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ORIGINAL PAPER

The Costs to Criminal Theory of Supposing that Intentions are Irrelevant to Permissibility

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Abstract I attempt to describe the several costs that criminal theory would be forced to pay by adopting the view (currently fashionable among moral philosophers) that the intentions of the agent are irrelevant to determinations of whether his actions are permissible (or criminal).

Keywords Criminalization · Permissibility · Intentions · Justification and excuse · Proportionality

I

I begin with what I hope is a sensible working hypothesis: The substantive criminal law should track moral philosophy closely. This hypothesis has profound implications for criminal theory. The central objective of criminal theory, as I construe it, is to evaluate and improve the substantive criminal law from a normative perspective. Unless the penal law tracks moral philosophy closely, it is unclear what norms should be employed to evaluate and improve it. Norms that are central to any system, such as consistency, simplicity and efficiency, will take us only so far.[1] But if the criminal law should track moral philosophy closely, moral theory provides a wealth of resources to assess the positions taken by the criminal law about such matters as culpability, excuse, punishment, and the like. Most importantly for present purposes, supposing that the penal law should track moral philosophy closely allows philosophers to evaluate decisions about criminalization—decisions about *what* conduct should be subjected to punishment. The default position or presumption is that the acts proscribed by a system of criminal justice should be those that moral philosophy condemns as wrongful.

[1] Efficiency is perhaps the only alternative norm that might conceivably be used to assess and evaluate the criminal law. For a cursory defense of an economic analysis of criminal law, see Posner (1985).

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In other words, the criminal law should be governed by a *wrongfulness constraint*, and the content of this constraint should be derived *largely* from moral philosophy. The latter qualification is important; of course, the criminal law should proscribe only a subset of wrongful conduct. Wrongfulness is at most a necessary but not a sufficient condition for criminalization. Penal offenses will diverge from moral wrongs for a number of reasons, three of which are of special significance for the purposes that follow. First, because criminal prosecutions are brought by and on behalf of the state, only *public* wrongs should be criminalized. *Private* wrongs, however they are identified, are not eligible for penal liability.[2] Second, practical problems of evidence and proof with no clear analogue in moral thought should influence judgments about criminalization. We should be reluctant to enact laws that are difficult or counterproductive to enforce, even though they proscribe conduct that everyone agrees to be immoral.[3] Third, the criminal law should not prohibit minor or trivial wrongs. A given threshold of seriousness must be crossed before the case for punishment becomes persuasive.[4] The central point, however, is that the criminal law needs reasons to justify any deviations from morality. Even though such reasons can often be given, it seems sensible to begin the inquiry by supposing that the offenses that the criminal law should enact are those morality condemns as wrongful.

A theorist may respond that my hypothesis is obviously misguided. We all know that the penal law contains an enormous number of *mala prohibita* offenses—offenses that (roughly) proscribe conduct that is not wrongful prior to and independent of law. I submit, however, that these offenses are not counterexamples to my hypothesis. Any respectable effort to justify punishing persons who commit *mala prohibita* offenses must show why such behavior is wrongful after all.[5] Even *mala prohibita* offenses are said to be *mala*. Because a given instance of conduct is not wrongful prior to or independent of law hardly shows that it is not wrongful *simpliciter*. The fundamental challenge is to show *how* such behavior becomes wrongful, not to show why the criminal law should proscribe conduct that is *not* wrongful.

We must understand the nature and structure of moral wrongdoing before we can hope to implement my working hypothesis. Unfortunately, philosophers differ profoundly about several crucial matters.[6] For present purposes, their most important disagreement involves the role played by mental states generally, and by intentions in particular, in evaluating the permissibility or wrongfulness of actions. It is tempting to suppose that what matters is *what* agents do, not what is going on in their heads when they do it. Indeed, if one evaluates actions solely by reference to their consequences, it is hard to see why *any* mental states are involved in their assessments.[7] Significantly, however, a number of prominent moral philosophers who resist pure consequentialist accounts of wrongdoing hold that no mental

[2] See Duff (2007).

[3] See Bierschbach and Stein (2007).

[4] See Husak (forthcoming).

[5] See Husak (2005b, p. 65).

