A Trilogy of Papers on the *Malum prohibitum—Malum in se* Distinction in Criminal Law

Introduction

SUSAN DIMOCK *York University*

It has seemed to many legal scholars and philosophers of law that any plausible approach to justifying criminal prohibitions and criminal punishments will have difficulty justifying the inclusion of *mala prohibita* offences in penal law. To understand why, we must explain what we mean when we refer to conduct that is (merely) '*malum prohibitum,*' and contrast it with its contrary, conduct that is *malum in se*. The distinction is most commonly drawn as follows: conduct *mala in se* is morally wrongful prior to and independently of law, whereas acts that are *mala prohibita* are not wrongful prior to and independently of law.[1] Working just with this simple contrast, we can explain why so many theorists have thought that the use of *mala prohibita* offences (the adoption of criminal laws

[1] See, for example, Husak 2010. I will suggest problems with this way of distinguishing the two types of conduct, as will Stuart Green and Chad Flanders, in our companion essays in this issue of *Dialogue*, but it suffices for my present purposes. (Citations in this Introduction can be found in the References section of my paper in this issue of *Dialogue*.)

***Dialogue* 55 (2016), 1–7.**

doi:10.1017/S0012217316000287

that prohibit and punish conduct that was not wrongful prior to its criminalization) is inherently suspect; such offences are suspect because they seem to condemn conduct that does not deserve condemnation (because it is not pre-legally morally wrongful), and to punish people for engaging in actions they had no pre-existing moral duties to avoid. Reflecting very briefly on how the 'problem' of *mala prohibita* criminal laws is characterized within a range of diverse theories of criminalization and punishment will illuminate why they have seemed to many to pose unique justificatory challenges.

A pure consequentialist of the utilitarian variety, for example, may wonder how we could justify the disutility caused by criminalizing some conduct—the disutility caused by the restriction of freedom for the law-abiding and the imposition of penal sanctions on law violators, which necessarily accompany every use of the penal law—when that conduct is not itself wrongful prior to its criminalization. Surely, at least in standard cases, deterring conduct that violates no pre-existing duties, creates no unwilling victims and is not otherwise immoral cannot be so beneficial as to outweigh the known and very significant costs associated with criminalizing it and punishing people for doing it. The challenge is even clearer for theorists who believe that criminal law should prohibit only wrongful conduct and should impose only punishments that are deserved. This group includes theorists who adopt a 'wrongfulness' constraint on criminalization and/or a 'desert' constraint on criminal punishment.[2] Although *desert* is historically associated with retributive theories of punishment, and prior *moral wrongfulness* with legal moralism, the problem with which we are engaged challenges anyone who accepts that we should punish people only if they deserve such treatment and only to the extent of that desert, or who accepts that only wrongful actions should be the target of criminal law or that wrongdoing should operate as a side-constraint on criminalization.[3] Understood in this way, as a necessary but not sufficient condition of justified punishment, the desert constraint implies only a commitment to negative (weak or permissive) retributivism. Negative retributivism is widely subscribed to, even by theorists who would not describe themselves as retributivists (for example, those who develop hybrid views, or who treat desert as placing side-constraints on the achievement of instrumental values by punishing).[4] Likewise, given the variety of ways

[2] Both the wrongfulness and desert constraints are ably articulated and defended by Husak 2008. They are also adopted by Simester and von Hirsch 2011, Duff 2007, and Moore 1998/2010.

[3] For a very useful discussion of the varieties of legal moralism, and their relation to other principles of criminalization such as the harm principle, see Duff 2007, Chapter 4, and Duff 2014.

[4] The only prominent example of a theorist who explicitly eschews the wrongfulness and desert constraints is Tadros in his highly original *The Ends of Harm: The Moral Foundations of Criminal Law*.

in which wrongfulness can be incorporated into very different theories of criminal law, it too is a very widely held commitment. Thus, if the use of *mala prohibita* offences runs afoul of either the wrongfulness constraint on criminalization or the desert constraint on punishment, this would have widespread repercussions for most contemporary theories of criminal law. If criminal law can justly prohibit only conduct that is pre-legally wrong, and if we want to impose only just punishments, we should demand that those defending the use of *mala prohibita* offences show how their use can be reconciled, appearances to the contrary notwithstanding, with these two basic principles of penal justice.

