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ORIGINAL PAPER

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Abstract Imagine a citizen (call her Ellen) engages in conduct the state says is a crime, for example, money laundering. Imagine too that the state of which Ellen is a citizen has decided to make money laundering a crime. Does the state wrong Ellen when it punishes her for money laundering? It depends on what you think about the authority of the criminal law. Most criminal law scholars would probably say that the criminal law as such has no authority. Whatever authority is has depends on how well it adheres to the demands of morality inasmuch as morality is the only authority we have. Thus if morality says that money laundering should not be a crime then the state wrongs Ellen when it punishes her. But if the criminal law as such does have authority, and if in the exercise of its authority the state has decided to make money laundering a crime, then the state does Ellen no wrong when it punishes her.

Keywords Authority · Criminalization

Ellen's Question

Ellen Campbell has a big problem: money laundering. She also has a simple question: When the feds put her in jail for it, is *she* the one being wronged? The question is simple. The answer is not. Here is the back story.

Campbell was a real-estate broker in posh Lake Norman, North Carolina. Mark Lawing was a drug dealer who wanted to buy a house. He contacted Campbell for help. Lawing eventually settled on a house for $182,500 but told Campbell he could get a mortgage for only $122,500. In order to get around the shortfall he persuaded the sellers to take $60,000 under the table in cash and sign a renegotiated purchase agreement for $122,500. The house was his. The $60,000 came (of course) from selling drugs. When the closing

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documents were all signed and sealed, Lawing had successfully concealed $60,000 worth of dirty drug money in a fancy piece of clean real estate.[1]

Campbell was charged with "engaging in [a] monetary transaction[] in property derived from specified unlawful activity,"[2] otherwise known as money laundering. The jury found Campbell guilty: She "engage[d] … in a monetary transaction" (the transfer of the $60,000) in "criminally derived property of a value greater than $10,000" (the $60,000 in drug money), and she knew the $60,000 came from a "criminal offense."[3] Lawing never told her in so many words that the money was drug money. Of course not. But Campbell figured it out (or so the jury believed). That was all it took. Guilty of money laundering. She could have gotten up to 10 years.

Set aside for now any thought that the transaction was in any way fraudulent. If it helps, imagine that Lawing bought the house at its fair market value of $182,500 using the dirty $60,000 and the proceeds of a bank loan for the rest. Assuming Campbell knew the $60,000 was dirty, she would be guilty of money laundering. She conducted a monetary transaction knowing that the funds used in the transaction were dirty. Is that morally wrong? Indeed, money laundering can amount (almost) to nothing more than *possessing* dirty money knowing it to be unclean. Is *that* morally wrong? I suppose reasonable minds can disagree, but for now let's suppose that money laundering so understood is *not* morally wrong. Let's suppose too that it should not be a crime because only moral wrongs should be crimes. If money laundering is no moral wrong, then neither should it be a crime.[4]

Return now to Ellen's question: When the federal marshal slaps the handcuffs on and hauls her off to prison for money laundering, is Campbell the one being wronged? In other words, is it wrong to punish conduct that is itself no wrong?[5]

Ellen's story is one small chapter of a much bigger story called "over-criminalization."[6] The story is old and enduring: We have far too many crimes and far too many people being punished for committing them.[7] Some crimes should not be crimes because they punish conduct that constitutes no wrong. Others should not be crimes because the wrong they punish is none of the state's business. Others should not be crimes because they punish conduct that other crimes already punish. Others impose too much punishment for the wrong they render criminal. Money laundering is just the tip of the iceberg. Ellen is not alone. She has lots of company. Her question is one many have standing to ask.

[1] A more complete statement of the facts can be found in *United States v. Campbell* (1991) and *United States v. Campbell* (1992).

[2] 18 U.S.C. § 1957(a). Federal law contains two money laundering offenses: § 1957, which is usually described as a trafficking offense, and § 1956, which is usually described as a transaction offense. The details are not important for present purposes.

[3] A "monetary transaction" means among other things the "transfer, or exchange, in or affecting interstate … commerce, of funds … by, through, or to a financial institution," 18 U.S.C. § 1957(f)(1), and a "financial institution" means among other things "persons involved in real estate closings and settlements." 31 U.S.C. § 5312(a)(2)(U).

[4] I use money laundering as my example of a crime that in some cases constitutes no wrong, but if you can't help but think that money laundering is a wrong then substitute your favorite non-wrongful crime. For some examples consult Luna (2004).

[5] To be more specific: the actor's conduct is not wrong independent of the law, nor does it become wrongful after the state has declared it to be a crime.

[6] On what it might mean to say that a particular jurisdiction suffers the ill of "overcriminalization," and why no jurisdiction should suffer it, see generally Husak (2008), Ashworth (2008b). The overcriminalization story in the United States includes an "overfederalization" subplot, i.e., some federal crimes should be state crimes only. See, e.g., Beale (2005).

[7] See Kadish (1968).

So far as one can tell over-criminalization is here to stay. Indeed, chances are it will get worse. The political dynamic (at least in the United States) that tends to produce more and more crimes on the books now has a name: the pathological politics of the criminal law.[8] It goes like this: Democratic lawmakers have every reason to make anything under the sun a crime. It allows them to appear to be tough on crime and being tough on crime is a good way to get reelected. Prosecutors have every reason to encourage lawmakers to make everything under the sun a crime. It makes their job easier and allows them to decide who to prosecute and what to prosecute them for. The public is happy (because the law is tough on crime), lawmakers are happy (because the public is happy), and prosecutors are happy (because their job is easier). A perfect storm.

So how do we answer Ellen's question? Was she wronged when the United States punished her for money laundering? It depends. It depends on what you believe about the authority of the state. If you believe either that no state can, or that no state does, possess authority (if you are, in other words, an a priori or a posteriori anarchist, respectively), then you will say that Ellen was indeed wronged when she was hauled off to the federal pen. It was wrong for the state to punish her for a crime that should not have been a crime in the first place. She did no wrong and as such did nothing that should have been a crime. Thus when the state punished her for a crime that should not have been, the state was the wrongdoer, not Ellen. *It* did *her* wrong.

But if you believe a state can and that some states do possess authority, and if the state that punished Ellen indeed possessed such authority, then you will say that Ellen was the one who did wrong, not the state. The state may have been mistaken or misguided when it punished her for a crime that should not have been a crime in the first place, but it nonetheless did her no wrong when it punished her for committing that crime.[9] The first answer comes from those who embrace what I will call the *moral model* of the criminal law. The second comes from those who embrace what I will call the *political model*. The two models are both similar to and different from one another.

They are similar insofar as each insists that punishment at the state's hands is wrong unless all the following are true: First, wrongfulness is ascribed to the actor (thereby rendering him prima facie liable to censure). Second, *criminal* wrongfulness is ascribed to the actor (thereby rendering him prima facie liable to censure at the hands of the state in the form of hard treatment, i.e., punishment). Third, culpability is ascribed to the actor (thereby rendering him all things considered liable to state punishment).[10] Fourth, some good will come from punishing the actor (thereby rendering state punishment justified). Ellen would therefore have good reason to complain about being put in the pen unless and until wrongfulness, criminality, and culpability are all properly ascribed to her, thereby giving the state the privilege to punish her. She would also have reason to complain unless and until the state came forward with good reason to exercise that privilege.

The two models are different insofar as the moral model insists that no state can or does possess authority, whereas the political model insists that some states can and do possess

[8] See Stuntz (2001).

[9] I assume here and throughout that Ellen was "culpable" in the commission of her crime, but I will not take the time to explain what I take such "culpability" to entail.

[10] I should be more precise here. I believe that an actor who culpably commits a criminal wrong renders himself liable to punishment. But punishment is usually understood to have two pieces: censure and hardship. An actor who culpably commits a criminal wrong gives the state permission to censure him and to impose on him the hardship associated with punishment. A state is obligated to exercise that permission with respect to the censure piece. It is permitted to exercise that permission with respect to the hardship piece provided it can come forward with some good reason to do so.

authority. Because the moral model rejects state authority, it looks to morality alone in order to determine when an actor has culpably committed a criminal wrong and when punishment for such wrongdoing is warranted. The moral model rests entirely on the authority of morality. In contrast, the political model rests on the authority of the state, though it looks to morality to tell us the conditions under which a state possesses authority and what limits exist on that authority. But so long as a state vested with authority acts within those limits the political model assumes that the state is free to determine for itself when an actor has culpably committed a criminal wrong and when punishment for such wrongdoing is warranted.

For the moral model, criminal-law theory is about discovering the mind of morality. For the political model, criminal-law theory is *also* about discovering if and when a state possesses authority and what limits exist on that authority. The moral model ignores the circumstances of politics: the fact that people reasonably disagree about what morality requires. It soldiers on despite such disagreement. Once we at last know the mind of morality, once the power of this or that argument finally silences dissent, the state will be obligated to fall into line and do what morality tells it to do. In contrast, the political model places the circumstances of politics and the existence of reasonable disagreement front and center. It then asks what morality requires in the face it.[11]

If the philosophical anarchists are right and no state either can or does possess authority, we need the moral model to tell us if and when the state wrongs those it punishes when and because it punishes those who do no wrong. If the philosophical anarchists are right we would have no need for the political model. The moral model would be the only game in town. But if the philosophical anarchists are wrong and some states can and do possess authority, we need the political model to tell us if and when a state has authority and where that authority ends. We need to know if and when a state does no wrong to those it punishes even when those it punishes have done no wrong. Moreover, if the philosophical anarchists are wrong and some states can and do possess authority, we would still need the moral model to tell us how the state can make its criminal law the best it can be: how to make its criminal law conform to morality.

The Moral Model

The moral model sees criminal-law theory as a species of moral theory. The only authority the moral model countenances is the authority of morality itself. The state might claim authority but only morality possesses it.[12] The task for criminal-law theory is therefore to identify what morality says makes this or that wrongful; what morality says makes this or

[11] The moral model is of course "political" in the sense that it deals with the limits morality imposes on state action, but it cannot be characterized as "political" in the sense that it aims to provide an account of the nature and limits of the state's authority: it denies that the state has authority.

[12] Here are the words of one prominent moral modeler (Michael Moore): "Citizens have no moral obligation to obey a law just because it is a law." Moore (1997, p. 72). "[L]aw as such does not obligate citizen obedience, not even prima facie. This means that the legislative enactment of a legal prohibition cannot make (morally) wrong an act not morally wrong before." Moore (2011, p. 13). Antony Duff claims that the criminal law lacks authority: "The criminal law does not (cannot) turn conduct that was not already wrongful into a moral wrong." Duff (2011a, p. 127). "[T]he criminal law's authority does not consist in a power to make wrongful conduct that was not already wrong: it lies primarily in its procedural dimension, as a power to call alleged wrongdoers to public account, to judge their conduct, to condemn and punish their criminal wrongdoing." Duff (2012, p. 3). He does not claim, however, that the state lacks the power to create moral obligations for its citizens across *all* domains of law.

that wrong criminal; what morality says makes an actor culpable for this or that criminal wrong; and what morality says is a good enough reason to warrant punishing an actor to whom a culpable criminal wrong has been ascribed.