[6] For example, Antony Duff contends that responsibility in morality, unlike responsibility in criminal law, is (almost always) *strict*. This claim, if true, would suggest a major structural difference between morality and the criminal law. For a defense of this claim and an explication of the contrast between responsibility and morality on which the claim depends, see Duff Op.Cit. Note 2. For a sympathetic but critical assessment, see Husak (forthcoming).

[7] It is hard to see how all mental states *could* be irrelevant to the evaluation of actions, since actions must be voluntary to be appropriate objects of assessment, and voluntariness is often explicated in terms of the exercise of the *will*. Since I am interested only in the relevance of intentions to criminal liability, I leave such complications aside.

states of agents—not even beliefs—are relevant to the moral evaluation of their actions.[8] Some philosophers, however, defend a more modest (and more plausible) position; they hold that *intentions* are irrelevant to permissibility (a thesis I will call **IIP**),[9] even though other mental states such as beliefs may be relevant. Perhaps a majority of contemporary moral philosophers (who express opinions on the matter) now accept IIP.[10]

Unfortunately, the bulk of commentary on the more modest position I describe as IIP tends to focus on the so-called doctrine of double-effect (DDE).[11] I describe this focus as unfortunate because some moral philosophers are less inclined to argue that intentions are relevant (or irrelevant) to permissibility *simpliciter* than to argue that intentions are relevant (or irrelevant) to permissibility in the particular way alleged by DDE.[12] Exactly why these theorists are more interested in undermining something they characterize as DDE rather than in examining IIP directly is a mystery I cannot resolve. In any event, we cannot begin to assess their complex arguments unless we understand how DDE purports to make intentions relevant to permissibility. This latter task is difficult since DDE has many distinct formulations; no particular version is canonical. I construe DDE to state that sometimes it is morally worse to perform an action when the agent intends a harm than to perform that action when the agent foresees that same harm.[13] For example, it is one thing to ring a church bell knowing it will send a hypersensitive epileptic into convulsions; it is quite another to ring the bell for the purpose of exploiting his peculiar vulnerability.[14] Because my primary concern is not to defend this doctrine, however, I do not dwell on such examples or develop a more precise formulation of DDE here. I do not struggle, for example, to explicate the "sometimes" quantifier in the doctrine and specify exactly when it is plausible to think that intention makes a wrongful action worse than foresight.[15] Nor do I try to decide what intentions *are* and what is within or outside their scope.[16] An enormous scholarly literature has grown around these controversial topics, and I have little to contribute to them directly. If intentions are relevant to permissibility, I will not be concerned about whether they are relevant in the precise way required by a particular version of DDE.

[8] See Thomson (1992). Examples (such as *Day's End* at p. 229) are designed to show that even beliefs do not matter to permissibility.

[9] Both the name IIP as well as reasons to accept it can be found in Thomson (1991), especially p. 294.

[10] They may differ, however, in exactly *how* they formulate the version of IIP that they accept. A majority of contemporary moral philosophers accept IIP in denying that intentions are *intrinsically* relevant to permissibility; they are not among the factors that are inherently relevant to determinations of permissibility. Everyone concurs, however, that intentions may be relevant extrinsically. Suppose, for example, that a terrorist somehow rigs a bomb to explode if and only if he forms the intention to eat chocolate ice cream. His forming of this intention clearly would be impermissible.

[11] Perhaps debates about the relevance of intentions to permissibility should not focus on anything that should be called a *doctrine*. Instead, we might speak of "Double Effect Reasoning". See Cavenaugh (2007).

[12] Some theorists hold that intentions are relevant to permissibility after all, but only when they are of a certain type. For example, see Walen (2006).

[13] Several proposed refinements are suggested in Kamm (2007), especially pp. 21–23. Even in the criminal law, DDE has been the subject of at least one book. See Kugler (2002).

[14] *Rogers v. Elliot*, 15 N.E. 768 (1888).

[15] Some philosophers claim "there is nothing particularly controversial about the claim that it is worse to aim at harm as an end than to bring about a harm as a foreseen side effect of promoting a good end." See MacIntyre (2001).

[16] Thus I do not try to resolve the "closeness" problem to decide what exactly persons intend rather than merely foresee. For a discussion, see Bennett (1995, pp. 203–213).

