

Positive Disciplinary Power

Charles Miceli, Wenzhou Kean University, China

The Asian Conference on the Asian Studies 2015
Official Conference Proceedings

iafor

The International Academic Forum
www.iafor.org

Introduction

Over the last few decades, scholars have developed analyses for uncovering oppressive forms of power in society. These analyses often reveal conscious and unconscious prejudices behind seemingly humanistic agendas. Academic research makes visible the power structures operating in society, allowing individuals to understand the ways they are subjugated so as to better resist control. Sometimes though, scholars overlook positive forms of disciplinary power, and they misperceive and wrongly judge policies. Taking criminalization as an example, I argue for a more reasonable and less rigid interpretation of power than one that emphasizes power as a force that limits freedom. As the law can be understood as lagging behind changing social situations, the evaluation of the disciplinary power of policies should be more deliberate and thoughtful.

The number of laws regulating behavior raises concern over whether society is overcontrolling. Debate regarding what conduct to criminalize is not new; behaviors that are not threats to society occasionally become so. As societies grow, the interdependence of individuals makes it necessary to enlarge the criminal law. The crux of the issue typically revolves around whether the conduct in question poses a significant harm. Philosophers and social scientists often disagree about this question, all citing empirical evidence in support of their positions. Frequently, new statutes are needed to meet the changing conditions of life, often inspiring discussion of the proper reach of the law. In describing contemporary criminalization, philosophers hold diverse views, some asserting that there is too much criminal law, and, as a result, too much punishment. But as technology changes, the law must catch up with these changes. Science develops and grows, our understanding of people and the world expands—and, consequently, behaviors come to be deemed harmful, and regulations are required. For the victims of wrongdoing, the proscriptions are always overdue. The law, therefore, needs to be carefully assessed to determine whether the power that is implemented increases or decreases personal freedom.

Society is sometimes described as disciplinary; in the modern age, individuals are made subjects through a complex network of controls implemented by governments, religions, schools, healthcare practitioners, etc. While it is important to know how subjects are created, it is also crucial to ask whether laws expand personal freedom. Harms are prior to laws, and in this sense, lagging criminalization better characterizes contemporary criminalization. The criminal law is always lagging behind, never catching up with the transformations that are occurring in society. At any moment, there is not enough law.

In the first part of this essay, I clarify my use of the terms “harm” and “just law.” I describe a dimension of the ideal society that pertains to the undercriminalization argument. I follow this with a thought experiment illustrating that the proscriptions given as examples of overcriminalization in fact relate to productivity-reducing behaviors, and thus, are not examples of too much criminal law. To do this, I examine claims in Douglas Husak’s *Overcriminalization: The Limits of Criminal Law* in which he argues that there are too many laws, and that the laws result in too much punishment. I assert that Husak is wrong, and I attack the red herrings of overcriminalization. Appearances are deceiving: what looks like overcriminalization is effective law enforcement and a justice system having integrity. Finally, I argue for undercriminali-

zation and suggest perceiving the law as a positive disciplinary power that expands freedom. Evolving technology brings about new ways to be productive, but it also gives birth to new harms that reduce productivity, expression, and security. A better understanding of human behaviors is acquired through science, but the law always lags behind developments. Danger is prior, so the law must catch up, must meet the demands of society; productivity and interdependence are essential to well-being. The evaluation of law must be less hasty and more thoughtful.

The Ideal Society and Other Terms

In an ideal society, people are productive, secure, and can express themselves. “Productive” should be understood broadly—it means that people have the opportunity to be workers, makers, and creators. What is required to approach this ideal is the criminal law, the identification of those behaviors which threaten the well-being of society. Those who engage in these behaviors the government punishes (Reid, 1995, p. 523). As Mark Tebbit (2005) comments, criminal conduct is “the kind of conduct—acts or omissions—that the law seeks to discourage or prevent through the implementation of punitive sanctions, whether or not [the conduct] is morally wrong or harmful” (p. 157). When determining whether a behavior is harmful, it is necessary to define “harm” in a manner consistent with that aspect of the ideal society discussed above. “Harm” is behavior which, directly or indirectly, results in people being less productive, less secure, and less able to express themselves. Harmful behavior hinders society. Harm sabotages the functioning of others and is not effectively balanced with a substantial positive weight. This is seen in the law when, as Murphy and Coleman (1984) show, the state chooses to prosecute crimes in favor of a victim even though the victim does not wish for them to do so (p. 119). In their *Philosophy of Law*, Murphy and Coleman (1984) point out that some philosophers advocate reducing crime by outlawing driving, since there are many crimes related to driving, most significantly Driving While Intoxicated (p. 118). Relying on Robert Nozick’s reasoning, they hold that a society needs to tolerate certain risks. The benefits of driving far outweigh the dangers; a proscription on driving would lessen productivity, not increase it. Criminalization of certain behaviors aims to reduce loss; the ideal society seeks to maximize productivity, security, and the capability of self-expression, and to that end, prohibits behaviors that reduce these things.

