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ENFORCING MORALITY

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Introduction

Suppose that we are considering whether an action is immoral. Its harmfulness is sometimes, but not always, our starting point. Some actions, such as murder and attempted murder, are wrongs because of the harm to which they conduce. Others are not. Actions such as rape, perjury and blackmail are wrongs prior to any consequences they cause. Their wrongfulness originates elsewhere. It may spring from the means by which the agent does something: not in *where* you go, as it were, but in how you get there—notably, how you treat people along the way. (Did you deceive her?) In special cases, it may be motive-based, resting on *why* a person does something. (Was it a warning or threat? An offer or blackmail?) These kinds of action involve what might be termed nonderivative wrongs, in as much as their basic wrongfulness is not dependent upon an outcome. If asked, "Which comes first, the wrong or the harm?" We can only say: it depends.

When deciding whether to prohibit such actions, however, a parallel question may not receive the same reply. Famously, for Mill (1859, ch. 1), "the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others." Perhaps, like Feinberg (1984: 34–36), we might require that the harm *also* be wrongful, but part of the point of the Harm Principle is to focus attention on the harm—and to reject immorality, or wrongfulness *per se*, as a ground of prohibition. On the other hand, Patrick Devlin (1965: 12–13) controversially asserted that "it is not possible to set theoretical limits to the power of the State to legislate against immorality . . . or to define inflexibly areas of morality into which the law is in no circumstances allowed to enter." Indeed, according to a school of thought known as Legal Moralism, an action can warrant proscription simply on the ground of its moral wrongfulness.

Ultimately, these approaches are incompatible. But they share common ground, and Devlin's challenge helpfully focuses our attention on the requirements of the Harm Principle itself. There is nothing special, or objectionable, about confining prohibitions to morally wrongful actions, i.e., actions that one ought not to do. Those are exactly the sorts of action that prohibitions should address. As we shall see, it is certainly arguable that there are harm-based constraints on state intervention to regulate wrongs. If so, however, they complement rather than displace the wrongfulness requirement. Indeed, a concentration on harm may divert attention from the more general inquiry whether, and if ever when, we should prohibit *wrongful* conduct.

What Counts as Immoral?

Depending on one's views about the scope of morality, it is possible to narrow the gap. Michael Moore (1997: 662), for example, rejects the thought that morality has anything to say about consensual sexual practices. Hence, even on his retributivist view, the state has no basis to criminalize such activities. More generally, if one thinks of morality as an antidote to selfishness (cf. Mackie 1977, ch. 5), reasons may be "moral" ones when they address how we should treat each other. On that view, the legal moralist's claim to enforce morality will tend to converge with the Harm Principle's focus on conduct that, directly or indirectly, affects other people's lives.

But that would artificially truncate our inquiry. Devlin's skepticism about limiting state enforcement of morality finds its strongest expression if we take it that an action is "immoral" whenever it is morally wrongful; and that it is morally wrongful whenever, all things considered, one ought not to do it. In turn, one ought not to do an action whenever the reasons favoring its performance are, all things considered, defeated by the reasons against. For an action to be immoral, therefore, does not require that it is seriously or profoundly wrong, that it be evil or wicked; only that it should not be done. Most wrongful conduct is venial.

On this view, practical morality is concerned not merely with how one should treat others but with the question, what should one do? Thus no categorical distinction is drawn here between "moral" and other kinds of reasons, such as prudential ones. There are, of course, many distinctions that we *can* draw, in particular between guiding reasons (which in fact apply to an action—Raz 1990: 16ff) and explanatory reasons (by which the agent is, subjectively, motivated). The present essay is concerned with guiding reasons—that is, with the reasons why we ought, or ought not, to do something. Yet within that realm, reasons, whether prudential, altruistic or of some other character, are either good—i.e., valid—reasons for doing something, or they are not. Those narrower labels are meaningful, but they are not foundational to the moral question, what ought one to do? Obviously, different kinds of reasons may have differing weights and priorities; what we tend to call "moral" reasons, especially concerning the interests of others, often have relatively greater importance. Yet a reason that is, say, prudential in character can still be a good reason for doing something. Imprudence can be a vice too. Imagine the case of a successful, patriotic businessman, who decides to kill himself should the UK do badly in the next Eurovision Song Contest. He may justly be criticized morally by his friends for resolving to "throw away" his life on such a foolish basis.

We do need, however, to distinguish an action's wrongfulness, or immorality, from its being *a wrong*. In the usage I adopt here, an action is a wrong when it breaches a duty or violates a right. On occasion, it may be permissible—not wrongful—to perpetrate a wrong, as when D breaks into V's house in order to call an ambulance to the accident on the road outside. Our main concern in this essay is with the converse issue: whether, as Jeremy Waldron (1981) would put it, one has a right to act wrongfully.