In this paper my central objective is not to assess DDE but to reveal the steep price that the substantive criminal law almost certainly would be required to pay in order to accept IIP. As I will indicate, the criminal law currently treats intentions as relevant both to the determination of *whether* defendants have committed acts of criminal wrongdoing as well as to the identification of *what* criminal wrongs they have perpetrated. This latter identification—of *what* criminal wrongs defendants have committed—is crucial for purposes of assessing the *degree* of wrongfulness of a given act. Thus the criminal law rejects IIP, or, more precisely, the analogue of IIP in the criminal domain. If IIP is true, it follows that the criminal law as it presently exists deviates substantially from moral philosophy, and therefore, in this respect, fails to track it closely. Admittedly, the criminal law *could* be revised to incorporate IIP; the changes that would be needed would not generate logical incoherence. But the costs of accepting IIP throughout the substantive penal law would be enormous, would echo throughout all of criminal law theory, and should not be paid lightly. Once we recognize these costs, we might be better able to appreciate the full implications of accepting IIP in the moral domain as well.

II

Before turning to its implications for the substantive criminal law and our best theories about it, I propose to provide a very brief and admittedly cursory introduction to the debate about IIP itself.

In the first place, those philosophers who resist IIP have found it hard to say why they believe that intentions are relevant to whether an action is morally permissible. Thomas Scanlon contends "to my knowledge no one has come up with a satisfying theoretical explanation of why the fact of intention in the sense that is involved here—the difference between the consequences that are intended and those that are merely foreseen—should make a moral difference."[17] Some philosophers, influenced by the work of Michael Bratman, have tried to meet this challenge by alleging that persons have a special kind of commitment to plans they pursue intentionally.[18] But what is the normative significance of this view of intentions? Suppose we assess a particular instance of unlawful conduct in which a defendant acts intentionally and succeeds in attaining his criminal objective. Why is the fact that he had a special kind of commitment to his plan material to his culpability? Is the answer that he would have been willing to try again at a later time in a possible world in which he had failed? Why does this alleged fact affect the permissibility of his deed in the actual world?

Other philosophers who reject IIP appeal to a conception of agency.[19] Despite their disagreement about so many fundamental matters, Antony Duff and Michael Moore provide similar reasons to reject IIP in both the moral and criminal domains. Duff writes: "It is through the intentions with which I act that I engage in the world as an agent, and relate myself most closely to the actual and potential effects of my actions; and the central or fundamental kind of wrong-doing is to *direct* my actions towards evil—to *intend* and to *try* to do what is evil."[20] Moore's reasoning is strikingly parallel. He claims that intentions

[17] Scanlon (forthcoming, p. 6).

[18] See Bratman (1987).

[19] For example, see Nagel (1986), especially pp. 181–183.

[20] Duff (1990, p. 113).

often matter to judgments about permissible action because "aiming at evil on a given occasion makes one more culpable…. [T]his differential culpability between intent and foresight has to do with notions of authorship, or agency. We are the authors of evil when we aim to achieve it in a way we are not if we merely anticipate that evil coming about as a result of our actions."[21] But how persuasive are these appeals to the nature of agency in attempts to show why IIP should be rejected? Persons who intend an evil only as a means to some further objective do not seem to direct their actions toward that evil, or aim to achieve it, as clearly as those who intend that evil as an end. Yet few philosophers seem to regard the contrast between means and ends as morally significant.

Abstract appeals to the structure of intention and/or to the nature of agency, although suggestive, ultimately are inconclusive. Most moral philosophers take a very different approach. They propose to decide whether and under what conditions intentions are relevant to judgments about permissibility by employing the time-honored device of soliciting moral intuitions about a range of hypothetical cases. Standard pairs of examples are marshaled to show that intentions must be relevant to the assessment of action.[22] Although the complexity of these examples can be staggering, the most well-known pair is as follows.[23] In *Trolley,* respondents are asked whether it is permissible to divert a runaway trolley about to kill five workers onto a side track where it will kill only one. In *Transplant,* respondents must decide whether it is permissible to kill a healthy patient in order to harvest his organs and save five others who can survive only by receiving his kidneys, heart, etc. Both pairs of cases involve killing one to save five. But the vast majority of respondents concur that it is permissible to divert the trolley even though it is wrongful to kill the patient. The task is to identify a rationale to justify this difference in our moral judgments, and one promising solution begins by distinguishing intention from foresight. In *Trolley*, the death of the single worker is merely a foreseen side-affect of diverting the trolley, whereas in *Transplant* the death of the single patient is an intended means to the end of saving the greater number. If the intending-foreseeing distinction is irrelevant to permissibility, and if no other distinction can be found to replace it, respondents will be unable to defend the different moral judgments they make in *Trolley* and *Transplant*.