The component of the “just law” that is argued for in this essay identifies those behaviors that result in harm—and the prescribing of consequences for engaging in such behavior. These consequences will discourage engagement in the proscribed behavior and prevent offenders from continuing that behavior. The just law, together with the principle of harm herein presented, is not to be taken as a blind calculation, a weighing of “pros” and “cons”; rather, they are to be combined with and limited by various constraints. While my thesis is at variance with Husak’s theory of overcriminalization, this does not imply that constraints are not observed in determining punishment. No constraints on the law would be incompatible with a productive society, and it would be unjust if punishments were not deserved (as Husak’s makes clear). But there is also a place within the law for considering productivity and the consequences of behaviors. In short, the view that there are necessary constraints in the criminal law, along with the view that there is undercriminalization, can be simultaneously held. Husak identifies internal constraints, those that are derived from the law itself. There are four: nontrivial harm, wrongfulness, desert, and burden of proof. The third and

fourth constraints are not in conflict with what is presented in this essay and can be retained. The desert constraint maintains that punishment should only be given to the extent that it is deserved (Husak, 2008, p. 82). Husak cites the work of J.D. Mabbott, who holds that punishment is justified because a law has been broken. But according to Husak, Mabbott's view does not attend to the substance of law which determines its constitutionality; a punishment must meet constitutional requirements. For Husak, the burden of proof constraint requires that laws that punish conduct be justified. Lawmakers must be able to make a strong case for the laws; laws that are unjustified should not be enacted. This constraint requires lawmakers to exercise care in the creation of criminal laws. The other constraints Husak derives—nontrivial harm and wrongfulness—are too limited. Even Husak admits that the law determines what a harm or evil is, and the hard dilemma is what should count as harm or evil, a question the answer to which is obvious in some cases but not in others.

Red Herrings in the Criminal Law

Phenomena and statistics are misinterpreted, engendering the perception of overcriminalization. Rather, technological advances, effective crime investigation and law enforcement, and a judicial system having integrity account for the high incarceration rate and the perception that there are too many laws. In addition, discretion serves as a bulwark against too much punishment. These issues are contentious and problematic for philosophers and social scientists, and require analysis beyond the scope of this paper; nonetheless, several considerations cast doubt on commonly held assertions. Some aspects of Husak's *Overcriminalization: The Limits of the Criminal Law* will serve as focal points of my discussion.

Husak's primary interest in *Overcriminalization: The Limits of Criminal Law* is the rise in punishment, as evidenced by criminal statistics and the U.S. prison populations. Husak notes that some commentators claim that the rise is owing to punishments being excessive and the criminalization of conduct that should not be treated as criminal. There is excessive punishment and questionable criminalization, but the increase in the number imprisoned and the expansion of the criminal law is best and most fully explained by changes in technology.

New technologies makes it possible to commit new kinds of wrongdoing. The fact that there are more punishments stems from recognized possible threats. Harm, whether possible or actual, usually precedes any law. The new potential harms, resulting from developing technologies, must be considered when appraising contemporary criminalization. Husak (2008) states: "Reasonable persons should anticipate that levels of punishment and amounts of criminal law on this massive scale will prove impossible to justify" (p. 4). However, technologies and the growth of society support the view that much more harm will occur if certain behaviors are not outlawed. New laws and regulations are constantly needed for an everchanging, evergrowing-more-complex society. According to Lawrence Friedman (1977), "The relationship among freedom, individual choice, and law (regulation) is by no means simple in modern society. In an urban, industrial world, freedom itself, paradoxically, gives rise to regulation, and individual choice creates conditions that demand a great deal of law. Traffic rules are largely unnecessary in a society of peasants tied to the soil" (p. 58). It is logical that a rapidly developing society requires more and more laws. Friedman (1977) asserts in the modern world, "Safety [is] an issue" that "accounts for tons of rules"

regarding transportation, construction, and so on (p. 58).

