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Two kinds of criminal wrongs

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Abstract

I distinguish two kinds of criminal wrongs. A wrongdoer who acts in defiance of his conscience is guilty of what I call a wicked wrong. A wrongdoer who does not act in defiance of his conscience is guilty of what I call a vicious wrong. The distinction derives from a conception of immorality often associated with the Christian tradition. The distinction is important because it determines the moral message a wrongdoer should try to send through the punishment or penance he must endure in order to atone for his wrongdoing.

Key Words

penance • punishment • religion • virtue and vice • wickedness

INTRODUCTION

Consider the following cases:

- Richard Herrin was a 23-year-old college student at Yale University, where he met Bonnie Garland. Herrin was a Mexican-American from the barrio of Los Angeles. He found Yale a foreign and alienating place. He and Garland fell in love, but when Garland wanted to break off the relationship, Herrin hammered in her skull as she slept (Gaylin, 1982).
- John Forrest went to the hospital where his father lay dying a painful death from terminal illness. He carried with him a single-shot .22 calibre revolver. After telling him how much he loved him, Forrest put the barrel to his father's temple and pulled the trigger. He pulled the trigger three more times (*State v. Forrest*, 1987).
- Bernard Goetz was riding the IRT on a Saturday afternoon on 22 December 1984. Four young black men were riding the same train. One of the young men approached Goetz, who is white, and said, '[G]ive me five dollars.' Goetz, who had been previously mugged, said he was afraid the request was the prelude to another attack. Goetz pulled the revolver he was carrying and fired four shots. Each bullet found its mark (*People v. Goetz*, 1986).

- Walter Williams was 24 years old with a sixth grade education. His wife Bernice was 20 years old with an eleventh grade education. Both were Sheshont Indians. Their son, 14-month-old William, developed an abscessed tooth, which became gangrenous. Walter and Bernice, both of whom loved their son very much, did not realize how ill the child was. They thought aspirin would help. The child eventually died (*State v. Williams*, 1971).

Assuming that the defendant in each of these cases is guilty of a crime, what, if anything, is it that makes their crimes *wrong*? In other words, do all crimes share anything in common that make them wrongs? According to what I will call the *standard account*, the answer is yes. According to the standard account, all crimes are wrongs insofar as the wrongdoer through his conduct conveys a message of disrespect or contempt for his victim. What makes a crime – any crime – a wrong is the insulting message it sends.

But is that right? Does the conduct of the defendant in each of the cases described above convey insult or contempt? Did John Forrest, for example, convey contempt for his father when he pulled the trigger? For me the answer is no.

If so, then the standard account is incomplete. It can and does explain one important category of criminal wrongdoing, which I call wicked wrongs, but fails to explain another category, which I call vicious wrongs. The distinction is premised on a conception of immorality that places conscience and subjectivity front and center: Did the defendant honor his conscience, or did he defy it? Did he try his best to conform his conduct to the demands of his conscience, or not? Did he make a good faith mistake of fact, or did he not even try to figure out the facts?

Christian moral theology, or at least one important part of it, also places great emphasis on conscience and the subjective,¹ and I draw freely on the resources of that tradition. My argument is meant, however, to be primarily philosophical, not theological. It relies on a particular conception of immorality often associated with the Christian tradition, but it does not depend upon faith in the existence of God.²

WRONGS – THE STANDARD ACCOUNT

What makes a crime wrong? According to the standard account, the answer begins with a distinction between harms and wrongs. Most crimes, though not all, are both harms and wrongs, but what makes a crime a crime is the wrong it does, not the harm it causes.

If I, without excuse or justification, steal your car, or hit you with a bat, I cause you to suffer a material harm. I deprive you of your car, or I injure you. The law of torts will accordingly call me to account for what I have done. It will impose on me an obligation to pay you compensation intended to ‘make you whole’ for the harm I have caused. But will compensation alone do the trick? Will compensation alone make you whole? It will of course provide you monetary recompense for your loss. But material harm or loss is not the only thing you have suffered.

On the contrary, I have done more than just harm you. I have also *wronged* you; and I have wronged you because my actions have said something about my worth relative to yours. They have declared that I count myself free to pursue my own ends without regard to, and indeed at the expense of, yours. They have in effect dispatched a moral

communiqué, which says: *I'm better than you*. As Jeffrie Murphy puts it, wrongful actions are 'symbolic communications', which say such things as: 'I count but you do not', 'I can use you for my own purposes' or 'I am here up high and you are there down below' (Murphy and Hampton, 1988: 25). Thus, what makes a crime a crime, and not simply a tort, is not material harm, but *moral injury*; and the moral injury that constitutes wrongdoing is the injury I cause through the message of contempt, insult, dishonor, disrespect and so forth that I convey through my actions.