Equally familiar cases have been proposed to show that intentions are not relevant to judgments about permissibility. An instructive pair of cases is as follows. In *Benevolent Doctor*, a physician is about to administer a deadly dose of morphine in order to relieve the unbearable pain of a terminally ill patient who provides his informed consent. Although the morphine is known to hasten the patient's death, suppose we judge that the act of administration is morally permissible. Imagine, however, that the attending physician is replaced by *Malevolent Doctor,* who also knows that the morphine will lessen pain but administers it solely for the purpose of causing death. Although he foresees that the suffering of the patient will be relieved, he does not act for this reason. Few respondents change their minds about whether the action is permissible when the malevolent doctor replaces the benevolent doctor. If we have judged the act to be permissible, why should we care about the intentions of the agent who performs it? Such examples lead some

[21] Moore (1997, p. 409).

[22] For a recent attempt to provide cases in which intentions are intuitively relevant to permissibility, see Liao (forthcoming).

[23] In claiming that the pairs of cases I discuss are among the most well-known, I do not mean to indicate that they are the *best* examples that might be offered to persuade respondents of the supposed relevance or irrelevance of intentions to permissibility.

philosophers to conclude that intentions are irrelevant to determinations of whether actions are morally permissible.[24]

Appeals to these dueling intuitions have proved no more effective in resolving the debate about IIP than appeals to the structure of intention or the nature of agency. Almost certainly, respondents continue to provide different moral assessments in *Trolley* and *Transplant.* If the pair of cases in *Doctor* casts doubt on the view that intentions are relevant to whether the actions of these physicians are permissible, what exactly are these different moral assessments *about*? The most plausible (but not the only) answer, which I will presuppose in much of what follows (although it too has many distinct and complex variations) is that even though the intentions of agents are irrelevant for judgments in what might be called "first-order morality"—judgments about the actions that agents perform—such intentions are morally relevant for judgments in "second-order morality"—judgments about the agents who perform these actions.[25] Judy Thomson claims the supposition that intentions are relevant to permissibility depends on "a failure to take seriously enough… that the question whether it is morally permissible for a person to do a thing is just not the same as the question whether the person who does it is thereby shown to be a bad person."[26] Thus we should blame the physician in *Malevolent Doctor*, while not blaming his counterpart in *Benevolent Doctor*, even though both of their actions are permissible.

Although I will not pretend to conceal my skepticism about IIP, I certainly do not purport to raise any decisive objections to it here. I offer only one modest observation about the foregoing endeavor to explain what our different moral assessments are about in the pairs of cases I have described. As far as I can determine, we lack good theories to tell us *what* a factor that clearly is relevant to our moral assessments is relevant *to:* that is, whether it is relevant to our judgments about the actions that agents perform, or whether it is relevant to our judgments about the agents who perform these actions. We lack good theories of action as well as good theories of agency, so it is hardly surprising that we have enormous difficulty in trying to decide whether a given factor, such as intention, is material to one as opposed to the other.[27] Unless we are able to draw this distinction in a wide range of cases, we will be unable to determine whether the moral discriminations we make in the foregoing pairs of cases are discriminations about agents or about the actions they perform.

To illustrate the difficulty of categorization, consider an example in which the nature of the action performed depends on the attitude it expresses.[28] Suppose that Jason's attentive behavior has persuaded Linda that he is genuinely in love with her. Subsequently, she learns that her enemies have paid Jason to feign affection for her. Jason is a fantastic actor, and Linda had not suspected the awful truth. It goes without saying that this new information will produce a radical change in Linda's attitude about her relationship with Jason. Should she re-evaluate Jason's *actions* or Jason's *character*? In the absence of a good reason to believe otherwise, I would think that the most plausible answer is that she should

[24] Of course, far more would need to be said—and *has* been said by the many philosophers who have addressed these pairs of cases. In particular, no judgment about a single case could possibly prove that intention is never relevant to permissibility. In addition, we might be skeptical about the reliability of the intuitions on which these arguments rest. For an assessment informed by empirical findings, see the papers in Sinnott-Armstrong (2008)

[25] Although he attributes this contrast to Alan Donagan, the distinction between first and second order morality is developed most thoroughly by Bennett Op.Cit. Note 16.

