworking of criminal theory, especially along lines of revived commitments to desert principles and retributivism rather than instrumental accounts of punishment. Accompanying that shift (and preceding it in time by roughly a decade) was the criminal-procedure revolution, which arguably prompted a response in the form of expanded substantive criminal law;[48] if that is so, the need for judicial regulation of crime was less pressing until recent decades.

At the same time, the Supreme Court developed constitutional doctrinal tools more generally to regulate legislatures on topics, such as speech, privacy, and race, that effectively intersected with criminal law, because legislatures were regulating in such areas with criminal prohibitions. That meant courts could strike down a lot of criminal statutes *without needing* a theory of criminal law; theories of due process, privacy, and speech did most of the work. Thus fell crimes of certain forms of speech, contraception distribution, abortion, interracial marriage, and, eventually, consensual adult sex.

Further, the Court made attempts at regulating substantive criminal law in other ways, without a theory of criminal law's general normative limits. It struck down criminal statutes in *Papachristou* and *Kolendar* not because the statutes criminalized nonharmful, nonwrongful conduct (though the statute in the first case criminalized "habitual loafers" and "strolling around . . . without any lawful purpose," and the second required proof of identification when one is stopped by a police officer) but because the statutes were vaguely worded.[49] It limited criminal punishment of status in *Robinson*, which struck down under the Eighth Amendment a statute making it a crime to "be

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45. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); KADISH, *supra* note 8; Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952); *see also* HERBERT MORRIS, *Persons and Punishment*, *in* ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 31 (1976); Williams, *supra* note 9.

46. On this point, see George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CAL. L. REV. 687 (2000).

47. For a broad overview of the shift toward punitive criminal-sentencing policies in the last decades of the twentieth century, see DAVID GARLAND, THE CULTURE OF CONTROL (2002).

48. William Stuntz developed this thesis. *E.g.*, Stuntz, *supra* note 39.

49. Kolender v. Lawson, 461 U.S. 352, 357–58 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

addicted to" narcotics.[50] And in *Lambert*, it struck down a city ordinance requiring felons to register with police upon arriving in the city, because the ordinance required no "activity" by offenders, offered no plausible notice of its requirement, and a breach could be "entirely innocent."[51] Those decisions attempted to regulate criminalization and punishment on due process or cruel and unusual punishment grounds, rather than on a principle that such conduct (or nonconduct) was directly protected as a substantive individual right. Those efforts at indirect regulation, coupled with recognition of substantive rights to privacy and speech that barred criminalization in those contexts, may have seemed promising approaches at the time to contain excessive criminalization. But with the passage of time—and in light of the growth in crimes and incarceration rates unconstrained by Eighth Amendment doctrine—they are recognized as weak, failed, or abandoned efforts.[52]

All of that can be understood to provide an explanation for why normative criminal-law theory has had very little effect on the development of criminal law to date, and in particular why it effectively has not long been available as an influence on judicial development of constitutional law. Normative theory of the sort Husak offers has developed a level of sophistication only relatively recently, and until fairly recently the Court was likely to recognize less need for such a theory, in large part because it was attempting to clean up criminal law with other doctrinal tools, some of which were very effective (privacy and speech doctrines, for example) and others much less so (notice and vagueness rules). It is plausible to believe that only in the last couple of decades has the need for a criminal-law jurisprudence to accompany a criminal-procedure jurisprudence become apparent and then (in the view of many, including Husak and me) pressing.

Husak's account is valuable, then, as an effort to present a careful philosophical account structured as a doctrinal response that courts and lawyers (and not just philosophers) can understand. Husak is no doubt right that courts will continue to be reluctant to adopt it as a means to restrict legislative criminal lawmaking, because the doctrine requires substantive judgments that intrude some core social-policy strategies. But the more clarity and consensus theorists like Husak achieve, and the greater the need for such a theory becomes apparent, the better the chances become for criminal law achieving a constitutional jurisprudence on par with procedure. Odds still may not be good. Consensus ideas have swept sentencing policy twice in the last century, but we still lack strong constitutional regulation of pun-

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50. Robinson v. California, 370 U.S. 660, 667 (1962).

