Law and Philosophy (2022) 41: 263–282
https://doi.org/10.1007/s10982-021-09437-3

ALICE RISTROPH

CRIMINAL THEORY AND CRITICAL THEORY: HUSAK IN THE AGE OF ABOLITION

(Accepted 17 November 2021)

ABSTRACT. Political theorists imagine a world without government (''a state of nature'') in order to assess the legitimacy of existing states. Some thinkers, such as philosophical anarchists, conclude that in fact no state can be justified. Should theorists of criminal law similarly imagine away the very thing they seek to theorize? Doug Husak has claimed that ''the object of criminal theory is to offer suggestions to improve the content of the criminal law … not to abolish it.'' But this Essay argues that abolitionist-leaning scholarship reflects several welcome developments in criminal theory: a concern with the state; attention to empirical data and the distinction between normative claims and descriptive ones; recognition of enforcement as an essential element of criminal law; and above all, a demand that criminal law prove itself—a refusal to grant to criminal law a presumption of legitimacy. These theoretical orientations did not appear for the first time in abolitionist scholarship. In fact, all are calling cards of Husak's own work, and cause to celebrate it.

It was 1974, and Doug Husak was still a student, when Robert Nozick claimed that ''[t]he fundamental question of political philosophy, one that precedes questions about how the state should be organized, is whether there should be any state at all. Why not have anarchy?''[1] That Nozick could see this question as *the* fundamental one suggests that he was thoroughly a modern rather than an ancient, to invoke a familiar dichotomy used to organize the history of political thought.[2] The ancients viewed the polity as both chrono-

[1] Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974): p. 7.

[2] See Benjamin Constant, ''The Liberty of the Ancients Compared with that of the Moderns,'' in Constant, Political Writings (Cambridge: Cambridge Univ. Press, 1988) (1819).

logically and normatively prior to any individual member; they did not imagine such a thing as a pre-political individual who would have the autonomy and independence (let alone a moral right) to decide whether to form a state or not. The discovery—or invention—of the autonomous individual arguably marks the birth of liberalism and the transition from the ancients to the moderns.[3] That shift took place long before Nozick's libertarianism, with profound consequences: it changed baseline expectations, so that philosophers might begin from a presumption against state authority rather than one in favor of it.

Criminal theory purports to be modern, in that most who write in this field embrace basic liberal precepts such as respect for individual liberty and the need for constraints on the state.[4] We might expect, then, that *the* fundamental question of criminal theory, one that precedes questions about how criminal law should be organized, is whether there should be any criminal law at all. Why not abolition? But that is not a question widely pursued by criminal theorists. Husak has suggested that it is a question outside the scope of criminal theory altogether. ''The object of criminal theory is to offer suggestions to improve the content of the criminal law from a moral perspective, not to abolish it or transform it into something it is not.''[5] Husak acknowledges ''a fine line'' between improvement and

[3] Many identify Hobbes's depiction of individuals in a state of nature, and their supposed choice to contract with one another and form a sovereign, as the key inflection point.

[4] See Douglas N. Husak, Philosophy of Criminal Law (Totowa, NJ: Rowman & Littlefield, 1987): p. 244 (''Liberalism, as here understood, represents the moral and political tradition with which I believe it is most promising to fuse revised criminal theory.''). Husak's 1987 book bears almost the same name as Husak's 2010 collection of essays, The Philosophy of Criminal Law: Selected Essays. Throughout this essay, I have attempted to avoid confusion by referring to the latter book as Selected Essays, and to this 1987 volume as Philosophy of Criminal Law. George Fletcher has suggested that criminal law theory may be exclusively modern: ''[T]he major debates in the philosophical reflection on the criminal law have a distinctively modern ring to them. Established authorities have been punishing criminals from the beginning of organized society, but it is not until the late eighteenth century that we find serious engagement and disagreement about the purposes of inflicting this harm on those who have transgressed the norms of the community.'' George Fletcher, ''The Nature and Function of Criminal Theory,'' 88 Cal. L. Rev. 687, 689 (2000). Fletcher's dates are at least a little off, since Thomas Hobbes discussed the purposes and legitimacy of criminal punishment in *Leviathan* in the mid-seventeenth century.

[5] Douglas N. Husak, ''Introduction: Reflections on Criminal Law Theory,'' in The Philosophy of Criminal Law: Selected Essays (Oxford and New York: Oxford University Press, 2010): p. 7 [hereinafter Husak, Selected Essays]. But contrast that claim with Husak's work on questions such as ''Why criminal law?'' and ''Is criminal law important?'' See Douglas N. Husak, ''Why Criminal Law: A Question of Content?,'' 2 Crim. L. & Phil. 99, 115 (2008) (noting failure of U.S. criminal law to limit punishments in line with desert, and asking ''how much worse the deviation from the ideal would need to be in order for the entire system of criminal justice to lose its legitimacy''); Douglas N. Husak, ''Is the Criminal Law Important?,'' 1 Ohio St. J. Crim. L. 261, 261 (2003) (''Is the criminal law important? I am skeptical.'').

transformation, but he did not attempt to mark that line except to insist (sometimes) that abolition was off the theorist's table.[6]

Nearly half a century after Nozick wrote, and after almost as many years of influential scholarship from Husak, abolition is on the table for many criminal law scholars, some more theoretically inclined than others. Most works contemplating abolition are anything but libertarian, and many critique classic liberalism; they often focus instead on the interdependence of human beings and the selective, racialized ways in which conceptions of individual responsibility have been constructed to legitimize structural inequality.[7] And yet still the new prominence of abolitionist arguments may mark a profound shift in baseline expectations akin to the one that divides the ancients from the moderns: we may be moving from a world in which institutions of criminal law enjoy a presumption of legitimacy to a world in which they do not.

