

HARMFULNESS, WRONGFULNESS, LESSER EVILS AND RISK-CREATION: A COMMENT ON DOUGLAS HUSAK'S *OVERCRIMINALIZATION*

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INTRODUCTION

*Overcriminalization*¹ is a terrific book. It tackles a problem of great importance, given the staggering amount of punishment dealt out by the courts and evidenced in the overpopulation of prisons in the United States and elsewhere, at least some of which is unconscionably excessive, and the book offers very plausible proposals for limiting the creation of criminal law. It is an unabashedly normative book. Husak's interest is in how law ought to be. But the book adopts none of the extremes of methodology that we find in much normative philosophy. The book does not attempt to derive constraints on criminal law from the fundamental principles of a previously accepted moral or political theory; it does not offer conditional arguments of the form "If you accept such-and-such moral or political theory (e.g. Kant's, or Utilitarianism, or whatever), then you ought not to approve of prohibitions violating such-and-such constraints." But nor does it start with intuitions about the unacceptability of particular criminal prohibitions or about the injustice of punishments of particular actual or hypothetical people and then rationalize those intuitions, *post hoc*, through appeal to general principles that systematize them. Rather, the book offers a range of different sorts of arguments for what might be called "mid-level principles"—principles that are too specific and narrow to serve as the axioms of a moral or political theory but are sufficiently general that they do not amount merely to intuitive pronouncements about particular prohibitions or particular cases. It seems to me that it is through appeal to such mid-level principles that we actually reason, and ought to reason, when we worry about normative problems, and so I think Husak has adopted exactly the right

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¹ DOUGLAS HUSAK, *OVERCRIMINALIZATION—THE LIMITS OF CRIMINAL LAW* (2008).

approach. He is neither in the bedrock nor in the sky, but on the surface where we all actually live.

There is far too much in the book to discuss all of it adequately in a short commentary. So, instead of trying to do so, my aim here is to say a few words about a recurrent idea in the book, which is not at all new with Husak but which he uses in a variety of novel and interesting ways. The idea, aiming to be captured in the various “harm principles” that have been offered now and again in discussion of the limits on the use of state power to punish, is simply this: *We should use state punishment only to minimize behaviors that make the world worse in some way that human beings care about, either because those behaviors are intrinsically bad (they are “evils”) or because they cause bad things (they are “harms”).*

This idea shows up in two different necessary conditions on justified criminalization that Husak proposes, the second of which is stronger than the first. The first is what Husak calls “the non-trivial harm or evil constraint” according to which a type of conduct is legitimately criminalized only if the prohibition aims to prevent or minimize a non-trivial harm or evil. According to the second constraint, the “substantial state interest constraint,” the non-trivial harm or evil that a prohibition aims to minimize must be of a sort that the state has a substantial interest in minimizing. Hence, Husak thinks, a statute prohibiting, for instance, the breaking of important private promises would meet the non-trivial harm or evil constraint, but might fail to meet the substantial state interest constraint, on the assumption that breaking a private promise is a non-trivial harm or evil, but is not of the sort that the state has a substantial interest in minimizing.

Husak thinks that the non-trivial harm or evil constraint is “internal” to criminal law. He thinks it is presupposed by manifestly justified criminal law practices of a sort to be discussed shortly. By contrast, he thinks the substantial state interest constraint is “external” to the criminal law. Someone who accepted all of those aspects of criminal law practice that are justified would not necessarily be committed to the substantial state interest constraint. Commitment to it requires acceptance of other, independent, normative claims, particularly claims about what the state should and should not do to citizens. The substantial state interest constraint is used in various ways in the book, but in one particularly interesting section, Husak uses it to argue for some limitations on the criminalization of risk-creating behavior.

Part I of this comment focuses on the non-trivial harm or evil constraint, and on Husak’s claim that it is “internal” to criminal law. Part II concentrates on the substantial state interest constraint and on the use to which Husak puts it in consideration of crimes of risk-creation.

