

Douglas Husak

The Philosophy of Criminal Law.

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Douglas Husak is in the small handful of outstanding criminal law theorists in contemporary analytic philosophy of law. He has written important books—three on drug policy and decriminalization (*Drugs and Rights* [CUP 1992]; *Legalize This!* [Verso 2002]; *The Legalization of Drugs* [CUP 2005]), and a recent book on *Overcriminalization* (OUP 2008). However, the bulk of his research output has been published in journal articles and contributions to anthologies. There are seventeen such essays in this book, which Husak estimates to be about half his total publications (10). The essays here have all appeared in top journals or highly regarded anthologies, and will be all well known to the specialists; so one cannot plead the usual reason of relative inaccessibility to explain such an assemblage. Nonetheless, this collection is valuable for bringing an important body of scholarly work to the attention of a wider audience. The range of essays published here is wide in terms of the scope of philosophical theorizing about the criminal law. The section ‘Criminal Liability’ covers the alleged requirement of a criminal act for liability, the place of motives and intentions, the concepts of transferred intent and nonconsummate offence, and the concept of strict liability. The section ‘Culpability’ discusses relative culpability, willful ignorance and the principle of legality, rape, and mistake of law. ‘Defenses’ is a section that talks about justifications and excuses, partial defenses, the ‘But Everyone Does That’ defense and the *De Minimis* defense. The section ‘Punishment and Its Justification’ includes ‘Why Punish the Deserving’?, an essay on *malum prohibitum* and retributivism, and a discussion of the idea of ‘already punished enough’. Virtually all of these papers are classics, points of departure for any further consideration of the topics with which they deal.

Perhaps the most important and interesting thing that emerges from seeing all this work together in one place is this: there is no question that there is a guiding moral sensibility behind everything that Husak researches and argues. It is a somewhat old-fashioned, and certainly in the Age of Security an unfashionable, sensibility—that of the traditional civil libertarian. I mean this. Take for example the minority dissent in the recent Supreme Court of Canada case of *R v Sinclair*. Sinclair consulted in a cursory kind of way a lawyer at the beginning of his interrogation as a murder suspect. The interrogation then continued. Sinclair asked several more times to consult a lawyer, but the police declined to permit this, arguing that he had had his consultation and that was that. He eventually confessed, was charged and convicted. He asked to have all evidence gained from the interrogation and the confession excluded as his constitutional right to consult counsel had been infringed. The Supreme Court majority said it had not: the conditions under which a second lawyer consultation would be permissible were very narrow, and did not apply to Sinclair’s circumstances. The dissent on the other hand delivered an impassioned opinion linking together the presumption of innocence, the right against self-incrimination and the right to consult counsel as the three pillars

supporting the relationship between citizen and state, built around the fact that individual liberty is fundamental and that the burden of proving that its interference with such liberty is justified falls wholly on the state and is a very high burden. That is what I mean by civil libertarianism, and that is the spirit that animates Husak's work.

Husak describes himself as a retributivist in that he firmly believes criminal punishment should be applied only to those who deserve it. But he is far from being the cartoon-figure fire-breathing retributivist of law-and-order politics. Much of his work goes towards showing how few of those alleged offenders who allegedly deserve punishment because they broke a law really actually do deserve punishment from the moral point of view. He is highly skeptical about strict liability, about *mala prohibita* as grounds of liability, about inchoate offences as grounds of liability, and so on. He is doubtful that the behavior condemned by the vast majority of drug-related offences constitutes 'desert' in the required sense. Moreover, he is very insistent that deserving punishment sets only a necessary condition for justified punishment: it is far from a sufficient condition. He emphasizes what he calls 'the drawbacks of punishment': state punishment is 'tremendously expensive, subject to grave error, and susceptible to enormous abuse' (397). In the light of these drawbacks, the actual imposition of punishment must be justified independently of the fact that the punishment is deserved.

The second general feature of Husak's work that I would like to isolate and commend is his awareness of boundary, if I may put it that way. In his introduction to the book (which makes, by the way, fascinating reading in itself), Husak positions his work at the intersection of philosophy and law (6). Philosophers working in criminal law theory, he says, have a tendency to be 'extraordinarily knowledgeable about the nuances of moral and political responsibility', but rarely refer to actual criminal law cases or statutes. Legal academics on the other hand know a great deal about statutes and cases, but rarely pursue the more abstract and reflective questions their doctrinal *tours de force* invite. Husak tries 'to be firmly anchored in existing criminal law while drawing heavily from contemporary moral, political and social philosophy.' There is a lot of space between the abstractions of general political morality and the detailed provisions of a criminal code or body of criminal law. The more you approach the former, the more likely you are to fudge details of the latter. The more you approach the latter, the more you are likely to finesse controversies within the former. Navigating the path down the middle requires great care, and great sensitivity to when the relative lack of detail or the relative avoidance of controversy threatens the force of the argument being made. Such a path can only be well navigated by one who is in full command both of the background philosophical issues and of the relevant black-letter law. Husak is a very careful and acute navigator of this path. He understands well how far he can go in the direction of philosophical abstraction without starting to beg questions embedded in the cases and statutes he discusses. He constructs, as any analytic philosopher constructs, abstract structures of reasonings that have loose ends. He often says things to the effect of 'some would go further and contest this issue just so: I will leave that to those who think it matters': or 'if you don't accept what I am saying, then you have to be prepared to defend such-and-such a position, or thesis or claim', but he leaves it there. The result is a whole

load of analyses that both clarify issues and move them along. What more could one ask for in a work of analytic philosophy?

Husak in person is low-key and modest, mostly content to leave the limelight to the flamboyant or the more prodigiously system-building (not exclusive options among criminal law theorists). He has nothing to be modest about. His body of work is relevant, humane, tightly focused, powerfully presented, and cogently argued. This collection of essays is a fine example, and a fine book. Welcome it and read it.

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