Husak has hardly embraced this abolitionist turn. To the contrary, he has expressed concern about what he calls "criminal law skepticism," in which he includes abolitionism.[8] But whatever one's ultimate conclusion on the merits of abolition as policy or strategy, abolitionist-leaning scholarship reflects developments in criminal theory that are independently valuable: a concern with the state and its institutions; attention to empirical data, and a related insistence on keeping distinct normative and descriptive claims; an understanding of enforcement as an essential element of criminal law that theorists must address; and above all, a demand that criminal law prove itself—a refusal to grant to criminal law a presumption of legitimacy. These theoretical orientations did not appear for the first time in abolitionist (or skeptical) scholarship. In fact, all are calling cards of Husak's own work, and cause to celebrate it.

Should we embrace these methods but nonetheless denounce the arguments for abolition that they may produce? In this essay, I investigate that question. I begin with a question about labels: Husak

[6] Husak, "Introduction," Selected Essays, supra n.5. Ten years later, I am not sure whether Husak still thinks of abolition as an impermissible aim of criminal law theory. He has recently made clear that he does not endorse that goal, but his very effort to respond to abolitionist arguments suggests a recognition that they are, for better or worse, part of the terrain of criminal theory now. See Douglas N. Husak, "The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law," 23 New Crim. L. Rev. 27 (2020).

[7] See, e.g., Dorothy Roberts, "Foreword: Abolition Constitutionalism," 133 Harv. L. Rev. 1 (2019).

[8] Husak, "The Price of Criminal Law Skepticism," supra n.6.

describes his enterprise as *criminal theory* rather than *criminal* law *theory*; is this a slip of the tongue, or a distinction with a difference? I will suggest that in fact Husak brings a concern with law, and a particular understanding of law, to his inquiries, much to the benefit of the scholars that follow him. Even as he has engaged in normative philosophy, he has insisted on telling the truth about law, identifying a broader range of empirical realities that matter to the work of criminal theorists. In the second section of the essay, I identify the implications of Husak's observation that criminal law is in fact law. Law is not a divine writ, moral intuitions, or timeless and abstract principles of reason; it is a collection of human practices and human institutions. Law involves state institutions that are always costly, usually inefficient, often biased, and sometimes inaccurate. And yet, these institutions may turn out to be necessary, or the best of the available options. In my third and final section, I look to the future of criminal theory, with particular attention to critical perspectives including abolitionist arguments. Criminal theory should not commit at the outset either to preserving criminal law or abolishing it, I suggest. It should commit to honesty and critical inquiry, and to model that commitment, theorists will find no better inspiration than Husak.

I. CRIMINAL THEORY: WHITHER LAW?

Though many scholars seem to use the phrases *criminal theory* and *criminal law theory* interchangeably, Husak has consistently favored the former.[9] I have not been able to locate any explicit rationale for using one term over another in Husak's own work or elsewhere, but I can imagine two very different arguments for dropping the word *law* and using the shorter phrase *criminal theory*. These two arguments are in direct opposition with one another, and in that opposition we may find much about where criminal theory has been and where it needs to go.

First, one might favor the term "criminal theory" over "criminal law theory" simply to avoid redundancy. On this account, criminal is an adjective that can be used only in the context of law. There is no

[9] E.g., Husak, Philosophy of Criminal Law, supra n.4, passim.

such thing as crime, or criminality, without law. *Nullum crimen sine lege* could be understood not simply as a normative statement about the best design of a legal system, but as a conceptual truth. Call this the *legalistic* conception of criminality. It still requires an account of law, so if scholars disagree about what counts as law, they may share a legalistic conception of criminality and yet still disagree about what counts as criminal. But the key point is that in the legalistic conception, criminality is always defined by law.

Alternatively, one might favor the term ''criminal theory'' because one views law as optional or secondary to the enterprise. On this account, criminality is a characteristic of actions or persons, defined by wrongfulness, harmfulness, or some other extra-legal criteria. Positive laws, the laws actually enacted and enforced by real polities, may or may not accurately identify true criminality. A central aim of the criminal theorist who holds this view is the articulation of true criminality, with the hope that lawmakers and law enforcers will follow her recommendations. It is tempting to label this view the moralistic conception of criminality, since morality is the usual candidate for a non-legal guide to what is criminal. But to preserve the possibility that something other than morality could define criminality, I will call this second view the *extra-legal* conception of criminality.[10]

With these two categories, I mean to raise two jurisprudential questions. There is, of course, the classic and vexing question *what is law*, a darling topic of scholars of general jurisprudence but an inquiry that most criminal theorists seem to have viewed as unnecessary. The second question is about the meaning of the adjective *criminal* and the way that it relates to the category *law*. Though theorists have given some attention to what is distinctive about criminal law, they typically do so without first addressing what counts as law. I share many criminal theorists' impatience with general jurisprudence that seems unconnected to actual practice, but it is my interest in actual practice that makes the question, what is (criminal) law, so important. When one seeks to justify criminal law, what are the precise practices or institutions that need to be justified?

[10] Although I think Husak usually relies on a legalistic conception of *criminality*, he does embrace an extra-legal conception of *desert*. But to deserve punishment is not necessarily to be criminal. See Douglas N. Husak, ''What's Legal About Legal Moralism?,'' 54 San Diego L. Rev. 381, 390-91 (2017). Admittedly, there are some strands of Husak's work that seem more in keeping with an extra-legal and even specifically moralistic conception of criminality. See infra section 3.