Three Theses Concerning Immorality

Taking moral wrongfulness as a starting point may seem counterintuitive. It is often said that the law should not be in the business of prohibiting immoral behavior, and at least one version of that claim is surely right. But we need to be careful about what is meant by the claim, and about how convincing it really is. Clarification is required. Here are three possible interpretations:

1. That φing is immoral is insufficient to justify its criminalization (Insufficiency Thesis).
2. That φing is immoral is necessary to justify its criminalization (Necessity Thesis).
3. That φing is immoral is insufficient to establish even a pro tanto ground for its criminalization (Non-qualifying Thesis).

(For convenience, I will focus primarily on enforcement through criminal law. As we see below, however, similar principles apply to coercion through the civil law.) The first thesis, that moral wrongfulness is insufficient to justify criminalization, seems uncontroversial. Even Devlin could embrace it. Suppose that φing ought not to be done. Accept too, for the moment, that this generates a reason to prohibit it. It does not follow that, *all things considered*, we should prohibit φing, because the reason favoring prohibition may be defeated by other considerations.

One set of counter-considerations is operational. Even if a prima facie case can be made for prohibition, and φing lies within the range of conduct that there is reason to criminalize, that case must still overcome various negative constraints that militate against criminalization generally. At the very least, to make an all-things-considered case for criminalization, we need to show that the criminal law offers an appropriate method of controlling φing, and is preferable to other methods of legal regulation available to the state. Recall the disastrous attempt by many western governments in the twentieth century to regulate alcohol using criminal prohibitions, which created a black market ripe for extortion and racketeering. Rightly, alcohol licensing and taxation laws are now preferred. Other constraints include the practical challenges of crafting an offense definition in terms that are effective, enforceable and which meet rule of law and other concerns (Simester and Sullivan 2007, § 16.5–7). It may be, if these demands cannot be met, that the state ought not to prohibit φing despite the prima facie case for doing so.

The in-principle case must also be weighed up against the burdens of prohibition itself, most notably in terms of freedom and lost opportunities (Feinberg 1984: 216). No doubt extramarital affairs constitute wrongful betrayals. But perhaps they should not be criminalized because of the extensive intrusions that their prohibition would involve. For all of these reasons, we should concede the Insufficiency Thesis. But we can do so without concern. For it is a long step from that thesis to concluding (i) that immorality is *unnecessary* to justify criminalization, or (ii) that even an in-principle case for criminalizing φing requires *more* than that φing is immoral.

The Need for Moral Wrongfulness

A very long step. Indeed, conclusion (i) would be a misstep, because the truth is the other way around. Preventing immorality is an *indispensable* condition of criminalization. It is the Necessity Thesis, not an "un-necessity" thesis, to which we should subscribe: any prohibition of φing can be justified only when φing is morally wrongful action.

Within the criminal sphere, the Necessity Thesis is most easily defended by reference to the distinctive nature of criminal law, which punishes, and censures, the offender for having done wrong. The criminal law is a blaming institution, and one cannot blame a person unless that person does something morally wrong; that is, unless she does something that, all things considered, she ought not to do. One can, of course, also judge people morally for their good deeds: yet such judgments are not blaming judgments. Blame lies only for conduct that, all things considered, one should not do.

As it happens, while that argument is adequate for the criminal law, a version of the Necessity Thesis holds also for the civil law; and, indeed, for all of us. No moral agent should act wrongfully. And the state is, like the rest of us, subject to the requirements of morality. It too should act in accordance with undefeated, all-things-considered reasons. Where it fails to do so, it acts wrongly, just like the rest of us.

This matters because if, all things considered, D has undefeated reason to φ, it generally follows that no one, including the state, should stop D from φing. Notwithstanding that D's reasons to φ may be personal to D, the existence of those reasons is itself a general matter (cf. Gardner 2007: 131). That D has reason to φ, therefore, is something that commands our allegiance too. This is not so much because D herself is entitled to respect—since respect for another human being does not imply that we must always respect the reasons for which that person acts. Rather, it is because the reasons themselves are entitled to respect—that is, because they are (good) reasons.

(In passing, we should allow some provisos to this claim. On occasion, the existence of reasons may depend on the status of the agent; thus it is possible that some reasons for individuals to φ may be excluded in the hands of certain other agents, such as the state, and vice versa. More on this possibility later. Neither do I suggest that we should all care *just as much* about reasons that are personal to others as we should about those personal to us.)

Legally Created Wrongs?

But what about regulatory laws? It is a commonplace that the state frequently prohibits conduct that is not pre-legally wrong. Indeed such offenses, which Anglo-American lawyers call *mala prohibita*, form the major part of the criminal canon. They vastly outnumber *mala in se* proscriptions of conduct that is pre-legally wrong. Yet, if φing is not morally wrongful, how can we justify its prohibition and subsequent punishment? Is the Necessity Thesis incompatible with *mala prohibita* offenses? This worry has concerned many writers. As Douglas Husak (2007: 112) complains, "I fail to understand why persons behave wrongfully when their conduct is *malum prohibitum* but not *malum in se*." While accepting that some *mala prohibita* prohibitions may give substantive content to underlying, preexisting wrongs, Husak doubts that many modern offenses do specify such pre-legal wrongs.