I. NON-TRIVIAL HARM OR EVIL CONSTRAINT: IS IT “INTERNAL” TO CRIMINAL LAW?

Husak argues that the criminal law presupposes the non-trivial harm or evil constraint in at least four places. It presupposes it, he thinks, in three different defenses: in the lesser-evils defense, in which a defendant argues that he should not be punished since his criminal act realized a lesser evil than would have been realized by refraining from that act; in the defense of consent, in which a defendant argues that he should not be punished since the victim of the crime consented to the crime’s commission; and in the *de minimis* defense, in which the defendant claims that the harm that he caused was so minimal as to be unworthy of punishment. And, in addition, Husak thinks that the non-trivial harm or evil constraint is presupposed in the law’s standard for determining when a conditional intention (e.g., an intention to take that umbrella if it is mine, or an intention to kill him if he makes a noise) suffices for the intent element of a crime (e.g., attempted theft, or assault with intent to kill, which require, respectively, intent to take something which is not one’s own and intent to kill).

There are good reasons for thinking that the law ought to make it possible, as it usually does, to defend oneself from a criminal charge through appeal to lesser evils, consent, *de minimis*, or the conditional nature of one’s intention. So Husak’s idea is that the non-trivial harm or evil constraint is entrenched in practices that are themselves justified. Hence we can reject it only by rejecting these practices. One can claim, for instance, to be justified in criminalizing homosexual behavior only if one either asserts that (a) such behavior involves a non-trivial harm or evil, as Lord Devlin asserted, or, alternatively, asserts that (b) those charged with such crimes can never seek relief through appeal to lesser evils, conditional intent, or, in this case most importantly, either *de minimis* or consent. Since Husak understands it to be clear that the approach described in (b) would be manifestly unjust—there can be no type of crime that necessarily, by its very nature, precludes defense in these four ways—he concludes that criminalization is justified only when there’s compliance with the non-trivial harm or evil constraint. It follows that someone who wants to defend the criminalization of homosexual behavior, for instance, cannot avoid defending the indefensible claim that such behavior involves a non-trivial harm or evil. Hence Husak sides with Ronald Dworkin’s famous remark, “What is shocking and wrong is not [Devlin’s] idea that the community’s morality counts, but his idea of what counts as the community’s morality.”²

² Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, in *TAKING RIGHTS SERIOUSLY* 255 (1977), quoted in HUSAK, *supra* note 1, at 60.

There is great appeal to this argument. And it is, as far as I know, entirely original. Various arguments have been offered for various harm principles, such as the non-trivial harm or evil constraint, but nobody has attempted to argue that such principles are implicit in any specific criminal law doctrines. Further, the argument is important. It matters whether the non-trivial harm or evil constraint is “internal” or “external” to the criminal law. It does not matter when it comes to the question of what should and should not be criminalized. So long as we accept the non-trivial harm or evil constraint—internal, external or what have you—we reach the same results about legitimate criminalization. But the question of whether the constraint is presupposed by criminal law practices such as the lesser evils defense is important for another purpose: it is important for understanding what, if anything, justifies *those practices*. According to Husak’s view, a judge attempting to adjudicate a lesser-evils defense in a case in which the prohibition in question failed to meet the non-trivial harm or evil constraint, would be engaging in, at best, a pantomime of justified practice. What this implies is that, at least when it comes to the non-trivial harm or evil constraint, Husak rejects the possibility of doing justice within unjust constraints. By contrast, as the rest of this section argues, it seems to me that a judge who adjudicates a lesser evils defense to a violation of a law that fails to meet the non-trivial harm or evil constraint would be doing justice *given the immutability of the unjust law that the defendant violated*. Is this the highest possible form of justice? No. But it is better than nothing. There are better and worse ways to handle the cases of those accused of violating unjust laws. It is better that a judge allow a defendant’s lesser evils defense, if it applies, in such a case than to throw up his hands and insist that the task is impossible given that the law in question was not enacted in order to minimize a non-trivial harm or evil. In short, I think there is room to do justice while accepting the legislature’s unjust prohibition as given, while Husak is committed to denying it when it comes to the various criminal law doctrines that he takes to presuppose the non-trivial harm or evil constraint.

