

On the Liberty of Scoundrels:
Wrongfulness and the Justifiability of
Criminalization

Jens Damgaard Thaysen

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Criminalization

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¹ The inhabitants of the three-person office being Kristian, Andreas, and me at first, and after Andreas got his own office, Kristian, Viki and me.

authoring a paper with Andreas was a highly rewarding and fun experience.² Andreas is also the kind of person who does not just put his own coffee cup in the dish washer, but also the (often considerable number of) cups left by others. He is one of the nicest and most uncompromisingly moral people I know. I frequently wonder how Kristian finds the energy to both be a productive academic and a devoted father of three, somehow also always being able to find the time for a laugh, a talk, or a cup of coffee. It has been super fun to share an office with Kristian, and he has usually been the first to congratulate me when my work was accepted and to pick me up when it was rejected. Viki has been an amazingly kind, caring, and fun office mate. I have really enjoyed her company in the office, particularly during the stressful last period of my PhD. It has been incredibly easy to talk to Viki about sensitive issues that would have been very difficult to discuss with many others. I would also like to thank Viki for her help in enforcing the morality of when to wear a bicycle helmet.³

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² J. D. Thaysen and A. Albertsen, “When Bad Things Happen to Good People: Luck Egalitarianism and Costly Rescues,” *Politics, Philosophy & Economics*, September 20, 2016, doi:10.1177/1470594X16666017. [Not included in this dissertation]

³ For the benefit of the curious: The dominant view in academia is the *actual bike-touching view* according to which wearing a bicycle helmet is permissible if, and only if, you are touching a bike. However, there has been some recent philosophical debate about whether we should reject the *actual bike-touching view* in favor of the *possible bike-touching view*, according to which wearing a bicycle helmet is permissible if, and only if, you are able to touch a bike without moving your legs.

ed and successful scholar like Lasse experienced setbacks during his PhD helped me realize that this is something that happens to everyone, at a time when I was on the verge of quitting, because I thought the frustrations with which I struggled were a sign that I wasn't talented enough to do a PhD. I am also grateful to Lasse Nielsen for believing that '*reciprocity is for strangers*', which commits him to buying beer for me, regardless of whether I ever buy any rounds for him. I have enjoyed the company of David V. Axelsen tremendously. He is the kind of person in whose company you will find yourself having a great discussion about literature or the nature of love one minute, only to find yourself rolling dice with your mouth or doing drunken karaoke the next (which is one of the best kinds of person). David is one of the most interesting and fun persons I know. Moreover, he has a gift for attracting other interesting and fun people, to many of whom he has generously introduced me. I am grateful to David for doing so. I am also grateful to David for trying to prevent a video of me performing the aforementioned drunken karaoke⁴ from being sent to Kasper Lippert-Rasmussen and Victor Tadros, although he did not succeed. David is also an incredibly talented philosopher. His ability to write in a way that is stringent, while also conveying the sense of moral outrage, which is the only appropriate response to the global poverty with which much of his work is dealing, is something I aspire to be able to emulate someday. Though I have probably spent way more time discussing a variety of philosophical topics in the hallway with Rasmus Sommer Hansen than I should have, I have greatly enjoyed doing so. Rasmus was a great colleague and a particularly inspiring teacher, whose lecture on libertarianism convinced me to abandon the crude libertarianism which I subscribed to at the time. This makes it all the more ironic that Rasmus liked to playfully refer to me as the "rightwing bastard." I am grateful to Rasmus for the lesson, if not for the name calling.

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⁴ For those wondering: It was 'Living on a Prayer.'

Tadros, the latter of whom I would also like to thank for insightful comments and supervision during my stay in Warwick.

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Chapter 1: Introduction⁵

This dissertation sets out to investigate the following research question:

What is the relation between the wrongfulness of conduct⁶ and the justifiability of its criminalization?

Some logically possible ways in which the wrongfulness of conduct can relate to the justifiability of its criminalization can immediately be ruled out. Consider, first, the claim that the wrongfulness of conduct is sufficient, all things considered, to justify its criminalization; that is, that all wrongful conduct ought to be criminalized. According to such a view, even trivial wrongdoing like minor lies, minor rudeness, failing to do one's fair share of the dishes, cutting the line at the supermarket, etc. ought to be criminalized. Imagine what it would be like to live in a state that criminalized all wrongful conduct. Not only would such a state be constantly intruding into the minute details of its citizens' personal lives, leaving them with little freedom and no privacy, but enforcing such an expansive criminal law would probably be so expensive that the state would not have the resources to do much else;⁷ no public education, no public healthcare, only criminal justice. Even the staunchest moralist is unlikely to believe that the state should do nothing *but* legally enforcing morality. It is therefore unsurprising that this position is defended by literally nobody in the academic debate.⁸

⁵ I am grateful to Lars Thorup Larsen, Peter Damgaard Marshall, and Lars Petratt-Meyer for useful comments on this chapter.

⁶ Throughout this dissertation, *conduct* refers to both actions and omissions.

⁷ Some countries, notably the United States, already spend astronomical amounts of resources enforcing the currently existing criminal codes (Douglas N Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008), 203.). Enforcing a criminal law prohibiting *all* wrongful conduct would be much more expensive.

⁸ A. P. Simester and Andrew Von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford; Portland, Or: Hart Pub, 2011), 22–3; Thomas Søbirk Petersen, “What Is Legal Moralism?,” *SATS* 12, no. 1 (January 2011): 83, doi:10.1515/sats.2011.006. It is particularly telling that not even Thomas Aquinas, a medieval Catholic monk, thinks that the wrongfulness of conduct is sufficient to justify criminalization, all things considered (Thomas Aquinas, *Summa Theologica*, 1274, 1363, <http://www.basilica.org/pages/ebooks/St.%20Thomas%20Aquinas-Summa%20Theologica.pdf>).

Consider, next, the claim that the wrongfulness of conduct detracts from the justifiability of its criminalization. In this case, it would *ceteris paribus* be less justifiable to criminalize conduct if that conduct is wrongful than if it is permissible. The wrongfulness of conduct might make no difference to the justifiability of its criminalization, but the view that the wrongfulness of conduct detracts from its criminalization simply seems bizarre. To call some conduct wrongful is to say that one ought not to engage in it.⁹ *Ceteris paribus*, the wrongfulness of conduct must therefore detract from the legitimacy of any complaint about not being free to engage in that conduct. Perhaps the legitimacy of potential complaints about not being free to engage in the criminalized conduct is irrelevant to the justification of criminalization, but it does not detract from it. Since this is so, it is difficult to see why the wrongfulness of conduct could detract from the justifiability of its criminalization, and I know of no one defending this claim.

Other than the possibility that there is no relation between the wrongfulness of conduct and the justifiability of its criminalization, we are left with two minimally plausible ways in which the wrongfulness of conduct can relate to the justifiability of its criminalization:

Legal moralism: The wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization.

The wrongness constraint: The wrongfulness of conduct is necessary to justify its criminalization.

Naturally, these brief statements do not do justice to the numerous complexities and nuances of both legal moralism and the wrongness constraint, but they will do for the purposes of this introduction. This dissertation, then, is mainly about the plausibility of legal moralism and the wrongness constraint.

1.1. Relevance and motivation

In the introduction to my copy of *The Age of Alexander* (a selection of Plutarch's work, *Parallel Lives*), the reader is told that:

⁹ Gerald Dworkin, "Devlin Was Right: Law and the Enforcement of Morality," *William and Mary Law Review* 40, no. 3 (1999): 943.

We should not confuse Plutarch's moral aims with his being 'moralistic' or imagine that in the *Parallel Lives* Plutarch lectures his reader on good or bad behavior.¹⁰

It is to be understood that *Parallel Lives* would have been a much worse work if Plutarch's *moral aims* had degenerated into moralism. This reflects how moralism, including legal moralism to the extent the term appears in the public discourse, is widely seen as something unequivocally negative. Being labelled as "the morality police" is *not* a compliment. It is not too difficult to understand why this is, for legal moralism is associated with some truly repugnant legislation. The notion that the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization has, explicitly or implicitly, been invoked in the defense of criminal laws against homosexual relations between consenting adults,¹¹ resistance to the legalization of early abortion,¹² laws forcing Iranian women to wear the hijab,¹³ and French women *not* to wear the burkini.¹⁴ None of these laws are defensible. On that background,

¹⁰ Plutarch, Ian Scott-Kilvert, and Tim Duff, *The Age of Alexander: Ten Greek Lives* (London; New York: Penguin Books, 2011), xx.

¹¹ For all their disagreements over whether the United Kingdom should decriminalize homosexual relations between consenting adults, the 1957 "Report of the Committee on Homosexual Offences and Prostitution" (generally known as the "Wolfenden Report"), Lord Patrick Devlin and H. L. A. Hart could all agree that legally enforcing morality meant criminalizing homosexual intercourse between consenting adults (Sir John Wolfenden et al., "Report of the Committee on Homosexual Offences and Prostitution" (Home Office: Scottish Home Department, 1957), para. 61; Patrick Devlin, *The Enforcement of Morals* (Indianapolis: Liberty Fund, 1963), 12–13; H. L. A. Hart, *Law, Liberty, and Morality* (Stanford, CA: Stanford University, 1963), 6.)

¹² Cf. Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*, Legal Theory Today (Oxford; Portland, Or: Hart Pub, 2007), 144.

¹³ The unit tasked with enforcing this law is colloquially known as the "morality police" Saeed Kamali Dehghan, "Influx of Morality Police to Patrol the Streets of Tehran," *The Guardian*, April 20, 2016, <https://www.theguardian.com/world/2016/apr/20/influx-of-morality-police-to-patrol-the-streets-of-tehran>.

¹⁴ The ticket of a woman fined for wearing a burkini read that she was fined for wearing an outfit which did not respect "good morals and secularism" Ben Quinn, "French Police Make Woman Remove Clothing on Nice Beach Following Burkini Ban," *The Guardian*, August 24, 2016, <https://www.theguardian.com/world/2016/aug/24/french-police-make-woman-remove-burkini-on-nice-beach>.

there might seem to be little doubt about the plausibility of legal moralism and therefore little cause to discuss it.

This, however, would be profoundly mistaken. Yes, much of what passes for the legal enforcement of morality is truly repugnant, but then again much of what passes for the legal enforcement of morality targets conduct that is simply not morally wrong. It is not even remotely plausible that there is something wrong about homosexual relations between consenting adults,¹⁵ the failure to wear a hijab, or wearing a burkini. The best explanation of what is wrong with these criminal laws is precisely that the conduct they target is perfectly innocent. Having a lengthy history of confusing sexual mores and religious taboos with genuine morality,¹⁶ our society in general and, perhaps, self-declared moralists in particular have a poor track record when it comes to getting the content of morality right. This is, however, an exceptionally poor reason for rejecting legal moralism. A fair investigation of the plausibility of legal moralism must consider the merits of the view that the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization when no mistakes are made about what is wrongful in the first place.¹⁷ Doing other-

¹⁵ Richard J. Arneson, "The Enforcement of Morals Revisited," *Criminal Law and Philosophy* 7, no. 3 (October 2013): 452, doi:10.1007/s11572-013-9240-y; Gerald Dworkin, "Devlin Was Right: Law and the Enforcement of Morality," *William and Mary Law Review* 40, no. 3 (1999): 946; Michael S. Moore, *Placing Blame: A Theory of the Criminal Law*, first published in paperback (Oxford; New York: Oxford University Press, 1997), 756.

¹⁶ As Douglas Husak quips: "Historically legal moralist were obsessed with the proscription of so-called sexual vices such as obscenity, homosexuality, prostitution, and the like" (Husak, *Overcriminalization*, 197). The fact that this is so explains why it so important for Moore to stress that, in his view, "morality by and large does not concern itself with much of what passes for social mores in our society on the topic of sex. I think that it trivializes morality to think that it obligates us about what organ we insert into what orifice of what gender of what species" (Moore, *Placing Blame*, 756).

¹⁷ Is the historical prevalence of moral mistakes (i.e. mistakes about what is morally wrong, not to be confused with the "moral error" of error theory) of no special significance for legal moralism at all? I do not think this is exactly right either. The risk that any given moral mistake will adversely affect human flourishing is greatly magnified if that moral mistake ends up being reflected in the criminal law. Since legal moralists would have the wrongfulness play a particularly prominent role in the justification of criminalization, legal moralism increases the risk that moral mistakes will adversely affect human flourishing. While the historical prevalence of moral mistakes should lead us all to recognize our own fallibility in getting the content of morality right, the legal moralist should take the possibility that he is wrong

wise would be begging the question against legal moralism. Furthermore, legal moralists are not committed to the view that the wrongfulness of conduct is sufficient, all things considered, to justify its criminalization. Therefore, legal moralists have no trouble allowing for the possibility that there are some genuine wrongs which ought not to be criminalized, because the negative side-effects of doing so, such as the infringement on autonomy¹⁸ or the costs of enforcement,¹⁹ would be so significant that this provides a reason against criminalization which is weighty enough to prevent the *pro tanto* sufficient justification of criminalizing wrongful conduct from being sufficient, all things considered.²⁰ Thus, even if (and that's a big if) there is something wrong about early abortion, the legal moralist might argue that criminalizing early abortion has such a negative impact on the morally valuable autonomy of women that this outweighs the goodness of legally enforcing morality.²¹

When legal moralism is coupled with a more plausible view of what is morally wrong in the first place together with a rich enough account of the reasons against criminalization, it is no way committed to supporting the repugnant legislation traditionally associated with legal moralism.²² Doing so results in what one might refer to as a distinctively liberal legal moralism.²³

about wrongfulness especially to heart (as is also recognized by the prominent legal moralist Michael S. Moore (Moore, *Placing Blame*, 662–3)).

¹⁸ Ibid., 76–77–795; Michael S. Moore, “Liberty’s Constraints on What Should Be Made Criminal,” in *Criminalization: The Political Morality of the Criminal Law*, ed. R. A. Duff et al., Criminalization Series 4 (New York, NY: Oxford University, 2014), 187–188–202–205; Dworkin, “Devlin Was Right,” 930.

¹⁹ Moore, *Placing Blame*, 663; Moore, “Liberty’s Constraints on What Should Be Made Criminal,” 188; Robert P George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford; New York: Clarendon Press; Oxford University Press, 1993), 42.

²⁰ Husak, *Overcriminalization*, 197.

²¹ Moore, *Placing Blame*, 659–60.

²² Ibid., 661.

²³ Moore claims that his legal moralism is a theory of legislation which is “quite liberal-in-outcome, if not liberal-in-form” (Ibid.). A claim he repeats elsewhere along with the claim that it seems “to make little or no difference in what can be justifiably criminalized” whether one accepts his legal moralism or Douglas Husak’s legal minimalism (Michael S. Moore, “A Tale of Two Theories,” *Criminal Justice Ethics* 28, no. 1 (May 2009): 38, doi:10.1080/07311290902831284). Although one of the papers in this dissertation shall argue that ultimately Moore is mistaken in claiming that his legal moralism is free of illiberal implications for legislation, Moore is right to take pride in his successful effort to detach legal moralism from illiberal moral views and take the reasons against criminalizing what is morally wrong properly into account.

When we consider conduct that is *actually* morally wrong, the notion that the wrongfulness of conduct *pro tanto* justifies its criminalization is compelling indeed.

Furthermore, whereas the legislation traditionally associated with legal moralism is happily becoming a thing of the past²⁴ (albeit slowly, and with some setbacks, like the aforementioned French burkini ban and the 2014 Danish criminalization of bestiality),²⁵ liberal legal moralism seems to be alive and kicking. While the public discourse of Western democracies often pays lip service to the harm principle,^{26, 27} recent years have seen a number of countries criminalize animated child pornography,²⁸ even though there is no empirical evidence that animated child pornography causes harm to children

²⁴ D. J. Frank, B. J. Camp, and S. A. Boutcher, “Worldwide Trends in the Criminal Regulation of Sex, 1945 to 2005,” *American Sociological Review* 75, no. 6 (1 December 2010): 867–93, doi:10.1177/0003122410388493.

²⁵ Final version of the bill

http://www.ft.dk/RIPdf/samling/20141/lovforslag/L134/20141_L134_som_vedtaget.pdf, accessed 13 September 2016 [source in Danish].

²⁶ Cf. John Stuart Mill’s canonical formulation “the only purpose for which the power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others” (John Stuart Mill, *On Liberty and Utilitarianism*, Everyman’s Library 81 (New York: Knopf: Random House, 1992), 12).

²⁷ There might be no better evidence of this than the fact that even many anti-gay activists would rather make ridiculously implausible empirical claims to the effect that homosexuality causes harm to others than attempt to argue that homosexuality is wrongful when arguing that the freedom to form consensual homosexual relations ought to be legally restricted (cf. the passage from Paul Cameron’s “Medical Consequences of What Homosexuals Do” quoted (disapprovingly, of course) by Martha Nussbaum in *From Disgust to Humanity: Sexual Orientation and Constitutional Law*, Inalienable Rights Series (Oxford; New York: Oxford University Press, 2010), 1).

²⁸ Countries that have criminalized animated child pornography since year 2000 include the United States (Protect Act of 2003, 2003, <https://www.congress.gov/bill/108th-congress/senate-bill/151/text> (accessed 13 September 2016) Norway (Norwegian Criminal Code, chapter 19 §204a (https://lovdata.no/dokument/NLO/lov/1902-05-22-10/KAPITTEL_2-12#§204a [Source in Norwegian])), South Africa (Film and Publications Amendment Bill, 2003, (<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2003/appendices/03111b61-03.pdf>)), and the United Kingdom (Coroners and Justice Act, 2009, part 2, chapter 2, s. 65 (<http://www.legislation.gov.uk/ukpga/2009/25/part/2/chapter/2> (accessed 13 September 2016))).

by leading those who consume it to sexually abuse actual children at some later point.²⁹ It has also seen the expansion of criminal laws targeting what might be called “unsympathetic speech,” such as the agreement of a majority of the Danish legislature to work towards criminalizing “explicit approval of terrorism, manslaughter, rape, violence, incest, pedophilia, deprivation of liberty, coercion, and polygamy in the context of religious instruction”³⁰ earlier this year.³¹ To be sure, the actions which it is made criminal to explicitly approve are (mostly) harmful,³² and any plausible version of the harm principle will be able to cover incitements to engage in harmful conduct, but *explicit approval* of harmful conduct might very well fall short of *incitement*.³³ In addition to these more recent examples, the harm principle also struggles to account for the justifiability of longstanding criminal prohibitions of harmless trespassing,³⁴ so-called “harmless rapes” of unconscious victims

²⁹ Suzanne Ost, *Child Pornography and Sexual Grooming: Legal and Societal Responses*, Cambridge Studies in Law and Society (New York: Cambridge University Press, 2009), 124–31). See also *Ibid.*, 110–12.

³⁰ “Agreement between the Government, and the Social Democrats, Danish People’s Party and the Conservative People’s Party regarding initiatives against clergy who seek to undermine Danish laws, values and support parallel legal systems” (2016), p. 5 <http://www.km.dk/fileadmin/share/kursus/Aftalepapir.pdf>, accessed 13 September 2016 [source in Danish, my translation].

³¹ For the benefit of the, no doubt numerous, future readers of this summary, “this year” would be 2016.

³² Polygamy might be problematic in that regard (Douglas N. Husak, “Polygamy: A Novel Test for a Theory of Criminalization,” in *Criminalization: The Political Morality of the Criminal Law*, ed. R. A Duff et al., Criminalization Series 4 (New York, NY: Oxford University, 2014), 213–31).

³³ Consider, for instance, the predicament in which such a law would place the imam: It seems to be a religious tenet of Islam that its prophet Muhammed led a perfect life. Thus, the imam cannot avoid explicitly approving his actions. However, the life of Muhammed included polygamy. Suppose that, as is reasonable, the imam handles this by saying that the context of early seventh century Arabia was radically different from that of today’s society, and though none of Muhammed’s actions were wrongful back then (indeed they were all perfect), some of the things Muhammed did would be wrongful of others to do *today*. Granting *arguendo* that polygamy is rightly criminalized, such a statement still falls far short of encouraging or inciting polygamy. If some believers understand this explicit expression of the approval of the actions of Muhammed as encouraging them to take multiple wives, then those believers have not been paying attention; nevertheless, the imam would still seem to be in violation of the proposed law.

³⁴ Arthur Ripstein, “Beyond the Harm Principle,” *Philosophy & Public Affairs* 34, no. 3 (June 2006): 215–45, doi:10.1111/j.1088-4963.2006.00066.x.

who never find out that someone had intercourse with them without their consent and do not suffer any adverse consequences,³⁵ and the desecration of corpses (as long as no one finds out).³⁶ While I think we would be right to abolish some of these laws, some of these prohibitions obviously seem justified. At any rate, none of these prohibitions are repugnant in the same manner that the criminalization of homosexuality is. Liberal legal moralism is, thus, both sufficiently *prima facie* attractive and widespread enough for its plausibility to be worth investigating (admittedly, however, the mere fact that the harm principle cannot justify these laws does not mean that they are instances of legal moralism; some third principle might be able to justify the criminalization of some of the mentioned behavior).³⁷

However, the strongest point in favor of the relevance of normative inquiry into the relation between the wrongfulness of conduct and the justification of its criminalization is the profound and coercive impact of criminal law on the life of individuals. When the state criminalizes conduct, it declares its intention to—of its own accord—identify those who engage in said criminalized conduct and subject them to state punishment. This is a threat that coerces those whom it deters from engaging in the criminalized conduct in a very direct manner.³⁸ Then there are the taxpayers who must cover the—often considerable³⁹—cost of enforcing criminal laws; they too are coerced by criminalization, for extra taxation is also coercion.⁴⁰

This alone would be enough reason to scrutinize the relation between the wrongfulness of conduct and the justification of its criminalization. What

³⁵ John Gardner and S. Shute, “The Wrongness of Rape,” in *Offences and Defences*, ed. John Gardner (Oxford University Press, 2000); Duff, *Answering for Crime*, 128–9.

³⁶ Moore, *Placing Blame*, 646.

³⁷ Like Arthur Ripstein’s sovereignty principle (Ripstein, “Beyond the Harm Principle”) or Duff and Marshall’s view that crimes are *public wrongs* (Sandra E. Marshall and R. Anthony Duff, “Criminalization and Sharing Wrongs,” *Can JL and Jurisprudence* 11 (1998): 7). Given the potentially infinite range of what could be substituted for X in the sentence “the fact X about some conduct is *pro tanto* sufficient to justify its criminalization,” it is impossible to identify any particular criminal prohibition that could *only* be justified by an appeal to the wrongfulness of the criminalized conduct, for such a prohibition would have to target conduct that had no other features than moral wrongfulness.

³⁸ Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 6.

³⁹ Husak, *Overcriminalization*, 203.

⁴⁰ Michael Blake, “Distributive Justice, State Coercion, and Autonomy,” *Philosophy & Public Affairs* 30, no. 3 (July 2001): 276ff, doi:10.1111/j.1088-4963.2001.00257.x.

makes inquiry into the justification of criminal laws of special interest, however, is neither the impact of criminal prohibitions on those whom they deter nor on the tax-payers who pay for their enforcement; rather it is what happens when the state is forced to demonstrate the credibility of its threat to subject those who engage in the criminalized conduct to state punishment. While it is usually hoped that the threat of punishment will deter *some* from engaging in the conduct,⁴¹ it is unrealistic to expect that it will deter *everybody* from engaging in it. It is precisely when the threat of state punishment fails to deter and the state is forced to demonstrate the credibility of its threat that it becomes apparent just how extreme this threat is. As a general rule, the worst thing decent states do to their own citizens is subjecting them to the more severe forms of state punishment.⁴² Offenders who serve lengthy prison sentences are deprived of their liberty for an extended period of time. This is certainly bad enough in itself. As Husak points out, “prison life is boring and empty” even at its best.⁴³ As he also points out, inmates retain virtually no privacy rights.⁴⁴ What is at least as important is that incarcerated offenders might be unable, or severely hampered in their ability, to pursue their goals and projects for the duration of their sentence. It is hard to have anything resembling a normal family life or career from within a prison cell.⁴⁵ If the offender is lucky, the pursuit of these goals and projects can be put on hold. However, this is often not the case; not all jobs or partners will wait while one serves a lengthy prison sentence, and no children will stop growing up while their parent is incarcerated. Offenders might find that they have neither employment nor a family to return to upon having served their sentence. Even if one was incarcerated in an ideal prison, life as an inmate would come with these hardships. This is important to recognize. What is at least as important to recognize is that the conditions of the prisons are anything but ideal. As Schonsheck reminds us, “[a]lthough imprisoned as the perpetrators of crimes, inmates very often become the victims of crimes. In some instances, inmates are subjected to the violence of prison guards and other prison officials. More often inmates are subjected to the violence of an-

⁴¹ Cf. Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 6.

⁴² Husak, *Overcriminalization*, 95.

⁴³ *Ibid.*, 5.

⁴⁴ *Ibid.*, 6.

⁴⁵ Joel Feinberg, *The Moral Limits of the Criminal Law Vol. 1: Harm to Others* (New York; Oxford: Oxford University Press, 1984), 4.

other inmate, or other inmates: robbery, assault, battery, rape and murder.”⁴⁶

Admittedly, not all convicted offenders serve prison sentences. Partly for this reason, it is important to realize that serving the sentence itself might not be the worst aspect of an encounter with the criminal justice system.⁴⁷ Prior to serving his or her sentence, an offender is arrested and brought to trial. Being arrested is a humiliating event (almost) whenever and wherever it occurs. The trial itself is often a costly affair for the defendant. Depending on the crime in question, the trial might reveal information about the defendant which she would strongly have preferred remained private. A criminal conviction might continue to impose disadvantages on one long after the sentence has been served. In some jurisdictions, it can lead to the permanent loss of certain rights, such as the right to vote. Even when this is not the case, in Feinberg’s words, a criminal conviction “brand[s] him [the offender] with society’s most powerful stigma.”⁴⁸ Perhaps it because they have been branded with this stigma that so many ex-offenders struggle to find employment and housing.⁴⁹

All coercion requires justification,⁵⁰ but the question of the justification of the coercion exercised by acts of criminalization is more pressing than most, for the criminal law has an unparalleled potential to ruin lives due to its intimate connection with the practice of criminal punishment. Thus, it is especially important that the state is justified in doing so when it criminalizes conduct and, therefore, of special importance to investigate what makes the criminalization of conduct justifiable.⁵¹ For similar reasons, the works with which this dissertation has primarily engaged have all focused exclusively on the criminal law.⁵²

⁴⁶ Jonathan Schonscheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law*, Law and Philosophy Library, v. 19 (Dordrecht; Boston: Kluwer Academic Publishers, 1994), 5.

⁴⁷ The following draws largely on Schonscheck’s vivid account of such an encounter (Ibid., 2–6).

⁴⁸ Feinberg, *Harm to Others*, 4.

⁴⁹ Husak, *Overcriminalization*, 6.

⁵⁰ Gerald F. Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World* (New York; Cambridge: Cambridge University Press, 2012), 479–508; Blake, “Distributive Justice, State Coercion, and Autonomy,” 265.

⁵¹ Feinberg, *Harm to Others*, 4; Schonscheck, *On Criminalization*, 2.

⁵² Moore, *Placing Blame*; Feinberg, *Harm to Others*; Joel Feinberg, *The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing* (Oxford University

1.1.1. Liberal legal moralism in action: Australian legislation on animated child pornography

If these considerations about the hardships of criminal punishment sound abstract, there are others for which they are all too real. In 2008, Alan John McEwen, an Australian citizen, was sentenced to pay a fine of 3000 Australian Dollars⁵³ and enter into a 2-year good behavior bond⁵⁴ for possessing sexual depictions of the characters from the Simpsons (three of whom are underage).⁵⁵ Australian law draws no principled distinction between “real”⁵⁶ and animated child pornography.⁵⁷ McEwen was thus convicted under section 474.19 of the Australian Criminal Code, which prohibits “using a carriage service for child pornography material.”⁵⁸ Though McEwen’s punishment might seem fairly mild, it is worth noting that the offence of which McEwen was found guilty carries a maximum 10-year prison sentence.⁵⁹

More importantly, McEwen’s case vividly illustrates how the disadvantages of having a criminal conviction are in no way confined to the formal punishment. McEwen’s conviction made public his sexual attraction to depictions of the underage members of the Family Simpson. Even those who consume “regular” (perfectly legal) pornographic material depicting mainstream sexual acts would usually prefer that their habits remained private. It must have been extremely shameful for McEwen to have his highly unusual browsing habits revealed for the world to see; a world that includes his family, friends, and perhaps a romantic partner, who one might imagine would not react positively to this new information about her boyfriend/husband. One can only hazard a guess at how the conviction affected McEwen’s personal relations, but it is difficult to imagine that it had a positive effect. In that connection, it is worth noting that McEwen’s possession of pornograph-

Press, 1990); George, *Making Men Moral*; Simester and Von Hirsch, *Crimes, Harms, and Wrongs*; Husak, *Overcriminalization*; Duff, *Answering for Crime*.

⁵³ Equivalent to USD 3,170.

⁵⁴ An Australian sentencing option where the offender must promise to be of good behavior for a certain period of time. Breach of the bond is usually sanctioned by the payment of a predetermined sum of money (Legal Services Commission of South Australia, <http://www.lsc.sa.gov.au/dsh/ch10s11.php>).

⁵⁵ *McEWEN v SIMMONS & ANOR* [2008] NSWSC 1292

⁵⁶ That is, photographic depictions of episodes of sexual abuse of children that have actually occurred.

⁵⁷ In this respect, Australia is like Sweden (Swedish Criminal Code, chapter 16, §10 (<http://www.notisum.se/rnp/sls/lag/19620700.htm> [source in Swedish])).

⁵⁸ http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html

⁵⁹ *McEWEN v SIMMONS & ANOR* [2008] NSWSC 1292

ic drawings of the underage members of the Simpsons would have been publicly revealed during the trial, even if his defense strategy—arguing that since the characters appearing in the Simpsons only have four digits on each hand, their physical characteristics are too unlike those of humans for the drawings to qualify as depicting “persons”⁶⁰—had been successful and he had been acquitted.

One might also note that McEwen’s full name appeared both in the official court documents and in national news outlets in connection with the conviction.⁶¹ Indeed, it is necessary to mention his name in order to cite the case. It might be argued that it is McEwen’s good fortune that he shares his name with a former Australian prime minister whose Wikipedia entry occupies the top spot if one was to Google the name “Alan John McEwen,” something which employers who receive a job application from McEwen are likely to do. Still, at the time of writing more than 8 years later, the story about his conviction remains on the first search page.⁶² There is every reason to doubt that the AUD 3000 fine had a more significant, adverse effect on McEwen’s life than the public revelation of the fact that he looked at pornographic drawings of the underage members of the Simpsons family and the stigma of a conviction for accessing child pornography, which must have been significant indeed. Perhaps it is only right that McEwen suffer all of these consequences for his conduct. Regardless, his story illustrates what is at stake when conduct is criminalized and that the punishment itself may not be the worst part of a criminal conviction. It is one thing to agree that there is something morally problematic about the consumption of animated child pornography; it is quite another to think that the state should take it upon itself to identify the consumers of animated child pornography and bring them to trial, revealing their shameful habit to the public.

⁶⁰ McEWEN v SIMMONS & ANOR [2008] NSWSC 1292

⁶¹ Cf. “Children Sex Acts Based on The Simpsons Are Ruled Pornographic,” *Herald Sun*, accessed 26 November 2016, <http://www.heraldsun.com.au/entertainment/television/man-convicted-of-simpsons-porn/story-e6frf9ho-111118254071>; “Fake Simpsons Cartoon Is Child Porn, Judge Rules,” *ABC News*, 8 December 2008, <http://www.abc.net.au/news/2008-12-08/fake-simpsons-cartoon-is-child-porn-judge-rules/233562>.

⁶² Google search on Alan John McEwen: <https://www.google.dk/search?q=Alan+John+McEwen&oq=Alan&aqs=chrome.o.69i59l2j69i57j69i59j0l2.1111jo7&sourceid=chrome&ie=UTF-8#safe=active&q=Alan+John+McEwen> [Accessed 10 November 2016].

1.1.2. The vulnerability of wrongdoers

Even those who believe that criminal laws against possessing animated child pornography are unjustified will be reluctant to come to the defense of people like McEwen. For even if those who consume animated child pornography are *victims* of an unjust law, they are not *innocent* victims in the same manner as homosexuals were innocent victims of the various criminal prohibitions on homosexual relations between consenting adults. Unlike homosexuals, those who consume animated child pornography are guilty of doing something which it is plausible is genuinely morally wrong.⁶³ It is much harder to identify with the plight of the unjustly punished wrongdoer than it is to identify with the plight of the unjustly punished homosexual. Thousands will march in gay pride parades, but who will march for the benefit of those convicted under unjust laws against possessing animated child pornography? In a way, this is as it should be, for even those wrongs that ought to be legal are, by definition, not something to be proud of engaging in. However, this also leaves wrongdoers particularly vulnerable to having their conduct criminalized regardless of whether doing so is justifiable.

To see why this is so, suppose that you are a legislator who wants to appear particularly tough on the sexual abuse of children. Much to your regret, you find that there is little room for improvement in your country's criminal statutes regarding the sexual abuse of children and child pornography. How can you then signal to your electorate how much you care about preventing the sexual abuse of children? Why not propose that your country criminalize the possession of animated child pornography as well! To be sure, there is no evidence that this would prevent the sexual abuse of actual children,⁶⁴ but how much opposition is the bill really likely to meet on those grounds? There will certainly be no organized opposition from the consumers of animated child pornography, for that would require that they admit having consumed animated child pornography. Others with misgivings about the law might also be reluctant to put up too much of a fight. After all, the consumers of animated child pornography are difficult to sympathize with, and people might be fearful of being perceived as defending animated child pornography itself

⁶³ Cf. John Danaher, "Robotic Rape and Robotic Child Sexual Abuse: Should They Be Criminalised?," *Criminal Law and Philosophy*, 13 December 2014, doi:10.1007/s11572-014-9362-x. which advances an argument for the wrongness of intercourse with under-age sex robots which is readily applicable to animated child pornography.

⁶⁴ Ost, *Child Pornography and Sexual Grooming*, 124–31).

rather than its legality.⁶⁵ This, then, is the very real sense in which H.L. Mencken was right in claiming that:

The trouble with fighting for human freedom is that one spends most of one's time defending scoundrels. For it is against scoundrels that oppressive laws are first aimed, and oppression must be stopped at the beginning if it is to be stopped at all.⁶⁶

I am neither arguing that criminalizing animated child pornography is not justified⁶⁷ nor that liberal legal moralism is problematic. Rather, I am arguing that given the destructive consequences of even relatively mild punishment for human flourishing and given the vulnerability of wrongdoers to having their conduct criminalized, it is of special interest to assess whether the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization.

As a final note, the relation between the wrongfulness of conduct and the justifiability of its criminalization is also relevant for how to *argue* about criminalization. When a legislator wishes to argue that some conduct ought to be criminalized, can she begin with an argument that the conduct is morally wrong or does she have to begin with something else, such as the argument that criminalizing the conduct would prevent harm? The interest of investigating the plausibility of legal moralism therefore does not depend on legal moralism having different implications for the scope of the criminal law than its main rivals.

⁶⁵ One should both think and hope that few politicians are as cynical as the one described here. The point of the story, however, is to showcase how little opposition such legislation is likely to meet, regardless of whether it is justified. This point would not be undermined if the legislator sincerely believed that such a law would prevent the sexual abuse of children or if his motivations were moralistic and he was completely upfront about this.

⁶⁶ While this remark is commonly attributed to H. L. Mencken, I confess that I have been unable to find a source apart from "some guy on the Internet who claims that H. L. Mencken once said this." Since the remark is not quoted in order to impute any particular position to H. L. Mencken, but simply because it makes a good point relevant to the purpose of this dissertation, I have chosen to quote it anyway. Should it turn out that Mencken never said any such thing, I would certainly not be sorry to have the remark attributed directly to me.

⁶⁷ However, the *Australian law* on the matter seems clearly problematic by virtue of the harshness of the maximum penalty and the fact that possessing animated child pornography is not considered a distinct (lesser) offence than possessing "real" child pornography.

1.2. Overview and contribution

As stated in the beginning of this chapter, answering the overall question is mainly a matter of assessing the plausibility of legal moralism and the wrongness constraint. Doing this involves answering a number of further questions, such as, what is the most plausible version of legal moralism and/or the wrongness constraint? Insofar as one important way to probe the plausibility of principles concerning what ought to be criminalized is to investigate whether the principle has plausible implications for what ought to be criminalized, answering the question also involves investigating the legislative implications of the most plausible version of legal moralism and the most plausible version of the wrongness constraint. In turn, the legislative implications of both depend heavily on first-order claims about what is morally wrong. Additionally, the legislative implications of legal moralism also depend on an account of the reasons against criminalizing wrongful conduct that might prevent the *pro tanto* sufficient justification of criminalizing wrongful conduct from being sufficient, all things considered (as already noted, contemporary liberal legal moralism attempts to avoid the embarrassing legislative implications traditionally associated with legal moralism by adopting a thin account of what is morally wrong and a thick account of the reasons against criminalizing what is morally wrong). The dissertation seeks to answer these questions through five articles:

1. Jens Damgaard Thaysen, "Defining Legal Moralism," *SATS* 0, no. 0 (26 January 2015), doi:10.1515/sats-2014-0013.
2. Jens Damgaard Thaysen, "Infidelity and the Possibility of a Liberal Legal Moralism," *Criminal Law and Philosophy*, 28 March 2015, doi: 10.1007/s11572-015-9370-5.
3. Jens Damgaard Thaysen (working paper), "Law Letters: On the Correspondence between the Justification of Criminalization and the Justification of the Coercive State." (Henceforth, "Law Letters")
4. Jens Damgaard Thaysen (working paper), "Hamburger-Hating Terrorists, The Duty View of Punishment, and The Wrongness Constraint."
5. Jens Damgaard Thaysen (working paper), "I Would Do Anything for Law (and that's a problem): Criminalization, Value, and Motives." (Henceforth, "I Would do Anything for Law")

"Defining Legal moralism" argues that legal moralism should be understood as the view that for any *x* it is always a *pro tanto* reason for justifiably imposing legal regulation on *X* that *X* is morally wrong, and distinguishes between some different types of legal moralism. This dissertation describes legal moralism as the view that "the wrongfulness of conduct is *pro tanto* suffi-

cient to justify its criminalization.” While this partly reflects the focus on one particular type of legal moralism, namely that concerned with the criminal law, it also reflects that during the more than 2 years since the last submission of the manuscript for “Defining Legal moralism” I have come to prefer a slightly different, although (almost) substantially similar formulation of legal moralism. I shall comment on the reason for this slight difference later.⁶⁸ Nevertheless, the arguments employed in “Defining Legal moralism” against accepting competing definitions of legal moralism, as well as the distinctions between different types of legal moralism, remain valid. “Defining Legal moralism” contributes to answering the overall question by clarifying the claim to be discussed in order to assess the plausibility of legal moralism.

“Infidelity and the Possibility of a Liberal Legal Moralism” argues that Michael S. Moore’s influential and compelling version of liberal legal moralism implies that we should accept the criminalization of infidelity.⁶⁹ This contributes to answering the overall questions by clarifying the legislative implications of contemporary legal moralism, surveying the relevance of the reasons against criminalizing what is morally wrong, and, most importantly, raising a number of doubts about whether there can be such a thing as liberal legal moralism. While “Infidelity and the Possibility of a Liberal Legal moralism” does not argue that infidelity ought not to be criminalized, the article exposes legal moralism as having implications for the scope of the criminal law that many will find counterintuitive.

“Law Letters” develops and defends what it dubs The Correspondence Requirement, according to which a fact, *F*, *pro tanto* justifies criminalizing some conduct, *C*, only if *F* makes criminalizing *C* serve an aim which the existence of a coercive state is *pro tanto* justified by serving. It argues that we should accept The Correspondence Requirement and that, if we do so, we must reject legal moralism, because no plausible justification of the existence of the coercive state is such that the wrongfulness of some conduct makes the criminalization of that conduct serve an aim which the existence of a coercive state is *pro tanto* justified by serving. This contributes to answering the overall question by providing a novel and distinct argument against legal moralism, which does not rely on the alleged counter-intuitiveness of the legislative implications of legal moralism.

“Hamburger-Hating Terrorists, the Duty View of Punishment, and the Wrongness Constraint” discusses whether the wrongness constraint should be accepted. It argues that we should accept a version of the wrongness con-

⁶⁸ In chapter 4, section 4.3.1.

⁶⁹ Defended in Moore, *Placing Blame*; Moore, “A Tale of Two Theories”; Moore, “Liberty’s Constraints on What Should Be Made Criminal.”

straint according to which: *The wrongfulness of breaking a criminal statute prohibiting some conduct and the wrongfulness of attempting to evade punishment for breaking a criminal statute prohibiting that conduct are jointly necessary to justify criminalizing it.* Since both common versions of the wrongness constraint have the implication that the wrongfulness of breaking a law against that conduct alone is necessary to justify the criminalization of that conduct,⁷⁰ “Hamburger-Hating Terrorists, the Duty View of Punishment, and the Wrongness Constraint” also argues that these stronger versions of the wrongness constraint should be rejected. The wrongness constraint thus contributes to answering the overall question by developing a novel version of the wrongness constraint, arguing that we should reject stronger versions of the wrongness constraint and accept this version.

“I Would Do Anything for Law” further examines one of Michael S. Moore’s reasons against criminalizing what is morally wrong, namely, his concern that criminalizing wrongful conduct will reduce the number of people who refrain from that conduct for the right reason. It raises some objections to Moore’s argument for this claim and suggests that it is unlikely to be true in a non-trivial number of cases. It suggests that Moore’s argument instead gives us reason to think that criminalizing wrongful conduct will reduce the number of people who are *correctly perceived* as refraining from that conduct for the right reason and that there is something regrettable about this fact. “I Would Do Anything for Law” contributes to answering the overall questions by delving further into the significance of the reasons against the criminalization of what is morally wrong and how they affect the implications of legal moralism.

In combination, the five articles making up this dissertation together with this summary provide the following answer to the overall question:

It is necessary to justify criminalizing some conduct, C, that it is either wrong to break a criminal statute prohibiting C or wrong to attempt to avoid punishment for breaking a criminal statute prohibiting C. There is no other relation between the wrongfulness of conduct and the justifiability of its criminalization.

⁷⁰ That is, this is an implication of both the *strong* and the *weak wrongness constraint*, since the former holds that it “is permissible to criminalize some conduct only if that conduct is wrong independently of its being criminalized” (Victor Tadros, “Wrongness and Criminalization,” in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (New York, NY: Routledge, 2012), 158) and the latter holds that it “is permissible to criminalize some conduct only if that conduct is wrong either independently of its being criminalized or as a result of its being criminalized” (Ibid.).

Since this answer amounts to a rejection of the legal moralist claim that the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization as well as any stronger version of the wrongness constraint, this dissertation thus argues that there is much less of a relation between the wrongfulness of conduct and the justifiability of its criminalization than is often supposed. Although one of the most important contributions of this dissertation, namely providing an argument for rejecting legal moralism, is negative, the dissertation also makes two significant positive contributions by suggesting a novel version of the wrongness constraint and defending and developing the correspondence requirement. The latter makes a significant contribution to refining, clarifying, and strengthening the position that normative theories of the criminal law are *political* in the sense that the following is correct:

The political claim: Some (normative or descriptive) fact about the state, S, has implications for whether a feature, F, of some conduct, C, is *pro tanto* sufficient to justify its criminalization.⁷¹

The correspondence requirement is a distinct and novel version of this claim, as is the argument advanced by “Law Letters” in its favor.