So what does the moral model have to say about what morality says? Take the pieces—wrongfulness, criminality, culpability, and punishment—one at a time.

Wrongfulness

The moral model insists that an actor should not be punished unless wrongfulness can somehow be ascribed to him.[13] It thus needs a theory of wrongfulness. Proponents of the moral model agree on the need for such a theory. They also agree that any such theory must come from morality. They disagree on what morality says that theory says. Consider just three such disagreements.[14]

First. Is wrongfulness limited to acts or can it attach to non-acts too? Some moral modelers believe that morality in the main imposes on us only negative obligations not to make the world worse off and thus ascribes wrongfulness only to acts having that effect.[15] The criminal law's so-called act requirement therefore makes perfectly good sense. The law does not (nor should it) punish mental acts or non-willed bodily movements, nor does it (or should it) punish the simple possession of a thing or status. True: the criminal law does sometimes punish omissions.[16] But omission liability is a limited exception tolerable only under limited circumstances. Morality sometimes imposes positive obligations to make the world better, but not often.[17]

[13] For an extended analysis of the "relationship between moral wrongfulness and the appropriate content of the criminal law," see Tadros (2012, p. 157).

Inchoate offenses might be thought to present a challenge to the moral model's insistence that a wrong must be ascribed to an actor before punishment can be in the offing. Take an actor who shoots at a post believing the post to be a person and intending to kill the person he imagines the post to be. Where is the wrong in that? A moral modeler has two replies available. First, he could insist that an attempt (or other inchoate offense) should not be a crime unless it constitutes a wrong in which case he will need to explain when an attempt (or other inchoate offense) can be a wrong, or else urge the end of such offenses. See, e.g., Alexander et al. (2009, pp. 197–225) (urging the end of incomplete attempts, conspiracy, and solicitation); Husak (2008, p. 39) (suggesting that attempts and other inchoate offenses can sometimes constitute the wrong of unreasonable risk-imposition). Second, he could make an exception in which case attempts (or other inchoate offenses) would be examples of non-wrongful crimes. See, e.g., Moore (1997, p. 193) ("Culpability is necessary to desert, but wrongdoing is not."); Hurd (1999, pp. 1558–1559) ("[M]oral culpability may be a sufficient condition of blame and punishment."). It might be worth emphasizing here Moore's observation that "[c]ulpability could … be said to *be* wrongdoing in a sense, namely it is wrongdoing in the possible worlds created by our representational states." Moore (1997, p. 405).

[14] I might add that moral modelers also disagree over when and why consent can transform a wrong into a non-wrong. One line of thought has it that consent can transform a wrong into a non-wrong unless doing so would somehow jeopardize the dignity or humanity of the one giving consent. Consent has transformative power, but it cannot magically transform a degrading or dehumanizing wrong into a non-wrong. See, e.g., Duff (2007, p. 132), Bergelson (2007, p. 216), Dan-Cohen (2000, pp. 773–777). What makes a wrong degrading or dehumanizing is bound (at least at the margins) to be a matter of disagreement. If *A* gives his masochistic consent to *B*'s sadistic violence has *B* wronged *A*?

[15] Moore (1993, pp. 47–59), Hurd (1994, pp. 193–208).

[16] See, e.g., Alexander (2002).

[17] See, e.g., Moore (1993, p. 59) (Omission liability is permissible "for those omissions that violate our duties sufficiently that the injustice of not punishing such wrongs outweighs the diminution of liberty such punishment entails."). Other moral modelers believe that morality requires more. Perhaps any culpable failure to act as would a good Samaritan should render one liable to punishment? See, e.g., Dressler (2000), von Hirsch (2011), Smith (2003).

Others disagree. Acts are not the only possible predicates that can carry wrongfulness as a property. Take the mental act of forming an intent. Does it not make sense to say that morality obliges us not to form intentions with particular objects, at least when no good reason exists to bring that object into being? An intention to maim? An intention to kill? If so, then maybe the act requirement should be replaced with something more in line with morality. Maybe a control requirement,[18] or an act presumption.[19] Or, if we keep the act requirement, then its raison d'etre will need to be understood as something other than the fact that (in the main) only acts can be wrongs. Perhaps the act requirement is better defended, not on the ground that only acts can be wrongs, but on the ground that only acts should be *criminal* wrongs. Permitting the state to punish wrongful non-acts (assuming they exist) would be (morally) worse than not: better therefore to put them beyond the state's grasp.[20]

Second. Does the wrongfulness of an act, or the degree to which an act is wrong, depend on the mind of the actor, or is wrongfulness mind-independent? Take the following case. Paul is a petty thief who hangs out at Penn Station looking for easy opportunities. He spots a backpack left unattended next to the track for the Silver Star line. He takes the backpack and exist the station. When he opens the backpack he sees a clock with wires sprouting out of it. The backpack is full of nails. Paul realizes he has discovered a bomb. He calls the police for help and the bomb is safely defused. No one is injured. Had the bomb gone off dozens would have been killed or injured. Has Paul done anything wrong? If so, how wrong is the thing he's done?[21]

Moral modelers disagree. So-called subjectivists would look at the facts subjectively (as Paul saw them): they would include the fact that Paul never realized the backpack contained a bomb until after he had stolen it. All he believed he was doing was stealing. Paul, so says the subjectivist, has done wrong: he is guilty of theft.[22] So-called objectivists would look at the facts objectively (as they really were): they would exclude whatever was or was not going on in Paul's head at the time and would conclude that, all things considered, he has done nothing wrong. Far from it: he has saved dozens from death and injury. Never mind what he thought he was doing. Sure, he might be guilty of *attempted* theft. He might be culpable because he *tried* to steal. But, having saved dozens of lives, he did nothing wrong all things considered.[23] If the law punishes completed crimes more than attempted ones, the disagreement between subjectivists and objectivists matters, at least for folks like Paul.

Third. Does the extent to which an act is wrongful depend on its consequences? Does actual harm matter? This notorious question is an interminable source of disagreement among moral modelers. Be that as it may, the criminal law everywhere says that harm matters: try to cause harm, get punished; cause harm, get punished more. Many theorists nonetheless insist that the law gets it wrong because it gets morality wrong: resulting harm matters not. The usual line of thought it that the punishment I deserve when I try to shoot and kill Bill does not and should not depend on the happenstance of a meteor falling in the bullet's path, on Bill's having a fatal stroke before the bullet strikes, or on any other

[18] See Husak (2010a, pp. 36–42), Husak (2011a).

[19] See Duff (2007, pp. 99–121).

[20] See Husak (2010a, p. 49).

[21] For an account of the case on which this example is based, see Robinson (1999, pp. 123–128) (describing the facts surrounding the case of Motti Ashkenazi).

[22] See, e.g., Greenawalt (1984).

[23] See, e.g., Robinson (1996).

fortuity over which I had no control.[24] But the law has its defenders: the common man's intuitions reflected in the law reflect the moral truth. As long as you foresee killing Bill you have all the control you need to have over his death to be fairly held responsible for it. If you insist on more, get over it.[25] Morality does not require responsibility to be immunized against all luck.

We could identify still more disagreements among moral modelers, but enough has been said to make the point. In order to answer Ellen's question moral modelers must read morality's mind. They must tell us if morality tells us that money laundering is wrong or not. Morality alone has the power to make this or that a wrong. Nothing else. Especially not the state. The state is morality's minion: it must punish no one unless and until morality gives it the green light to do so.

The problem is that morality does not easily give up its secrets. Reasonable mortal minds must do their best to discover the mind of morality, but reasonable mortal minds disagree. Not that no moral mind exists to be discovered. We can (and probably should) assume morality does provide answers. But moral modelers disagree over what those answers are, and no end to the disagreements is in sight. What is the state to do in the meantime? What is the state to do while the moral modelers wait for Godot?

The moral model has another problem. It says that only wrongs should be crimes, but some non-wrongs are crimes too. We commonly call them malum prohibitum offenses. Indeed, I've assumed that money laundering is among them. But what if it turns out that the number of crimes falling into the malum prohibitum category is really big, as many believe it to be.[26] In other words, what if the bulk of the criminal law is made up of crimes the moral model says should not be crimes at all? In what sense would a moral model of the criminal law then be a model *of the criminal law*? Maybe the moral model is a model of *morality's* criminal law. Or maybe the moral model is a model for the *reform* of the criminal law. Maybe it claims to be nothing more.[27] But what if it does? What if it claims to be a model of the criminal law *as we know it*? How can it credibly make that claim if it fails to account for so much of what it claims to be an account?

Moral modelers might give a two-part answer.[28] The first part is a clarification: some crimes often put in the malum prohibitum category are really moral wrongs. You just need to look close enough to see why. Maybe a crime that constitutes no wrong on its face really is a wrong insofar as its commission often (but not always) is a wrong.[29] For example, speeding often (but not always) is wrong because it amounts to reckless driving. Or maybe a crime that

[24] See, e.g., Alexander et al. (2009, pp. 171–196).

[25] See, e.g., Moore (2009a, pp. 20–33). Nor should we forget the even those who agree among themselves that causation matters disagree about the nature of causation itself.

[26] See, e.g., Husak (2008, p. 103) (Malum prohibitum offenses constitute a "huge class of criminal prohibitions.").

[27] Compare Moore (1997, pp. 9–10) ("[T]he most interesting theory of criminal law … is descriptive of what is known as criminal law's 'general part' and normative about what is known as criminal law's 'special part.'"), with Dimock (2011, p. 1) ("Any theory [of criminalization] that must dismiss as an aberration what is in fact the vast bulk of modern criminal codes is descriptively inadequate.").

[28] Or maybe a three-part answer. In addition to the two parts described in the text, a moral modeler might also say that malum prohibitum offenses or crimes are not real or true crimes. That honor is reserved for malum in se. Because malum prohibitum offenses are not real crimes, those who culpably commit them should suffer some hardship for what they have done in order to secure whatever good the prohibition seeks to achieve, but they should receive no censure or condemnation. Insofar as malum prohibitum offenses are treated as crimes without punishments, they are really nothing more than crimes manqué or wannabe crimes.

[29] See, e.g., Duff (2007, pp. 166–172) (discussing so-called "hybrid" offenses); Husak (2008, pp. 106–112) (same).

constitutes no wrong on its face really is a wrong insofar as its commission amounts to free riding on the cooperation of others.[30] For example, driving on the wrong side of the road is wrong because the law has decided that this or that side is the right side, thereby solving a coordination problem and making us all better off. Other possibilities may exist. The first part of the answer thus shrinks the category of malum prohibitum and thereby improves the fit between the moral model we embrace and the law we know. Still, the state cannot transform a non-wrong into a wrong *just* because it decides to make a non-wrong a crime.