[26] Thomson (1999).

[27] The commentary on agents and action is overwhelming. For a small sampling of the complexity of the issues, see Hyman and Steward (2004).

[28] Similar examples are provided in Raz (1990, pp. 181–182).

re-evaluate *both*. Linda should come to understand the nature of his actions quite differently in addition to changing her opinion of Jason himself. Jason is a scoundrel; he is not the person Linda believed him to be. Moreover, he ought not to have done what he did; he ought not to have performed the actions that conventionally are understood (and were designed to be interpreted) as expressions of genuine affection. If IIP is true, however, one might conclude that Jason's intentions are relevant only to the evaluation of his character but not to the evaluation of his actions.[29] My point in providing this sort of case is to indicate that philosophers who purport to defend IIP by invoking the contrast between first and second-order morality owe us, first, criteria to distinguish judgments about agents from those about their actions, and, second, a way to apply these criteria that shows that the new information will lead Linda to re-evaluate her judgments about the former but not about the latter. I am skeptical that this challenge can be met.

Some philosophers have admitted that cases such as that of Linda and Jason show that intentions matter to permissibility, but deny that they show that intentions matter to permissibility in an interesting way. Thomas Scanlon admits that there are cases in which "facts about an agent's intentions, or about the reasons he or she is moved by, are relevant to the permissibility of the agent's action." He goes on to contend, however, that they are "relevant only in a derivative way, as a consequence of a more basic moral requirement not to mislead others or to take advantage of their mistaken beliefs about one's intentions." Clearly, this rejoinder requires an account of when one moral requirement is more basic than another. In any event, it is not altogether clear why those who reject IIP must allege that intentions matter to permissibility *basically*, whatever exactly we take this qualification to mean. IIP should be rejected if intentions matter to permissibility, basically or otherwise.[30]

III

Intentions matter to the criminal law in countless ways I can barely mention. Intentions, I believe, are crucial for determining what the criminal law *is*. I will summarize my argument quickly. The criminal law, as I conceive it, is that body of law that subjects persons to state punishment. State punishment, as I construe it, involves both the imposition of hard treatment (or deprivation) and the infliction of stigma. Each of these two conditions must be brought about deliberately rather than accidentally. In other words, state sanctions do not amount to punishments because they *happen* to impose deprivations and stigmatize those on whom they are imposed. The very *purpose* of a punitive state sanction is to inflict a stigmatizing hardship on an offender. Admittedly, the state may have ulterior motives in resorting to punishment. A punitive response to criminal behavior may be the most effective way to deter future crimes and protect the rights of law-abiding citizens. But the existence of these ulterior motives does not undermine my claim that a sanction is not a punishment without a purpose to deprive and stigmatize. No other state institution or practice is comparable in this respect. After all, many state sanctions result in hardships and several others stigmatize. Some state practices, like involuntary confinement

[29] Notice that such examples (those in which the nature of the action performed depends on the attitude it expresses) are not unusual; they do not involve bizarre or unfamiliar scenarios that some philosophers are notorious for constructing. Nor do they involve a borderline case to which all distinctions are subject, where our judgments are tugged in different directions.

[30] See his "Permissibility and Intent II: The Significance of Intent," (forthcoming), p. 2.

of the dangerous mentally ill, probably do both simultaneously. But these sanctions differ from punishments because they lack a punitive intention. Although they *knowingly* cause deprivations and stigmatize, that is hardly their point or purpose. We would prefer a different response that neither stigmatized nor imposed a hardship on these unfortunate souls if a suitable alternative could be found. That is why we should be reluctant to say that dangerous mentally abnormal offenders are *punished*, even though the *effects* of their treatment may be indistinguishable from genuine punishments. What differs is the intention of those who impose the sanction. If this argument is sound, I conclude that punishment—and thus the criminal law itself—cannot be identified without reference to intentions.

Instead of belaboring the foregoing point, I will focus on the substantive criminal law itself. The most obvious point to notice about existing penal codes in the United States—both state and federal—is that they contain an enormous number of offenses that make intentions relevant to criminal wrongdoing.[31] Intentions are relevant both to *whether* a defendant commits an offense as well to *what* offense he commits. These offenses are an entrenched staple of criminal codes we can scarcely imagine doing without.