This near consensus has been challenged more recently, however, by a group of criminal law theorists whose approach is importantly different. This group characterizes the dominant position that was just described—criminal law prohibits only morally wrongful conduct—as reflecting what I'll call *the moral approach to criminal law*. On this conception, criminal law backstops a moral code that pre-exists the development of criminal law. One primary task of legal theory, then, becomes determining which of the items in the class of pre-legal moral wrongs are such that they should also be proscribed by the criminal law (at least assuming that not *every* moral wrong should be criminalized).[5] This is true even of the most ambitious of the contemporary legal moralists, Michael Moore; though Moore accepts that every moral wrong could in principle be criminally prohibited, just in virtue of its moral wrongfulness, he thinks there are competing pragmatic and moral considerations that make it the case that, in fact, we should not criminalize all moral wrongdoing.[6] Antony Duff suggests that this is an immodest version of legal moralism, and instead defends a more moderate thesis, namely, that only a subset of moral wrongs—those that can be characterized as *public* wrongs—are suitable for criminalization.[7] Doug Husak similarly confines himself to the class of public moral wrongs.[8] Once one accepts the moral approach to criminal law, identifying the necessary and sufficient conditions that a moral wrong must meet in order to be an apt target of criminal prohibition and punishment then presents itself as one's central theoretical task. Within the moral approach, our collective entitlement to criminalize at least some pre-existing moral wrongs, because they are (public) moral wrongs, is exercised by the enactment of offences prohibiting and sanctioning conduct that is *mala in se*.

The moral approach is presupposed in the description of the 'problem' of *mala prohibita* offences offered above. That approach treats criminal law theory as a subset of moral theory, and criminalization and punishment as topics in applied ethics. But there is an emerging alternative to the moral approach to

5 See Duff 2007, and Husak 2008.

6 Moore 2009.

7 Duff 2014, 2011, and Duff and Marshall 2010.

8 Husak 2009, 2004.

https://doi.org/10.1017/S0012217316000287 Published online by Cambridge University Press

criminal law, which I'll call *the political approach*. Canadians are at the vanguard of this approach, which is being developed in very promising ways by Vincent Chiao and Malcolm Thorburn, for example; it is reflected too in Chad Flanders' companion piece in this issue of *Dialogue*, as well as my own. The political approach, as the name suggests, begins with basic political principles and values, rather than first order morality, and develops a theory of criminalization as part of a more comprehensive theory of political justification. That justification will never appeal to pre-legal moral facts alone in the justification of a decision to criminalize some type of conduct, but will necessarily also include explicitly political principles and values, such as principles governing political legitimacy and the political rights of citizenship.[9]

Adopting a political approach to questions of criminalization and the proper ambit of the penal law allows us to consider criminal law as but one branch of public law, all of which ought to be arranged to achieve the common good (understood in some concrete way by each political theorist). It invites theorists to apply principles of political justification to the evaluation of any proposed criminal offence and to criminal law as a public practice and public institution. And it allows us to escape what some see as the pretty hopeless task facing those who adopt the moral approach, namely, trying to develop the criteria needed to distinguish the subset of morality that properly falls within the ambit of criminal law (the subset of *public* moral wrongs) from the larger category of moral wrongs that are not the business of one's fellow citizens as such.

To see the significance of this last point, consider that the moral approach invites theorists to reflect on a range of cases involving the commissions of pre-legal moral wrongs, asking of each: is it a *public* wrong, the kind of wrong for which I am answerable to my fellow citizens just in virtue of our equal standing within a shared polity (i.e., a political society governed by public law)?[10] Some pre-legal moral wrongs surely are the kinds of conduct that concern all the members of a polity, because they cannot be permitted in any legitimate political community: the use of violence, for example, must be restricted if we are to form a successful polity of any kind, and so violence falls within the boundaries of criminal law on the moral approach. But, as soon as we

[9] I have drawn the contrast between the political and moral approaches as a starkly binary, either-or choice, but, of course, they are not so sharply separable in the work of philosophers of criminal law. By insisting that only *public* moral wrong-doing should be criminalized, for example, Duff and Husak both introduce political elements into their predominantly moral approaches. Nonetheless, pre-legal morality remains the normative system that "underlies the criminal law" for these theorists. Husak 2010, p. 2.

[10] See Duff 2007 for an overview of his relational theory of responsibility as accountability.

descend into the level of concrete criminalization decisions, there are controversial matters: which state officials (police, etc.) should be permitted to use violence against other members of the society, for example, and on what terms? These, though, are not the hardest questions confronting theorists like Duff and Husak. Consider, by way of illustration, the moral wrong of violating a commitment (promise) to remain sexually monogamous and to have no other sexual partners than him or her to whom one has so committed. (I'll just refer to the conduct as *adultery*, involving sexual infidelity against or cheating on a spouse, in a community that has organized itself around a practice of monogamous, two-person marriage, and that such marriages are the predominant family form in which children are raised, for the sake of the example.) Adultery was criminalized within Anglo-American criminal law until quite recently, and it remains a criminal offence in many jurisdictions; in some societies, the crime of adultery is still vigorously enforced, and can even be punished with death.[11] But liberal Western societies, and certainly the majority of legal scholars and theorists within those societies, believe that criminalizing adultery is unjust. This is puzzling. Why would a person who thinks the point of criminal law is to ensure that a certain range of pre-legal moral wrongdoing is not done (or is publicly denounced and punished should it be done) object to criminalizing adultery? Adultery is a paradigmatic moral wrong: it is a violation of an ongoing promise; it typically involves massive amounts of deception, lasting not only the length of the affair but beyond indefinitely; it disappoints the legitimate expectations of the spouse who is cheated on; it may expose the trusting spouse to sexually transmitted diseases and other harms; it may place the adulterer in a position to be blackmailed, thus threatening the financial interests of the family; etc. Why should these moral wrongs not be judged serious enough to warrant the denunciation of adulterous conduct and punishment of those who perpetrate it?

