Public Wrongs and Public Reason

CHAD FLANDERS *Saint Louis University School of Law*

ABSTRACT: The distinction between crimes that involve wrongs in themselves and crimes that are wrong because the law makes them so has long puzzled theorists. This essay argues that the distinction, while getting at something real, is based on a mistake. That mistake is made both by those who see moral wrongness as a necessary condition for criminality and by those who believe merely making something illegal is sufficient to make it criminal. Neither is correct. Rather, what makes something a criminal wrong is that it involves a violation of a law that has been justified in terms of "public reason."

RÉSUMÉ : La distinction entre les crimes qui impliquent un mal en soi et les crimes qui sont mauvais parce que la loi les désigne ainsi a longtemps intrigué les théoriciens. Le présent article soutient que cette distinction, bien qu'elle touche une différence réelle, est fondée sur une erreur. Cette erreur est commise tant par ceux qui considèrent le mal moral comme une condition nécessaire de la criminalité que par ceux qui croient que le simple fait de rendre une chose illégale suffit à la rendre criminelle. Aucune de ces positions n'est correcte. Plutôt, ce qui rend un acte criminel, c'est le fait que cet acte implique la violation d'une loi qui a été justifiée en termes de «raison publique».

> It might also be argued, however, that the line of thought sketched above begins in the wrong place. It begins with a supposedly pre-legal, perhaps even pre-political category of wrongdoing, and then asks how we can determine which kinds of wrong within that (very large) category we have reason to criminalize. [But this] might be the wrong place to start. Perhaps, taking seriously the political character of criminal law as a state institution, we should instead begin with … an account

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of the state and its proper aims, and of the institutions that should be created and maintained to serve those.[1]

Introduction

Surely one of the great frustrations of the distinction between *mala prohibita* and *mala in se* is its protean quality. The distinction has variously been put as one between common law crimes and crimes that are defined by statute; between crimes that have a *mens rea* element and those which do not ('strict' or 'absolute' liability crimes); between crimes that involve physical harm and those that do not; between felonies and misdemeanors; between crimes and sins. Doubtless there are other ways of putting the distinction and doubtless there will be many more in the future.

But perhaps the very fungibility of the distinction has led it to be defeated one too many times. One simply picks out the distinction one wants to attack and then proceeds to say that we have moved past it historically (this is easier to do in the case of common law crimes versus statutory ones, or divine versus secular law) or that the distinction is one of semantics rather than one of substance. Nonetheless, the distinction "a theory which, it is often said, was exploded a long time ago … like an inveterate trouper, refuses to desert the stage."[2]

What accounts for the vitality of the distinction? One might say that any distinction so roundly dismissed by Jeremy Bentham must have *something* going for it,[3] so that if we gave up on debates about the nature of the distinction, we might end up with a characterization of the criminal law that involved a false reduction, or an elimination of something real. In fact, there is a basis for the contemporary debate, and it is one which we can put as a matter of defining what a 'public wrong' is—to use a term commonly used in contemporary debates.[4]

On one side, there are those who take *mala in se* as not just paradigmatic but in a way definitive (in the sense of definitional) of what sorts of things should be criminalized. For them, what should be emphasized is the moral wrongness of the public wrong, which gives them the problem of picking out which

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[1] Antony Duff, *Theories of Criminal Law*, Stanford Encyclopedia of Philosophy (2013), http://plato.stanford.edu/archives/sum2013/entries/criminal-law/.

[2] Patrick J. Fitzgerald, "Real Crimes and Quasi-Crimes," 10 *National Law Forum* 21 (1965).

[3] See Jeremy Bentham, *A Comment on the Commentaries and a Fragment on Government* (James H. Burns et al. Eds., 2008).

[4] See Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (2008); Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007).

wrongs are properly public if (as seems plausible) not all wrongs are public wrongs. On the other side, are those who want to defend the 'public wrongness' of the *mala prohibita*. For them, the challenge is to specify the status of *mala prohibita* as genuinely wrongs without in the process converting them into *mala in se*, if (as seems plausible) merely making something illegal is insufficient to make it a wrong. This strikes me as a real and not just semantical debate. It is a debate about what makes a wrong properly a 'public one,' and whether this category includes all or only *mala in se* crimes and whether it includes any *mala prohibita* crimes at all.