According to Jean Hampton, monetary compensation works to remedy any harm resulting from crime, but the only adequate remedy for a crime's wrong is punishment. (Hampton, 1992a, 1992b). Punishment fights symbolic fire with symbolic fire. If my wrongdoing sends an objectively false moral message about my value relative to yours, punishment sends a counter-message, negating or annulling my message and setting the moral record straight. Punishment condemns or censures, denying the wrongdoer's false claim to superiority, and thereby affirming the equal moral worth and value of the victim. As Hampton puts it, 'The one who acted as if he were the lord of the victim is humbled to show that he isn't lord after all. In this way the demeaning message implicit in his action is denied' (Hampton, 1992a: 13). Punishment should therefore humble; it should tell the wrongdoer that he is no better than his victim. But it should not humiliate; it should not tell him that he is worth *less* than his victim, or anyone else for that matter.

Hampton characterizes this theory as a form of retribution, which is a theory for which I have considerable (but not complete) sympathy. Indeed, I think it accurately portrays the meaning many, if not most, people attach to crime and punishment in the real world today. Crime expresses the wrongdoer's contempt for his victim. In response, punishment expresses our collective indignation and humbles the wrongdoer's will. It thereby vindicates the victim's value and expresses our solidarity with the victim.³

WICKED WRONGS

The standard account assumes that all crimes are wrongs because they send a message of insult or contempt to their victims. But is that right? Do all crimes convey such a message?

I doubt it. Consequently, I doubt that all crimes are wrongs of the same kind. Indeed, I suggest that the criminal law encompasses at least two distinct kinds of wrongs: wicked wrongs and vicious wrongs. The standard account is distorting because it treats all crimes as if they were wicked wrongs. It fails to see that wicked wrongs are only part of the domain of criminal wrongdoing. Vicious wrongs also occupy that domain. In the hope of forestalling any immediate misunderstanding, I emphasize at the outset that I use the term 'vicious' as a *term of art*. The term is not meant to carry the same meaning here as it does in ordinary language.

I begin with wicked wrongs. Take the following case. *A* is the beneficiary on *B*'s life insurance policy of \$100,000. *A* never really cared that much for *B*, and he could use the money. Accordingly, *A* kills *B*. *A* knows that killing *B* for the money is wrong. His conscience tells him so. But he kills *B* anyway. The money means more to him than *B*'s life.

Here we have a classic case of greed run amok. We also have a classic case of wickedness. *A* acts under no threat; he makes no mistake about what he's doing; and he acts under no delusion that killing *B* is morally permissible, let alone obligatory. On the contrary, he believes, and rightly so, that killing *B* is wrong, but he does it anyway. In so doing he violates or defies not only the law but his conscience as well. He believes, and rightly so, that he should not kill *B* for the money, but he puts his own good (as he sees it) above the good of his victim, and kills him anyway, disregarding his conscience. Consequently, his act conveys precisely the message of claimed superiority over his victim, of contempt for his victim's rights and well-being and of insult that the standard account treats as the defining feature of all criminal wrongs.⁴

Wicked wrongs reflect what I take to be the central case of criminal wrongdoing. They also reflect, I think, an understanding of wrongdoing rooted in – or at least friendly to – Christianity. First, consider the role played by conscience. Conscience is generally understood as the 'capacity, commonly attributed to most human beings, to sense or immediately discern that what [one] has done, is doing or is about to do (or not to) is wrong, bad or worthy of disapproval' (Hill, 1998: 14). A wrong is wicked only if the actor believes what he is doing or has done is wrong. In other words, an act is not wicked unless the actor performs it in violation of his conscience.⁵ Of course, conscience plays a part in various moral traditions, but it does not seem unfair to say that the Christian tradition, in which conscience is sometimes said to be the 'voice of God', or the law of God 'written in the heart' (Romans 2:14–15), assigns conscience an especially prominent role in assessing the moral status of a person's conduct.

Second, according to Christian theology, a mortal sin – one that places the soul in eternal jeopardy – not only had to be objectively grave, it also had to be done with 'full consent' and 'full knowledge', which meant roughly that the offender knew what he was doing, knew that it was an offense against God and consented to doing it all the same. Yet sin does not *harm* God, because it cannot; God cannot be harmed, at least not in any ordinary way. But He can be *wronged*. Indeed, what makes a sin a sin is not the harm it causes God – which is none – but the *contempt* it shows for Him (Abelard, 1971: 7; Marenbon, 1997: 265–6). Similarly, what makes a wicked wrong wicked is the contempt the wrongdoer shows for his victim (who is, after all, made in the image of God, as of course is the wrongdoer himself). Wicked wrongs, assuming they are sufficiently grave, are thus the mortal sins of the criminal law.