The summary of this dissertation is structured as follows. A number of preliminaries are settled in chapter 2. In chapter 3, the methodology employed by this dissertation is presented and discussed. In addition to clarifying the method of normative political theory, it attempts to alleviate some of the worries about the use of intuitions and peculiar hypothetical cases. Chap-

⁷¹ This claim may be fleshed out in different ways depending on the relevant *fact*. The vague and abstract statement provided here is meant to express the common core of a certain family of positions. The most famous member of this family is the view provided by Anthony Duff and Sandra Marshall that only *public wrongs* can justifiably be criminalized (Marshall and Duff, “Criminalization and Sharing Wrongs”). *Public wrongs* being wrongs which violate the values by which the polity defines itself, the proper aims and scope of the criminal law thus depend upon an account of those values (Duff, *Answering for Crime*, 142–3). Other members of this family include the views of Douglas Husak (Husak, *Overcriminalization*, 132–4) and A. P. Simester and Andreas von Hirsch (Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 16–17, 30). While Duff, Husak, Simester and von Hirsch all explicitly defend the claim that the proper scope of the criminal law depends upon some fact about the state, there are also less outspoken members of this family, including Arthur Ripstein, who writes as if this claim is true (Arthur Ripstein, *Force and Freedom Kant’s Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), <http://site.ebrary.com/id/10402504>). *The correspondence requirement* is a distinct member of this family, which, as I shall later argue in detail, breaks some new ground compared to its other family members. More on this in chapter 7, sections 7.2 and 7.3.

ter 4 discusses the core claim of legal moralism, defends the definition of legal moralism employed in this dissertation, and argues that conceiving the core claim of legal moralism as one exclusively concerned with harmless wrongdoing is problematic. It then turns to the details of Michael S. Moore's liberal legal moralism, the version of legal moralism with which this dissertation shall mainly engage. It explores its foundations in Moore's theory of punishment and the sources of its liberal character. This chapter contextualizes and summarizes the contributions of "Defining Legal Moralism" and "I Would Do Anything for Law." Chapter 5 presents and discusses the various arguments that have been advanced in favor of legal moralism. It argues that although some of these arguments are fail, those which do not make a compelling case for legal moralism. Chapter 6 discusses the objections to legal moralism on account of having counterintuitive implications for what ought to be criminalized. It argues that there are a number of ways for liberal legal moralism to defend itself against such objections and that, consequently, most of these objections fail. In so doing, it contextualizes and summarizes the contribution of "Infidelity and the Possibility of a Liberal Legal Moralism." Chapter 7 presents and discusses "theory-driven objections"⁷² to legal moralism on the basis of Millian liberalism and political normative theories of the criminal law. It argues that Millian liberalism has almost nothing to offer as a critical perspective on legal moralism. Conversely, the objections to legal moralism on the basis of political normative theories of the criminal law are on the right track. This chapter contextualizes and summarizes the contribution of "Law Letters", which develops and strengthens those objections. Chapter 8 both presents the theory of the wrongness constraint and discusses its plausibility. In so doing, it contextualizes and summarizes the contribution of "Hamburger-Hating Terrorists, the Duty View of Punishment, and the Wrongness Constraint," which argues that the two dominant versions of the wrongness constraint must both be rejected in favor of a weaker version. Chapter 9 concludes.

⁷² While there is no principled distinction between the objections discussed in chapter 6 and those discussed in chapter 7, a semi-arbitrary division into two kinds of objections is preferable to a single 40-page chapter.

Chapter 2: Preliminaries

The purpose of this chapter is to settle some preliminaries regarding the research question and the meaning of the concepts that play a central role throughout this dissertation. While this chapter is thus unlikely to be particularly exciting to read (or write), it will hopefully prevent any misunderstandings about the questions asked and the answers given in the work at hand.

Section 2.1 makes a few remarks about *normative theories of the criminal law*, which is the sort of theory that legal moralism (and its rivals) is. Sections 2.2–2.4 all clarify various parts of the research questions: Section 2.2 is devoted to clarifying the *conduct* and *criminalization*, section 2.3 clarifies the meaning of *wrongfulness*, whereas section 2.4 clarifies the meaning of *justifiability*. While a few substantive points are scattered throughout this chapter, most of it is merely concerned with informing the reader of the terminology used throughout the dissertation.

2.1. What is a normative theory of the criminal law?

Throughout this dissertation, legal moralism and its rivals shall be referred to as *normative theories of the criminal law*. Normative theories of the criminal law make claims about *what* is *pro tanto* sufficient to justify the criminalization of conduct.⁷³ That is, they are all variations on the following:

A fact, F, about some conduct, C, is *pro tanto* sufficient to justify criminalizing C.

According to the definition of legal moralism to be defended in chapter 4, legal moralists claim the fact, F, is that C is wrongful. The adherents to Mill's harm principle claim that the fact, F, is that criminalizing C would prevent

⁷³ Thus, the idea of a normative theory of the criminal law is fairly close to Feinberg's concept of a *liberty-limiting principle* (Joel Feinberg, *The Moral Limits of the Criminal Law Vol. 1: Harm to Others* (New York; Oxford: Oxford University Press, 1984), 7–10) and Moore's idea of a *theory of the proper legislative aim* (Michael S. Moore, *Placing Blame: A Theory of the Criminal Law*, first published in paperback (Oxford; New York: Oxford University Press, 1997), chap. 16).

harm to others.⁷⁴ Duff and Marshall claim that the fact, F, is that C is publicly wrong,⁷⁵ which is a political normative theory of the criminal law, because whether a wrong is *public* depends upon a fact about the state, namely the core values by which the polity defines itself.⁷⁶ All of the normative theories of the criminal law considered in this dissertation focus either on some feature of the criminalized conduct or some effect about criminalizing that conduct.

Normative theories of the criminal law can either be *complete* or *incomplete*. A complete normative theory of the criminal law purports to provide an exhaustive list of which facts about some conduct are *pro tanto* sufficient to justify its criminalization. Joel Feinberg endorses both of the following incomplete normative theories of the criminal law:

The harm principle: The fact that criminalizing some conduct, C, would prevent harm to others is *pro tanto* sufficient to justify criminalizing C.

The offense principle: The fact that criminalizing some conduct, C, would prevent offense to others is *pro tanto* sufficient to justify criminalizing C.

Since Feinberg affirms both of the above, neither of these principles provides an exhaustive account of what is *pro tanto* sufficient to justify criminalization. However, since Feinberg affirms that the harm principle and the offense principle *jointly* provide such an exhaustive account, they jointly constitute a complete normative theory of the criminal law, namely Feinberg's liberalism.⁷⁷ Legal moralism is typically affirmed as a complete normative theory of the criminal law. Incomplete normative theories of the criminal law are not mutually exclusive, but complete normative theories of the criminal law are.⁷⁸ One way to justify the wrongness constraint is to show that the correct complete normative theory of the criminal law is such that the fact, F, only applies to wrongful conduct, such that there is only ever a *pro tanto* sufficient justification to justify conduct if it is wrongful.⁷⁹

⁷⁴ John Stuart Mill, *On Liberty and Utilitarianism*, Everyman's Library 81 (New York: Knopf: Distributed by Random House, 1992); Feinberg, *Harm to Others*.

⁷⁵ Marshall and Duff, "Criminalization and Sharing Wrongs."

⁷⁶ Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*, Legal Theory Today (Oxford; Portland, Or: Hart Pub, 2007), 143.

⁷⁷ Feinberg, *Harm to Others*, 14–18.

⁷⁸ Note, however, that while there can only be one correct complete normative theory of the criminal law, other allegedly *complete* normative theories of the criminal law are correct *incomplete* normative theories of the criminal law if they are proper subsets of the correct complete normative theory of the criminal law.

⁷⁹ Cf. Moore, *Placing Blame*, 661–2.

2.2. Conduct and criminalization

Recall that this dissertation is an inquiry into the relation between the wrongfulness of conduct and the justifiability of its criminalization. Chapter 1 has already explained how *relation* is to be understood. Section 2.4 below shall elaborate slightly on how one should understand *pro tanto*. All that shall be added here is that the claim “*the wrongfulness of conduct is pro tanto sufficient to justify its criminalization*” and the claim “*the wrongfulness of conduct pro tanto justifies its criminalization*” should be read as having the same meaning. The latter version occasionally appears in the articles and has probably also slipped in a few places in the summary.

A few brief remarks are sufficient to clarify the meaning of *conduct* and *criminalization*. *Conduct* is meant to refer to anything that can be wrongful and for which an individual can be responsible; at minimum, this includes actions and omissions. The dissertation takes no stance on whether it could also include other things such as character. The *criminalization* of conduct is the enactment of a criminal law prohibiting that conduct. A law is part of the criminal law when one becomes liable to state punishment by breaking that law.⁸⁰ That which separates state punishment from other state responses to conduct is that punishment involves both hard treatment and censure of the punished.⁸¹

2.3. Wrongfulness

All instances of wrongfulness refer to moral wrongfulness. They refer to what is *actually* morally wrong; that is, in the terms of the Hart-Devlin debate it is concerned with the legal enforcement of *critical*—not *positive*—morality.⁸² Thus, what is claimed, generally believed, or considered by reasonable people on busses to and from Clapham⁸³ to be morally wrong is only relevant insofar as those facts determine what is actually morally wrong.

Throughout this dissertation, claims about the wrongfulness or permissibility of any and all conduct except acts of criminalization shall be referred to as being claims about the *content of substantive morality*. Determining the content of substantive morality is a task far beyond the scope of this disserta-

⁸⁰ Husak, *Overcriminalization*, 78; Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 1; Feinberg, *Harm to Others*, 3–4.

⁸¹ Husak, *Overcriminalization*, 92; Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 11–16.

⁸² H. L. A. Hart, *Law, Liberty, and Morality* (Stanford, CA: Stanford University, 1963), 17–24.

⁸³ Cf. Devlin, *The Enforcement of Morals*, 15.

tion and shall not be attempted. Whenever it is necessary to make a non-trivial claim about the content of substantive morality, the articles comprising this dissertation will provide an argument for that claim—and that claim only. Accordingly, “Infidelity and the Possibility of a Liberal Legal Moralism” defends the claim that infidelity to one’s romantic partner is morally wrong, and “Hamburger-Hating Terrorists, the Duty View of Punishment, and the Wrongness Constraint” defends the claim that a credible terrorist threat to detonate a number of bombs unless those who consume hamburgers are not punished does not make it wrong to consume a hamburger. The distinction between claims about the content of substantive morality and claims about the relation between the wrongfulness of conduct and the justifiability of its criminalization will play some role in chapter 4, where it will be argued that the failure to distinguish disagreements over the content of substantive morality from disagreements about the relation between the wrongfulness of conduct and the justifiability of its criminalization is a flaw that mars a number of debates about the plausibility of legal moralism.

2.4. Justifiability

The *justifiability* of some act of criminalization is the potential of that act of criminalization for being justified. *Justified* is understood in the normative sense, where the wrongfulness of some conduct, C, justifies its criminalization if, and only if, C *ought* to be criminalized *because it is wrongful, regardless of what other features of conduct are connected with that of being morally wrong*.

The claim that the wrongfulness of some conduct, C, is *pro tanto* sufficient to justify its criminalization should be understood as follows: The wrongfulness of C *supports* criminalizing it. It is a morally relevant reason for criminalizing C, *because it is wrongful, regardless of what other features of conduct are connected with that of being morally wrong*. A *pro tanto* sufficient justification of criminalizing C would always have been sufficient to justify its criminalization, all things considered, had there been no morally relevant considerations militating *against* the criminalization of C. However, a *pro tanto* sufficient justification will not always be sufficient, all things considered, in the face of such counterweighing considerations.

Specifying the meaning of “justifiability” in the research question is particularly important because it distinguishes the question of this dissertation from three questions with which it might otherwise be confused. First, it distinguishes the question of this dissertation from the empirical question of the extent to which acts of criminalization are motivated by the legislators’ belief

that the conduct is wrongful.⁸⁴ Second, it distinguishes the question from that of whether morality has any role to play in the *identification* of laws and legal systems, the subject of a longstanding debate between natural law theorists and legal positivists.⁸⁵

Third, it distinguishes the question from that of whether the wrongfulness of conduct is a *reason to believe* that criminalizing the conduct is *pro tanto* justified. Suppose the presence of the feature of *wrongfulness* in some conduct is so closely connected with the presence of another feature of conduct, F-fulness, that although the two features are analytically distinct, wrongful conduct also tended to be F-ful, and vice versa. Suppose, further, that it is the F-fulness of conduct which is *pro tanto* sufficient to justify its criminalization whereas the wrongfulness of conduct is not. In that case, the wrongfulness of conduct would be a powerful reason to believe the criminalization of that conduct to be *pro tanto* justified—since it would be a powerful reason to believe that the conduct was F-ful—but the wrongfulness of conduct would not be *pro tanto* sufficient to justify its criminalization. This last point shall turn out to be important, most plausible alternatives to legal moralism as a normative theory of the criminal law focus on features of conduct that also qualify as *wrong-making features*,⁸⁶ such as its harmfulness to others,⁸⁷ offensiveness to others⁸⁸ or its interference with the sovereignty of others.⁸⁹ That some conduct harms others, offends others, or interferes with the sovereignty of others is normally also reason to think that it is wrongful.⁹⁰ It is hardly inconceivable that, between them, the normative theories of the criminal law rivalling legal moralism cover *all* wrong-making fea-

⁸⁴ I.e. from the study of “morality policy” as conventionally understood in the social sciences (cf. the understanding of morality policy employed in Christopher Z. Mooney, “The Public Clash of Private Values,” in *The Public Clash of Private Values: The Politics of Morality Policy*, ed. Christopher Z. Mooney (New York: Chatham House, 2001), 3–20.

⁸⁵ Cf. Lon L. Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart,” *Harvard Law Review* 71, no. 4 (1958): 630–72; H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71, no. 4 (February 1958): 593, doi:10.2307/1338225.

⁸⁶ The feature of *being harmful to oneself* is possibly an exception to this.

⁸⁷ Mill, *On Liberty and Utilitarianism*; Feinberg, *Harm to Others*.

⁸⁸ Joel Feinberg, *The Moral Limits of the Criminal Law Vol. 2: Offense to Others* (New York: Oxford University Press, 1987).

⁸⁹ Ripstein, “Beyond the Harm Principle.”

⁹⁰ Cf. Victor Tadros, “Harm, Sovereignty, and Prohibition,” *Legal Theory* 17, no. 1 (March 2011): 64, doi:10.1017/S1352325211000024.

tures,⁹¹ such that *all* wrongful conduct falls within the proper scope of the criminal law even if legal moralism should be rejected. To be sure, it is more commonly held that the criminalization of C is *pro tanto* justified by the fact that criminalizing C would *prevent* harm, offense, or interference with the sovereignty of others rather than the fact that C harms, offends, or interferes with the sovereignty of others *per se*, and the wrongfulness of conduct is likely to be much more loosely connected with the former than with the latter.⁹² Still, it remains rather possible that even if legal moralism is false, the wrongfulness of conduct is a reason to believe that its criminalization is *pro tanto* justified, because whatever is *pro tanto* sufficient to justify the criminalization of some conduct is strongly connected with wrongfulness. It is important to distinguish this scenario from one where it is actually the wrongfulness of conduct that does the work in justifying its criminalization. I shall return to this below.⁹³

2.4.1. Justifiability and permissibility

The reader might wish to know how *justifiability* relates to *permissibility*. One reason for asking this question is that *the* wrongness constraint has often (but not always)⁹⁴ been phrased as holding that the wrongfulness of conduct is necessary for the permissibility of its criminalization.⁹⁵ Indeed, one of the articles in this dissertation also formulates the wrongness constraint in terms of permissibility.⁹⁶ Why, then, does this dissertation ask whether the wrongfulness of conduct is necessary to *justify* its criminalization rather than whether it is necessary to make its criminalization permissible?

The justifiability of criminalization relates to its permissibility as follows. All justified acts are permissible, but not all permissible acts are justified. Performing an action, A, is justified when there is a positive reason to per-

⁹¹ For instance, Mill might very well have held the view that all wrongs are harmful (see particularly Mill, *On Liberty and Utilitarianism*, 72–81; 90). As Moore also remarks (Michael S. Moore, “Liberty’s Constraints on What Should Be Made Criminal,” in *Criminalization: The Political Morality of the Criminal Law*, ed. R. A. Duff et al., Criminalization Series 4 (New York, NY: Oxford University, 2014), 193).

⁹² But see John Stanton-Ife, “What Is the Harm Principle For?,” *Criminal Law and Philosophy* 10, no. 2 (June 2016): 329–53, doi:10.1007/s11572-014-9311-8.

⁹³ In chapter 5, section 5.5.

⁹⁴ See for instance Simester and von Hirsch’s formulation of what they dub *the necessity dissertation* (*Crimes, Harms, and Wrongs*, 22).

⁹⁵ Victor Tadros, “Wrongness and Criminalization,” in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (New York, NY: Routledge, 2012), 158.

⁹⁶ “The Wrongness Constraint.”

form A, which is able overcome any morally relevant reasons against performing A. However, there are some actions which there are no reasons to refrain from, such as singing in the shower when no one can hear you. Such acts are permissible even though they are not justified, because they are not even *justification-requiring*. Since no one can hear my heart-rending (and ear-rending) version of “One Day More” from *Les Miserables*, I do not need to justify giving it. In the case of inquiries into the criminal law, the distinction between permissibility and justifiability is of no practical relevance. There are a number of drawbacks to criminalization, which the case for criminalization must overcome;⁹⁷ hence, all criminal laws require justification. Only justified acts of criminalization are permissible. This dissertation phrases its question as one about the relationship between the wrongfulness of conduct and the justifiability of its criminalization, as this underscores its interest in whether wrongfulness has a *positive* role to play in the justification of criminalization.

This completes the task of clarifying the meaning of the central concepts and terms applied in this dissertation. It is now possible to proceed to the next chapter, which shall present the methodology of this dissertation.

⁹⁷ Cf. Husak, *Overcriminalization*, 203–6.

Chapter 3: Methodology⁹⁸

The purpose of this chapter is to present the methodological approach of this dissertation. The reader will recall that it seeks to answer a *normative* question, one about the relation between the wrongfulness of conduct and the justification of its criminalization. Attempt is made at answering this question mainly by engaging with two normative principles: legal moralism and the wrongness constraint. The dissertation purports to engage with these normative principles in a scientific manner. Some think that normative principles cannot be the subject of scientific inquiry.⁹⁹ The purpose of this chapter is not to refute such skepticism¹⁰⁰ but instead to explain *how* such an inquiry can be conducted in a rigorous manner. I shall merely note here that this dissertation wants to contribute to a debate between scholars who all agree that it is possible to engage with normative principles in a scientific way.¹⁰¹

Section 3.1 sheds light on some elements of normative principles that do not presuppose anything about the status of normative propositions. Section

⁹⁸ I am grateful to Lasse Nielsen and Peter Damgaard Marschall for a number of insightful comments on the first draft of this chapter.

⁹⁹ This is typically either because they think that normative claims are not the sort of claims that can be *true* or *false* independently of the attitudes of those who make the claims or because there is no way of knowing with any degree of reliability which normative claims are true and which are false.

¹⁰⁰ Although I think it is a view that is both manifestly false and dangerous doing so would require a dissertation of its own

¹⁰¹ Joel Feinberg, *The Moral Limits of the Criminal Law Vol. 1: Harm to Others* (New York; Oxford: Oxford University Press, 1984), 25–6; Michael S. Moore, *Placing Blame: A Theory of the Criminal Law*, first published in paperback (Oxford; New York: Oxford University Press, 1997), 645; Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*, Legal Theory Today (Oxford; Portland, Or: Hart Pub, 2007), 53; A. P. Simester and Andrew Von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford; Portland, Or: Hart Pub, 2011); Douglas N. Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008). Admittedly, Lord Devlin seems to deny precisely that it is possible to rationally discuss normative questions (Devlin, *The Enforcement of Morals*, 17. As Hart points out, however, it is difficult to make sense of Devlin's attempt to argue that in favor of the normative claim that morality ought to be legally enforced, unless this is the case (H. L. A. Hart, *Law, Liberty, and Morality* (Stanford, CA: Stanford University, 1963), 19.

3.2 argues that it is possible to carry a normative inquiry quite far without presupposing anything about the status of normative propositions. Section 3.3 presents the most common method for justifying normative propositions: *wide reflective equilibrium*. Section 3.4 discusses two elements of normative inquiry that are most likely to arouse suspicion: The use of moral intuitions and peculiar hypothetical cases. Throughout the chapter it shall be noted when the approach discussed is employed in my own articles.

3.1. What can you say about normative propositions without presupposing anything about their status?

The following three claims are both uncontroversial and relevant to normative inquiry. First, it is uncontroversial that arguments with a normative conclusion (henceforth: normative arguments) can be unsound because they contain a false empirical premise. Thus, it is completely uncontroversial that it is possible to refute some normative arguments. A deductively valid argument with a normative conclusion must have at least one normative premise. However, normative arguments need not, and often do not, have *only* normative premises. A deductively valid argument is sound only if all of its premises are correct. Normative arguments containing at least one non-normative premise can be unsound because the non-normative premise is false.

Second, while some deny that any *single* normative proposition can be less problematic with respect to its justification than any other normative proposition (including its negation), nobody denies that there are some *sets* of two or more normative propositions that are more problematic with respect to their justification than other sets of two or more normative propositions. As A.J. Ayer writes:

If our opponent concurs with us in expressing moral disapproval of all actions of a given type, *t*, then we may get him to condemn a particular action, *A*, by bringing forward arguments to show that *A* is of type *t*. For the question of whether *A* does or does not belong to that type is a question of fact. Given that a man has certain moral principles, we argue that he must, in order to be consistent, react morally to certain things in a certain way.¹⁰²

¹⁰² A. J. Ayer, *Language, Truth and Logic*, Repr (London: Penguin Books, 1990), 115–16.

Let P , R , and S denote three normative propositions, and $\text{not-}P$, $\text{not-}R$, and $\text{not-}S$ denote their negations. No one denies that any set of normative propositions containing at least one of the pairs $\{P \text{ and } \text{not-}P\}$, $\{R \text{ and } \text{not-}R\}$, and $\{S \text{ and } \text{not-}S\}$ is more problematic than a set of normative propositions that contains none of these pairs. This is simply a matter of *demanding consistency*. However, while the demand for consistency tells us that P and $\text{not-}P$ cannot both be correct, it does nothing to tell us whether it is P or $\text{not-}P$ that should be rejected.¹⁰³

Third, it is uncontroversial that descriptive claims about the prevalence of normative attitudes (e.g. “most people think that murder is wrong”) can be true or false and that it is possible to gather reliable knowledge about whether they are so.

3.2. How far can you get using only the uncontroversial parts?

Suppose we were only allowed to use the elements described in section 3.1 to conduct our normative inquiries. How much progress could be made solely by discounting normative, false empirical premises, demanding consistency, and making descriptive claims about which normative attitudes people hold? The answer would seem to me to be: *a lot*.

Methodological approaches such as the one employed by Joel Feinberg rely only on demanding consistency and certain descriptive claims about the normative attitudes of certain others. Feinberg describes his method of normative inquiry as one of taking the normative proposition to be attacked, P , and trying to show that P logically entails another normative proposition, S , which those who affirm P “could not [...] affirm without great embarrassment.”¹⁰⁴ By analogy to the *reductio ad absurdum* arguments employed in geometry, Feinberg labels this approach a *reductio ad hominem*. He writes:

A *reductio ad absurdum* argument in geometry proves a proposition by showing that its denial logically entails a false proposition. Its *ad hominem* counterpart in ethics purports to show only that the entailed proposition is *believed to be false* by the person addressed.¹⁰⁵

Several things should be noted here. First, this method does not presuppose anything about the status or cognitive content of a normative proposition. It matters not whether the person addressed has any rational grounds for be-

¹⁰³ Nils Holtug, “Metoden i Politisk Filosofi,” *Politica* 43, no. 3 (2011): 283.

¹⁰⁴ Feinberg, *Harm to Others*, 18.

¹⁰⁵ Ibid. [emphasis Feinberg’s].

believing the relevant proposition P to be true and S to be false; all that matters is that she believes this. This is enough for *the reductio ad hominem* approach to work.

The second thing to note is that such a mode of argumentation requires an audience with whom one shares a certain common normative ground, for it is by reference to the common ground between the one making the argument and the audience to whom it is addressed that a *reductio ad hominem* seeks to support its normative propositions. As Feinberg must admit:

As for the logically possible but not very likely person whose moral beliefs are all logically contradictory to my own, there is nothing relevant that I can say to him. Whether reason has further resources to “refute” the consistent fascist, or convince the hypothetical skeptic, are questions for moral epistemology [...] ¹⁰⁶

How much this concession should worry us depends on how many people with whom we share no moral beliefs in common. Following Feinberg, let us refer to these people as “consistent fascists.” How many consistent fascists exist is an empirical question. From my comfortable armchair, however, I am inclined to think that these people are akin to a particularly unpleasant breed of unicorn; they are logically possible, but they do not exist. But even if there are *some* consistent fascists, I am content to address only those with whom I share *some* common normative ground. People who think torturing babies for fun is just a super nice thing to do: read no further! Everyone else: read on. Furthermore, strictly speaking, Feinberg is wrong to think that there is nothing he can say to the consistent fascist. For the results of Feinberg’s inquiries as well as the results of the inquiries of this dissertation might be rendered as hypothetical conclusions of the form: *If* you accept some normative propositions, P, Q, R, *then* you must accept the conclusion C. Such a hypothetical conclusion is not undermined by the fact that, *ex hypothesi*, the consistent fascist does not accept P, Q, and R. The consistent fascist must still admit that *if* he accepted those propositions, then he would have to accept C. Otherwise he would just be a fascist. While the fact that the consistent fascist denies P, Q, and R enables him to deny the relevance of such a hypothetical conclusion, it is no way to object to the hypothetical conclusion itself.

The third thing to note is that the fact that the law is the subject of one’s normative theorizing is often a distinct advantage when using this approach. For such theorizing can treat *the law* itself as its audience, an audience that has done us the huge courtesy of recording its normative commitments in painstaking detail: do not murder, do not launder money, consent is a de-

¹⁰⁶ Ibid.

fense against an accusation of rape, but not against murder, etc.¹⁰⁷ This is fertile ground for *reductio ad hominem* if anything is! This is helped by the fact that consistency seems to be a weighty commitment in judicial reasoning itself; for example, the role played by legal precedent and case law.¹⁰⁸

However, one should be aware that treating the law as one's audience in this sense also inevitably skews one's conclusion in a conservative direction, since it involves taking the justifiability of certain laws for granted. If the current legal system is consistently fascist, a *reductio ad hominem* with the law as one's audience cannot expose it as being such! This should not worry us too much. For all their flaws, the current legal regimes of Western democracies are far from being consistently fascist, the "core crimes" at the heart of most criminal codes, like murder and rape, are obviously justified. Nevertheless, one should be careful about status quo bias when objecting to some moral principles on the grounds of being inconsistent with current legal practice. As examined in detail in chapter 7, Duff objects that legal moralism cannot account for the justifiability of territorial jurisdiction.¹⁰⁹ But perhaps this should lead us to reject territorial jurisdiction as unjustified rather than legal moralism. Duff does not advance this objection in isolation. And it is a good thing that he does not, for without arguments showing that the current practice is justified, pointing out the inconsistencies between a moral principle and current practice is, at best, a weak objection to the moral principle.

3.2.1. Examples from the dissertation

One of the articles in this dissertation, "I Would Do Anything for Law," argues that the following argument fails because it has a false non-normative premise, here quoted in Victor Tadros' reconstruction:¹¹⁰

¹⁰⁷ Cf. Husak's use of the legal defenses to draw conclusions about the proper scope of the criminal law (Husak, *Overcriminalization*, 72–3).

¹⁰⁸ Perhaps even more could be said by way of comparison between judicial reasoning and the method of normative inquiry, and the strong connection between the law and justice in the formal sense of treating like cases alike and different cases differently (H. L. A. Hart, *The Concept of Law*, 3rd edition, Clarendon Law Series (Oxford, United Kingdom: Oxford University Press, 2012), 157–67). However, I shall not do this, since this would require engaging with the debate between natural law and legal positivism, the finer points of which I am woefully ignorant about (but see *Ibid.*, 204–5).

¹⁰⁹ Duff, *Answering for Crime*, 47–9.

¹¹⁰ Victor Tadros, "The Wrong and the Free," in *Legal, Moral, and Metaphysical Truths*, ed. Kimberly Kessler Ferzan ([S.l.]: Oxford University Press, 2016), 82. Original argument by Moore, *Placing Blame*, 747–8; Moore, "Liberty's Constraints on What Should Be Made Criminal," 187–8.

1. Criminalizing any wrongful action, *v*, supplies people with a prudential reason to refrain from *v*ing.
2. Because some people will refrain from *v*ing for prudential reasons criminalizing *v*ing decreases the number of people who will refrain from *v*ing for moral reasons.
3. The value of refraining from *v*ing for prudential reasons is less than the value of refrain from *v*ing for moral reasons.
4. Therefore, criminalization diminishes the value of permissible actions.
5. Therefore, we have reason not to criminalize wrongful action.

“I Would Do Anything for Law” argues that the normative conclusion of this argument should be rejected, as the non-normative second premise is false. Regardless of whether the normative third premise is correct that the value of refraining from wrongdoing for prudential reasons is less than the value of refraining from wrongdoing for moral reasons (as seems plausible), the argument does not demonstrate that we have a reason not to criminalize wrongful action, because there is no reason to think that the criminalization of wrongdoing will reduce the number of people who refrain from the criminalized wrong for moral reasons. Another of the articles in this dissertation, “Infidelity and the Possibility of a Liberal Legal Moralism,” is a clear example of an attempt at *reductio ad hominem*. It argues that Moore’s legal moralism commits us to the view that infidelity ought to be criminalized, all things considered; something which it is presumed that many would find highly objectionable.

3.2.2. Reductio ad hominem in practice

As a practical example of how far you can get using only the moves detailed in section 3.1, consider the following excerpt from the Wolfenden Report:

In considering whether homosexual acts between consenting adults in private should cease to be criminal offences we have examined the more serious arguments in favour of retaining them as such. We have now set out these arguments and our reasons for disagreement with them. In favour of retaining the present law, it has been contended that homosexual behaviour between adult males, in private no less than in public, is contrary to the public good on the grounds that—

- (i) it menaces the health of society;
- (ii) it has a damaging effect on family life;

- (iii) a man who indulges in these practices with another man may turn his attention to boys.¹¹¹

All three items refer to arguments for the normative claim that that *homosexual conduct ought to remain criminal*. The arguments in favor of this conclusion based on (i) and (iii) are unsound because they rely on false empirical premises. (i) has the following structure:

1. The degeneration and decay of civilization ought to be prevented.
2. If homosexuality is decriminalized, then “our nation [will] degenerate and decay.”¹¹²
3. Hence, homosexual conduct ought to remain criminal.

And (iii) has the following structure:

4. Child abuse ought to be prevented.
5. Criminalizing homosexual conduct prevents child abuse.
6. Hence, homosexual conduct ought to remain criminal.

Whatever you believe about the normative premises (1) and (4), both arguments are unsound because the non-normative premises (2) and (5) are blatantly false. (ii) does not suffer from this problem; it has the following structure:

7. If some conduct, C, has a damaging effect on family life, then C ought to be criminal.
8. If C is a cause of divorce, then C has a damaging effect on family life.
9. Homosexual conduct is a cause of divorce.
10. Hence, homosexual conduct ought to be criminal.

Here, the empirical premise (9) is plausible (or at least it is not blatantly false like (2) and (5), and the Wolfenden Report says that it is correct).¹¹³ It is here, however, that the appeal to *consistency* does its work. Consider:

(9*) Infidelity is a cause of divorce

Suppose that (9*) is correct (which is plausible, but it is an empirical question).¹¹⁴ Either you accept (7) and (8) or you do not; if not, then the argument

¹¹¹ Wolfenden et al., “Wolfenden Report,” 21.

¹¹² Ibid., 22.

¹¹³ Ibid.

¹¹⁴ Here is some empirical research to support (9*): Todd K. Shackelford, Gregory J. LeBlanc, and Elizabeth Drass, “Emotional Reactions to Infidelity,” *Cognition & Emotion* 14, no. 5 (September 2000): 643–59, doi:10.1080/02699930050117657.

for (10) disappears; if so, then you must also accept that in conjunction with (9*) it follows from these premises that

(10*) Hence, infidelity ought to be criminal.

One cannot consistently accept the soundness of (ii) and (9*) while rejecting (10*); either one accepts that infidelity ought to be criminal or one must find another argument for criminalizing homosexuality than (ii). Note, however, that such a line of argument tells us only that if (ii) is sound, then infidelity ought to be criminalized. It undermines the soundness of (ii) only if infidelity ought not to be criminalized. It operates on the assumption that those who consider (ii) to be sound would be loath to embrace (10*) and works by demonstrating that claiming (ii) to be sound is inconsistent with rejecting (10*). It has no bite against those who are willing to embrace (10*). Attention is therefore drawn to *infidelity* rather than, say, *domestic violence*, even though it is probably also true that:

(9**) Domestic violence is a cause of divorce.

And, thus, it follows from (7), (8), and (9**) that

(10**) Hence, domestic violence ought to be criminal.

It is every bit as inconsistent to accept the soundness of (ii) and reject (10**) as it is to accept the soundness of (ii) and reject (10*); however, as it is to be presumed that those inclined to claim that (ii) is sound (and people in general) will happily affirm (10**), this has no bite against (ii) and it is not interesting for our present purposes. What is important, however, is that affirming (ii) commits one to embracing (10*). This insight is then combined with an empirical claim about the prevalence of the normative attitude that infidelity ought not to be criminalized such that many of those who affirm (ii) would reject (10*). Thus, affirming (ii) is exposed as having implications that most of those who affirm (ii) would not accept, completing the *reductio ad hominem*.

Recall that these were the *three best arguments* for criminalizing homosexuality that the Wolfenden Commission could find! And yet two can be flatly rejected and the third exposed as having implications that many who accept it would (presumably) reject. This raises the possibility that even *if* it is in principle impossible to show that any single normative proposition, *P*, is more problematic than *not-P*, one can, in practice, reject certain normative propositions using only the uncontroversial “tools” of *demanding consistency*, *showing normative arguments to be unsound because an empirical premise is false*, and *making claims about the normative attitudes of one’s audience* to show that:

There is no argument to be made in support of that normative proposition which does not either contain a false empirical premise, and/or is such that its soundness is inconsistent with some other normative propositions affirmed by those who make it.¹¹⁵

“Homosexuality ought to be criminal” is likely to be one such proposition. Other prime candidates include the closely related claim that homosexuality is wrongful and various normative claims associated with sexism and racism (e.g. “we ought to build a wall on the border to Mexico because all Mexicans are rapists”).

3.3. Wide reflective equilibrium

The previous section revealed the extent to which it is possible to carry out a normative inquiry without presupposing anything about the status of normative claims. However, this dissertation seeks to justify some of its normative propositions as more than merely being attitudes to which most people subscribe. It seeks to do so by using the method of *wide reflective equilibrium*.¹¹⁶ This is the dominant methodological approach in political philosophy.¹¹⁷

Wide reflective equilibrium is a method for justifying normative claims by fitting them into a coherent set of mutually supporting beliefs at three different levels:

- a. A set of considered moral judgments
- b. A set of moral principles
- c. A set of relevant background theories¹¹⁸

¹¹⁵ What then about the potential for saying something *positive* about certain normative claims? These tools will not be able to show that some normative propositions should be *accepted*. What one will be able to do is to provide arguments and reasons supporting the acceptability of certain normative propositions (see Lasse Nielsen, “Om Metoden i Normativ Politologi,” *Politik* 16, no. 3 (2013): 46–7). This should not surprise us. Most normative propositions purport to be universal in a way, which is such that similarly bold claims about the empirical world (e.g. about the laws of nature) are also incapable of being *proven*, rather merely supported by the empirical evidence.

¹¹⁶ John Rawls, *A Theory of Justice*, Original ed. (Cambridge, MA: Belknap Press, 2005), 17–22.

¹¹⁷ Note that Feinberg’s *reductio ad hominem* can be seen as a version of that method (cf. Feinberg, *Harm to Others*, 18n).

¹¹⁸ Norman Daniels, “Wide Reflective Equilibrium and Theory Acceptance in Ethics,” *The Journal of Philosophy* 76, no. 5 (1979): 258.

This method presupposes a *coherentist* view of the justification of normative claims, as such a system of mutual support would otherwise not have any positive justificatory power.¹¹⁹ *Moral judgments* and *moral principles* are at different levels of abstraction such that moral principles can account for and explain our particular moral judgments. *Wide reflective equilibrium* can be used to justify normative judgments and normative principles alike. Calling a moral judgment *considered* means two things: that the person making the judgment is reasonably confident that it is correct¹²⁰ and that the judgment is formed without obviously distorting influences such as anger, fear, or self-interest.¹²¹

The process of reaching a *wide reflective equilibrium* takes its starting point in one's considered moral judgments,¹²² which are to be treated as "provisional fixed points which we presume any conception of justice [the kind of normative principle we are looking for] must fit."¹²³ One then attempts to find a general principle that can account for these particular judgments. We work back and forth between the general principles and the particular judgments, possibly revising both (after all, the considered moral judgments are only *provisional* fixed points)¹²⁴ until (a) the considered moral judgments and (b) the moral principles fit together, such that the moral principles explain and account for the considered moral judgments. We have now reached a *narrow reflective equilibrium*.¹²⁵

The stability of this *narrow reflective equilibrium* is tested by taking (c) the relevant background theories into account. The *relevant* background theories are those that have implications for the acceptability of (b) the moral principles *independently* of their fit with (a) our considered moral judgments, meaning that the acceptability of the background theories themselves must also be independent of the considered moral judgments that are in *narrow reflective equilibrium* with the moral principle we seek to justify.¹²⁶ One then goes through another round of working back and forth, this time between (a), (b), and (c), potentially revising any of these in the process until a *wide reflective equilibrium* is reached where the considered moral judg-

¹¹⁹ Rawls, *A Theory of Justice*, 21.

¹²⁰ *Ibid.*, 47.

¹²¹ *Ibid.*

¹²² *Intuition* and *judgement* are used interchangeably throughout this chapter, always referring to either *considered moral intuitions/judgements* unless otherwise explicitly noted.

¹²³ Rawls, *A Theory of Justice*, 20.

¹²⁴ *Ibid.*

¹²⁵ Daniels, "Wide Reflective Equilibrium and Theory Acceptance in Ethics," 258.

¹²⁶ Daniels, "Wide Reflective Equilibrium and Theory Acceptance in Ethics."

ments, moral principles, and the relevant background theories fit together in a mutually supporting system. Norman Daniels describes the role of background theories as follows:

The background theories in (c) should show that the moral principles in (b) are more acceptable than alternative principles on grounds to some degree independent of (b)'s match with relevant considered moral judgments in (a). If they are not in this way independently supported, there seems to be no gain over the support the principles would have had in a corresponding narrow equilibrium, where there never was any appeal to (c). Another way to raise this point is to ask how we can be sure that the moral principles that systematize the considered moral judgments are not just "accidental generalizations" of the "moral facts," analogous to accidental generalizations which we want to distinguish from real scientific laws.¹²⁷

Thus, the background theories help test whether the moral principles which were found to be in *narrow reflective equilibrium* with our considered moral judgments are really just accidental generalizations of these judgments, and one important benefit of the move from *narrow* to *wide equilibrium* is to guard against the possibility that this is the case.

3.3.1. Examples of wide reflective equilibrium in this dissertation

As already mentioned, "Infidelity and the Possibility of a Liberal Legal Moralism" argues that legal moralism commits one to endorsing the criminalization of infidelity. Insofar as "infidelity ought not to be criminalized" qualifies as a considered moral judgment, this can be seen as an attempt at demonstrating that legal moralism is not in perfect narrow equilibrium with our considered moral judgments, since there is at least one which it cannot explain. The following hypothetical case from "Hamburger-Hating Terrorists, the Duty View of Punishment and the Wrongness Constraint" plays a similar role:

Terrorists plant a series of small bombs all over a major city, and now threaten to detonate them unless those who eat hamburgers are sentenced to 14 days in prison. It is impossible to stop the terrorists. The government has had time to evacuate the population, so detonating the bombs will not kill anyone. However, every building in the city will be severely damaged. Suppose that Ronald consumes a hamburger even though he knows all these facts.¹²⁸

¹²⁷ Ibid., 259.

¹²⁸ Quoted from "Hamburger-Hating Terrorists, the Duty View of Punishment and the Wrongness Constraint," p. 11.

The article argues that even though it is not wrong of Ronald to consume a hamburger in this scenario, criminalizing the consumption of hamburgers is justifiable. Thus, this case is an attempt to show that the fit between the wrongness constraint and our considered moral judgments is not perfect, which raises a number of problems concerning the extent to which *the wrongness constraint* is in narrow reflective equilibrium with our considered moral judgments.

Another article included in this dissertation, “Law Letters,” provides a good illustration of the role played by *background theories*. Since the institutions of the criminal law are institutions of the state, normative accounts of the justification of states are part of the relevant background theories when assessing moral principles regarding the justification of the criminalization. Put in the terms of *wide reflective equilibrium*, “Law Letters” can be seen as arguing that even if legal moralism is a decent fit for our considered moral judgments, taking the relevant background theories (here: considerations about the justification of the state) into account should lead us to reject legal moralism. This is so since no plausible justification of the state is such that it can support legal moralism,¹²⁹ and we should therefore doubt that legal moralism is part of a wide reflective equilibrium between our considered moral judgments, moral principles, and the relevant background theories.

3.4. Using moral intuitions about peculiar hypothetical cases vs. making things up

This brings us to a concern that many have about normative inquiries: Whereas our senses give us some form of access to the world as it is, it is unclear whether and how we have a similar kind of access to the world as it ought to be. If the basic observations of empirical science come from sensory perception, from where do the basic observations of normative science come? It often *appears* as though the answer is our *considered moral intuitions*, but it is unclear how these can be a reliable source of knowledge about anything other than one’s own opinion.

This worry treats wide reflective equilibrium as a foundationalist method of justification. According to foundationalist theories of (epistemic)¹³⁰ justification, all knowledge is ultimately inferred from a set of propositions which

¹²⁹ This might be stating the obvious, but I do not expect the reader to be convinced about this hugely controversial claim by the remarks given here. Though a fuller summary of “Law Letters” is given in section 7.3, the defense of this claim is mostly confined to the article itself.

¹³⁰ Henceforth this word is omitted.

possess some non-inferential credibility, i.e. we are justified in believing these propositions to be true even though they are not inferred from any other propositions we are justified in believing to be true.¹³¹ Empirical science is typically seen as treating empirical observations as having non-inferential credibility.¹³² The theories of empirical science are justified because they explain (and predict) empirical observations, but the empirical observations themselves ultimately admit to no further justification than having been perceived through the senses under reliable conditions (e.g. “I saw it,” “I heard it” etc.).¹³³ If normative inquiry treated moral intuitions as a source of non-inferential credibility for normative propositions the same way sensory perception is treated as a source of non-inferential credibility for empirical propositions (i.e. empirical observations) in empirical science, then we would be right to worry. The human body has no organ for moral perception the way it has eyes for seeing and ears for hearing (the musings of René Descartes about the function of the pineal gland notwithstanding).¹³⁴ In the absence of such an organ, we should be skeptical of our ability to perceive rightness and wrongness the way we perceive that some objects are blue and others are yellow, and, accordingly, skeptical of treating moral intuitions as the source of non-inferential credibility for normative propositions.

It is a good thing, then, that *wide reflective equilibrium* is *not* a foundationalist method of justification; rather, it is a coherentist method for justifying normative propositions according to which they are justified by their coherence with a maximally coherent set of mutually supporting claims.¹³⁵ Thus, the method does not treat moral intuitions as a source of non-inferential credibility for normative propositions. It treats nothing as being the source of non-inferential credibility for normative propositions, because it treats no normative propositions as having non-inferential credibility. They must all be justified by their degree of fit into the maximally coherent

¹³¹ Ali Hasan and Richard Fumerton, “Foundationalist Theories of Epistemic Justification,” in *The Stanford Encyclopedia of Philosophy (Winter 2016 Edition)*, 2016., <http://plato.stanford.edu/archives/win2016/entries/justep-foundational>.

¹³² Alan Francis Chalmers, *What Is This Thing Called Science?*, 3rd edn. reprinted (Buckingham: Open University Press, 2009), 1–4.

¹³³ Daniels, “Wide Reflective Equilibrium and Theory Acceptance in Ethics,” 269–73.

¹³⁴ For an overview of Descartes’ rather amusing thoughts about the pineal gland as the location of everything from the *human soul* to *common sense*, see Gert-Jan Lokhorst, “Descartes and the Pineal Gland,” in *The Stanford Encyclopedia of Philosophy (Summer 2016 Edition)*, 2016, <http://plato.stanford.edu/archives/sum2016/entries/pineal-gland>.

¹³⁵ Rawls, *A Theory of Justice*, 21.

system of mutually supporting normative claims.¹³⁶ This goes for the particular normative judgments we affirm on the basis of our considered intuitions about right and wrong and the general moral principles alike. None are self-justifying. All must be justified by their degree of fit into such a system.