51. Lambert v. California, 355 U.S. 225, 228–30 (1957).

52. For a discussion of *Lambert* in this respect, see Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 127–37. *Robinson*'s failure to extend beyond its facts is generally recognized to be demonstrated in *Powell v. Texas*, 392 U.S. 514 (1968) (rejecting challenge to a conviction for public intoxication on grounds that, under *Robinson*, it punished defendant's status of being an alcoholic, because "so viewed it is difficult to see any limiting principle" to *Robinson*). On the negligible constitutional regulation of sentence proportionality, see *Ewing v. California*, 538 U.S. 11 (2003).

ishment despite a plausible textual basis for it.[53] But stranger things—like the privacy doctrine, or the constitutionalization of criminal procedure, or the recent reinvention of the Confrontation Clause and federalism doctrines—have happened.[54]

If the timing is right—overcriminalization is substantial, and other strategies of containment signaled by *Papachristou*/*Lambert*/*Robinson* proved inadequate—why might the odds not be good for development of constitutional regulation of criminal law? One explanation would cite originalist or textualist accounts of constitutional interpretation and find little basis for limits on legislative definition of criminal law beyond those we have now. That is certainly true, but such accounts of constitutional law have relatively little explanatory power for the dramatic changes we have seen in constitutional interpretation, and for the wide acceptance of those changes.

Other accounts describe and endorse an interpretive process in which courts look not only to the Constitution's text and original meaning but also to contemporary norms and understandings, and the challenge of contemporary conditions, with the goal that the Constitution's "text and principles retain their authority and legitimacy over decades and centuries."[55] Described as purposive or dynamic interpretation, acceptance of a "living constitution," or a method of "constitutional fidelity," this approach accepts that constitutional meaning evolves over time in response to "how courts, political leaders, and everyday citizens interpret, apply, and adapt our written Constitution," even though "the Constitution itself does not change unless properly amended."[56] Constitutional interpretation looks to "the document's text, history, structure, and purposes, as well as judicial precedent," but also "contemporary social practices, evolving public understandings of the Constitution's values, and the societal consequences of any given interpretation."[57]

This latter approach has the virtue of explaining the acceptance and legitimacy of big shifts in constitutional meaning, such as the constitutional regulation of criminal procedure that was, until the 1960s, largely regulated by state statutes, or contemporary equal-protection doctrines regarding gender and race bias that have little or no grounding in original understandings of the Civil War amendments.[58] More importantly for present purposes, an approach such as this raises the possibility of an evolving constitutional

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53. The most plausible textual basis is the Eighth Amendment's Cruel and Unusual Punishment Clause. The absence of significant constitutional regulation of punishment proportionality is evidenced in *Ewing*. 538 U.S. at 24–28, 30–31 (upholding sentence under California's "three strikes" recidivist statute and describing deference to legislative policy choices on sentencing generally).

54. *See* Stuntz, *supra* note 7, at 588–98 (describing the way in which courts could gradually apply constitutional restrictions to sentencing policy).

55. LIU ET AL., *supra* note 22, at 29.

56. *Id.*

57. *Id.* at 33.

58. *See, e.g.*, *id.* at 47–63.

understanding that could regulate the scope of substantive criminal law, in light of contemporary normative commitments and changed circumstances such as a growing collection of overreaching criminal statutes and America's turn to unprecedented incarceration rates. Husak's ambition for a theoretical account that informs popular and scholarly debate and thereby contributes to an emerging vision of criminal law's normative parameters could aid this shift in understanding.

But if criminalization theory achieves this kind of success, notice that it would not be in the way Husak foresees—a normative principle that stands against popular opinion in favor of more criminal law. A theory that successfully informs scholarly and popular discussion eventually shifts views, so that popular (and scholarly or "opinion-maker") opinion and moral intuition will no longer contrast so sharply with the principles Husak endorses. Dynamic constitutionalism recognizes that courts are in constant implicit dialogue with the political branches. The Supreme Court sometimes explains its decisions with recognition of explicit legislative signals about changed constitutional meaning, such as citing trends among legislatures in decriminalizing certain conduct or removing juveniles from death penalty eligibility. Or, it may recognize other signs of evolving norms and public values, such as civil rights legislation that is both Congress's attempt to give meaning to the substance of the Civil War amendments and an example of public values that affect how the Court will interpret those provisions.

If all of this is correct, notice the difficulty it presents for a constitutional jurisprudence that would bar, say, some drug laws.[59] On the one hand, we have clear records of democratic politics reducing overcriminalization in light of changed social mores. Legislatures responded to democratic pressures to repeal a wide variety of long-standing crimes, such as consensual-sex offenses. When (and mostly only when) those legislative trends are clear, the Court is willing to step in and impose, as a matter of constitutional law, the view of national majorities on outlier jurisdictions, as it did in, for instance, *Lawrence v. Texas*[60] and, earlier, *Loving v. Virginia*.[61] On the other hand, our democratic indicators that drug crimes are losing public favor are more modest and tentative, and we have little indication that drug crimes are viewed as clashing with constitutional values in the way that race and gender discrimination came to be so viewed, or statutes criminalizing speech, contraception, or private consensual sex. Despite some trend toward medical-marijuana decriminalization and some

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59. Husak cites the surprising enforcement records regarding even simple drug-possession crimes. P. 16.