While some philosophers argue for a minimalist theory of criminal law, the demand for increasing productivity has engendered the creation of numerous statutes intended to maintain a functioning, efficient workforce. New technology brings about additional ways to be productive—but it also brings about new possible harms, new possible actions that would result in productivity, expression, and security being hindered or compromised. Software piracy laws, the law prohibiting unauthorized duplication of DVDs, seatbelt requirements, bans on texting while driving, banking regulations, smoke detector mandates—these all have as their ultimate aim a more productive society. We come to understand the dangers of smoking (smoking makes society less productive)—and we outlaw smoking in restaurants. Following 9/11, postal restrictions are implemented. Harm is done—and new laws are enacted.

Sometimes changes in human understanding bring about decriminalization—the elimination of laws prohibiting sodomy and interracial marriage are examples of this; sometimes changes in technology brings about decriminalization; there is, for example, little need today to regulate gas lamps and land-line telephones. There will always be laws that can be abolished or not enforced, but every new arena demands expansion of the criminal law. The growth of society means the need for more law, but new laws come at a slower pace than the changes that precipitate them, and, of course, the reasonable person *wants* productivity-fostering regulation.

Technological advances are one reason for the surge in criminal law and the growth in punishment. In limiting the use of certain technologies rather than permitting people to employ them however they wish, legislatures prevent harms. New laws and punishments are necessary; they are not a symptom of overcriminalization. After the introduction of cellphones, people took to talking on cellphones while driving, and their doing so resulted in many accidents. In response, legislatures passed statutes prohibiting talking on cellphones while operating a motor vehicle, and it is the rare person who does not see these statutes as reasonable and beneficial.

Although the example above is from the everyday, more grievous offenses can easily be conceived, such as the distribution of child pornography and the sexual predation of minors via the internet. Even if these crimes are punished too harshly, it is not true that they should be treated lightly; undeniably, if statutes outlawing such behaviors were repealed, children would suffer. Given the potential harms, it is better to err on the side of protection and to rely on the prosecutor and the judge to exercise their discretion to ensure fair treatment. Technological advances are the reason substantive criminal law has expanded; laws regarding behaviors made possible by developments in technology are not superfluous.

Drugs and Crime

The following examples illuminate the terms “harm” and “just law”; they also illustrate how laws prohibiting the use of drugs are necessary, and, consequently, do not represent overcriminalization.

Joe. Joe has three underage children. He regularly takes drugs, and his drug use precludes his being employed, and, consequently, he and his children are dependent on

government aid. Joe's lack of productivity results in his taking from others: revenue is needed to support him and his children, revenue that others must provide by way of paying taxes. There is less money for those providing the funds—less money for their personal expression, obtaining a better home, seeing a better doctor, and so on. People are compelled to relinquish resources which, left in their hands, would allow them to be more productive.

Peter. While enjoying drugs, Peter can keep a job and support his children, and he and his children receive no government aid. Some claim that the law treats Peter unfairly, that Peter should be allowed to take drugs since society is not injured by his doing so. Drugs, however, diminish the drug taker's capacity to be productive, and the consequences of drug taking include addiction, tolerance (needing higher doses to achieve intoxication), and time squandered acquiring and recuperating (Varcarolis, 1990, p. 634). A drug taker's behavior influences his children, increasing the likelihood of their using drugs and developing dependence; in addition, a drug taker's offspring are more likely to have birth defects, and drug taking often precipitates accidents causing injury and death.

Laws do not moralize, they answer society—and the outlawing of drugs answered people's hurting themselves and society by taking drugs. The only "benefit" of substance abuse is the user's pleasure, and this is not sufficient to outweigh the negative effects of the abuse. Prohibitions on drug taking address and discourage behaviors that diminish society while promoting the real self-interest of would-be drug takers, helping them preserve their mental and physical health. It may be true that punishment for drug offenders is sometimes excessive, but much harm results from the use of drugs, and when discussing laws that prohibit drug use and when discussing the notion of overcriminalization, this fact should be acknowledged.

There being anti-drug laws is not proof that there are too many laws. Husak (2008) reports that nearly "one of every five prisoners in America is behind bars for a nonviolent drug offense" (p. 16), suggesting that drug-related activity does society no ill. "Nonviolent" does not mean "not harmful," though, and moreover, many violent crimes—muggings, burglaries, and robberies—are committed to gain funds with which to purchase drugs. Drug laws can and should be understood as an assessment from evidence amassed over time that people doing what they wish with drugs reduces productivity.