As Husak would put it, what are the data that our theories seek to explain or to justify?[11]

In the next section, I examine the account of law and the conception of criminality that emerges from Husak's work. One preliminary note may help clarify what is at stake. Our underlying assumptions about what law is, and what criminal law is, are of profound practical importance, even beyond their philosophical interest.[12] The disaggregation of criminality from law—the notion that acts themselves, or still worse, *people* may be inherently criminal—has been disastrous in the United States. It has allowed the state that makes and enforces laws to escape responsibility for the ways in which state actors bestow criminality. An extra-legal conception of criminality was articulated explicitly during the eugenics movement in the early twentieth century, but over a much longer period, it has made possible the association of criminality with a particular racial group: Black Americans.[13] It has made it much more difficult to recognize the legal and social construction of Black criminality *as* a construct. It has reconfigured the political order to transform America into a carceral state: a nation organized around a fundamental division between full-fledged citizens and criminals.[14] I don't have any strong preference between the phrases *criminal theory* or *criminal law theory*, but I do think it is a mistake to theorize criminality without paying attention to law, or to theorize law without paying attention to state actors and state institutions.

As will become clear, I don't think it makes sense to commit a priori that criminal theory will seek to improve criminal law, or

[11] Douglas N. Husak, "Retribution in Criminal Theory," 37 San Diego L. Rev. 960 (2000).

[12] "[N]othing is as useful to sound practice as a good theory. I hope to show that the poverty of Anglo-American criminal theory is among the most significant contributors to substantive injustice." Husak, Philosophy of Criminal Law, supra n.4, at 6-7.

[13] Khalil Gibran Muhammad, The Condemnation of Blackness (Cambridge: Harvard University Press, 2010); Jonathan Simon, "'The Criminal Is to Go Free': The Legacy of Eugenic Thought in Contemporary Judicial Realism About American Criminal Justice," 100 B.U. L. Rev. 787 (2020).

[14] See Alice Ristroph, "The Second Amendment in a Carceral State," 116 Nw. U. L. Rev. 203 (2021); Alice Ristroph, "Farewell to the Felonry," 53 Harv. C.R.-C.L. L. Rev. 563 (2018); Alice Ristroph, "Criminal Law as Public Ordering," 70 U. Toronto L.J. 64 (2020). An extra-legal conception of criminality allows not only the criminalization of persons by race, but also the persistent trope of the "law-abiding" citizen who nonetheless breaks criminal laws. This figure appears in critiques of allegedly unjust laws and seems usually to be white. Douglas N. Husak, "Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction," 23 L. & Phil. 437 (2004); Sarah Seo, Policing the Open Road (Cambridge: Harvard University Press, 2019).

transform it, or abolish it, or refrain from any of these tasks. Whether criminal law should be improved or transformed or abolished is one of the questions criminal theorists should seek to answer, and we shouldn't bind ourselves to a particular conclusion before we've done the work. But being a modern, as far as political theory goes, when I enter conversations about criminal law I *am* committed at the outset to a background principle of political equality: a fundamentally inegalitarian criminal law is suspect, even if inequality were shown to produce more social stability or serve the interests of the political entity as a whole.[15] There are questions to be resolved about what degree of inequality is tolerable, but I cannot imagine circumstances in which we would find legitimate a system of criminal law whose central function is the production and maintenance of a permanent underclass. My position on this point precedes my criminal law theorizing, but it is not pre-theoretical; it flows from political theory, which must precede and surround any theoretical evaluation of criminal law.[16]

Enough about my views; this is an essay about Husak. It seeks to demonstrate that Husak's great influence, on me and many others, stems from the importance of *law* to his criminal theory.[17] The next section examines the relevance of law in Husak's work, and in so doing, clarifies what counts as law.

II. NEITHER MAGIC NOR DIVINE, BUT HUMAN

In many works, Husak defines criminal law as those laws that subject persons to punishment, with punishment then defined as "an

[15] For an ancient defense of inequality in the interests of social stability, see Plato, The Republic. I don't want to take unnecessary swipes at the ancients, whose many insights about politics merit more attention than they presently receive. But I think it fair to say that a concern with human equality did not command the ancients as much as it commands thinkers from Hobbes afterward.

[16] See Husak, Philosophy of Criminal Law, supra n.4, at 5; id. at 244 ("[C]riminal theory has no viable alternative but to incorporate a substantive moral and political philosophy."); Husak, "The Price of Criminal Law Skepticism," supra n.6, at 50 ("Criminal law is an instance of state authority, and necessarily requires a political as well as a moral theory to rationalize it.").

[17] See, e.g., Husak, "Guns and Drugs," supra n.14, at 438 ("Too often, moral and criminal theory are separated from applied ethics and criminal law."). To be sure, Husak did sometimes identify specific concepts dear to criminal theorists, such as desert, as independent of law. See "What's Legal About Legal Moralism", supra n. 10, at 387-88 (arguing that "legality is not a principle of desert"); see also n.59 below and accompanying text.

intentionally imposed deprivation that expresses condemnation.''[18] This definition specifies which subset of law counts as *criminal*, and it specifies what counts as *punishment*, but it does not address the threshold question of what counts as *law*. Across Husak's work, there are different possible answers to that question. Sometimes, the label law (at least, when modified by the adjective criminal) seems to refer only to formal rules and general principles of liability, such as those found in statutes or court decisions.[19] But rules and principles, floating in the ether and disentangled from actual enforcement, are costless. And a signature feature of Husak's work is its emphasis on the costs or drawbacks of criminal law.[20] When Husak writes about the costs of criminal law, there arises a conception of law richer and more complex than a set of formal liability rules. The costs of law arise from the fact that criminal law (like all law) is a human practice. As Husak often emphasizes, criminal law is a product of a state, a distinctively human institution.

The insight that law requires a state is captured by two simple claims about what law is not. First, criminal law is not a manifestation of divine will. Husak's point is not that the content of criminal prohibitions may deviate from what a divinity might command, although such deviation is surely possible. Rather, Husak is making a point about enforcement: ''[B]ecause punishment is administered by the state rather than by God … it is inevitable that the practice of punishment … will be tremendously expensive, subject to grave error, and susceptible to enormous abuse.''[21] Human institutions are both costly and fallible, and Husak has not allowed theorists to stipulate away those features of human law.