This line of thought is partly right and partly misleading. It is right in so far as it reflects the truth—and it *is* a truth—that φing does not become morally wrong just because the state declares it so. But it is misleading in that it doesn't sufficiently distinguish prohibition, which is forward looking, from punishment, which is retrospective and *ex post*. The justification of an act of criminalization is not the same as the justification of an act of punishment. They are different acts. The former can play a role in justifying the latter.

How so? Because the state sometimes *creates* specific moral reasons. Moreover, it can do so in a variety of ways (e.g., Honoré 1993; Finnis 1980: 284ff). Indeed, that power is not restricted to the state. When the soccer referee shows a player a red card, the player thereupon has a reason, indeed a duty, to leave the pitch. Any moral agent in a position of authority can create reasons: the power to do so is part of the very idea of authority (cf. Raz 1979, ch. 1). Prior to law, there is no reason to drive on any particular side of the road, but one arises as soon as the state stipulates on which side the citizens should drive. If the state rules that we must drive on the right, it thereby creates a post-legal reason so to do.

Admittedly, this involves a contingency: that the authority is not merely legitimate but effective, so that there is a reasonable expectation of conformity with the rules it creates. But this does not seem too much to require, since effectiveness is a general condition of the instrumental reasons underpinning a state's authority. In one sense, the law's role here is to generate authoritative conventions. At the same time, the rule is not mere convention. Imagine that (as sometimes occurs in certain countries) one arrives at a road being unsure what is the local driving practice. One knows the legal rule—drive on the left, say—but not whether it is observed. Other things being equal, one should drive on the left. Slowly.

Many standard examples of successful norm creation involve conventions, typically as coordinating rules or as content-determinations of some more abstract, pre-conventional norm. How many players to field on a soccer team? How should we return the ball into play? What side to drive on? The answers to these questions may be to some extent arbitrary, even suboptimal; yet the very existence of an authoritative answer is itself valuable. Now we can have an organized game. Now we can drive with more safety. And so on. The precise content of these coordinating rules may be less important than the purpose they serve. Even a rule about the age of consent in underage sexual intercourse, which most people would regard as a *mala in se* offense, is partially conventional. It varies widely across jurisdictions and history. But the rule is valuable—morally valuable—in virtue of helping to articulate one boundary of permissible sexual activity, benefiting potential offenders as well as potential victims by its clarity.

In all these kinds of cases, the state has good *ex ante* reason for passing the relevant law. In effect, the state acts as a conduit, crystallizing those *ex ante* reasons into a more particular, practicable form—the moral force of which derives not from the enactment itself, but from its function. Generally speaking, the wrongfulness of a rule-violation depends on the moral force of the rule. For a *malum prohibitum* rule, the moral force comes from its instrumental value, which depends, in turn, on the reasons the rule serves and how well it serves them.

Of course, not all prohibitions are justified. They are neither self-justifying nor do they automatically justify the punishment of violations. The point here is that there is a normative gap between prohibition and punishment. Husak insists that punishment is appropriate only if φing is wrongful. I agree. But it need not be wrongful independently. Whether φing is wrongful depends on whether it is, all things considered, wrong to φ; and at the stage of punishment, the reasons not to φ are to be assessed *post-legally*, not pre-legally.

What's the difference? When does the state succeed in creating reasons not to do something that, pre-legally, was morally permissible? What counts is whether the authoritative agent creates those reasons *for good reasons*. More precisely, what counts is whether the agent's legislative act is justified. In the driving case, the reason we now have is created as a particular determination of the more general reasons we have to drive safely. Even though the content of the rule is arbitrary, it acquires moral force in virtue of its purpose. Here, the particular crystallizes the abstract; but notice that it is the abstract which gives the particular its moral force. Even here, the state should do what morality gives it *ex ante* reason to do. Even authorities need a basis for their actions.

Authorities do not always have to be right. They just have to generate reasons. The referee who makes an error still creates a duty for the player to leave the pitch. On the other hand, those reasons have to be sufficient, and that depends on why and how they were created. The hard cases are the marginal ones, where the state has pressing need

to regulate μing but cannot practicably do so without also regulating φing. Speed limits, drunk-driving limits and age-of-sexual-consent rules are examples where a prohibition is unavoidably *overinclusive*, capturing both pre-legally immoral and pre-legally permissible instances of their perpetration. A prohibition is overinclusive when it proscribes a wider range of conduct than is required by the reasons motivating the prohibition. For example, a prohibition on driving above a certain speed limit may criminalize both safe and unsafe instances of such conduct, even though it is only the unsafe instances that motivate the prohibition. Since driving above the speed limit is not always dangerous, and the actor may know this is the case, Husak questions:

> In these circumstances—when a defendant commits a hybrid offense by engaging in conduct that is *malum prohibitum* although not simultaneously *malum in se*—how can punishment be justified within a theory of criminalization that includes the wrongfulness constraint? . . . In the circumstances I have just described, how can punishment be justified at all?
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> (2007: 107)

To my mind, we should flip Husak's question around. The primary issue is not whether punishment of φing is justified but whether the state is justified in prohibiting it. If the restriction is justified, we don't need supplementary grounds to show why φing is then wrongful. We don't need, in other words, to look for some supervening vice to explain why it is wrong for D then to φ. (Husak himself rejects such explanations: 108ff; although they may be relevant to judgments of culpability.) If the state's exercise of authority was justified, then φing is already immoral. Post-legally, D ought not to φ.