Although each side of the debate score rather telling points, the way each side frames the debate prevents us from seeing how best to resolve it. Both sides focus on the content of the wrong: whether it is intrinsic (in the case of those who see *mala in se* as foundational) or a violation of some norm of fairness or promise-keeping (in the case of those who want to justify the wrongness of *mala prohibita*). In what follows, picking up on a suggestion by Victor Tadros,[5] I focus instead on the way the criminalization of the wrong is justified. As I will argue, a wrong is a public wrong simply insofar as it represents the violation of a law that has been publicly justified, that is, justified in terms of public reason. In other words, I plan to focus on the *form of justification* of criminal laws (and indeed of all laws), rather than the *substance* or *content* of what is criminalized.

If we take this perspective on the criminal law, our first question will not be 'what sorts of things are wrong, pre-legally?' but rather, and more broadly, 'what are the fair terms of cooperation by which we should govern ourselves?' Of course, those terms will include things like what behaviour we should regulate by use of the criminal law. But we will not be divining the answer to questions of criminalization by doing moral philosophy. Rather, we will have to find the answers to those questions through asking about what things *we* agree need to be regulated by the use of coercive sanctions. The structure of these inquires—one which treats criminal law as a subset of moral philosophy, and one which sees it as a subset of political philosophy—is importantly different. We will not say, 'this should be criminalized because the best moral theory says it's wrong.' We will say, 'we can justify this use of the state's coercive power in terms we can all endorse.' Public reason will be our standard, not first-order moral philosophy.

Now this proposal may raise more questions than it answers, and it leaves open in the end the question of which public wrongs should be criminalized, that is, subject to penal sanctions. I am not sure these sorts of questions have determinate answers. But I think my focus on justification gets us on the right track to appreciating what sort of thing is at stake in debates over the

[5] Victor Tadros, "Wrongness and Criminalization," in *The Routledge Companion to Philosophy of Law* 157 (Andrei Marmor, Ed. 2012).

distinction between *mala in se* and *mala prohibita*, as well as having the additional benefit of placing debates about the nature of criminal law more firmly into debates over political philosophy more generally. In particular, it opens up the possibility that some theories of criminalization and punishment are wrong because they are incompatible with the demands of public reason.

My paper proceeds in four brief parts. In the first two parts, I show how criticism of so-called pure *mala in se* crimes and pure *mala prohibita* crimes in fact implicate questions about justification. I can summarize my conclusions this way. If the worry about *mala in se* crimes is that we don't know what makes them "public" crimes, then the answer might be that they have to go through a process of *public* justification. If the worry about *mala prohibita* crimes is that making something illegal isn't sufficient to make it wrong, the answer might be that to be crimes they have to go through a process of public *justification*. In the third and fourth parts, I make some broader remarks about criminal law and political philosophy.

I.

I begin with two very old definitions of what is *mala in se*. First, *mala in se* referred to those crimes that were not merely against positive law, but against divine or eternal law. Thomas Hobbes early on suggested that the distinction was one between crimes and sins, but he seemed to also pack into that the distinction between crimes that involve acts and those that involve mere intentions.[6] Second, *mala in se* was regularly thought to refer to those crimes that were part of the common, judge-made law and not yet formalized into statutes.[7]

Of course, the two are related because the common law included, either by explicit incorporation or by implicit influence, the prohibitions of divine law. Thus, Lord Coke said:

> the common law was that which was in England before any statute was enacted. It is grounded upon the general customs of the realm; includes in it the law of God, and the principles and maxims of the law. It is founded upon reason, is the perfection of reason, acquired by long study and experience, and refined by learned men in all ages.[8]

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[6] Thomas Hobbes, *Leviathan*, 216–217 (Michael Oakeshott, Ed., First Touchstone ed. 1997); see also Alice Ristroph, "Responsibility for the Criminal Law," in *Philosophical Foundations of the Criminal Law* (Antony Duff and Stuart Green, Eds., 2011).

[7] See generally, Nancy Travis Wolfe, "Mala In Se: A Disappearing Doctrine?," 19 *Criminology*, 131 (1981); see generally, Stuart P. Green, *Lying, Cheating and Stealing*, 118-121 (2007).

[8] *People v. Melvin*, 2 Wheeler C.C. 148-149 (N.Y. 1810) (*quoting* Co. Lit. 978, 142); see also Note, "The Distinction between *Mala Prohibita* and *Mala In Se* in Criminal Law," *Columbia Law Review* 30: 74-108 (1930).

These two ways of defining *mala in se* (as those things against either divine law or against the common law) have fallen out of favour, however, and the reasons are important, given my focus on public justification.