Similarly, Husak has pointed out that criminal law is not a magic wand that makes undesirable conduct disappear. Here his point is not simply that law would be administered by humans, but also that

[18] See, e.g., Husak, ''The Price of Criminal Law Skepticism,'' supra n.6, at 31.

[19] See Husak, ''Is the Criminal Law Important?,'' supra n.5, at 262 (''I believe that the criminal law itself is not important. … The factors that govern whether or not persons will be punished are not much affected by the content of the statutes we teach and write about.'').

[20] See Douglas N. Husak, Overcriminalization (Oxford and New York: Oxford University Press, 2008); Husak, ''Why Punish the Deserving?,'' in Selected Essays, supra n.5.

[21] Husak, ''Why Punish the Deserving,'' supra n.20, at 397. Contrast Husak to Nozick, who analogized punishment to God's infliction of pain. Nozick quoted C.S. Lewis for the proposition that retribution was God's way to ''plant[] the flag of truth within the fortress of a rebel soul.'' Nozick, Philosophical Explanations (Cambridge: Harvard University Press, 1981): p. 718 n.80. Query whether planting flags of truth within rebel souls is consistent with the minimalist state that Nozick purported to embrace in Anarchy, State, and Utopia.

it would be directed at and applied to humans, who may not respond exactly as the lawgiver might wish.[22] "In reality, of course, the criminal law … *proscribes*, but may not *prevent*. We can safely predict that some people will engage in the prohibited behavior, whatever the law may say. If the statute in question is indeed a criminal law, these offenders will become subject to punishment."[23] I suspect that many theorists have missed the force of this claim, thinking it obvious that punishment must be justified and thinking themselves to have engaged in just that task. But as Husak insists, it is *state* punishment that must be justified when we contemplate criminal *law*. The usual obsessions of punishment theorists—the desert of the offender and the disutility of the prohibited conduct—simply do not exhaust the relevant considerations when punishment takes place within a state. When punishment takes place within a state, we must ask what it will cost to administer, what rights it will infringe, what externalities it will produce, and of course, what errors or abuses are likely to occur.[24] And crucially, because states do many things other than impose criminal punishment, we cannot evaluate state punishment without asking about "the justice of other social institutions," and without comparing criminal sanctions to possible alternatives.[25]

To Husak's explicit claims that criminal law is not divine will or magic wand, one might add a third claim implicit in his work: criminal law is not (merely) a concept but a collection of actual human practices. Criminal law is something real people actually do, and a criminal theorist must pay attention to the real world. "To begin to theorize about any subject matter, we must have some means to identify what the theory is about. What are the data about

[22] Separate from the point here that criminal law is an imperfect mechanism to change behavior, Husak's work often emphasizes empirical evidence about what humans are really like. For example, an effort to understand how real persons negotiate sexual intimacy led to his controversial work on consent standards in sexual assault law. See Husak, "Rapes Without Rapists: Consent and Reasonable Mistake," in Selected Essays, supra n.5, at 233. In a very different vein, he argued that psychological research on various forms of cognitive bias called into question criminal theorists' heavy reliance on intuitions. See Douglas N. Husak, "What Moral Philosophers Might Learn from Criminal Theorists," 36 Rutgers L.J. 191, 192-194 (2004).

[23] Husak, "Guns and Drugs," supra n.14, at 469.

[24] All of these considerations arise in Husak's work, some receiving more attention than others. Particularly useful, in my view, are his discussions of a right not to be punished and his articulation of a framework to evaluate infringements of that right. Overcriminalization, supra n.20, at 92-103, 122-159.

[25] Douglas N. Husak, "Holistic Retributivism," 88 Calif. L. Rev. 991, 1000 (2000); see also Husak, "Why Punish the Deserving," supra n.20, at 401.

which a theory of the criminal law is constructed? … [B]y what criterion do we identify what counts as the criminal law?''[26] With these questions, Husak calls for both a definition of criminal law (the criterion to choose the data), and also attention to empirical evidence of actual practices (the data itself). I have already noted that Husak defines criminal law as those laws that subject a person to punishment, but here I want to emphasize that Husak sees actual laws, not ideal ones, as the data points from which a theorist must proceed. He has often insisted that criminal theory take seriously the content and breadth of actual criminal codes.[27] He is not alone in insisting that actual, positive law provides the raw data from which criminal theory begins its work, but he is unusual among theorists in his sustained attention, across decades of scholarship, to the difference between descriptive claims and normative or prescriptive aspirations. Early on, he recognized that both our understanding of law and our ability to evaluate it—and possibly change it—are compromised if we do not keep separate descriptive and prescriptive claims.[28]

Husak's insistence on the separation of *is* and *ought* suggests a rejection of one specific theory of law—the view that rules should not even be called legal unless they satisfy given normative standards.[29] Beyond that rejection, however, Husak did not opine on ''what is law,'' disclaiming any effort at ''grand theorizing'' or the identification of ''necessary truths about law.''[30] Fair enough; I share the view that most jurisprudential efforts to articulate one grand theory of law have abstracted too far from actual practice to be

[26] Husak, ''Retribution in Criminal Theory,'' supra n.11, at 960.

[27] Id. at 962. This led Husak to reject what I have called elsewhere subject-matter exceptionalism, or the view that criminal law may be defined and distinguished by the unique category of conduct that it regulates. ''The range and diversity of criminal offenses proved resistant to the formation of grand generalizations about substance. The principles that indeed pertain without exception to all offenses have the appearance of platitudes.'' Husak, Philosophy of Criminal Law, supra n.4, at 21.