The second part of the answer is a reminder: the moral model is not supposed to account for *everything* that passes for a crime. Some malum prohibitum offenses can fairly be understood as wrongs, but not all of them can be. Some malum prohibitum offenses are and always will be non-wrongs. Nothing can be done to portray them otherwise. But who cares? They should never have been included in the penal code in the first place, and we should be happy to see them go. According to at least one prominent proponent of the moral model, money laundering is one such non-wrongful crime that should never have been. We should be delighted to bid it adieu.[31]

Criminality

The moral model's theory of crime (or criminalization) is simple: α should be a crime only if α is a moral wrong (either before or after the state declares it a crime) and φ. What makes one moral modeler's theory of crime different from that of the next is φ. Explaining in what φ consists is (of course) where the complications and disagreements arise. Let me describe just three takes on φ. The first is old and venerable. The next two are new and noteworthy.

Begin with John Stuart Mill. Mill's classic theory of crime is traditionally associated with the moral limits of the criminal law in a liberal state. According to Mill, the only legitimate reason for making this or that a crime is to prevent harm to others.[32] Thus does Mill give us the so-called harm principle.[33] So understood, Mill's theory might well include too much: it might include non-wrongful acts that cause or risk harm but that neither are nor should be crimes. A good example is fair economic competition. Competing with you economically may harm you economically, but you nonetheless suffer no wrong

[30] See, e.g., Duff (2007, pp. 172–174) (discussing so-called "coordination" offenses); Husak (2008, pp. 112–113) (same). Husak suggests that both conditions must be met. See Husak (2008, p. 114) ("[P]unishments may be justified when the solution to a coordination problem specifies the content of a *malum in se*, … [but] few hybrids are coordination offenses.").

[31] See Husak (2011c, p. 105) ("[M]oney laundering… [is] my favorite example of a *malum prohibitum* offense.").

[32] Mill (1859/1956, p. 13).

[33] This description of the harm principle should suffice for present purposes. A much more careful and nuanced treatment of the harm principle can be found in Tadros (2011). Joel Feinberg provides the classic contemporary defense of a Mill-inspired position in Feinberg (1984). Feinberg goes beyond Mill when he argues that preventing serious offense, as well as harm, can provide a legitimate reason to criminalize conduct. See Feinberg (1985). How far the state should be permitted to go in punishing offensive conduct (if at all) is, as you might have guessed, a matter of disagreement. See generally von Hirsch and Simester (2006).

The debate over the moral limits of the criminal law has traditionally been in terms the principle or set of principles—harm, offense, paternalism, legal moralism—to which the state should adhere. But perhaps we should eschew altogether the search for any such "master principle" or "set of definitive criteria?" Duff (2007, p. 147). I would also note that any theory of crime that depends on the idea of harm must provide an account of that in which harm consists, and any such account is bound to be yet another source of disagreement. The idea of harm has of course been criticized as empty and thus capable of providing no limit on the state's power to make this or that a crime. See, e.g., Harcourt (1999).

in the bargain. The fix for this problem is easy: this or that should be a crime only if it constitutes a moral wrong that causes or risks harm to others. Fair competition may cause harm, but it constitutes no wrong. Likewise, consent to harm can sometimes drain the wrongfulness from its intentional infliction.

Mill's theory thus revised maps nicely onto the moral model's template: α should be a crime only if α is a moral wrong and only if that moral wrong causes or risks harm to others (φ = causing or risking harm to others). But that fix leaves the opposite problem intact. The revised theory might include too little insofar as it excludes some wrongs that neither cause nor risk harm but that one might reasonably believe should be crimes all the same.[34] What about desecrating a corpse? Shouldn't that be a crime? If so, and if desecrating a corpse is a wrong that neither causes nor risks harm to others, then Mill's theory is at a loss to explain why. Or what about incest?[35] Or polygamy?[36] Perhaps Mill's theory can be refined and revised still further such that any such troubling cases go away. Or perhaps such troubling cases are too far and few between to worry about. Perhaps.

Fast forward to Michael Moore. Moore insists that no one deserves to be punished unless and until he has done something wrong, but he also insists that anyone who has done something wrong deserves to be punished, just because he has done something wrong.[37] For Moore, the state is like Nemesis, Greek goddess of vengeance. Just as Nemesis gives all those who deserve it the punishment they deserve, so too should the state (subject to the principle of legality).[38] All else being equal, the state should go about imposing just retribution on everyone who commits a moral wrong, from the most heinous to the most trivial. Justice demands no less. Moore's theory of crime thus amounts to legal moralism: the proposition that the state should punish anyone and everyone who commits a moral wrong, no matter how small.[39] But legal moralism has long been thought to be no friend of liberalism. Indeed, legal moralism has long been thought to be liberalism's nemesis.

But wait. One needs to look closer. Moore's moralism is not Lord Devlin's. Far from it. For starters Moore has no patience for a state that polices the bedroom in search of vice. As Moore understands it, morality has nothing at all to say about what consenting adults do behind closed doors. The bedroom is, so far as consenting adults are concerned, a moral free-zone. Morality claims a far more limited jurisdiction for Moore than it did for Devlin. Quoting Moore: "[I]n general we have no duties to ourselves [which rules out crimes based on paternalism] or to some god, nor do we have duties to others with respect to many of the items about which customary morality so fusses and fumes, such as sex."[40]

[34] We can also identify some wrongful harms that the law should but generally does not criminalize. Think of so-called sextortion: the use of a threat to obtain intercourse where such a threat would constitute extortion if used to obtain property. Or maybe sexual harassment.

[35] See Bergelson (2012) (suggesting not). For more candidates for such "free-floating evils," see Feinberg (1988, pp. 20–25).

[36] See Husak (2011b) (suggesting not).

[37] Moore (1997, p. 661) ("[T]he achievement of retributive justice gives a legislature good reason to criminalize all immoral behavior, for this is the only way the good of retributive justice can be achieved."); Moore (2009b, p. 31) ("[P]rima facie, *all* moral wrongs culpably done should be criminalized.").

[38] See Moore (1997, p. 186).

[39] The thesis that the state should punish moral wrongs has been described as the "new legal moralism." See Petersen (2010); see also Zaibert (2011).

[40] Moore (2009b, p. 32). Antony Duff has made to me the point that Devlin is properly understood as an adherent of the harm principle, not a legal moralist, inasmuch as he believed that the state had good reason to criminalize conduct that the man on the Clapham omnibus believed was wrong in order to prevent a future harm; namely, social disintegration. Point taken.

Having thus identified morality's proper and properly limited domain, Moore argues that, where the wrong in question (like breach of contract) is minor, the good that comes from not punishing outweighs the good that comes from punishing. The goods that come from not punishing support what Moore calls the presumption of liberty.[41] Punishing a moral wrong always brings the good of doing retributive justice, no matter how small the wrong at hand. But leaving people free to make their own choices also brings about goods even when what they choose is wrong. Getting people to make the right choices on pain of punishment squanders the goods that come from letting them choose freely, and sometimes the goods achieved through free choice will outweigh the good of retributive justice achieved through the punishment of wrong choices.

On top of the presumption of liberty we sometimes have a right to do wrong, or more precisely, a right not to be punished for doing wrong, even where the wrong in question is serious (like suicide). Moore calls this right the basic right to liberty. Not to be confused with Mill's right to do whatever you want so long as you neither cause nor risk harm to others, Moore's basic right to liberty protects "self-defining choices."[42] American constitutional lawyers might recognize it as the right protected under the heading "substantive due process," which protects the freedom to choose, for example, whether and who to marry, whether and when to become a parent, whether and when to allow this or that medical intervention. When all is said and done Moore gives us a criminal law whose mind is with Devlin but whose heart is with Mill. The presumption of liberty and the right to basic liberty give us the φ in Moore's theory of crime.

Go finally to Douglas Husak.[43] His theory of crime involves more principles than does Moore's moralism, but it comes out in much the same place: our criminal law contains far too many crimes. Husak describes and defends six principles that together limit the criminal law's ambit and thus constitute the φ in Husak's theory.[44] The first three principles, which are "internal" to the criminal law, can be summarized in the following proposition: Conduct should not be criminalized unless it constitutes a public wrong the prohibition of which is designed to forestall a nontrivial harm or evil, and punishment for committing any such wrong is justified only when and to the extent that such punishment is deserved.[45]

He adds to these internal principles three more that are "external" to the criminal law. They can be summarized thus: Any criminal prohibition should advance a substantial state interest, must directly advance the objective toward which it aims, and must cover no more conduct than is necessary to achieve its objective.[46] These principles, like Moore's basic right to liberty, might sound familiar to American constitutional lawyers: they describe

[41] A full accounting of those goods can be found in Moore (2011, pp. 6-9).

[42] Moore (1997, p. 773), Moore (2011, pp. 30–36). Moore also says that a lawmaker who pursues a legal moralist agenda should make sure that he criminalizes this or that wrong because it is wrong (and not for some other reason) and that he should be appropriately humble: if he has any doubt that this or that is a moral wrong, he should leave well enough alone and refrain from bringing the criminal law to bear. See Moore (2009b, p. 32).

[43] Husak's theory is set forth in detail in Husak (2008).

[44] The burden of proof as to whether these six principles permit this or that to be criminalized rests with the proponent of criminalization.

[45] See Husak (2008, pp. 55–119). Husak relies on Duff and Marshall in his effort to draw the line between public wrongs and private ones. See Marshall and Duff (1998). Moore argues that the public–private distinction is really nothing more than a distinction between serious (public) and minor (private) wrongs: a distinction in degree, not in kind. See Moore (2011, pp. 22–23).

[46] See Husak (2008, pp. 120–177).

what has come to be known as "intermediate scrutiny." When state action is subject to this form of review, the burden on the state to come forward with a justification for its action is tough, but not impossible, to meet. Impossible burdens travel under the title of "strict scrutiny." Husak's internal and external principles combine to give us the smallest criminal law we can reasonably imagine. What better name for such a theory of crime than minimalism?

So who has it right? In what does φ consist? Should the state follow Mill? Moore? Husak? Devlin? Someone else altogether? When it comes to theories telling us where to find the moral limits of the criminal law, we have an embarrassment of riches.[47]

I doubt not that one of them may indeed have it right. Still, the jury remains out. How do we answer Ellen's question in the meantime? Is money laundering in or out? I've assumed that it should be out because I've assumed that no one who launders money does anything wrong. But what if money laundering is a wrong? Should it be a crime? Does it meet the requirements of φ?