Third, keep in mind that contempt – the distinctive moral message that wicked wrongs broadcast – never travels alone. It has a loyal and dedicated companion. Recall *A*, who killed *B* for the insurance. *A* is guilty of the crime of murder, but *A* has also committed a sin. In fact, the sin of which he is guilty is a member of the seven deadly ones. In case you have forgotten them, they are pride, anger, envy, sloth, avarice, gluttony and lust (Bloomfield, 1952). Of which is *A* guilty? You might think he is guilty, and obviously so, of avarice, and indeed he is. Yet he is also guilty of the sin of *pride*.

But why is pride *A*'s sin (or one of them)? Indeed, why is pride a sin at all, much less a deadly one? A healthy sense of self-respect, which is related to but distinct from pride, is clearly no sin; on the contrary, it is a virtue. In fact, pride – in the right measure – is itself a virtue. Nonetheless, when pride turns into an excessive love of self – when pride turns into arrogance – it becomes a vice, and moreover, it becomes the sponsor of wicked wrongdoing.⁶ The arrogant arrogant; and what wicked wrongdoers arrogant, or try to

arrogate, is an elevated moral status to which they are not entitled. A wicked wrong might thus have any number of lesser vices giving it aid and comfort, but at its origin will be pride, which according to some statements of the Christian tradition, 'leads to every other vice' (Lewis, 1960: 109). Money may be the root of all evil, but pride is the root of all wicked wrongs.

Conscientiously wicked wrongs

Let me now take an extended detour to consider the possibility of a special kind of wicked wrongdoing. Consider what would typically be described as a hate crime: *A* attacks *B* because *B* is black. *A* knows that attacking *B* is morally wrong, but he freely gives into his hate and attacks him anyway.

Now add a twist: assume that *A* does not believe that attacking *B* is morally wrong. He follows a perverse morality, one maxim of which holds that it is morally permissible, or worse, morally obligatory, to attack people who are black. *A* knows that the law follows a different moral code, one that forbids him from attacking *B*, but he thinks the law, at least on this point, is morally obtuse.

Here we encounter what appears to be a very different kind of wicked wrong, which we might call a *conscientiously* wicked wrong. The run-of-the-mill wicked wrongdoer believes that what he is doing is wrong, but puts the pursuit of his own good (as he sees it) above the call of his conscience. In contrast, the conscientiously wicked wrongdoer follows his conscience to the letter. Pride is at the root of ordinary acts of wicked wrongdoing, but acts of conscientiously wicked wrongdoing are not rooted in pride, at least not in the same way. Pride is not the immediate problem. The immediate problem is a deeply *erroneous* conscience. The ordinary wicked wrongdoer defies his conscience, and in so doing displays contempt for his victim. The conscientiously wicked wrongdoer, in contrast, abides by his conscience, only the morality his conscience tells him to follow is itself wicked or immoral.

Now consider a very different kind of case. Laurie Walker was a devote Christian Scientist. When her 4-year-old daughter fell ill, Walker treated her with prayer, calling upon a Christian Science practitioner and a Christian Science nurse to pray for and attend to her. The little girl eventually died; the diagnosis was meningitis. Walker honored the demands of her God and her conscience. She was also prosecuted for, and convicted of, felony child endangerment and involuntary manslaughter (*Walker v. Superior Court*, 1988).

Was Walker guilty of a conscientiously wicked wrong? I doubt it. Her conduct was the proximate cause of her child's death, but I doubt the maxim on which she acted was immoral. She could hardly be said to have embraced the maxim that it is morally right to harm one's children, or to deny them life-saving treatment. On the contrary, she probably loved her daughter very much. Instead, she likely believed – honestly but erroneously – that medical treatment was not an effective, or not the most effective, way to treat her child, or that prayer and spiritual healing were as effective, if not more so. Yet if that is right, then her mistake was a factual one, not a moral one.

But what about the actions of the dyed-in-the-wool racist with whom we began? Or the devout Nazi or skinhead who commits a crime ostensibly in the name of principle? Or bin Laden? Are not *these* clear-cut cases of wrongdoers acting conscientiously on the basis of a wicked morality, thus making them guilty of conscientiously wicked

wrongdoing? Do we not here have ignorance or mistake of the most basic and rudimentary moral rules, and not simply, as in Walker's case, a buried mistake of fact?