Start with the idea that *mala in se* is a reflection of divine law, so that those crimes that are *mala in se* are those that are against God's law, counting as sins in addition to counting as crimes. We reject this as a way of conceptualizing *mala in se*, but why? It is not, or not only, because we no longer believe in God; in fact, many of us do continue to believe in God and that morality is in the end a matter of obeying God's law.

I submit that we reject this conception because we think that religious justifications for state action are the wrong *type* of justifications for state action. John Rawls made this insight the basis of his later political philosophy.[9] Modern societies, Rawls said, are characterized by a diversity of plural and conflicting but reasonable viewpoints on the nature of the good life. We disagree, for one, about religious justifications for state action; as a result, we don't say those justifications are *wrong*, we just try to move past them, to find common ground for legislation that doesn't depend on them. Lord Patrick Devlin, although he would not in the end adopt the point of view of the Wolfenden report, rightly described its basis, which is also political liberalism's.[10] The law must accommodate itself to the atheist, who 'cannot accept the divine law,' and not just to the religious person who accepts divine law. The law must also reconcile itself to the religious person who sees the embodiment of religion into law as a hindrance rather than a help to the faith.

It is important to see what this objection to using divine law as a basis for criminalization is *not*. It is not the objection that wrongs against the divine law are not really wrongs. To use Tadros' example, blasphemy might be in fact very wrong; one of the worst wrongs.[11] But the reasons one might bring to bear to justify criminalizing blasphemy would not be reasons that others could reasonably be expected to accept. They may believe in different Gods or in no Gods at all. It would be odd if our first-line argument against criminalizing blasphemy was that there was no God. Instead, we should say that we can't make certain types of things illegal because we could not justify them to others on terms that they could reasonably accept.

When we look at public reason as the standard for criminalization rather than moral philosophy, we start not with pure reason but with our overlapping consensus. Our inquiry will be focused on justifying the coercive power of the state on terms we can all agree on; that is, using reasons we can all

9 John Rawls, *Political Liberalism*, 36-37 (1992).

10 Lord Patrick Devlin, *The Enforcement of Morals*, 3-4 (1959).

11 Tadros, *supra* note 5, at 164.

see as reasons.[12] The ultimate source of justification is not moral philosophy, but we, the people. Even if it is true that blasphemy is a moral wrong, it may be inappropriate to use the coercive power of the state to regulate it. It may not be possible to justify criminalizing blasphemy because it depends on controversial ideas about the good, and about God, ideas that people might reasonably reject.

Now, it may be that blasphemy *isn't* wrong. But it is important to see that on the view I am proposing, this question is in the end beside the point. Michael Moore would say that we should not criminalize blasphemy because blasphemy is not morally wrong. In fact, many things are simply not wrong (including various sexual activities) on Moore's "spare morality."[13] So Moore will say, accordingly, that we don't criminalize blasphemy because blasphemy is not a wrong (supposing we believe in God or gods at all). If this seems right, it is because we agree with him as a matter of our comprehensive doctrines; but in a pluralistic society, not everybody will believe that blasphemy is not a wrong. We will have deep disagreements about the good life and about the kind of bad things people can do. Not all of these are the public's concern or the 'law's business,' because explaining why they are right or why they are wrong will not be able to be done in terms that others could reasonably be expected to accept.

Suppose we instead characterized *mala in se* as not against God's law, but simply against natural law or even as those things that are 'intrinsically wrong' or even inimical to our understanding of human flourishing. These appeals may be less objectionable than bare appeals to God's will, but they may have the same problem: they are appeals that depend on one's "comprehensive doctrine" as Rawls puts it (they are obviously wrong to *you*, we might say, but not to *us*). In a society marked by reasonable pluralism, these types of appeals won't get you very far: others might disagree with you, and reasonably so. We must give justifications in terms of public values, not in values that we happen to believe given our comprehensive beliefs and what strikes us as wrong according to those comprehensive views.[14]

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12 This does not mean adopting the strong constraint that support for all laws must be unanimous. Majorities can rule, but is important that the minority be able to see that the majority is acting for public reasons. Otherwise, it is just the majority exercising its will. For example, in voting for a public park, the measure may go down because it would mean raising taxes. The losers can see this as a reason, even though they may feel that other public reasons (such as having a space for children to play) may be more important.

13 Michael S. Moore, *Placing Blame* 662 (1997); Michael S. Moore, "A Tale of Two Theories," *Criminal Justice Ethics* 28: 27-48 (2009).