Let me now identify a problem with which all moral models must contend. Whatever content a moral model gives to φ in its theory of crime, the model will invariably struggle to explain why crimes are widely and traditionally portrayed in some sense as *public* wrongs. Think about it this way: why are criminal cases (in the United States) captioned *State v. Doe*, or *People v. Doe*, or *United States v. Doe*? Why is the state or the people the one calling the other party to account? The moral model usually gives one of two answers. Some moral modelers say that the state (or the people) is the one demanding an accounting because the state stands in for the real victim (assuming one can be found). Call this the *next-friend* theory. Others say the state (or the people) is one the one demanding an accounting because the state is properly *identified* with the real victim. Call this the *identification* theory.

The next—friend theory says that the real victim of a crime *is the victim (if any) of the crime*. Full stop. Set aside so-called victimless crimes. They probably shouldn't be crimes anyway. Focus on malum in se offenses: murder, rape, robbery and the like. The real victim here is hardly the state, but the state brings the wrongdoer to task as the real victim's next fried. The real victim remains the real party in interest. But why? Why need the state stand in for the victim? The simple answer is to protect the real victim from his baser self. Doing retributive justice is like garbage collection: necessary but dirty work. It conjures up all the darker emotions that travel under the French word *ressentiment*: resentment, projected guilt, sadism, and so on. In order to save us from such vice, the state does the dirty work for us. Moreover, insofar as the state is less likely than the real victim to act in the heat of passion, the state is more likely to get the punishment right. The real victim is apt to go overboard.[48]

The identification theory says that the state (or the people) is the party who calls the offender to account in a criminal case, not because it stands in for the real victim, but because it too can be seen as a victim of the wrongdoer's depredations. Why? Because the state (or the people or the community) can identify with the real victim, and inasmuch as the wrong the victim suffered should be the concern, not only of the victim, but of the state as well, the state should identify with the victim. According to the foremost proponent of the identification theory, criminal wrongs are *public* wrongs insofar as they are "wrongs that properly concern the public."[49] Or: "A public wrong is … a wrong against the polity

[47] Besides Feinberg's four-volumes on the moral limits of the criminal law, here is a sampling of some others: Baker (2011), Braithwaite and Petitt (1990), Schonsheck (1994), Simester and von Hirsch (2011).

[48] See Moore (1997, p. 152).

[49] Duff (2007, p. 141).

as a whole, not just against the individual victim: given our identification with the victim as a fellow citizen, and our shared commitment to the values the [criminal] violates we must see the victim's wrong as also being our wrong."[50] Insofar as the victim's wrong is also our wrong it makes sense for us—the State or the People or the United States—to be prosecuting and punishing the wrongdoer.

The next-friend and identification theories are plausible, but they have about them the smell of the lamp. What one wants or hopes for is an account that takes things at face value: one that explains, not why the state should shove the real victim aside (as in the next-friend theory) or why the state can be seen as a victim (as in the identification theory), but one that explains why the real victim of a crime really is the state. Isn't a cigar sometimes just a cigar?

Culpability

Theories of wrongfulness and criminality speak to a wide audience. They generate rules designed to guide the conduct of everyone within the criminal law's jurisdiction. These conduct rules tell us what we must do or not do unless we are prepared to suffer punitive consequences. Theories of culpability speak to a smaller audience. They speak to those responsible for determining the responsibility of those who commit criminal wrongs for the criminal wrongs they commit. Theories of culpability give us decision rules designed to guide the decisions of those responsible for ascribing responsibility qua culpability.[51]

The flip side of a theory of culpability is a theory of excuse.[52] A theory of culpability describes the conditions under which responsibility for a criminal wrong should be ascribed to an actor. Identify the conditions that partially or completely undermine those conditions and you have a theory of excuse. An excuse defeats the ascription of responsibility. The various excuses the criminal law recognizes can therefore be understood as obligations imposed on those responsible for determining the responsibility of criminal wrongdoers to render a verdict of not guilty if and when the elements of an excuse exist. The state generally and fairly presumes that criminal wrongdoers are responsible for what they do, but that presumption can be defeated. That which defeats the presumption we call an excuse.

An actor to whom a criminal wrong has been ascribed is not yet liable to punishment. Culpability must also be ascribed. The ascription of culpability means that the actor has waived something important: the right not to be punished. Think of this right as a shield against state punishment. Imagine now that a judge (or jury) has a button he can press causing the shield to drop. If the defendant fails to come forward with an excuse, the judge (or jury) ought to press the button (in which case the shield will drop and the defendant will be liable to punishment) and convict. We might say of such a defendant—one found guilty of having culpably committed a criminal wrong—that he deserves to be punished.[53] But if

[50] Duff (2007, pp. 141–142).

[51] On the distinction between conduct rules and decision rules, see Dan-Cohen (2002a), Robinson (1997).

[52] See, e.g., Moore (1997, p. 548) ("[T]he excuses are the royal road to theories of responsibility generally."). Some writers distinguish between excuses and exemptions. See, e.g., Duff (2007, pp. 284–291). Exemptions are status excuses, like infancy and (according to some) insanity. I ignore that distinction for now.

[53] The fact that a defendant deserves to be punished is not yet enough to justify the state's decision to punish him. The state still needs to come forward with good reasons to give him what he deserves. A theory of punishment identifies the reasons that count as good.

the defendant comes forward with an excuse, the judge (or jury) ought not to press the button (in which case the shield remains in place and the defendant retains his immunity to punishment) and acquit.[54]

Criminal-law theorists disagree (of course) over which of two theories best accounts for the law of excuse and culpability: choice or character.[55] Should the criminal law condemn the sin or the sinner? Choice theorists say that an actor is culpable if and because he chooses in some suitable sense to commit a criminal wrong: he is excused if he does not so choose.[56] Choice theorists say that the criminal law should and in the main does reflect their theory. Character theorists say that an actor is culpable if the criminal wrong he commits reflects in some suitable sense his character: he is excused if it does not so reflect.[57] Character theorists say that the criminal law should and in the main does reflect their theory. Choice theory appears for now to have the upper hand, but the character theory is a phoenix: always rising from the ashes.[58]

Both theories claim to account for much of the criminal law as we know it, but the character theory claims at least one advantage over its rival.[59] It claims to explain why negligence inculpates whereas the choice theory can offer no such explanation. An actor's failure to notice a risk or fact he should have noticed is unreasonable, according to character theorists, insofar as he fails to notice it because he cares less about others than he should. He is unreasonable insofar as he is indifferent (either dispositionally or occurrently) to the well-being of others. He is negligent insofar as indifference leaves him blissfully ignorant of a risk of which he should have been aware.[60] Perhaps. But even if a character theory can better accommodate criminal negligence choice theorists are free to dismiss negligence liability altogether, and some do. The criminal law should not, they say, punish someone for risking this or that harm unless he is aware of the risk he is taking. Negligence liability is an embarrassment: the criminal law's crazy uncle in the attic.[61] Perhaps.

Add to the disagreements between these two theories the disagreements within each of them. Take the choice theory. All choice theorists agree that an actor is not culpable unless he freely chooses to commit a crime. Set aside for now any disagreement over the circumstances under which an actor's choice to commit a crime will render his choice unfree and the actor therefore non-culpable. Focus on what an actor must know about what he is doing in order to be culpable. Ignorance can and does excuse. But when? How far must an

[54] The idea here bears some resemblance (maybe a great deal) to those accounts (usually described as theories of punishment) according to which the actor's choice to commit a crime results somehow (usually through forfeiture or consent) in the loss of his right not to be punished such that punishment constitutes no infringement of that right. See Goldman (1982), Morris (1991), Nino (1983), Wellman (2009), Scanlon (2003). See also Berman (2008, p. 274) (developing what he calls a "right articulation" theory intended to "show that core cases of punishment need not infringe rights—but without the forfeiture mechanism").

[55] Sorting the disputants into two camps and two camps alone obviously oversimplifies the debate and thus the extent of the disagreement: some participants find truth in both theories.

[56] See, e.g., Moore (1997, pp. 549–562).

[57] See, e.g., Brandt (1992, pp. 235–263), Tadros (2005, pp. 44–70).

[58] See, e.g., Lacey (2011, p. 153) ("[C]riminal conviction … is coming more frequently to imply a judgment of criminal character.").

[59] Choice theorists naturally dispute the claim. See Moore (1997, p. 590).

[60] See, e.g., Duff (1990, p. 157), Simons (1994, p. 388), Simons (2002, p. 264).

[61] See, e.g., Alexander et al. (2009, pp. 69–85). For a recent entry in the ongoing disagreement over negligence liability that concludes with a pox on all houses that claim to have discovered the one and only moral basis for such liability, see Moore and Hurd (2011, p. 192).

actor's knowledge about what he is doing extend in order to render him culpable? Choice theorists disagree.

Some believe that an actor is culpable for the crime he is charged with having committed if he is aware of *some* of the facts constituting the charged crime, provided those facts amount to *some* crime. For example, if Joe kills John with the intent to kill a human being, he need not realize that John is a police officer in order to be responsible for the crime of killing a police officer.[62] It suffices that he realized he was killing a human being and that killing a human being is a crime. Others believe that an actor is culpable only if he is aware of *all* the facts constituting the charged crime. For them, Joe would not be guilty of killing a police officer unless he realized, not only that John was a human being, but that John was a police officer.[63] Others go further still, insisting that an actor is not culpable unless he realizes, not only what he is doing, but that what he is doing is a crime. For them, ignorance of the law *is* an excuse, despite the law's insistence to the contrary.[64] Thus Joe would not be guilty of murdering a police officer unless he realized, not only that he was killing a police officer, but also (as is of course likely) that killing a police officer is a crime.

Disagreement also arises over the doctrinal particulars of particular excuses. Take duress. Does morality require that duress be available for murder or not?[65] Take provocation. Does morality excuse when an actor's capacity to conform his conduct to the requirements of law is impaired in the face of reasonable provocation? If so, is the excuse full or partial? Should it apply to all crimes, or only murder? Or should it be abolished altogether?[66] Or take insanity. Does morality excuse an actor when a mental disease (whatever that means) renders him unable to tell right from wrong (and does that mean legal wrong or moral wrong) or to stop himself from committing a crime, or does it excuse (or exempt) when his mind is so irrational as to be beyond the pale?[67] Some combination thereof? Or maybe insanity should be abolished altogether too?[68] You get the idea. Reasonable minds disagree about the mind of morality.

[62] See, e.g., Gardner (1998, p. 244), Horder (1995, p. 764). For criticisms of this general position, see Ashworth (2008a). For a "modest defense of modest forms of strict liability in grading," see Simons (2012, p. 22).