The role played by moral judgments and moral intuitions in a *wide reflective equilibrium* are thus not analogous to the role played by empirical observations and sensory perception in empirical inquiry. In (idealized) empirical science, the justificatory relationship between observations and theories is a one-way street: the theories are justified by their ability to explain (and predict) empirical observations, but the empirical observations are not justified by their ability to be explained by theories. Revising empirical observations because they do not fit into one's theory is a paradigmatic example of bad science. In empirical science, a discrepancy between observation and theory is always to be solved by revising the theory. Though the moral principles of normative inquiries are also justified by their ability to explain the considered moral judgments, it is equally true that moral judgments are justified by their ability to be explained by plausible moral principles. Moral judgments and principles alike are revisable. Revising one's moral judgments because they do not fit otherwise plausible principles is not bad normative science, as a discrepancy between one's moral judgments and moral principles can lead to the rejection of the moral judgment as well as the principle. As Daniels tells us, "a considered moral judgment, even in a particular case, is in many ways far more like a 'theoretical' than an 'observation' statement."¹³⁷

Another crucial difference between empirical observations and our moral judgments is that we should be able to give *reasons* for our moral judgments; reasons that appeal to moral principles and relevant background theories.¹³⁸ Moral judgments for which we are not able to provide reasons in favor are suspect. It is largely due to the fact that the reasons provided in favor of this or that moral judgment are open to analysis as to whether they actually explain the moral judgment and what other moral judgments they logically entail that the moral judgments themselves become a subject of scientific debate rather than mere statements of opinion. As indicated in section 3.2, we might be able to discredit certain normative propositions simply by showing that even those who find such normative propositions intuitive are unable to produce any arguments in their support without making empirically false

¹³⁶ Ibid.

¹³⁷ Daniels, "Wide Reflective Equilibrium and Theory Acceptance in Ethics," 270.

¹³⁸ Ibid.

claims or affirming normative principles that would commit them to normative propositions which they reject.

Finally, it is important to realize just how little the usefulness of moral intuitions in normative inquiry depends on the extent to which moral intuitions have independent justificatory power.¹³⁹ Victor Tadros highlights three roles of moral intuitions in normative inquiry. First, intuitions help us to articulate more general moral principles which can explain them. Second, intuitions help identify the factors explaining the moral force of a principle, thus revealing the arguments in favor of adopting that moral principle. Note that the second and third roles of intuitions correspond roughly to the roles they play in searching for narrow and wide reflective equilibrium, respectively. Third, examples highlighting the intuitive implications of a principle can help convey the force of the arguments underlying that principle.¹⁴⁰ When it comes to the capacity of moral intuitions as such to justify normative principles, however, Tadros' view is modest bordering on the dismissive:

The fact that a moral principle has intuitive implications is almost never a sufficient reason on its own to endorse that principle. And the fact that a principle has counter-intuitive implications is almost never a sufficient reason on its own to reject that principle. One reason why this is so is that there may be explanations for our intuitions that show that these intuitions lend no credence to the principle in question. But it is also true that our intuitions about cases and the best arguments that we have for a set of principles will come apart. In this case, we may be led to endorse what we can call "revisionist" principles and ideas: principles and ideas that lead us to form judgments about cases that conflict with our intuitive responses to them. Moral intuitions are at most a reason to endorse a principle.¹⁴¹

The intuitiveness of the implications of a principle might be an inconclusive reason in its support, but never more than that. Yet Tadros relies on cases

¹³⁹ That is, the extent to which the fact that the implications of a moral principle being intuitive can contribute to justifying a moral principle (and vice versa), independent of any underlying reason or argument explaining why those implications are intuitive.

¹⁴⁰ Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law*, First paperback edition, Oxford Legal Philosophy (Oxford United Kingdom: Oxford University Press, 2013), 6–7. We shall set aside this third role of moral intuitions. While Tadros is undoubtedly correct that moral intuitions are useful as communicative devices for conveying the force of a principle, this is irrelevant for our present purposes.

¹⁴¹ *Ibid.*, 6.

and our judgments about them extensively throughout the book.¹⁴² And rightly so, for the primary roles of moral intuitions in normative inquiry are as indispensable as tools for articulating general principles and identifying the arguments to be given in their favor (i.e. the first and second roles mentioned above). The extent to which moral intuitions possess independent justificatory power has little—if any—impact on their capacity to serve those functions.

3.4.1. What's up with the weird hypothetical cases?

A satisfactory discussion of the role of moral intuitions requires discussing the hypothetical cases often used to elicit these intuitions. These hypothetical cases are sometimes peculiar indeed. For some, this contributes to concerns that the philosopher is simply making things up. This worry too is misplaced. To see this, we must first appreciate that the use of hypothetical cases offers a solution to a problem often encountered when trying to determine which moral principle fits one's moral intuitions best: The world is messy. Suppose we want to test the fit of the following principle with our moral intuitions:

Hard paternalism: It is always “a reason for criminal legislation that it is necessary to protect competent adults, against their will, from the harmful consequences even of their fully voluntary choices and undertakings.”¹⁴³

To do this, we have to consider a case where a choice causing harm to self is *fully voluntary*, but we are rarely, if ever, certain that such a choice is fully voluntary in real-world cases. Thus, the best way to test hard paternalism is by using an artificially “pure” hypothetical case, where any doubts about voluntariness have been stipulated away. Hypothetical cases are thus employed as a means to isolate the factor in which we are interested—here, fully voluntary harm to self—in order to investigate whether it is a morally relevant consideration.¹⁴⁴ Victor Tadros explains this rather nicely:

Suppose that I want to test some putative principle, P. Suppose that P, were it valid, would require me to *v* in circumstances *c*. Suppose that it is intuitive that I ought to *v* in *c*. This fact provides us with some reason to endorse P, especially if other apparently attractive principles cannot explain the obligation to *v* in *c*. P might provide the explanation of our intuition, in this case. But other principles might also explain the obligation that we feel that we have to *v* in *c*.

¹⁴² Tadros, *The Ends of Harm*.

¹⁴³ Joel Feinberg, *The Moral Limits of the Criminal Law Vol. 3: Harm to Self* (Oxford: Oxford University Press, 1986), 12.

¹⁴⁴ Tadros, *The Ends of Harm*, 7; Holtug, “Metoden i Politisk Filosofi,” 287.

We ideally want to test the validity of P by constructing cases that implicate P alone: where P would require us to *v* in *c* and other seemingly alternatively principles that we might endorse instead of P would not require us to *v* in *c*. If circumstances *c* do test the validity of P on its own, circumstances *c* provide us with a “clean case” to test P. The case is clean in that our judgments about it are not muddled by the fact that there are other principles that we endorse that lead us to make judgements about *c*.¹⁴⁵

This logic should be perfectly familiar to empirical scientists, for the aim of “clean cases” is simply to control for “*confounding values*” in the same way statistical analysis seeks to control for confounding variables. It seeks to control for the potential influence of other normative considerations than the one in which we are interested. The term “thought *experiment*” is to be taken quite literally, for the aim is to isolate the normative consideration in which we are interested such that it is the only thing which could conceivably explain our moral judgments about the case, just like experiments seek to isolate the variation on the independent variable such that this is the only systematic difference between the treatment and control groups and therefore the only thing that could explain any variation in the dependent variable.¹⁴⁶

The necessity of the case being “clean” is one reason why hypothetical cases tend to involve scenarios which rarely, if ever, arise in the messy real world. The alternative to a peculiar hypothetical case will often be a case that tells us little about what we want to know, because so many potentially relevant things could be at work.¹⁴⁷ This is one reason why hypothetical cases are often “peculiar.” However, I think another reason is much more important: Normative principles which failed to explain our intuitions about everyday cases would quickly be rejected. If legal moralism could not explain why core crimes like murder and rape ought to be criminal, we would have stopped discussing its plausibility long ago. Somewhat ironically, the gravitation of the philosophical discussion towards increasingly peculiar hypothetical cases seems to be a sign of the presence of something which philosophy, in contrast to the natural sciences, is often claimed to lack desperately: scientific progress. The necessity of resorting to peculiar cases to elucidate the differences between moral principles is a sign that the relevant moral principles are converging in their judgments regarding normal cases. Only in the face of

¹⁴⁵ Tadros, *The Ends of Harm*, 7.

¹⁴⁶ Lotte Bøgh Andersen, Kasper Møller Hansen, and Anne Storkjær Binderkrantz, “Forskningsdesign,” in *Metoder i statskundskab*, ed. Robert Klemmensen, Lotte Bøgh Andersen, and Kasper Møller Hansen (Kbh.: Hans Reitzels Forlag, 2012), 66–96; Nielsen, “Om Metoden I Normativ Politologi.”

¹⁴⁷ Tadros, *The Ends of Harm*, 8.

such convergence does it become necessary to resort to outlandish cases to find cases where the judgments differ. Other fields consider it a point of pride that the set of theories plausible enough to be worth discussing is continuously shrinking such that the cases in which they yield different predictions become ever more removed from the cases we encounter in everyday life.

Of course, the use of outlandish hypothetical cases in philosophy is not rendered unproblematic by being a sign of scientific progress. The fact that P is an indication that one problem is absent does not mean that it is not the indication of the presence of another. It is important that peculiar hypothetical cases be used with caution. First, stipulating the absence of some factor which one does not want to influence the judgement does not guarantee that this factor will not influence the judgment. Take hypothetical cases designed to test *hard paternalism* as an example. By necessity, these cases must stipulate that a person with perfect information freely decides to do what cannot help but seem monumentally stupid to most of those encountering the case. Indeed, there is a risk that such decisions will appear so strange to this readership that an implicit assumption slips in to the effect that the person lacks a fully adequate understanding of the harm she will suffer despite stipulations to the contrary. Of course, such pitfalls can be avoided by taking some precautions, (e.g. telling a believable story of *why* this or that factor (here: lack of information) is absent is usually preferable to merely stipulating that it is absent), but doing so requires acknowledging that they are there.¹⁴⁸

Second, *ceteris paribus*, the more peculiar the hypothetical case, the more it could reasonably be doubted that one is able to imagine what the details of the case are really like and accordingly the less confident one should be about one's intuitions about that case.¹⁴⁹ When realistic cases are "unclean" (and they often are), however, avoiding the Scylla of peculiar hypothetical cases takes one straight into the maw of the Charybdis of "unclean" cases, with the assorted problem that one's intuitions about the case risk being entirely irrelevant on account of being influenced by something other than the normative consideration in which one is interested. Those familiar with the Odyssey will remember that whereas Scylla will eat six men, Charybdis will swallow the whole ship and everyone on it. While there is thus

¹⁴⁸ Thus, this is not intended to be an indictment of hypothetical cases about hard paternalism, much less hypothetical cases in general.

¹⁴⁹ Tadros, *The Ends of Harm*, 8. Cf. Parfit's reply to Nozick's "utility-monster" objection to utilitarianism, where he argues that Nozick fails to appreciate what such a utility monster would be like (Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 41; Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1987), 389).

good reason to make one's hypothetical cases as realistic as the ambition of "cleanliness" allows,¹⁵⁰ it is not clear that one should go much further, and sometimes the only "clean" hypothetical case will be peculiar indeed.

This concludes the discussion of the role of moral intuitions, peculiar hypothetical cases, and the chapter in general. Although I do not fancy myself to have allayed all reasonable worries about their use, I hope the discussion above has assuaged them to some degree. In order to do so, it has been argued that normative inquiry does not treat moral intuitions as a source of non-inferential credibility for normative propositions the way empirical science treats sensory perception as a source of non-inferential credibility for empirical propositions. Nor does the usefulness of moral intuitions presuppose that they have independent justificatory power. Intuitions must be justified by moral principles as much as the moral principles must be justified by them. Moral intuitions are something to be reasoned *about*; there might be a point where no further discussion is possible, but this point is not reached the second A has a moral intuition which is not shared by B. For at this point, B might expect A to give some reasons in favor of the moral judgment he finds intuitive, and these reasons can be probed and analyzed in a number of ways. It has further been argued that the frequent use of peculiar hypothetical cases to elicit these intuitions is motivated by an interest in isolating the considerations one is attempting to investigate in accordance with an experimental ideal.

As a final point before ending the chapter, I would like to draw attention to the implications that the view of philosophical method espoused in this chapter has for *clarity* as a virtue of academic philosophy. Being as clear as possible about the arguments supporting one's moral judgments, the moral judgments supporting one's principles and what one's hypothetical cases are supposed to show are important to the replicability as well as the falsifiability of one's conclusions. Obscure writing does not make one's philosophical writing more profound. It just makes it worse. It makes it worse because it makes it harder for one's peers to engage with it fruitfully. A philosopher who writes obscurely is like an empirical scientist who fails to elucidate the methodology behind his conclusions. A philosopher who deliberately writes obscurely is like an empirical scientist who refuses to reveal the methodology behind his conclusions. There is something inherently suspicious about deliberately obscure writing in philosophy; it suggests an unwillingness to having one's work scrutinized by others. If at times the remaining chapters of this dissertation will appear to be excessively concerned with giving quasi-

¹⁵⁰ Tadros, *The Ends of Harm*, 8.

formal versions of its arguments as well as of those with which it engages, it is motivated by a desire for clarity.

Chapter 4: The Theory and Claim of Legal Moralism¹⁵¹

The purpose of this chapter is to present the theory of legal moralism and to contextualize and summarize the contribution that “Defining Legal Moralism”¹⁵² makes to, well, defining legal moralism, and the contribution that “I Would Do Anything for Law” makes to understanding the values underlying a presumption of liberty. The focus will be on Michael S. Moore’s *liberal legal moralism*, which is the version of legal moralism with which this dissertation mainly engages.¹⁵³ Section 4.1 discusses the definition of legal moralism. In so doing, it contextualizes and summarizes the contribution of “Defining Legal Moralism.” Section 4.2 presents Michael S. Moore’s legal moralism. Section 4.3 explains what it means for legal moralism to be *liberal* and elucidates the two sources of the distinctively liberal character of Moore’s legal moralism: The thin account of the content of substantive morality and the thick account of the presumption of liberty. Moore’s thick account of the presumption of liberty provides the context of the contribution made by “I Would Do Anything for Law,” which engages with this account. This contribution is summarized in section 4.4. Section 4.5 discusses an objection to the description of Moore’s view given in this dissertation.

This chapter is the first to summarize the contribution made by the individual articles included in this dissertation.¹⁵⁴ This is therefore a good place

¹⁵¹ As I have been on so many other occasions during the last 4 years, I am extremely grateful to my supervisor Kasper Lippert-Rasmussen for his comments on this and the four following chapters. As always, they were insightful and helpful.

¹⁵² Jens Damgaard Thaysen, “Defining Legal Moralism,” *SATS* 0, no. 0 (26 January 2015), doi:10.1515/sats-2014-0013.

¹⁵³ Michael S. Moore, *Placing Blame: A Theory of the Criminal Law*, first published in paperback (Oxford; New York: Oxford University Press, 1997); Michael S. Moore, “A Tale of Two Theories,” *Criminal Justice Ethics* 28, no. 1 (May 2009): 27–48, doi:10.1080/07311290902831284; Michael S. Moore, “Liberty’s Constraints on What Should Be Made Criminal,” in *Criminalization: The Political Morality of the Criminal Law*, ed. R. A. Duff et al., Criminalization Series 4 (New York, NY: Oxford University, 2014), 182–212.

¹⁵⁴ This chapter summarizes the contribution of “Defining Legal Moralism” and “I Would Do Anything for Law.” The contribution of “Infidelity and the Possibility of a Liberal Legal Moralism” is summarized in chapter 6, that of “Law Letters” in chap-

to make some general remarks about what is (not) the purpose of these summaries and what this should lead one to expect them to contain. The purpose of these summaries is to inform the reader of the conclusions of the summarized article and how establishing these conclusions contributes to 1) answering the overall question and 2) advancing the literature. In a few cases, a secondary purpose is also 3) explaining the differences (if any) between the article and the dissertation. With the exception of “*Defining Legal Moralism*,” these differences only concern the choice of words. The purpose of these summaries is not to convince the reader that the conclusions of the summarized article are correct; that is to be done by the articles themselves. Consequently, the reader *should* expect the summaries to contain the core claims of the summarized article, the implications of these claims for the research question, the implications of these claims for the literature and the gap in the literature to which these claims contribute to filling (this is what is meant by *context*). The reader should not expect the summaries to repeat the argumentation employed in the summarized article in order to establish its core claims at length (or even at all). Accordingly, the reader should expect the summaries to occasionally make some claims without defending them, even though they are very much in need of defense. The defenses of these claims are to be found in the articles themselves.¹⁵⁵

4.1. The core claim of legal moralism: The context and contribution of “*Defining Legal Moralism*”¹⁵⁶

This section defends the definition of the core claim of legal moralism favored in this dissertation. This definition is as follows:

The wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization

In so doing, it contextualizes and summarizes “*Defining Legal Moralism*.” This section expands on some of the argumentation given in that article while at the same time presenting the differences between the definition of legal moralism used throughout this dissertation and the one I argue should be adopted in “*Defining Legal Moralism*,” and I explain why I do not adopt this definition.

ter 7, and that of “Hamburger-Hating Terrorists, The Duty View of Punishment, and The Wrongness Constraint” in chapter 8.

¹⁵⁵ Of course, it may be that the reader fails to find such a defense in the summarized article either in which case he is free to fault the author.

¹⁵⁶ Damgaard Thaysen, “*Defining Legal Moralism*.”

Every definition of legal moralism consists of a *moral*, a *justificatory*, and a *legal* component. That is, they are all claims that something related to morality has some relation to the justification of some form of legal intervention. Beyond that they vary. A lot. It is thus possible to find one definition or the other which disagrees with any particular component of the definition employed in this dissertation.

Table 4.1 The components of a definition of legal moralism

Moral component	Justificatory component	Legal component
If some conduct is _____ then	it _____ to justify	Its _____
(A) Wrongful ¹⁵⁷	(1) Is <i>pro tanto</i> sufficient ¹⁶⁰	
(B) A wrong which causes no harm (or offense) ¹⁵⁸	(2) Can be sufficient all things considered ¹⁶¹	(I) Legal restriction ¹⁶² (II) Criminalization ¹⁶³
(C) A certain kind of wrong ¹⁵⁹	(3) Is sufficient all things considered	

¹⁵⁷ Devlin, *The Enforcement of Morals*, 12–13; 14. Moore, *Placing Blame*; Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford; New York: Clarendon Press; Oxford University Press, 1993). This is what Duff calls *ambitious* legal moralism (R. A. Duff, “Towards a Modest Legal Moralism,” *Criminal Law and Philosophy* 8, no. 1 (January 2014): 222, doi:10.1007/s11572-012-9191-8).

¹⁵⁸ Feinberg, *The Moral Limits of the Criminal Law Volume 4*, xix–xx; Arneson, “The Enforcement of Morals Revisited,” 439; Petersen, “What Is Legal Moralism?”; Larry Alexander, “Plastic Tress and Gladiators: Liberalism and Aesthetic Regulation,” *Legal Theory* 16, no. 2 (June 2010): 77–90, doi:10.1017/S1352325210000133.

¹⁵⁹ This is how Duff understands “*modest*” legal moralism Duff, “Towards a Modest Legal Moralism,” 222.

¹⁶⁰ Moore, *Placing Blame*, 659–61. I take Feinberg to mean something along these lines by “it can be a morally legitimate to prohibit conduct on the ground [...]” (Feinberg, *The Moral Limits of the Criminal Law Volume 4*, xix–xx).

¹⁶¹ Petersen, “What Is Legal Moralism?”; Arneson, “The Enforcement of Morals Revisited,” 339.

¹⁶² Devlin, *The Enforcement of Morals*; James Fitzjames Stephen, *Liberty, Equality, Fraternity*, Primary Source Edition (New York: Holt & Williams, 1878), 144; Larry Alexander, “The Legal Enforcement of Morality,” in *A Companion to Applied Ethics*, ed. R. G. Frey and Christopher Heath Wellman (Oxford, UK: Blackwell Publishing, 2003), 135.

¹⁶³ Moore, *Placing Blame*; Feinberg, *The Moral Limits of the Criminal Law Volume 4*; Duff, “Towards a Modest Legal Moralism;” Douglas N Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008).

Table 4.1 shows the most popular candidates for the different components of a definition. Initially, we note that the different options are not mutually exclusive for any of the components. On the contrary, someone who affirms (B) will also affirm (C), since it is conceptually true that a wrong which causes no harm (or offense) is a certain kind of wrong. Similarly, someone who affirms (3) will also affirm (2), and someone who affirms (2) will also affirm (1). Even though it is not conceptually true, those who affirm (ii) will also tend to affirm (i). This is so since *criminalization* is a form of *legal restriction* which is particularly hard to justify.¹⁶⁴ Therefore, when it is possible to justify the criminalization of something, it is usually also possible to justify legal restrictions on it. The definition favored in this dissertation is A.1.II. For the record, I do not think that A.1.II is superior to A.1.I as a definition of legal moralism. However, this dissertation is about criminalization, which merits choosing A.1.II over A.1.I. No one has ever held that the justificatory component of legal moralism should be fleshed out in the manner of (3). The most common alternatives to the definition favored in this dissertation are those using (B) for the moral component and/or (2) for the justificatory component. I now proceed to summarize the reasons for rejecting that (B) or (C), and (2) or (3) are good candidates for the moral and the justificatory components of a definition of legal moralism (respectively). First, however, I shall provide a brief terminological history of legal moralism, as this history is important in the rejection of (B) and (C).

4.1.1. A brief terminological history of legal moralism: The Hart-Devlin debate

Any terminological history of legal moralism must begin with the 1957 “Report of the Committee on Homosexual Offences and Prostitution” (colloquially known as “the Wolfenden Report,” after its chairman).¹⁶⁵ The Wolfenden Report recommended that the United Kingdom decriminalize the so-called “homosexual offenses.”¹⁶⁶ Its main argument for this recommendation was the following:

¹⁶⁴ The unique harshness of the sanctions of the criminal law was elucidated at length in chapter 1.

¹⁶⁵ Wolfenden et al., “Wolfenden Report.”

¹⁶⁶ A group of criminal prohibitions against homosexual relations between consenting adults, which included the following offenses: included *buggery*, i.e. anal intercourse (punishable by up to life in prison), *attempted buggery*, *indecent assault on a male by a male*, and *assault with intent to commit buggery* (all punishable by up to 10 years in prison), *indecent assault on a female by a female*, *acts of gross indecency between males*, *procuring acts of gross indecency between males*, *attempt-*

[T]here must remain a realm, of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality.¹⁶⁷

British High Court Judge Lord Patrick Devlin vehemently disagreed with the report's recommendations in general, and this claim in particular. In a lecture that would later become part of his book *The Enforcement of Morals*, Lord Devlin directly contradicted the claims of the Wolfenden Report when he asserted the following:

[I]t is not possible to set theoretical limits to the power of the state to legislate against immorality. It is not possible settle in advance exceptions to the general rule or to define inflexibly areas of morality into which the law is in circumstances to be allowed to enter.¹⁶⁸

This led the great legal philosopher H. L. A. Hart to intervene on the side of Wolfenden in a series of lectures, which were collected in the volume entitled *Law, Liberty, and Morality*.¹⁶⁹ It was in this volume that the term *legal moralism* was first used as a description of Lord Devlin's views.¹⁷⁰ Of course, Lord Devlin held a number of views about a number of things. However, the views that legal moralism was meant to describe were those Devlin held *about the normative relationship between morality and law* (quoted above). It was disagreement over this relation which explained why The Wolfenden Report and Hart supported the decriminalization of homosexuality, whereas Lord Devlin opposed it. There was no disagreement between Lord Devlin and Wolfenden over the moral status of homosexual conduct, the immorality of which was disputed by neither.¹⁷¹ Likewise, Hart stressed

ing to procure acts of gross indecency between males, and persistent soliciting or importuning of males by males for immoral purposes (all punishable by up to 2 years in prison) (Ibid., 29–30). It is worth remarking that these laws were actively enforced. In 1955, approximately 2504 people were prosecuted under one of these laws, 2288 of whom were found guilty, 14 of whom received prison sentences exceeding 7 years (Ibid., 131–5).

¹⁶⁷ Wolfenden et al., "Wolfenden Report," 24.

¹⁶⁸ Devlin, *The Enforcement of Morals*, 12–13.

¹⁶⁹ H. L. A. Hart, *Law, Liberty, and Morality* (Stanford, CA: Stanford University, 1963).

¹⁷⁰ Ibid., 6. While Lord Devlin is not mentioned by name, the mention of the "one judge" who has argued that the enforcement of sexual morality "is a proper part of the law's business—as much its business [...] as the suppression of treason" is a very obvious allusion to Devlin and his main argument.

¹⁷¹ Wolfenden et al., "Wolfenden Report," 24; Devlin, *The Enforcement of Morals*, 11. At this point, the reader might point out that Devlin was only claiming that ho-

that the disagreement at hand was not “merely over the content of the morality to be enforced [...]”.¹⁷² While I shall return to Lord Devlin’s disintegration thesis in the next chapter,¹⁷³ what has been said already is sufficient for the purpose at hand.

Namely, it establishes that legal moralism is a position about how morality relates to the justification of legislation. It is *not* a position about the substantive content of morality. Accordingly, a definition of legal moralism should capture disagreements over how morality relates to the justification of legislation. By this I mean that on a good definition of legal moralism it should not be possible for someone who is a legal moralist and someone who is not to agree about this relation. In particular, a good definition of legal moralism should not allow for the possibility that of two people who agree about the relation between morality and the justification of criminalization but disagree about the content of substantive morality, one qualifies as a legal moralist and one does not.

4.1.2. Summary of the contribution of “Defining Legal Moralism”

The point that legal moralism is a position about how morality relates to the justification of criminalization might seem trivial. However, once we accept that legal moralism is such a position, it becomes natural to think that the role of a concept like “legal moralism” is to help us structure a debate about how morality relates to the justification of criminalization. This turns out to be a reason to strongly prefer (A) to (B) and (C) as the moral component of a definition of legal moralism, and (1) to (2) and (3) as the justificatory component.

Most importantly, definitions of legal moralism using (B) or (C) as the moral component simply fail to treat legal moralism as a position about how morality relates to the justification of criminalization. This is most striking in the case of (B). Suppose two persons, Joel and Michael, both hold that the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization. Michael believes that some conduct which causes neither harm nor offense to others can be morally wrong, however, whereas Joel believes that only harmful conduct can be morally wrong. If (B) is used as the moral component in the definition of legal moralism, then Michael is a *legal moralist* and

mosexual conduct was considered immoral rather than claiming that it *was* immoral. Being an emotivist, however, Lord Devlin held that there is no “morality” beyond the attitudes of which he was speaking (Ibid., 5; 17) rendering such a dichotomy rather misleading. More on that in the next chapter.

¹⁷² Hart, *Law, Liberty, and Morality*, 24.

¹⁷³ Section 5.1.

Joel is not. However, the disagreement between Joel and Michael is about the content of substantive morality, not the relation between morality and the justification of criminalization. Even worse, such a definition would categorize people who affirmed the following as legal moralists:

The Bizzaro harm principle: The only good reason in support of criminalization is to prevent harmless immoralities

But a person who affirms the Bizzaro harm principle has a very different view of the relationship between morality and the justification of its criminalization than that of Devlin.¹⁷⁴ The reply that most legal moralists affirm both legal moralism and the harm principle¹⁷⁵ is no good; for legal moralists typically reject the moral relevance of the distinction between *harmful* and *harmless wrongs*. What matters is simply *wrongfulness*¹⁷⁶—it is the wrongfulness of conduct which makes it fall within the proper scope of the criminal law, and whether conduct is harmful or not is only relevant insofar as harmfulness is a wrong-making feature of conduct.¹⁷⁷ That which definitions using (B) as the moral component capture is not legal moralism but the conditions under which the implications of legal moralism differ from the harm principle. While this difference is important, it is not all there is to legal moralism. When this part of the argumentation of “Defining Legal Moralism” is treated at such length, it is because the rejection of (B) as an appropriate moral component of a definition of legal moralism is among the most important points of “Defining Legal Moralism.” It turns out to have rather serious ramifications for how to argue about legal moralism. (B) is a particular version of (C), according to which the relevant *kind* of wrong is *harmless wrongs*. Any version of (C) will suffer from problems similar to those of (B).

Definitions of legal moralism that use (B) or (C) as the moral component simply fail to appropriately capture disagreements over how morality relates to the justification of criminalization. Definitions of legal moralism which use (3) as the justificatory component fail to *structure* it, because they turn legal moralism into a view which nobody defends. Regarding (2), we may note that one cannot affirm A.2.II without affirming A.1.II. If the wrongfulness of conduct can be sufficient, all things considered, to justify its criminalization, it must be because the wrongfulness of conduct is always *pro tanto* sufficient to justify its criminalization. Otherwise the wrongfulness of conduct could never be sufficient, all things considered. If legal moralism is defined in the manner of A.2.II, then legal moralists would also be committed

¹⁷⁴ Devlin, *The Enforcement of Morals*, 12–13.

¹⁷⁵ Petersen, “What Is Legal Moralism?,” 87.

¹⁷⁶ See particularly Moore, *Placing Blame*, 647–52.

¹⁷⁷ Damgaard Thaysen, “Defining Legal Moralism,” 186–7.

to the additional claim that it is sometimes the case that the *pro tanto* justification of criminalizing wrongful conduct is sufficient, all things considered. A.1.II is neutral about this claim. In a way, A.1.II therefore makes a more basic and more parsimonious claim than A.2.II. I admit this is not a strong reason to prefer A.1.II to A.2.II, but it is *some* reason to prefer it.

4.1.3 Why this dissertation does not adopt the definition settled upon in “Defining Legal Moralism”

“Defining Legal Moralism” does not settle on the definition of legal moralism as being the claim that the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization. Rather, it settles on:

LM3*: For any X, it is always a *pro tanto* reason for justifiably imposing legal regulation on X that X is morally wrong (where “morally wrong” is not conceptually equivalent to “harmful”).¹⁷⁸

Lest this appear to be an oversight by a sloppy author, I should comment upon the reasons this definition is not employed in the dissertation. First, the change in definition reflects the focus in this dissertation on *criminalization*, whereas LM3* attempts to provide a more general definition of legal moralism. In other respects, the changes in the definition reflect changes in my understanding of legal moralism. Consider the following view:

The F-fulness of conduct is *pro tanto* sufficient to justify its criminalization. The F-fulness of conduct is analytically distinct from the wrongfulness of conduct, but wrongful conduct is always F-ful. The wrongfulness of conduct contributes nothing to the justification of criminalizing that conduct.

People who hold this view will agree that it is always *pro tanto* justifiable to criminalize wrongful conduct and that the wrongfulness of conduct is always a reason to *believe* that criminalizing that conduct is *pro tanto* justified, but they will not affirm that *the wrongfulness of conduct is pro tanto sufficient to justify its criminalization*. For the wrongfulness of conduct does not provide reasons for action; rather, the wrongfulness of conduct is a sufficient reason to believe that the feature which is *pro tanto* sufficient to justify criminalization, F-fulness, is present. On LM3* it is ambiguous whether such people are legal moralists yet they are clearly not, for though they believe that criminalizing wrongful conduct is *pro tanto* justified, they do not hold

¹⁷⁸ Damgaard Thaysen, “Defining Legal Moralism,” 190.

that it is the wrongfulness of conduct which does the justificatory work. For this reason, the definition used throughout this dissertation is different.

4.2. Michael S. Moore's legal moralism

This section presents the legal moralism of Michael S. Moore.¹⁷⁹ This is the version of legal moralism with which this dissertation primarily engages. Moore's legal moralism is based on a retributivist theory of punishment. According to retributivism, the purpose of punishment is to serve the intrinsic good of retributive justice by making people suffer in proportion to what they deserve.¹⁸⁰ Only culpable wrongdoers deserve to suffer at all, and all culpable wrongdoers "deserve to suffer for their culpable wrongdoings"¹⁸¹ in proportion to the gravity of their culpable wrongdoing.¹⁸² For brevity, I shall henceforth refer to the goal of retributive justice as *giving wrongdoers what they deserve*.

It is important to grasp how Moore moves from a theory of punishment to a normative theory of the criminal law. This is particularly so since this dissertation shall argue that Moore's attempt to make this move fails. Moore makes his move in two steps. First, he claims that a theory of punishment is a theory of what he variously refers to as the criminal law's function,¹⁸³ aim,¹⁸⁴ the value it serves,¹⁸⁵ the good it serves,¹⁸⁶ its general justifying aim,¹⁸⁷ and what "criminal law in general is good for."¹⁸⁸ The purpose of this is not to scold Moore for using varying terminology (nor am I in any position to do so, since "Law Letters" introduces yet another different term to refer to this thing, namely, *the proper aim* of the criminal law). Furthermore, some of these things are tightly connected rather than literally equivalent.¹⁸⁹ Rather, the point is to inform the reader that whichever one of the items on this list is substituted for X in the question: "what is the criminal law's X?" Moore

¹⁷⁹ Defended in Moore, *Placing Blame*; Moore, "A Tale of Two Theories"; Moore, "Liberty's Constraints on What Should Be Made Criminal."

¹⁸⁰ Moore, *Placing Blame*. Moore, "A Tale of Two Theories," 31.

¹⁸¹ Moore, "A Tale of Two Theories," 31.

¹⁸² Moore, *Placing Blame*, 662; Moore, "A Tale of Two Theories," 31; Moore, "Liberty's Constraints on What Should Be Made Criminal," 192.

¹⁸³ Moore, *Placing Blame*, 23–30.

¹⁸⁴ *Ibid.*, 660.

¹⁸⁵ *Ibid.*

¹⁸⁶ Moore, "Liberty's Constraints on What Should Be Made Criminal," 189.

¹⁸⁷ Moore, "A Tale of Two Theories," 31.

¹⁸⁸ Moore, "Liberty's Constraints on What Should Be Made Criminal," 190.

¹⁸⁹ E.g. the criminal law's function is *not* the good it serves, but to serve a good.

would give essentially the same answer: Giving wrongdoers what they deserve.

According to Moore, the function of the criminal law is to bring about whatever intrinsic good it has the capacity to bring about.¹⁹⁰ Whatever the criminal law has the capacity to bring anything about it has the capacity to bring about through *punishment* (or the threat thereof). Thus, the question of the function of the criminal law becomes a question of what goods can be brought about by punishment. In turn, this is to be settled by a theory of punishment. As Moore writes “any theory of punishment, gives an answer to the question ‘what is the criminal law good for?’”¹⁹¹ Moore acknowledges that in addition to the promotion of retributive justice, the prevention of crime is also an intrinsic good which could be served by the criminal law.¹⁹² However, he claims that it is not possible for the criminal law to simultaneously serve both goods effectively. Since the capacity of the criminal law to promote retributive justice is much greater than its capacity to prevent crime, this is the *only* function of the criminal law.¹⁹³ So much for the relation between the theory of punishment and the function of the criminal law. We are now in a position to understand the following passage by Moore:

The natural place to start in looking for good reasons with which to overcome the presumption in favour of liberty [i.e. to justify criminal laws¹⁹⁴] would be in the theory of punishment. After all, a theory of punishment is a theory of what good(s) are served by criminal law generally, and that should directly determine what are the good(s) criminal legislation should be seeking to achieve in their formulating the particular prohibitions making up the special part of the criminal law.¹⁹⁵

Apart from repeating the claim about the influence of a theory of punishment on the function of the criminal law, Moore here claims that the *function* of the criminal law *directly determines* the set of things which can *pro tanto* justify criminalization. As Moore writes, “surely legislators should aim in their criminal legislation at whatever criminal law itself is aimed at. What criminal law in general is good for should tightly control what good(s) legis-

¹⁹⁰ Moore, *Placing Blame*, 26. Something that is not able to bring about anything that is intrinsically good has no function. Moore thus uses *function* in a normative sense.

¹⁹¹ *Ibid.*, 71.

¹⁹² *Ibid.*, 27.

¹⁹³ *Ibid.*, 28–30.

¹⁹⁴ The presumption of liberty will be discussed in the next section.

¹⁹⁵ Moore, “Liberty’s Constraints on What Should Be Made Criminal,” 189 [my emphasis].

lators should seek in their criminal legislation.”¹⁹⁶ By thus moving from the theory of punishment to the general aim (or function) of the criminal law, and from the general aim of the criminal law to an account of what can and cannot justify *particular* criminal laws, Moore gets from retributivism to legal moralism.

Because the good served by punishment is promoting retributive justice, the general aim of the criminal law is to promote retributive justice. Because the general aim of the criminal law is promoting retributive justice, particular criminal laws should aim at promoting retributive justice. Since only conduct which has first been criminalized can be permissibly punished,¹⁹⁷ permissibly promoting retributive justice requires “that all and only morally wrongful behavior should be criminalized.”¹⁹⁸ Because retributive justice requires that culpable wrongdoers suffer *for* their culpable wrongdoing, it also requires that wrongful conduct is criminalized because it is wrongful. As Moore writes, this means that

[L]egislatures should *prima facie* criminalize all immoral conduct *because it is immoral*.¹⁹⁹

The immorality of behaviour, on this theory of legislation, will be a sufficient condition with which to justify criminal legislation.²⁰⁰

Moore clearly thinks neither that the wrongfulness of conduct is sufficient, all things considered, to justify its criminalization,²⁰¹ nor that the wrongfulness of conduct merely appears to be a reason to criminalize it, which may disappear upon closer inspection.²⁰² I therefore take these quotes to indicate that Moore affirms that *the wrongfulness of conduct is pro tanto sufficient to justify its criminalization*. This is especially so since a *pro tanto* sufficient justification will often be *prima facie* sufficient, all things considered.

¹⁹⁶ Ibid., 190.

¹⁹⁷ Moore, *Placing Blame*, 660; Moore, “A Tale of Two Theories,” 31; Moore, “Liberty’s Constraints on What Should Be Made Criminal,” 191.

¹⁹⁸ Moore, “A Tale of Two Theories,” 32.

¹⁹⁹ Moore, *Placing Blame*, 80 [my emphasis].

²⁰⁰ Ibid., 645.

²⁰¹ Moore, “Liberty’s Constraints on What Should Be Made Criminal.”

²⁰² Moore, *Placing Blame*, 660.

4.3. The nature and sources of the *liberal* character of Moore's legal moralism

The previous section presented Moore's reasons for thinking that the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization. In order to understand the appeal of Moore's legal moralism, however, it is of crucial importance to understand why Moore repeatedly claims that his legal moralism is *liberal* and what that claim means.²⁰³

We should understand Moore's claim that his legal moralism is *liberal* as a claim that his version of legal moralism does not have the legislative implications traditionally associated with legal moralism that have led liberals to reject legal moralism. As he writes:

What make [sic] him [the legal moralist] a liberal is how he comes out at the end of the day in assessing the rightness of laws dealing with homosexuality, abortion, and the like. [... he] can and should agree that with his more sophisticated allies that the criminal law has no business criminalizing behaviours such as "deviant" sex, abortion, drug use, and the like.²⁰⁴

In fact, Moore holds the differences between his legal moralism and the straightforwardly liberal theory of Douglas Husak to make "little or no difference in what can be justifiably criminalized."²⁰⁵ Moore does not claim that the implications of his legal moralism are completely equivalent to those of liberalism.²⁰⁶ However, he emphasizes a number of significant points of agreement. Notably, Moore's legal moralism is every bit as hostile to paternalism and the "criminalization of behaviour that is incorrectly believed to be morally wrong"²⁰⁷ as Mill's harm principle.²⁰⁸ When Moore claims that his legal moralism is liberal, I thus take him to be claiming that most of the legislative implications of his legal moralism are equivalent to those of liberal theories and that it is never the case that accepting Moore's legal moralism commits one to criminalizing some conduct, which liberals hold that it would

²⁰³ Ibid., 661–65; Moore, "A Tale of Two Theories," 33; 38; Moore, "Liberty's Constraints on What Should Be Made Criminal," 193.

²⁰⁴ Moore, *Placing Blame*, 661.

²⁰⁵ Moore, "A Tale of Two Theories," 38.

²⁰⁶ Moore, *Placing Blame*, 646.

²⁰⁷ Moore, "Liberty's Constraints on What Should Be Made Criminal," 193.

²⁰⁸ Ibid., 192–3.

be *obviously and pre-theoretically unjust*²⁰⁹ to criminalize—such as “deviant” sex or abortion.

4.3.1. The two sources of “liberalism” in Moore: Moore’s account of the content of substantive morality and the presumption of liberty

The liberal implications of Moore’s legal moralism flow from two elements of the theory. First, it flows from the account of substantive morality which Moore combines with his legal moralism. It is as obvious as it is important that the legislative implications of legal moralism are highly sensitive to one’s account of the content of substantive morality. While the accounts legal moralists have traditionally given of the content of substantive morality have tended to be religiously conservative,²¹⁰ Moore’s account of the content of substantive morality is thin, bordering on the minimalistic. In a passage (too delightfully blunt not to quote), Moore is eager to distance himself from the accounts traditionally associated with legal moralism:

On my view of sex, for example, morality by and large does not concern itself with much of what passes for social mores in our society on the topic of sex. I think that it trivializes morality to think that it obligates us about what organ we insert into what orifice of what gender of what species.²¹¹

[M]y own view of morality is quite spare: in general, we have no duties to ourselves or to some god, nor do we have duties with respect to many of the items about which customary morality so fusses and fumes, such as sex.²¹²

Thus, Moore’s account of the content of substantive morality leaves no room for the enforcement of various sexual taboos or legal paternalism. It should come as no surprise to anyone that the implications of legal moralism start to look suspiciously like those of liberalism when the account of the content of substantive morality is itself liberal.

The second source of the liberal character of Moore’s legal moralism is the expansive account of the values that limit the extent to which retributive justice can be permissibly pursued through the criminal law. Two things

²⁰⁹ This formulation is taken directly from Jens Damgaard Thaysen, “Infidelity and the Possibility of a Liberal Legal Moralism,” *Criminal Law and Philosophy*, March 28, 2015, doi:10.1007/s11572-015-9370-5.

²¹⁰ Cf. George, *Making Men Moral*.

²¹¹ Moore, *Placing Blame*, 756.

²¹² Moore, “A Tale of Two Theories,” 32.

must be true of any value, V, which limits the extent to which retributive justice can be permissibly pursued by the criminal law:

1. *Value*: V is valuable
2. *Conflict*: The criminalization of wrongful conduct causes less moral value qua V to be realized

If, and only if, (1) and (2) are both true of V, then respect for V is a reason against criminalizing wrongful conduct, which must be weighed against the reason in favor of criminalizing wrongful conduct by virtue of its wrongfulness.²¹³ If (1) is false, then there is no reason to care about that the criminalization of wrongful conduct conflicts with V. If (2) is false, then criminalizing wrongdoing does not cause less of V to be realized, then the pursuit of retributive justice is not in conflict with respect for the value of V. The moral significance of the different values which conflict with the criminalization of wrongful conduct adds up to a *presumption of liberty*, namely, an account of the moral value *lost* by criminalizing some wrong, W, which must be overcome by the moral value *gained* by criminalizing W by virtue of retributive justice (which is directly proportional to W's degree of wrongfulness, since the more wrongful an action is, the worse it is—from the point of view of retributivism—that those who engage in that action go unpunished).²¹⁴ It is because of this presumption of liberty that the wrongfulness of conduct is only *pro tanto* sufficient to justify its criminalization. While the wrongfulness of conduct always adds moral weight to the case for criminalization, it is not always sufficient to outweigh the moral weight of the case against criminalization by virtue of its conflict with certain moral values.

Moore grounds the presumption of liberty in five values, the realization of which he claims is always in conflict with the criminalization of wrongful conduct.²¹⁵ First, the criminalization of wrongful conduct infringes on the value of *positive liberty*, because it deprives people of the positive liberty to engage in the criminalized conduct.²¹⁶ Second, the criminalization of wrongful conduct infringes on the value of *Millian autonomy* (understood as the “causal efficacy of one's own second-order choices about the kind of person

²¹³ Or so says Moore, for some skeptical remarks about that claim, see Tadros, “The Wrong and the Free,” 83.

²¹⁴ Moore, “Liberty's Constraints on What Should Be Made Criminal.”

²¹⁵ Ibid.