Mere Immorality?

So, I think, the Necessity Thesis is right too. But what about the third claim, that the in-principle case for criminalizing φing requires more than that φing is immoral? This is a much stronger version of the Insufficiency Thesis. According to the Non-qualifying Thesis, immorality per se does not generate even a pro tanto case for prohibition. Only certain kinds of immorality qualify. Something extra is needed. The Non-qualifying Thesis really does stand opposed to Patrick Devlin's view (1965: 12–13) that "it is not possible to set theoretical limits to the power of the State to legislate against immorality." Devlin's verdict finds modern resonance in decisions such as *1568 Montgomery Hwy. v. City of Hoover* ((2010) 45 So. 3d 319), where the Alabama Supreme Court upheld a provision of the Alabama Code making it a crime to sell devices "for the stimulation of human genital organs." The court ruled that public morality could supply a rational basis for the legislation.

For those who reject Devlin's position, the challenge is to identify what else is needed to justify the additional criteria that state intervention requires. Most secular responses to that challenge are consequential, holding that conduct is eligible for criminalization only when it involves further effects. Depending on the version, qualifying effects may be restricted to those impacting adversely upon people and their lives, or may be extended to other kinds of victims, such as other sentient creatures. This should be no surprise, since (secular) authority does not exist, and is not granted, for its own sake—it exists for instrumental reasons, as a means to promote the quality of people's lives, perhaps the lives of other creatures, etc. Thus, according to the Harm Principle (Feinberg

1984), what counts in the justification of state intervention is the impact of conduct upon other human lives. Conduct becomes eligible for prohibition when it adversely affects the interests that serve another person's well-being, the opportunities that she has (or may have) to pursue and enjoy a good life.

How much constraint does the Harm Principle add? Certainly, the Principle is nowhere near as restrictive as it might seem. Conduct may prima facie qualify for proscription without actually harming people, either directly or necessarily. Sometimes indirect risks will do (cf. von Hirsch 1996). Moreover, there is nothing in the Harm Principle to rule out the protection of things of intrinsic value, provided those things have implications for our lives. For example, the state might legitimately impose export restrictions, backed up by coercive laws, in order to conserve the nation's art heritage; as under the UK Export Control Act 2002.

However, the Principle does restrict doing so *for the art's own sake*. Suppose that a work of art can be preserved in such a way that no one will ever be able to see or experience it. Even the knowledge of its existence will be lost. In such a case, its protection falls outside the scope of the Principle, which constrains intervention to the sorts of events that in some manner affect people's lives.

Even if indirectly, then, there must be harm—some negative effect on people and their lives.

Yet this, too, seems a tenuous constraint, since in at least one sense the effect need not be negative. Seemingly, it is permissible within most versions of the Harm Principle for the state to enact coercive laws for the sake of *improving* peoples' lives. The case for enforcing contractual promises supplies an example. The regime of contract law facilitates well-being by empowering us to bind ourselves within exchange transactions. Without state intervention, systems of contract would be ineffective, resulting in lost opportunities for the kinds of welfare gains that can be secured from coordinated economic activity. State enforcement of contractual promises is warranted, therefore, by reason of the *benefits* to people thereby secured. And there is nothing in principle to stop a suitably contumelious breach from being criminalized.

(Contrast Husak 2007: 135–37, who regards contractual wrongs as "private" in nature. But a breach of contract is at least as "public" as a domestic assault, in as much as it involves other-affecting behavior—indeed, it may be legitimately criminalized if done fraudulently. While typical cases of breach of contract are insufficiently serious to warrant criminal regulation, it is hard to see any conceptual distinction that rules them outside the reach of the criminal law *tout court*.)

Notice that, although I have focused on criminal law as the standard means for coercively enforcing morality, the same issue arises for coercion through the civil law. Mill's articulation of the Harm Principle was not specific to the criminal law: it applied to any exercise by the state of coercive power over its citizens (cf. Smith 2000). Hence the state ought not to give effect to a regime of contract, even through the civil law, unless to do so is consonant with the Harm Principle.

A similar analysis holds for the regime of property law. Strictly speaking, even property wrongs are *mala prohibita*, in the sense that, for most modern societies, property rights are not pre-legal (Simester and Sullivan 2005). The allocation of proprietary interests is itself a matter of legal rules. I don't need the law to know that this arm is mine; I do need the law to know who owns that table. To invoke the Harm Principle successfully, therefore, we must demonstrate that the use of coercive laws to protect property rests on values other than protecting property rights for their own sake—otherwise the

state's claim to be protecting property owners from harm would be self-justifying. This challenge is met by reference to the value of having a *regime* of property law. The law of property facilitates the creation of forms of welfare and human flourishing that only the peaceful ownership and possession of property can deliver. Assuming minimum standards of just distribution of property, the regime itself is a public good. It provides a reliable means by which we can pursue a good life, through the voluntary acquisition, use, and exchange of resources. Having such a system may promote our well-being even if the particular form of the regime is imperfect (Coleman 1992: 350–54), provided that members of the community benefit by having a predictable, reliable, set of rules with which to organize their lives.