[63] The Model Penal Code takes something like this position. The Code provides that an actor must be at least reckless with respect to every material element of an offense unless a "legislative purpose to impose absolute [strict] liability … plainly appears." Mode Penal Code § 2.05(1)(b). In other words an actor is not liable unless he at least suspects each material element of the offense with which he is charged exists unless the legislature clearly intended to impose strict liability.

[64] For arguments to the effect that the law should excuse ignorance of itself more often than it does, see, for example, Husak (2010b), Cass (1976, p. 695) (concluding that the "doctrine [of *ignorantia legis]* is both inefficacious and unjust"); Garvey (2009, pp. 362–364). Peter Westen has recently argued that certain doctrines associated with the principle of legality do *in fact* excuse mistakes of law if and when "conscientious members of the political community that enacted the statute, knowing everything (if anything) that the actor knew about the law, would likely deny that such conduct so infringes upon the interests of others as officially to warrant punishment." Westen (2007, p. 263). He also argues that the widely assumed discrepancy between the exculpatory scope of mistakes of fact and mistakes of law is "largely illusory." Id.

[65] See, e.g., Dressler (2011).

[66] See, e.g., Berman and Farrell (2011), Dressler (2009).

[67] See, e.g., Sinnot-Armstrong and Levy (2011), Morse (2009).

[68] See, e.g., Slobogin (2009). Disagreement also exists over whether some defenses commonly called excuses really deserve to be so called. Is provocation a partial excuse, partial justification, or something else? What should it be? Much the same goes for duress. Is it an excuse, justification, or something else? Maybe it makes no difference? Indeed, are the traditional categories of justification and excuse (and maybe exemption) the only ones the criminal law (or at least criminal-law theorists) should be using? See, e.g., Husak (2011d).

Punishment

Once upon a time, criminal-law theorists agreed to disagree on what it took to justify state punishment. Retributivists lined up on one side and pointed to the need for the state to see that retributive justice got done, whether or not any good came from doing it. Punishment was (at least) permissible if and because the actor deserved it. Period. Consequentialists lined up on the other side and pointed to the need for some good to come from punishment. If no such good could be found, then punishment was at best pointless suffering and at worst an outlet for some rather unseemly emotions. Some moral modelers defended retribution or consequentialism unalloyed. Others found the answer in a mix of the two.[69]

Nowadays the disagreement is different. Many on both sides now seem to agree that a state should not exercise its privilege to punish unless doing so would do some good.[70] Give that point to the consequentialists. But there the agreement ends and the two sides again take up arms. Consequentialists believe that punishment is never a good in itself: it is always, if anything, a means to some other good. Once that good is identified, punishment's power to achieve it will depend on the facts. The punishment game is worth the candle if the goods it achieves outweigh its costs. Maybe something other than punishment can achieve the same good at less cost. On the other side, retributivists believe that the good punishment achieves is the good of retributive justice: giving culpable wrongdoers the suffering they deserve. Punishment is good in and of itself. Moreover, punishment alone can bring about that good. Nothing else can do the trick.

Moral modelers continue to disagree over the right mix of goods the state should pursue through punishment. Some say that retributive justice is the only good the state should pursue when it punishes. Others say the state can and should pursue both retributive justice and (for example) deterrence. If so, how do those goods fit together? Suppose you figure out how much punishment a wrongdoer deserves.[71] Can the state impose *more* punishment than the actor deserves in order to send a message loud and clear to would-be wrongdoers? Or does the punishment a criminal wrongdoer deserves set an impenetrable ceiling on the state's power to pursue deterrence? Moral modelers disagree. Can the state impose *less* punishment than the actor deserves if it believes the wrongdoer will never do it again? Or does the actor's deserved punishment set an impenetrable floor on the state's power to extend lenience? Should the state sometimes show mercy, or is mercy a vice when the one handing it out is the state?[72] Moral modelers disagree. Or maybe the actor's deserved punishment establishes both a floor and a ceiling?[73]

[69] For a recent review of the debate, see Dolinko (2011).

[70] See Berman (2011, p. 434) ("[R]etributivism has increasingly morphed into an account that rests upon a justificatory structure that is plainly consequentialist."); see also Moore (2011, p. 9) ("[A] theory of punishment is a theory of what good(s) are served by criminal law generally.").

[71] A very big supposition and yet another source of disagreement. Indeed, if retribitivism has any Achilles heel it lies here. As Heidi Hurd puts it: Retributivism's "greatest [puzzle] is the question of whether it can defend, in any principled way, claims about the proportionality of particular punishments to the particular harms culpably caused by particular offenders." Hurd (2005a, p. 415). Can some such principled defense be offered? Compare Roebuck and Wood (2011) (no), with Robinson (2008) (yes). Here is yet another question: When trying to figure out if this or that punishment is proportional to this or that crime, should we care about how a particular offender experiences a particular punishment? Compare Kolber (2009) (yes), with Gray (2010) (no).

[72] See, e.g., Duff (2011b), Tasioulas (2011).

[73] See, e.g., Frase (2004).

The point should now be painfully obvious. We should expect no agreement any time soon on what good or mix of goods gives the state sufficient reason to exercise its privilege to punish culpable criminal wrongdoers. Nor should we forget that some moral modelers insist that no good or mix of goods can pull that rabbit out of the hat. Their advice to the state? Abolish punishment altogether.[74]

The Political Model

The moral model rests on the premise that the only authority we have (and thus the only source of our moral obligations) is morality itself. When it comes to the criminal law, the state must therefore do what morality tells it to do. Morality tells the state what constitutes a wrong. Morality tells the state which among those wrongs should be a crime. Morality tells the state what renders criminal wrongdoing culpable. Morality tells the state what warrants the exercise of its privilege to punish. The task moral modelers set for themselves is to identify what morality requires and then hope the state listens to what they (and morality) say. The moral model is inevitably equivocal because modelers inevitably disagree about what morality requires.

No one reasonably believes that morality would not criminalize murder, rape, robbery and so forth. Yet once we move beyond the malum in se core of the criminal law, disagreement sets in. Does morality declare anything else a crime? If so, what? Indeed, disagreement can even arise *within* the category of malum in se. Is it murder or some lesser offense if *A* acts knowing that what he does will cause *B*'s death but does so with no intent or purpose to cause *B*'s death? Is it rape or some lesser offense if *C* has sexual intercourse with *D* without *C*'s consent but *D* does not realize *C* is not consenting even though he should? If the state punishes *A* as a murderer or *C* as a rapist, has it punished them more than it should? Has *it* wronged *them*?

Again, the moral model is premised on the proposition that moral obligation come from morality and morality alone. Morality is our only authority. The political model rests on a different premise. Contrary to the moral model, the political model assumes that morality is *not* the only authority we can have. Morality is not the only source of moral obligation. The state can possess authority too. It can in the exercise of that authority ratify and endorse the moral obligations morality already imposes (or not). It can also create and impose moral obligations where morality itself imposes none. In other words, the moral model assumes the truth of philosophical anarchism. The political model argues that philosophical anarchism is false.[75]

Remember that a complete account of the criminal law will tell us what makes this or that a wrong (thereby rending an actor who does this or that prima facie liable to censure); what makes a wrong criminal (thereby rendering an actor who commits a crime prima facie liable to punishment, i.e., censure in the form of hard treatment); what makes an actor culpable when he does this or that criminal wrong (thereby rendering the actor liable all things considered to punishment); and what makes it warranted for a state to exercise its permission to punish an actor who culpably commits a criminal wrong.

[74] See Boonin (2008), Golash (2005). See also Garvey (2011).

[75] Philosophical anarchists believe that no state can or does possess authority in the sense of having the power to impose on its subjects a general obligation to do as the state says. Most citizens of liberal democracies nonetheless believe that they do indeed labor under such an obligation. See, e.g., Klosko (2005, pp. 183–222), Tyler (2006, pp. 45–46 tbls.4.3 & 4.4).

For now I want to focus on the first two pieces. What does the political model say about what makes this or that a criminal wrong such that its culpable commission renders an actor liable to state punishment? The short answer is: not much. If a state possesses authority, it follows that what makes this or that a criminal wrong, and what makes its commission culpable, depends more or less on what the state says. A justified and legitimate authority possesses the power to obligate those subject to its jurisdiction to do as it tells them to do so long as it acts within its jurisdiction. It also possesses the power to christen as crimes which of those wrongs it sees fit to so christen and to identify as it sees fit that which renders an actor culpable for the commission of such a criminal wrong.[76]

If we begin from the premise that the state can possess authority, we broaden the agenda for criminal-law theory. For moral modelers criminal-law theory's job is to figure out what morality requires in the hope that the state will have the good sense to go along. For political modelers criminal-law theory has another job too: figuring out what to do when some reasonably believe that morality requires this, and others reasonably believe that morality requires that. The question is not only: What does morality require? The question is also: What should we do when we reasonably disagree about what morality requires? The answer to that question depends in turn on the answer to three others: Can a state possess authority? If so, what does it take for a state to possess authority? If a state does possess authority, what are the limits of its authority, if any? In short, the political model situates criminal-law theory within political philosophy, whereas the moral model situates it within moral philosophy.[77]

Authority

Because the political model rests on the proposition that a state can possess authority, and that some states do possess authority, we need an account of what it means to say that a state possesses authority. Most everyone agrees that having authority means having in some sense a "right to rule." Beyond that point, we come to a fork in the road. When we say that a state possesses authority we can mean one of two different things.

First, when we say that a state possesses authority we might mean, as I have assumed thus far, that it possesses a normative power or capacity: it possesses the power or capacity to change the normative situation or position of those subject to it.[78] The state's subjects

[76] A wrong does not become a crime just because the state calls it a crime. Talk is cheap. It becomes a crime when the state can respond to its culpable breach with punishment. Likewise, a wrong does not fail to be a crime just because the state fails to call it a crime. If the state can respond to a wrong with punishment then a crime it is no matter what the state says or fails to say.

[77] The first sentence in the preface to George Fletcher's *Rethinking Criminal Law* says: "Criminal law is a species of political and moral philosophy." Fletcher (1978, p. xix). It seems fair to say that at least as of late moral philosophy has dominated the field. A notable exception is Brudner (2009).

[78] We can be more precise about the ways in which the state can change the normative status of its subjects with respect to the criminal law. The state has the power to impose moral obligations on subjects the culpable breach of which will render the actor liable to censure; to impose obligations the culpable breach of which will render the actor liable to censure in the form of hard treatment; to grant moral permission to officials (prosecutors) to call those believed to be guilty of criminal wrongdoing to account; to impose moral obligations on officials (judges and juries) to acquit those called to account whose breach was non-culpable (excused) or all-things-considered non-wrongful (justified); to impose moral obligations on officials to censure those whose breach was culpable and to order for good reasons the imposition on them of hard treatment; and to impose moral obligations on officials to impose hard treatment on those who have been ordered to suffer such treatment. It may be that all the power to cause all these changes can be reduced to the power to impose moral obligations. See Marmor (2011a, p. 132 n. 19) (citing Raz (2009, pp. 134–135 n. 13)).

are correlatively liable to some such change in their position or situation. Because states speak through laws, the authority of the state and the obligation of its subjects to obey the law go hand in hand: a subject is obligated to obey the law if a state has exercised its power to impose on him such an obligation, which it does if enacts a law imposing on him such an obligation. That which makes a state an authority with the power to impose on its subjects an obligation to do as it says is one side of the coin. That which grounds a subject's obligation to do as the state says is the other.