[28] ''The tension and interplay between descriptive and prescriptive functions is perhaps the most fascinating and important aspect of criminal theory.'' Husak, Philosophy of Criminal Law, supra n.4, at 24. See also id. at 25 (''Regardless of whether the theorist emphasizes description or prescription, he must employ some criterion for deciding when a recalcitrant part of the substantive law should be accommodated by a change in general principle, or when it should be condemned as unjust. In short, he needs to know when it is appropriate to describe and when to prescribe.''); Douglas N. Husak, ''Crimes Outside the Core,'' 39 Tulsa L. Rev. 755, 759 (2004).

[29] This view is often associated with Lon Fuller, The Morality of Law (New Haven: Yale University Press, 1969).

[30] Husak, Introduction, Philosophy of Criminal Law, supra n.4, at 1, 6; see also Overcriminalization, supra n. 20, at vii (expressing skepticism about the relevance of many jurisprudential debates, including ''the endless refinements of various modes of positivism'').

useful. But it is precisely because actual practices matter that I think some attention to the definition of law is necessary. Without some conception of which practices are legal, how do we know which ones are relevant? Without a definition of law to discipline their inquiries, theorists may wind up cherry-picking their data.[31] In particular, the uglier aspects of actual practice may be dismissed as something other than "criminal law."

This is exactly what happened in American criminal theory over the twentieth century: discretionary and discriminatory enforcement practices were occasionally noted and bemoaned, but they were treated as irrelevant to the normative evaluation of criminal law.[32] Theorists assumed a substance / procedure dichotomy, designating rules of liability as substance and most enforcement mechanisms as procedure.[33] Curiously, punishment, which is undoubtedly part of the enforcement process, was placed on the substance side and deemed a worthy subject for criminal theory. But the legal practices that transpire after the articulation of liability rules and before the imposition of punishment—policing, prosecution, and adjudication—have been ignored by most criminal theorists.[34] This part of law, the part called "process," is arguably the most important, as famously expressed by Representative John Dingell: "I'll let you write the substance; you let me write the procedure, and I'll screw you every time."[35]

As noted above, Husak defines criminal law as those laws that subject persons to punishment. Without quarreling with that definition, it is important to see that criminal law subjects persons to

---

[31] For an illustration, see Kimberly Ferzan, "Of Weevils and Witches: What Can We Learn from the Ghosts of Responsibility Past?," 101 Va. L. Rev. 947 (2015). In the span of a few lines, Ferzan claims first that as a criminal law theorist she studies "moral truths" that are independent of actual legal practices such as plea bargaining, id. at 948, but then she distinguishes criminal law theory from general jurisprudence with the claim that criminal law theory addresses actual legal practices. Id. at 949. "Criminal law theorists care about the law"—but apparently, not enough to clarify when or how much actual practice counts as law.

[32] E.g., Sanford Kadish, "Why Substantive Criminal Law—A Dialogue," 29 Clev. St. L. Rev. 1 (1980).

[33] I develop the claims of this paragraph in greater detail in Alice Ristroph, "The Thin Blue Line from Crime to Punishment," 108 J. Crim. L. & Criminology 305 (2018).

[34] Antony Duff and Doug Husak are among the exceptions who have given at least some attention to investigative and/or adjudicative procedure. See id. at 312-313 (discussing Duff); 322-324 (discussing Husak).

[35] Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary, 98th Cong. 312 (1983) (statement of Rep. John Dingell).

much more than punishment. As Husak recognizes, criminal law also subjects people to an enforcement process.[36] And importantly, many enforcement powers arise not with *proof* of a criminal violation but with *suspicion* of one. Thus, a choice to criminalize given conduct – marijuana possession, for example – is a choice not only to subject persons who possess marijuana to punishment, but also to subject all persons whom the police suspect of marijuana possession to possible police interventions.[37] These police interventions may include the use of force, even deadly force, and all without proof of any actual violation of a criminal statute. Of course, it is open to theorists to argue that the procedural rules should be otherwise. But we cannot fully understand or assess even the subset of criminal law called ''substantive'' without consideration of how liability rules generate enforcement powers. Thus, as I have noted elsewhere, investigative (and adjudicative) procedures are not simply new topics for theorists to ponder. They are crucial considerations in the subjects that theorists have long seen as key inquiries of the field: what to criminalize and how to justify punishment.[38]

By insisting that criminal law is neither an exercise of divine power nor a feat of magic, Husak draws our attention to law as a human practice, and to the actual human practices of contemporary American law. Like other theorists, he gives close attention to punishment, but his work also puts other enforcement mechanisms, including police practices, into the conversation.[39] His insistence on criminal law as a state institution invites greater attention to the state more generally, for criminal law is to be evaluated ''holistically,'' in relation to other state institutions.[40] In short, Husak has approached criminal law in a way that dramatically expanded the range of considerations relevant to criminal theorists.

---

[36] See Husak, Overcriminalization, supra n.20, at 13; id. at 21; see also Husak, ''The Price of Criminal Law Skepticism,'' supra n.6, at 44-46. In the Skepticism article, Husak portrays stops and frisks, and more generally ''the direct use of coercive force'' by police solely as *benefits* of criminal law, without contemplating the possibility that these practices may suffer as many ''drawbacks'' as punishment, or more. For further discussion of this point, see n.57 below and accompanying text.

[37] Technically, the suspicion must be legally adequate—''objectively reasonable''—but as many commentators and some courts have recognized, once an officer does suspect a given person, his suspicions will nearly always be found legally reasonable.

[38] Ristroph, ''Thin Blue Line,'' supra n.30, at 309.

[39] ''Whether or not the criminal law is justified depends not only on what conduct is proscribed, but also on how these proscriptions are applied and enforced at various stages of the criminal process.'' Husak, ''Why Criminal Law,'' supra n.5, at 115.