In the criminal law, the securement of benefits finds its best known expression through the law of omissions, which sometimes imposes positive duties to act for the sake of others, e.g. by rescuing someone who has fallen into danger, or by sending one's child to school. Such cases are controversial because of their potential onerousness, but not because of their *ineligibility* under the Harm Principle. If my child does not attend school, he will be worse off (in the long run). He will lack an adequate preparation for adult life in a developed economy, being denied many of the employment and other opportunities to advance his welfare that others will typically have.

So there is nothing in the Harm Principle, or in the requirement of immorality, that draws a sharp line between the promotion of value and the prevention of disvalue. Sometimes, even frequently, there may be associated differences in the kinds of interests affected by acts and omissions (e.g., Honoré 1991), but those differences enter the criminalization analysis later, affecting the strength of the case for regulation rather than its eligibility. Sometimes, one may be morally obliged to act for the benefit of another, sometimes to refrain from acting to another's detriment. Neither the Necessity Thesis nor the Harm Principle precludes this.

What else, then, can we say in favor of the Non-qualifying Thesis? There are two lines of argument that might be adopted.

A Red Herring

But first, let's clear out one inconclusive argument. Defenders of the Harm Principle accept that the principle does not restrict criminalization only to actions that directly cause harm. Indirect harm will suffice. Some writers object, however, that this move results in overbreadth. They suggest that it hopelessly undermines the ability of the principle to restrict criminalization, since it allows the proscription of otherwise harmless conduct on the basis of how that conduct is perceived by others; e.g., because it leads those other persons to experience anxiety and fear (Stewart 2010: esp. 26ff).

Now, the Harm Principle would certainly be problematic if it allowed the criminalization of conduct merely because of the distressed reactions of other people. But that truth doesn't refute the Harm Principle. It just shows that we would need to refine it, so that only certain kinds of indirect harm qualify. Moreover, if one accepts the Necessity Thesis, it follows that the Harm Principle must be compatible with criminalizing only wrongful behavior. Its supporters cannot, and indeed do not, argue that harm, whether direct or indirect, suffices in itself for criminalization. *And conduct does not become wrongful by reason of the manner in which other persons respond to it* (Simester and von Hirsch 2002). A properly articulated Harm Principle is therefore likely to be immune from this objection of overbreadth.

Reasons for Strangers, and the Role of the State

There are also problematic arguments in favor of the Non-qualifying Thesis. The challenge for Legal Moralism is to get from the proposition, φing is wrongful, to the proposition that the state may use coercion to prevent people from φing. It may be thought that the major barrier to navigation lies in a kind of agent-relativism about reasons: the objection that the state has no interest in reasons that don't involve other persons. Without more (say, harm to others), the objection goes, that φing is wrongful supplies *no reason at all* for the state to intervene.

There is something in this argument, but we need to be careful how we formulate it. One might seek to put the point more generally: that third parties (strangers) have no interest in purely self-regarding reasons, i.e., reasons that don't involve other persons. That seems too strong. Earlier, I suggested that, where a person has reason to φ, that reason is entitled to our respect. Similarly, the reasons she has *not* to φ also command our allegiance. If that's right, even "private" wrongfulness is capable of generating reasons for other persons. Suppose that D's φing is morally valuable or good. Then third parties have reason to promote, support or facilitate its occurrence. Conversely, that φing is bad supplies reason to avoid its occurrence. This isn't controversial; or, at any rate, it shouldn't be, since it is inherent in the very idea of morality. *Any* agent ought to do good and avoid bad. And the state is an agent too. We should not be indifferent to moral reasons just because they don't concern us. To be sure, the claim here is only that there is *some* reason, not that it is sufficient or even that third parties have standing to act upon it (without which it is, as Raz would say, excluded), let alone that they should use coercion. Sometimes—frequently—others should not intervene. But that doesn't mean that there is no reason in play for them *at all*.

To see this, consider paternalistic interventions (Husak 2011). Sometimes, all things considered, they are morally desirable. Indeed, someone who sees another pedestrian about to step off the curb in front of an oncoming car *should* physically restrain that person (cf. Raz 1986: 378). It would be wrong not to. If we accept this, it follows that even conduct which is not other-affecting can generate reasons for third parties. Indeed, it is this possibility that creates the moral space for justifying *any* form of paternalistic coercion, even via the civil law.

Why not, then, intervene to prevent immorality more generally? One line of argument depends on how one conceives of the role of the state; a conception that affects its standing to intervene. Suppose that we take the state to be a straightforwardly instrumental actor, an artificial creation that exists in order to advance the welfare of its subjects. On this view, the state has no interest in regulating conduct that does not affect people's lives. Pure moral wrongs fall outside its remit. That still leaves the Necessity Thesis untouched. Moral wrongfulness is indispensible to coercive intervention. But it is not sufficient. Ultimately, the point of intervention lies in its consequences for human beings (and, perhaps, the needs of other creatures to whom humanity owes duties). The state has an interest only in regulating conduct that affects peoples' lives.