Second, when we say a state possesses authority we might mean only that the state is (merely) permitted to use coercion to enforce obedience to its laws.[79] On this account subjects obey, if they do, because they fear the consequences of disobedience. They have no moral obligation to obey and so do no wrong in disobeying. But neither does the state do wrong to them when it forces them into obedience. On this account of authority, the question is not what gives the state the power to impose obligations. The question is what gives the state permission to impose hard treatment for disobedience and thereby coerce obedience. The fact that a state has authority thus tells us nothing about the obligation of its subjects to obey. Authority and obligation are two sides of different coins.

The first account better reflects what we ordinarily have in mind when we speak of authority, and that account is the one on which I will for now hang my hat.[80] A state that possesses authority possesses the power or capacity to impose obligations on its subjects. Sometimes the exercise of this power places the state's seal of approval on an obligation morality already imposes, in which case the fact that the state has spoken renders me answerable (all else being equal) to it or to those in whose name it speaks for any breach of that obligation. I was not so answerable before it spoke. Sometimes the exercise of this power does more. It creates such obligations *ex nihilo*: it makes it wrong for you or me to do this or that where it was not wrong before, where morality was indifferent to the doing of this or that. Exercising authority can thus (within limits) turn a non-wrong into a wrong. Exercising another (maybe more familiar and congenial) moral power—consent—can work in the opposite direction: it can (within limits) turn a wrong into a non-wrong. The power of authority to create wrongs and the power of consent to extinguish them are, if not magic, then at least magical.[81]

I should emphasize that the state's possession of such power gives it no permission to punish its subjects just because they breach the obligations it creates and imposes. Doing what the state prohibits or failing to do what it demands does not without more render an actor liable to state censure through hard treatment. We render ourselves so liable and thereby confer on the state permission to punish us only when we culpably breach a state-approved or -imposed obligation. We become liable to punishment only if we choose in

[79] See, e.g., Edmundson (1998b), Greenawalt (1987), Buchanan (2002), Copp (1999), Edmundson (1998a), Landeson (1980), Sartorius (1981), Wellman (2001).

Some writers would describe a state permitted to use coercion to enforce compliance with its demands as "legitimate," but not necessarily possessed of "authority." They use the term "authority" to describe a state that has the power to change the normative position of its subjects. They use the term "legitimate" to describe a state permitted to exercise coercion to enforce compliance with its directives. See, e.g., Morris (1998), Murphy (1999, p. 77) ("[T]he state's moral legitimacy concerns its right to coerce citizens to comply with its dictates, that is, its laws.").

[80] For reasons why one might regard the first account as better, see, for example, Raz (1986, p. 27) (concluding that the second account is not an "analysis of the concept of authority which is part of our cultural tradition" nor one with "much use in our world"); Dagger (2000, pp. 402–406) (arguing that the second account will not "overcome the objections of the most thorough-going of the philosophical anarchists," such as Robert Paul Wolff).

[81] See Hurd (1996, p. 121) (Consent has "magical power[].").

some suitable sense to *disobey* the state: to *defy* an obligation the state has imposed on us where that obligation is one the state insists we obey on pain of punishment.[82] Only then are we guilty of committing a crime. Only then are we vulnerable to punishment.

Some believe that no state can possess authority understood as the power to change the normative status of its subjects. Call them a priori philosophical anarchists.[83] Others believe that a state can possess authority but that none in fact does. Call them *a posterior* philosophical anarchists.[84] Others believe that a state can possess authority and that some states do possess authority, but only with respect to some of its laws and some of its subjects. State authority is thus at most and at best "piecemeal."[85] I want to suggest in contrast that a state can possess authority with respect to all of its laws and all of its subjects and that some states do possess such authority. State authority can be and sometimes is inherent authority. Before trying to make good on that suggestion, I should distinguish between the authority such a state claims and the authority it possess. The two are not precisely one and the same.[86]

First, the state claims to exercise authority over everyone within its jurisdiction. Second, it claims that the obligations it imposes run to the state itself or to those in whose name or on whose behalf the state claims to act.[87] The culpable breach of a state-imposed duty to do this or that renders me accountable or answerable to the state or to those in whose name the state acts, which explains why the state or the people are the ones who in a criminal case call the accused to account. They (in addition to any individual victim) are the ones who have been wronged. Third, the state claims that the obligation running to it is an obligation to *conform*, not to *comply*. Conforming means simply that I do as I'm told, for whatever reason. Complying means that I do as I'm told *because I'm told to do it*.[88] The state might *hope* that it has earned my respect such that I will comply, such that I will do as it says because it says so. But all it cares about really is that I do as it says.[89] *Why* I do as it says is my business. Finally, the state claims that the obligations it imposes have pre-emptive force. If the state says not to do this or that, it does not countenance or tolerate disobedience.

The authority the state can in fact possess is the same as the authority it claims to possess. Almost. The exception is this: the obligations a state imposes have some "special force" to them, but they are not preemptive. They do not bind come what may.[90]

[82] See Hampton (2007).

[83] See, e.g., Wolff (1970).

[84] See, e.g., Simmons (1979), Smith (1973).

[85] Raz (1986, p. 80).

[86] Some writers reject the thesis that the law claims legitimate authority. See, e.g., Soper (2002, pp. 51–88). For a recent discussion, see van der Vossen (2011).

[87] See, e.g., Hershovitz (2012, p. 72); Marmor (2011b, p. 256) (Authority-imposed obligations are owed to the "members of the practice or institution on whose behalf the authority operates.").

[88] See Hershovitz (2012, p. 70) ("The right that is constitutive of authority is a right to have subjects do as one says, not a right to have them do as one says for the reason that one said so."). Hershovitz claims that the "standard view identifies obedience [to an authority] with compliance," id. at p. 67, but he persuades me that the better view is that obedience is fairly understood to require conformity only. Id. at p. 68.

[89] See id. at pp. 69–70.

[90] Little may in the end turn on the supposed difference. See Kramer (2005, p. 188) ("[B]ecause the supporters of the first approach regard obligations as especially weighty reasons, and because the supporters of the second approach accept that the exclusionary sway of just about any exclusionary reason is restricted in scope, the two perspectives are by no means as clearly divergent as they might first seem to be.").

State-imposed obligations have prima facie or pro tanto force, but they lack the pre-emptive force they claim. They are content-independent inasmuch as their force or weight does not depend entirely on the moral status of the action they proscribe or require.[91] The fact that the state has spoken adds to the weight its directives would otherwise have had on their own, but countervailing reasons can and sometimes do outweigh them such that I am not in the end obligated to conform.[92] When the weight of such reasons defeat my obligation to conform, I do no wrong when I refuse to do as the state tells me to do, or do as it tells me not to do.

Yet even when not obligated to conform I nonetheless remain obligated to accept or submit to the state's authority when it responds to my justified choice to defy that authority. Even when I justifiably defy a state-imposed obligation—even when the reasons against conformity defeat those in favor of it—I remain obligated to submit to its authority all the same. My duty to obey does not vanish: its residue persists and requires me to accept the consequences of my choice. Even if the state cannot rightly demand that I surrender my judgment to its will, it can rightly demand that I surrender my will to its judgment even when in morality's eyes (but not in its own) it judges wrongly.[93] The only exception is when the state acts ultra vires: when it tells me to do this or not to do that when I have a *right* to do this or not to do that. When the state condemns and punishes me for defying an ultra vires exercise of its authority, I am obligated neither to conform to its will nor to submit to its judgment.

Let me try to put some flesh on these bones. Take the red light in the desert.[94] You are sitting at a red light in the middle of the desert. The day is clear. You can see for miles and miles. Not a car in sight. Nonetheless, the state demands that you stop and stay stopped until the light turns green. No exceptions. Because the state recognizes nothing like a defense of lesser evils or necessity you have no claim that the law actually permits you to run the light in order to get wherever you are going insofar as doing so is better on balance than forcing you to sit there for no apparent reason. Assume finally that you are in fact morally permitted to run the light and you do. What then? On the one hand, your defiance of the state's demand to stay put was morally permissible and you are guilty of no wrong in the eyes of morality. On the other hand, you have defied the state's legitimate authority thereby rendering yourself liable to the state's punitive response. Thus when forced to pay

[91] See Edmundson (2010, p. 181) ("[A] content-independent reason for action does not derive entirely from the value of the action itself.").

[92] See Dworkin (2002, p. 1672) ("We do not treat even those laws that we regard as perfectly valid and legitimate as excluding and replacing the background reasons the framers of that law rightly considered in adopting it. We rather regard those laws as creating rights and duties that normally trump other decisions. The reasons remain, and we sometimes need to consult them to decide whether, in particular circumstances, they are so extraordinarily powerful or important that the law's trump should not prevail."); Hurd (2005b, p. 76) ("[T]he rationality of following any given rule resides in one's confidence that one is acting on the balance of reasons—including the good reasons for following the rule—and not at all on the fact that there is a rule."); Moore (1988, p. 858) ("[L]egitimate authorities cannot be construed to give us exclusionary reasons for action… without making us too obeisant to such authorities."); Shapiro (2002, pp. 411–412) (describing alternatives to the pre-emption model).

[93] I take it that what I say here is consistent with Rawls' widely accepted account of civil disobedience. See Rawls (1971, pp. 363–368, 371–377).

[94] This chestnut comes from Smith (1973, p. 971).

the ticket you receive from the state trooper who appears out of nowhere you should do so without believing yourself aggrieved.[95] Follow Socrates and swallow the hemlock.[96]

Justified and Legitimate Authority

So far the talk has been about the authority the state claims and the authority it can possess. But what does it take for a state actually to possess the authority it can? Any account of when and why a would-be authority actually possesses the power it can possess requires answering two questions.[97] First, what *justifies* the existence of the state qua authority in the first place? What good does it do or achieve? What role does it play? What function does it perform? What makes it worth having? An authority might play more than one role and different authorities might play different roles. What role or roles does the state play? This is the *justification* question. Second, assuming the state qua authority is worth having, how and why are those it claims as subjects duty-bound to do as it says? What *legitimates* an authority with respect to the subjects it claims to bind? This is the *legitimation* question.[98]

Answering the legitimation question is harder than answering the justification question. The fact that an authority does or achieves some good or fulfills some role might without more justify the state: it might explain why I *ought* to give it my obedience (or at least not undermine it). But it does not yet explain why I am *obligated* to obey. Something more is needed in order to legitimate the state. Something more is needed to create the existence of a relationship within which the state can come to possess the power authorities have over subjects. Something more is needed to explain why I must surrender my will to its judgment, and why I am accountable or answerable to the state when I defy it.