To support this position, I need to show that Husak’s argument fails. It seems to me that Husak is mistaken about what is presupposed by the defenses he mentions and by the law’s treatment of conditional intent. A more modest constraint, easily confused with the non-trivial harm or evil constraint is what is really presupposed by those practices. What they presuppose is only that the law is aimed at eliminating or lowering the incidence of the prohibited behavior, but they involve no presupposition that the prohibited behavior is, in fact, *harmful or evil* or even that it is believed to be by the legislature or “the people” or by any other real or imaginary body. One can escape criminal liability through appeal to lesser evils, consent, *de minimis*, or

the conditional nature of one's intention, even if the law one putatively violates, was explicitly recognized as aiming to eliminate *a benefit or a good*. Those defenses presuppose that the law wants less of what it prohibits, but not that there are any good reasons for its having this desire.

The point for which I argue can be put another way: If the non-trivial harm or evil constraint is to exclude anything from justifiable criminalization, the evil in question must not be that possessed by any offense merely in virtue of the fact that it has been prohibited by a valid law. A form of conduct cannot count as "harmful or evil," in the sense that allows criminalization of it under the non-trivial harm or evil constraint, merely because it is prohibited. If that were so, then the constraint would amount to no more than the trivial assertion that a type of conduct is justifiably criminalized only if it is criminalized. True enough, but nothing is excluded from justifiable criminalization as a result. Rather, if the non-trivial harm or evil constraint is to exclude anything, "harm or evil" must be understood in such a way as to leave it an open question whether a kind of conduct that is in fact prohibited involves "harm or evil." But, as we'll see, what is necessarily presupposed by the defenses Husak mentions, and by the legal treatment of conditional intention, is merely that prohibited behavior is prohibited in order to minimize or eliminate it, and that is perfectly consistent with it being evil in no sense other than that it is, in fact, prohibited.

I should make clear what I am not objecting *to*. I am not objecting to the non-trivial harm or evil constraint. I suspect that, accompanied by a suitable account of "harm or evil," it is true. Rather, I am objecting to Husak's novel argument for the constraint. I don't think that there is sufficient evidence to prove that the constraint is "internal" to the criminal law. It seems to me that an argument for this probably requires, instead, some kind of claim about how criminal law *in its current form* ought and ought not to be used. It is not because of how our criminal law *is* but because of how it ought to be used that we ought to criminalize only behavior that makes the world worse.

To make out my objection to Husak in full, I would need to discuss each of the four ways of escaping criminal liability that he mentions. But limitations of space and time prevent me from doing so. Instead I discuss just one of the four—the lesser evils defense—and claim without argument that what I have to say about it extends also to consent, *de minimis*, and conditional intention.

To start, consider the early American case of *United States v. Ashton*,³ a clear case in which the lesser evils defense applied. A ship's crew revolted when it was

³ 4 F.Cas. 873 (C.C.D. Mass. 1834) (No. 14,470).

discovered that the ship was not seaworthy. After the captain refused nonetheless to return to port to make repairs; the captain ordered his crew to soldier on, even though the ship would have sunk; the crew refused to obey his order. The judge in the case acquitted the defendants on the grounds that the refusal to follow orders, which was normally punishable, was not so in this case, since a greater evil would have been realized by following orders, namely the death of the crew and the loss of the ship. The judgment that there would have been a “greater evil” in obeying the order presupposes that disobeying the order was an evil *of some sort*. So, in making this kind of judgment, the judge needs to treat the disobeying of orders as though it were a harm or an evil. It is this observation that fuels Husak’s argument. Husak’s idea is that the very task of adjudicating the lesser evils defense requires construing the law as aimed at eliminating or minimizing a harm or evil. If the judge doesn’t construe the law that way, then he cannot construe the defendant’s argument as meaningful—he has nothing to compare the world realized by the defendant’s act *to* unless he assumes that failing to follow orders necessarily involves a harm or evil.