Obviously, that conception is not shared by all. One might think of the state's primary aim in terms of doing justice (of some kind); or indeed of ensuring that events transpire—and citizens behave—as morality demands. These ways of thinking about the law have particular resonance when we imagine the legal system in terms of what happens in a courtroom, and in terms of the criminal law. The operation of the courts in this context tends to be retrospective. At the moment of trial, the law operates *ex post*.

The deed is done. Or, rather: we have to decide whether it was done and, if so, whether it was done culpably; and, if so, how much to penalize it.

So it is intuitive to think of the criminal law as something that looks backward, adjudicating upon punishment of a defendant's conduct. In turn, it becomes natural to characterize the function of criminal law as a punitive one, and then to extend that characterization backward in time to the *ex ante* stage of prohibitions. On this view, the criminal law is a field *sui generis*—a special body of law that is distinctively motivated by its concern with to impose sanctions for wrongful conduct. Other bodies of law might occasionally punish, e.g. through exemplary damages, but they do so only incidentally. It is a short move from there to the conclusion that criminal law exists *in order to* punish people for their culpable misconduct. For a retributivist like Michael Moore (1997), the question what to criminalize becomes secondary to the question, what to punish? Prima facie (and subject to institutional considerations), one should criminalize, and punish, *whenever* there is a culpable wrong, *and not otherwise*. And the primary task when ascertaining the scope of criminalization is to identify when conduct is morally wrongful.

The difficulty with this approach is that the civil law can be coercive too: yet no-one suggests that the civil law's coercive rules are driven by punitive motives. Consequently, the retributive analysis implies a deep separation between criminal and civil law.

Yet coercion is always forward looking. Just like the law's role in creating reasons, it operates *ex ante* in both types of law. It is the threat of future legal consequences, not the consequences themselves, that guides the behavior of citizens. On this *ex ante* view, there is no fundamental distinction between crimes and other branches of law that impose sanctions. The criminal law is simply a special kind of regulatory tool in the state's toolbox for influencing behavior—the morally loaded tool. The criminal law has a communicative function which the civil law does not. It speaks with a distinctively moral voice, one that the civil law lacks. Beyond that difference in mechanisms, however, the ultimate aims of criminal law are no different from those of the civil law, which is why Mill was quite right to extend the Harm Principle to civil-law coercion too.

This analysis generates convergence between the reasons that underpin the state's involvement in legal regulation through both criminal and civil law. Such reasons engage the principal reasons for the state's existence, as an institution for helping to secure and improve the lives of its citizens. There are various means of going about those aims. One is by generating public goods such as education, roads, hospitals, and the like. Another is by setting certain basic rules of engagement, or terms of interaction, among citizens. Those rules can be criminal or civil.

Coercion

Suppose, however, that we reject the constraint that state intervention should be designed to improve the quality of people's lives, to promote the goods of human welfare. Even without such benefits, minimizing wrongful conduct is surely a good thing, something desirable in principle. Perhaps, then, we can justifiably *interfere*, and seek to minimize immorality, say by creating a better social and economic environment, thereby giving citizens a range of preferable options.

But coercion *destroys* options. Even if the remaining options are valuable (or indeed beneficial), they are imposed rather than voluntary. In principle, this objection applies to strangers who intervene as well as to the state. But the state's interventions are recurrent in nature: this feature is characteristic of legal rules, which tend to apply generally

rather than occasionally. In this respect, the case of a coercive law is unlike that of intervening to restrain someone about to step in front of an oncoming car. On that specific occasion, intervention may be the right thing to do. But laws are not concerned with *ad hoc* scenarios. They regulate activities systematically.

Here we have the second line of reasoning in favor of the Non-qualifying Thesis and against enforcing morality: that coercion is a prima facie wrong. It may sometimes be justified. But not, the argument goes, for the sake of suppressing merely wrongful conduct. This is not to deny that merely wrongful acts warrant censure *ex post*. But it is to claim that something more is required to justify the *ex ante* step of criminal prohibition. That your φing would be wrongful doesn't entitle me to coerce you not to do it. Coercion is a prima facie wrong on two of the three grounds identified at the start of this essay. It can lead to harm. And it treats people badly.

One source of harmfulness rests in the fact that coercive prohibitions can significantly affect people's lives. They foreclose options that some individuals may value, and which (even if themselves wrongful) may form part of a valuable way of life. Indeed, because of their general nature, they tend in practice to be overinclusive, even ruling out instances of the proscribed conduct that are not wrongful at all. It is hard to see how these effects of coercion can be justified when that conduct has no adverse effects on anyone's well-being.