[40] ''Holistic Retributivism,'' supra n.25.

But did he go too far? In the approach to criminal theory just articulated are all the seeds of contemporary abolitionist thinking. When we see that criminal law is human, it is easy to see the ways in which it is all too human. When we take actual legal practices seriously as the data about which to theorize, we see severe punishments, coercive policing, and grave racial disparities. And when we insist on the relevance of law to criminal theory, all of law and all of the state come into view. And when our field of vision includes an entire state and all of its legal institutions, criminal law in particular may not seem as necessary or desirable as it once did.

III. SKEPTICISM, FAITH, AND CRITICAL THEORY

In the 1980s, Husak set his sights on something called ''orthodox criminal theory,'' and he sought to articulate, from a critical perspective, something he called ''revised criminal theory.''[41] He began with the actus reus requirement, ''which occupies a privileged position at the very heart of orthodox criminal theory.''[42] For the present essay, my interest is not so much the substantive argument that control rather than an act is more plausibly seen as a requirement for criminal liability, which Husak later developed further,[43] but instead Husak's critiques of orthodox thinking. He charged that orthodox theorists ''venerated'' the act requirement as an article of faith, adjusting their analysis as necessary ''to assure the inviolability of [the act] requirement.''[44] Proving the ''truth'' of the act requirement was more important to orthodox theorists than giving an accurate account of existing law.[45] Again, what is most important for purposes of this essay is not whether and how Husak differed from orthodox theorists on the question whether criminal liability requires an act, but rather Husak's critique of a faith-based methodology. Here is Husak's statement of a better theoretical approach:

[41] See Husak, Philosophy of Criminal Law, supra n.4, ch. 1.

[42] Husak, Philosophy of Criminal Law, supra n.4, at 72.

[43] See Husak, ''Does Criminal Liability Require an Act?,'' in Selected Essays, supra n.5.

[44] Husak, Philosophy of Criminal Law, supra n.4, at 79.

[45] Id. at 80.

> The philosopher of criminal law who hopes to *assess* the actus reus requirement should resist the extraordinary deference shown by orthodox theorists toward the principle. From a critical perspective, those analyses of the concept of an act that are designed to preserve the inviolability of the requirement are question-begging. Nor should we accept the requirement without at least a rough understanding of what we have accepted. Finally, we must not succumb to the temptation to construe the principle as a tautology.[46]

Suppose that this methodological orientation were extended not just to the claim that criminal liability requires an act, but toward the full subject of criminal theory—to criminal law itself. The revised advice for the theorist would look something like this:

> The philosopher of criminal law who hopes to *assess* [the criminal law] should resist the extraordinary deference shown by orthodox theorists toward [the institution]. From a critical perspective, those analyses of the concept of [a crime] that are designed to preserve the inviolability of [the criminal law] are question-begging. Nor should we accept [the criminal law] without at least a rough understanding of what we have accepted. Finally, we must not succumb to the temptation to construe the [field] as a tautology.

This revised statement captures the critical methodology that I have outlined in the previous section, and that informs much of Husak's oeuvre.[47] Strikingly, though, when Husak has considered directly the question whether to approach ''the criminal law'' itself with deference, rather than any specific part of it, he has adopted a position of deference and urged others to do so as well. As noted at the outset of this essay, he identified as the function of criminal theory ''to improve the content of the criminal law from a moral perspective, not to abolish it or to transform it into something that it is not.''[48] There appears to be a distinction between some unified concept of ''the criminal law,'' on one hand, and the various component parts of criminal law, on the other. To ''the criminal law'' Husak grants not just a presumption of legitimacy but a conclusive presumption. In contrast, the subsidiary parts of criminal law—even or especially those that hold a ''privileged position'' such as the act requirement—could and should be subject to ruthless skeptical critique.

This distinction between ''the criminal law'' and its subsidiary components lurks in the background of Husak's recent critique of

[46] Id. at 81 (emphasis in original).

[47] For example, Husak purports to reject definitions of crime that assume the normative legitimacy of existing statutory offenses.

[48] Husak, ''Introduction: Reflections On Criminal Theory,'' in Selected Essays, supra n.5, at 7.

''criminal law skepticism,'' which I will call CrLS for short.[49] CrLS is not simply skepticism about particular uses of criminal law or specific doctrines; Husak distinguishes his targets of critique from those who merely ''urge caution or a more judicious use of the criminal law.''[50] Rather, ''the thrust of criminal law skepticism is more sweeping and radical: it presents reasons to doubt that the criminal law as it is constituted at present should continue to survive at all.''[51]

Who are the criminal law skeptics? In describing the view he aims to critique, Husak uses two slippery phrases: *the criminal law* and *as it is constituted at present*. Depending on how we interpret the latter phrase, every criminal theorist could be a criminal law skeptic, including of course Husak himself. Husak has some narrower group of thinkers in mind, but again, the parameters of this group are not clearly specified. CrLS is depicted as both a recent phenomenon and a scholarly one (indeed, it is presented a newly fashionable ivory tower enterprise not endorsed by sensible real people), but when Husak does name names, he cites older scholarship and more recent writing in the popular press by non-academics.[52] At some points, Husak seems to direct his critique at those who speak of abolition of police, prisons, or all of criminal law, but he also cites scholars who simply emphasize continuity between criminal law and other forms of law.[53] At the same time, several law professors who have openly embraced and theorized abolition or at least ''skepticism'' vis-à-vis

[49] The r is meant to avoid confusion with the typical shorthand for Critical Legal Studies (CLS). To be sure, Husak's complaints about criminal law skeptics echo some of the responses to Critical Legal Studies by more orthodox legal theorists. In its heyday Critical Legal Studies made little impact on criminal theory, as others have noted. Robert Weisberg, ''Criminal Law, Criminology, and the Small World of Legal Scholars,'' 63 U. Colo. L. Rev. 521 (1992). Could the CrLS we see now just be an effort to catch up? Not exactly, in my view. While some skepticism about criminal law does draw upon insights promulgated by critical legal scholars, by and large criminal law skepticism, and especially abolitionist scholarship, reflects a great deal of confidence in other forms of law. In other words, critical legal studies articulated skepticism about law across all fields of law, whereas many of the works I'd associate with criminal law skepticism are optimistic about the possibility of replacing criminal law with other forms of law.