A defender of the moral approach to criminal law might respond by claiming that these are not the *kinds* of moral wrongs that properly concern our fellow citizens as such. They are wrongs, and serious ones at that, but it is the spouses (and perhaps other family members and the closest of friends) who have standing to call cheaters to account for adultery and to impose whatever consequences they deem suitable. Just as the state cannot make me answer to it for my failures to fulfill my duties to my employer (though my employer may have that right), it also cannot demand that I account to it for my failure to fulfill my duties to my spouse. Such a response suggests that how I run my personal life, and how I fulfill (or fail to fulfill) duties within my marriage, are none of my neighbours' business.[12] But that response seems particularly ill-suited in the

[11] Saudi Arabia, Egypt, and Pakistan, for example, continue to put women to death for the crime of adultery.

[12] On the relational elements inherent in practices of calling persons to account for their alleged wrongdoings, see Duff 2007.

adultery case, even if it is true of some other moral matters. After all, adultery has profound negative social effects, effects that impact the adulterer's fellow citizens in multiple important ways. Adultery is a major cause of marriage breakdown and divorce, for example, actions that very often have profoundly detrimental results for women and children. Women and children are much more likely to live in poverty after divorce, for example. In some cases, women and children will have to access public welfare schemes to partially replace the lost income of the cheating spouse and parent. In still other cases, it creates increased demand for subsidized childcare spaces and all-day kindergarten programs. And, when initiated because of adultery, divorces often inflict lasting psychological harms upon children. These are serious social harms. One wonders how it could be that liberal (or republican or communitarian *a la* Duff) legal scholars can be so sure that adultery doesn't have the features in virtue of which some wrongs may be treated as public wrongs. If the political approach can help us navigate through (or bypass altogether) these kinds of controversies, that would be an independent consideration in its favour.

In December 2013, Chad Flanders, Stuart Green and I participated in a Committee Session on "*Mala prohibita* and the Reach of the Criminal Law" at the American Philosophical Association Eastern Division's 110th Annual Meeting, in Baltimore, Maryland. The trilogy of papers in this issue of *Dialogue* is the product of that session. Collectively, they strongly suggest that, despite being addressed by some of the most able theorists in the history of jurisprudence, the meaning of the distinction remains contested, as does the justice of including *mala prohibita* conduct in the regular part of the criminal law.[13]

Ours is, then, a question about the legitimate limits of criminal law: would our best theory of criminalization permit (or require) the enactment of some

[13] The distinction between the 'regular part' or 'special part' and the 'general part' of criminal law is an important one in criminal law scholarship and practice. Very roughly, the regular part contains all the specific offences recognized in a particular legal jurisdiction, while the general part articulates principles that apply to all or whole classes of crimes (e.g., that being 'not criminally responsible' or 'insane' is a general defence to any criminal charge; that one must be above some specified age in order to be able to commit any crime at all; and that the Crown (prosecutor) bears the burden of proving the guilt of accused persons beyond a reasonable doubt). It is possible that the general part of some specific criminal code includes a principle that no offence in the special part should be enacted unless the conduct it targets is pre-legally wrong. In other words, the general part of a given penal code might rule out the adoption of any *mala prohibita* offences in the special part, though I am not aware of any actual code that does so. (Perhaps the Model Penal Code comes the closest to doing so.) See Shute and Simester 2002.

mala prohibita offences and, if so, which ones? Both Flanders and Green, in very different ways, argue that at least some *mala prohibita* behaviour can legitimately be prohibited using criminal law. I did too, in Baltimore, but I am now less sanguine about that position than I was a few years ago.[14] While I continue to think that some *mala prohibita* offences can be legitimately enacted, I now think the defence of that claim is even harder than I first realized. Indeed, I now think that even the *mala in se* category needs to be re-examined. Progress on identifying the conditions under which the employment of *mala prohibita* offences can be justified should be responsive to the reconceptualization necessitated by this revised understanding of what makes some conduct *mala in se*. Changing the way we think about *mala in se* crimes opens up new ways of thinking about their contrary as well.

[14] Indeed, I even put some of those thoughts in writing: see Dimock 2014.

https://doi.org/10.1017/S0012217316000287 Published online by Cambridge University Press