Prohibitions take options away from people—they are meant to. Accepting the general case for proscribing mere immorality will, inevitably, lead to restrictions of autonomy, especially because the law is rather coarse-grained, so that its rules are typically framed in broad rather than narrow terms. Given the diversity of human needs and preferences, criminal prohibitions will inevitably deprive some individuals of freedoms that are valuable to them. For such persons, the very existence of the prohibition will mean that their lives go less well: they will, in effect, be harmed by the prohibitions. The strongest cases for depriving people of opportunities in this way arise where D's activity is likely to diminish the opportunities for others to live good lives. In these cases, a condition of D's well-being (her autonomy) is weighed against a condition of V's well-being: like is compared with like. In these cases, if you like, the state has a role as arbiter, since there is a real trade-off of competing human interests that needs to be made. But, in these very cases, D's conduct is by definition harmful. Where, by contrast, the conduct is merely immoral, the interests of persons (such as D) are being weighed only against abstract judgments of morality. There is no well-being or autonomy-based reason *for* criminalization, only against: like is not being compared with like. In a liberal society, the interests of persons should take priority at this point. Thus mere wrongfulness is, by itself, insufficient for criminalization.

The other way of putting the matter is as a concern about means. Even if the end may be valuable, there are norms governing how we should treat people in the pursuit of those ends. Perhaps we can agree that the state is entitled to foster valuable rather than valueless options; yet it does not follow that we can short-cut individual choices in order to promote those options. A meaningful right of self-determination must include a right to make bad decisions, at least when those decisions do not adversely affect other people. People have a right to be treated as self-determining creatures. This is a right of respect, or human dignity. And it is violated by coercive measures, which attack D's right to choose whenever they make intervention contingent on the choice being a good one.

Self-determination is backed by welfare interests. We have noted that coercion reduces options. But it also interferes with the process by which they are *self*-chosen.

Well-being depends not only upon the successful pursuit of the goals that make one's life worthwhile; it depends additionally upon those goals' being one's own. When choices, even valuable choices, are imposed rather than self-determined, their imposition undermines the individual's ability to shape and direct her own life, a life framed by loyalty to and engagement with her own commitments.

This is not to claim that consent, or a voluntary choice, prevents an action from being wrongful. Choices don't become valuable just because they are freely made. Freely chosen, self-oriented acts are capable of satisfying the first condition of criminalization: that the conduct ought not to be done. Of course, what morality requires (if anything) is often hard to ascertain, especially in the context of self-regarding conduct, which itself supplies a reason why the state should hesitate to intervene (Moore 1997: 662–63). Nonetheless the argument here accepts that, in principle, the state can be alive to immorality. Noncoercive measures, including public information initiatives, may be appropriate. But coercive responses are not. To this extent, we have a right to act wrongfully.

Harmless Wrongs to Others?

It does not follow that we have a right to *wrong others*. Indeed, that conclusion doesn't follow even when the wrong is harmless.

In the context of the Harm Principle, the victim's involvement is not voluntary and, consequently, the state's involvement is not entirely voluntary either. Where conduct affects the interests of other persons, the potential for conflict between individuals tends to place the state in a position of arbitration, negotiating the boundaries of permissible social interaction. It cannot simply decline to intervene, since—in a situation of conflicting actions and interests—that establishes a rule too. Rather, it has to weigh up the effects and risks at stake, accommodating the likely extent and severity of the problem that an act is likely to generate.

Even though, in cases of harmless wrongs to others, there is no such balancing of consequences, much the same still holds true about the state's role. Consider the Offense Principle. Insulting or exhibitionist behavior, for example, is offensive because it wrongs other people by treating them with a certain lack of consideration and respect (Simester and von Hirsch 2002). Even when no harm occurs, the existence of a (right-violating) wrong creates normative space for arguments in favor of coercive intervention, where those arguments do not rely just on the immorality of the conduct but respond to the fact that D has attacked V's right to be treated as an equal qua self-determined, morally responsible, human being.

The point is that, unlike pure immorality, D's conduct is not merely wrongful *in abstracto*: it too is other-affecting. D's wrong generates a conflict between V's right to be treated with respect and D's interest in being able to express herself freely. That tension is not an abstract one: typically, D's attack has real, unpleasant, effects in virtue of the affront it causes to V. Moreover, where there is conflict between individuals in a community, regulating the terms of their engagement is exactly the sort of function that the state exists to perform. At least where that conflict is sufficiently serious (e.g., because D's behavior causes widespread offense across a society), the state is surely an appropriate referee. It has a prima facie reason to intervene, bearing in mind the state's role in setting the terms of interaction between individuals in a society. At the same time, since D's conduct is *ex hypothesi* a wrong, there is no reason for the state to support D's liberty

to behave in that manner, save in so far as is necessary to protect the conditions of D's well-being. Hence, to the extent that the state has good reason to intervene, it may be thought that V's rights should be preferred.

So the case for regulating wrongs to others is different from, and stronger than, the case for regulating mere immorality. The argument for intervention still gives priority to people and not simply to morality. Hence, it contains and does not eschew the central advantage that the Harm Principle has over legal moralism.