60. 539 U.S. 558 (2003) (holding unconstitutional a statute criminalizing homosexual sodomy).

61. 388 U.S. 1 (1967) (holding unconstitutional a statute criminalizing interracial marriage). For different descriptions of courts, especially the Supreme Court, devising doctrine in light of broader social change, see, for example, Jack M. Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537 (2004); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Michael J. Klarman, Brown*, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

moderation of certain drug-crime punishments, drug crimes as a whole continue to be regularly enforced (though enforcement patterns, especially with regard to marijuana possession, vary widely between localities), and there is so far insufficient indication that policy makers are moving significantly toward decriminalization and toward a harm-reduction or public-health strategy, rather than law-enforcement strategy, for addressing drug use and drug markets. Without those sorts of democratic indicators to support if not lead a changed understanding of constitutional meaning regarding criminal law's proper scope, it is unlikely courts will move in that direction. There is more to be said here, to be sure, than is summarized in this briefest of sketches of constitutional interpretation; courts do act in antimajoritarian ways at times. Still, originalist approaches provide no support for such a move, and dynamic or fidelity approaches, dependent on courts taking signals from democratic branches, would not likely predict or recommend it either.

Normative criminal-law theory is a contribution toward a shift in understanding, but normative theory seems rarely to have much influence directly on courts' decision making absent its influence first on at least elite professional opinion, if not popular opinion.[62] Husak's agenda, especially in as much as it is directed to legislatures and public critics, is an explicit effort to influence the project of democratic meaning making. In that sense, his emphasis on speaking to legislatures and scholars rather than courts is a plausible one.

But note the difference in how Husak aims to achieve limits on criminal law's reach and how existing limits have largely been achieved in the past. Husak seeks to limit criminal law as a category; any law imposing criminal punishments should accord with the prerequisites of wrongdoing, harmfulness, significant government interest, and the like. To reject a particular drug crime or other offense, we determine that it lacks one of these components. But the historical successes of criminal-law reform have not been framed in quite these terms, although interestingly, they implicitly employ some of them. More typically, social movements and eventually democratic branches of government focus on a particular criminalized activity (interracial marriage, consensual adult sex) and build arguments in favor of liberty regarding that particular activity. Often, the arguments resonate with Husak's familiar criteria. Regarding private consensual gay sex, for example, they took the form that such conduct is not harmful or wrongful and the government thus has no significant interest in regulating it.[63] For long periods, those arguments failed because many people thought nonmarital sex

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62. One might explain originalism's influence in this way: that method is one some Supreme Court Justices such as Justice Scalia explicitly endorse, but that approach won wide acceptance in circles of conservative elites at a time when conservative politics was ascendant. *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844, 896–99 (2005) (Scalia, J., dissenting) (asserting that the Constitution's meaning should be determined by how the Founding generation would have applied it); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–62 (1989) (similar).

63. For the definitive history of sodomy-law reform, see WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003 (2008).

threatened families and community order or spread disease or other harms. Eventually, as views changed, they became persuasive. But successful movements tend to start not with a focus on the proper parameters of criminal law generally but on the particular criminalized activity. Yet in the history of many successful decriminalization movements, we find arguments partially in Husak's terms: arguments that gun possession, consensual sex, interracial marriage, or alcohol use is not wrongful or harmful.[64] There are strong arguments that not all existing crimes address wrongful and harmful conduct. Yet wrongfulness and harmfulness are familiar terms we turn to in democratic debate over whether a given activity should be criminalized. To that extent, Husak already has a partial victory.

If that is so, why does overcriminalization remain, especially with respect to drug crimes? It may be that other components of Husak's argument that have less resonance in public debate—the limitation of significant government interests, and the presumptive right not to be punished—are necessary to do the further reform work Husak would like to see. More likely, I suspect, it is that remaining examples of excessive criminalization fall into two categories: offenses, such as drug crimes, that are amenable to democratic reform, and second, other sorts of crimes that are unlikely to be the object of social-reform movements and thus may require a harder, or at least different, route for reform. Substantial repeal or revision of drug laws may be no more implausible than repeal of homosexual sodomy laws once was; we have noted some modest changes in that direction, and groups such as the Drug Policy Alliance Network actively lobby for repeal and reform.[65] Some polling data suggest substantial support for less criminalization and less incarceration regarding drugs.[66] Perhaps drug policy is simply a couple of decades behind, say, sodomy-law reform and harsh drug prohibition will last a few decades longer than alcohol prohibition did. Whatever the eventual outcome, drug crime and punishment is a topic of ongoing public debate—on the familiar terms of harmfulness and wrongfulness—of the sort that has led in the past to legislative decriminalization.