But to say that the judge needs to act *as though* disobeying orders is a harm or evil doesn’t imply that it needs *to actually be* a harm or an evil. In fact, it is common for nobody to be harmed when an order is disobeyed—is anybody harmed when a soldier petulantly refuses to do ten push-ups?—and even more common for there to be more harm in obeying than not obeying, as when a soldier following orders kills three and thereby saves two, or spends years toiling pointlessly abroad while both he and his family suffer severely from his absence, a suffering that might far exceed whatever good, if any, he produces through his labor. The harm or evil associated with failure to follow orders is not possessed by every, or even most token instances of such failure. It is possessed, instead, by the *widespread* failure to follow orders that results in a military incapable of doing the various things that militaries do. If there’s good in having an orderly military, then there is harm in failing to follow orders construed as an act type. But in any case in which the lesser evils defense arises, it is a token act that is at issue, namely the act performed by the defendant. What a judge adjudicating a case like *Ashton* must do is to assume for the sake of argument that *the token act* of not following orders involved harm or evil, and then weigh that *imagined harm or evil* against the results that the defendant sought to achieve through performance of the act. The judge must act *as if* the token act involved a harm or an evil. Of course, the only reason he must act as if this is so is because *it is a crime* not to follow orders. The judge treats the defendant’s token act of not following orders as involving a harm or evil simply because that type of act is prohibited. To adjudicate a defendant’s lesser evils defense, that is, it would suffice to assume that the defendant’s act is evil

merely because it is prohibited. But, as we've seen, this kind of "evil" cannot be the sort a prohibition aims to eliminate or minimize if it is to meet the demand of the non-trivial harm or evil constraint unless that constraint fails to exclude anything from criminalization.

Now we can still reach Husak's conclusion if the judge must treat the defendant's act as if it involved a harm or evil *because* acts *like it* were criminalized in order to eliminate a harm or evil. Perhaps the judge would not be justified in treating a failure to obey orders as if it involved a harm or evil if failures to obey orders were not criminalized in order to prevent or minimize something bad, such as the harm or evil of a disorderly military. But I don't think this is so. After all, for defendants like those in *Ashton* the harms or evils in virtue of which not following orders is criminalized were not at stake at the time of action. Whether they follow orders or not the military will remain orderly. Further, imagine that it comes to be universally recognized that an orderly military is a bad thing; best is no military, second best is a disorderly military, and worst of all is an orderly military. But despite this recognition, the legislature continues to make it a crime not to follow orders. Perhaps the legislature does this out of perversity, perhaps merely because it has forgotten why disobeying orders was ever made a crime in the first place. Still, when a judge is faced with a case like *Ashton* he knows precisely what he needs to do: treat the defendant's act *as though* it were a harm or evil and see whether the harms or evils that were averted by disobeying orders were greater. This isn't to say that, on the assumption that an orderly military is not a good thing, it would be justified to criminalize failures to obey orders. Perhaps it would not, and perhaps it would not be justified precisely because in that case there would be a violation of the non-trivial harm or evil constraint. But, as I said, I am not claiming that the non-trivial harm or evil constraint is mistaken; in fact, I think it's probably true. I'm claiming, instead, that Husak's effort to derive it from the lesser evils defense is mistaken. All that is presupposed by the defense is that it is harmful or evil to do anything prohibited.

There is a quite general question about whether or not, and if so to what degree, those facts in virtue of which a kind of conduct is justifiably prohibited make their way into the substantive rules of criminal law surrounding that prohibition, or ought to. Rape is prohibited in large part because of the distinctive and egregious forms of harm that it inflicts on its victim. But does, or ought, the application of the legal rules for determining what does and does not count as rape, and what does and does not count as a defense to rape, require appreciation of the nature of those harms? In arguing that Husak's argument fails, I take myself to have shown that, despite appearances, at least one crucial justificatory fact—namely the harm or evil that a justifiably prohibited

form of conduct involves—need not be appreciated by those applying at least one set of legal rules, namely those involved in the lesser evils defense. Whether such reasoning applies across the board is another and further question that will not be addressed here.