Medieval theologians, Thomas Aquinas among them, commonly drew a distinction between two different moral faculties, each of which we were all said to possess. One of these was the faculty of conscience (*conscientia*). Conscience instructs us on the application of certain basic moral principles – which for medieval theologians were principles of natural law – to particular moral problems. Conscience could, however, sometimes be mistaken. It could err. It could misapply the moral law to the facts and lead one astray. The other faculty was called *synderesis*. *Synderesis* told us what the principles of natural law were in the first place. *Synderesis* was thus the 'spark' of conscience. Moreover, unlike conscience, *synderesis* could not err. Insofar as one was ignorant of the natural law, one's ignorance was itself vincible or culpable. Invincible or non-culpable ignorance of the natural law was simply impossible.⁷

I suspect that many, if not most, crimes put forward as examples of conscientiously wicked wrongdoing are, if not ultimately based on deep mistakes of fact, really nothing more than wicked wrongs of the ordinary variety dressed up in the name of conscience and principle. Yet, insofar as a person *can* truly be ignorant of basic moral propositions – of the natural law – I will for now side with the medieval theologians who say that such ignorance can never be invincible. Such profound moral ignorance can only be ignorance for which one is culpable, because virtuous or reasonable people simply do not suffer from it. Consequently, wrongs that issue from such ignorance fall (as explained more fully below) into the category of vicious wrongs. Wicked wrongs are reserved for those who do wrong knowing full well that that is what they are doing.

I do not mean to deny that conscientiously wicked wrongs, like simple wicked wrongs, can send a message of contempt or insult. Indeed they can. But when a conscientiously wicked wrong conveys contempt, it does so in a different way. A wicked wrong conveys contempt insofar as it expresses the wrongdoer's unjustifiably elevated sense of self. In contrast, a conscientiously wicked wrong conveys contempt insofar as the morality to which the wrongdoer erroneously pays allegiance is one that treats some people (supposedly as a matter of moral principle) as better and more worthy of respect than are others. The contempt of a conscientiously wicked wrong thus derives from the wicked morality to which the wrongdoer erroneously adheres, and not directly from the wrongdoer's overweening sense of self.⁸

One final point. We need to be careful not to confuse conscientiously wicked wrongs with valid acts of civil disobedience. In both instances the agent proceeds from conscience. But the two cases are very different. The conscientiously wicked wrongdoer acts immorally, though does not see it that way; the civil disobedient acts illegally but not immorally. In the paradigm case of civil disobedience, the law, not the actor, is on the wrong side of the moral fence. Moreover, the conduct of the civil disobedient sends no message of contempt to its putative victim. The civil disobedient's violation of the law may cause harm (e.g. trespass on or destruction of property), but that harm should not be understood as an expression of contempt for the one who suffers it. On the contrary, the target of the civil disobedient's contempt is not the person who bears the collateral harm, but the law or policy against which she is protesting.

VICIOUS WRONGS

Contrary to the standard account, not all wrongs coming within the jurisdiction of the criminal law are examples of wicked wrongs. The criminal law extends to an important class of non-wicked wrongs as well; I call these vicious wrongs.

How does a vicious wrong differ from a wicked one? The best way to explain the difference is to start with the idea of excuse.

The virtue in excuse

A wrongdoer who is otherwise guilty of a crime can escape liability if he cannot be held responsible for having committed it, or in other words, if he is *excused*. As I see it (and as others have persuasively argued), the criminal law offers defendants two basic excuses. A defendant can claim to have been *insane* at the time he acted, or he can claim to have acted under *duress*.

Although the test for judging legal insanity has changed over time, and still varies from one jurisdiction to the next, the insanity defense is best understood as marking the *limit of moral address*. The doctrinal formulation that comes closest to this understanding is the venerable *M'Naughten* rule, according to which an offender is judged insane if, as a result of mental disease or defect, he *could not* tell right from wrong. But if that is right – if an insane defendant *lacks the cognitive capacity* to know right from wrong – it would be better to say he is *exempt* from criminal liability, not simply that he is *excused*. Excusing a defendant presupposes him to be an agent capable of moral address. An insane defendant, however, lacks that capacity. His illness places him outside the legal – and moral – blame game altogether.⁹

That leaves duress. According to the American Law Institute's Model Penal Code, a defendant should be excused on grounds of duress if he was 'coerced' to act 'by the use of, or threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist' (ALI, 1985: §2.09(1)). That is the general rule, but it does not really tell us *why* we should excuse an act committed under duress. Duress excuses, but why?¹⁰

Philosophers of the criminal law have come up with three different theories, each of which purports to offer a deeper account of when and why the criminal law excuses.¹¹ According to one account – the *causal* theory – we excuse a wrongdoer if and when factors outside of his control caused his actions. Another – the *character* theory – holds that we excuse a wrongdoer if and when his wrongdoing was out of character. Still another – the *choice* theory – holds that we excuse a wrongdoer if his choice to commit the act was not a free choice. In the final analysis, none of these theories successfully explains the existing law of excuse, but the choice theory comes closest.