²¹⁶ Ibid., 186. Note that my primary purpose here is to present the details of Moore's theory. Therefore, I do not discuss the controversial claim that the positive liberty to engage in seriously wrongful conduct is intrinsically valuable (see Tadros, “The Wrong and the Free,” 81; Joseph Raz, *The Morality of Freedom* (Oxford [Oxfordshire]; New York: Clarendon Press; Oxford University Press, 1986), 380).

one wants to become”),²¹⁷ because the criminalization of some wrong, W, coerces people to refrain from W’ing and thereby robs the choice not to W of its value as an expression of the agent’s self-creation. Third, the criminalization of wrongful conduct infringes on the value of *Kantian autonomy*, since this value is realized only when the right thing is done for the right reason, and criminalization makes people refrain from wrongdoing only out of fear of the law, which is *not* the right reason to refrain from wrongdoing.²¹⁸ Fourth, the criminalization of wrongdoing conflicts with the value of people getting their preferences fulfilled.²¹⁹ The fifth item on Moore’s list is slightly more complicated. Moore refers to this item as “the well-known costs attendant upon the criminal sanction.”²²⁰ This refers to a number of things. First, it refers to the direct economic costs of enforcing criminal prohibitions. Second, it refers the fact that enforcing some criminal prohibitions will infringe on morally valuable privacy. Third, it refers to the problems of *not* enforcing criminal prohibitions effectively, namely that this will lead to disrespect for the law, creating opportunities for selective enforcement.²²¹ When a criminal prohibition of some wrong is not enforced effectively then the criminal prohibition might even perversely end up benefitting those who engage in that wrong, because it raises the price people are willing to pay for the prohibited good or service (e.g. recreational drugs). This is known as the “crime tariff.”²²²

While Moore lists the costs of criminalization as the fifth of “the more basic goods to which negative liberty can be a means,”²²³ it differs from the four other goods in several respects. Most strikingly, economic resources²²⁴ are not intrinsically good, but rather a textbook example of an instrumental good. If the economic costs of effectively enforcing a criminal prohibition are a reason against criminalizing wrongful conduct then it is because those economic resources could have been used to further some other intrinsic moral value than retributive justice. Second, that which Moore labels as “well-known costs attendant upon the use of the criminal sanction”²²⁵ is clearly not *a single good* upon which the criminalization of wrongdoing always infringes. Nevertheless, Moore is right that the costs of criminalization are relevant

²¹⁷ Moore, “Liberty’s Constraints on What Should Be Made Criminal,” 187.

²¹⁸ Ibid.

²¹⁹ Ibid., 188.

²²⁰ Ibid.

²²¹ Ibid.

²²² Ibid.

²²³ Ibid., 186.

²²⁴ I.e. what society will have less of, because it has to pay the “direct enforcement costs” (Ibid.).

²²⁵ Ibid., 188.

when deciding whether criminalizing wrongful conduct is justified, all things considered, but what Moore is doing is pointing out the following dilemma:²²⁶ When wrongful conduct is criminalized, the criminal ban is either effectively enforced or it is not. If the criminal prohibition is effectively enforced then it is costly in terms of economic resources and often also infringes on morally valuable privacy,²²⁷ If the criminal prohibition is not effective, then it results in disrespect for the law, creates opportunities for selective enforcement, and funds wrongdoers because of the “crime tariff.” On either alternative, we are faced with another consideration militating against criminalization.

According to Moore, these five values provide the moral weight behind the presumption of liberty. Importantly, the moral weight they lend to the case against criminalization differs from wrong to wrong, meaning that the moral weight of the presumption of liberty itself differs from wrong to wrong. Accordingly, the degree of wrongfulness necessary for the *pro tanto* sufficient justification of criminalizing some wrong by virtue of its wrongfulness to be strong enough to overcome the presumption of liberty varies from wrong to wrong.²²⁸ Let “D” denote the decrease in the amount of the relevant value realized caused by the criminalization of C. Let “V” denote the moral value of realizing equivalent amounts of this or that value. The moral weight of *the presumption of liberty* in the case of any given wrong, C, is then as follows:

$$\begin{aligned} &D(\text{Positive liberty}(C)) \times V(\text{Positive liberty}) + D(\text{Millian autonomy}(C)) \times \\ &V(\text{Millian autonomy}) + D(\text{Kantian autonomy}(C)) \times V(\text{Kantian autonomy}) \\ &+ D(\text{Preference satisfaction}(C)) \times V(\text{Preference satisfaction}) + D(\text{the re-} \\ &\text{sources used to effectively enforce a criminal ban against C could have} \\ &\text{promoted other intrinsic moral values than retributive justice}) \times V(\text{those} \\ &\text{other intrinsic moral values}). \end{aligned}$$

Since the *degree* to which the criminalization of C infringes on these different values differs depending on the nature of C, the moral weight of the presumption of liberty differs depending on the exact type of conduct in ques-

²²⁶ Cf. the discussion of economic costs in Thaysen, “Infidelity and the Possibility of a Liberal Legal Moralism.”

²²⁷ For those who consider the interest in *having control over information about oneself* and to whom it is revealed to be an essential part of the interest in privacy (cf. Judith Wagner DeCew, “The Scope of Privacy in Law and Ethics,” *Law and Philosophy* 5, no. 2 (n.d.): 145–73.) the case of McEwen from chapter 1 will provide a good example of how criminalization can infringe on privacy.

²²⁸ Moore, “Liberty’s Constraints on What Should Be Made Criminal,” 201.

tion.²²⁹ It is this moral weight of the presumption of liberty which must be outweighed by the case for criminalizing C by virtue of its wrongfulness. Notably, Moore maintains that only Millian autonomy is valuable enough to prevent the criminalization of serious moral wrongs from being justified, all things considered.²³⁰

It is Moore's—largely well-founded—belief that the combination of this *thick* account of the values underlying the presumption of liberty with the *thin* account of the content of substantive morality enables his legal moralism to avoid the implications for what conduct ought to be criminalized traditionally associated with legal moralism which the liberal is likely to find most disturbing, such as the implication that homosexuality and/or abortion ought to be criminalized, either because such conduct is not morally wrong or because the *pro tanto* sufficient justification of criminalizing this conduct by virtue of their wrongfulness fails to be sufficient, all things considered, on account of not being able to overcome the presumption of liberty. Thus, we end up with a distinctively *liberal* legal moralism.

As we shall see, the contribution of “Infidelity and the Possibility of a Liberal Legal Moralism” is to argue that Moore's legal moralism ultimately fails to be liberal, since, despite Moore's valiant efforts, accepting his legal moralism still commits one to considering the criminalization of infidelity to be justified, all things considered.²³¹ However, no one can deny that freeing legal moralism from the shackles of the implausible and unsympathetic religiously conservative accounts of the content substantive morality with which it has been so closely associated is a significant step forward for legal moralism. Moore's legal moralism remains the only single version of legal moralism that proceeds on the basis of a plausible account of the content-substantive morality while also being elaborate enough to be able to derive implications from it. There are many other elaborate defenses of legal moralism—both older ones, like that of James Fitzjames Stephen and Lord Patrick Devlin, and more recent ones, like that of Robert George²³²—but these works are all marred by their commitment to those manifestly implausible accounts of the content of substantive morality from which Moore is so eager to distance himself. Conversely, there are also other defenders of liberal legal moralism, such as Gerald Dworkin and Richard Arneson,²³³ but they tell us too

²²⁹ Ibid., 200–6.

²³⁰ Ibid., 202.

²³¹ Thaysen, “Infidelity and the Possibility of a Liberal Legal Moralism.”

²³² Stephen, *Liberty, Equality, Fraternity*; Devlin, *The Enforcement of Morals*; George, *Making Men Moral*.

²³³ Dworkin, “Devlin Was Right”; Arneson, “The Enforcement of Morals Revisited.”

little about when and why the *pro tanto* sufficient justification of criminalizing wrongful conduct by virtue of its wrongfulness fails to be sufficient, all things considered, for us to be able to pin down the legislative implications of their views (although these views remain interesting, and certainly much more interesting than those of illiberal legal moralists). By contrast, Moore provides a detailed account of the values underpinning the presumption of liberty that must be overcome by any case in favor of criminalization.

4.4. The context and contribution of “I Would Do Anything for Law”

We saw above that for a value to add moral weight to a presumption of liberty, it must *conflict* with the criminalization of wrongful conduct. “I Would Do Anything for Law” delves into the details of Moore’s argument that the criminalization of wrongful conduct *conflicts* with Kantian autonomy; that is, that the criminalization of any wrongful conduct reduces the number of people who refrain from the criminalized wrong for the right reason. This is dubbed the corruption thesis. Moore argues that the fact that criminalization creates a prudential reason to refrain from the criminalized conduct, which is not the right reason to refrain from wrongdoing, supports the corruption thesis. He writes:

Autonomous action in this [Kant’s] sense is doing right actions for right reasons. Such autonomous decision—in the sense of acting out of a concern for morality and not merely out of prudence—is an important moral desideratum, and state coercion always renders such decision-making less likely.²³⁴

[L]egal coercion always diminishes the possibility of attaining morality’s highest value [doing the right thing for the right reason], because the law’s coercive sanctions induce many to act for those merely prudential reasons (fear of punishment) that have no moral worth.²³⁵

The first contribution of “I Would Do Anything for Law” is to argue that the fact that criminalization creates a prudential reason to refrain from the criminalized conduct, which is not the right reason to refrain from wrongdoing, does not support the corruption thesis. This fact gives us no reason to expect that the criminalization of wrongful conduct will reduce the number of people refraining from the criminalized wrong for the right reason. The fact is a reason to expect that the criminalization of wrongful conduct will increase

²³⁴ Moore, *Placing Blame*, 747–8.

²³⁵ *Ibid.*, 747.

the number of people who refrain from the criminalized wrong out of prudence, but only because it is a reason to expect that some of those who would otherwise have engaged in the criminalized wrong will now refrain from that wrong out of prudence. Those people would not have refrained from the criminalized wrong for the right reason either way. There is no reason, however, to expect the creation of a prudential reason to refrain from wrongful conduct to make some of those who would otherwise have refrained from the criminalized wrong for the right reason to refrain from the criminalized wrong only out of prudence. This is so since those people already took themselves to have a sufficient reason to refrain from the criminalized wrong. Thus, the fact that criminalization creates a prudential reason to refrain from the criminalized conduct, which is not the right reason to refrain from wrongdoing, is a reason to expect that the criminalization of wrongful conduct will *increase* the number of people who refrain from the criminalized wrong out of prudence, but not that it will *reduce* the number of people who refrain from the criminalized wrong for the right reason. It therefore does not support the corruption thesis and is, accordingly, no reason to expect the criminalization of wrongful conduct to conflict with the value of Kantian autonomy.

The second contribution of “I Would Do Anything for Law” is to argue that the fact that criminalization creates a prudential reason to refrain from the criminalized conduct, which is not the right reason to refrain from wrongdoing, instead supports what is dubbed the obscuration thesis according to which criminalizing any wrongful conduct decreases the number of people who are correctly perceived as refraining from the criminalized wrong for the right reason. This is so since the fact that criminalization creates a prudential reason to refrain from the criminalized conduct, which is not the right reason to refrain from wrongdoing, causes the criminalization of wrongful conduct to make it harder to tell whether any given person who refrains from wrongdoing does so for the right reason. Among other things, this is so since the presence of a prudential reason to refrain from wrongful conduct as powerful as those created by many criminal laws means that prudence is always a potential explanation of why any given person refrained from wrongful conduct. “I Would Do Anything for Law” then argues that it is often valuable that those who refrain from wrongdoing for the right reason are also perceived as being rightly motivated. If this is correct, then the obscuration thesis also makes the criminalization of wrongful conduct conflict with something valuable. The overall thrust of the article is, thus, to argue that the criminalization of wrongful conduct does not conflict with Kantian autonomy but that it might conflict with another value that is realized when

those who do the right thing for the right reason are correctly perceived as doing the right thing for the right motive.

It must be admitted that an exploration of the values underpinning the presumption of liberty is not directly relevant to answering the overall question. That is, an account of the values that add moral weight to the case against criminalizing wrongful conduct does not *directly* inform us about the relation between the wrongfulness of conduct and the justification of its criminalization. As the example of Moore's legal moralism shows, however, the legislative implications of legal moralism are highly sensitive to the account of the values underlying the presumption of liberty. Add to this the uncontroversial claim that the legislative implications of legal moralism play an important role in the assessment of its plausibility and it becomes evident that exploring the values underlying the presumption of liberty is clearly, if indirectly, relevant to the task of investigating the relation between the wrongfulness of conduct and the justification of its criminalization.

4.5. Moore's legal moralism and punishment

This concludes the presentation of the core claims of legal moralism in general and Moore's liberal legal moralism in particular. In sum, Moore holds that the *wrongfulness of conduct* is *pro tanto sufficient to justify its criminalization*. The *pro tanto* sufficient justification of criminalizing some conduct by virtue of its wrongfulness is sufficient, all things considered, when the moral value of criminalizing the conduct by virtue of its wrongfulness is sufficient to overcome the moral weight of the presumption of liberty. The moral value of the case for criminalizing any given wrong, C, is directly proportional to the degree to which C is wrongful.²³⁶ Before moving on to examining the case for legal moralism in chapter 5, this section will make a few remarks about the role of punishment in the characterization of Moore's legal moralism. In recent work, Moore characterizes his own view as follows:

²³⁶ Both the degree of wrongfulness C and a person's degree of responsibility for committing C are relevant to how much she deserves to suffer from the point of view of retributivism (Ibid., 35ff.). However, it is rarely, if ever, the case that there is anything general to be said about the degree to which people who commit C are responsible. Thus, when deciding whether the general prohibitions of the criminal law are justified, only the *degree* of wrongfulness will tend to matter, whereas the other component of desert only comes in at the time of sentencing.

Criminal legislation must exclusively aim at preventing or punishing moral wrongs, and this it can do by prohibiting all and only those behaviors that are morally wrong.²³⁷

This raises the question of whether it is correct to characterize Moore's view as being that the wrongfulness of conduct, rather than the fact that criminalizing that conduct would lead to the prevention of wrongdoing and/or the punishment of wrongdoers, is *pro tanto* sufficient to justify its criminalization. We might initially note that Moore himself does not seem to consider the difference significant, swiftly concluding that focusing on the prevention and/or punishment of wrongdoing implies focusing on wrongdoing. Moreover, he characterizes "legislation that aims to prohibit moral wrongdoing" as "rightly motivated" a mere three pages later.²³⁸ If and to the extent that Moore considers the fact that criminalization will lead to the punishment of wrongdoing rather than the wrongfulness of conduct *pro tanto* sufficient to justify its criminalization, I have no issues conceding the point. The central points of this dissertation apply to both with equal force.²³⁹

I do not think that the central points of this dissertation would be undermined if the question at hand was whether *the fact that criminalization will prevent wrongful conduct is pro tanto sufficient to justify its criminalization*. However, I also doubt very much that Moore's theory allows him to claim that the prevention of wrongdoing is among the proper aims of criminal legislation. At first glance, preventing wrongdoing obviously seems to be something different than giving wrongdoers what they deserve. At second glance, one sees that preventing people from becoming culpable wrongdoers prevents them from deserving punishment in the first place, thus promoting retributive justice after all.²⁴⁰ However, the third glance will reveal that this does not make the claim that it is legitimate for criminal legislation to aim at the prevention of wrongdoing consistent with Moore's retributivism. To see this, let us first examine what Moore's retributivism *does* allow him to say about the goodness of preventing wrongful conduct. First, he *can* give it weight as a value which limits the extent to which retributive justice can be pursued along with the other values in the presumption of liberty. Indeed, Moore is right to claim that his theory is consistent with:

sacrificing punishing some guilty in order to prevent more of the right violations that violent crime represents; if a dollar of public resources could either

²³⁷ Moore, "Liberty's Constraints on What Should Be Made Criminal," 192.

²³⁸ Ibid., 195. See also the quotations from section 4.2.

²³⁹ Cf. "Law Letters" pp. 22–4.

²⁴⁰ Moore, "A Tale of Two Theories," 43–4; Tadros, "The Wrong and the Free," 91.

catch and punish a guilty offender or prevent this offense to start with, surely we should use it to do the latter. [... However] it would be a mistake to conclude, as does Husak, that preventative and expressive consequences have to be included within one's theory of punishment along with retributivism, by reason of these budgetary considerations.²⁴¹

Note, however, that what Moore is speaking of here is *refraining* from criminalization because the costs of enforcing the relevant criminal prohibition is better spent on social initiatives which prevents people from becoming wrongdoers. Second, Moore *can* attach moral weight to the prevention of wrongdoing as a beneficial side-effect of the pursuit of retributive justice, which can help offset some its costs. Denying Husak's claim that it must be shown that the benefit of pursuing retributive justice *alone* is worth the costs of a criminal justice system²⁴² Moore counters:

[W]hat must be shown is that the goodness of achieving retributive justice is sufficient to outweigh the *net* balance of costs *and other benefits* of setting up punishment institutions. If punishing the guilty achieves the benefits of crime-prevention and expression of censure [...] then one must net out these social benefits of punishment against its social costs, and *then* ask [...] whether the goodness of achieving retributive justice is enough to make its achievement worth its *net* cost.²⁴³

Note how, in this reply, the good served by the criminal law is still retributive justice. This much is compatible with Moore's retributivism and how Moore argues punishment relates to criminalization. That which is not compatible with the rest of Moore's theory is the claim that it is legitimate for criminal legislation to *aim* at the prevention of wrongdoing for the sake of preventing it. As we saw above, Moore holds that criminal legislation should aim at what criminal law is generally good for; that is, ensuring that wrongdoers get what they deserve.²⁴⁴ Of course, if a criminal law against the wrong, C, prevents some from C, then it also prevents these people from deserving punishment. However, the aim of preventing people from deserving punishment is importantly different from giving wrongdoers what they deserve.

I conclude that it seems perfectly warranted to ascribe the position that the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization to Moore. On the off chance that it is not, then it is the fact that crimi-

²⁴¹ Moore, "A Tale of Two Theories," 43.

²⁴² Husak, *Overcriminalization*, 204. Husak's criticism of legal moralism is discussed in detail in chapter 7.

²⁴³ Moore, "A Tale of Two Theories," 44.

²⁴⁴ Cf. Moore, "Liberty's Constraints on What Should Be Made Criminal," 191.

nalizing some conduct will lead to the punishment of culpable wrongdoers which is *pro tanto* sufficient to justify the criminalization of that conduct. Should this be the case, the difference will not undermine the case this dissertation makes against legal moralism. Having discussed the theory and core claim of legal moralism, as well as presented Moore's legal moralism, I now proceed to the next chapter, which presents and discusses the main arguments in favor of legal moralism.

Chapter 5: The Case for Legal Moralism

The purpose of this chapter is to present and discuss the case *for* legal moralism. This is done by presenting and discussing the various arguments advanced in favor of legal moralism and discussing their viability. In so doing, it also touches upon the arguments of some of the critics of legal moralism insofar as they are aimed at undermining the case for legal moralism rather than making a case against legal moralism *per se*. This chapter shall not discuss “purely defensive” arguments aimed only at defending legal moralism by discrediting objections or to legal moralism or arguments in favor of alternatives to legal moralism.²⁴⁵ While making such arguments is certainly a worthwhile activity for the legal moralist, they only serve to maintain the parity of legal moralism with rival normative theories of the criminal law. Purely defensive arguments cannot by themselves speak in favor of legal moralism. If those who affirm the harm principle object to legal moralism because it implies that gay sex ought to be criminalized, then arguing that legal moralism does not have this implication is certainly something one would expect a serious defense of legal moralism to do; but doing so is not providing an argument in favor of legal moralism.

Section 5.1 presents Lord Devlin’s famous *disintegration thesis* and the reasons why it is widely discredited. Section 5.2 discusses *the argument from the moral gradation of punishment*, arguing that Feinberg’s attempt at refuting this argument is mostly unsuccessful. Section 5.3 discusses *the conceptual argument* in favor of legal moralism and argues that providing a convincing rebuttal of this argument is likely to be the most serious challenge facing those who would refute legal moralism. Section 5.4 presents Moore’s main argument in favor of legal moralism, indicating how this dissertation attempts to refute it, and briefly outlines how it differs from Tadros’ recent discussion of Moore.²⁴⁶ Section 5.5 discusses arguments based on the intuitive plausibility of the legislative implications of legal moralism. It argues that while such arguments do not fail to support legal moralism over rival normative theories of the criminal law which do not have the relevant legislative implication, it is rarely, if ever, the case that legal moralism has an im-

²⁴⁵ Cf. Michael S. Moore, “Liberty’s Constraints on What Should Be Made Criminal,” in *Criminalization: The Political Morality of the Criminal Law*, ed. R. A. Duff et al., Criminalization Series 4 (New York, NY: Oxford University, 2014), 197–200.

²⁴⁶ Victor Tadros, “The Wrong and the Free,” in *Legal, Moral, and Metaphysical Truths*, ed. Kimberly Kessler Ferzan ([S.l.]: Oxford University Press, 2016), 80–94.

plication for legislation which it does not share with at least one rival theory. The chapter concludes that while Devlin's case for legal moralism fails and intuitive arguments in favor of legal moralism are of limited use, the argument from the moral gradation of punishment, the conceptual argument, and Moore's argument jointly make a formidable case for legal moralism.

5.1. Fear and loathing on the Clapham Omnibus: Lord Devlin's disintegration thesis

Lord Patrick Devlin (in)famously defended legal moralism by advancing his disintegration thesis. He wrote:

[A]n established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions.²⁴⁷

The thrust of Lord Devlin's argument is that because society will disintegrate unless a "common morality" is observed, the state ought to legally enforce this "common morality" in order to ensure that people keep observing it so that society does not disintegrate.²⁴⁸ This argument is thoroughly discredited²⁴⁹—and for good reason. It is worth mentioning only due to its historical importance and strong association with legal moralism. For starters, it involves an empirical claim which is simply false.²⁵⁰ Contemporary Western European societies do not consistently enforce morality by law, and none of them criminalize homosexual relations between consenting adults anymore—which is the prohibition which Devlin set out to defend as an instance

²⁴⁷ Patrick Devlin, *The Enforcement of Morals* (Indianapolis: Liberty Fund, 1963), 13.

²⁴⁸ Cf. Thomas Søbirk Petersen's rendition of the argument (Thomas Søbirk Petersen, "New Legal Moralism: Some Strengths and Challenges," *Criminal Law and Philosophy* 4, no. 2 (June 2010): 218, doi:10.1007/s11572-010-9094-5).

²⁴⁹ Joel Feinberg, *The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing* (Oxford University Press, 1990), 133; H. L. A. Hart, *Law, Liberty, and Morality* (Stanford, CA: Stanford University, 1963), 50; Petersen, "New Legal Moralism;" Richard J. Arneson, "The Enforcement of Morals Revisited," *Criminal Law and Philosophy* 7, no. 3 (October 2013): 437, doi:10.1007/s11572-013-9240-y.

²⁵⁰ Petersen, "New Legal Moralism," 217–18; Hart, *Law, Liberty, and Morality*; Feinberg, *The Moral Limits of the Criminal Law Volume 4*, 133–44.

of legally enforcing morality—yet one cannot help but notice that these societies have yet to disintegrate.²⁵¹ Certainly, Hart is right to ridicule the disintegration thesis as “entitled to no more respect than the Emperor Justinian’s statement that homosexuality was the cause of earthquakes.”²⁵²

This is as good a place as any to make a few general comments on Devlin’s meta-ethics, ethics, and legal moralism. According to Devlin, immoral conduct is “what every right-minded person is presumed to consider to be immoral,”²⁵³ Devlin claims that “intolerance, indignation, and disgust [...] are the forces behind the moral law,”²⁵⁴ and the immorality of conduct is thus simply determined by the fact that the conduct evokes those feelings in right-minded persons. Thus, Devlin is often characterized as advocating the legal enforcement of *positive*²⁵⁵ or *conventional* morality,²⁵⁶ as opposed to *critical*,²⁵⁷ *true*,²⁵⁸ or *real*²⁵⁹ morality. It should be noted, however, that the difference between Devlin and the legal moralists who favor the legal enforcement of “real” morality²⁶⁰ concerns meta-ethics rather than how morality relates to the justification of criminal laws.²⁶¹ On Devlin’s emotivist meta-ethics, there is no *real* or *true* morality “hiding” behind the positive morality revealed by the emoting of intolerance, indignation, and disgust. To be sure, nothing in emotivism precludes the individual from rejecting positive morality on account of having different feelings about conduct (e.g. homosexuality) than the general public.²⁶² When it comes to determining what counts as morality *at the societal level*, however, the emotivist can point to nothing but the aggregation of people’s general feelings about conduct. As he sees it, Devlin is thus advocating the legal enforcement of the only morality there

²⁵¹ Petersen, “New Legal Moralism,” 220.

²⁵² Hart, *Law, Liberty, and Morality*, 50.

²⁵³ Devlin, *The Enforcement of Morals*, 15.

²⁵⁴ *Ibid.*, 17.

²⁵⁵ Hart, *Law, Liberty, and Morality*, 17ff.

²⁵⁶ Feinberg, *The Moral Limits of the Criminal Law Volume 4*.

²⁵⁷ Hart, *Law, Liberty, and Morality*, 17ff.

²⁵⁸ Feinberg, *The Moral Limits of the Criminal Law Volume 4*; Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford; New York: Clarendon Press; Oxford University Press, 1993), 71.

²⁵⁹ Moore, “Liberty’s Constraints on What Should Be Made Criminal,” 193.

²⁶⁰ E.g. Michael S. Moore (*Placing Blame: A Theory of the Criminal Law*, first published in paperback (Oxford; New York: Oxford University Press, 1997)).

²⁶¹ Which is also noted in Moore, “Liberty’s Constraints on What Should Be Made Criminal,” 199.

²⁶² Cf. Devlin, *The Enforcement of Morals*, 24–5.

can be at the societal level,²⁶³ according to which homosexual conduct is immoral due to “a general abhorrence of homosexuality.”²⁶⁴

I draw attention to the meta-ethical and ethical views of Lord Devlin because the implausibility of these views cannot but muddle our engagement with his legal moralism. Emotivism is an implausible meta-ethical theory, and whatever the correct meta-ethical theory is, “homosexual conduct [... is] not plausibly regarded as immoral at all, on any grounds.”²⁶⁵ The specific legislation defended by Lord Devlin, the criminalization of homosexuality, is truly repugnant. Then there is the spectacular failure of Devlin’s social disintegration argument for legal moralism. However, a defender of legal moralism might reasonably claim that the problem here is Devlin’s moral and meta-ethical theory rather than his legal moralism,²⁶⁶ which can be backed up by an argument other than the failed disintegration thesis. Ironically, Lord Devlin seems to stand a much better chance of having been right about legal moralism than almost any other claim.

5.2. The moral gradation of punishment

This classical argument for legal moralism was first advanced by James Fitzjames Stephen.²⁶⁷ It can be rendered as follows:

1. Moral blameworthiness *per se* is relevant to how severely offenders ought to be punished.
2. If moral blameworthiness *per se* is relevant to how severely offenders ought to be punished, then the function of the criminal law is enforcing morality.
3. Hence, the function of the criminal law is enforcing morality.

This argument raises a basic question: If the moral blameworthiness *per se* of those who engage in the conduct is irrelevant to the justification of criminalizing that conduct, then how can it be relevant when meting out the punishment of those who engage in the conduct we actually criminalize? Both Hart and Feinberg have attempted to reject the second premise. Let us first look at Hart’s well-known rejoinder:

²⁶³ Cf. *Ibid.*, 86–101.

²⁶⁴ *Ibid.*, 17.

²⁶⁵ Arneson, “The Enforcement of Morals Revisited,” 452.

²⁶⁶ Cf. Moore, “Liberty’s Constraints on What Should Be Made Criminal,” 199.

²⁶⁷ James Fitzjames Stephen, *Liberty, Equality, Fraternity*, Primary Source Edition (New York: Holt & Williams, 1878), 149–51.

“What sort of conduct may be justifiably punished?” and “How severely should we punish different offenses?” are distinct and independent questions. There are many reasons why we might wish the legal gradation of the seriousness of crimes, expressed in its scale of punishments, not to conflict with common estimates of their comparative wickedness. One reason is that such a conflict is undesirable on simple utilitarian grounds: it might either confuse moral judgments or bring the law into disrepute, or both. Another reason is that principles of justice and fairness between different offenders require morally distinguishable offences to be treated differently and morally similar offences to be treated alike. [...] those who concede that we should attempt to adjust the severity of punishment to the moral gravity of offences are not thereby committed to the view that punishment merely for immorality^[268] is justified.²⁶⁹

Surely, Hart is correct that the question of what can be justifiably punished (which, in this context, is practically the same question as what can be justifiably criminalized) and how severely to punish are logically distinct questions. The two reasons Hart offers for why we might grade punishment according to moral blameworthiness even though the wrongfulness of the conduct for which the offender is punished is irrelevant to the justification of criminalizing that conduct are more problematic, however. They are problematic in that it is unclear how they can be good reasons for grading punishment without also being good reasons to consider the wrongfulness of conduct relevant to the justification of its criminalization. According to the first argument, not grading punishment according to moral blameworthiness would bring the law into disrepute and/or confuse moral judgments. If this claim is true, then why would it not also be true that attaching no relevance to the wrongfulness of conduct in decisions about criminalization will not similarly bring the law into disrepute and/or confuse moral judgments? Why think that people’s moral judgments/opinions of the law are influenced by sentencing but not by criminalization?

Second comes the fairness argument to the effect that, regardless of the role played by considerations about wrongfulness in the justification of criminalization, it is unfair to punish offenders who are equally morally blameworthy to different degrees (and vice versa). This argument is more interesting, but it is unclear *why our concerns about fairness should be confined to how the criminal law treats offenders rather than being extended to everyone*. Consider the following stylized example.

²⁶⁸ Here meaning immoral conduct which harms no one.

²⁶⁹ Hart, *Law, Liberty, and Morality*, 36–7.

Table 5.1 Fairness, criminalization, and sentencing

	Relative wrongfulness	Relative severity of punishment
Murder	500	500
Petty theft	9	9
Adultery	10	0 (legal)

In the absence of a reason to restrict our concerns about fairness to the comparative treatment of *offenders*, the following question arises: If the differential moral blameworthiness makes it unfair not to punish the murderer more severely than the petty thief, then one might ask why it raises no similar problems about unfairness that the adultery is not punished at all (since it is legal), even though it is usually more severely wrongful (and those who engage in it are therefore normally more blameworthy) than petty theft?²⁷⁰ More needs to be said here.

Joel Feinberg takes up the mantle of the fairness argument and attempts to fill out this gap in Hart's argumentation.²⁷¹ He writes:

A rule-governed practice or institution will have its own distinctive justifying aim and its own characteristic process ("machinery"). Either or both of these may be distinctively moral or entirely non-moral. In either case, the operations of the practice must be governed by fair rules, *else it will mistreat those people who participate in it*, as well as defeat some of its own internal aims [...] A system of criminal law, whether or not it is assigned a moral justifying aim, employs an inherently moral (judgmental) constitutive process, and that process, in conjunction with the formal principle of fairness, is what underlies the concern with blameworthiness in sentencing.²⁷²

Feinberg begins his argument with the claim that rule-governed practices with non-moralized functions are not exempt from moral requirements regarding how this function should be pursued. Surely, this is true. Feinberg draws a very helpful analogy with the sport of football, which has an obviously non-moral justifying aim but where the rules for playing must be fair

²⁷⁰ For an argument that adultery is often quite seriously wrongful, see Jens Damgaard Thaysen, "Infidelity and the Possibility of a Liberal Legal Moralism," *Criminal Law and Philosophy*, March 28, 2015, doi:10.1007/s11572-015-9370-5. Note, however, that the reader need not accept that this remark about the relative wrongfulness of adultery and petty theft is true, but only that some legal conduct is more seriously wrongful than some criminal conduct.

²⁷¹ At Feinberg, *The Moral Limits of the Criminal Law Volume 4*, 146ff.

²⁷² Ibid., 151 [my emphasis].

nonetheless.²⁷³ However, it is simply false that only offenders (or those on trial in general) *participate in the rule-governed practice that is the criminal law*. If the criminal law is a sport, then every citizen under its jurisdiction is playing. Saying that only offenders participate in the rule-governed practice of criminal law is tantamount to saying that only those who break the rules of football are playing the game. If I am right about this, the fairness argument does not succeed as an explanation of what makes moral blameworthiness relevant to sentencing but not to criminalization, for while those who participate in the rule-governed practice of the criminal law must be treated fairly, such participation is not confined to offenders.

However, the fairness argument is not Feinberg's main line of reply to the argument from the moral gradation of punishment. Rather, it is a flat rejection that the grading of punishment according to the moral blameworthiness is appropriate after all.²⁷⁴ As he notes, the adherent of the harm principle would surely not allow the sentencing of a man guilty of jaywalking to be influenced by the fact that he jaywalked in order to ogle at a sexually attractive woman, "on the same grounds that he would condemn a statue that made 'discreet ogling' itself into a crime."²⁷⁵ Thus, it is not, in fact, the case that punishment ought to be graded according to moral blameworthiness; rather:

When he [the consistent liberal] approves gradations in punishment based on different degrees of *blameworthiness* (as opposed to responsibility) he must not permit the types of blameworthiness which he excludes at the legislative level to sneak in the back door at the sentencing level. In both cases the moral blameworthiness that is relevant is the harm-threatening, right-violating kind, dispositions to feel or act in ways condemned by grievance morality. And in both cases also, moral blameworthiness based on the principles of nongrievance morality must equally be excluded.²⁷⁶

This reply is much more convincing. Note, however, that Feinberg's argument that those who think that punishment ought to be graded to moral blameworthiness need not affirm that the wrongfulness of conduct is relevant to the justification of criminalization, is thus immediately succeeded by an argument that the consistent liberal must permit all and only those types of moral blameworthiness which bear the right relation to the kind of con-

²⁷³ Ibid., 147.

²⁷⁴ Ibid., 151.

²⁷⁵ Ibid., 154. Upon reading this passage, one can almost faintly hear Michael S. Moore shouting somewhere in the distance: "Discreet ogling is not morally wrong!" But Feinberg's point gets through all the same.

²⁷⁶ Ibid.

duct which liberalism holds to be the proper concern of the criminal law to influence sentencing. If Feinberg's first argument is correct, then this seems quite the coincidence.

In addition to Feinberg's argument that punishment ought not to be graded according to moral blameworthiness *per se* after all, it might be noted that some theories of punishment would have the implication that punishment should be graded to blameworthiness *per se* without therefore having the implication that the function of the criminal law is the enforcement of morality. This is true when:

- i. The justifying aim of punishment is such that either *no* punishment is justified or *maximally severe* punishment is justified.
- ii. The pursuit of the justifying aim is side-constrained by the moral blameworthiness of the offenders, such that it is never permissible to punish offenders more than in proportion to their blameworthiness.²⁷⁷

Imagine the justifying aim of punishment was a (very crude) version of general deterrence. Suppose, as is not completely implausible, that increasing the severity of punishment would always increase the deterrent effect of punishment. Thus, whenever we punish offenders for engaging in conduct which we want to deter others from engaging in, we ought to punish as harshly as possible, putting murderers and petty thieves alike before the firing squad. Suppose now that (ii) is also correct, such that the moral blameworthiness of the offenders limits how severely it is permissible to punish offenders. Since the justifying aim of punishment favors punishing offenders as severely as possible, offenders should always be punished as severely as permitted by the by their degree of moral blameworthiness. Thus, punishment ends up being graded according to moral blameworthiness in this scenario. However, the fact that the moral blameworthiness of the offender constrains the degree to which the justifying aim of punishment, which *ex hypothesi* is general deterrence, can be permissibly pursued is no reason at all for thinking that moral blameworthiness has any relevance for what to punish. Even if one concedes that the relation between the justification of punishment and the

²⁷⁷ Cf. the structurally similar role played by *the obligations* of the offender, in Tadros' theory of punishment (Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law*, first paperback edition, Oxford Legal Philosophy (Oxford United Kingdom: Oxford University Press, 2013). Some of the arguments for the wrongness constraint (discussed in chapter 8) would favor something like (ii).

justification of criminalization is tight indeed,²⁷⁸ it would be the justifying aim of punishment—rather than the constraints on the degree to which this justifying aim could be permissible pursued—which was relevant for what to criminalize.

I shall leave the discussion of the argument based on the moral gradation of punishment here. The upshot of the preceding discussion is that the argument based on the moral gradation of punishment can, unsurprisingly, be denied by rejecting that punishment ought to be graded according to moral blameworthiness in the first place. Somewhat more surprisingly, it can be denied even by those who accept that punishment ought to be graded according to moral blameworthiness because the moral blameworthiness of the offender side-constrains how severely it is permissible to punish. Feinberg's attempt to sever the connection between the justification of punishment and the justification of criminalization entirely must ultimately be considered unsuccessful, and it seems that as though the argument based on the moral gradation of punishment ultimately succeeds in establishing a connection between legal moralism and a full-fledged retributivism according to which punishment ought to be graded according to moral blameworthiness because the justifying aim of punishment is to give wrongdoers what they deserve.²⁷⁹ I now move on to the conceptual argument.

5.3. The conceptual argument

This line of argument is offered by Gerald Dworkin,²⁸⁰ Richard Arneson,²⁸¹ and—of all people—Joel Feinberg.²⁸² Consider Gerald Dworkin, who writes:

If an action is wrong, that provides a reason – perhaps conclusive, perhaps not – for not doing it. It also provides a reason – perhaps conclusive, perhaps not – for discouraging the performance of such actions. [...] Of course it does not *follow* from the fact that an action ought not to be done that any third party ought to discourage it, to criticize it, or to forbid it by means of criminal law. All of these, however, seem appropriate responses. Wrong (immoral) actions are

²⁷⁸ For instance, by adopting Moore's view on the matter (Moore, *Placing Blame*, 23–30).

²⁷⁹ Cf. *Ibid.*, 71.

²⁸⁰ Gerald Dworkin, "Devlin Was Right: Law and the Enforcement of Morality," *William and Mary Law Review* 40, no. 3 (1999): 943.

²⁸¹ Arneson, "The Enforcement of Morals Revisited," 441.

²⁸² Feinberg, *The Moral Limits of the Criminal Law Volume 4*, 37–8.

not to be done, but that means that they are the appropriate targets of our criticism and our discouragement.²⁸³

This seems to suggest the following argument:

1. The wrongfulness of some conduct, C, means that C ought not to be done.
2. If the wrongfulness of C means that C ought not to be done, then the wrongfulness of C makes it appropriate to discourage people from engaging in C.
3. If the wrongfulness of C makes C makes it appropriate to discourage people from engaging in C, then the wrongfulness of C is *pro tanto* sufficient to justify discouraging people from engaging in C.
4. If the wrongfulness of C is *pro tanto* sufficient to justify discouraging people from engaging in C, then the wrongfulness of C is *pro tanto* sufficient to justify its criminalization.
5. Hence, the wrongfulness of C is *pro tanto* sufficient to justify its criminalization.

The first premise is plausibly true by virtue of the meaning of “wrongfulness.” The second and third premises also seem plausible.²⁸⁴ The plausibility of the fourth premise turns on what is meant by “discourage.” If the relevant sense of discouragement is one in which criminalization discourages people from engaging in C only if it makes fewer instances of C occur (i.e. prevents C), then the fourth premise is plainly false;²⁸⁵ for although it is likely to be true that criminalization reduces the frequency with which the criminalized conduct occurs in the vast majority of cases, it is always an empirical question whether this is actually the case. There is a significant gap between the *prevention* of wrongful conduct and the *criminalization* of wrongful conduct. It never follows from solely from the fact that some conduct, C, is wrongful that criminalizing C will cause fewer instances of C to occur.²⁸⁶

²⁸³ Dworkin, “Devlin Was Right,” 943 [Dworkin’s emphasis].

²⁸⁴ It might seem as though Dworkin explicitly disavows the third premise in the quote above when he writes that “it does not *follow* from the fact that an action ought not to be done that any third party ought to discourage it [...]” (Ibid.). However, it seems to me that by making this remark Dworkin only denies that the appropriateness of discouraging C is sufficient, *all things considered*, to justify discouraging it.

²⁸⁵ This seems to be the sense in which Arneson uses “discourage” in his version of the conceptual argument (Arneson, “The Enforcement of Morals Revisited,” 441).

²⁸⁶ And it certainly does not follow that criminalizing C will make fewer wrongs occur *in general*. This claim is even unlikely to be empirically true in the case of most wrongs. This is so, since it is likely that most criminal laws greatly increase the

Whether criminalizing some conduct causes fewer instances of this conduct to occur is always also a question of whether the criminal prohibition is effectively enforced and the extent to which people are deterred by criminal prohibitions.²⁸⁷ Thus, if “discourage” is to be understood in the sense of “prevent,” then it does not follow from the fact that the wrongfulness of C is *pro tanto* sufficient to justify discouraging it that the wrongfulness of C is *pro tanto* sufficient to justify criminalizing it. If, on the other hand, the relevant sense of “discourage” is one in which the criminalization of conduct discourages people from engaging in that conduct only if it encourages people not to engage in that conduct by expressing disapproval of that conduct and by attempting to make it less attractive to engage in that conduct, then it is plausible that criminalization always discourages the criminalized conduct in the relevant sense. At least it is often held that criminal prohibitions communicate both that the criminalized conduct is not to be done and (attempt to) create prudential reasons not to engage in the criminalized conduct by threatening to punish those who do.²⁸⁸

The conceptual argument is among the most compelling arguments for legal moralism. As chapter 7 makes clear, Millian liberals cannot escape the clutches of this argument. It is indeed difficult to avoid conceding that key parts of the conceptual argument are correct. This dissertation shall attempt to refute the conceptual argument by arguing that the fourth premise is false. Regardless of whether the relevant sense of “discourage” is such that criminalizing conduct always amounts to discouraging people from engaging in that conduct, it does not follow from the fact that the wrongfulness of C is *pro tanto* sufficient to justify discouraging people from engaging in C that the wrongfulness of C is *pro tanto* sufficient to justify its criminalization. For the *pro tanto* sufficient justification of discouraging people from engaging in wrongful conduct is not necessarily *pro tanto* sufficient to justify *the state*

number of lies told. All who engage in criminal conduct but plead “not guilty” when charged with doing so tell a lie they would not have told if the conduct in question had not been criminalized. The mere fact that the process of investigating and prosecuting the crime of engaging in some conduct, C, involves *asking so many questions* of people, some of whom will have an unusually strong incentive to lie when asked those questions (because the true answer to the question is incriminating), questions which never would have been asked if C had not been criminalized, should lead us to think that most criminal laws increase the number of lies told and even suspect that they may increase the number of lies told more than they reduce the incidence of the conduct they proscribe.

²⁸⁷ This point is elaborated upon in in “Law Letters.”

²⁸⁸ A. P. Simester and Andrew Von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford; Portland, OR: Hart Pub, 2011), 6.

using *the criminal law* to discourage people from engaging in wrongful conduct, even if it is *pro tanto* sufficient to justify certain other third parties in discouraging people from engaging in that conduct. “Law Letters” shall argue that something like this is indeed the case.

5.4. Moore’s argument for legal moralism

Moore’s main argument for legal moralism initially seems to be a retributivist variation of the conceptual argument with a few twists. Moore characterizes the liberal position as follows:

The liberal believes that one category of morality can exclude another category of morality from counting. Specifically, such a liberal believes that the goodness or badness of practices like abortion and homosexuality does not count at all in judging the rightness of political institutions dealing with such behaviour, because this kind of moral judgment is precluded by another kind of moral judgment.²⁸⁹

He refers to this as “a hierarchical view of morality.” Then follows his argument for legal moralism (which I quote at length on account of its importance for this dissertation):

Very generally speaking, the problem with this hierarchical view of morality is a moral problem: nothing that is good or bad can be excluded in judging the morality of a political institution without skewing one’s judgment about the all-things-considered desirability of that institution. One might think, as I argue [...] that the ideal of autonomy provides a very strong, first-order reason of morality not to regulate a woman’s decision whether or not to have an abortion. Such an ideal does not provide a second-order reason that justifies excluding first-order reasons of morality, such as the reason provided by the wrongness of killing a foetus. The woman’s autonomy may *outweigh*, but does not *exclude*, the wrongness of killing a foetus. To hold otherwise, as does the classical liberal, is to invite systematic moral error.

This very general objection does not by itself justify [... legal moralism]. For nothing in the rejection of hierarchically ordered morality speaks in favor of the relevance of moral wrongness to the question of what should be criminalized. Perhaps the moral status of potentially criminalized behaviour does not need to be *excluded* by some classically liberal argument; perhaps it is not relevant to the aims of the criminal law to start with. [...] Whether this is so depends of course on one’s theory of punishment [...]²⁹⁰

²⁸⁹ Moore, *Placing Blame*, 659.

²⁹⁰ *Ibid.*, 659–60.

In the first paragraph quoted, Moore seems to put forth his own version of the conceptual argument, arguing that everything that is good or bad about the criminalization of some conduct must be considered relevant when judging whether that conduct ought to be criminalized. In the second paragraph, however, Moore indicates that *if* it was the case that the wrongfulness of conduct was simply not *relevant* to the aim of the criminal law, then it might not be relevant to the justification of criminalization, even though nothing excludes the wrongfulness of conduct from counting. Moore's argument ultimately seems to be something like the following:

1. The wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization if and only if it makes its criminalization serve the aim of the criminal law.
2. The aim of the criminal law is serving the intrinsic good which justifies punishment.
3. The intrinsic good which justifies punishment is "the achieving of justice in retribution."²⁹¹
4. The wrongfulness of conduct makes its criminalization necessary to permissibly achieve justice in retribution.
5. Hence, the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization.