II. STATE INTEREST CONSTRAINT

One use to which Husak puts the substantial state interest constraint—the claim that a criminal prohibition is justified only if it aims to prevent a non-trivial harm or evil *which the state has a substantial interest in minimizing*—is in the development of constraints on the criminalization of risk-creating behavior. He offers four constraints, but I remark on the implications of only one of them. What Husak calls “the culpability constraint” says that risk-creating behavior is justifiably criminalized only if the person who engages in it has some kind of mental state with respect to the harm risked; perhaps, for instance, to be guilty of dangerous driving, the driver must know that he’s driving in such a way as to risk an accident. Husak is motivated to impose this constraint through consideration of the class of behaviors that meet the description of a risky type of behavior but do not in fact risk any harm. The person who, for instance, walks in the park with his dog off-leash might be violating a leash law in a particular park without actually risking anything. The leash law prohibits a crime of risk-creation: Generally, dogs off-leash pose a risk of injury to other people and to other people’s dogs. But when a person walks his dog off-leash at a time when no one else is in the park, or when he walks a dog that is completely unaggressive both toward people and toward other dogs, he does not actually pose a risk of injury to anyone or to any other dog. Is it acceptable to criminalize such behavior? Husak’s answer is that it is acceptable to criminalize such behavior *unless the person engaging in it has the true belief that he is not imposing any risk on anyone*. Hence, Husak holds that we ought to make some kind of mental state that excludes such a belief an element of the crime. Someone, who, for instance, has an unaggressive dog but is unsure if his dog is unaggressive is rightly punished for allowing the dog off-leash in the park—his uncertainty about this precludes a belief that he is imposing no risk of harm—while the person who truly believes his dog to be a pussy cat (as it were) is not. Hence the culpability constraint on crimes of risk-creation.

What is the relationship between the culpability constraint and the substantial state interest constraint, according to Husak? Ordinarily, a mental state with respect to X (e.g., knowledge that something is not one’s own or intention to take something) is made an element of a crime on the grounds that not just wrongdoing, but *culpable*

wrongdoing is required for desert of punishment. To follow this line of thought to the conclusion that some sort of mental state should be an element of a crime, however, is not to derive that conclusion from any sort of harm principle, much less the substantial state interest constraint. It is possible that Husak intends to derive the culpability constraint not from the substantial state interest constraint but, instead, from what he calls “the wrongfulness constraint”—the requirement that conduct be wrongful if it is to be justifiably criminalized. However, some of the things that he says speak against interpreting him in this way. In particular, he argues that the culpability constraint solves a problem of “over-inclusiveness,” it helps to ameliorate the criminalization of behaviors that meet the definition of a crime but are not justifiably criminalized (if at all) for the reasons that most behaviors that meet that definition are. The idea is that those who are culpable with respect to the harm risked by their behavior are more likely to be engaging in actually risky behavior, and so the rationale for the prohibition of such behavior is more likely to apply to their conduct. Husak also takes the state to have an obligation to minimize over-inclusiveness thanks to its obligation to meet the substantial state interest constraint in its prohibitions. Putting these things together, it seems that Husak takes the culpability constraint to be supported by, although probably not entailed by, the substantial state interest constraint.

Now Husak recognizes that if a prohibition of a risk-creating type of act meets the culpability constraint—it includes a mental state with respect to the harm risked as an element—then determining whether or not a particular defendant’s act is of the prohibited type requires that the harm risked is explicitly specified. If the harm risked can’t be specified, then who’s to say if any given defendant knows that his act risked that harm (or was reckless or negligent in that regard)? Thus, if the culpability constraint is correct, a judge faced with the task of determining if a defendant’s act was prohibited by a particular statute must be able to determine precisely what harm or evil the prohibition is aimed at preventing.

It is important to see that there is no comparable requirement when it comes to crimes other than those of risk-creation. While we might, contra to what I argue in the first half of these remarks, need to specify the “harm or evil” a prohibition aims to prevent in order to adjudicate defenses like lesser evils, consent or *de minimis*, we do not need to do so in order to determine whether a particular defendant’s conduct meets the definition of the crime. To see this, note that virtually every justified prohibition is enacted in order to minimize more than one type of harm or evil. Even murder is prohibited not merely to prevent people from killing other people. It is also prohibited in order to prevent people from losing faith in their government’s ability to protect them from violence. Theft is prohibited in order to prevent people from depriving

other people of the use of things that are theirs, but it is also prohibited in order to prevent property rights violations. In fact, it is probably also prohibited in order to prevent violence since, often, people respond to property violations by attempting to take their things back and this is often the first step in escalating a conflict. But it would be absurd to suggest that the behavior of a person who takes something of someone else's without permission can be justifiably criminalized only if he believes that he is depriving the other of the property's use, much less that he is violating the other's property rights, or risking violence; and it is particularly implausible to suggest that he would necessarily need to know that his conduct caused (or even risked) *all* of these things. Consider merely how narrow the prohibition on theft would be if commission of the crime required the belief that you are depriving another of the taken object's use. Say that I know where my neighbor hides his car keys and, whenever he is out of town, I use his car without his permission, making sure to park it just where it was before he returns. I don't believe that I am depriving him of the car's use, since I believe, correctly, that since the neighbor's away, he won't be using the car anyway. But, still, it seems that there is nothing inappropriate about use of the penal sanction against someone who engages in such behavior; what he does is clearly stealing, a violation of another's property rights. The point of importance is that it is rarely the case that determining precisely what harm or evil a prohibition is aimed at preventing is necessary for determining whether or not a defendant engaged in that type of behavior. And it seems that, at least in crimes like theft, there is good reason for that. So, if Husak is right about crimes of risk-prevention, they are importantly different from (most, if not all of) the rest.