The causal theory has one big problem: it is false, legally and morally. The causal theory is based on the principle that causation excuses – i.e. if an act has a cause, then the actor is excused. But if determinism is true, and all acts have causes, then no one is ever responsible for anything. Everyone is excused, always. That conclusion is rightly treated as a *reductio ad absurdum*. Moreover, the criminal law is in fact not nearly as forgiving as the causal theory would imply. It excuses sometimes, but not *all* the time. Indeed, inasmuch as the criminal law is a mechanism for allocating blame, the causal theory would, if true, put the criminal law out of business (Moore, 1985).

The character theory has much the same problem; it too is false, legally, if not morally.

The character theory, as its name implies, takes character, not acts, as the primary object or touchstone of responsibility. Acts are important, but only insofar as they tell us something about a person's character. A criminal act sometimes, maybe even often, reflects a criminal character – but not always, which is why, according to the character theory, we need excuses. We should and do excuse, according to the character theory, when the circumstances are such that the usual inference from criminal act to criminal character is invalid and should therefore be blocked.

But in truth, that is not how the criminal law really works, whether or not that is how it should work. Contrary to what the character theory would predict, a person of otherwise good character who nonetheless commits a crime in the absence of any valid excusing condition will still be subject to criminal liability and punishment. Of course, you might say that anyone who commits a crime in the absence of an excusing condition is *for that reason alone* a bad character (see Duff, 1993: 378–9). But that would be an odd theory of character. One crime does not a bad character make; good people sometimes do wrong, and when they do, the criminal law holds them accountable, despite their otherwise good characters. Conversely, and again contrary to what the character theory would predict, a person of bad character faces no liability or punishment unless and until his bad character manifests itself in criminal conduct. As long as he commits no crime, even the most rotten of characters will remain free from the clutches of the criminal law.

That leaves the choice theory, which seems to me to be the prevailing theory of excuse today, and rightly so. Unlike the causal and character theories, the choice theory has the virtue of being true, both legally and morally. It is, however, also *incomplete*. Let me explain.

According to the choice theory, the criminal law grants a defendant an excuse if and when he or she lacked a 'fair opportunity' to obey the demands of the criminal law. If so, the obvious question is: under what circumstances is an actor's opportunity to obey the criminal law *unfair*?

It is hard to say. The criminal law does sometimes tell us when it will *not* consider an opportunity unfair. For example, in many jurisdictions duress is no excuse for murder. It is never unfair, according to the law in these jurisdictions, to ask a person to resist a threat from *X* if his only other option is to intentionally kill *Y* – even if the threat is to his own life, or to the life of someone he loves. However, most of the burden of distinguishing between fair and unfair opportunities to obey the law is borne by a legal fiction, fondly known as the 'reasonable person'. If the reasonable person would have resisted, then the opportunity facing the defendant was not unfair, and the defendant will not be excused; conversely, if the reasonable person would have succumbed, as did the defendant, then the opportunity facing the defendant was unfair, and the defendant will be excused.

But who *is* the reasonable person? What does he or she look like? One possibility is that the reasonable person is or should be understood as the average or ordinary person (Hart, 1970: 153–5). Another is that the reasonable person is or should be understood as one who acts in accordance with the norms that define the relevant social role he or she occupies (Kahan and Nussbaum, 1996: 366). Still another is that the reasonable person is or should be understood as the person who acts as a good person would act, no matter how the average or ordinary person would have acted, and no matter what prevailing social norms prescribe (see Gardner, 1998: 579).

The criminal law's own account of the reasonable person is notoriously agnostic.

Rather than trying to describe the reasonable person in any detail, the law tends instead to leave it to the good judgment of the jury to decide who the reasonable person is, how he or she would have acted in the defendant's situation and accordingly, how the defendant should have acted. Within broad limits, each jury constructs its own vision of the reasonable person.

Yet despite the considerable controversy and uncertainty surrounding who the reasonable person is, or who he or she should be, one thing is clear: the reasonable person reflects a *normative* standard. The standard of the reasonable person may not be a particularly difficult one for most of us to meet, but it is a standard nonetheless – a standard the criminal law insists that each of us *live up to* (Gardner, 1998: 598). The reasonable person therefore reflects some ideal of virtue or character, even if that ideal is not an especially exalted or demanding one. If so, then *some* conception of virtue or character lies at the very core of the choice theory of excuse, without which it is impossible to tell if the choice the defendant faced was an unfair one. In the final analysis, therefore, the choice theory requires us to ask: how would a virtuous (i.e. reasonable) person have acted under the circumstances, and did the defendant on the present occasion measure up?

If the answer is yes, then the criminal law will extend an excuse: no one should be blamed for having acted as a virtuous person would have acted.¹² But if the answer is no, then the criminal law will refuse an excuse. The criminal law sets a standard of virtue, and the defendant, on the present occasion at least, failed to meet it. He has acted non-virtuously – or, taking some considerable liberties with ordinary language, one might even say (as I will) that he has acted *viciously*.