The main elements of this argument were spelled out in the presentation of Moore in the previous chapter. Note how, in contrast to the conceptual argument, premise 1 raises the possibility that there are some things that are good to do and which the criminal law could do which the criminal law ought not to do because they are not relevant to its aim. Premises 1 and 2 describe Moore's claims about the relation between the justification of particular criminal laws and the general justifying aim of the criminal law, and the relation between the general justifying aim of the criminal law and the theory of punishment, respectively. Premise 3 describes Moore's retributivism. Premise 4 is true because retributivism requires the punishment of wrongful conduct, and this is only permissible if the conduct in question has been criminalized first (the principle of legality).²⁹²

While rejecting retributivism is one way of rejecting Moore's argument for legal moralism, this dissertation shall not be disputing Moore's retributivist theory of punishment; instead, the dissertation remains neutral on this matter.²⁹³ While I am partly motivated by a suspicion that my familiarity

²⁹¹ Ibid., 660.

²⁹² Ibid.

²⁹³ For a critique of retributivism, see Tadros, *The Ends of Harm*, 60–87.

with debates over the justification of punishment is too limited to be able to enter into such discussions meaningfully, the more important reason is that what I *do* want to discuss is the move from punishment to criminalization. In other words, this dissertation shall argue that the second premise of the argument ought to be rejected.²⁹⁴ With the exception of this premise (and premise 3, about which I am neutral), I think all of the other premises are true.

5.4.1. The problem of Moore's argument and a preview of the argument for rejecting the legal moralism given in "Law Letters"

Although "Law Letters" and the summary of the contribution of this article²⁹⁵ shall delve into the details of why the second premise of Moore's argument should be rejected, its arguments are not couched in Moore's terms. I shall therefore say a little about why the second premise should be rejected here. Moore's mistake lies in the failure to distinguish between a general theory of punishment and a theory of *state punishment*. This difference is significant, for while all state punishment is punishment, not all punishment is state punishment. The "distinctive remedy"²⁹⁶ of the criminal law is not punishment, but state punishment, for the institutions of the criminal justice system are very much state institutions. Even if we accept the rest of Moore's claims, the function of criminal law is thus not to be found in a general theory of punishment but in a theory of state punishment. As we shall see, retributivism falls short as a theory of state punishment, whatever its merits as a general theory of punishment. As previously pointed out by others, Moore lacks a positive explanation of why the task of promoting retributive justice must necessarily fall to the state.²⁹⁷ Among the contributions of "Law Letters" is showing that no such explanation can be given without undermining the move from retributivism to legal moralism. In order for criminalization to be *pro tanto* justified, it will always be necessary for wrongful conduct to have some other feature, F, which, though it might always be present when wrongfulness is present, is analytically distinct from its wrongfulness such

²⁹⁴ This is done in "Law Letters."

²⁹⁵ In chapter 7.3.

²⁹⁶ Moore, *Placing Blame*, 25.

²⁹⁷ Douglas N. Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008), 196–206; R. A. Duff, "Legal Moralism and Public Wrongs," in *Legal, Moral, and Metaphysical Truths*, ed. Kimberly Kessler Ferzan ([S.I.]: Oxford University Press, 2016), 98; Tadros, "The Wrong and the Free," 86–89.

that (at most) *the wrongfulness and some other feature, F, of some conduct, C, are jointly pro tanto sufficient to justify its criminalization.*

5.4.2. Tadros on Moore

In an excellent discussion of Moore's legal moralism, Victor Tadros also attacks Moore for his failure to take the difference between punishment and state punishment seriously.²⁹⁸ Before moving on, I want to briefly note some differences between Tadros' line of attack and my own. First, Tadros' reconstruction of Moore's argument in favor of legal moralism is slightly different (although I have no doubt that Moore affirms all of these four claims and that he affirms the conclusion *because* he affirms the premises):

1. If some conduct, *v*, is wrong, those *v* deserve punishment.
2. The state ought to ensure that those who deserve punishment get what they deserve.
3. The state ought to punish a person for acting in a certain way only if it has criminalized acting in that way.
4. Therefore, the state ought to criminalize all wrongful conduct.²⁹⁹

Tadros attacks the second premise, arguing that even if retributivism is correct, state punishment is a disproportionately harsh response to trivial wrongdoing. As he writes:

[T]he suffering that trivial wrongdoers deserve might be limited to weak pangs of guilt. State punishment inevitably inflicts suffering and deprivation that is different in kind and degree from weak pangs of guilt.³⁰⁰

Thus, we should reject the claim that the state ought to criminalize all wrongful conduct in order to give wrongdoers what they deserve because "ought implies can." The criminal justice system is simply unable to give trivial wrongdoers what they deserve, and trivially wrongful conduct ought therefore not to be criminalized. Tadros goes on to argue that the fact that the state punishment of trivial wrongs will *inevitably* be disproportional should also make us doubt that the state has a *pro tanto* duty to criminalize trivial wrongdoing, since this *pro tanto* duty would then be one which the state ought never to fulfill, all things considered. Tadros raises some doubts about whether such *pro tanto* duties exist. If such *pro tanto* duties exist then we would seem to have an astronomical amount of *pro tanto* duties which we

²⁹⁸ Tadros, "The Wrong and the Free," 85–89.

²⁹⁹ Ibid., 86.

³⁰⁰ Ibid., 87.

ought never to fulfil, such as a *pro tanto* duty to rescue those whom we dedicating our entire live to doing so.³⁰¹ Furthermore, *pro tanto* duties are supposed to play a role in practical reasoning and one often ought to apologize violating a *pro tanto* duty, even when doing so is justified.³⁰² But *pro tanto* duties which never translate to all-things-considered duties do not play any role in practical reasoning, and apologizing for their violation seems a strange thing to do.

Regardless of whether Tadros' objections are successful in undermining Moore's argument that there is a duty to criminalize all wrongdoing (and they seem to me to be largely successful), they are less successful in undermining the argument that the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization. While this is totally unsurprising since this is not the argument Tadros is addressing, it leaves a hole for this dissertation to fill. First, whereas the claim that the state ought to criminalize all wrongdoing implies that it can, the claim that the wrongfulness of conduct *pro tanto* justifies its criminalization does not similarly imply that this can be (permissibly) done by the state. There is almost certainly a murder happening somewhere in Asia right now. While the claim that I am *pro tanto* justified in using coercion to prevent this murder is rendered thoroughly uninteresting by the fact that I cannot do so, there is nothing problematic or implausible about it. In similar fashion, the factors which made the existence of unfulfillable *pro tanto* duties so implausible do not apply to *pro tanto* justifications that never translate to all-things-considered ones. They trigger no duties of apology and make no claims on entering into our practical deliberations.

Finally, turning as it does on whether the state has a duty to punish *trivial* wrongdoing, Tadros' argument makes an important concession to Moore, namely, that the difference between those wrongs which ought to be criminalized and those which ought not is essentially *quantitative* rather than *qualitative*.³⁰³ What is argued is that some wrongs are too trivial for state punishment; not that something more than wrongfulness is needed to make the regulation of some conduct the proper business of the state. This dissertation seeks to argue that there is such a *qualitative difference*.

³⁰¹ Ibid., 88.

³⁰² Ibid., 89.

³⁰³ See especially Moore, "Liberty's Constraints on What Should Be Made Criminal," 199–200.

5.5. The limitations of arguments based on the intuitive appeal of the legislative implications of legal moralism

A “legislative implication” of a normative theory of the criminal law is an implication regarding whether the criminal prohibition of some conduct is (not) justified. Arguments in favor of legal moralism based the intuitive appeal of the legislative implications of legal moralism seek to demonstrate that the legislative implications of legal moralism are more intuitively appealing than those of competing normative theories of the criminal law.³⁰⁴ As chapter 3 made clear, I do not share the general skepticism about the usefulness of intuitions regarding peculiar hypothetical cases. Nevertheless, the usefulness of casuistry and arguments based on the intuitive appeal of the legislative implications of legal moralism are limited for reasons unrelated to the reasons why some are skeptical regarding the use of intuitions about peculiar hypothetical cases.

First, arguments based on the intuitive appeal of the legislative implications of legal moralism can at most establish the local superiority of legal moralism. By this I mean that the fact that criminalizing the wrong, C, is justified is only a reason to prefer legal moralism to rival normative theories of the criminal law that cannot account for the justifiability of criminalizing C. Consider these normative theories of the criminal law (rephrased in the vocabulary used throughout this dissertation):³⁰⁵

1. *Legal moralism*: The wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization.
2. *Feinbergian Liberalism*: The fact that criminalizing some conduct would prevent non-consensual harm or offense to others is *pro tanto* sufficient to justify its criminalization.³⁰⁶

³⁰⁴ Note that this is akin to the search for a narrow reflective equilibrium.

³⁰⁵ These formulations are selected for purposes of illustration. I make no claims that these statements correctly represent anyone’s views (although I think they are reasonable interpretations), that they are the most plausible statements of the versions of the theories I relate them to, or that this is an exhaustive list of plausible theories.

³⁰⁶ John Stuart Mill, *On Liberty and Utilitarianism*, Everyman’s Library 81 (New York: Knopf: Distributed by Random House, 1992); Joel Feinberg, *The Moral Limits of the Criminal Law Vol. 1: Harm to Others* (New York; Oxford: Oxford University Press, 1984), 26.

3. *The expanded harm principle*: The fact that criminalizing some conduct would prevent *any* harm is *pro tanto* sufficient to justify its criminalization.³⁰⁷
4. *The sovereignty principle*: The fact that criminalizing some conduct would secure the mutual independence of free persons from each other is *pro tanto* sufficient to justify the criminalization of that conduct.³⁰⁸
5. *The public wrong principle*: The public wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization³⁰⁹

Stipulate that each normative theory of the criminal law purports to be *complete* (i.e. state *the only pro tanto* sufficient justification of criminalization). Stipulate further that there are no other plausible normative theories of the criminal law than the five stated above.

How are we to go about making a case for considering legal moralism superior to the four other normative theories of the criminal law by appealing to legislative intuitions? We might note that *the sovereignty principle* has difficulty accounting for why criminalizing harm to infants, the severely cognitively impaired, and animals is justified since infants, the severely cognitively impaired, and animals all lack the mental capacity for exercising their independence in the relevant sense.³¹⁰ The fact that no right-minded person would decriminalize these actions only shows that *the sovereignty principle* is *pro tanto* inferior to the legal moralism, Feinbergian liberalism, the expanded harm principle, and the public wrong principle, since neither of these normative theories of the criminal law have problems explaining why these criminal prohibitions are justified. It does nothing to support legal moralism over these three rival normative theories of the criminal law. It thus only supports legal moralism in the weak sense of ruling out one rival theory.³¹¹

³⁰⁷ Hart, *Law, Liberty, and Morality*, 33–4.

³⁰⁸ Arthur Ripstein, “Beyond the Harm Principle,” *Philosophy & Public Affairs* 34, no. 3 (June 2006): 215–45, doi:10.1111/j.1088-4963.2006.00066.x.

³⁰⁹ Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*, Legal Theory Today (Oxford; Portland, OR: Hart Pub, 2007).

³¹⁰ Victor Tadros, “Harm, Sovereignty, and Prohibition” *Legal Theory* 17, no. 1 (March 2011): 62–3, doi:10.1017/S1352325211000024.

³¹¹ Admittedly, this is rather significant in a scenario in which we have stipulated that there are only five possible theories. However, this scenario is manifestly implausible. There are many more theories than this—especially since each of the five principles admits of a great number of variations and amendments (cf. James Edwards, “Harm principles,” *Legal Theory* 20, no. 4 (December 2014): 253–85,

So far I seem to be describing a non-problem with an obvious solution: One should try to find an example of an intuitively justified criminal prohibition which *only* legal moralism can account for. If that cannot be done, one should try to find several examples of obviously justified criminal prohibitions, all of which legal moralism can account for why are justifiable, and where (2), (3), (4), and (5) each fail to account for the justifiability of at least one in the manner illustrated by table 5.2.

Table 5.2 Intuitively justified legislation and normative theories of the criminal law

	Legal moralism	Feinbergian Liberalism	The expanded harm principle	The sovereignty principle	The public wrong principle
Legislation (A)	Can justify	Cannot justify	Can justify	Can justify	Can justify
Legislation (B)	Can justify	Can justify	Cannot justify	Can justify	Can justify
Legislation (C)	Can justify	Can justify	Can justify	Cannot justify	Can justify
Legislation (D)	Can justify	Can justify	Can justify	Can justify	Cannot justify

If this could be done, it would indeed constitute an intuitive argument in favor of legal moralism. Even with the stipulations in place, this is a difficult task. Setting aside worries about the vagueness of the concept of *harm*, determining whether Feinbergian liberalism or the expanded harm principle can account for the justifiability of a criminal prohibition requires one to answer a number of difficult empirical questions about causation in order to determine whether the criminalized conduct causes remote harm. This makes the legislative implications of Feinbergian liberalism and the expanded harm principle difficult to pin down, since these implications often depend upon whether some more-or-less plausible but hard-to-test empirical claims are true.³¹²

Consider, for instance, Devlin's less famous argument in favor of legal moralism, according to which

The criminal law of England has from the very first concerned itself with moral principles. A way of testing this is to consider the attitude which the criminal law adopts towards consent.³¹³

doi:10.1017/S135232521500004X. to get an impression of just how many different versions of the harm principle can be formulated).

³¹² But see Tadros, "Harm, Sovereignty, and Prohibition."

³¹³ Devlin, *The Enforcement of Morals*, 6.

The idea is that legal moralism alone can explain when consent matters for the law. The only way to explain why *consent* matters as a valid legal defense against an accusation of rape³¹⁴ but not against an accusation of homicide is that murder remains wrongful regardless of the consent of the victim, whereas the consent of the “victim” transforms rape into the non-wrong of consensual intercourse.³¹⁵ To this, Feinberg replies that if we admit *consent* as a legal defense against murder, this might

encourage ill-motivated murderers to pose as mercy killers, and manipulate or counterfeit the consent of their victims in advance. This in turn significantly weakens the deterrent effect of the homicide law, thus harming (destroying) indeterminate third parties who might otherwise not have been killed.³¹⁶

If this is true, the inadmissibility of the defense of *consent* does in fact prevent harm to non-consenting third parties.³¹⁷ Whether it is true remains an empirical question. While it is plausible enough that it is true, it would be next to impossible to prove it false even if it were not, as this would require some jurisdiction to admit *consent* as a defense against homicide.³¹⁸ Now suppose that Feinberg’s empirical claim is in fact false and has been proven to be so. In that case, Feinberg could simply bite the bullet and argue that *consent* ought to be admissible as a defense against an accusation of homicide. Now suppose that this is just implausible. Consent ought not to be admissible as a defense against homicide. In this case, Devlin has in fact given us reason to prefer legal moralism over the harm principle. As Hart is quick to point out, however, the expanded harm principle can account for the law’s attitude toward consent just as well as legal moralism can.³¹⁹ This is also true

³¹⁴ Here, I set aside Duff’s point that consent is not actually a *defense* against an accusation of rape; rather, the absence of consent is an essential element of the offence of rape (Duff, *Answering for Crime*, 208–11).

³¹⁵ Devlin, *The Enforcement of Morals*, 6.

³¹⁶ Feinberg, *The Moral Limits of the Criminal Law Volume 4*, 168–9.

³¹⁷ It is probably also true that if *consent* were no longer admissible as a defense against rape, then fewer rapes would be committed. However, it would also greatly infringe on people’s freedom to have consensual sexual relations, a freedom which is far more important for human flourishing than the freedom to kill those who consent.

³¹⁸ While the effect of admitting consent as a legal defense against accusations of having committed other crimes might give us some indication of what would happen if consent was admitted as a valid defense against an accusation of murder.

³¹⁹ Hart, *Law, Liberty, and Morality*, 30.

of the sovereignty principle³²⁰ and the public wrong principle.³²¹ So how much weight does this really have as a positive argument in favor of legal moralism?

Then there are the distinct problems of showing the implications of legal moralism for what conduct ought to be criminalized to be more intuitive than those of the public wrong principle. To be sure, we are told that what makes a wrong public is that it violates the values by which the community defines itself,³²² but it remains unclear how one finds out what these values are.³²³ It is difficult to imagine any wrong—or at least any wrong which it is remotely plausible ought to be criminalized—which could not also be argued to be public. While I am inclined to agree with Moore that this vagueness is indicative of a flaw in Duff's view,³²⁴ it undermines the potential of intuitive arguments about what ought to be criminalized to support legal moralism over the public wrong principle all the same.

The usefulness of arguments based on the intuitive appeal of legislative implications is also limited by the fact that they can only support legal moralism over rival normative theories of the criminal law if the theories in question differ in their legislative implications, which may or may not be the case. As Moore writes:

It could turn out that the two principles [legal moralism and the harm principle] are extensionally equivalent in the laws that they justify; if all moral wrongs consisted of actions harming others, and if all actions harmful to others constituted moral wrongs, then the two principles would justify exactly the same legislation.³²⁵

Even stipulating that there are only five plausible normative theories of the criminal law and that these theories cannot be mixed, finding arguments from legislative intuitions which truly support legal moralism is a difficult task. When the stipulations are removed it becomes much harder.

Once we remove the stipulation that (2), (3), (4), and (5) purport to be *complete* normative theories of the criminal law, such that normative theo-

³²⁰ Arthur Ripstein, *Force and Freedom Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), 126–44, <http://site.ebrary.com/id/10402504>.

³²¹ Duff, *Answering for Crime*, 208–19.

³²² *Ibid.*, 143.

³²³ Victor Tadros, "Wrongness and Criminalization," in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (New York, NY: Routledge, 2012), 157–73; Moore, "Liberty's Constraints on What Should Be Made Criminal," 199.

³²⁴ Moore, "Liberty's Constraints on What Should Be Made Criminal," 199.

³²⁵ *Ibid.*, 192.

ries of the criminal law mix any or all of (2), (3), (4), and (5), then the *only* way to provide an argument from legislative intuitions is to find an example of an intuitively justified criminal prohibition that only legal moralism can explain, as the alternative of providing a range of examples that can all be explained by legal moralism, and where (2), (3), (4), and (5) each fail to explain at least one, cannot establish the superiority of legal moralism over a normative theory of the criminal law according to which (2), (3), (4), AND (5) all state *pro tanto* sufficient justifications of criminalization. It seems highly unlikely that there are any such examples, because the chance that the legislative implications of legal moralism are wholly coextensive with those of some mix of two or more of the rival normative theories of the criminal law (2), (3), (4), and (5), are dramatically higher than the chance that those implications are coextensive with any single one of (2), (3), (4), and (5). This so since some of the main rivals of legal moralism as a normative theory of the criminal law focus on features of conduct, which are also wrong-making features.³²⁶ Regardless of the role of the harmfulness of conduct in justifying its criminalization, the fact that some conduct causes non-consensual harm to others is a powerful (if not always conclusive)³²⁷ reason to consider that conduct wrongful, as is the fact that it interferes with the sovereignty of others and the fact that it intentionally causes offence for no good reason.³²⁸ If those three were the only three wrong-making features of conduct, then a normative theory of the criminal law which mixed Feinbergian liberalism and the sovereignty principle would have exactly the same implications for legislation as legal moralism. While any claim that either of those three features was the only wrong-making feature of conduct would be severely controversial, the claim that these three features of conduct jointly exhaust the universe of wrong-making features does have some measure of plausibility.³²⁹

Although arguments based on intuitions about what conduct ought to be criminalized have a role to play in the discussion of what justifies criminalization, this role is almost exclusively negative for the reasons given above. While arguments from legislative intuitions can discredit principles, we should be much more skeptical of their potential for supporting them. It is for this reason that I do not think Moore is right that

³²⁶ As previously touched upon in chapter 2.

³²⁷ Cf. Moore, *Placing Blame*, 649.

³²⁸ Moore, "Liberty's Constraints on What Should Be Made Criminal," 192–3.

³²⁹ See Tadros, "Harm, Sovereignty, and Prohibition," 64–5.

The plausibility of legal moralism can be seen when one considers whether there should be legislation against behaviour such as cruelty to animals, mutilation of dead bodies, or the survival of certain species.³³⁰

Legal moralism can undoubtedly explain why this conduct is rightly criminal. It is more doubtful that legal moralism is the only plausible normative theory of the criminal law which can explain why this conduct is rightly criminal. This merely gives us reason to prefer legal moralism to competing theories which cannot account for why this conduct is criminal. Perhaps it is with this awareness that Moore continues as follows:

If one assumes that no large number of citizens would know of some of these kinds of acts, so that no could be offended; if one further assumes that animals, dead bodies, and species are not the sort of actors whose interests could be harmed in a way that normally justifies legislation under Mill's harm principle [...] I suspect that most of us would feel that there ought to be laws against these kinds of behaviours anyway. If so, the basis must be because we think such behaviours are wrong, and we think society ought to legislate against such wrongs.³³¹

Here, Moore tries to make a number of stipulations to the effect that the circumstances are such that competing normative theories of the criminal law cannot explain why cruelty to animals, the mutilation of dead bodies, and killing the last member of a species can be justifiably criminalized. I am largely sympathetic to this strategy;³³² however, there are limits to what can be stipulated. Moore ventures beyond these limits in the passage quoted above. There is no problem in assuming that no one will know of some act of animal cruelty or mutilation of corpses. However, asking the reader to consider whether cruelty to animals should still be criminal if we assume that *animals are not the sort of actors who can be harmed in a way that justifies legislation under the harm principle* is dangerously close to asking the reader to consider whether murder should still be criminal if we assume that people do not die from being murdered. Asking readers to assume that animals cannot be harmed in the relevant sense is asking them to assume that animals are not animals, but something else.³³³ It is unclear what our intui-

³³⁰ Moore, *Placing Blame*, 646.

³³¹ Ibid., 646–7.

³³² Note how, in accordance with that which was claimed in chapter 3, it is the need to differentiate between increasingly convergent normative theories of the criminal law that forces Moore to resort to unusual hypothetical scenarios.

³³³ To be fair, Moore only speaks about *harm* in the sense that justifies legislation under Mill's harm principle. But it is surely true that either animals can be harmed

tions about the justifiability of criminalizing cruelty to such animals (which would seem more akin to plants) tells us about the justifiability of criminalizing cruelty to real animals. What would it even mean to be *cruel* to something that cannot be harmed? I am no enemy of peculiar hypothetical cases, but there are limits to what features of some conduct, C, one can assume away without ceasing to talk about C, which limits our ability to isolate the *wrongfulness* of conduct in accordance with the ideal outlined in section 3. None of this is to say that arguments based on legislative intuitions have no role to play. They do have a significant role to play when arguing against competing theories. Unless they are backed up by other arguments, however, legislative intuitions cannot provide much support to legal moralism. This is not just true of legal moralism but also of its competitors.

This concludes the discussion of arguments based on the intuitive appeal of the legislative implications of legal moralism and of the arguments in favor of legal moralism in general. Devlin's disintegration thesis fails. The usefulness of arguments based on the intuitive appeal of the legislative implications of legal moralism turns out to be quite limited. However, retributivists about punishment will find that the argument based on the moral gradation of punishment, the conceptual argument and Moore's argument jointly make a formidable case for legal moralism. Those who are not retributivists about punishment will be skeptical of the argument from the moral gradation of punishment and Moore's argument. However, they are still faced with the conceptual argument, which seems to me to make a compelling case for legal moralism on its own.

in the way that justifies criminalization under Mill's harm principle or Mill's concept of harm should be rejected in favor of a concept of harm where this is the case. And surely we are interested in how legal moralism fares compared to the best version of the harm principle rather than one operating with an obviously problematic conception of harm. This has also been pointed out by Thomas Søbirk Petersen (Petersen, "New Legal Moralism," 227).

Chapter 6: The Case against Legal Moralism I: The Plausibility of the Legislative Implications of Legal Moralism

Chapter 5 presented the case for legal moralism. This chapter discusses the nature and viability of objections that the legislative implications of legal moralism are counterintuitive. Section 6.1 elucidates on the nature of arguments that the legislative implications of legal moralism are counterintuitive. Section 6.2 presents the defenses available to the liberal legal moralist, arguing that these defenses are so potent that few, if any, attempts to show that liberal legal moralism has counterintuitive implications have hitherto succeeded. Section 6.3 contextualizes and summarizes the contribution of “Infidelity and the Possibility of Liberal Legal Moralism,” which argues that even liberal legal moralism cannot avoid the legislative implication that infidelity ought to be criminalized, all things considered.

6.1. Some remarks on arguments based on the intuitive appeal of legislative implications

The legislative implications of a normative theory of the criminal law are counterintuitive if accepting that normative theory of the criminal law commits one to rejecting the justifiability of some intuitively justified criminal prohibitions, and/or commits one to accepting the justifiability of some intuitively unjustified criminal prohibitions. If the former is the case then the normative theory of the criminal law is under-inclusive. If the latter is the case then the normative theory of the criminal law is over-inclusive. Objections to the effect that legal moralism is under-inclusive have the following structure:

1. If legal moralism is correct, then criminalizing some conduct, C, is not *pro tanto* justified.
2. If criminalizing C is not *pro tanto* justified, then criminalizing C is not justified, all things considered.
3. Criminalizing C is justified, all things considered.
4. Hence, legal moralism is not correct.

Note that (2) is analytically true. To my knowledge, no one objects to legal moralism on account of underinclusivity. This is so because most of the critics of legal moralism accept the soundness of the following argument:

5. If legal moralism is correct, then criminalizing, C, is *pro tanto* justified if C is wrongful.
6. If the wrongness constraint is correct, then criminalizing C is justified, all things considered, only if C is wrongful.
7. The wrongness constraint is correct.
8. Hence, (1) and (3) cannot be simultaneously true.

In other words: The legislative implications of legal moralism are underinclusive only if criminalizing some permissible conduct is justified, all things considered, but this is denied by those who endorse the wrongness constraint, which most of those critical of legal moralism.³³⁴ Objections to the effect that legal moralism is over-inclusive have the following structure:

9. If legal moralism is correct, then criminalizing C is *pro tanto* justified.
10. If criminalizing C is *pro tanto* justified, then criminalizing C is justified, all things considered.
11. Criminalizing C is not justified, all things considered.
12. Hence, legal moralism is not correct.

While the two objections are structurally similar, (2) and (10) are importantly different. Unlike (2), (10) is not analytically true, but is true or false depending on whether the reasons against criminalizing C are weighty enough to prevent the *pro tanto* sufficient justification of criminalizing C from being sufficient, all things considered.

Note that in practice, objections to legal moralism are made by *someone* advocating a rival normative theory of the criminal law in order to establish the superiority of their favored theory over legal moralism. In order to do so, the following must also hold:

13. If the rival theory, t, is correct, then criminalizing C is not *pro tanto* justified.

³³⁴ R. A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*, Legal Theory Today (Oxford; Portland, OR: Hart Pub, 2007), 81; Douglas N Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008), 72ff; A. P. Simester and Andrew Von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford; Portland, OR: Hart Pub, 2011), 23–9; A. P. Simester, “Enforcing Morality,” in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (New York, NY: Routledge, 2012), 483ff; Joel Feinberg, “The Expressive Function of Punishment,” *The Monist* 49, no. 3 (1965): 397–423.

14. Hence, there is at least one false claim, P, which is such that P is entailed by legal moralism and not entailed by t.

Unlike the objection that legal moralism is underinclusive, the objection that legal moralism is overinclusive is rather common.³³⁵ As the next section shall argue, however, the liberal legal moralist has the resources to meet most of those objections.

6.2. The difficulty of showing the legislative implications of liberal legal moralism to be counterintuitive

On the basis of the formalization of the overinclusiveness objection in the previous section, it can now be shown at just how many points the liberal legal moralist can mount his defense against any given overinclusiveness objection. Consider Joel Feinberg's list of free-floating evils:³³⁶

- A. "Violations of taboos"³³⁷
- B. "Conventional 'immoralities' when discreet and harmless"³³⁸
- C. "Religiously tabooed practices"³³⁹
- D. "Moral corruption of another (or of oneself)"³⁴⁰
- E. "Evil Thoughts"³⁴¹
- F. "Impure Thoughts"³⁴²
- G. "False Beliefs"³⁴³
- H. "The wanton, capricious squashing of a beetle (frog, worm, spider, wild flower) in the wild"³⁴⁴
- I. "The extinction of a species"³⁴⁵

³³⁵ See for instance, Duff, *Answering for Crime*, 50; Husak, *Overcriminalization*, 199.

³³⁶ That is, things that are evil independent of how they affect anyone's interest (Feinberg, *The Moral Limits of the Criminal Law Volume 4*, 19.

³³⁷ Ibid., 20.

³³⁸ Ibid., 21.

³³⁹ Ibid., 22.

³⁴⁰ Ibid.

³⁴¹ Ibid., 23.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Ibid., 24.

³⁴⁵ Ibid.

Suppose someone was to argue that liberal legal moralism is overinclusive because it had the counterintuitive legislative implications that criminalizing some of the conduct listed above is justified, all things considered. How could the legal moralist defend himself? The first—and probably the most important – line of defense is that of denying (9); that is, denying that the conduct in question is actually wrongful. It is not at all plausible that (A), (B), and (C) are wrong (as opposed to being widely and falsely believed to be wrong) unless they cause harm or offence. It is also very much open to doubt whether (D), (E), (F), (G), and (H) are wrong. If this fails, the liberal legal moralist can try defending himself by denying (10) instead; that is, he can provide an explanation of why the *pro tanto* sufficient justification of criminalizing them on account of their wrongfulness fails to be sufficient, all things considered. Even if (E) and (F) are wrongful, these “thought wrongs” are certainly so difficult to detect that criminalizing them would be pointless. Nothing bars a legal moralist like Moore from arguing against the criminalization of (G) using the very same arguments Mill uses in his defense of free speech.³⁴⁶ Should it be impossible to deny (9) or (10), the *legal moralist* can try her hand at (11) and argue that the conduct ought to be criminalized after all. I, for one, see nothing particularly counterintuitive about criminalizing (I).

Should all of these strategies fail, the legal moralist can make a last stand at (13): Certainly the only way to explain why (H) is wrongful (if and when it is wrongful) is because it is harmful. Feinberg argues that it is implausible that killing a beetle harms it, since “it is implausible to ascribe desires, goals, projects, or aspirations to a creature whose cognitive capacities (if any at all) are so primitive.”³⁴⁷ However, his line of argument invites a devastating objection regarding the comatose, the severely cognitively impaired, and the newborn, to whom it is also implausible to ascribe desires, goals, projects, or aspirations.³⁴⁸ Supposing Feinberg’s argument does not fail on that account, it seems to demonstrate that such wanton killing is not morally wrong either. At least I struggle to see what the wrong-making feature of “the blotting out of any vital force”³⁴⁹ could be, other than harmfulness. (D) is perhaps the most interesting of the lot. While much of what is associated with (D) is not plausibly morally wrong (e.g. making a man who thought he was heterosexu-

³⁴⁶ John Stuart Mill, *On Liberty and Utilitarianism*, Everyman’s Library 81 (New York: Knopf: Distributed by Random House, 1992), chap. 2.

³⁴⁷ Feinberg, *The Moral Limits of the Criminal Law Volume 4*, 24.

³⁴⁸ That is, it invites the same objections often made to Ripstein’s sovereignty principle (cf. Victor Tadros, “Harm, Sovereignty, and Prohibition,” *Legal Theory* 17, no. 1 (March 2011): 35–65, doi:10.1017/S1352325211000024.)

³⁴⁹ Feinberg, *The Moral Limits of the Criminal Law Volume 4*, 24.

al recognize that he is not), and some of the other things falling under (D) bear a relation to harm that would bring it under the harm principle anyway, (e.g. instilling a lust to kill in someone such that it becomes more likely that she will cause harm to others), (D) might also capture some genuine, non-harmful wrongs (D) like the “unsympathetic speech,” which is the target of some of the recent legislation mentioned in chapter 1.

The defenses available to liberal legal moralism also elucidate why Hart’s *Law, Liberty, and Morality*,³⁵⁰ has little to offer as a general critique of legal moralism, despite its merits as a critique of Devlin. Since the Hart-Devlin debate was sparked by the proposal that homosexuality be decriminalized, one can hardly fault Hart for focusing on the legal enforcement of *sexual morality* in general, and the criminalization of homosexuality in particular. However, this enables a contemporary legal moralist, like Moore, to escape Hart’s criticism of Lord Devlin by simply and plausibly denying that such conduct is wrongful. As he remarks, “in general we have no duties [...] with respect to many of the items about which customary morality so fusses and fumes, such as sex.”³⁵¹

Even if we indulge in the double fiction that Moore rightly considers homosexuality wrongful,³⁵² Moore could easily argue that the wrongfulness of homosexual conduct fails to be sufficient, all things considered, to justify its criminalization, because of the very same costs in terms of autonomy which Hart notes:

[L]aws enforcing a sexual morality [...] create] misery of a quite special degree. For both the difficulties involved in the repression of sexual impulses and the consequences of repression are quite different from those involved in the abstention from “ordinary” crime. Unlike sexual impulses, the impulse to steal or to wound or even kill is not, except in a minority of mentally abnormal cases, a recurrent and insistent part of life. Resistance to the temptation to commit these crimes is not often, as the suppression of sexual impulses generally is, something which affects the development or balance of the individual’s emotional life, happiness, and personality.³⁵³

Perhaps the reason it is so difficult to demonstrate that legal moralism is overinclusive is that legal moralism is not overinclusive. Another explanation

³⁵⁰ H. L. A. Hart, *Law, Liberty, and Morality* (Stanford, CA: Stanford University, 1963).

³⁵¹ Michael S. Moore, “A Tale of Two Theories,” *Criminal Justice Ethics* 28, no. 1 (May 2009): 32, doi:10.1080/07311290902831284.

³⁵² A *double fiction* because it involves two blatantly false claims: That Moore thinks it is wrongful *and* that he is right about this.

³⁵³ Hart, *Law, Liberty, and Morality*, 22.

could be that the legislative implications of legal moralism are nearly coextensive with those of its rivals. In that case, we should not be surprised that so many of the items on Feinberg's list of non-grievance evils fail to connect with legal moralism. This is simply because there are precious few non-harmful, non-offensive wrongs. A third explanation of the difficulty of proving legal moralism to be overinclusive is that uncertainty about the content of substantive morality and the open-endedness of what exactly can prevent the *pro tanto* sufficient justification of criminalizing wrongful conduct from being sufficient, all things considered, makes it so unclear whether legal moralism has any particular legislative implication that the legal moralist will be able to plausibly reject that legal moralism has any particular implication the moment a critic claims that it has. Pinning down the legislative implications of legal moralism can be frustratingly difficult.³⁵⁴ It is for this reason, that it is such a great virtue of Moore's legal moralism that it painstakingly spells out the values infringed on by the criminalization of wrongful conduct, and the weight they add to a presumption in favor of liberty.³⁵⁵ Moore's legal moralism is perhaps the only (remotely plausible) version of legal moralism which provides us with enough information to pin down its implications.

6.3 Liberal legal moralism, overinclusiveness and infidelity: The context and contribution of "Infidelity and the Possibility of a Liberal Legal Moralism"

The previous section spelled out the difficulties of making a successful overinclusivity objection to liberal legal moralism. One of the articles in this dissertation, "Infidelity and the Possibility of a Liberal Legal Moralism,"³⁵⁶ tries

³⁵⁴ For a particularly frustrating example, consider Devlin's remark that there must be "a toleration of the maximum individual freedom that is consistent the integrity of society" (Devlin, *The Enforcement of Morals*, 16.). This is not to say that this difficulty is indicative of a flaw in legal moralism. Certainly pluralist legal moralism is no worse than pluralist luck egalitarianism in that respect (compare, e.g., Michael S. Moore, "Liberty's Constraints on What Should Be Made Criminal," in *Criminalization: The Political Morality of the Criminal Law*, ed. R. A. Duff et al., Criminalization Series 4 (New York, NY: Oxford University, 2014), 182–212. With G. A. Cohen, *On the Currency of Egalitarian Justice, and Other Essays in Political Philosophy*, ed. Michael Otsuka (Princeton, NJ: Princeton University Press, 2011), 908–12).

³⁵⁵ Moore, "Liberty's Constraints on What Should Be Made Criminal."

³⁵⁶ Thaysen, "Infidelity and the Possibility of a Liberal Legal Moralism."

to overcome these difficulties and argue that Moore's liberal legal moralism implies that criminalizing infidelity is justified, all things considered. The purpose of this section is to summarize and contextualize the contribution made by that article.

R. A. Duff uses infidelity (or adultery) as an example of wrongful conduct which ought to be criminalized on the grounds that it is not publicly wrongful. He writes:

Adultery is still criminal, and occasionally prosecuted, in some American states; but to liberals it is *clearly* a private matter. One question is whether marriage is or should still be part of our polity's self-definition [...] another question is whether the normative definition of marriage is becoming more fluid, so that sexual fidelity is no longer seen as absolutely crucial [to it]. Even if [...] it was still and rightly a core aspect of our public conceptions of the right and the good that marriage is *the* form that long-term sexual relations and child-rearing should take, and that sexual fidelity is crucial to marriage, to argue that we should criminalise adultery would also require arguing that it is a wrong that cannot be left to the individuals concerned to deal with (or to ignore) but that *must* be publicly condemned and sanctioned. [...] We do not take this view of adultery—nor do I suggest that we should. My point is only that by asking *why* it should seem so obvious that it should not be criminal, we may become clearer about what can constitute a proper ground for criminalization.³⁵⁷

Duff is not explicitly claiming to argue against legal moralism. Nevertheless, the example of infidelity does nothing to support his principle that crimes must be *public* wrongs rather than just wrongs unless legal moralism cannot explain why infidelity ought not to be criminalized. Thus, the example of infidelity illustrates Duff's point only if it shows legal moralism to be overinclusive. However, Duff's remarks are seriously lacking as an objection showing that legal moralism is overinclusive. To make such an objection, Duff must argue the following:

1. If legal moralism is correct, then criminalizing infidelity is *pro tanto* justified.
2. If criminalizing infidelity is *pro tanto* justified, then criminalizing infidelity is justified, all things considered.
3. Criminalizing infidelity is not justified, all things considered.³⁵⁸

³⁵⁷ Duff, *Answering for Crime*, 144–5.

³⁵⁸ The formulation of the third premise might seem peculiar, since Duff would deny even the weaker claim that the criminalization of infidelity is *pro tanto* justified (cf. *Ibid.*, 89). However, the idea behind the argument is that if (2) is true, the only way to deny that the criminalization of infidelity is justified, all things considered,

4. Hence, legal moralism is not correct.

Duff says almost nothing about (1), i.e. the wrongfulness of infidelity, however, and literally nothing about (2). We lack an explanation of why the legal moralist cannot merely argue that though the wrongfulness of infidelity is *pro tanto* sufficient to justify its criminalization, criminalizing infidelity infringes so heavily on other values, e.g. autonomy, that the wrongfulness of infidelity is not sufficient to justify its criminalization, all things considered. These explanations of why infidelity ought not to be criminalized are readily available to the liberal legal moralist and seem at least as plausible *prima facie* as the explanation Duff gives.³⁵⁹

This is where the contribution of “Infidelity and the Possibility of a Liberal Legal Moralism” is made. The article argues that infidelity is, in fact, quite seriously wrongful and that none of the values Moore mentions as underlying the presumption of liberty are able to explain why the wrongfulness of infidelity is not sufficient to justify its criminalization, all things considered.³⁶⁰ Thus, the only way to escape the conclusion criminalizing infidelity is justified, all things considered, is to deny that the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization; that is, reject legal moralism. That which is wrong is not infidelity *per se*, but rather *non-consensual infidelity*, which the article defines as

A has sexual relations with C, while A is in a committed relationship with B, and B does not consent to the sexual relationship between A and C.³⁶¹

There are several reasons why such infidelity is quite seriously wrongful. When A is unfaithful, she breaks a special kind of promise. When Bob promises to pick up his friend Albert at the airport, it tends to be true that the friendship between the two men is not conditional on Bob’s promise; that is, they still would have been friends even if Bob had not promised to pick up Albert. Conversely, romantic relationships tend to be conditional on the implicit or explicit promise that the romantic partners will not have any other sexual partners—B would not have consented to be in a romantic relation-

is to deny that it is *pro tanto* justified. If (1) is true, this cannot be done without denying legal moralism. Thus, the claim that the criminalization of infidelity is not justified, all things considered, is invoked in support of the conclusion that it is not even *pro tanto* justified.

³⁵⁹ Victor Tadros, “Wrongness and Criminalization,” in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (New York, NY: Routledge, 2012), 162.

³⁶⁰ Thaysen, “Infidelity and the Possibility of a Liberal Legal Moralism.”

³⁶¹ Ibid.

ship with A at all unless A had promised fidelity. This makes A's breach of this promise much more seriously wrongful, as B's agreement to remain romantically involved with A is preconditioned on B's belief in A's faithfulness. Furthermore, as I write in "Infidelity and the Possibility of a Liberal Legal Moralism":

People invest time and effort in their relationships and in the worst cases infidelity can undermine a life-long project. Belief in the fidelity of one's partner can form part of the basis of potentially life-changing decisions, such as where to live and where to work.³⁶²

Remaining romantically involved with A has a romantic opportunity cost for B in the sense that the time B spent pursuing the relationship with A could have been spent building a life with a different, faithful partner. In short, A's breach of the promise of fidelity is seriously wrongful, because B is likely to have relied on this promise in making a number of major life decisions. In addition to this is the fact that A can reasonably expect her infidelity to hurt B severely. Victims of infidelity are known to experience a variety of negative consequences, including feelings of shame and inadequacy. Some even experience symptoms resembling those of post-traumatic stress disorder. The upshot of this is that infidelity is quite seriously wrongful, and its degree of wrongfulness tends to be directly proportional to the length of the romantic relationship. Note that the argument that morality has little to say about what consenting adults do in the bedroom is not applicable here. The wronged party is the non-consenting deceived spouse—not the two persons having consensual intercourse. Thus, the article defends the first premise of the argument that legal moralism is overinclusive, arguing that if legal moralism is correct, then criminalizing infidelity is *pro tanto* justified. Infidelity is wrongful, and the legal moralist must think that the wrongfulness of infidelity is *pro tanto* sufficient to justify its criminalization.

Next, the article defends the second premise of the argument that legal moralism is overinclusive by arguing that none of the values underlying Moore's presumption of liberty provide reasons against criminalizing infidelity which are weighty enough to explain why criminalizing infidelity is not justified, all things considered.³⁶³ It thus argues that neither the way criminalizing infidelity infringes on the value of positive liberty, Millian autonomy, Kantian autonomy, the satisfaction of preferences, nor the costs of enforcing a criminal prohibition on infidelity lends enough moral weight to a presumption of liberty to wrongfully engage in infidelity to make the *pro*

³⁶² Ibid.

³⁶³ These values were introduced in section 4.3.1.

tanto sufficient justification of criminalizing infidelity on account of its wrongfulness unable to overcome this presumption, and thus prevent it from being sufficient, all things considered. Demonstrating this requires lengthy argumentation, which I shall refrain from repeating here. These arguments can be found in the article itself, most of which is dedicated to providing them.

The article does not defend the third premise of the argument that legal moralism is overinclusive and argue that *criminalizing infidelity is not justified, all things considered*. However, the view that infidelity ought to be criminalized, all things considered, is very controversial indeed. Furthermore, the legislative implication that infidelity ought to be criminalized, all things considered, is anything but liberal. While it is indeed true that *liberal* is a vague term, the reader should recall that, based on Moore's own remarks, chapter 4 provided a reasonably precise description of what it meant for legal moralism to be liberal;³⁶⁴ namely, that it has no implications for legislation that the paradigmatic liberal critics of legal moralism would characterize as *obviously* and *pre-theoretically unjust*. But this is exactly how many would characterize the criminalization of infidelity.³⁶⁵ Thus, the fact that Moore's legal moralism has this implication shows that Moore is wrong to think that his legal moralism is liberal.³⁶⁶

By showing that Moore's legal moralism has the implication that criminalizing infidelity is justified, all things considered, "Infidelity and the Possibility of a Liberal Legal Moralism" shows that even Moore's liberal legal moralism is overinclusive and that it fails to be as *liberal* as Moore thinks it is. This, then, is this dissertation's first argument for rejecting *legal moralism*: It has counterintuitive implications for legislation, as it implies that criminalizing infidelity is justified, all things considered. On its own, this is not a very strong objection to legal moralism. While biting the bullet and conceding that that criminalizing infidelity is justified, all things considered, would be fatal to *liberal* legal moralism, it would not be fatal to legal moralism. As discussed in chapter 3, this dissertation agrees with Tadros that the fact that a principle has counterintuitive implications is never sufficient rea-

³⁶⁴ In section 4.3.

³⁶⁵ See, e.g., the last sentence of the Duff quote earlier in this chapter (from Duff, *Answering for Crime*, 144–5).