Why would crimes of risk-creation be different? We might think that the reason is that, unlike in crimes like theft, the *only* sufficient reason for prohibiting the conduct in question is that the prohibition minimizes the risked harm. There is no reason to criminalize walking one's dog off-leash *except* that that type of behavior (even if not all of its tokens) poses a danger to other people and their dogs. By contrast, there are good reasons to prohibit theft that don't derive from the harms that such a prohibition minimizes. Notably, there is the fact that theft is wrong, considered independently of the harms that that type of act produces. What this means is that it is possible in the case of crimes of risk-creation to define the acts prohibited in such a way as to ensure that every act that meets the definition is one to which the rationale for punishment applies. We can do this simply by using the very concepts invoked in the rationale for the prohibition—the concept of the harm the prohibition is attempting to minimize—in the definition of the crime. By contrast, we cannot do any such thing in the case of theft. To use the concepts involved in the rationale for the prohibition—the

concepts of deprivation of use, of property rights, etc.—we would have to criminalize any act that deprives someone of use of his property, or violates a property right, or risks an escalating conflict over property, etc. Further, even such a long disjunctive description would leave out what many of us take to be the fundamental reason for prohibiting theft: stealing, under that very description, is wrong. By contrast, walking one's dog off leash, considered independently of the risks that such an act imposes, is simply not wrong; if it is wrong at all, it is so only in virtue of the risks that it imposes. The aspiration to define the acts we prohibit in such a way that the rationale for the prohibition applies to all and only those acts that meet the definition seems realizable in the case of crimes of risk-creation merely by defining them with reference to the harm risked, where it is not comparably easy, if even possible, in cases like theft.

However, this line of thought succeeds only if the only reason to prohibit acts of risk-creation is to minimize the harm risked by such acts. This is less obviously so than it might appear. Husak, for instance, takes attempts to be crimes of risk-creation. They are criminalized, he thinks, in order to minimize the occurrence of the completed crimes of which they are attempts.⁴ We punish people for attempting murder, on this view, so that there will be fewer murders. However, presumably there are harms associated with those completed crimes in virtue of which they are criminalized. So it appears that attempts are criminalized not to minimize completions, but to minimize the harms in virtue of which completions are criminalized. We punish people for attempting murder, that is, so that we'll have fewer murders *and* so that people won't lose faith in their government's ability to protect them from violence, among other things. But then consider attempted theft. That form of behavior is criminalized in order to minimize all the various harms that are associated with theft. And, importantly, it is also criminalized because, like theft, it is wrong. All the reasons for criminalizing theft are reasons to criminalize attempted theft, so if attempt is a crime of risk-creation, it is not the case that in all cases of risk-creating behavior the only reason to criminalize them is to minimize occurrence of the harms they risk. Put more pointedly, while attempt law requires an intention to commit theft on the part of the attempter, with good reason it does not require any kind of mental state with respect to depriving someone of use of the taken object, any more than theft requires such a mental state. Someone who merely tries, but fails, to take his neighbor's car without

⁴ I disagree with this claim. I hold, in contrast, that attempts are criminalized because they are tryings to complete the crime, and I take tryings to be legitimately criminalized for reasons that have little to do with the risks that they impose of completion. See my TRYING AND ATTEMPTED CRIMES (forthcoming 2010, Oxford University Press).

permission while his neighbor is away, to extend our earlier example, is still deserving of punishment for the attempt even though he correctly believes that he will not be depriving anyone of the car's use should he succeed.