Return now to the question with which we began: how does a wicked wrong differ from a vicious one? We are now in a position to give the answer. If the gist of an excuse lies in having lived up to the criminal law's standard of virtue, the gist of a vicious wrong lies in having failed to live up to that standard. Unlike wicked wrongs, vicious wrongs are not done in defiance of one's conscience, and they convey no message of contempt for their victims. Vicious wrongs are therefore wrongs of a different order altogether.

A vicious wrong can arise from one of two basic moral failures. First, it can arise from *weakness*. I might realize that I am doing something wrong, but I do it anyway, not because I count my ends as more important than yours (as wicked wrongdoers do), but because I fail, despite my best efforts, to muster the fortitude or self-control the criminal law demands of me (and which a virtuous person would have mustered). Second, it can arise from a *mistake*. I might do something wrong, but only because I did not realize it was wrong, though I would have realized it was wrong if only I had got all my facts straight (as would a virtuous person).

Vicious wrongs – weakness

Like someone who is guilty of a wicked wrong, someone who is guilty of a vicious wrong arising from weakness realizes that he is doing something wrong, but does it anyway. But *why* he does it is very different. Someone guilty of a wicked wrong places his own good over and above the good of his victim: pride is the problem, and contempt is the message. In contrast, a vicious wrong is not the product of pride; it is the product of weakness or failure to exercise self-control.

Of course, the criminal law makes room for human weakness; it does not demand

saintly fortitude. Faced with a credible and imminent threat to my life unless I rob the local convenience store, the criminal law will probably excuse my actions. I acted under duress. If *A* becomes angry when *B* tells him tauntingly that he has sexually abused *A*'s young daughter, and *A*'s anger turns quickly into deadly violence against *B*, the criminal law will likewise probably excuse *A*, albeit only partially, mitigating what would otherwise be murder into voluntary manslaughter. *A* has killed, as the common law put it, in the 'sudden heat of passion'.

But the criminal law does not hand out excuses to just anyone. On the contrary, it excuses an offender if and only if a reasonable (or virtuous) person would have done the same. If a reasonable person in the defendant's situation would *not* have been overcome with the anger or fear that eventually lead to the crime, or would at least have kept those emotions under control, then the defendant – who was afraid or angry, and who did not keep those emotions in check – is out of luck. His plea for excuse will fail, no matter how real his fear or anger was to him, and no matter how hard he tried to control it. He has failed to live up to the standard of virtue the criminal law demands of us all. He has acted viciously.

Vicious wrongs – mistakes

Weakness is one source of vicious wrongdoing; mistakes are the other. In the case of weakness, the wrongdoer realizes that he is doing wrong, but he does it anyway, either because he experiences emotions a virtuous person would not, or because he fails to control those emotions when a virtuous person would have controlled them. In the case of mistake, however, the offender does wrong without realizing that that is what he is doing.

Mistakes of fact

If you pull the trigger believing you are shooting at a deer, but the deer turns out to be a person (call him *B*), you have made a big mistake. The criminal law calls it a mistake of fact. If your mistake was reasonable, and you are charged with murder, you will be acquitted. Why? The doctrinal answer is that you lacked the *mens rea* for murder, which typically requires that you knew you were shooting a human being. You, however, thought *B* was a deer.

But again, your mistake will in general exculpate you only if it was reasonable.¹³ If *B* was dressed as a deer, wandering through the woods during hunting season on his way to the masquerade, you will probably be acquitted. But if *B* was dressed in fluorescent orange, walking along the highway at high noon, your prospects are less bright. Now your mistake would be unreasonable. It would be the kind of mistake a virtuous person would not have made; consequently, you are out of luck, no matter how honest or sincere your belief at the time you pulled the trigger that *B* was the oddest-looking deer you had ever seen. You are guilty of what the common law called involuntary manslaughter, and what the Model Penal Code calls negligent homicide.

Mistakes of fact are possible not only with respect to the elements that define a criminal offense (as in the deer example) but also with respect to the elements that define a justification. Take, for example, a putative case of self-defense. Imagine you are getting cash at the ATM late one night. A man approaches you. As he nears you see his hand move toward a bulge in his pocket. You see a gun, and you fire your own. The gun you

saw turns out to be a wallet. You are charged with murder and claim self-defense. If your mistake was reasonable – if a virtuous person would have seen a gun too – then you will be acquitted; if not, then you will be convicted of murder (or perhaps manslaughter), no matter how honestly or sincerely you believed at the time that your life was on the line.