Considerations Raised Against Overcriminalization

Most crimes are not discovered by law enforcement officers. Samaha (1988) remarks that if "victims or witnesses do not call, the police can do little or nothing" (p. 189). Communities regularly face threats, and people understand these threats and seek ways to combat them. Behind the criminal law are harsh realities that are oftentimes overlooked by those who do not have to deal with those realities. Yes, there is a lot of criminal law, but if this were not so, many communities would not be safe.

Husak (2008) points out that the number of imprisoned and supervised offenders has increased over the years, offering this as proof of overcriminalization (Husak, 2008, p. 5). Husak overlooks the fact that technological developments have improved policing and crime investigation, that the increase in the number of incarcerated offenders is

owing in large measure to better crime detection and law enforcement. GPS-tracking, immediate and mobile access to databases, and other technologies help police learn of and respond to crime, and these technologies, social media, the ubiquity and immediacy of news, digital bulletin boards, and television programs such as *America's Most Wanted* help police locate and apprehend criminals.

In the U.S., some break the law because they do not fear the justice system. According to Samaha (1988), studies show that many criminals are not afraid of the police or the law: "Prisoners admitted . . . they were neither frightened nor deterred by police" (p. 192). The justice system is not harsh enough for some crimes, and punishment is sometimes insufficient, especially when the offender has a support system. Husak claims U.S. prisons are very harsh, that offenders in the U.S. are punished more severely than offenders in Western European countries. He remarks that prison life is "boring and empty," evils which, according to him, are exacerbated by overcrowding (Husak, 1988, p. 5). Whether criminals are treated harshly in the U.S. is debatable, and it should be kept in mind that many programs—vocational training, work release, prison industries—aim to rehabilitate prisoners (Samaha, 1988, p. 595). Husak (2008) concedes that his primary premise cannot easily be proven, stating that the "extent of criminalization (and thus of overcriminalization) is largely a function of the breadth or reach of the criminal law, and we have no simple way to measure this variable at a given time or place. That is, no statutes can express whether or to what extent one jurisdiction criminalizes more or less than another" (p. 8). In other words, there being more criminal law does not mean there is overcriminalization.

It is sometimes argued that the U.S. has great numbers of prisoners, and that this proves that the system punishes too much and/or too harshly—that there is overcriminalization. When looking at the number of offenders imprisoned, it must be remembered that the population of the U.S. exceeds the population of Western Europe. The large prison population, moreover, reflects the integrity of the U.S. criminal justice system: police, prosecutors, judges, and juries are not generally susceptible to bribes, and media scrutiny, access to government documents, and the democratic process limit the extent to which the wealthy and connected can avoid prosecution and punishment.

Those in America's prisons should be in prison: the competency of police and forensic investigators, prosecutorial discretion, the providing of counsel, the evidentiary standard, the competency of judges, the appeals process—these things ensure that convictions are merited.

Conclusion

Undercriminalization—not overcriminalization—is the state of affairs in the U.S. Each new technology brings new dangers—new possible harms to productivity, expression, and security. Positive disciplinary power exists when new laws create freedom from these possible harms. There ever being new technologies, at every moment, we do not have all the laws we require. Effective crime investigation and law enforcement contribute to the number of incarcerated offenders, as does the integrity of the justice system. Many laws believed to not benefit individuals further self-interest by engendering productivity. Shallow are the accounts of contemporary criminalization that rest on the number imprisoned and/or the idea that drugs are harmless.

References

Friedman, L. M. (1977). *Law and Society: An Introduction*. Englewood Cliffs, NJ: Prentice Hall.

Husak, D.(2008). *Overcriminalization: The Limits of the Criminal Law*. New York: Oxford University Press.

Lucas, J.R. (1980). *On Justice*. New York, NY: Oxford University Press.

Murphy, J. G. G. & Coleman, J.L. (1984) *Philosophy of Law: An Introduction to Jurisprudence*. Totowa, NJ: Rowman and Allan Held.

Samaha, J. (1988). *Criminal Justice*. St. Paul, MN: West Publishing Co.

Tebbit, M. (2005). *Philosophy of Law: An Introduction*. London and New York: Routledge.

Titus Reid, S. (1995). *Criminal Law*. Englewood Cliffs, NJ: Prentice Hall.

Varcarolis, E.M. (1990). *Foundations of Psychiatric Mental Health Nursing*. Philadelphia, PA: Harcourt Brace Jovanovich.