In general, if an act that does not cause harm is prohibited both in virtue of the fact that it is wrong *and* in virtue of the fact that acts of that sort risk harm, it will be too much to demand that the culpability constraint is met. Such acts can be justifiably prohibited even if they can be tokened in the absence of any awareness of the risk of harm on the part of the defendant. Consider incest. Where incest between consenting adults is a crime, it is prohibited in part because that type of act risks both psychological damage and birth-defective children. But it does not follow that a statute that prohibits incest between consenting adults—brothers and sisters, say—who have taken ample steps to prevent pregnancy is overinclusive. Even incest that fails to risk the harms that incest is prohibited to prevent is wrong and justifiably criminalized. The wrongness of incest does not consist merely in the harms that it risks. But still, where it is prohibited it is a crime of risk-creation. To require that those who engage in it are punished only if aware of the risks of such harms is to leave uncriminalized the wrong act performed by those who are not aware of any such risks (perhaps because there are none in their case).

I conclude, therefore, not that the culpability constraint is false, but that in the form in which Husak offers it, it is too strong. It applies to what might be called crimes of “pure” risk-creation. It applies, that is, whenever the prohibited act is wrong only in virtue of the harms it risks. This is not true of attempts, solicitations or, probably, conspiracies, nor is it true of crimes like incest. But it is true of leash laws. They ought to require that the defendant lacks the true belief that he is imposing no risk at all of injury to other people or dogs if they are to be completely just. (Of course, as Husak recognizes, we still might allow a leash law that failed to meet the culpability constraint if there is no way for the state to minimize the harms in question while still meeting the culpability constraint. But that's another issue.)

Is the culpability constraint true in the example that Husak most cares about, namely drug possession? Should drug possession laws reserve punishment only for those who are in some way aware of the risks to others that drug possession imposes? If so, then, as Husak argues, there probably should be no drug possession prohibitions, since it is far from clear what harms, if any, possession risks, and even if we could identify them it is far from clear that any act of possession imposes more than a vanishingly small amount of risk of those harms. But the question, it seems to me, is whether drug possession is wrong, if it is, only in virtue of the harms that it risks. I suspect that many people who take drug possession to be wrong do not take it to be

so solely in virtue of the harms that it risks. Compare drug possession to possession of child pornography. Arguably, possession of child pornography does pose risks by encouraging the creation of depictions that injure children. But is it wrong solely in virtue of the harms it risks? It seems wrong for further reasons, notably because those who possess child pornography fail to respect sufficiently a boundary in sexual behavior that should never be crossed. If drug possession is wrong for reasons that go beyond the harms it risks, as incest and possession of child pornography are, then the fact that drug possession prohibitions fail to meet the culpability constraint will be no strike against them, and so it will be no strike against those who advocate them that they cannot specify the harm that such prohibitions are aimed at minimizing. Of course, arguing either for or against the claim that a type of action is wrong independently of harm is extremely difficult. And so it is extremely difficult to settle the fundamental dispute over the criminalization of drug possession.

CONCLUSION

The two parts of this comment are connected by their common concern with Husak's views about the intuitive idea that we should not prohibit conduct that does not make the world worse in some way that we care about. Now Husak notes that many of his constraints on legitimate criminalization overlap. Husak thinks, for instance, that we ought not to criminalize behavior that is not wrong, and recognizes that much behavior that is not wrong also fails to involve a non-trivial harm or evil. For the most part, Husak is untroubled by the overlap between his various constraints. His goal is to provide principled restrictions on the creation of criminal law, and if many prohibitions fail in more than one way, so be it. However, one lesson that we can take from the discussion here is that the relation between the harms or evils involved in a type of behavior, on the one hand, and their wrongness, on the other, must be considered if we are to develop an adequate account of their respective limits on legitimate criminalization. In the thin sense required by defenses like the lesser evils defense, there can be harms or evils present in types of action that are not wrong at all. They need to be harmful or evil only in the very thin sense that they are prohibited. But in the sense of harm or evil that supports (a narrowed version) of Husak's view about crimes of risk-creation, the fact that a particular type of action risks a harm must exhaust the sense in which it is a wrong. Clarification of the relation between harmfulness and wrongfulness, that is, will help us figure out what we are and are not justified in prohibiting given the plausible view that Husak's book makes great progress in supporting, that in the absence of either harmfulness or wrongfulness, we ought not to criminalize.