Other examples of overcriminalization to which Husak also gives some attention, however, seem in a different category that is much less likely to be the focus of successful political movements. Much overcriminalization, as noted earlier with regard to overlapping crimes, takes the form of offenses that punish functionally the same conduct—the same harmful, wrongful

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64. Advocates tend to argue against all regulation of the conduct, civil or criminal, rather than starting with the category of criminal law and asking whether this activity justifies overcoming one's right not to be punished. That may be why we have very little distinction, as a matter of constitutional law, of the sort Husak argues for between what the government can *criminalize* and what the government can *regulate*. There are a few exceptions. Nascent arguments for marijuana legalization tend to endorse civil regulation along the lines of tobacco control.

65. For a description of Drug Policy Alliance Network efforts, including involvement in partial repeal of harsh sentencing laws for drug offenders in New York state, see Drug Policy Alliance Network, http://www.drugpolicy.org/ (last visited Aug. 17, 2009).

66. For a summary of recent polls on these issues, see Drug Policy Alliance, *Rockefeller Drug Laws: Quick Facts* 2, Feb. 2009, http://www.drugpolicy.org/docUploads/RockefellerDrugLawQuickFacts.pdf.

conduct—in multiple ways, meaning to an excessive degree. Broad interpretations of federal fraud statutes are one set of examples;[67] the *Pinkerton* conspiracy doctrine is another.[68] Particular applications of these offenses regard behavior that is wrongful only in a marginal, ambiguous, or attenuated sense, and perhaps a high-profile case could prompt some public attention to reform. But most such examples of expansive criminal liability are under the radar of significant democratic monitoring and, perhaps more importantly, are often connected to unambiguously wrongful behavior,[69] as in the conspiracy context.

What is worrisome about these examples of excessive criminalization is that neither democratic actor is likely to push for their revision—for they don't have the symbolic meaning or widespread reach into people's lives that sex or gun statutes do—and courts seem unlikely to either. Courts, after all, created some of the excessive reach of these provisions through statutory interpretation; the Supreme Court, of course, devised the *Pinkerton* doctrine. With regard to these latter sorts of offenses, we need either courts to internalize some commitment to criminal law's parameters like Husak's arguments, or reformed institutional arrangements in legislatures to help put such items on the agenda despite an absence of public lobbying. While courts show little sign of either shift now, change is not as implausible as it may seem. Precisely because democratic monitoring pays less attention to this sort of criminalization, courts, by imposing some limits on criminalization, would not contravene notable democratic preferences (the way it would in holding drug crimes unconstitutional) and legislatures might find less popular resistance to reform. In the latter case, however, the likely resistance of prosecutors may be an insuperable barrier. But this context is in fact where courts are most suited—acting to refine law in accord with core normative commitments of the sort Husak describes, in a process that looks like common lawmaking, in a context in which democratic governance pays little attention.

IV. Overcriminalization and Overpunishment

Husak's theory is an appealing and sound one as far as it goes, even if we have uncertain hopes of either courts or legislatures acting in accord with such a vigorous theory of criminalization. But perhaps the current absence

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67. *See* Norman Abrams & Sara Sun Beale, Federal Criminal Law and Its Enforcement 160–236 (4th ed. 2006) (overview of federal fraud statutes); John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 Am. Crim. L. Rev. 427, 463 (1998) (arguing mail-fraud statute is excessively broad especially as to private fiduciaries); Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 771 (1980) (describing the mail fraud statute's appeal to federal prosecutors for, inter alia, its "simplicity" and "adaptability").

68. *See* Pinkerton v. United States, 328 U.S. 640 (1946) (holding conspirators liable for coconspirators' crimes in furtherance of the conspiracy even if the conspirators did not agree to those crimes).

69. This behavior is arguably nonculpable, however, because the conspirator may have had no knowledge of, and did not approve of, his coconspirator's additional criminal acts for which he faces liability under *Pinkerton*.

of such a theory is not as critical to the biggest underlying problem of criminal justice as Husak suggests. Husak believes that the most important problems in criminal justice today are "expansion in the substantive criminal law and the extraordinary rise in the use of punishment" (p. 3). He sees the first as a cause of the second: "I argue that overcriminalization is objectionable mainly because it produces too much punishment."[70] Our punishment practices are unjust, he argues, not simply because we punish excessively with regard to widely accepted crimes—though he seems to agree with that argument as well—but because punishments "are inflicted for conduct that should not have been criminalized at all" (p. 3).