It remains unclear, however, whether this possibility really does generate harm-independent cases of justified state coercion. Recognizing that rape is a non-derivative wrong, a wrong prior to any harm it may cause, some writers have suggested that the case for its criminalization is a counter-example to the Harm Principle (e.g., Stewart 2010). But one of the reasons why rape is so serious a wrong is because of the great harm that it typically causes. It is very hard, perhaps impossible outside the realm of philosophy, to imagine rape as a harmless wrong. It certainly wouldn't be rape as we know it. And perhaps the case for criminalization would be weaker. Further, even if the case remained just as strong, there are very few rights that don't depend for their justification on the welfare interests they serve. Certainly not property rights. Normally, harm is in the background.

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References

1568 Montgomery Hwy. v. City of Hoover (2010) 45 So. 3d 319 (Alabama Supreme Court).

Coleman, J. (1992) *Risks and Wrongs*, New York: Cambridge University Press.

Devlin, P. (1965) *The Enforcement of Morals*, Oxford: Oxford University Press.

Export Control Act 2002 (UK).

Feinberg, J. (1984) *Harm to Others*, New York: Oxford University Press.

Finnis, J. (1980) *Natural Law and Natural Rights*, Oxford: Oxford University Press.

Gardner, J. (2007) "Complicity and Causality," 1 *Criminal Law and Philosophy*: 127.

Honoré, A. M. (1991) "Are Omissions Less Culpable?" in P. Cane and J. Stapleton, eds., *Essays for Patrick Atiyah*, Oxford: Oxford University Press, p. 31.

—— (1993) "The Dependence of Morality on Law," 13 *Oxford Journal of Legal Studies*: 1.

Husak, D. (2007) *Overcriminalization*, Oxford: Oxford University Press.

—— (2012) "Paternalism," in A. Marmor, ed., *Routledge Companion to Philosophy of Law*, New York: Routledge, pp. 467–80.

Mackie, J. L. (1977) *Ethics: Inventing Right and Wrong*, London: Penguin Books.

Mill, J. S. (1859) *On Liberty*, London: Parker and Son.

Moore, M. S. (1997) *Placing Blame: A Theory of Criminal Law*, Oxford: Clarendon Press.

Raz, J. (1979) *The Authority of Law*, Oxford: Oxford University Press.

—— (1986) *The Morality of Freedom*, Oxford: Oxford University Press.

—— (1990) *Practical Reason and Norms*, 2nd edition, Princeton: Princeton University Press.

Simester, A. P. and Sullivan, G. R. (2005) "The Nature and Rationale of Property Offences," in R. A. Duff and S. Green, eds., *Defining Crimes: Essays on the Criminal Law's Special Part*, Oxford: Oxford University Press, p. 168.

—— (2007) *Criminal Law: Theory and Doctrine*, 3rd edition, Oxford: Hart Publishing.

Simester, A. P. and von Hirsch, A. (2002) "Rethinking the Offense Principle," 8 *Legal Theory*: 269.

Smith, S. (2000) "Towards a Theory of Contract," in J. Horder, ed., *Oxford Essays in Jurisprudence*, Fourth Series, Oxford: Oxford University Press, p. 107.
Stewart, H. (2010) "The Limits of the Harm Principle," 4 *Criminal Law and Philosophy*: 17.
von Hirsch, A. (1996) "Extending the Harm Principle: 'Remote' Harms and Fair Imputation," in A. P. Simester and A. T. H. Smith, eds., *Harm and Culpability* Oxford: Oxford University Press, p. 259.
Waldron, J. (1981) "A Right to Do Wrong," 92 *Ethics*: 21.

Further Reading

For further reading, see: R. Dworkin (1985) *A Matter of Principle*, Cambridge, Mass.: Harvard University Press; R. Dworkin (1986) *Law's Empire*, Cambridge, Mass.: Harvard University Press; J. Feinberg (1988) *Harmless Wrongdoing*, New York: Oxford University Press; L. L. Fuller (1969) *The Morality of Law*, New Haven: Yale University Press; R. P. George (1993) *Making Men Moral: Civil Liberties and Public Morality*, Oxford: Clarendon Press; R. P. George (1999) *In Defense of Natural Law*, Oxford: Clarendon Press; H. Grotius (1925/1625) *On the Law of War and Peace*, F. W. Kelsey, trans., Oxford: Oxford University Press; J. R. Lucas (1966) *The Principles of Politics*, Oxford: Clarendon Press; A. Marmor (2001) *Positive Law and Objective Values*, Oxford: Clarendon Press; M. S. Moore (2000) *Educating Oneself in Public: Critical Essays in Jurisprudence*, Oxford: Oxford University Press; T. Nagel (1987) "Moral Conflict and Political Legitimacy," 16 *Philosophy and Public Affairs*: 215; H. Oberdiek (2001) *Tolerance: Between Forbearance and Acceptance*, Lanham: Rowman & Littlefield; S. Pufendorf (1934/1673) *On the Law of Nature and of Nations*, C. H. and W. A. Oldfather, trans., Oxford: Oxford University Press; and J. Raz (1995) *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford: Oxford University Press.