Crimes of negligence are also based on mistakes of fact. According to the Model Penal Code, negligence is the failure to perceive a substantial and unjustifiable risk that you should have perceived. The problem is not (as in the prior example) that you see a risk where none exists. Just the opposite: you fail to see a risk where one *does* exist. If *A*'s child is in fact suffering from a life-threatening illness, but *A* sees no risk to the child's life, then *A* has made a mistake of fact. Moreover, if a reasonable or virtuous person, who knew what *A* knew, would have seen the risk, then *A*'s mistake is unreasonable; and if the child dies as a proximate result of *A*'s mistake, then *A* is guilty of negligent homicide.

We all make mistakes, and the criminal law does not demand omniscience. But it does expect us to act with the knowledge a reasonable or virtuous person would have had under the circumstances. If we do, then we will be excused. But if we do not, and if we do wrong as a result, the wrong we do falls into the vicious category, not the wicked one.

Mistakes of law

Unlike mistakes of fact, the criminal law recognizes no excuse based on a mistake of law, even if a reasonable or virtuous person would have made the same mistake.¹⁴ The standard rationale for this rule is utilitarian. If the law were to recognize mistake of law as a defense, so the argument goes, it would create perverse and dangerous incentives. People would, for example, be encouraged to remain ignorant of the law, or to lie, claiming they were ignorant when they really were not. The law would unravel, or at least that is the worry.

But for a non-utilitarian, the law's refusal to excuse reasonable mistakes of law is itself a mistake. Start with the easiest case. Sometimes the criminal law punishes *morally innocuous* conduct. So-called *malum prohibitum*, or regulatory offenses, come to mind. Because our best clue to what the criminal law forbids is what morality forbids, and because the criminal law usually does not forbid what morality permits, even reasonable and virtuous folks can get thrown off when the criminal law extends its reach to morally innocuous conduct, and no other clue exists to tip us off that we are in fact entering criminal territory. Nonetheless, if an offender insists – honestly and earnestly – that he would not have torn the tag off the mattress if only he had known it was a crime to do so, the criminal law cares not. *Ignorantia legis neminem excusat*.

The better view, I think, would be to treat mistakes of fact and mistakes of law on a par (Husak and von Hirsch, 1993: 173). In other words, the law should allow an offender to avoid criminal liability based on a mistake of law if a reasonable or virtuous person would have made the same mistake (Kahan, 1997: 153). If a reasonable or virtuous person would not have realized that his conduct was a crime, then the defendant, who made the same mistake, should be excused; he simply did not fall short of the law's standard of virtue. In contrast, if a virtuous person would have realized his conduct was criminal, then the defendant's mistake, however honest or sincere, is no

excuse. Of course, you might say that a virtuous person would never make a mistake of law; a virtuous person always knows what the law forbids. But that claim is implausible. It might have made sense when the criminal law only extended to *malum in se* offenses, but today's criminal law is not nearly so modest.

Now take a harder case. Suppose, for example, that my best friend is dying of a painful terminal illness. He is a shell of his former self, and now wants only escape. Suppose too that he has great faith in the hereafter, into which he is now anxious to step. And he wants my help taking that step. Suppose finally that he and I are recent arrivals to the United States. We hail originally from Country Z, where assisted suicide is not a crime. I plead with my friend to change his mind. But he insists, and I relent. The overdose of pain killer I give him produces a peaceful death.

I believe my conduct is morally justified. Moreover, I believe it is legally justified too. It never dawns on me that the law might treat what I did as a crime, let alone murder. But I am, of course, mistaken. What I saw as a personally painful act of love the law sees as a crime. Should I be acquitted if I claim (and you believe) that I would not have helped my friend die if only I had known the law required me not to?

It depends. Here, the underlying conduct for which the criminal law holds me accountable is, I think it is fair to say, *morally ambiguous*. I have not simply torn the tag off a mattress; I have killed someone. If the law were to recognize mistake of law as a defense, my guilt would depend on what the reasonable or virtuous person would have known or believed about the law's demands. If the reasonable or virtuous person in my situation would not have been aware of the law's prohibition, I should be acquitted; if the reasonable or virtuous person would have been aware of it, then I should be convicted. But if I am convicted, the crime of which I am guilty is an example of a vicious wrong, not a wicked one.

CONCLUSION

So what? What difference does it make whether we say a wrongdoer is guilty of a wicked wrong or a vicious one?

The short answer goes something like this. If, as I have argued elsewhere in more detail (Garvey, 1999), we treat punishment as a form of secular penance by which a wrongdoer atones for his wrongdoing, and if we accept that punishment so understood is a deeply communicative or expressive activity, then the pressing question is this: what message should a wrongdoer be trying to convey through the penance he or she endures? The answer, I suggest, depends in important part on the nature of his or her wrongdoing. Different wrongs say different things – wicked wrongs say one thing, vicious wrongs say something else – and the message a wrongdoer tries to send through the penance he or she endures should differ accordingly.