My tentative answer to these two questions is limited to the criminal law. I want to explain when and why a state's criminal law has authority, not when and why the law as such has authority. What I say about the criminal law may or may not apply to the law's other departments. I don't know. My concern for now is with the criminal law: the law the culpable breach of which renders me vulnerable to the state's censure in the form of hard treatment.

My answers to the justification and legitimation questions will come in two parts corresponding to the conventional division of the criminal law into malum in se and malum prohibitum. Describing exactly what this venerable distinction consists in is controversial.

[95] See Applbaum (2010, pp. 231–232).

[96] Here's another way to think about it. If you believe, and rightly so, that you have no obligation to wait for the green light and so run the red, you engage in what might very loosely be understood as civil disobedience. I say "very loosely" because civil disobedience is standardly understood to require a public act (*i.e.*, an act the doing of which one makes known to the authorities) committed in order to change the law. Your run through the red light, a furtive act done to get going sooner rather than later, is neither. Still, you and the civil disobedient share the belief, assumed to be true, that you are morally permitted to do as you do. Indeed, the civil disobedient may well believe that he is obligated to do as he does. Nonetheless, insofar as the civil disobedient's act is permitted only if he is willing to accept the legal consequences of his conduct, I'm suggesting the same goes for you when you justifiably run the red light. Of course, the foregoing is only as persuasive as the account of justifiable civil disobedience on which it rests.

[97] For more on the distinction between that which justifies an authority and that which renders it legitimate, see Simmons (2001). Joseph Raz's influential theory of authority answers the justification question (an authority is justified insofar as it provides the good of helping me do as I ought to do anyway), but has been fairly criticized for providing no answer to the legitimation question. See, e.g., Darwall (2009, p. 146) ("Meeting the conditions of the normal justification thesis is not … sufficient to establish practical authority."); Hershovitz (2011, pp. 6–10), Perry (2012, p. 52).

[98] The legitimation question corresponds to what has come to be known as the "particularity problem": What binds *this* person to *this* state? An answer to this question is an answer to the legitimation question.

The difference is commonly cast as the difference between crimes that are wrongs in themselves (and thus wrongful independent of the law) and crimes that are not wrongs in themselves (and thus not wrongful independent of the law). I will deploy the distinction in the following uncommon way: A malum in se crime is a crime the wrongfulness of which does not depend on the law (it depends on morality), but the class of malum in se crimes does not include all moral wrongs. Malum in se crimes constitute a subset of moral wrongs. A malum prohibitum crime is any non-malum-in-se crime. The class of malum prohibitum offenses thus includes some crimes the wrongfulness of which does not depend on law (but which are not within the set of malum in se crimes) and some crimes the wrongfulness of which does depend on the law.[99]

Malum in Se

Take malum in se crimes first. What good does it do when the state declares that a wrong included within the set of malum in se crimes is a crime? The good it does is to save us from the state of nature. The function the state qua authority serves when it declares malum in se crimes to be crimes is to deliver us from what would otherwise be a nasty, brutish and short existence. Malum in se crimes thus consist in those moral wrongs that, if they could be committed with impunity, would render co-existence impossible.[100] They consist in those wrongs that can perhaps best be described as wrong against one's agency or sovereignty or dignity.[101] Security against such wrongs is the sine qua non of social order.

When a state declares that this or that malum in se wrong is a crime it does not thereby make it wrong. It already is. What it does is to render anyone who culpably commits such a wrong answerable to the state.[102] If I culpably commit a malum in se *wrong*, I am answerable to whoever I wrong. If I culpably commit a malum in se *crime*, I am answerable to the state as well, which is why criminal prosecutions are properly captioned *State v. Doe*, or *People v. Doe*, or *United States v. Doe*.[103] Being answerable to the state means that malum in se wrongs cannot be done with impunity. When the state criminalizes malum in se wrongs it recruits itself to punish culpable breaches of that bit of morality without which the rule of law, peace, security, order, and so forth would not be possible.

[99] I have to acknowledge that including some crimes the wrongfulness of which does not depend on the law within the category of malum prohibitum crimes will strike some as odd. It strikes me as odd too. All I can say is that I am using the distinction in what is perhaps an unconventional way. Perhaps casting the distinction in terms of *core* and *non-core* crimes, or something along those lines, would be less odd.

[100] I'm reminded here of H.L.A. Hart's "minimum content of natural law" and Herbert Morris's description of "primary rules" as a "group of rules guiding the behavior of individuals in the community which establish spheres of interest immune from interference by others." See Hart (1994, pp. 193–200), Morris (1976, p. 36).

[101] See, e.g., Brudner (2009, pp. 28–37), Dan-Cohen (2002b), Ripstein (2009, pp. 42–50), Ripstein (2006). The shared idea here seems to be that the criminal law exists to protect our capacity to choose and that malum in se offenses consist in wrongs that interfere with that capacity. If we call this basic idea the sovereignty principle, and if that principle is understood as setting the *limits* of the criminal law, such that it would be wrong for a state to criminalize anything outside the scope of that principle, then "those who lack a sovereign will," such as "very young infants, those who have severe cognitive defects, and, most obviously, nonhuman animals," will not have the criminal law around to protect them from harm. Tadros (2011, p. 62). But as I see it, the sovereignty principle sets no such limit. I invoke it here only insofar as it identifies a class of wrongs with which I associated a particular account of the justification and legitimation of state authority.

[102] See, e.g., Hershovitz (2012, p. 72).

[103] This account might explain why the state has standing (all else being equal) to punish one who wrongs it, but still needed is an explanation for why the individual victim (where one exists) lacks such standing.

A state that does not protect its subjects from the malum in se depredations of its other subjects has little reason for being.

Yet even if we assume that criminalizing malum in se wrongs is a good thing inasmuch as it staves off the state of nature, why am I duty-bound to conform to the state's demands? In other words, what *legitimates* the state? What obligates me to obey it?

One sure-fire way for me to bind myself to an authority is for me to consent to it: I am bound because I agree to be bound.[104] I willingly surrender my will to the state's judgment. I sign on for the role of subject and thereby obligate myself to obey the state's directives. No conflict exists between my freedom to decide what to do and the power of the authority to whom I consent to decide for me because I freely give the authority the power to tell me what to do. My consent (unless invalid for some reason) creates the needed legitimating relationship between me and the state.

The problem with consent as the basis upon which to legitimate the state's authority is well-known: most of us do not in fact consent to the state's authority. Nor do we do anything that might reasonably be construed as having given consent. Some of us consent, but most of us don't.[105] Most of us are just born into the state claiming authority over us. Consent's champions have made many a clever attempt to rescue consent from these brute facts,[106] but most remain dubious.[107]

Most authorities do indeed derive their legitimacy from the consent of their subjects. But not all. Consent is not the only way to be bound. Consider the family. Children do not choose their parents, but we usually believe that parents (within limits) have authority over their children. If so, then *something* must be at work other than consent to legitimate parental authority. Perhaps something other than consent can likewise legitimate state authority. The point is not to suggest that the state is like a family. Such thoughts are either romantic or fascistic depending on your point of view. The point is simply to suggest that consent is not necessary to legitimate an authority. Consent may be sufficient, but not

[104] A. John Simmons has long argued that only actual consent can legitimate authority and that no state gets the actual consent of all its subjects. See Simmons (1979). Consent theories provide a good answer to the legitimation question but have nothing in particular to say in response to the justification question. An actor presumably would not consent to be bound to a particular authority unless he believed that doing so provided some good to him.

[105] Officials and naturalized citizens come to mind as among those who do.

[106] See, e.g., Beran (1987), Murphy (2006), Steinberger (2004, p. 218).

[107] Much the same can probably be said for so-called fair play theories of political obligation insofar as such theories ultimately rely on the voluntary acceptance (and not mere receipt) of goods or benefits in order to generate a duty to obey. Fair play theories of punishment might be understood as applications of fair play theories of obligation according to which the answer to the justification question is the good of social order, peace, security and so forth (i.e.,. goods to be achieved when most everyone refrains from committing malum in se) and the answer to the legitimation question is that I am obligated to obey in fairness to everyone else who has obeyed. Insofar as the goods achieved when most everyone refrains from committing malum in se are not ones we can be said to be in a position to accept or reject—they are like the air we breathe—the claim that fairness theories can generate an obligation to obey when and only when the goods to be achieved thereby are voluntarily accepted would seem to carry less conviction when the scope of the theory is limited to the goods achieved when most everyone refrains from malum in se. See Hoskins (2011, p. 68). The fair play theory of punishment so understood is meant to explain our obligation to obey the law prohibiting malum in se whereas the fair play theory of political obligation is meant to explain our obligation to obey the law writ large. The former appears more plausible than the latter. Indeed, the fair play theory of punishment seems to have folks ready, willing, and able to come to its defense, see, e.g., Dagger (2008); Hoskins, supra, whereas the fair play theory of political obligation seems more or less to have been left to defend itself. The main proponent of the fair play theory of political obligation has of late recognized the need to supplement the fair-play principle with other principles in order to account for obligations to obey laws "support[ing] the entire range of state functions." Klosko (2005, p. 95).

necessary. I may be obligated to surrender my will to an authority even though I have not willed to surrender my will.

Let me for now do nothing other than suggest that what legitimates a state when it proscribes malum in se crimes is the respect I owe those whom history happens to have bound me within the territory of a particular state. The only way we can collectively remain outside the state of nature is to confer on some entity the power to punish those who culpably violate the rights we naturally possess while in that sorry condition. We call that entity the state, and respect for those with whom I happen to be bound obliges me to recognize the state's authority so as to save us from collapsing into the state of nature. If I demand that you respect my right to be free from your depredations, I am duty-bound to respect your right to the same. I can of course withhold my recognition of the state's authority. I can refuse to give my consent. But my refusal does nothing to undermine the state's legitimacy. I am obligated to obey all the same.

Malum Prohibitum

The state's authority with respect to the criminal law begins with malum in se. Its exercise gives us the criminal law one would expect to see in a minimalist or libertarian state. Those who worry about over-criminalization would probably be delighted if the state's authority ended with malum in se as well. Alas. It does not. It extends to malum prohibitum as well. Indeed, if it did not extend to malum prohibitum the political model would give the same answer to Ellen's question as does the moral model. If money laundering is no wrong in the mind of morality, and if the state lacks the power to render non-wrongful conduct wrongful just because it says so, then the state wrongs Ellen if and when it punishes her. It wrongs her because it censures and punishes her for having done nothing wrong.