³⁶⁶ Despite all of his thoroughness, Moore might possibly have overlooked some value relevant to the presumption of liberty which can explain why legal moralists need not consider the criminalization of infidelity justified, all things considered. In this case, "Infidelity and the Possibility of a Liberal Legal Moralism" would still contribute by showing that we need an explanation of what this value is.

son to reject that principle.³⁶⁷ If this dissertation is to make a convincing case for rejecting legal moralism, then more than an argument that legal moralism has a single counterintuitive implication is needed. This is the topic of the next chapter, which discusses theory-driven objections to legal moralism.

³⁶⁷ Specifically, this was discussed in section 3.3. Tadros discusses this in *The Ends of Harm: The Moral Foundations of Criminal Law*, first paperback edition, Oxford Legal Philosophy (Oxford United Kingdom: Oxford University Press, 2013), 6).

Chapter 7: The Case Against Legal Moralism II: Theory-driven Objections

Chapter 6 discussed objections that legal moralism had counterintuitive implications for legislation and presented the contribution of “Infidelity and the Possibility of a Liberal Legal Moralism,” which argued that legal moralism had at least one counterintuitive implication for legislation. Chapter 7 discusses the objections to legal moralism explicitly made from the point of view of rival normative theories of the criminal law.

Section 7.1 discusses objections to legal moralism on the basis of Millian liberalism. It argues that Millian liberalism has almost nothing to offer *in lieu of objections to legal moralism* and explains why this should come as no surprise. Section 7.2 discusses objections to legal moralism on the basis of *political normative theories of the criminal law*, like those of Duff, Husak, and Simester and von Hirsch.³⁶⁸ It argues that, in their own way, they all raise the same critical question to legal moralism: Why the state? Or more elaborately: Granting, *arguendo*, that the wrongfulness of conduct is *pro tanto* sufficient to justify coercively interfering with that conduct, why is it *pro tanto* sufficient to justify *the state* in coercively interfering with that conduct? This is a question which any normative theory of the criminal law must be able to answer but to which legal moralists have paid almost no attention. Section 7.3 contextualizes and summarizes the contribution of “Law Letters” by arguing that while Duff, Husak, Simester and von Hirsch have asked *the* question to ask of legal moralism, they have not shown that legal moralism cannot answer it. Nor are they clear enough about what legal moralists must show to answer it. It then summarizes the contribution of “Law Letters,” namely, formulating a novel and distinct *political normative theory of the law*, on the basis of which it shows that legal moralists cannot answer the question of why the wrongfulness of conduct is *pro tanto* sufficient to justify *the state* in p coercively interfering with that conduct. Note that our interest here remains the plausibility of legal moralism. The plausibility of

³⁶⁸ R. A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*, Legal Theory Today (Oxford; Portland, OR: Hart Pub, 2007); Douglas N. Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008); A. P. Simester and Andrew Von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford; Portland, OR: Hart Pub, 2011).

rival normative theories of the law is only of interest insofar as it has implications for the plausibility of legal moralism. Section 7.4 makes some concluding remarks about this dissertation's argument for rejecting legal moralism.

7.1. Why Millian liberalism has almost nothing to say about legal moralism

The designation "Millian liberalism" refers to the family of normative theories of the criminal law according to which considerations about *harm* plays a fundamental role in the justification of criminalization. This family includes any complete normative theory of the criminal law consisting of one or some combination of the following:

The harm principle: The fact that criminalizing some conduct would prevent harm to others is *pro tanto* sufficient to justify its criminalization.

Paternalism: The fact that criminalizing some conduct would prevent harm to self is *pro tanto* sufficient to justify its criminalization.³⁶⁹

The offense principle: The fact that criminalizing some conduct would prevent offense to others is *pro tanto* sufficient to justify its criminalization.

This family thus includes those who affirm the harm principle as a complete normative theory of the criminal law,³⁷⁰ Feinberg's liberalism, which affirms the combination of the harm principle and offensive principle as a complete normative theory of the criminal law, and Hart's expanded harm principle,³⁷¹ which affirms the combination of the harm principle, the offense principle, and paternalism as a complete normative theory of the criminal law.³⁷²

Many of the intuitive objections that the legislative implications of legal moralism are counterintuitive, some of which were discussed in the last

³⁶⁹ Granted, given Mill's famous hostility to paternalism, there is something weird about labelling theories which allow paternalistic considerations to play a role in justifying criminalization as belonging to the family of *Millian* liberalism. To do otherwise would, however, exclude the normative theory of the law espoused by Hart in *Law, Liberty, and Morality* (H. L. A. Hart, *Law, Liberty, and Morality* (Stanford, CA: Stanford University, 1963), 30–4).

³⁷⁰ John Stuart Mill, *On Liberty and Utilitarianism*, Everyman's Library 81 (New York: Knopf: Distributed by Random House, 1992).

³⁷¹ So dubbed by Arneson (Arneson, "The Enforcement of Morals Revisited," 439).

³⁷² Hart, *Law, Liberty, and Morality*, 30–48.

chapter, have come from Millian liberals.³⁷³ Chapter 6 argued that few of them, if any, should worry the legal moralist. This section shall argue that this is indicative of the fact that while Millian liberalism has much to say about mistakes about what is morally wrong and the illegitimacy of legally enforcing social morality, it has little to offer as a critical perspective on legal moralism itself.

To see this, let us start by considering the following objection to legal moralism followed by Thomas Søbirk Petersen:

The Pareto Challenge: How can legal moralists provide “a plausible rationale for the claim that certain acts should be criminal even though they may benefit some people and harm no one.”³⁷⁴

Note that Petersen understands harm as “a wrongfully caused worsening of a person’s well-being.”³⁷⁵ The *Pareto challenge* faces the following problem as a challenge to legal moralism. Either only well-being is of intrinsic moral value or well-being is not the only thing which is of intrinsic moral value. If only well-being is of intrinsic moral value, then only conduct which sets back well-being can be morally wrong. But then there are no wrongs which benefit some and harm no one. Accordingly, the *Pareto challenge* would no longer be challenging legal moralism but a view about the content of substantive morality. If well-being is not the only thing of intrinsic moral value, then there is something else of intrinsic moral value: V. If V is of intrinsic moral value then there may be some conduct which is wrongful on account of conflicting with or setting back V, even though this conduct benefits some and harms no one, *but* if this is the case then why is the protection or promotion of V not a plausible rationale for criminalizing such wrongful conduct even though it benefits some and harms no one? Thus, the *Pareto challenge* succeeds as a challenge to legal moralism only if *it can be maintained that only well-being is intrinsically morally valuable without showing that only conduct which sets back well-being can be morally wrong*. This seems impossible to maintain.³⁷⁶

³⁷³ Like Mill, *On Liberty and Utilitarianism*; Hart, *Law, Liberty, and Morality*; Feinberg, *The Moral Limits of the Criminal Law Volume 4*; Petersen, “New Legal Moralism.”

³⁷⁴ Petersen, “New Legal Moralism,” 228.

³⁷⁵ Ibid., 215n.

³⁷⁶ This problem cannot be escaped by revising the definition of harm. However, harm is defined, those who would make the *Pareto challenge* faces the dilemma that either the only thing of intrinsic moral value is that which is set back by being harmed (e.g. well-being, welfare etc.) in which case only harmful conduct is morally wrong, or something other than that which is set back by being harmed is of intrinsic

Petersen presumably thinks that the *Pareto challenge* would be relevant to legal moralism even in the event that there were no wrongs which benefited some and harmed no one. As he writes:

If the outcome of the two theories [*legal moralism* and the harm principle/legal welfarism] is the same, why not just stick with the harm principle or legal welfarism? One reason for doing so is that the rationale for the basic welfarist claim is obvious—nobody wants to be harmed.³⁷⁷

Several replies are available here. First, *intension matters*. As long as harm and wrongfulness are analytically distinct, the two principles are importantly different in their implications for how to reason about criminalization. Second, the rationale for legal moralism offered by the conceptual argument is at least as obvious as the one Petersen gives for the welfarist claim: *wrongdoing is always bad, it is always better if wrongful actions are not engaged in*. Third, even if there are no harmless wrongs, there are wrongless harms: fairly outcompeting one's rivals in business (or love), or killing in (proportional and necessary) self-defense.³⁷⁸ However, it is not at all plausible that these things ought to be criminalized, supporting the contention that it is due to their wrongfulness, rather than their harmfulness, that the harmful wrongs at the heart of the criminal law are rightly criminalized.³⁷⁹ Conversely, one might attempt to argue that while it is the case that both V and well-being are of intrinsic moral value, such that conduct which conflicts with V can be wrongful even when it benefits some and harms no one, the intrinsic moral value of V is trivial compared to the intrinsic moral value of well-being such that the intrinsic moral value of V only provides a very weak rationale for criminalizing conduct which conflicts with or sets back V when doing so

sic moral value in which case the protection of these other intrinsic (and perhaps, impersonal) moral values would seem to be a plausible rationale for criminalization.

³⁷⁷ Petersen, "New Legal Moralism," 227.

³⁷⁸ Michael S. Moore, *Placing Blame: A Theory of the Criminal Law*, first published in paperback (Oxford; New York: Oxford University Press, 1997), 649.

³⁷⁹ The reply that there are no wrongless harms, because wrongfulness is part of Feinberg's definition of harm (Joel Feinberg, *The Moral Limits of the Criminal Law Vol. 1: Harm to Others* (New York; Oxford: Oxford University Press, 1984), 35) will just lead the legal moralist to rephrase the objection: Even if there are no wrongs which do not set back interests, there are setbacks to interests that are not wrongs. However, it is not all plausible that conduct that sets back interests but is not wrongful ought to be criminalized, supporting the contention that it is due to the wrongfulness, rather than the fact that they set back interests, that the wrongful setbacks to interest at the heart of the criminal law are rightly criminalized.

benefits some and harms no one. However, the legal moralist is only committed to the claim that the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization,³⁸⁰ and a very weak rationale for criminalizing conduct which is wrongful on account of conflicting with V even though it benefits some and harms no one is still a rationale.

It is worth noting that the *Pareto challenge* is a fairly potent challenge to views about the content of the substantive morality according to which conduct can be wrongful even though it benefits some and harms none. As a challenge to legal moralism, however, it invariably proves too much or too little; either it proves that there is no wrongful conduct which benefits some and harms none, in which case the legal moralist need not come up with any rationale for criminalizing such conduct, or it does not prove that there is no wrongful conduct which benefits some and harms none, in which case a rationale for criminalizing wrongful conduct which benefits some and harms no one can be found in the protection or promotion of whatever intrinsic moral value other than welfare explains why some conduct is wrongful, even though it benefits some and harms no one.

7.1.1. Millian liberalism and the conceptual argument for legal moralism

The problem of the *Pareto challenge* is a general problem for the Millian case against legal moralism. Its arguments against the criminalization of harmless wrongdoing either shows that the harmless conduct in question is not morally wrong after all or fails to convince. Millian liberalism has much to offer as a critique of accounts of the content of substantive morality according to which there are harmless wrongs and as a critique of criminalizing conduct which is widely, but mistakenly, considered to be wrongful, *but it has almost nothing to offer as a critique of legal moralism*.³⁸¹

³⁸⁰ There is much good in Petersen's article but it is simply incorrect that Moore thinks *any* acts are "wrong in themselves and therefore should be illegal no matter how much they will benefit or harm individuals," or that he is committed to holding that it "should be illegal [...] to mutilate a dead if that will save the human race from becoming extinct" (both quotes at Petersen, "New Legal Moralism," 228). Claiming that this is the case ignores, Moore's commitment to threshold deontology (Moore, *Placing Blame*, chap. 17), and fails to distinguish between disagreement with Moore over the legal enforcement of morality, and disagreement over the content of substantive morality.

³⁸¹ The closest we get are the refutations of Devlin's arguments in favor of legal moralism offered by Hart and expanded on by Feinberg. However, it is a gross understatement to say that Devlin does not make the best possible case for legal mor-

Nowhere is this clearer than in the works of Mill himself. It is in *On Liberty* that Mill states his famous harm principle:

the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.³⁸²

Yet one struggles to find any argument directed at the legal enforcement of *real* morality in *On Liberty*. Mill held that “the public of this age and country improperly invests its own preferences with the character of moral laws.”³⁸³ His criticism of the legal enforcement of preferences-in-morality’s-clothing (i.e. social morality)³⁸⁴ and of paternalism³⁸⁵ is plentiful, vivid, and brilliant. However, not only does Mill not criticize the legal enforcement of *real* morality, he even contrasts the illegitimacy of paternalism and the legal enforcement of social morality with the enforcement of *real* morality. He writes:

Encroachment on their rights; infliction on them of any loss or damage not justified by his own rights; falsehood or duplicity in dealing with them; [... etc.] these are fit objects of moral reprobation and, in grave cases, of moral retribution and punishment. [...] Cruelty of disposition; malice and ill-nature; [...] the pride which derives gratification from the abasement of others; the egotism which thinks itself and its concerns more important than everything else, and decides all doubtful questions in its own favour; - these are moral vices, and constitute a bad and odious moral character: *unlike the self-regarding faults previously mentioned, which are not properly immorality*, and to whatever pitch they may be carried, do not constitute wickedness.³⁸⁶

It seems to me that we have every reason to believe that Mill affirms the harm principle because he believes all wrongs to be harmful and all harms to be wrongful.³⁸⁷ Regardless of whether I am right, one would be hard-pressed

alism. This is not to deny that Hart’s refutation of Devlin was important. It was important, because it was important to reveal the glaring flaws of Devlin’s legal moralism, which, if adopted as a guiding theory by legislators, would have ruined the lives of real, morally innocent, people.

³⁸² Mill, *On Liberty and Utilitarianism*, 12.

³⁸³ Cf. *Ibid.*, 81.

³⁸⁴ Cf. *Ibid.*

³⁸⁵ If, as seems likely, Mill thought that many of those preferences wrongly claimed to be morality concerned self-regarding conduct, then the issue of paternalism is really just the most poignant example of a case where what is considered to be wrongful diverges from what is actually wrongful (cf. *Ibid.*, 80).

³⁸⁶ *Ibid.*, 75 [my emphasis].

³⁸⁷ See also Michael S. Moore, “Liberty’s Constraints on What Should Be Made Criminal,” in *Criminalization: The Political Morality of the Criminal Law*, ed. R.

to find any arguments against the coercive enforcement of *real* morality in Mill; but of course, Mill never claimed to have provided such arguments anyway.³⁸⁸

The reason why Millian liberalism has so little to offer as a critique of legal moralism seems to me to be straightforward: Crucial parts of *the conceptual argument* cannot be denied and they are indeed conceded by both Mill and Feinberg. Mill writes:

We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow-creatures; if not by opinion, by the reproaches of his own conscience.³⁸⁹

Feinberg writes:

Since evils [including harmless immoralities³⁹⁰] are, by definition, something to be regretted and prevented when possible, it seems to follow that the prevention of an evil, *any* evil, is always *a reason* of some relevance, however, slight, in support of criminal prohibition. [...] This shows that legal moralism is technically correct [...]³⁹¹

To call conduct *wrongful* is to say that it is better if the conduct is not engaged in and good to prevent it. There is little reason to think that one can successfully drive a wedge between the “wrongfulness of conduct makes it better that this conduct is not engaged in” and “the wrongfulness of conduct

A. Duff et al., *Criminalization Series 4* (New York, NY: Oxford University, 2014), 192–3.

³⁸⁸ This makes it all the more peculiar that the harm principle should be treated as the *arch-nemesis* of legal moralism. To be fair, as much as any Millian liberal, it is Stephen and Devlin who emphasize the contrasts between their views and Mill’s (James Fitzjames Stephen, *Liberty, Equality, Fraternity*, Primary Source Edition (New York: Holt & Williams, 1878), 123–88; Patrick Devlin, *The Enforcement of Morals* (Indianapolis: Liberty Fund, 1963), vi). This is not to say that the views of Stephen and Devlin were equivalent to those of Mill. That would be a silly claim. What I am claiming is that their disagreements concerned the *content of substantive morality* and the *legitimacy of legally enforcing positive morality*, neither of which have bearing on the legitimacy of legally enforcing *real* morality.

³⁸⁹ Mill, *On Liberty and Utilitarianism*, 157. This point is not lost on legal moralists Gerald Dworkin also presents this quote as evidence of “the good liberal pedigree” of legal moralism (Gerald Dworkin, “Devlin Was Right: Law and the Enforcement of Morality,” *William and Mary Law Review* 40, no. 3 (1999): 943).

³⁹⁰ Feinberg, *The Moral Limits of the Criminal Law Volume 4*, 4.

³⁹¹ *Ibid.*, 37–8.

is *pro tanto* sufficient to justify preventing it;” from there it is but a short step to legal moralism.

7.1.2. The pyrrhic victory of Millian liberalism

There is, however, one thing that the Millian liberal *can* say by way of critique of legal moralism, even in the face of the conceptual argument (I only wrote that Millian liberalism had *almost* nothing to offer by way of critique of legal moralism). Note that Feinberg is only conceding that there is always a reason to *prevent* wrongful conduct. Millian liberals can attempt to drive a wedge between “the wrongfulness of conduct is *pro tanto* sufficient to justify preventing it” and “the wrongfulness of conduct is *pro tanto* sufficient to justify criminalizing it.” As pointed out in chapter 5, it is always an empirical question whether criminalizing some conduct is effective in reducing the frequency with which people engage in it. Therefore, it never follows merely from the fact that the wrongfulness of conduct is *pro tanto* sufficient to justify preventing it that the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization. It is always also a matter of whether criminalization would be effective in preventing people from engaging in the wrong question. Strictly speaking, Feinberg’s remark quoted above thus supports the claim that *the fact that criminalizing some wrongful conduct, C, would make fewer instances of C occur* is *pro tanto* sufficient to justify the criminalization of C rather than the claim that *the wrongfulness of conduct* is *pro tanto* sufficient to justify its criminalization.³⁹² More generally, Millian liberals who are also consequentialists³⁹³ might note that the question of whether criminalizing some action, A, maximizes whatever intrinsic good acts are made morally right by maximizing (e.g. utility) according to the relevant consequentialist theory (i.e. whether criminalizing that action is justified) is always distinct from and can never be settled solely by determining whether A fails to maximize the relevant intrinsic good (i.e. whether A is wrongful).³⁹⁴

The availability of this reply is likely to be a cold comfort to the Millian liberal, however, for it does nothing to warrant treating *harm* as fundamental to the justification of criminal laws. The exact same gap between the *prevention* and *criminalization* of wrongful conduct exists between the *preven-*

³⁹² Note that this strategy will only be successful if it is possible to avoid conceding that wrongful conduct is by definition to be *discouraged* in the sense in which criminalization *discourages* the criminalized conduct regardless of whether it is effective in preventing it.

³⁹³ Like John Stuart Mill famously was (Mill, *On Liberty and Utilitarianism*, 14).

³⁹⁴ This is also noted by Dworkin (Dworkin, “Devlin Was Right,” 943n).

tion and *criminalization* of harmful conduct.³⁹⁵ Thus, this reply can, at most, lead Millian liberalism to a Pyrrhic victory over legal moralism. After discussing some objections to the conceptual argument, Gerald Dworkin writes:

All I am claiming is that because “wrongful” implies “ought not to be done,” the category of immoral acts establishes the same threshold for the legitimacy of state interference as does the category of harmful or offensive acts.³⁹⁶

Indeed, the conceptual argument still shows wrongful conduct to fall within the proper scope of the criminal law every bit as much as harmful conduct. To the extent that the gap between prevention and criminalization undermines the claim that the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization, it also undermines the claim that the harmfulness of conduct is *pro tanto* sufficient to justify its criminalization. To the extent that the gap between prevention and criminalization leaves intact the claim that the fact that criminalizing some conduct would prevent harm to others is *pro tanto* sufficient to justify the criminalization of that conduct, it also leaves intact the claim that the fact that criminalizing some conduct would prevent wrongdoing is *pro tanto* sufficient to justify the criminalization of that conduct.

7.1.3. The failure of the Millian case against legal moralism

This section has argued that Millian liberalism has little to offer as a critical perspective on legal moralism because it cannot escape the clutches of the conceptual argument. To call conduct wrongful is to say that people ought not to engage in it; it is to say that it is regrettable that some people engage in that conduct, and it is to say that it is *pro tanto* good if people are prevented from engaging in that conduct. It plausibly follows that the wrongfulness of conduct is *pro tanto* sufficient to justify preventing it. Millian liberalism lacks the resources to block the move from the claim that the wrongfulness of conduct is *pro tanto* sufficient to justify preventing it to legal moralism.

³⁹⁵ The question of whether criminalizing some action, A, maximizes something which can plausibly be considered intrinsically good can never be settled merely by determining whether this conduct has a certain feature, such as harmfulness or wrongfulness. Apart from trivial consequences such as criminal wrongful conduct maximizes the number of criminal laws prohibiting wrongful conduct it is never possible to determine whether criminalizing A has any given consequence solely by looking at the features of A. The consequences of criminalization are always also shaped by general facts about the psychology of the persons subject to the law and the manner in which the criminal law is enforced.

³⁹⁶ Dworkin, “Devlin Was Right,” 944.

For this reason, the objections advanced by Millian liberals against legal moralism tend either to prove too much or too little; that is, they will either prove that harmless conduct is not morally wrong or fail to show that criminalizing harmless conduct is not *pro tanto* justified.³⁹⁷ The most promising way to escape this trap is to deny that it follows from the fact individuals are *pro tanto* justified in preventing wrongful conduct that *the state* is *pro tanto* justified in preventing wrongful conduct. There are some bad things that the state has no reason to prevent, even though it can—at least not by means of the criminal law. Some think that harm to self is such a thing.³⁹⁸ This dissertation argues that wrongful conduct *per se* is another. Making such an argument requires doing what none of the Millian liberals cited in the above discussion do in their discussions of legal moralism: *Engaging with the nature, goals, and justification of states*. Such *political* strategies for denying legal moralism are much more promising, or so I shall argue in the next section.

7.2. Legal moralism and political normative theories of the criminal law

I now turn to the objections to legal moralism offered by a family of theories I dub *political* normative theories of the criminal law. A normative theory of the criminal law is *political* if, and only if, it affirms that:

The political claim: Some (normative or descriptive) fact about the state, S, has implications for whether a feature, F, of some conduct, C, is *pro tanto* sufficient to justify its criminalization.³⁹⁹

A political normative theory of the law is incompatible with legal moralism if, and only if:

The incompatibility claim: S is such that the wrongfulness of conduct is not *pro tanto* sufficient to justify its criminalization.

Indubitably, the head of this family is the theory of R. A. Duff (and S. E. Marshall—but I draw mostly on Duff's single-authored work).⁴⁰⁰ Its other mem-

³⁹⁷ If, as it admittedly does, a 10-page discussion seems a rather weak foundation for this swooping claim, the reader should note that support for this claim is also to be found in chapter 6, which discusses some of the work of Hart and Feinberg.

³⁹⁸ At least Feinberg denies that there is any reason to prevent it (Joel Feinberg, *The Moral Limits of the Criminal Law Vol. 3: Harm to Self* (Oxford: Oxford University Press, 1986).) Perhaps Feinberg would also deny that it is bad when harm to self occurs. This, however, seems to me to be manifestly implausible.

³⁹⁹ Note that nothing in *the political claim* precludes Millian Liberalism, and thus the two theories are not mutually exclusive.

bers include the legal minimalism of Douglas Husak,⁴⁰¹ the theory espoused in the writings of A. P. Simester and Andreas von Hirsch,⁴⁰² and the *correspondence requirement* which I develop and defend in “Law Letters.” All of these theories affirm both the political claim and the incompatibility claim.

As with Millian liberalism, the plausibility of these theories is not of primary concern (naturally with the exception of my own theory). The plausibility of these theories is only of interest insofar as it has implications for the plausibility of legal moralism. Nevertheless, this section will present a more thorough description of these theories than was given of Millian liberalism. This is because summarizing the contribution of this dissertation requires a more detailed explanation of these theories, since it builds directly on them. As is only natural, the focus will be on their shortcomings and their reasons for rejecting legal moralism; were there no shortcomings, there would be no room for contribution. For this reason, I begin by explicitly stating my great respect for the work of Duff, Marshall, Husak, Simester, and von Hirsch. My own views owe much to their writings. For reasons made clear in “Defining Legal Moralism,” however, I shall never adopt Duff’s singularly unhelpful taxonomy, according to which his view is properly seen as a kind of *modest legal moralism*.⁴⁰³

7.2.1. Duff: Public and private wrongs

Duff’s theory begins with an account of the responsibility relation,⁴⁰⁴ which he neatly sums up as follows:

We are responsible for particular matters, to specifiable people or bodies, in virtue of satisfaction of relevant normatively significant descriptions. Such descriptions locate us within the normative structure of particular institutions

⁴⁰⁰ S. E. Marshall and R. A. Duff, “Criminalization and Sharing Wrongs,” *Can JL and Jurisprudence* 11 (1998): 7; R. A. Duff and S. E. Marshall, “Public and Private Wrongs,” in *Essays in Criminal Law in Honour of Sir Gerald Gordon*, ed. Gerald H. Gordon et al., Edinburgh Studies in Law, v. 8 (Edinburgh: Edinburgh University Press, 2010), 70–85; Duff, *Answering for Crime*; R. A. Duff, “Legal Moralism and Public Wrongs,” in *Legal, Moral, and Metaphysical Truths*, ed. Kimberly Kessler Ferzan ([S.l.]: Oxford University Press, 2016), 95–109; R. A. Duff, “Towards a Modest Legal Moralism,” *Criminal Law and Philosophy* 8, no. 1 (January 2014): 217–35, doi:10.1007/s11572-012-9191-8.

⁴⁰¹ Husak, *Overcriminalization*.

⁴⁰² Simester and Von Hirsch, *Crimes, Harms, and Wrongs*.

⁴⁰³ Duff, “Towards a Modest Legal Moralism.”

⁴⁰⁴ Duff, *Answering for Crime*, 23–30.

and practices, within which and in terms of whose constitutive values responsibilities [...] are recognized and attributed.⁴⁰⁵

Thus, an unfaithful husband is responsible to his wife for his infidelity because infidelity violates the constitutive values of marriage. By contrast, he is not responsible to his employer, because infidelity is not in conflict with the constitutive values of the employer–employee relationships. Thus, what we are criminally responsible *for* depends upon whom we are criminally responsible *to* and the constitutive values of the institutional practice we participate in with those to whom we are criminally responsible to. We are criminally responsible as citizens *to* our fellow citizens, thus, the scope of criminal responsibility depends upon an account of “the civic enterprise – of the enterprise of living as and in a polity.”⁴⁰⁶ Thus, we have arrived at the idea that the criminal law is concerned with, and only concerned with *public wrongs*, which is the subset of wrongs which violate “the core values by which we define ourselves as a polity.”⁴⁰⁷ On Duff’s normative theory of the criminal law, the public wrongfulness of conduct—and *only* the public wrongfulness of conduct—*pro tanto* justifies its criminalization. Duff thus affirms *the* political claim because he affirms that the account we give of the values constitutive of the polity determines the subset of wrongs which are the business of the criminal law.

While Duff is certainly no relativist about morality itself,⁴⁰⁸ he seems to either reject that we should “aspire to a universalist account of the form that political community must take,”⁴⁰⁹ or to be undecided on the matter. Duff leaves open that *any wrong* can be public provided the polity in question treats the relevant values as constitutive of its self-definition.⁴¹⁰ Therefore, one is particularly curious to know about Duff’s basis for affirming *the in-*

⁴⁰⁵ Ibid., 37.

⁴⁰⁶ Ibid., 50.

⁴⁰⁷ Ibid., 141.

⁴⁰⁸ Ibid., 53. Thus, Moore is attacking a pure strawman, when he remarks that the “Marshall/Duff/Husak line [i.e. the focus on *public* wrongdoing] is in danger of returning us to the conventionalist and relativist ethics that made Devlin’s brand of legal moralism so distasteful” (Moore, “Liberty’s Constraints on What Should Be Made Criminal,” 199).

⁴⁰⁹ R. A. Duff, “Introduction,” in *Criminalization: The Political Morality of the Criminal Law*, vol. 2014, n.d., 25.

⁴¹⁰ Duff, *Answering for Crime*, 53. Thus, Moore is attacking a pure strawman, when he remarks that the “Marshall/Duff/Husak line [i.e. the focus on *public* wrongdoing] is in danger of returning us to the conventionalist and relativist ethics that made Devlin’s brand of legal moralism so distasteful” (Moore, “Liberty’s Constraints on What Should Be Made Criminal,” 199).

compatibility claim. If *any* wrong can be public, then why cannot *every* wrong be public? What prevents Moore from conceding everything written so far, and then claiming that the constitutive values of the polity are, or ought to be such, that *all* wrongs are public?

Duff offers three arguments in favor of the incompatibility claim;⁴¹¹ that is, three reasons in support of the claim that not all wrongs are public wrongs and that his theory thus rules out legal moralism. First, he notes that legal moralism “cannot deal adequately with the issue of jurisdiction.”⁴¹² It cannot explain why England should not make it a crime for an Argentinian to steal the wallet of another Argentinian in Argentina. As Duff is well aware, the legal moralist can answer that she only considers this *pro tanto* justifiable. Nothing prevents her from agreeing that it is not all-things-considered justified to criminalize theft committed anywhere by anyone against anyone because of the practical benefits of a division of labor or out of respect for the sovereignty of other states. However, he still considers it “implausibly imperialistic [... to hold that] a national legislature that took its responsibilities seriously would begin with a provisional claim to universal jurisdiction over moral wrongdoing.”⁴¹³

This argument is hardly conclusive. In addition to the answer already sketched by Duff, the legal moralist could also flatly reject the justifiability of a world order composed of national states. After all, this is routinely done by some cosmopolitans.⁴¹⁴ In a world state there is no territorial jurisdiction to account for. It is also possible that the legal moralist could raise a similar challenge to Duff by noting that difference which makes Duff but not the legal moralist able to explain the justifiability of territorial jurisdiction would seem to make legal moralism but not Duff able to explain why it is justifiably that territorial jurisdiction is sometimes abandoned; that is, why we are sometimes justified in bringing cases before the International Criminal Court (ICC). Duff’s preferred explanation of how his theory deals with those cases seems to be that in that the offenders brought before international tribunals “are still answerable to the national political communities within which they committed their crimes [...] international tribunals should have jurisdiction only when the relevant national courts either no longer exist or cannot discharge that task, and such tribunals must be seen to act on behalf and in the

⁴¹¹ Note that, like this dissertation, Duff focuses largely on Michael S. Moore’s legal moralism.

⁴¹² Duff, *Answering for Crime*, 48.

⁴¹³ *Ibid.*, 49.

⁴¹⁴ Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity, 2008), 184.

name of the members of the particular polity.”⁴¹⁵ I am unsure whether this reply is better than the explanations the legal moralist can give of territorial jurisdiction. For instance, it is a hard time explain why it is justifiable for international courts to prosecute cases which national courts *are unwilling* (rather than *unable*) to prosecute.

Duff’s second argument in favor of the incompatibility claim is as follows:

[L]iberal political association [...] will be partial and limited: it will just be one, often not the most significant, of the associations or communities in which its members lead lives and find their goods; *it will properly concern itself with only a limited dimension of their lives*. We are not only citizens: we are parents, workers, and colleagues in this or that job, friends, neighbours, members of a range of other associations [...] our civic responsibilities often impinge only lightly, if at all, on these other dimensions of our lives.⁴¹⁶

The citizens (of liberal states) are undoubtedly also members of a wide array of other associations than the polity in which they are citizens. Being members of other associations, it is plausible that there are wrongs that they must answer for as members of these other associations. However, this supports the incompatibility claim only if being responsible for some wrong as something other than a citizen excludes criminal responsibility for that wrong as a citizen. But this is clearly not so. Duff explicitly writes that

what happens within a friendship can be the business of the polity, and of the criminal law: if I attack and wound my friend in a quarrel, that is the law’s business. But that is because such an attack is not just a breach of the obligations of friendship: it is a breach of the obligations that I owe to others simply as fellow citizens, indeed as fellow human beings.⁴¹⁷

But if being responsible for this or that wrong as a parent, worker, colleague, friend, neighbor, etc. is compatible with being criminally responsible as a citizen, the fact that we are members of a range of other associations, though correct, does nothing in itself to support the claim that the constitutive values of a liberal polity cannot be so comprehensive that they are violated by all wrongdoing.

Third, Duff claims that “a primary reason for the partial, limited character of liberal political association is the central role that liberals give to the values of privacy, freedom and responsibility.”⁴¹⁸ *Prima facie* the legal mor-

⁴¹⁵ Duff, *Answering for Crime*, 55–6.

⁴¹⁶ Ibid., 50 [my emphasis]. See also Duff, “Legal Moralism and Public Wrongs,” 99.

⁴¹⁷ Duff, “Legal Moralism and Public Wrongs,” 107.

⁴¹⁸ Duff, *Answering for Crime*, 50.

alist can easily take such values into account and even attach great weight to them while remaining as committed as ever to the claim that the wrongfulness of conduct *pro tanto* justifies its criminalization. All she has to do is argue that these should be taken into account because they are among the values standing behind the presumption of liberty⁴¹⁹ which the *pro tanto* sufficient of justification of criminalizing wrongful conduct must overcome, rather than because they limit what wrongs there is a *pro tanto* sufficient justification of criminalizing. Duff is perfectly aware of this possibility, he argues:

The core liberal value of liberty requires, inter alia, the maintenance of an extensive private sphere into which the polity has no right to intrude; but the pursuit of retributive justice to which Moore's legal moralism commits him precludes the recognition of any such sphere, since it makes all wrongdoing in principle the polity's business.⁴²⁰

Thus, the legal moralist claim that wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization (i.e. all wrongdoing is in principle the polity's business) is inherently at odds with the value of liberty, regardless of whether the value of liberty is allowed to block the *pro tanto* sufficient justification from being sufficient, all things considered, as Moore allows. As Duff writes, "my objection to Moore's legal moralism is that his liberalism comes in too late."⁴²¹ To this Moore might reply that people are equally at liberty to engage in some wrong in a scenario where that wrong should not be criminalized because it is not in conflict with the core values of the polity; and in a scenario where the value of liberty prevents the *pro tanto* sufficient justification from being sufficient, all things considered. On this basis he may ask *why* Duff thinks the value of liberty is accorded more respect in the first scenario.

7.2.2. Husak's legal minimalism

Husak suggests that "a total of seven general principles or constraints designed to limit the authority of the state to enact penal offenses" should be adopted.⁴²² Only the constraint of *substantial state interest* interests here. Unsurprisingly, the constraint of *substantial state interest* tells us that "the state must have a substantial interest in whatever objective the [criminal]

⁴¹⁹ Moore, "Liberty's Constraints on What Should Be Made Criminal."

⁴²⁰ Duff, "Legal Moralism and Public Wrongs," 107.

⁴²¹ Ibid.

⁴²² Husak, *Overcriminalization*, 55.

statute is designed to achieve.”⁴²³ Husak highlights the great difficulty in determining whether any given objective is legitimate:

This problem is also daunting—as much as any in political philosophy. Nothing less than a theory of the state can settle disputes about whether given objectives are legitimate.⁴²⁴

Husak then proceeds to adopt Duff’s distinction between private and public wrongs. Thus, he endorses the political claim on the same grounds as Duff.

I now move on to the details of Husak’s argument in favor of the incompatibility claim. While Husak repeats some of Duff’s reasons for affirming the incompatibility claim,⁴²⁵ it should be noted that most of what Husak has to say about legal moralism (and hence the incompatibility claim) is strictly focused on the legal moralism of Michael S. Moore.⁴²⁶ This is important for two reasons. First, it explains why the discussion below will be talking about *retributivism* at one moment, only to be drawing conclusions about *legal moralism* the next. Second, it potentially confines the scope of Husak’s argument in favor of the incompatibility claim such that it need not necessarily worry other legal moralists than Moore.

Husak advances at least one distinct and important argument in favor of the incompatibility claim. Namely, he argues that even if Moore’s retributivism succeeds as a theory of punishment, he also needs “to show why the *state* is an appropriate vehicle for imposing punishment.”⁴²⁷ Private individuals are perfectly capable of exacting retribution. No one can doubt that human beings are eminently capable of inflicting the stigmatizing deprivation characteristic of punishment on each other. It is true that the problems of private punishment are well known.⁴²⁸ As reasons against permitting private punishment, Moore draws attention to the dangers of excessive punishment,⁴²⁹ the difficulty of ensuring “equality of punishment”⁴³⁰ across wrongdoers, and the difficulty of correctly determining guilt and innocence in a system of private punishment.⁴³¹ However, these reasons only support a system of state

⁴²³ Ibid., 132.

⁴²⁴ Ibid., 134.

⁴²⁵ Ibid., 199.

⁴²⁶ Ibid., 196.

⁴²⁷ Ibid., 200.

⁴²⁸ Cf. the classical account of John Locke, *Two Treatises of Government; And, a Letter Concerning Toleration* (Stilwell, KS: Digireads.com pub., 2005).

⁴²⁹ Moore, “A Tale of Two Theories,” 42.

⁴³⁰ Ibid.

⁴³¹ Ibid.

punishment insofar as this is the alternative to private punishment. This leads Husak to write:

Legal moralism is problematic because it offers no principled reason to believe that the *state* should punish persons who break its criminal laws. If am correct to conclude that our reasons to prefer state punishment to private vengeance cannot be derived solely from the value of implementing a principle of retributive justice, what *else* is required to justify criminal law and punishment? Why should citizens create an institution of criminal justice to do the work that can be done without the time, effort, and expense?⁴³²

Husak is not entirely clear about why it is a problem for Moore's legal moralism that the reasons to prefer state punishment cannot be derived from retributivism. After all, the problems of private punishment are *very* good reasons to prefer state punishment to private punishment, whether or not they can be derived from retributivism. Nor is Husak disputing this.⁴³³ To be sure, he writes that because the reasons to prefer state punishment cannot be derived from retributivism, we lack an argument showing that the state has a substantial interest in promoting retributive justice. But why can Moore not simply answer that the state has a substantial interest in promoting retributive justice because retributive justice is an intrinsic good which only the state can promote in a permissible manner due to the problems of private punishment? What does it matter that the work of promoting retributive justice *can* be done without the time, effort, and expense of creating a criminal justice system if it is not *permissible* to do so without the time, effort, and expense of creating a criminal justice system? Indeed, this is *exactly* what Moore replies.⁴³⁴ In turn, Moore's reply has recently been cited by Duff, who writes that Moore answers the

question of why the pursuit of retributive justice should be reserved for the state [by claiming that...] the state is better placed than are private individuals to determine whether a person culpably committed a wrong, how serious that wrong was, and what degree of penal suffering would be proportionate to it; and a system of state punishment is better placed to reduce the "danger[s] to virtue" that the imposition of punishment involves. Such reasons are, however, extrinsic to retributivism itself: retributive justice is something that can, in principle, be achieved by private individuals who set about imposing deserved suffering on wrongdoers.⁴³⁵

⁴³² Husak, *Overcriminalization*, 203.

⁴³³ *Ibid.*, 201.

⁴³⁴ Moore, "A Tale of Two Theories," 42.

⁴³⁵ Duff, "Legal Moralism and Public Wrongs," 98.

Duff's reply to Moore is, thus, little more than a restatement of Husak's argument to which Moore was replying. With all due respect to Duff (and considerable respect is due), we are not making any progress here. While Moore obviously must be able to explain why it is appropriate for the state to pursue retributive justice, the reader is again left wondering why Moore's answer to the effect that this is because private punishment is problematic is disqualified because the problems of private punishment are extrinsic to retributivism as long as they are still good reasons for preferring state punishment to private punishment. Though "Law Letters" argues that Husak and Duff are in fact completely right to consider it problematic that Moore's explanation of why the *state* is justified in punishing wrongdoers, the problems rendering private punishment impermissible are unrelated to retributivism itself; neither have adequately explained why this is the case.

Husak soon turns to worrying whether the value of retributive justice is weighty enough to justify a system of state punishment in the face of the drawbacks of such a system. Husak mentions three such drawbacks: economic costs, risks of error, and the potential for the abuse of power.⁴³⁶ Husak argues that the moral value of retribution alone is not sufficient to explain why having a system of state punishment is worth it in the face of these three drawbacks. State punishment must therefore attain some further value in addition to the promotion of retributive justice in order to be justified.⁴³⁷ If Husak is right about this, then Moore's legal moralism is undermined, as the wrongfulness of conduct alone is then not *pro tanto* sufficient to justify its criminalization; there must be some other benefit to state punishment of that conduct than the promotion of retributive justice.

In reply to Husak, Moore first argues that the moral value of retributive justice need only outweigh the "*net balance of costs and other benefits* of setting up punishment institutions,"⁴³⁸ rather than the costs alone, in order to be sufficient to justify the creation of a system of state punishment. Second, he argues that the moral value of promoting retributive justice is indeed worth the net costs of creating a system of state punishment.⁴³⁹ While these "other benefits" include crime-prevention, Moore remains adamant that the

⁴³⁶ Husak, *Overcriminalization*, 204. Note that this worry is independent of the objection that Moore's legal moralism is problematic because the reasons to prefer state punishment cannot be derived from retributivism. To see this, suppose that the reasons to prefer state punishment *could* be derived from retributivism. In that case, Moore would still have to show that the value of retributive justice is significant enough to make a system of state punishment worth its cost.

⁴³⁷ *Ibid.*, 205.

⁴³⁸ Moore, "A Tale of Two Theories," 44 [Moore's emphasis].

⁴³⁹ *Ibid.*

function of the criminal law is pursuing retributive justice and that such further benefits are merely beneficial side-effects of this pursuit.⁴⁴⁰ I am unsure whether this reply can succeed without undermining the claim that the only function of the criminal law is the pursuit of retributive justice. There is a limit to how much work the “other benefits” of having system of a state punishment can do in offsetting the drawbacks of having such a system compared with the work done by the moral value of retributive justice itself before the “other benefits” are no longer side-effects of the pursuit of retributive justice, but vice versa. If the moral value of preventing wrongdoing makes just as much of a contribution to offsetting the drawbacks of having a system of state punishment as the moral value of retributive justice, then why should we consider the pursuit of retributive justice, but not the prevention of criminal wrongdoing, a function of the criminal law? This question looms especially large if, as Moore implies might be the case, the net balance of the costs and benefits of a system of state punishment, other than the promotion of retributive justice, might not even be *negative*.⁴⁴¹ I am not arguing that Moore is wrong to think that the moral value of promoting retributive justice is indeed worth the net costs of having a system of state punishment. What I am arguing is that unless the value of retributive justice does most of the work in overcoming the brute costs (or drawbacks) of having a system of state punishment on its own, it becomes unclear why the pursuit of retributive justice *alone* is central to the criminal law and must not share the spotlight with some of the other benefits brought about by having a system of criminal justice.

It seems to me that Husak is asking the right question of legal moralism: Even if wrongdoers ought to be punished, why does the task of punishing them fall to the state? However, it remains unclear why Moore’s answer to this question is not acceptable merely on the grounds that it is unrelated to retributivism.

7.2.3. Simester and von Hirsch

This leads us to Simester and von Hirsch, who argue that any answer to Husak’s question about why punishment should be carried out by the state will be grounded in an answer to the question “why is the *ex ante* issuance of morally-loaded, prohibitory norms [i.e. criminal statutes] itself one of the state’s proper functions?”⁴⁴² Like Husak, they emphasize the inadequacy of a purely negative argument:

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid.

⁴⁴² Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 17.

[Which] suggests why it might be wrong to entrust penalizing responses primarily to private citizens. But it does not develop affirmative reasons for the state, in particular, to be involved in a system of criminal proscriptions.⁴⁴³

According to Simester and von Hirsch, that affirmative reason is a matter of “the principal reasons for the state’s existence, as an institution for helping to secure and improve the lives of its citizens.”⁴⁴⁴ They later refer to this as the view that the state “exists in order to advance the welfare of its subjects.”⁴⁴⁵ This account of the principal reasons for the state’s existence turns out to be central to their rejection of legal moralism⁴⁴⁶ since the state is an artificial creation that exists in order to advance the welfare of its subjects, its mandate does not extend to the regulation of wrongful conduct that does not affect people’s welfare.⁴⁴⁷ Of course this may be true of *all* wrongs, but as long as the *wrongfulness* of conduct is analytically distinct from its effect on people’s welfare, this shows the *wrongfulness* of conduct alone is not *pro tanto* sufficient to justify its criminalization, even if the criminalization of all wrongful conduct is *pro tanto* justified.

Like Duff and Husak, Simester and von Hirsch thus affirm the political claim, but they offer a slightly different candidate for the relevant fact about the state; namely, it is *the reasons for the existence of the state* that have implications for whether the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization.⁴⁴⁸ They affirm the incompatibility claim because they affirm that the state exists to promote welfare, meaning that the wrongfulness of conduct is not *pro tanto* sufficient to justify its criminalization in the absence of that conduct affecting welfare negatively. It is also worth noting that the theory of Simester and von Hirsch is an example of a *political* Millian liberalism grounded in a welfarist justification of the state.