[50] Husak, ''The Price of Criminal Law Skepticism,'' supra n.6, at 30.

[51] Id.

[52] See id. at 32-33 nn.11-16; id. at 44 n.47 (referring to The Marshall Project's list of references, most in the popular press, as evidence of support for police abolition among criminal law skeptics); see also Douglas N. Husak, ''Criminal Law at the Margins,'' 14 Crim. L. & Phil. 381, 391 (2019) (referencing ''the general skepticism about criminal justice that has become so fashionable'').

[53] Husak, ''The Price of Criminal Law Skepticism,'' supra n.6, at 32–33.

criminal law and punishment are not cited.[54] I note these ambiguities about the identity of Husak's targets not to question the phenomenon of CrLS, which I think is real (and welcome). But I do not think Husak has yet engaged much with contemporary theoretical arguments from abolitionists or the "abolition adjacent."

Indeed, Husak frames his critique of CrLS as the identification of various valuable functions of criminal law that skeptics have overlooked.[55] Without rehearsing Husak's full list, we should note that it is full of issues that are in fact addressed by abolitionists and skeptics, as part of arguments against specific criminal practices or against criminal law more broadly. For example, Husak charges that skeptics fail to appreciate the expressive function of criminal law, when in fact its expressive condemnation—the deep stigmatization of "criminals"—is precisely what many skeptics want to eliminate.[56] And Husak identifies "the powers of legal officials," including the power of police to stop and frisk, as another valuable function of criminal law, when in fact skeptics and abolitionists have been explicit in their critiques of stop-and-frisk as well as police authority more generally.[57] So too with Husak's arguments about proportionality and collateral consequences: skeptics have not overlooked these topics, but simply disagree with Husak about whether criminal law is providing value in these areas.[58]

For many reasons, Husak's critique of CrLS is unlikely to convert skeptics to believers. It is perhaps best read as a recitation of a catechism, an expression of faith in criminal law amid a new clamor of non-belief. Husak might resist this characterization, but recall that all along he has seen the role of criminal theory as the betterment of

[54] See, e.g., Roberts, "Abolition Constitutionalism," supra n.7. This particular article appeared only a few months before Husak's skepticism paper, perhaps too late to be addressed by Husak, but Roberts has been writing about criminal law abolition for years. See also Amna Akbar, "Toward a Radical Imagination of Law," 93 N.Y.U. L. Rev. 405 (2018).

[55] "I collect ten important functions of the criminal law that would at best be jeopardized and at worst would be sacrificed altogether if the criminal justice system were radically transformed. I doubt that most of those legal philosophers who embrace skepticism about the criminal law fully appreciate what they are in danger of losing." Husak, "The Price of Criminal Law Skepticism," supra n.6, at 34.

[56] Id. at 36; but see Roberts, "Abolition Constitutionalism," supra n.7, at 37-38.

[57] Husak, "The Price of Criminal Law Skepticism," supra n.6, at 44-45; but see Roberts, "Abolition Constitutionalism," supra n.7, at 115-116. In other work Husak has contemplated the costs of policing, but in his critique of CrLS he treats policing as an unqualified good.

[58] I note with due humility that I have argued for proportionality doctrine grounded not in a justificatory theory of criminal law but rather in "penological skepticism." Alice Ristroph, "Proportionality as a Principle of Limited Government," 55 Duke L.J. 263, 317-319 (2005). Sadly, this article did not attract Husak's attention.

criminal law, not its abolition or radical transformation. The presumption of legitimacy that Husak grants criminal law is one manifestation of an ambivalence in his work. As discussed above, he often endorses a legalistic conception of criminality, in which criminality is a specifically legal designation. But Husak also sometimes links "the core" of criminal law to an account of culpable wrongdoing that evokes an extra-legal, moralistic conception of criminality.[59] Once one imagines "criminality" to correspond to immorality or moral culpability, it may be hard to shake the faith that criminal law is itself a moral good.

A criminal law skeptic myself, I am wary of arguing with the faithful.[60] And ultimately, arguing about how much value to find in "the criminal law" may be a fool's errand. I am also a skeptic about any call to abolish the criminal law, at least in those terms: I doubt that there exists one coherent institution called "the criminal law" standing ready to be abolished.[61] Many of those who study "the" criminal law have found an unruly array of practices that proves resistant to "grand theorizing."[62] Many of those who did develop grand theories did so only by leaving aside the empirical realities of actual criminal laws. I am a skeptic about the very existence—to say nothing of the legitimacy—of a unified and therefore destructible institution called "the" criminal law, but I am not a skeptic about the existence of criminal laws, nor about the value of criminal theory. We can and should seek to understand and evaluate the unruly practices that are collected under the label criminal law, perhaps

[59] E.g., Husak, "Crimes Outside the Core," supra n.28, at 774.

[60] Though Husak sets up some targets that are very difficult to resist. For example, Husak warns that without criminal law, we would lose the ability to designate certain wrongs as public. He then cites "the recent outcry about the ongoing revelations of acts of sexual harassment by powerful men in entertainment and business" as a worry about a public wrong. Husak, "The Price of Criminal Law Skepticism," supra n.6, at 50. But most of the acts of harassment identified in the #MeToo movement have never been classified as criminal in American law. Moreover, notwithstanding nondisclosure agreements, the outcry over such acts seems so far to have been a more effective public condemnation than any legal penalty, civil or criminal, had been to date. See, e.g., Catharine A. MacKinnon, "#MeToo Has Done What the Law Could Not," N.Y. Times (Feb. 5, 2018), at A19. There may be no worse example than #MeToo to raise in defense of a claim that criminal law is necessary to identify and condemn public wrongs.