For my purposes, malum prohibitum crimes include crimes that are moral wrongs not included within the malum in se category, as well crimes that are not wrongs at all independent of the fact that the state says they are. Let me focus on the latter. In order to say that this or that is a wrong because the state says it is we need to explain how and why the state has the power to transform non-wrongs into wrongs. Thus we again need answers to the following questions: First, what *justifies* a state's authority to criminalize malum prohibitum? What good can a state do or achieve if it has, and if it exercises, the power to impose on me an obligation the culpable breach of which renders me liable to punishment, where the content of that obligation does not describe a wrong? Second, what *legitimates* a state with respect to crimes malum prohibitum? Assuming a state's authority to criminalize malum prohibitum is justified, in virtue of what am I obligated to conform?

The answer to the first question brings us back to the moral model's main problem: disagreement. Once you step beyond the limited domain of malum in se, reasonable people can and do disagree about how far the criminal law should be allowed to roam. They disagree about the principle or principles that should govern the criminal law's reach, as well as the best way to formulate those principles, not to mention the problems that invariably arise in applying them. Should the criminal law extend only to pre-existing moral wrongs (as the moral model says), or can it sometimes rightly include non-moral wrongs as well? Perhaps the main source of disagreement is how far the criminal law should be allowed to include non-wrongful conduct in the name of prevention. Should the state be permitted to make it a crime to do non-wrongful act β in order to forestall the possibility that β-ing will lead to Δ-ing, where Δ-ing *is* wrong? If so, how close must the connection between β and Δ be before we permit the state to criminalize β in the name of preventing Δ?

The good an authority can bring to the situation is obvious: it can authoritatively resolve the disagreement, if only provisionally and for a time. The authoritative settlement of disagreement enables us to get on with our collective lives, to coordinate our collective actions, and so forth. It achieves coordination writ large. It establishes justice in the face of disagreement over what justice really requires.[108] The alternative to state authority is not the state of nature: a state that criminalizes malum in se prevents us from slipping into that fate. The alternative is endless disagreement and the costs that go along with it. I'm reminded here of Hart and Sacks' principle of institutional settlement: the principle that "expresses the judgment that decisions which are the duly arrived at result of duly established procedures [that provide regularized and peaceable methods of decision]… ought to be accepted as binding upon the whole society unless and until they are duly changed."[109] Criminalizing malum in se averts the state of nature. Criminalizing malum prohibitum averts a state of constant disagreement. Both give repose.

Now we need to answer the second question. A functional state of any form can resolve disagreement. Consider the benevolent dictator. He can settle disagreement among his subjects with ease, but we would probably be disinclined to say that we are obligated to obey a benevolent dictator just because he can settle disagreements. A benevolent dictator would lack legitimacy. His authority would be justified inasmuch as its exercise would resolve disagreement and thereby bring about the good or goods associated with such resolution. Maybe the benevolent dictator's subjects ought therefore conform their conduct to his directives. But what would be the basis or grounds for saying that they are obligated to do so? What would be the basis for the benevolent dictator's legitimacy? Absent their consent to be so bound, I see none.

The same does not go, let me suggest, for a well-functioning democracy.[110] The subjects of such a state (who we can now call citizens) are obliged (within limits) to conform their conduct to the state's directives (which are now their directives). Why? A subject is bound to obey a state (democratic or not) when it forbids him on pain of punishment to commit a malum in se crime (whether he agrees to be so bound or not) out of respect for his fellow subjects. Likewise, a citizen is, I would venture, bound to obey a democratic state when it forbids him on pain of punishment to commit a malum prohibitum crime (whether he agrees to be so bound or not) out of respect for his fellow citizens.[111] When it

[108] Christiano (2008, p. 237) ("[E]stablish[ing] justice" is the "main purpose of the state.").

[109] Hart and Sacks (1994, p. 4).

[110] I intend to hide for the moment behind the phrase "well-functioning." Fill it in with whatever content you believe necessary to bestow authority.

[111] See, e.g., Christiano (2008, p. 236) ("[L]egitimate political authority must be grounded in part in the fact of disagreement among equals and must respect the judgments of each as an equal."); id. at 250 ("Those who refuse to pay taxes or who refuse to respect property laws on the grounds that these are unjust are simply affirming a superior right to that of others in determining how the shared aspects of social life are to be arranged. Thus, they act unjustly and violate the duty to treat others publicly as equals."); id. at 254 ("[A] conscientious person can see that her duty is to treat others publicly as equal and that failing to obey the democratic decision is a violation of that duty."); Christiano (2004, p. 277) ("[F]ailing to obey the decision of a democratic assembly amounts to treating one's fellows as inferiors."); id. ("[O]ne is in effect expressing the superiority of one's interests over others."); Shapiro (2002, p. 435) ("By disobeying, subjects are unilaterally, and hence unreasonably, setting the terms and direction of social cooperation."). See also Hershovitz (2003, p. 214) ("We also value democratic procedures because we believe they show proper respect for the dignity of people as rational agents. It is harder to pick out experts in moral and political matters than it is in medical or musical matters.").

I don't expect that any of this talk about respect for one's fellow citizens will persuade one wit those who believe that consent and consent alone can bind me to the state. See Simmons (2008, pp. 116–117).

comes to defining the terms of our collective co-existence, the will of no one is superior to that of anyone. Conforming to the collective will expresses my respect for the judgment of those with respect to whom my judgment is neither inferior nor superior.

A democracy's law reflects the will of all to the extent that anything does or can so reflect. If you defy that will you send a message to your compatriots: I am better than you. That message is false and arrogant. It violates the right all democratic citizens possess: the right to an equal say in setting the terms of their collective co-existence. Obedience to law is not in itself a virtue, and blind obedience is a vice. Nonetheless, when I conform to the law of a well-functioning democracy, I display respect for my fellow citizens, and my fellow citizens are entitled to such respect inasmuch as their right to define the terms of our collective life is no lesser and no greater than mine. The display of such due respect *is* a virtue.

The role of citizen in a well-functioning democracy is one into which we are born. We do not choose that role. We choose the roles that exist in civil society. I can choose to be a member of this association and that firm, or this religion and that political party. But we do not choose the roles associated with the family or the state. The role of citizen is one we are nonetheless obligated to accept. We are obligated to accept it out of respect for our fellow citizens: out of respect for the fact that we are equal to them, and they to us. You may not *identify* with the role of citizen and as such that role may not provide you with reasons for action that have any traction in your mind as you go about trying to decide what to do. You may not in other words conceive of yourself as a citizen. But insofar as you would be *wrong* to reject the role of citizen, insofar as you *should* see yourself as a citizen, that role provides you with reasons for action all the same.

Some believe that the authority of a well-functioning democracy has no limits. The disagreement that gives rise to the need for some way to reach an authoritative resolution, they insist, goes *all the way down*.[112] As they see things it makes no sense to believe that the disagreement that underwrites a democracy's authority stops when questions arise as to the limits of that authority. Here too one will find only disagreement. On this line of thought democratic authority knows no bounds, and judges have no business second-guessing the pronouncements of a well-functioning democratic state. Constitutional judicial review has no place in a well-functioning democracy. It deflects the tyranny of the majority in exchange for the tyranny of judges.

For now I will simply assert the belief that democracy does have limits. Those limits might derive from within democratic theory, or from without.[113] Democratic subjects have rights that establish a line beyond which democratic authority does not extend.[114] A democratic authority cannot among other things legitimately criminalize conduct otherwise falling within the protection of the standard litany of liberal rights. For example, I have a right among other things to speak my mind on (at least) the political issues of the day.

[112] See Waldron (1999, pp. 212–213) ("[T]he existence of disagreement and the need, despite disagreement, to set up a common framework … apply at least as much to issues of right as they apply to what is usually regarded as the more modest agenda of legislative politics.").

[113] Christiano (2008, pp. 261–264). Christiano argues that the limits on democratic authority are internal to democracy itself. See id. at 264–277.

[114] In the criminal law I imagine that those rights would be something along the following lines. With respect to criminalization, a democratic authority cannot criminalize conduct within the scope of long-standing liberal rights (speech, assembly, press, religion, and so forth). With respect to culpability, a democratic authority cannot punish an actor unless and until he has chosen to do something that he realizes the criminal law prohibits. With respect to punishment, a democratic authority cannot impose a punishment grossly disproportionate to the crime.

A democratic state cannot legitimately punish me for so speaking. Any effort to invade my rights means the state has acted ultra vires: without the authority it otherwise possesses when it acts within its proper jurisdiction. A democratic state wrongs its citizens when it punishes them for defying an ultra vires directive.

Conclusion

Let me return to Ellen. Her question was whether the state wrongs her when it convicts and punishes her for money laundering. The moral model tells us that it does. Because money laundering is ex hypothesi no wrong in the mind of morality, and because the moral model insists that a moral wrong can exist only if morality says it does, the state punishes Ellen for doing no wrong when it punishes her for money laundering. Morality would let her launder money to her heart's content. When the state punishes her it therefore acts as morality forbids it to act: it punishes her without just cause. It does her wrong. So says the moral model.

The political model sees the matter differently. A well-functioning democratic state possesses legitimate authority over its citizens. It possesses the power or capacity to create and impose moral obligations even where morality itself does not. When it declares that doing this or that is a crime it thereby makes it wrong to do this or that (assuming it was not wrong before the state spoke) and renders liable to punishment anyone who culpably chooses to do this or that. The authority of a democratic state is not without limits. Democratic citizens have rights, and those rights limit the state's authority to declare this or that a crime. But whatever those rights turn out to look like, no one has a right to launder money.

Ellen Campbell is a citizen of the United States. If the United States can be fairly described as a well-functioning democracy, if the Congress of the United States has decided to make money laundering a crime (as it has), and if Ellen culpably decided to launder money and so defy the will of the people in whose name the United States acts (as she presumably did),[115] she thereby rendered herself liable to punishment. If the United States had good reason to exercise its permission to punish her (as it presumably did),[116] then it did her no wrong when it exercised that permission. So says the political model.

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[115] If Campbell did *not* realize she was committing some crime, she should be excused: she did not in my view make a culpable choice. Thus her right not to be punished remains intact. If she is punished nonetheless then she has been wronged.

[116] The state always has at least one good reason to punish within the political model: to uphold or vindicate its authority. Cf. Brudner (2009, p. 48) ("[P]unishment … vindicat[es] the authority of Law rather than … giv[es] evil its just deserts."); Ripstein (2009, pp. 323–324) ("[P]unishment is nothing more than the supremacy of the rule of law."). Why should the state care about vindicating its own authority? I suppose it should care because and insofar as it should care about providing and securing the goods the exercise of such authority enables it to provide and secure.

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