7.3. The contribution and context of “Law Letters”

Duff, Husak, Simester and von Hirsch all ask the same question of legal moralism: *Why the state?* Showing that the wrongfulness of conduct is *pro*

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid., 30.

⁴⁴⁶ Though Simester and von Hirsch present it as an argument in favor of the following claim: “That thing is wrongful is insufficient to establish even a *pro tanto* ground for its criminalization (non-qualifying Thesis).” (Ibid., 22). This thesis is simply the negation of legal moralism.

⁴⁴⁷ Ibid., 30.

⁴⁴⁸ Ibid., 17.

tanto sufficient to justify punishing it is insufficient to show that this task falls to the state; and therefore insufficient to demonstrate that the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization. Raising this challenge to legal moralism is an important contribution. It has not been made sufficiently clear why Moore's answer to this question fails to meet the challenge, however, and even then it certainly has yet to be shown that the legal moralist cannot meet this challenge. The arguments made by Duff and Husak fall short of conclusively showing that the values by which the polity defines itself cannot be such that *all* wrongdoing is *public*. Simester and von Hirsch may be right that if the principal reason for the state's existence is the promotion of welfare, then legal moralism must be rejected, but legal moralism might be compatible with some other equally plausible account of the reasons for the state's existence.

Furthermore, while all of these theories are problematically unclear about key aspects concerning how the political claim is to be fleshed out: *What* is the relevant fact about the state? *How* is this fact identified? *Why* does this fact have implications for whether a certain feature of conduct (such as wrongfulness) is *pro tanto* sufficient to justify criminalization? *What* exactly are those implications?

According to Duff, only wrongs that violate the core values of the polity are the proper concern of the criminal law. However, it remains unclear *how* one identifies the values that are constitutive of the self-definition of this or that polity.⁴⁴⁹ This is especially so since, on the one hand, it seems as though determining the core values of any given polity is partly to be done empirically,⁴⁵⁰ meaning that normative argumentation can only get us so far in settling questions over which values are constitutive. On the other hand, it remains unclear where to look for the empirical data necessary to fully determine what values are constitutive to the self-definition of a given polity. This gives rise to worries such as those expressed by Victor Tadros:

I am not clear that the polity's self-definition, insofar as it is distinct from the proper functions of the state, can be established prior to the criminalization of conduct. There is a whiff of circularity about Duff's suggestion. What a state criminalizes seems to determine its self-definition, but its self-definition is supposed to govern what it criminalizes.⁴⁵¹

⁴⁴⁹ Cf. Moore's remark that Duff's definition of *public wrongs* is "unhelpful" (Moore, "Liberty's Constraints on What Should Be Made Criminal," 199).

⁴⁵⁰ Duff, *Answering for Crime*, 142; "Legal Moralism and Public Wrongs," 105ff.

⁴⁵¹ Victor Tadros, "Wrongness and Criminalization," in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (New York, NY: Routledge, 2012), 164.

According to Husak, nothing short of a “theory of state” is necessary to determine whether any given state objective is legitimate. Assuming that identification of the correct “theory of state” is a purely normative endeavor, it is clearer *how* such a theory is identified⁴⁵² than *how* to identify the core values of a polity. However, it is less clear *what* a theory of state must contain and *how* exactly one is to determine whether a given feature of conduct is *pro tanto* sufficient to justify its criminalization based on a given theory of the state. It is perhaps more clear what is meant by Simester and von Hirsch’s “principal reasons for the state’s existence”⁴⁵³ and how they are to be identified. It is correspondingly less clear, however, *why* the principal reasons for the state’s existence have implications for whether a given feature of conduct is *pro tanto* sufficient to justify its criminalization.

These unclarities make it frustratingly difficult, if not impossible, to pin down the legislative implications of these political normative theories of the criminal law.⁴⁵⁴ This leaves the legal moralist in the dark about how to answer the challenge they raise. Indeed, one might not only doubt that any plausible version of the *political claim* is such that the incompatibility claim is correct—that is, that the fact about the state which has implications for the whether any given feature, F, of some conduct, C, is such that legal moralism should be rejected—but also whether any plausible version of the political claim has *non-trivial* implications for the proper scope of the criminal law at all.⁴⁵⁵ As is written in the introduction to volume 4 of the criminalization series, “The Political Morality of the Criminal Law:”

A normative theorist of the criminal law might agree that her theorizing depends in this way on some account of the state’s legitimacy, but argue that she need not herself provide such an account, or commit herself to any particular such account. For, she might argue, theories of criminal law need not be shaped or structured by any particular account of state legitimacy; they need only presuppose that some such account is available.⁴⁵⁶

⁴⁵² Although the practical task of doing so will be no less daunting.

⁴⁵³ Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 17.

⁴⁵⁴ Cf. Moore’s remark that Duff’s definition of *public wrongs* is “unhelpful” (Moore, “Liberty’s Constraints on What Should Be Made Criminal,” 199).

⁴⁵⁵ In this context, an implication of a descriptive or normative fact about the proper scope of the criminal is taken to be *non-trivial* if, and only if, it is incompatible with at least one minimally plausible normative theory of the criminal law.

⁴⁵⁶ Duff, “Introduction,” 17.

7.3.1. The contribution of “Law Letters”

This is the context of the contribution made by “Law Letters” to the literature. In what follows, I summarize *the* claims and the overall structure of the arguments in “Law Letters” while leaving the arguments in support of these claims to be found in the article itself. “Law Letters” argues that legal moralism should be rejected, because we should accept the following principle:

The correspondence requirement: A fact, F, *pro tanto* justifies criminalizing some conduct, C, *only if* F makes criminalizing C serve an aim which the existence of a coercive state is *pro tanto* justified by serving.

The correspondence requirement is a distinct version of the political claim. The essence of the correspondence requirement is that if some feature of conduct, such as its wrongfulness *pro tanto* justifies it criminalization, then it must also be true that this feature of conduct *pro tanto* justifies the existence of a coercive state. One simple reason that this must be so is that the institutions of the criminal law are both *state* institutions and exercise profound coercion. *The* correspondence requirement fleshes out the particulars of the political claim as follows. The relevant fact about the state is: *an account of the aims which the existence of a coercive state is pro tanto justified by serving*. I refer to such an account as *a normative theory of the state*. Whether this or that normative theory of the state is correct is a purely normative question. The correspondence requirement has no room for Duff’s relativism about what values a polity ought to treat as constitutive of its self-definition. A normative theory of the criminal law and a normative theory of the state *correspond* to each other only if their central claims relate to each other as the antecedent and the consequent of the correspondence requirement relate to each other. If the correspondence requirement is accepted, then a normative theory of the criminal law is correct only if at least one corresponding normative theory of the state is correct. “Law Letters” advances the following argument in favor of the correspondence requirement:

1. A fact, F, *pro tanto* justifies criminalizing some conduct, C, only if F makes criminalizing C serve a proper aim of the criminal law.
2. F makes criminalizing C serve a proper aim of the criminal law only if F makes criminalizing C serve a proper aim of state coercion.
3. F makes criminalizing C serve a proper aim of state coercion only if F makes criminalizing C serve an aim which the existence of a coercive state is *pro tanto* justified by serving.
4. Hence, a fact, F, *pro tanto* justifies criminalizing some conduct, C, only if F makes criminalizing C serve an aim which the existence of a coercive state is *pro tanto* justified by serving (from 1, 2, 3).

The reader will recognize the conclusion of the argument as the *correspondence requirement*. The wording of the premises above may appear convoluted but the logic behind *correspondence requirement* is simple: If some consideration would not be *pro tanto* sufficient to justify creating a coercive state then that consideration is not *pro tanto* sufficient to justify criminalizing C. Normative theorists of the criminal law must therefore ask themselves: If no coercive state existed would this consideration be a good reason to create one? Unless this question can be answered in the affirmative, that consideration is not a good reason for criminalization either. The argument is deductively valid.⁴⁵⁷ Its first premise might be controversial but is explicitly affirmed by Moore.⁴⁵⁸ Its second premise relies on the fairly uncontroversial claim that the criminal law exercises state coercion.⁴⁵⁹ Some legal moralists might attempt to attack the first premise, but it is more likely that legal moralists in general (and certain that Moore) will launch their attack against the third premise.

Accordingly, “Law Letters” defends the third premise at length. I cannot summarize all of the details of this defense here. But the rough outline of this defense is something along the following: The exercise of state coercion is an inherent part of a system of criminal justice (that is the gist of the second premise). To say that criminalizing some conduct, C, is *pro tanto* justified is to say the exercise of state coercion in response to C is *pro tanto* justified. To say that the criminal law ought to serve some aim in general (e.g. the promotion of retributive justice) is to say that exercising state coercion in pursuit of that aim is always *pro tanto* justified. Any argument that the criminal law should serve some general aim is also an argument that a *more* rather than *less* coercive state ought to exist. For an argument to demonstrate successfully that a *more* rather than *less* coercive state ought to exist, it must also be capable of demonstrating that a *somewhat* coercive rather than *no* coercive state ought to exist. For this is demonstrating the same thing: That exercising more state coercion is justified. The argument need not be sufficient, all

⁴⁵⁷ The argument has the following structure: A only if B, B only if C, C only if D, hence, A only if D.

⁴⁵⁸ Moore, *Placing Blame*, 660; Moore, “Liberty’s Constraints on What Should Be Made Criminal,” 189.

⁴⁵⁹ Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 5–6; Moore, “Liberty’s Constraints on What Should Be Made Criminal,” 185; Husak, *Overcriminalization*, 77–85; Feinberg, *Harm to Others*, 3–26; Jonathan Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law*, Law and Philosophy Library, v. 19 (Dordrecht, Boston: Kluwer Academic Publishers, 1994), 1–6; Duff, “Introduction,” 17.

things considered, to justify the existence of a coercive state,⁴⁶⁰ but it needs to have *some* weight in justifying the existence of such a state (i.e. to be *pro tanto* sufficient). This is what “Law Letters” has to say about the political claim.

Next, we want to know why accepting the correspondence requirement means rejecting legal moralism; that is, we now require an argument in favor of the incompatibility claim. The argument provided by “Law Letters” in support of the incompatibility claim is structured as follows:

1. The wrongfulness of conduct *pro tanto* justifies its criminalization only if the wrongfulness of conduct makes its criminalization serve an aim which the existence of a coercive state is *pro tanto* justified by serving.
2. It is not the case that the wrongfulness of conduct makes its criminalization serve an aim which the existence of a coercive state is *pro tanto* justified by serving.
3. Hence, it is not the case that the wrongfulness of conduct *pro tanto* justifies its criminalization (1 and 2).

The reader will recognize the first premise as the conclusion of the previous argument, that is, as the correspondence requirement. If the previous argument is sound, then the first premise requires no further defense. In order to defend the second premise of this argument, it is necessary to demonstrate that there is no normative theory of the state according to which the existence of a coercive state is *pro tanto* justified by serving an aim, which is such that the wrongfulness of conduct makes the criminalization of that conduct serve that aim.

Given the number of possible normative theories of the state, this is a colossal task. The truth of the second premise can admittedly not be conclusively demonstrated. Certainly, a number of possible normative theories of the state are incompatible with the second premise of this argument. “Law Letters” defends the second premise by arguing that no *plausible* normative theories of the state are incompatible with the second premise. The essence

⁴⁶⁰ One reason why this is so is that it is quite likely that the existence of a just-a-little-bit-ever-so-slightly-coercive state is impossible, since it is plausible that there is some minimum threshold of coercion which a state must exercise in order to maintain itself. Thus, an argument which is sufficient to justify for creating a state which is just a little bit more coercive would not be sufficient to justify creating a coercive state in the first place, since the amount of “extra coercion” it justifies is insufficient to meet such a threshold. However, it would still be *pro tanto* sufficient to justify the existence of a coercive state on account of justifying *some* state coercion, which is all that the correspondence requirement is demanding.

of the argument is that the correspondence requirement implies that the wrongfulness of conduct *pro tanto* justifies its criminalization only if the wrongfulness of conduct makes its criminalization serve an aim which the existence of a coercive state is *pro tanto* justified by serving. However, there is no plausible normative theory of the state according to which the existence of a coercive state is *pro tanto* justified by serving an aim which is such that the wrongfulness of conduct makes the criminalization of that conduct serve that aim. “Law Letters” argues that this is so by, first, arguing that no plausible normative theory of the state according to which the existence of a coercive state is *pro tanto* justified because of the benefits it provides (benefit-centered theories) has the implication that the existence of a coercive state is *pro tanto* justified by serving an aim that the wrongfulness of some conduct makes its criminalization serve.⁴⁶¹ Second, it argues that no plausible normative theory of the state according to which the existence of a coercive state is *pro tanto* justified because discharging an enforceable duty requires a coercive state to exist (duty-centered theories) has the implication that the existence of a coercive state is *pro tanto* justified by serving an aim that the wrongfulness of some conduct makes its criminalization serve.⁴⁶² Third, it

⁴⁶¹ The welfarist justification of the state given by Simester and von Hirsch offers an example of such a theory (Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 17; 30). This underscores a point which, although peripheral to the question of this dissertation, might be of some significance. If my arguments are correct, then it is a glaring flaw of Millian liberalism and legal moralism alike that the defenders of either have paid virtually no attention to questions of why the state should prevent harm/punish immorality. But whereas coming up with a plausible answer to this question turns out to be problematic for legal moralism, some easy answers are available to the Millian liberal. Namely, unless one is skeptical of benefit-centered theories in general, it seems difficult to deny that if no coercive state existed, the protection such a state could provide against being harmed would be a supremely good reason to create one.

⁴⁶² Wellman provides the best example of such a theory, arguing that the existence of a coercive state is justified because discharging an enforceable duty to rescue others from dangers at no danger to oneself requires a coercive state to exist Christopher H. Wellman, “Liberalism, Samaritanism, and Political Legitimacy,” *Philosophy & Public Affairs* 25, no. 3 (July 1996): 211–37, doi:10.1111/j.1088-4963.1996.tb00040.x. See also Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law*, first paperback edition, Oxford Legal Philosophy (Oxford United Kingdom: Oxford University Press, 2013), chap. 13. An easy answer is also available to the Millian liberal here: If no coercive state existed, discharging our enforceable duty to assure others that we will not harm them, and/or rescue others from harm at an insignificant cost to ourselves would plausibly require us to create, or accept the creation of, a coercive state.

argues that only normative theories of the state that are either benefit-centered, duty-centered, or a mixed theory consisting of elements from both⁴⁶³ are plausible.⁴⁶⁴ Thus, no plausible normative theory of the state corresponds to legal moralism. I realize that the reader has not been given any reason here to believe either of these three claims. The reader can find such reasons in the article itself.⁴⁶⁵ The defense of the second premise occupies more than one-third of “Law Letters,” and giving a full summary of this defense will not be beneficial here.

What I shall do is to summarize the argument that one duty-centered normative theory of the state according to which the existence of a coercive state is *pro tanto* justified because it is required to permissibly discharge an enforceable duty to punish wrongdoer will not correspond to legal moralism.⁴⁶⁶ If Moore has a normative theory of the state, it is one according to which the existence of a coercive state is *pro tanto* justified because it is required to permissibly discharge an enforceable duty to punish wrongdoers.⁴⁶⁷ This normative theory of the state corresponds to legal moralism only if the wrongfulness of conduct *makes* the criminalization of that conduct required to permissibly discharge an enforceable duty to punish wrongdoers. According to Moore, the existence of a coercive state is required to permissibly discharge an enforceable duty to punish wrongdoers because:

Retributive punishment is dangerous for individual persons to carry out, dangerous to their virtue and, because of that, unclear in its justification.⁴⁶⁸

⁴⁶³ One example of such a mixed normative theory of the state could be one in which the existence of a coercive state is *pro tanto* justified because it benefits some group, which everyone who is not a member of that group has an enforceable duty to make better off (e.g. because the group which benefits is “the worst off”).

⁴⁶⁴ *Actual consent theories* lead to philosophical anarchism (A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society*, Studies in Moral, Political, and Legal Philosophy (Princeton, NJ: Princeton University Press, 1993), 260ff.). The ever popular *hypothetical-consent theories* (e.g. Thomas Scanlon, *What We Owe to Each Other* (Cambridge, MA: Belknap Press of Harvard University Press, 2000)) are really just restated benefit-centered, duty-centered, or mixed theories. For what other than the benefits provided by the existence of a coercive state and/or the fact that discharging one of our enforceable duties requires us to accept the creation of a coercive state could possibly make it impossible for anyone to reasonably reject the existence of a coercive state?

⁴⁶⁵ “Law Letters,” pp. 18–30.

⁴⁶⁶ To be found on pp. 24–6 of “Law Letters.”

⁴⁶⁷ Moore, *Placing Blame*, 152; Moore, “A Tale of Two Theories,” 42.

⁴⁶⁸ Moore, *Placing Blame*, 152.

Attempting to discharge a duty to punish wrongdoers privately is dangerous to virtue because of the opportunity for sadism it presents and because private persons are worse than the state at determining whether a person is guilty of culpable wrongdoing; and if so, how much punishment he deserves.⁴⁶⁹ However, if this is the explanation of why permissibly discharging an enforceable duty to punish wrongdoers requires the existence of a coercive state, it is not the wrongfulness of conduct *alone* but the wrongfulness of conduct *and* the fact that private punishment of that conduct is dangerous to virtue,⁴⁷⁰ which *jointly* makes the criminalization of that conduct required to discharge an enforceable duty to punish wrongdoers. Accordingly, this corresponds to a normative theory of the criminal law according to which the wrongfulness of conduct *and* the fact that private punishment of that conduct is dangerous to virtue are *jointly pro tanto* sufficient to justify its criminalization. That is, a normative theory of the criminal law that is *not* legal moralism. Even if we grant that the private punishment of wrongful conduct is *always* dangerous to virtue,⁴⁷¹ this problem remains as long as the proposition “the conduct, C, is wrongful” and the proposition “private punishment of C is dangerous to virtue” are analytically distinct, such that it is not the wrongfulness of the conduct itself that makes punishing that conduct dangerous to virtue. Clearly, these two propositions are in fact analytically distinct, since it is by virtue of certain contingent facts about human nature (e.g. the tendency to sadism) that private punishment is dangerous to the virtue of human beings, and these facts play no role in explaining the wrongfulness of some wrongful conduct.⁴⁷²

⁴⁶⁹ Moore, “A Tale of Two Theories,” 42.

⁴⁷⁰ I here use “dangerous to virtue” as a term covering all of Moore’s reasons for preferring state punishment.

⁴⁷¹ While it is plausible that it is never permissible for private individuals to exact punishment of a severity exceeding a certain (rather low) threshold, the claim that private punishment is always impermissible seems quite implausible. For instance, it is permissible for parents to punish their children within certain limits (Tadros, *The Ends of Harm*, 302–3). This is hardly surprising, as such punishment is often trivial (sending the child to bed early, denying them dessert), and the parents are in an excellent position to determine guilt or innocence. While it is important to prevent parents from inflicting excessive punishment on their children, that job is simply done by the criminalization of child abuse. But I digress. Whether or not there is such a thing as permissible private punishment, the coherence of the idea is sufficient to undermine Moore’s argument for legal moralism.

⁴⁷² This can be tested by considering whether the conduct in question would still be wrongful if the relevant claim about human nature were false. For instance, if we

“Law Letters” has more to say about why plausible, duty-centered normative theories of the state will not correspond to legal moralism. However, it should be noted that apart from the inherent interest this dissertation takes in the work of Moore, summarizing the discussion of his normative theory of the state is also interesting because many other duty-centered normative theories of the state fail to correspond to legal moralism for the same reason. Furthermore, it helps us see why Husak and Duff were ultimately correct in their claim that it was problematic that Moore’s explanation of why reserving the punishment of wrongdoers for the state could not be derived from retributivism. Such an explanation leads to the failure of the move from “the wrongfulness of conduct is *pro tanto* sufficient to justify its punishment” to “the wrongfulness of conduct is *pro tanto* sufficient to justify its *state* punishment.” In absence of an explanation of why the pursuit of retributive justice should be carried out by the state which is derived from retributivism itself, the wrongfulness of conduct alone will not be *pro tanto* sufficient to justify state punishment; rather, the wrongfulness of conduct and whatever explains the involvement of the state (as the dangers of private punishment did for Moore) are *jointly pro tanto* sufficient to justify state punishment. Accordingly, the resulting normative theory of the criminal law will not be legal moralism.

“Law Letters” contains this dissertation’s most significant contributions to the literature. The correspondence requirement is a distinct and novel version of the political claim, and the argument given in its favor is a distinct and novel argument in favor of the political claim. It thus makes a significant positive theoretical contribution to refining, clarifying, and strengthening political normative theories of the criminal law. In showing that the correspondence claim implies that legal moralism should be rejected, “Law Letters” shows that legal moralism cannot meet the challenge raised by Husak and explains why the enforcement of morality is the proper business of the state, thereby formulating a hard-hitting objection to legal moralism.

7.4. Concluding remarks about legal moralism

The “Law Letters” argument should lead us to reject legal moralism. It undermines the best arguments to be given in favor of legal moralism. The above discussion should make it clear enough why it undermines Moore’s argument from retributivism. Two other arguments can be given in favor of legal moralism. First, there was the argument from the gradation of punish-

imagined that human nature was different such that private punishment would not be dangerous to virtue, then wrongs like murder would still seem just as wrongful.

ment to moral blameworthiness. Recall from the discussion of this argument in chapter 5 that it was successful only if punishment was graded according to moral blameworthiness for purely retributivist reasons. The discussion of Moore's argument from retributivism also shows that whatever the merits of retributivism as a general theory of punishment, pure retributivism must be rejected as a theory of *state* punishment. Namely, it explains why the fact that the reasons why wrongdoers should be punished by *the state* could not be derived from retributivism shows that however important the moral culpability (or blameworthiness) of the punished is to the justification of state punishment, the moral culpability (or blameworthiness) of the punished cannot alone be *pro tanto* sufficient to justify state punishment. At most, moral culpability (or blameworthiness) *and* whatever explains why punishment should be carried out by the state are jointly *pro tanto* sufficient to justify state punishment.

Second, and most important of all, the argument from "Law Letters" has the resources to resist the conceptual argument in favor of legal moralism. I do not think there is any way to deny that the wrongfulness of some conduct, C, is *pro tanto* sufficient to justify discouraging people from engaging in C, or that this could be done by criminalizing C. However, it does not follow from the fact that the wrongfulness of conduct is *pro tanto* sufficient to justify discouraging people from engaging in C and that this could be done by criminalizing C that it is *pro tanto* sufficient to justify *the state* in discouraging people from engaging in C by criminalizing it. "Law Letters" provides a convincing explanation of why that is: However appropriate it is for individuals to discourage each other from engaging in wrongful conduct on account of its wrongfulness, this is not the sort of reason which alone can *pro tanto* justify the existence of a coercive state. At minimum, it must be coupled with a reason why private individuals cannot unproblematically discourage each other from engaging in wrongful conduct in the absence of a coercive state. For this reason, the conceptual argument fails to support legal moralism for the same reason Moore's argument from retributivism fails. More likely, the appropriateness of discouraging people from engaging in immoral conduct is not relevant to the justification of the existence of a coercive state at all. If no coercive state existed, the individuals in the state of nature would have a wide array of good reasons to create one. I sincerely doubt that the fact that such a coercive state could discourage immoral conduct would be among them.

Whether I am right about this latter claim is a matter of whether I am right that no plausible normative theory of the state corresponds to legal moralism, something which "Law Letters" seeks to demonstrate, but which is not readily apparent from this summary. If I am indeed right in this, then le-

gal moralism faces a far greater problem than the failure of the case for legal moralism in the face of the argument given in “Law Letters”; namely, legal moralism does not correspond to any plausible normative theory of the state, which it must if the correspondence claim is correct. There is simply no plausible account of the aim(s) which the existence of a coercive state is *pro tanto* justified by serving, which is such that the *mere* fact that a coercive state could prohibit (or prevent/punish) wrongful conduct *pro tanto* justifies creating and maintaining a coercive state, and therefore the mere fact that some conduct is wrongful is *not pro tanto* sufficient to justify the coercive states which do exist in exercising the state coercion involved in criminalizing that conduct. This concludes the chapter on theory-driven objections to legal moralism. This chapter was the last of the four chapters in this dissertation presenting and discussing legal moralism. The next chapter shall present the theory of the *wrongness constraint* as well as the contribution made by “Hamburger-Hating Terrorists, The Duty View of Punishment, and The Wrongness Constraint.” The concluding chapter, chapter 9, shall return to legal moralism and the conclusions this dissertation draws about the position.

Chapter 8: The Wrongness Constraint: Theory and Contribution

Chapters 4, 5, 6, and 7 presented the theoretical debate over the viability of legal moralism and explained how the articles of this dissertation contributed to this debate. However, this dissertation is not just about legal moralism (although the reader could certainly be forgiven for thinking so at this point). It is also about:

The wrongness constraint: The wrongfulness of conduct is necessary to justify its criminalization.

The wrongness constraint and legal moralism are two compatible but quite distinct positions. One can accept the wrongness constraint while denying legal moralism, and vice versa. For instance, those who believe that the criminal law is properly concerned with some subset of wrongful conduct, such as public wrongs⁴⁷³ or harmful (and offensive) wrongs,⁴⁷⁴ believe that the wrongfulness of conduct is necessary to justify its criminalization, but not that it is *pro tanto* sufficient.

The purpose of this chapter is to present the theoretical debate over the wrongness constraint and contextualize and summarize the contribution made to this debate in the article “Hamburger-Hating Terrorists, The Duty View of Punishment, and the Wrongness Constraint.” Section 8.1 presents the various arguments advanced in favor of the wrongness constraint and explains why defending the wrongness constraint on the basis of a general theory of punishment is unproblematic when this was not true of legal moralism. Section 8.2 presents the problem to the wrongness constraint posed by *mala prohibita*, introduces the distinction between the *strong* and the *weak wrongness constraint*, and the debate over which one should be affirmed. Section 8.3 presents the context of “Hamburger-Hating Terrorists, The Duty View of Punishment, and the Wrongness Constraint” and summarizes its contribution to the literature. Section 8.4 concludes. Only a single chapter is devoted to the wrongness constraint—as opposed to the four chapters devoted to legal moralism—for the simple reason that the wrongness constraint is significantly less controversial than legal moralism. Legal mor-

⁴⁷³ R. A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*, Legal Theory Today (Oxford; Portland, OR: Hart Pub, 2007).

⁴⁷⁴ Feinberg, *The Moral Limits of the Criminal Law Volume 4*, 153.

alists and their critics tend to be in happy agreement that some form of the wrongness constraint is correct.⁴⁷⁵

8.1. Punishment, *state* punishment, and the argument for the wrongness constraint

At the base of the wrongness constraint lies a powerful intuition that wrongfulness is necessary to justify punishment since it is unclear how people could possibly have come to *deserve* punishment if not through some kind of wrongdoing. As Husak explains:

Suppose a given individual were about to be punished, demanded a justification for his treatment, and was assured that a justification was needed. He might ask: [...] “What have I done wrong to justify my punishment?” or “Why do I deserve to be punished?” Suppose the state were to respond: [...] “You have done nothing wrong, but your punishment is justified nonetheless,” or, “Your punishment is not deserved, but still it is justified.” These replies are so peculiar that further dialogue between the individual and the state is unlikely to be fruitful.⁴⁷⁶

It is no surprise, then, that theories of punishment often play an important part in arguments in favor of the wrongness constraint.⁴⁷⁷ I shall briefly show how the wrongness constraint can be straightforwardly derived from retributivism⁴⁷⁸ and the communicative (or expressive) theory of punishment.⁴⁷⁹ However, it must first be explained why there is no problem in deriving the wrongness constraint from general theories of punishment given that the

⁴⁷⁵ Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford; New York: Clarendon Press; Oxford University Press, 1993), 71; Michael S. Moore, *Placing Blame: A Theory of the Criminal Law*, first published in paperback (Oxford; New York: Oxford University Press, 1997), 662; Duff, *Answering for Crime*, 81; Douglas N. Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008), 72ff; A. P. Simester and Andrew Von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford; Portland, OR: Hart Pub, 2011), 23–9; A. P. Simester, “Enforcing Morality,” in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (New York, NY: Routledge, 2012), 483ff; Joel Feinberg, “The Expressive Function of Punishment,” *The Monist* 49, no. 3 (1965): 397–423.

⁴⁷⁶ Husak, *Overcriminalization*, 83.

⁴⁷⁷ Moore, *Placing Blame*; Moore, “A Tale of Two Theories,” 31–32; Duff, *Answering for Crime*, 80; Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 23.

⁴⁷⁸ Moore, “A Tale of Two Theories,” 31–2.

⁴⁷⁹ Duff, *Answering for Crime*.

previous chapter argued that legal moralism could not be defended on this basis. Consider the two following arguments:

Legal moralism and punishment

1. If the wrongfulness of conduct is *pro tanto* sufficient to justify the *state punishment* of those who engage in it without excuse or justification, then it is *pro tanto* sufficient to justify its criminalization.
2. The wrongfulness of conduct is *pro tanto* sufficient to justify the *punishment* of those who engage in it without excuse or justification.
3. Hence, the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization.

The wrongness constraint and punishment

4. If the wrongfulness of conduct is necessary to justify its state punishment, then it is necessary to justify its criminalization.
5. The wrongfulness of conduct is necessary to justify punishment.
6. Hence, the wrongfulness of conduct is necessary to justify its criminalization.

Neither of these arguments is deductively valid; both miss a premise relating *punishment* and *state punishment* to each other. Few would deny that state punishment is a subset of punishment, such that *all state punishment is punishment, but not all punishment is state punishment*. This does not support the premise necessary to make the first argument valid, namely:

(2½) The wrongfulness of conduct is *pro tanto* sufficient to justify *state punishment* of those who engage in it without excuse or justification if the wrongfulness of conduct is *pro tanto* sufficient to justify *punishment* of those who engage in it without excuse or justification.

Since not all punishment is state punishment (2½) is false, what is *pro tanto* sufficient to justify punishment need not be *pro tanto* sufficient to justify state punishment. This point was explored in the previous chapter, which is why legal moralism cannot be derived solely from a general theory of punishment. Conversely, the fact that all state punishment is punishment warrants adding the premise that would render the second argument valid:

(5½) If the wrongfulness of conduct is necessary to justify *punishment*, then the wrongfulness of conduct is necessary to justify *state punishment*.

Since all state punishment is punishment, that which is necessary to justify punishment is also necessary to justify state punishment. This is why the

wrongness constraint can be derived from a general theory of punishment⁴⁸⁰ even though legal moralism cannot.

To my knowledge, nobody denies (4). When the state criminalizes conduct, it declares its commitment to identifying and punishing those who engage in said conduct without excuse or justification.⁴⁸¹ For any criminal prohibition target which targets conduct worth criminalizing,⁴⁸² it is possible that some will engage in the criminalized conduct, thus forcing the state to make good on its commitment to punish those who do so. The state had better be sure that, should that happen, state punishment is justified.⁴⁸³ Thus, the state ought not to criminalize conduct which it would not be justified in punishing. While the mere possibility that the criminalization of some conduct, C, will lead to the state punishment of those who engage in C is enough to justify (4), it should be noted that in the real world this is not only *possible*, but all but guaranteed. In the real world, no criminal law targeting conduct worth criminalizing will be universally respected, and it is all but inevitable that a criminal prohibition of C *will* force the state to punish some for engaging in C.⁴⁸⁴

Thus, the more interesting issue is why the adherents of the various theories of punishment affirm (5). Retributivists affirm (5) because they hold that punishment is justified “because and only because offenders deserve to suffer for their culpable wrongdoings,”⁴⁸⁵ and the wrongfulness of conduct is plainly necessary to make those who engage in such conduct culpable wrongdoers. Those who defend some version of a communicative theory of punishment often affirm (5) because they hold that punishment is justified only if it truthfully (or appropriately) communicates something which punishment communicates truthfully (or appropriately) only if it is inflicted in response to wrongful conduct. The message to be communicated by punishment is usually something like *censure*⁴⁸⁶ or *condemnation*⁴⁸⁷ of the pun-

⁴⁸⁰ Note that this implies that *the wrongness constraint* could also be derived from a theory of the state; just as all state punishment is punishment, all state punishment is carried out by the state.

⁴⁸¹ Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 6. Henceforth, I omit “without excuse or justification.”

⁴⁸² By “conduct worth criminalizing” is meant conduct in which someone conceivably *could* and *would* engage in (e.g. not conduct in which it is *literally* impossible to engage).

⁴⁸³ Husak, *Overcriminalization*, 78.

⁴⁸⁴ Ibid.

⁴⁸⁵ Moore, “A Tale of Two Theories,” 31.

⁴⁸⁶ Simester and Von Hirsch, *Crimes, Harms, and Wrongs*.

⁴⁸⁷ Duff, *Answering for Crime*, 80–9.

ished conduct as (publicly) wrongful *or* of the offender as a (public) wrongdoer, or both.

Those who hold other theories of punishment cannot arrive at (5) quite so easily. They cannot simply note that only wrongful conduct is relevant to the justifying aim of punishment. That does not mean that those who hold other theories cannot arrive at the wrongness constraint. One place to look is in the *legal defenses* of *excuse* and *justification* themselves. Thus, Susan Dimock offers the following argument:⁴⁸⁸

- A. A successful defense of justification reveals that while the defendant's actions satisfy the offence elements of the crime for which she is on trial, those actions were not wrong, all things considered.
- B. Arguing that the defendant's actions were not wrong, all things considered, is a valid legal defense only if the wrongfulness of the defendant's conduct is necessary to justify punishment.
- C. Justification is a valid legal defense.
- D. Hence, the wrongfulness conduct is necessary to justify punishment.

A similar argument involving the defense of excuse might be given:⁴⁸⁹

- E. A successful defense of excuse shows that although the defendant's actions satisfy the offence elements of the crime for which she is on trial, she is not to blame.
- F. Arguing that the defendant is not to blame is a valid legal defense only if the wrongfulness of the defendant's conduct is necessary to justify punishment.
- G. Excuse is a valid legal defense.
- H. Hence, the wrongfulness conduct is necessary to justify punishment.

To spell out the reasoning behind (E) a little, one is typically blamed only for wrongful conduct. Indeed, one could ask what there is to *excuse* if there has been no wrongdoing.⁴⁹⁰ Another argument that is sometimes advanced in favor of the wrongness constraint is conceptual:⁴⁹¹

⁴⁸⁸ Susan Dimock, "Contractarian Criminal Law Theory and Mala Prohibita Offences," in *Criminalization: The Political Morality of the Criminal Law*, ed. R. A. Duff et al., Criminalization Series 4 (New York, NY: Oxford University, 2014), 158.

⁴⁸⁹ Husak, *Overcriminalization*, 72–3.

⁴⁹⁰ Ibid., 72. I assume here that attempts to act wrongfully which are bound to fail due to some facts that are unknown to the offender (e.g. attempting to kill someone by shooting him with a gun which the offender mistakenly thinks is loaded) are properly characterized as *wrongdoing*.

⁴⁹¹ See Suzanne Uniacke, "Punishment as Penalty," *Criminal Law and Philosophy* 9, no. 1 (March 2015): 37–47, doi:10.1007/s11572-013-9215-z.

- I. A law, L, is part of the criminal law only if the sanction for breaking L constitutes punishment.
- J. A sanction, S, is punishment only if S communicates condemnation⁴⁹² of the punished.
- K. S communicates condemnation of the punished only if S is imposed in response to conduct which is wrongful.
- L. Hence, a law is part of the criminal law only if the prohibited conduct is wrongful.

The upshot of this argument is that, however we justify it, S is not punishment unless S is imposed in response to wrongful conduct, meaning that the wrongfulness of conduct is necessary to justify its criminalization, as it is necessary to criminalize it at all. Simester and von Hirsch sometimes seem to make such an argument. For instance, they claim to “take it to be conceptually true that punishment connotes blame”⁴⁹³ while also believing that “one cannot blame a person unless that person does something morally wrong.”⁴⁹⁴

⁴⁹² Or some related term like *censure* or *blame*.

⁴⁹³ Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 11. Perhaps I should comment on the relation between *connote* and *communicate*. If punishment *connotes* blame, then it must be the case that punishment *communicates* blame to everyone who understands its connotations. If this is a *conceptual* truth about punishment, then understanding that punishment has this connotation is necessary to understand the concept of punishment itself. Therefore, the claim that it is a conceptual truth about punishment that it connotes blame seems to imply that it is also conceptually true that punishment communicates blame to all who understand the concept. At any rate, I do not think there is any way to read Simester and von Hirsch as not also claiming it to be conceptually true that punishment communicates blame, since this would leave it unexplained *why* state punishment necessarily expresses *censure*, which Simester and von Hirsch understand as *authoritative blame* (Ibid., 13), thereby undermining Simester and von Hirsch’s claim that the criminal law is distinguished from other legal regulation by a morally-loaded regulatory tool (Ibid., 4; 11).

⁴⁹⁴ Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 23. Surely this claim is wrong, since it implies that those who mistakenly but sincerely believe that a person has done something morally wrong cannot blame her. One might also wonder whether it is possible for A to blame B for doing X even though X is neither wrongful nor believed by A to be wrongful provided that B believes X to be wrongful. I do not believe that it is normally wrongful to do drugs. Suppose I am right. Some of my friends disagree. Suppose one of those friends did drugs. Would it not then be the case that I could blame him for this merely on the grounds that *he* believed this to be wrongful, even if *ex hypothesi*, I rightly believe that it is not?

There is no way to put this nicely. Purely conceptual arguments in favor of the wrongness constraint will inevitably fail spectacularly for obvious reasons, and it is surprising that they are made, or at least hinted at, by scholars who, like Simester and von Hirsch,⁴⁹⁵ one would think (based on the quality of their arguments in other respects) were far too brilliant to even consider this argument. Making a conceptual argument for the wrongness constraint deprives it of any normative bite, for it shows that wrongful conduct *cannot*, rather than *ought* not, be criminalized. What appears to be punishment of non-wrongful conduct is in fact pseudo-punishment (I am sure Iranian homosexuals will be delighted to hear that, despite appearances, homosexuality is actually not *punished* in Iran...). Meanwhile, it tells us absolutely nothing about what is problematic about pseudo-punishing non-wrongful conduct.

Since Simester and von Hirsch also advance some arguments to the effect that permissible conduct *ought* not to be criminalized, however, they cannot intend to make the conceptual argument. Rather, they must affirm the following instead of (K):

(K*) The wrongfulness of conduct is necessary to justify a condemnatory response to that conduct.

Simester and von Hirsch would then be offering the following argument in support of the wrongness constraint. Even though it is possible for the state to punish permissible conduct, the condemnation communicated by state punishment inevitably brands the punished as a wrongdoer.⁴⁹⁶ The punishment of permissible conduct therefore inevitably communicates what is not true: that the conduct is wrongful. It is necessary to justify the state in communicating some message that the message is true.⁴⁹⁷ Hence, the wrongfulness of conduct is necessary to justify state punishment of that conduct criminalize permissible conduct. This argument is certainly better than the purely conceptual one.⁴⁹⁸ The fact that the state would be communicating an untrue message if it criminalized permissible conduct is a weighty reason to refrain from criminalizing conduct unless it is morally wrong. It must, however, be strong enough to show that the *wrongfulness of conduct is necessary to justify its criminalization*. And while one might certainly agree with Tadros that in “all but the most unusual circumstances, the state ought to imply [that a

⁴⁹⁵ Ibid., 10-14-24. See also Uniacke, “Punishment as Penalty.”

⁴⁹⁶ Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 13.

⁴⁹⁷ Ibid., 19–20.

⁴⁹⁸ It is worth stressing that the problems raised above only apply to *purely* conceptual arguments. It is no problem that one’s argument for the wrongness constraint contains some conceptual premises, e.g. I and J.

person is a wrongdoer ...] only if it is true,”⁴⁹⁹ the wrongness constraint also purports to hold in unusual circumstances. Furthermore, it is not at all clear that (J) is true; that is, that it is conceptually true that punishment communicates the condemnation of the punished rather than “merely” the strong disapproval or criticism of what has been done,⁵⁰⁰ which is far less tightly connected to wrongdoing.

8.2. *Mala prohibita*, underinclusivity, and two versions of the wrongness constraint

There can be no objection to the wrongness constraint on account of being overinclusive. As a constraint, it never has the implication that criminalizing any particular conduct is justified. Nor does it purport to be the only constraint on criminalization. Anyone who believes that there is some wrongful conduct which ought not to be criminalized (and this is denied by exactly nobody) believes that there are other constraints on criminalization than the wrongness constraint.

Rather, any intuitive objection to the wrongness constraint must be one of underinclusivity, where a couple of challenges to the wrongness constraint can be found. For *prima facie* it seems difficult for the wrongness constraint to account for a number of justified criminal laws. Specifically, some criminal laws enforce specific solutions to coordination problems that can be solved in multiple ways. Consider this example from traffic law:

1. If the wrongness constraint is correct, then criminalizing morally permissible conduct is never justified.
2. Making it a criminal offense to drive on the right side of the road is justified.
3. It is morally permissible to drive on the right side of the road.
4. Hence, the wrongness constraint is not correct.

Call this the problem of *coordination offenses*. Another problem is that some criminal laws that aim at uncontroversially wrongful conduct attempt to capture these wrongs by stipulating somewhat arbitrary thresholds, which they must since this is the only way to proscribe the wrong through general, clear,

⁴⁹⁹ Victor Tadros, “Wrongness and Criminalization,” in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (New York, NY: Routledge, 2012), 173.

⁵⁰⁰ Jeremy Horder, “Bureaucratic ‘Criminal’ Law: Too Much of a Bad Thing?,” in *Criminalization: The Political Morality of the Criminal Law*, ed. R. A. Duff et al., Criminalization Series 4 (New York, NY: Oxford University, 2014), 118–19.

and transparent rules. Consider the example of statutory rape and the legal age of consent:⁵⁰¹

5. If the wrongness constraint is correct, then criminalizing morally permissible conduct is never justified.
6. Stipulating a legal age of consent which it is a criminal offense to have sexual relations with people below is justified.
7. When sexual relations with people below the age of consent are wrongful, they are wrongful because they are not mature enough to provide morally valid consent.
8. For any reasonable legal age of consent there will be some below the legal age of consent who are mature enough to provide morally valid consent.
9. Hence, the wrongness constraint is not correct.

Call this the problem of *hybrid offenses*.⁵⁰² A similar story could be told about speed limits. Were the legal age of consent put at age 2, then obviously no one below the legal age of consent would be mature enough for their consent to be morally valid. However, such a statute would be almost wholly ineffective in terms of preventing the sexual exploitation of people who were not mature enough to give morally valid consent.⁵⁰³ This would be true of any legal age of consent which did not proscribe sex with *some* who were mature enough to give morally valid consent. Any reasonable legal age of consent will therefore result in a criminal prohibition of some sexual relations where both partners were mature enough to provide morally valid consent. The different solutions offered to those problems have given rise to two different versions of *the wrongness constraint*:⁵⁰⁴

The strong wrongness constraint: The *pre-criminal* wrongfulness of conduct is necessary to justify its criminalization.

The weak wrongness constraint: The *pre-criminal* or *post-criminal* wrongfulness of conduct is necessary to justify its criminalization.

Both Moore⁵⁰⁵ and Duff⁵⁰⁶ argue that the justifiability of such criminal laws is compatible with holding that only conduct which is wrongful independently of its criminalization can justifiably be criminalized. Others, like Simester

⁵⁰¹ I.e. without violating the principle of legality.

⁵⁰² So named by Husak, *Overcriminalization*, 106.

⁵⁰³ This is what *reasonable* means in (8).

⁵⁰⁴ Tadros, "Wrongness and Criminalization," 158.

⁵⁰⁵ Moore, *Placing Blame*, 72–3.

⁵⁰⁶ Duff, "Towards a Modest Legal Moralism;" Duff, *Answering for Crime*, 92.

and von Hirsch⁵⁰⁷ and Tadros,⁵⁰⁸ have argued that such cases reveal the need to relax the wrongness constraint so that it merely holds that only conduct which is either wrong independently of its criminalization or is made wrong by being criminalized can justifiably be criminalized.