14 The same point applies, *mutatis mutandis*, to criminalizing other wrongs because they transgress the divine law, even if criminalizing those wrongs could be justified on secular grounds. We might think that murder is wrong because God has said it is wrong. Nancy Travis Wolfe, "*Mala In Se:* A Disappearing Doctrine?," *Criminology* 19: 131-143, 137 (1981). But that is not the type of reason that could publicly justify making murder a crime.

II.

We can approach the importance of public justification a second way by looking at the problem with characterizing *mala in se* crimes as common law (that is, non-statutory and judge-made) crimes. We reject common law crimes, now, because they fail on any of various measures of so-called "legality."[15] We require notice and we reject *ex post facto* crimes and for these reasons (and more) we leave defining and promulgating crimes to the legislature and not to the courts. Criminal law must be codified in a statute for it to be 'criminal law.'

There is a familiar debating point that all crimes are really *mala prohibita* crimes because crime is not a pre-legal category; crime is only crime by being made part of the positive law.[16] This is true, but incomplete. Legality is not the same as codification: it is a normative constraint. Nor is it the only constraint. The dilemma with *mala prohibita* crimes—and which shows the limit of the familiar debating point—is how a bare legislative act can make something wrong, in the sense of being criminal. Laws passed by the legislature may meet all of the traditional criteria of legality (fair notice, etc.), but we still might wonder if they are criminalizing something that ought not to be criminalized. The legal moralists are, to this extent, correct. We cannot equate something's being criminalized in the positive law as making that thing normatively speaking a crime.

But maybe there is a case to be made that for a crime to be a crime it at *least* must meet certain constraints. That is, for something to be a crime, normatively speaking, it must meet the constraints of legality. We must give people fair notice, it must have gone through some sort of process, and it must have been codified by the legislature. But not just any process should do. In a liberal society, we expect (or we should expect) legislation not just to be a product of interest group politics, or majoritarian rule where might makes right, but as the result of a process of reasoned deliberation. That process should involve appeals to public reasons (as specified above): those reasons that others who disagree with us on the level of comprehensive doctrines could still reasonably be expected to accept. Criminal legislation is no exception to this rule, and this requirement is not just a side constraint; it is constitutive of a law's legitimacy.

So criminal legislation must be based on public reasons. Political liberalism rejects (and must reject) the positivist idea that what makes something a crime is merely the fact that a legislature has deemed that thing to be a crime; it must

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15 For a discussion of "legality values," see Michael S. Moore, *Act and Crime* 239-244 (1993); see also *Keeler v. Super*. Ct. of Amador Cnty., 2 Cal.3d 619, 634-635 (1970).

16 Ristroph makes a version of this point at the beginning of her article. See Ristroph, *supra* note 6, at 108 ("The maxim *mullum crimen sine lege* is not simply a preference for the notice afforded by clearly drafted criminal statutes: it is a reminder that crime literally does not exist in the absence of law.").

instead, be based on public values. Every crime represents at least an affront to these public values, even crimes that implicate what Dan Markel has called "dumb but not illiberal laws."[17] Suppose that these laws do indeed rest on some public liberal values, the promotion of public order say, but that connection is indirect or diffuse. Political liberalism has nothing to say against legislating in this way. How could it? Political liberalism as I am conceiving it is a theory of justification, and if the laws are justified in the right way, they are legitimate, whether these be laws against murder or against hunting out of season or without a license.

Stuart Green's essay on *mala prohibita* crimes gives us a good example of how we might conclude that something should be criminalized based on the values of public reason alone.[18] Green asks us to consider a law requiring licenses for doctors. Now, it may not be morally wrong to practice medicine without a license, provided one were competent at doing so. As a result it seems that such a regulation would be purely malum prohibitum. But Green imagines a scenario where there is an emergency and doctors who were not licensed would not be appropriately notified. The result might be a risk to the doctor's patients (they wouldn't know about additional precautionary measures they would need to take, for instance). Green's conclusion is that violating this regulation might be wrong, not just because the doctor violated a regulation, but because there might be a real moral risk to being unregulated.

Green has to stretch to show the moral wrong underlying the violation of the regulation, so that the regulation is not merely *mala prohibita*. But why stretch? We can recognize that there are certain public values to having a regulation system: making sure that all doctors who are practicing medicine meet certain standards of quality of care being only the most obvious. Provided this is a real public value—and I see no reason to doubt that it is—then the state can properly make violation of that regulation subject to sanction. We might conclude that a penal sanction for a violation is too harsh, but that is a separate question. The key question is whether the regulation can be supported by public reasons, and regulation of doctors surely can be.