Wicked wrongs convey a message of insult or contempt for their victim, and wicked wrongdoers convey a message of overweening pride or hubris in themselves. Accordingly, the penance they endure should send a message of humility. The wicked wrongdoer should humble himself through his penance, thereby displaying recognition of the fact that he is not any better than his victim, or anyone else.

In contrast, vicious wrongs convey no such message of contempt or insult. Instead, wrongdoers guilty of vicious wrongs display a lack of virtue. They fail to live up to the

standard of virtue the criminal law expects of us all. Consequently, the penance to which they submit should aim to show their resolve in the future to live up to, or to learn how to live up to, that standard, and if necessary, to commit themselves to a process of self-reform that will enable them to do so.

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Notes

- 1 The emphasis on subjective morality within the Christian tradition finds one of its earliest and most emphatic expressions in the *Ethics* of Peter Abelard (1079–1142) (Mahoney, 1987: 175–6).
- 2 The discussion that follows is heavily indebted to Milo (1984) and Hampton (1989, 1990).
- 3 I have elsewhere described an account of punishment, distinct from retribution, which I call punishment as atonement. On this account, victim and wrongdoer are treated as members of a community (in a sufficiently robust sense of the word), and crime is understood as weakening – but not breaking – the communal bond that exists between them (Garvey, 1999). Punishment in such a community would become a form of a secular penance. Wrongdoers and victims who inhabit this community would continue – despite the wrong one member has done to another – to recognize one another as fellow travelers. Wrongdoers would experience the hardship of penance as the price they must pay for admission back into the community as a member in good standing, a price they would consider well worth paying. Moreover, victims would realize that offenders who (through compensation or reparations) have repaired the harm they have caused, and who (through penance) have made amends for the wrong they have done, have done all they can reasonably be expected to do to expiate the guilt attendant to their crime. They have earned forgiveness, which should be forthcoming. Ideally, the net result is reconciliation, or atonement.
- 4 All wicked acts symbolically elevate the wrongdoer over his victim. Yet even among wicked acts, one kind is worse than the rest. In the example in the text, *A* killed *B* because he wanted *B*'s money. He killed *B* because he was greedy. Now suppose that *A* is not the beneficiary on *B*'s insurance policy. He kills *B* not because he is greedy, but instead because, and only because, he knows killing *B* is wrong, and he wants to do wrong. He does wrong *for the sake of it*. Here is an especially odious and (one hopes) mercifully rare variety of wickedness, which Milo calls 'satanic' (Milo, 1984: 7) and Benn calls 'malignant' (Benn, 1985: 805).

- 5 I am assuming that the actor's belief is correct, i.e. that what he *believes* is wrong is *in fact* wrong. I do not deal here with cases in which the act is not in fact wrong but the actor erroneously believes it is. For a philosophical exploration of this problem, see Bennett (1974).
- 6 For a helpful analysis of arrogance, see Tiberius and Walker (1998).
- 7 Thomas Aquinas (1948) *Summa Theologica*, pt. I–II, q. 19, a. 6 (emphasis added):
- For instance, if erring reason tells a man that he should go to another man's wife, the will that abides by that erring reason is evil; since this error arises from ignorance of the Divine Law, *which he is bound to know*.
- 8 This difference between wicked wrongs and conscientiously wicked wrongs has the following consequence. Whereas the penance endured by a wicked wrongdoer should serve primarily to humble the self and to convey that sense of humility, the penance endured by a conscientiously wicked wrongdoer should serve primarily as a way of conveying his repudiation of the wicked morality to which he previously adhered and his conversion to a morality of equal concern and respect.
- 9 I draw a distinction between insanity and psychopathy. A person who is insane suffers from a cognitive incapacity; he or she cannot tell right from wrong. A psychopath suffers from a motivational incapacity; he or she can tell right from wrong, but that knowledge provides them with no motivation. Psychopaths are therefore often said to be, not immoral, but amoral.
- 10 I would treat the so-called 'irresistible impulse' test of insanity as a form of duress that addresses cases of internal, as opposed to external, compulsion.
- 11 For an argument that no single theory can successfully account for the full range of excuses recognized in law, see Horder (1993).
- 12 For an effort to explain why this understanding of excuse does not collapse the distinction between excuse and justification, see Gardner (1996: 118–22).
- 13 The statement of the law in the text is of course an oversimplification. For a more complete treatment of the law of mistake of fact, see Dressler (1995: 133–44).
- 14 I refer here to mistakes 'as to whether conduct constitutes an offense, or as to the meaning of an offense' (Dressler, 1995: 154).

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