[61] On the phrase "*the* criminal law," with the definite article, see Alice Ristroph, "The Definitive Article," 68 U. Toronto L.J. 140 (2018).

[62] Husak, of course, is one such theorist. Husak, Selected Essays, supra n.5, at 1; Husak, "Retribution in Criminal Theory," supra n.11, at 966 ("The hundreds of thousands of laws that subject violators to punishment are so diverse that they resist any unifying theory."); Husak, "Crimes Outside the Core," supra n.28, at 758 ("No coherent normative theory—regardless of how simple or polycentric it may be—can hope to make sense of more than a fraction of the criminal law that actually exists.").

beginning our work with an account of the terms ''crime'' and ''criminal.''[63]

If I am right that ''the'' criminal law is a theoretical fiction, then there may not be much point in arguing about whether to abolish the criminal law writ large. Rather, we should analyze specific statutes, doctrines, or legal practices. We should be attentive to the ways in which various types of criminal law with one another and with civil laws. In evaluating specific laws or doctrines, we should, following Husak, resist ''extraordinary deference'' to existing orthodoxy; we shouldn't beg key questions by committing at the outset to the inviolability of some abstraction called ''the criminal law.'' It may then turn out that we recommend abolishing specific statutes, doctrines, or practices. Abolitionist scholarship may sometimes be insufficiently precise about what to abolish, but I see no benefit to closing our minds to the possibility that the ultimate answer will be everything now labeled criminal.

All the same, I read abolitionist scholarship with caution, for some of it seems to replace one faith with another. Husak and abolitionists ask the same question—''What would the world look like without criminal law?''—and reach nearly opposite conclusions, perhaps thanks to different tenets of faith.[64] Husak sees a dystopia: rampant violence and cruelty that legal institutions are unable to check. Abolitionists sometimes portray something closer to utopia: a state that guarantees sufficient equality, and sufficient material resources, to make criminal law unnecessary.[65] As many abolitionists recognize, abolition of many or all components of current criminal law can't happen without enormous reliance on the state, the same set of institutions that has disappointed us in so many ways. Notwithstanding these prior disappointments, abolitionists have faith in the possibility of a more egalitarian state, while Husak has faith that a reformed criminal law is necessary to protect public safety and communicate shared judgments to shape human behavior.

I share neither of these faiths, but it does seem plausible to me that whatever horrible forms of domination ruling powers might

[63] See supra Section 1; see also Alice Ristroph, ''The Curriculum of the Carceral State,'' 120 Colum. L. Rev. 1696 (2020) (proposing an account of criminal law to replace the current curricular canon).

[64] I thank Carol Steiker for noting this parallel inquiry.

[65] I do not suggest that *all* abolitionist arguments are utopian. Some are explicit that problems now addressed through criminal law, such as interpersonal violence or unjustified risk-creation, will persist. But they seek other responses to such problems.

think up when criminal law is off the table will be less terrible than the domination the state wields when criminal law is an option.[66] Plausible, but not certain, so we should proceed with caution rather than faith. My own suspicion is that humans are neither evolved enough to be trusted with criminal law nor evolved enough to do without it. We are faced with a tragic dilemma, and we've lived a long time on one horn of it. For many if not most pieces of criminal law, there is probably a good argument to give abolition a shot.

I close with a thought about the moderns, the ancients, and Nozick's first question for political philosophers. Husak has been a criminal theorist for moderns, placing the individual before the collective.[67] As he has sometimes recognized, such an approach makes criminal law much harder to justify.[68] It is worth remembering, I think, the ways that actual states changed as political theory shifted from the ancients to the moderns. For all the radical potential of the concept of the autonomous individual whose consent was necessary for legitimate political authority, no society did in fact reject all government and embrace anarchy. Some rulers were overthrown, but all were replaced. Nevertheless, the invention—or discovery—of the individual in a state of nature did transform states. It did generate new demands for accountability that produced new institutions; it changed the forms of government and what we expect from government. It is possible that a shift in baselines in criminal theory, from an assumption that criminal law is legitimate to a skeptical demand that criminal law prove itself, could have similar effects. A shift in baselines may not lead to the end of criminal law

[66] Whether one embraces abolition is likely to depend on one's optimism, or lack thereof, about the alternatives. "Abolitionists have been far more persuasive in critiquing supposed justifications of criminal law and punishment than in defending a viable alternative to them." Douglas N. Husak, "Reservations About Overcriminalization," 14 New Crim. L. Rev. 97, 107 (2011).

[67] "There is little doubt that moral and political values are required in any demonstration that the liberal concern for the individual is preferable to the utilitarian concern for the collective. …[T]he liberal is not morally neutral in his favoritism toward the individual as the basic political unit." Husak, Philosophy of Criminal Law, supra n.4, at 241.

[68] See Husak, "Why Criminal Law," supra n.5, at 114-115 ("Although I am tempted to believe that no punishment can be justified in an individual case unless it satisfies each of the criteria in our best theory of criminalization, I need not defend this extreme position to make my point. My claim is simply that the degree of deviation we should tolerate when we try to justify criminal law and punishment from the perspective of the individual is far less than we should be willing to accept when we try to justify criminal law and punishment from the perspective of society.").

but to changes in its form as radical as the changes that modern political theory brought to the state itself.

Brooklyn Law School, 250 Joralemon Street, Brooklyn, NY, 11201, USA
E-mail: alice.ristroph@brooklaw.edu