Because much of America's contemporary policy of extreme punishment arises from sentencing to relatively noncontroversial crimes, it is not clear how much a reduction of overcriminalization would affect the problem of overpunishment. Clearly if a substantial range of drug offenses were eliminated, incarceration rates would notably drop. Beyond drug offenses, however, there is a strong argument that the biggest cause of overpunishment is, simply, overpunishment—excessive sentences that far exceed international punishment rates or the American punishment averages for most of the twentieth century, even for familiar violent crimes.

A contributor to that overpunishment practice—one that Husak recognizes—is the probable growth ("probable" because the development is hard to measure accurately) of redundant or overlapping crimes, which increase liability and punishment for effectively the same conduct (pp. 22, 36–37). But Husak's theory may not do as much to control redundant offenses that criminalize wrongful conduct as it would to mitigate criminalization of nonwrongful, nonharmful conduct. His requirements that criminal law accord with offender desert,[71] coupled with his requirement that offenses be no more extensive than necessary to directly serve the government's substantial interest,[72] should provide the basis for limiting excessive punishment, whether arising from the sentence assigned to a single offense or arising from the accumulation of multiple, overlapping offenses. But, as to legislatures, at least, notions of desert and necessity regarding punishment have not in recent decades been restrictive ideas; they are as easily turned into rationales for our prevailing excessive sentences.[73] What little moderation we have

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70. P. 3; *see also* pp. 14–15. *But see* p. 18 ("I do not allege that the growth of the criminal law is the only or even the most significant factor in explaining the increased size of the prison population. The most important reason . . . is because punishments for existing offenses have become far more severe.").

71. Pp. 82–83 ("[P]unishments may be undeserved when they are excessive. The desert constraint underlies the principle of proportionality . . . .").

72. *See* pp. 153–59.

73. *See* James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85 (2003). Again, however, there are exceptions. Minnesota's legislature created a sentencing commission and regime that has successfully moderated incarceration policies. *See* Minnesota Sentencing Guidelines, *available at* http://www.msgc.state.mn.us/ (noting guidelines took effect in 1980); SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tbl.6.29 (2008) (documenting that Minnesota's incarceration rate per 100,000 residents was less than half the national average rate in 1980 and remains less than half the national average rate in 2007).

seen in sentencing from legislatures has come not on grounds of such principles but largely in response to budget pressures arising from increased incarceration coupled with some turn toward treatment over prison for drug users.

Courts may be a slightly more promising institution to turn to for control of sentencing. Although the Supreme Court's proportionality jurisprudence currently leaves little basis for judicial control of sentences,[74] that doctrine, and related ones of double jeopardy and merger, at least provide more familiar doctrinal premises from which courts could limit sentences arising from multiple offenses based on the same conduct.[75] But courts will probably need to conclude that our draconian punishment practices either constitute a failure of democratic governance that threatens important rights, as they have to some modest degree in prison-reform litigation, or they will need to see—as with reform of substantive offenses—some indicators of democratic support for such a shift.

CONCLUSION

One might argue—or at least, Husak might argue—that it is unfair in assessing this project to focus so much on the practical prospects of achieving its policy goals. Its primary aim is the philosopher's work of bringing analytic clarity to a problem and making or improving arguments for its normative position. Whether and how those arguments affect the world is a separate issue. On those terms, Husak's work should already be marked a success. While framed within familiar doctrinal terms, his arguments are sufficiently persuasive new contributions to the topic to have quickly earned favorable notation in prominent theoretical literature.[76] Nonetheless, Husak's book is a project of applied philosophy focused on a durable problem at the center of Anglo-American criminal justice. One ultimately wants to know whether it will change the state of affairs that detrimentally affects scores of thousands of lives indefinitely into the future. The institutional prospects for ameliorative change are mixed, but not hopeless. And ideas can matter; they can have persuasive force that changes widely shared views and actions. If Husak's book can contribute even modestly to that shift, it would be at least as great a practical achievement as it is a scholarly one.

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74. *See, e.g.*, Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009) (describing and criticizing the Court's constitutional governance of sentencing).

75. For brief discussions, see Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 461–65 (2009), and Stuntz, *supra* note 7, at 594–96.

76. *See, e.g.*, ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 22 (6th ed. 2009).