Focusing on whether something is morally wrong or whether it is wrong only because the law makes it so misses the point. It misses what all criminal laws, in a legitimate state will share.

Laws against murder and laws against hunting along with laws regulating doctors *if they are legitimate* will share the fact that they can be justified by public reasons: not the same reasons, of course, but the same type of reasons. Reasons that people of differing comprehensive views can share, that depend

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17 Dan Markel, "Retributive Justice and the Demands of Democratic Citizenship," *Virginia Journal of Criminal Law* 1 (1): 1-134 (2012).

18 See Stuart P. Green, "The Conceptual Utility of *Malum prohibitum*." *Dialogue: Canadian Philosophical Review*.

on values we all can recognize as values: bodily integrity, or fairness, or safety, or even the preservation of wildlife.[19] And justifications for *mala prohibita* can go wrong in the same way justifications for *mala in se* can, that is, by appealing to comprehensive reasons. The key thing is that the justifications be public, not that the wrong be of a certain type or another.

III.

Public wrongs, Tadros has suggested and I have tried to explain, are those wrongs against laws that can be publicly justified. But this point, if taken seriously, shows the mistake in how we characterize the debate over *mala in se* and *mala prohibita*. For it is not enough that something is criminalized because it is immoral or wrong by the lights of our comprehensive morality; rather, it must be immoral by the lights of public reason. Nor is it enough that something is a public wrong because there is legislation prohibiting it; rather, the reasons for that legislation (again) must be public reasons. From the perspective of public reason, laws can be defective either if they are justified by wrong sort of reasons or if they don't have reasons behind them at all (and are just expressions of majority will). So there are no pure *mala in se* crimes, if by that we mean crimes that are crimes because a comprehensive moral theory says that they are wrongs. And there are no pure *mala prohibita* crimes, if by that we mean crimes that are wrongs only because the law says so, regardless of the reasons (or lack of reasons) behind the law.

But a theory of public reason, as I noted above, is not a theory of the legitimacy of the criminal law; it is more broadly a theory of political legitimacy for all laws. Laws in general are only legitimate if they are supported by public reason. Any exercise of political power is legitimate, for Rawls, "only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in light of the principles and ideals acceptable to their common human reason."[20] So public reason operates as a constraint on all lawmaking, whether criminal or administrative; it gives us the answer to what is a public wrong: the violation of any law that is supported by legitimate public reasons, represents a public wrong. But this definition does not give us an answer to the question of what is a *criminal* public wrong.

Antony Duff's way of answering this question is to say that criminal wrongs are those public wrongs which should be punished, but what does he mean by this?[21] We have an interest in society's obeying the laws and punishment is one

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19 But see, Chad W. Flanders, "Public Reason and Animal Rights" in *Animal Politics/ Political Animals* (David Schlossberg and Marcel Wissenburg, Eds., 2014).

20 Rawls, *Political Liberalism*, 137 (1992).

21 See Duff, *supra* note 1; see also Antony Duff, "Crime, Prohibition, and Punishment," *Journal of Applied Philosophy* 19: 97-108 (2002).

way of achieving this goal, but there are other ways. Douglas Husak agrees that the "state has perfectly good reasons to discourage retailers from tearing tags off mattress."[22] But he will disagree that these "good reasons" are sufficient to justify punishment if by that we mean hard treatment; for this we need an offense that is *mala in se*.

So what is gained by saying that crimes are those things which the state ought to punish, as opposed to merely regulate? Duff's theory is (he says) retributive, so punishment for him is a matter of calling to account, of public censure, because the offender deserves it and for no other reason. But here we run into another problem from the standpoint of political liberalism. Is such a goal of punishment something others can reasonably be expected to accept?[23] Can retributive punishment be justified in terms of public reason?

I do not think so, although I will not make that extended argument here.[24] But let me summarize what that argument would look like. Laws are justified by public reasons. To say that violations of some laws should merit retributive punishment (either for itself or for the more elaborate reasons Duff lays out) is to say that punishment has a *raison d'etre* over and above the advancement of the original reasons for the law. Deterrence, say, might not have this structure: we punish violators of the law in order to prevent more violations of the law; the rationale for the punishment is the same as the rationale for the original law. A rehabilitative justification of punishment might have this structure as well: we try to reform offenders so that they don't commit the violation again. No additional appeal to the rehabilitative good needs to be made. We just have to refer *back* to the reasons we passed the law in the first place.