Duff attempts to reconcile *the* strong wrongness constraint with the justifiability of coordination and hybrid offenses by pointing out that conduct can be pre-criminally wrongful without being pre-legally wrongful. Thus, the strong wrongness constraint is compatible with the creation of non-criminal legal regulation of morally permissible conduct being justified by the good of the community.⁵⁰⁹ Thus, creating non-criminal legal regulation to the effect that people should drive on the right side of the road and refrain from having sexual relations with those below the age of consent is unproblematic. In order to save the strong wrongness constraint, however, such legal regulation has to make the conduct prohibited by coordination offenses and hybrid offenses wrong. This is easily explained in the case of coordination offences. As soon as legal regulation has made it possible to coordinate our conduct such that it is generally agreed upon that we should drive on the right side of the road, anyone driving on the left side of the road is committing the wrong of reckless driving, risking harm to others.⁵¹⁰

Hybrid offenses are more difficult to handle. It is unclear why setting the legal age of consent at 16 makes it wrongful to have sexual relations with a mature 15-year-old. Here, Duff suggests that such conduct is wrongful because it is a display of *civic arrogance*; it is arrogant to trust one's competence to decide whether the wrong the law seeks to proscribe would materialize in *this* case so much that one breaks the law. For one thing, one is typically not willing to extend this trust to one's fellow citizens.⁵¹¹ Furthermore, Duff points out that following such rules is a matter of providing *assurance* that we do not commit the wrong the hybrid offense aims to proscribe to our fellow citizens who cannot be expected to know details such as whether any given 15-year-old is mature enough to provide morally valid consent.⁵¹² Regardless of whether the offender is right that the consent of this particular 15-year-old is valid, he has arrogantly refused to provide such assurance.

⁵⁰⁷ Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 25–9.

⁵⁰⁸ Tadros, "Wrongness and Criminalization;" Tadros, *The Ends of Harm*, 322–5. Note that Tadros' arguments are mostly aimed at discrediting *the strong wrongness constraint* and does not commit him to the *weak wrongness constraint*.

⁵⁰⁹ Duff, *Answering for Crime*, 89–93.

⁵¹⁰ Moore, *Placing Blame*, 73; Duff, *Answering for Crime*, 92.

⁵¹¹ Duff, *Answering for Crime*, 171.

⁵¹² *Ibid.*, 170.

Husak points to a number of problems with this solution.⁵¹³ First, it relies on a controversial empirical claim that “the legislature is in a better position than the defendant to decide, for example, if a woman of a given age is sufficiently mature to make a rational decision about sex.”⁵¹⁴ Second, true as it may be that one should err on the side of caution when it comes to the conduct forbidden by hybrid offenses, we are sometimes perfectly warranted in believing that this particular instance of the hybrid offense is not wrong. While this remark does not seem to address Duff’s point about assurance, it seems to me that Husak’s point that *arrogance* is not very seriously wrong—and not the kind of wrong we normally punish—is a far more hard-hitting objection to Duff. As he writes:

Because civic arrogance itself is not a crime, our defendant is punished *for* his hybrid offense, not for his civic arrogance. The punishment imposed for some such offenses—like that for statutory rape—are severe. But civic arrogance, if it should be punished at all, does not seem especially serious.⁵¹⁵

This seems to me to be a knock-down objection against the *civic arrogance* line of argument. Certainly Husak is right that if the state punished those who committed hybrid offenses like speeding, drunk driving, and statutory rape for *arrogance*, it would not be justified in punishing those offenses as severely as it does—if it would be justified in punishing them at all. Recall, moreover, the heavy importance Duff attaches to the communicative aspects of the criminal justice system, where the role of criminalization is to mark out pre-criminally wrong conduct as publicly wrongful,⁵¹⁶ the role of the trial is to call the defendant to answer for his conduct as a citizen to his fellow citizens,⁵¹⁷ and the role of punishment to condemn the conduct as a wrongful violation of the core values of the community.⁵¹⁸ Given that, as Tadros puts it, “[c]riminal justice, for Duff, is communicative through and through,”⁵¹⁹ it seems problematic for Duff that none of that which the state communicates about most hybrid offenses at any stage, be it criminalization, investigation, prosecution, or punishment, indicates that what puts such conduct at odds with the values which are part of the polity’s self-definition is that they are displays of *civic arrogance*.

⁵¹³ Husak, *Overcriminalization*, 109–12.

⁵¹⁴ *Ibid.*, 109.

⁵¹⁵ *Ibid.*, 112.

⁵¹⁶ Duff, *Answering for Crime*, 52.

⁵¹⁷ *Ibid.*, 53.

⁵¹⁸ *Ibid.*, 143.

⁵¹⁹ Tadros, *The Ends of Harm*, 88.

Furthermore, Tadros argues that there is some conduct, C, of which all of the following is true:⁵²⁰

- A. C is wrongful if, and only if, other people behave in a certain way.
- B. People will behave in that way if, and only if, C is criminalized.
- C. There are reasons to prefer that people behave in such a way that C is wrongful.
- D. These reasons can justify criminalizing C.

Tadros has the following type of cases in mind:

More spies: X is a member of a group of ten government spies who are undercover in different locations, and who cannot communicate with each other. The nine spies other than X participated in a secret brainwashing programme that prevents them from acting wrongly. X does not know this. All ten have a piece of information. There are 10,000 people whose lives are at risk in a way that is connected to this information. X knows that if all ten keep the information secret for a year, all 10,000 lives will be saved. If X reveals the information now, he can save 9,000 lives, but 1,000 people will be killed. If anyone other than X reveals the information, all 10,000 will be killed.⁵²¹

This is a prisoner's dilemma type case, with the following structure:

Table 8.1. The spy's dilemma

	At least one of the other spies reveals the information	None of the other spies reveals the information
X reveals the information	1,000 killed	1,000 killed
X withholds the information	10,000 killed	0 killed

As Tadros points out, whether X ought to reveal the information depends upon his perception of the likelihood that one of the ten other spies reveals it.⁵²² If making it a criminal offense to reveal the information is necessary

⁵²⁰ Tadros, "Wrongness and Criminalization;" Tadros, *The Ends of Harm*, 322–5; Victor Tadros, "The Wrong and the Free," in *Legal, Moral, and Metaphysical Truths*, ed. Kimberly Kessler Ferzan ([S.l.]: Oxford University Press, 2016), 90–4.

⁵²¹ Tadros, "The Wrong and the Free," 91–2.

⁵²² The expected value of revealing the information is -1000×1 , whereas the expected value of withholding the information is $-10,000 \times P$, where P is the chance that at least one of the other spies will reveal the information. Thus, supposing X ought to be risk-neutral, X ought to withhold the information if, and only if, he thinks that the likelihood that any of the other spies will talk to be 10% or less.

and sufficient to bring X's reasonable estimation of the likelihood that no one will talk above the critical threshold, then criminalization is justified by the moral weight of saving 1,000 lives—which is surely sufficient, all things considered, to justify criminalization. Given what X knows, however, it is surely wrong of him to reveal the information only if so doing is criminalized. This ought to lead us to reject the strong wrongness constraint. This is true even if no actual such cases exist. Claims about necessity and sufficiency are claims about *possibility*—not *actuality*. As it happens, I suspect that Tadros is right that the crime of tax evasion has this structure;⁵²³ we ought only to pay our taxes if a significant proportion of other people pay theirs, for unless this is true, the justifying ends of taxation will not be met regardless of our contribution, and we have reason to believe that this is only the case when tax evasion is criminalized.

It should be noted that some defenses of the weak wrongness constraint are in danger of trivializing it. Consider, for instance, Simester and von Hirsch's rejection of the strong wrongness constraint in favor of the weak because:

The wrongfulness of a rule-violation depends on the moral force of the rule. In the case of a *malum prohibitum* rule, the moral force comes from its instrumental value; which depends, in turn, on the purposes the rule serves and how well it serves them. It depends, that is, on whether the creation of the rule itself is justified. [...] Husak insists that punishment [of ϕ ing] is appropriate only if ϕ ing is wrongful. We agree. But it need not be wrongful *independently*. Whether ϕ ing is wrongful depends upon on whether it is, all things considered, wrong to ϕ ; and at the stage of punishment, the reasons not to ϕ are to be assessed *post-legally*, not pre-legally.⁵²⁴

They further note that otherwise permissible conduct becomes wrongful by being criminalized whenever the act of criminalization is justified, such that:

The primary issue is not whether punishment of ϕ ing is itself justified, but whether the state is justified in criminalizing ϕ ing. If the proscription is

Supposing X trusts all of the nine other spies equally, this is the case only if he considers the likelihood that any single one of the other spies will talk to be just under 1.2% (Formula: $1-(1-\text{Probability any single spy will talk})^{(\text{Number of spies})}$) = probability someone will talk, calculation: $1-(1-0.012)^9 = 0.103$ or 10.3% chance that someone will talk.

⁵²³ Tadros, *The Ends of Harm*, 324.

⁵²⁴ Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 27.

justified, we don't need supplementary grounds to show why ϕ ing is then wrongful.⁵²⁵

Like this dissertation, Simester and von Hirsch define the *wrongness constraint* as the claim that the wrongfulness of conduct is necessary to justify its criminalization.⁵²⁶ They claim in the above, however, that the justifiability of criminalizing conduct is sufficient to establish its wrongfulness! This renders the wrongness constraint wholly trivial. *Only criminal laws that are already unjustified for other reasons fail to target conduct which is wrongful* in the relevant sense, and it cannot be determined whether the conduct proscribed by a criminal law is wrongful before we have determined whether criminalizing the conduct is justified. The only way to avoid making the wrongness constraint trivial is to allow for the possibility that criminalizing some conduct, C, can be unjustified *for no other reason* than the fact that C is neither pre-criminally nor post-criminally wrongful, which requires that there exist some considerations capable of contributing to the justification of criminalizing C without contributing to explaining why C is made wrong by being criminalized; but this would appear to be what Simester and von Hirsch are denying the existence of.⁵²⁷ None of this means that Simester and von Hirsch could not be right in their claims. If they are, however, then the wrongness constraint has no independent role to play in normative theorizing about the criminal law; it is, at best, a useful tool with which to identify criminal laws that are unjustified for other reasons.

8.3. The context and contribution of “Hamburger-Hating Terrorists, the Duty View of Punishment, and the Wrongness Constraint”

This section contextualizes the article “Hamburger-Hating Terrorists, the Duty View of Punishment, and the Wrongness Constraint” and summarizes its contribution. The strong and the weak wrongness constraint are both false unless the following is true:

⁵²⁵ Ibid., 28.

⁵²⁶ Note that Simester and von Hirsch define the wrongness constraint (or “necessity dissertation,” as they dub it) in the exact same manner as does this dissertation (Ibid., 23).

⁵²⁷ Ibid., 28–9.

The wrongness-of-conduct constraint: The wrongfulness of breaking a criminal statute prohibiting some conduct is necessary to justify its criminalization.⁵²⁸

Precious few contemporary scholars deny that the wrongfulness of conduct *in some sense* is not necessary to justify its criminalization.⁵²⁹ Nevertheless, “Hamburger-Hating Terrorists, the Duty View of Punishment, and the Wrongness Constraint” argues that some of the key insights of Victor Tadros’ theory of punishment⁵³⁰ should lead us to reject the wrongness-of-conduct constraint.

8.3.1. Tadros’ duty view of punishment

According to Tadros, the justifying aim of punishment is to prevent future crimes by deterring potential future offenders.⁵³¹ One of the central features of punishment is that it involves the infliction of intentional harm on the punished. When offenders are punished in order to deter others, they are intentionally harmed as a means to an end. Thus, punishing those who engage in some conduct, C, is justified only if harming those who engage in C as a means to an end is justified.⁵³² However, what Tadros calls the *means principle* tells us that it is normally impermissible to intentionally harm others as a means to an end.⁵³³ Indeed, the *means principle* goes a long way toward explaining what is wrong about punishing the innocent.⁵³⁴

⁵²⁸ “The Wrongness Constraint,” p. 2.

⁵²⁹ Cf. Antje Bois-Pedain, “The Wrongfulness Constraint in Criminalisation,” *Criminal Law and Philosophy* 8, no. 1 (January 2014): 149–69, doi:10.1007/s11572-012-9186-5.

⁵³⁰ Tadros, *The Ends of Harm*.

⁵³¹ *Ibid.*, 113–14.

⁵³² *Ibid.*, 22.

⁵³³ *Ibid.*, 113ff.

⁵³⁴ Note, however, that it cannot go all the way for a very obvious reason: While punishing innocents as a means to an end is often intuitively appalling, punishing innocents as an end in itself is much worse. The means principle cannot tell us what is wrong with a bizarre reverse retributivism, where the innocence of the punished justified their punishments. But then again, we hardly need the means principle to tell us why such punishment is problematic. The retributivist view that bringing about the suffering of *wrongdoers* is an end in itself is controversial enough (*Ibid.*, 60–88); it is difficult to even imagine that someone would claim that bringing about the suffering of *innocents* is an end in itself unless that person had failed to fully grasp the meaning of “suffering” or “innocent.”

Crucially, Tadros argues that the constraints of the *means principle* are not absolute. Harming those who engage in C as a means to an end is justified when those who engage in C incur an enforceable duty to serve the end for which they are punished by undergoing the harm of punishment.⁵³⁵ As he writes:

Offenders incur duties as a result of their offending. These duties are plausibly enforceable. They may be harmed as a means to compel them to carry their duties out. Their primary duties are of two kinds—to recognize that they have done wrong in violating the rights of their victims and to protect their victims from future harms. Grounding punishment in the duty to protect others, that offenders incur as a result of their wrongdoing [...] justifies general deterrence.⁵³⁶

The main objection to the use of punishment for reasons of general deterrence is that this would involve harming offenders as a means to the good of others. [... However] Harming offenders as a means is justified as it involves enforcing the duties that offenders have to protect their victims and others from future harms.⁵³⁷

The upshot of this is that it is necessary *to justify punishing some conduct, C, that engaging in C (without justification or excuse) gives rise to an enforceable duty which can only be discharged by suffering the harm of punishment.*

8.3.2. Summary of the contribution of “Hamburger-Hating Terrorists, the Duty View of Punishment, and The Wrongness Constraint”

The question then becomes whether it is possible to incur such enforceable duties that can only be discharged by suffering the harm of punishment by engaging in conduct which is neither wrongful nor made wrongful by being criminalized. “Hamburger-Hating Terrorists, the Duty View of Punishment, and the Wrongness Constraint” argues this to be the case. It does so by asking the reader to consider the following example, *Terrorists*:

Terrorists plant a series of small bombs all over a major city, and now threaten to detonate them unless those who eat hamburgers are sentenced to 14 days in prison. It is impossible to stop the terrorists. The government has had time to evacuate the population, so detonating the bombs will not kill anyone.

⁵³⁵ Ibid., 127ff.

⁵³⁶ Ibid., 3–4.

⁵³⁷ Ibid., 292.

However, every building in the city will be severely damaged. Suppose that Ronald consumes a hamburger even though he knows all these facts.⁵³⁸

“Hamburger-Hating Terrorists, the Duty View of Punishment, and the Wrongness Constraint” argues that it is not wrong of Ronald to consume a hamburger in *Terrorists* nor is it made morally wrong by being criminalized. Yet by consuming the hamburger, Ronald incurs an enforceable duty that can only be discharged by undergoing the harm of punishment by spending 14 days in prison⁵³⁹ in order to prevent the bombs from going off.⁵⁴⁰ The fact that those who consume hamburgers in *Terrorists* incur such a duty justifies the criminalization of consuming hamburgers. This shows how the duty view of punishment cannot support the wrongness-of-conduct constraint. The article also argues that this should lead us to reject the wrongness-of-conduct constraint on account of being underinclusive, since it is deeply implausible that criminalizing the consumption of hamburgers is not justified in *Terrorists*. Although it is legitimate enough, the interest people have in being free to consume hamburgers is trivial compared to the harm that would be brought about by the detonation of the bombs.

However, the duty view of punishment does not imply that any sort of wrongness constraint ought to be rejected. Rather, it has the following implication:

The wrongness-of-evading-punishment constraint: The wrongfulness of attempting to evade punishment for breaking a criminal statute prohibiting some conduct is necessary to justify its criminalization.⁵⁴¹

This is so since it is wrong not to discharge one’s enforceable duties. It is therefore always wrong to attempt to avoid punishment for breaking a criminal statute which prohibits conduct which makes those who engage in it incur an enforceable duty which can only be discharged by suffering the harm of punishment.

⁵³⁸ Quoted from “The Wrongness Constraint,” p. 11.

⁵³⁹ The objection that this does not qualify as punishment is discussed and dismissed in the article itself.

⁵⁴⁰ Or perhaps one should rather say that the consumption of a hamburger has consequences for what Ronald is required to do by virtue of his pre-existing enforceable duties such that they now obligate him to undergo the harm of punishment by spending 14 days in prison in order to prevent the bombs from going off. The argument of “Hamburger-Hating Terrorists, the Duty View of Punishment, and the Wrongness Constraint” is not sensitive to which description is adopted.

⁵⁴¹ “The Wrongness Constraint,” p. 3.

The article goes on to argue that a slight revision of *Terrorists* (creatively dubbed *Revised Terrorists* in the article) reveals that the wrongness-of-evading-punishment constraint should also be rejected on account of being underinclusive:

The terrorists now demand both that those who eat hamburgers are sentenced to 14 days in prison, and that those who eat hamburgers genuinely attempt to evade punishment. Otherwise the case is the same as *Terrorists*.⁵⁴²

Whereas attempting to evade punishment in *Terrorists* was wrong because it would cause the bombs to be detonated, attempting to evade punishment is required in order to prevent the bombs from being detonated in *Revised Terrorists*. Consequently, those who consume hamburgers do nothing wrong by attempting to avoid punishment in *Revised Terrorists*. Yet nothing relevant to the justifiability of criminalizing the consumption of hamburgers has changed. Unlike *Terrorists*, however, consuming hamburgers is morally wrong in *Revised Terrorists*. This is so because the bombs will be detonated unless those who consume hamburgers genuinely attempt to avoid punishment as well if they escape punishment in *Revised Terrorists*. Thus, those who consume hamburgers in *Revised Terrorists* have no control over whether their consumption of a hamburger will cause the bombs to be detonated. This makes consuming a hamburger in *Revised Terrorists* wrongful because it risks causing harm. This suggests that it may be viable to affirm:

The *Mixed Wrongness Constraint*: The wrongfulness of breaking a criminal statute prohibiting some conduct and the wrongfulness of attempting to evade punishment for breaking a criminal statute prohibiting that conduct are *jointly* necessary to justify criminalizing it.⁵⁴³

The article ends by offering some tentative considerations in favor of the mixed wrongness constraint. “Hamburger-Hating Terrorists, the Duty View of Punishment, and the Wrongness Constraint” thus contributes to the literature in at least two ways. First, it formulates *Terrorists*, using it to argue that the (hitherto all but undisputed) *wrongness-of-conduct constraint* ought to be rejected. Second, it suggests a distinct alternative version of the wrongness constraint.

⁵⁴² “The Wrongness Constraint,” p. 29.

⁵⁴³ From “The Wrongness Constraint,” p. 31.

8.3.3. The structure of Terrorists and a little bit of submission history

It is worth dwelling a little on the structure of *Terrorists* in order to discern the general conditions under which engaging in permissible conduct gives rise to an enforceable duty which can only be discharged by suffering the harm of punishment. The consumption of a hamburger in *Terrorists* illustrates that there is some conduct, C, of which the following is true:

- I. If a person, P,⁵⁴⁴ engages in C,⁵⁴⁵ and D⁵⁴⁶ does not subsequently occur, then the bad, B,⁵⁴⁷ will occur.
- II. If P engages in C and D does subsequently occur, then B will not occur.
- III. If P does not engage in C, then B (nor any other comparably serious bad) will not occur.
- IV. P has a legitimate interest in being free to engage in C, but it is trivial compared to the interest in avoiding B.

“Hamburger-Hating Terrorists, the Duty View of Punishment, and the Wrongness Constraint” then argues that this should lead us to conclude the following about the permissibility of C:

- V. If P can bring about D, then P is morally permitted to engage in C, but in so doing he incurs an enforceable duty to ensure that D occurs in order to avoid B from occurring.
- VI. If P cannot bring about D, then P does not incur an enforceable duty to ensure that D occurs by engaging in C,⁵⁴⁸ but it is wrongful of P to engage in C on account of recklessly risking that B occurs.

Whereas (I)–(IV) are true of both, the difference between *Terrorists* and *Revised Terrorists* is that (V) is true of the former, whereas (VI) is true of the latter. Note that everyday conduct like *driving* has this structure as well. If a person drives, then driving safely is required in order not to unacceptably risk harming others. If a person does not drive, then driving safely is not required to avoid unacceptably risk harming others.⁵⁴⁹ The interest in getting from one place to another in a reasonable time is legitimate but trivial compared to the interest in not being harmed as severely as often happens in

⁵⁴⁴ Ronald.

⁵⁴⁵ Consumes hamburgers.

⁵⁴⁶ 14 days in prison.

⁵⁴⁷ Detonation of the bombs.

⁵⁴⁸ This is so, since *ought implies can*.

⁵⁴⁹ Or perhaps we should say that the question of *how* to drive is only relevant *if* driving takes place.

traffic accidents. If the person can control whether she drives safely then driving is permissible, but it makes her incur an enforceable duty to drive safely in order to reduce the risk of harming others. If a person cannot control whether she drives safely (e.g. if she is drunk), then driving is wrongful because it recklessly risks harming others.

The setup in *Terrorists* is unusual (but not outlandish) in that the equivalent of “driving safely” is “spending 14 days in prison,” meaning that whereas the enforceable duty to drive safely only justifies the criminalization of unsafe driving (drunk driving, speeding, etc.), the enforceable duty to spend 14 days in prison requires criminalizing the consumption of hamburgers itself. A closer equivalent to the consumption of hamburgers in *Terrorists* might be using torture in order to avoid a major catastrophe. Torture *can* be morally permissible in a (no doubt purely hypothetical) case in which it is sufficiently certain that torturing a suspect will prevent a sufficiently serious disaster,⁵⁵⁰ but one might very well think that even so, those responsible incur an enforceable duty to deter others from torturing, which they can only discharge by suffering the harm of punishment.⁵⁵¹

In his contribution to the anthology celebrating the work of Michael S. Moore, Tadros asks the reader to consider the following:

[S]uppose that the US thinks that a Middle Eastern country is not taking seriously enough the War on Terror, and demands that various terrorism offences are created which prohibit conduct that is not wrong. The Middle Eastern country faces the threat of invasion if it does not comply. Everyone in the country, including those who will be subject to the prohibitions, will be worse off if this happens. That country ought to create these offences, even if what is criminalized is not wrong either prior to, or in virtue of it being criminalized.⁵⁵²

This is the same kind of case as *Terrorists*, and Tadros uses it for the same purpose. Lest the reader should conclude that “Hamburger-Hating Terror-

⁵⁵⁰ Just for the record: It is overwhelmingly likely that the hypothetical circumstances under which torture could be permissible never have and never will occur in the real world. One important reason this is so is that constructing a hypothetical case in which torture is permissible invariably involves stipulating that we are completely certain about how engaging in torture will prevent harm of a catastrophic magnitude and often also that the person being tortured would be responsible for this harm. Such complete certainty does not exist in real life; in real life, torture is always a grotesquely wrongful act of pure barbarism.

⁵⁵¹ Note how Moore struggles with this exact kind of case in Moore, *Placing Blame*, chap. 17.

⁵⁵² Tadros, “The Wrong and the Free,” 90.

ists, the Duty View of Punishment, and the Wrongness Constraint” makes no original contribution, it is therefore necessary to inform the reader that whereas the anthology containing the case above was published in the spring of 2016, the version of the “Hamburger-Hating Terrorists, the Duty View of Punishment, and the Wrongness Constraint” included in this dissertation was completed in early December 2015,⁵⁵³ at which point it was submitted (a decision first reached by the journal shortly before the dissertation was due).

8.4. Concluding remarks about the wrongness constraint

This chapter has introduced and discussed the relation between the justification of punishment and the wrongness constraint, the arguments in favor of the wrongness constraint, and the debate between the strong and the weak wrongness constraints. In light of the argument of “Hamburger-Hating Terrorists, The Duty View of Punishment, and the Wrongness Constraint,” this dissertation argues that the following constraint on criminalization should be affirmed:

The *Mixed Wrongness Constraint*: The wrongfulness of breaking a criminal statute prohibiting some conduct and the wrongfulness of attempting to evade punishment for breaking a criminal statute prohibiting that conduct are *jointly* necessary to justify criminalizing it.⁵⁵⁴

The Mixed Wrongness Constraint might be thought of as being equivalent to the wrongness constraint as defined in this dissertation, as it is wrongful to attempt to avoid punishment for breaking a criminal statute only if the conduct prohibited by that statute is morally wrong. But this is false. As *Terrorists* shows, it is sometimes wrong to attempt to avoid punishment for breaking a criminal statute prohibiting permissible conduct because, although permissible, engaging in this conduct makes one incur an enforceable duty that can only be discharged by undergoing punishment, and it is wrong to fail to discharge one’s enforceable duties. Thus, the wrongness constraint as defined in the beginning of this chapter should be rejected, even though

⁵⁵³ Just to be crystal clear: There is no hint of an accusation of plagiarism here.

Tadros could not possibly have known of *Terrorists* at the time he wrote his paper, and given that *Terrorists* is designed specifically to showcase some of the implications of Tadros’ view of the justification of punishment, it is hardly surprising that Tadros should end up drawing those implications himself.

⁵⁵⁴ From “The Wrongness Constraint,” p. 31.

some connection between wrongness and the justification of criminalization remains.

The Mixed Wrongness Constraint permits the criminalization of permissible conduct, which makes those who engage in it incur an enforceable duty which can only be discharged by suffering the harm of state punishment. Suppose that, inspired by the questions asked by Husak quoted in the beginning of this chapter, some of the punished object: *How can my punishment be justified even though I have done nothing morally wrong?* The state would be able to answer such a person by saying that even though what you did was not morally wrong, we are justified in punishing you because you incurred an enforceable duty which can only be discharged by undergoing state punishment by doing it. In punishing you, we are thus either merely assisting you in discharging your enforceable duty or coercively enforcing it, depending on whether or not you willingly accept being punished. Either way, we are justified in doing so. As soon as it becomes clear how one can incur an enforceable duty which can only be discharged by undergoing state punishment, I do not think there is anything particularly peculiar about such a reply.⁵⁵⁵

This chapter has admittedly presented several arguments in favor of the wrongness constraint (i.e. the *wrongness-of-conduct constraint*) to which no reply has yet been given. Remember, however, that no argument in favor of the *wrongness-of-conduct constraint* can make it escape the implication that criminalizing the consumption of hamburgers in *Terrorists* is impermissible,⁵⁵⁶ even though the freedom to consume hamburgers is only of trivial importance, criminalizing the consumption of hamburgers serves an important purpose, people can avoid becoming liable to punishment simply by refraining from consuming hamburgers, and they incur an enforceable duty which can only be discharged by undergoing state punishment by consuming hamburgers. Nor is the challenge *Terrorists* poses to the *wrongness-of-conduct constraint* simply a weak, free-floating charge of having a single counterintuitive implication; rather, it points out the significance of the duties of the punished in justifying punishment and illustrates how, in certain situations, enforceable duties of the kind relevant to justifying state punishment can be incurred by engaging in permissible conduct.

⁵⁵⁵ Cf. Husak, *Overcriminalization*, 83.

⁵⁵⁶ Provided I am right that the consumption of hamburgers is neither pre-criminally nor post-criminally wrongful in *Terrorists*, a claim which “Hamburger-Hating Terrorists, The Duty View of Punishment, and the Wrongness Constraint” defends at length.

Chapter 9: Conclusions

This dissertation investigates the relation between the wrongfulness of conduct and the justifiability of its criminalization. This has been carried out by investigating the plausibility of two claims regarding the relation between the wrongfulness of conduct and the justifiability of its criminalization:

Legal moralism: The wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization.

The wrongness constraint: The wrongfulness of conduct is necessary to justify its criminalization.

Through the five articles which form the backbone of this dissertation and the “summary”⁵⁵⁷ of which this is the last chapter, this dissertation argues that both legal moralism and the wrongness constraint should be rejected.

The dissertation argues that legal moralism should be rejected entirely by, first, arguing that legal moralism implies that the wrongfulness of infidelity is sufficient, all things considered, to justify its criminalization. Infidelity is morally wrong and Moore’s legal moralism is unable to explain why the *pro tanto* sufficient justification of criminalizing infidelity by virtue of its wrongfulness fails to be sufficient, all things considered.⁵⁵⁸ Second, it argues that the following constraint on normative theories of the criminal law should be accepted:

The correspondence requirement: A fact, F, *pro tanto* justifies criminalizing some conduct, C, *only if* F makes criminalizing C serve an aim which the existence of a coercive state is *pro tanto* justified by serving.

It further argues that if the correspondence requirement is accepted, then legal moralism should be rejected, as there is no plausible normative theory of the state⁵⁵⁹ according to which the wrongfulness of conduct makes the crimi-

⁵⁵⁷ Since the “summary” ended up being roughly equivalent in the extent to that of the five papers combined, this designation admittedly seems slightly ridiculous. However, the term serves as an important reminder of how the arguments found in chapters 1–9 *will* be sufficient to warrant the conclusions drawn by this dissertation only if considered in conjunction with the papers.

⁵⁵⁸ Chapter 6 and Thaysen, “Infidelity and the Possibility of a Liberal Legal Moralism.”

⁵⁵⁹ I.e. an account that aims at the existence of a coercive state is *pro tanto* justified by serving.

nalization of that conduct serve an aim which the existence of a coercive state is *pro tanto* justified by serving.⁵⁶⁰ At minimum, the claim that the wrongfulness of conduct is *alone pro tanto* sufficient to justify its criminalization must be abandoned in favor of the claim “the wrongfulness of conduct *and* some other fact⁵⁶¹ are *jointly* *pro tanto* sufficient to justify its criminalization.”⁵⁶² That which this other fact depends upon is which normative theory of the state is correct; something which this dissertation is neutral about except that no plausible contender for such a theory is such that the wrongfulness of conduct makes the criminalization of that conduct serve an aim which the existence of a coercive state is *pro tanto* justified by serving.

The dissertation further argues that, in the form stated above, the wrongness constraint should also be rejected. Criminalizing conduct can be justified when engaging in said conduct makes one incur an enforceable duty that can only be discharged by undergoing the imposition of stigmatizing harm by the state characteristic of state punishment. State punishment of such conduct is justified because it merely amounts to enforcing the enforceable duties of those who engage in this conduct, and criminalizing such conduct is justified because it is merely a systematic scheme of the enforcement of those duties. While such enforceable duties will usually be incurred by engaging in wrongful conduct,⁵⁶³ it is possible to incur them by engaging in permissible conduct.⁵⁶⁴ The wrongfulness of conduct is therefore not necessary to justify its criminalization, and the original wrongness constraint must thus be rejected.⁵⁶⁵ Unlike legal moralism, the dissertation does not argue that it must be entirely rejected. If one incurs an enforceable duty to undergo state punishment as a result of engaging in some conduct, then it is morally wrong to engage in that conduct *and* attempt to avoid punishment. Thus, we can adopt a weaker version of the wrongness constraint according to which:

The wrongfulness of breaking a criminal statute prohibiting some conduct, C, and the wrongfulness of attempting to evade punishment for

⁵⁶⁰ Chapter 7 and the working paper “Law Letters.”

⁵⁶¹ E.g. “private punishment of this wrong is dangerous to virtue.”

⁵⁶² For instance, Moore’s explanation of why the task of punishing wrongdoers should be carried out by the state.

⁵⁶³ Cf. Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law*, first paperback edition, Oxford Legal Philosophy (Oxford United Kingdom: Oxford University Press, 2013).

⁵⁶⁴ As illustrated in the *Terrorists* case.

⁵⁶⁵ Chapter 8 and the working paper “Hamburger-Hating Terrorist, The Duty View of Punishment, and the Wrongness Constraint.”

breaking a criminal statute prohibiting C are *jointly* necessary to justify criminalizing C.

Since legal moralism was rejected entirely, the result of the investigation into the relation between the wrongfulness of conduct and the justifiability of its criminalization is thus to conclude that this is the only way that the wrongfulness of conduct relates to the justification of its criminalization. That is, the overarching answer to the question asked in this dissertation is that the wrongfulness of conduct relates to the justifiability of its criminalization as follows:

It is necessary to justify criminalizing some conduct, C, that it is either wrong to break a criminal statute prohibiting C or wrong to attempt to avoid punishment for breaking a criminal statute prohibiting C. There is no other relation between the wrongfulness of conduct and the justifiability of its criminalization.

The most significant contributions made by this dissertation as a whole are the negative one of making a novel and—it seems to me—strong case for rejecting legal moralism and the positive one of contributing to the development of political normative theories of the criminal law by developing the correspondence requirement.⁵⁶⁶

We might want to ask whether the practical implications of these conclusions are interesting. Though “Law Letters” argued that legal moralism should be rejected because the wrongfulness of conduct *alone* was not *pro tanto* sufficient to justify its criminalization, it did not argue that the wrongfulness of conduct and some other fact *which, though analytically distinct from wrongfulness, always applies to wrongful conduct* were not jointly *pro tanto* sufficient to justify the criminalization of that conduct. If the “other fact” turns out to be true of all wrongful conduct, then what does it matter that legal moralism should be rejected?⁵⁶⁷ That is to say, if no wrongful conduct actually exists in this world which the state lacks a *pro tanto* sufficient

⁵⁶⁶ The contribution made by the individual papers to the investigation of how the wrongfulness of conduct relates to the justifiability of its criminalization as well as to the literature in general has already been specified in the relevant chapters. The arguments given for rejecting legal moralism and heavily revising the wrongness constraint have already been summarized toward the end of chapters 7 and 8, respectively. Neither shall be repeated here.

⁵⁶⁷ E.g., if the private punishment of any wrongful conduct is dangerous to virtue, then what does it matter that Moore’s arguments only show that the wrongfulness of conduct *and* the fact that the private punishment of this conduct is dangerous to virtue are jointly *pro tanto* sufficient to justify its criminalization?

justification of criminalizing, then what does it matter that the existence of such wrongful conduct is *possible*?

It matters because even then the rejection of legal moralism would still have consequences for how we should argue about the criminalization of wrongful conduct.⁵⁶⁸ It shows that decisions to criminalize some conduct cannot be justified *solely* by reference to the wrongfulness of that conduct. It is always necessary to demonstrate that some relevant “other fact” applies in order to argue that criminalizing any particular wrong is *pro tanto* justified. This can never be achieved merely by demonstrating that the conduct is wrongful, for even if the relevant “other fact” applies to all wrongful conduct, it does not apply to that conduct simply by virtue of its wrongfulness. Moreover, we can never be certain that there is no wrongful conduct to which the relevant “other fact” does not apply *precisely* because the relevant “other fact” does not apply to wrongful conduct by virtue of its wrongfulness. Even if we have never yet encountered *any* wrong to which the relevant “other fact” did not apply, the fact that it does not apply by virtue of the wrongfulness of wrongful conduct means that demonstrating the criminalization of any given wrong to be *pro tanto* justified still requires a separate argument⁵⁶⁹ showing that the relevant “other fact” applies.

It should also be remembered that if the conclusions of this dissertation are correct then it will be quite difficult to show that is not wrongful conduct which we lack a *pro tanto* sufficient justification of criminalizing. In order to show this, one must defend a normative theory of the state which is such that the existence of a coercive state is *pro tanto* justified by serving an aim which the wrongfulness of conduct and some “other fact,” which though analytically distinct from wrongfulness always applies to wrongful conduct, makes the criminalization of that conduct serve. This will be a difficult task indeed; not only because any normative theory of the state in which this could conceivably be the case would be quite controversial but also because it would be rather surprising if any great number of facts applied to all wrongful conduct yet were analytically distinct from wrongfulness. I doubt that any such normative theory of the state is defensible. Arguing this is a task for another day. For now, I am content to have argued that the wrongfulness of conduct alone is not *pro tanto* sufficient to justify its criminalization.

⁵⁶⁸ Cf. Victor Tadros, “Wrongness and Criminalization,” in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (New York, NY: Routledge, 2012), 171–2.

⁵⁶⁹ That is, separate from the demonstration of the wrongfulness of the conduct.

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Denne afhandling undersøger forholdet mellem handlingers moralske forkerthed og muligheden for at retfærdiggøre deres kriminalisering. Dette gøres ved at vurdere plausibiliteten af to påstande om dette forhold: *Legal moralisme*, ifølge hvilken det er *pro tanto* tilstrækkeligt til at kunne retfærdiggøre kriminaliseringen af en handling, at denne handling er moralsk forkert, og *forkerthedskravet*, ifølge hvilket det er nødvendigt for at kunne retfærdiggøre kriminaliseringen af en handling, at denne handling er moralsk forkert. Dermed er legal moralisme groft sagt synspunktet, at det at en bestemt handling er moralsk forkert altid er i stand til at bidrage til retfærdiggørelsen af at kriminalisere denne handling, hvorimod forkerthedskravet er påstanden om at kriminaliseringen af handlinger, der ikke er moralsk forkerte aldrig er retfærdiggjort. Afhandlingen argumenterer for, at forholdet mellem handlingers moralske forkerthed og muligheden for at retfærdiggøre deres kriminalisering er som følger: *Det er nødvendigt for at kunne retfærdiggøre kriminaliseringen af en handling, at det enten ville være moralsk forkert at bryde en lov, der forbød denne handling eller ville være moralsk forkert at forsøge på at undgå straf for at bryde en lov, der forbød denne handling.* Dermed argumenterer afhandlingen for, at vi bør afvise legal moralisme fuldstændigt. Den argumenterer også for at den udgave af forkerthedskravet der blev formuleret ovenfor bør afvises til fordel for en svagere udgave, ifølge hvilken det at en handling ville være moralsk forkert (efter at være blevet kriminaliseret) blot er en af to ting, som tilsammen er nødvendige for at kunne retfærdiggøre kriminaliseringen af denne handling.

Afhandlingens argument mod legal moralisme har to elementer. For det første vises det, at legal moralisme har den problematiske implikation, at vi bør kriminalisere utroskab. Legal moralisme har denne implikation selv hvis synspunktet bliver kombineret med en minimalistisk opfattelse af, hvad der er moralsk forkert, og der bliver taget højde for værdien af frihed. For det andet argumenterer afhandlingen for, at vi bør afvise legal moralisme ved at udvikle og forsvare et princip afhandlingen navngiver *korrespondenskravet*. Ifølge korrespondenskravet er et givet faktum, F, kun *pro tanto* tilstrækkeligt til at retfærdiggøre kriminalisering af en bestemt handling, C, hvis det følger af F, at kriminaliseringen af C tjener et formål, som eksistensen af en tvangsudøvende statsmagt bliver *pro tanto* retfærdiggjort af at tjene. Udviklingen af korrespondenskravet er motiveret af det faktum, at straffelovens institutioner er statslige institutioner som udøver en betragtelig grad af tvang. Korrespondenskravets centrale påstand er, at enhver begrundelse for at kriminalisere bestemte handlinger bør blive mødt med spørgsmålet: Hvis der ikke

eksisterede nogen stat, ville denne type begrundelse da være en god grund til at skabe en? Er svaret på dette spørgsmål ”nej”, så er det ikke en god begrundelse for kriminalisering heller. Det bliver vist, at der ikke er noget plausibelt bud på hvilke(t) formål eksistensen af en statslig tvangsmagt er *pro tanto* retfærdiggjort af at tjene, som er således, at det at det følger af at en handling er moralsk forkert, at dens kriminalisering tjener et formål som eksistensen af en statslig tvangsmagt er *pro tanto* retfærdiggjort af at tjene. Derfor bør vi afvise legal moralisme, såfremt vi accepterer korrespondenskravet.

Følgende påstande er centrale for afhandlingens argument for, at forkerthedskravet bør revideres. Hvis forkerthedskravet er korrekt, så er det fordi, at det er nødvendigt for at retfærdiggøre statslig afstraffelse af dem, der foretager en bestemt handling, at denne handling er moralsk forkert. Statslig afstraffelse af dem der foretager en bestemt handling, kan retfærdiggøres såfremt dem, der foretager denne handling, derved pådrager sig en forpligtigelse, som kun kan opfyldes ved at underlægge sig statslig afstraffelse. Det er muligt at pådrage sig en sådan forpligtigelse ved at udføre en handling, der ikke er moralsk forkert. Dette bør få os til at forkaste påstanden om, at det er nødvendigt for at kunne retfærdiggøre kriminaliseringen af en handling, at denne handling er moralsk forkert. Siden det er moralsk forkert ikke at opfylde sine forpligtigelser, bør vi dog forkaste den til fordel for en anden version af forkerthedskravet, ifølge hvilket det er nødvendigt for at kunne retfærdiggøre kriminaliseringen af en bestemt handling, at det *enten* er moralsk forkert at foretage denne handling (i hvert fald efter at den er blevet kriminaliseret) eller moralsk forkert at forsøge at undgå straf for at have foretaget denne handling. Som led i den generelle undersøgelse af plausibiliteten af legal moralisme og forkerthedskravet udforsker afhandlingen også følgende spørgsmål. Hvordan vi bør forstå legal moralisme? Hvilket forhold der er mellem legal moralisme og skadsprincippet? Har vi grund til at frygte at kriminaliseringen af moralske forkerte handlinger vil få folk til at afstå fra disse handlinger udelukkende af frygt for at blive straffet, i stedet for fordi de er moralsk forkerte? Afhandlingens konklusioner indikerer generelt, at hvorvidt en bestemt handling er moralsk forkert er af mindre relevans for retfærdiggørelsen af at kriminalisere denne handling end det ofte er blevet påstået.

English Summary

This dissertation investigates how the wrongfulness of conduct relates to the justifiability of its criminalization. It does so by assessing the plausibility of two claims about this relation: *Legal moralism*, according to which the wrongfulness of conduct is *pro tanto* sufficient to justify its criminalization, and *the wrongness constraint* according to which the wrongfulness of conduct is necessary to justify its criminalization. In other words, legal moralism is the claim that the wrongfulness of conduct always contributes to the justifiability of criminalizing that conduct, whereas the wrongness constraint is the claim that the criminalization of permissible conduct is never justified. The dissertation argues that the relation between the wrongfulness of conduct and the justifiability of its criminalization is as follows: *It is necessary to justify the criminalization of some conduct that it would either be wrongful to violate a criminal prohibition of that conduct or wrongful to attempt to avoid punishment for violating a criminal prohibition of some conduct.* The dissertation thus argues that legal moralism should be rejected entirely. It also argues that the version of the wrongness constraint stated above should be rejected in favor of a much weaker version according to which the wrongfulness of conduct, post criminalization, is one of two things which are jointly necessary to justify the criminalization of that conduct.

This dissertation makes its case against legal moralism in two steps. First, it argues that legal moralism has the problematic implication that infidelity ought to be criminalized, even when it is combined with a minimalistic account of what conduct is morally wrong and the value of freedom is taken properly into account. Second, the dissertation makes its case against legal moralism by developing and defending what it dubs *the correspondence requirement*. According to the correspondence requirement a fact, F, *pro tanto* justifies criminalizing some conduct, C, only if F makes criminalizing C serve an aim which the existence of a coercive state is *pro tanto* justified by serving. The development of the correspondence requirement is motivated by the fact that the institutions of the criminal law are state institutions which exercise profound coercion. The gist of the correspondence requirement is that whenever it is claimed that some consideration something is a good reason for criminalization, we should ask ourselves: If no coercive state existed would this consideration then be a good reason to create one? If the answer to this question is “no” then the consideration is not a good reason in support of criminalization either. It is argued that there is no plausible account of what aims the existence of a coercive state is *pro tanto* justified by serving which has the implication that the wrongfulness of conduct does not make

the criminalization of that conduct serve an aim which the existence of a coercive state is *pro tanto* justified by serving. Therefore, we should reject legal moralism if we accept the correspondence requirement.

The following claims are central to this dissertation's case for revising the wrongness constraint. If the wrongness constraint is correct then it is correct because the wrongfulness of conduct is necessary to justify state punishment of those who engage in that conduct. State punishment of those who engage in some conduct can be justified by the fact that those who engage in that conduct incur enforceable duty which can only be discharged by undergoing state punishment. It is possible to incur such an enforceable duty by engaging in permissible conduct. This should lead us to reject the view that the wrongfulness of conduct is necessary to justify its criminalization. Since failing to discharge an enforceable duty is wrong we should, however, reject it in favor of a version of the wrongness constraint according to which it is necessary to justify criminalizing some conduct that it must either be wrongful to engage in the conduct (at least after it has been criminalized) or wrongful to attempt to avoid punishment for engaging in that conduct after it has been criminalized. As part of the general investigation of the plausibility of legal moralism and the wrongness constraint the dissertation the following questions are also touched upon: How should the core claim of legal moralism be understood? How does legal moralism relate to the harm principle? Should we worry that the criminalization of wrongful conduct threatens to make people refrain from wrongdoing only out of fear of the law, rather than for more virtuous reasons? The conclusions of this dissertation generally indicate that considerations about wrongfulness are less important to the justification of criminalization than it is often assumed.