Retributive punishment doesn't have this character, where the reasons for the original law provide the reasons for the punishment. As Duff puts it, what wrongdoers deserve is "to suffer the pain of censure, of remorse, and or reparation for the wrong that they have done. This includes, or consists partly in, an attempt to persuade them to reform their future conduct: but what justifies it is that is what they deserve—that is appropriate retribution for what they have done."[25] The question then is whether people might reasonably disagree on this *additional* reason for punishment. And I think they would. Some might disagree with retribution *tout court*; others might wonder more deeply if we are

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22 Husak, *supra* note 4 at 119.

23 In a brilliant essay, Malcom Thorburn raises the important question of whether Duff can really justify *punishment* (as in 'hard treatment') at all, as opposed to merely justifying calling people to account. See Thorburn, "Constitutionalism and the Limits of the Criminal Law," in *The Structures of the Criminal Law* 96 (R.A. Duff et al., Eds., 2011).

24 See generally, Jeffrie Murphy, "The State's Interest in Punishment," *Journal of Contemporary Legal Issues* 5: 283-298 (1994).

25 Duff, "Crime, Prohibition, and Punishment," *supra* note 22, at 101.

free in the way retributivism requires; others might disagree with Duff's particular brand of retribution.[26] If this prediction of reasonable (not just actual) disagreement is correct, the retribution drops out as a legitimate goal of state punishment: it cannot be justified by reasons that are public. It follows that we cannot use retribution as a way to define what sorts of wrongs should be criminalized.

But then what is left of the idea of criminal public wrongs as opposed to merely civil or regulatory ones? I am not sure the distinction survives, or if it does, it will be defined in merely these terms: those public wrongs for which we need hard treatment to deter future instances of should be criminalized; those which are adequately deterred by more modest means will be part of the administrative, regulatory apparatus. The criminal law then becomes one of many instruments for promoting public values; it does not get to promote a controversial value (retribution) that is unique only to it.[27]

IV.

Public reason is part of political liberalism and political liberalism is a "theory of the state and its proper aims."[28] That theory doesn't tell us what those interests are; it doesn't give us a theory of the good or a theory of the bad. Rather, it gives us a theory of justification: whatever the state wants to promote must be justified in terms that others can reasonably accept, that is in terms of public reason. If we generate a theory of the criminal law out of this, the distinction between *mala in se* and *mala prohibita* loses much of its significance. We aren't basing our criminal law on what things are *wrong*, but what things are *publicly justifiably as wrong*. Moore's theory of this, and Husak's, are rejected not on the level of *content* but because they are comprehensive theories not of the good, but of the bad. But of course the fact that moral theory doesn't justify criminalizing things that are *mala in se* says nothing about the status of *mala prohibita* crimes. They, too, need to be justified by public reason. In a way, Moore and Husak are right: there is a wrongfulness constraint, but it is a political and justificatory constraint, not a substantive moral one.

Beyond this, I am not sure political liberalism gives any special care to whether something is a criminal wrong or not. Rather, there are public wrongs, and various means to discourage committing those wrongs, of which criminalization is one. But the goals of punishment must also meet the public reason constraint, and I have suggested that retributivism fails along these lines, or at

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[26] See also Chad W. Flanders, "Can Retributivism Be Saved?," *Brigham Young University Law Review* 309-363 (2014).

[27] Here the work of Vincent Chiao is important. See especially his excellent "Two Conceptions of Criminal Law" in *The New Philosophy of Criminal Law* (Zach Hoskins and Chad W. Flanders, Eds., forthcoming).

[28] Duff, *supra* note 1.

least Duff's version of it fails. Whether a different theory of retributivism meets it, I am skeptical. In sum, for criminalization to proceed in the way Moore and Husak envisage it, and for retributivism to be the point of punishment, as Duff conceives it, we would need a different and much more robust (not to say controversial) theory of the state.

In his book *Placing Blame*, Moore admits that his view—which starts with the idea of moral wrongs and builds towards state punishment of those wrongs—might be "illiberal in form" even if it is ultimately "liberal in content."[29] If I am right that Duff and Husak share this starting point, then they too may be illiberal in form even if what they happen to end up with is a liberal theory of criminal justice. They are starting from the wrong place. We should be liberal from the beginning. We should *start* with the idea of a politically liberal state and go from there, finding the content of criminal law in that which can be justified on fair terms to everyone, rather than finding it in a comprehensive moral code. I have tried to make just such a start in this essay.

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[29] Moore, *Placing Blame*, *supra* note 13, at 80.

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