Existing law makes intention relevant to permissibility in several ways that might be useful to contrast, although I make no effort to canvass them all here. First, some offenses are crimes of *ulterior intent:* they proscribe conduct A when it is performed with the intention to engage in subsequent conduct B. Perhaps the most well-known example of a crime of ulterior intent is burglary, defined at common law as the act of breaking and entering the dwelling house of another at night with the intention to commit a felony therein. A second familiar example is kidnapping, committed by unlawfully removing another from a place for a variety of specified purposes, most notably to hold him for ransom or reward. Jeremy Horder has provided a careful survey of the many kinds of crimes of ulterior intent, and I cannot hope to improve upon the detailed schema he has provided.[32] The two preceding examples are instances of what Horder (inelegantly) calls "crime-Crime ulterior intent crimes;" they increase the seriousness of a lesser offense when the defendant acts with the intention to commit a greater offense. Unlawfully removing a person from his place clearly is wrongful, amounting to false imprisonment. But such removal becomes a far more serious crime when it is performed with the intention to hold the victim for ransom. The same is true of burglary; breaking and entering is wrongful even when the defendant lacks an ulterior intention. His ulterior intention makes him guilty of a different and more serious offense.

Crimes of ulterior intent are not the only category of offense for which intentions are relevant. In several cases, intentions are partly constitutive of the criminal act itself. Some offenses employ verbs from ordinary language that imply intentionality; the agent simply has not performed the act described by the verb unless his act is intentional. One example is bribery. A person may give an official a gift that in fact influences his judgment, but he has not committed bribery unless his intention in giving the gift was to influence the official's judgment.[33] Other examples in which intentions are constitutive of the wrong are as follows. The act of altering a writing is innocuous, but a person commits forgery when

[31] The Model Penal Code, and state codes that adopt it, use "purpose" rather than "intention." Any differences between these two concepts are too subtle to require treatment here.

[32] See Horder (1996, p. 153).

[33] The fact that some verbs imply intentionality is widely appreciated by philosophers. Presumably, such cases simply amount to an exception to IIP, which must be understood to apply only to cases in which it is possible to perform the act in question *without* the relevant intention.

he alters the writing with the purpose to defraud or injure another. The destruction of evidence of a crime is an everyday occurrence, but a person commits an offense when he conceals or destroys evidence with the purpose of hindering a prosecution. Similar examples of crimes in which intention is partly constitutive of the wrong could be multiplied indefinitely.

Consider a case in the latter category—in which a criminal code should prohibit an action only when it is performed with a given intention or purpose. This case is special because the existence of this purpose makes an enormous difference to judgments about the seriousness of the conduct in which the person is engaged. Treason, I submit, is such an example.[34] A defendant should be guilty of treason only when he acts with the purpose to aid the enemy. Suppose that two persons, Jane and Jill, each attend the same anti-war demonstration. Jane attends in order to aid the enemy. She knows that her boyfriend will be at the rally and wants to impress him with her interest in politics, but does not attend for this reason. She would have participated in the rally even if she had been certain that her boyfriend would not be there. By contrast, Jill knows that her attendance will aid the enemy, but does not participate in order to further this objective. She attends because she wants to impress her boyfriend, and would not demonstrate if she knew he would not be there. The criminal law makes Jane but not Jill guilty of treason. If Jill acts wrongfully at all, which is debatable, the *degree* of her wrong is too trivial for the criminal law to take notice. The wrong committed by Jane, however, is incredibly serious, qualifying for a severe punishment.

Alec Walen describes several additional ways that intentions can matter to permissibility, at least two of which are relevant to the criminal law.[35] First, consider an act that is criminal if performed non-consensually. Theft, for example, typically is perpetrated by taking the property of another in the absence of consent. A victim, of course, is free to condition her consent on anything she chooses. Suppose a person conditions her consent on an intention to use the property for a specified purpose. A defendant who lacks the intention on which she conditions her consent has proceeded non-consensually, and thus is guilty of theft.[36] Second, consider a discretionary act that a defendant is allowed to perform only when it is not done with a given intention. A public official, for example, may be allowed to exercise his judgment on any number of grounds, but not because he wants to disadvantage persons of a given race. If his intention in disadvantaging minorities is racially motivated, he is guilty of illegal discrimination and may face punitive sanctions.

These (and other) examples notwithstanding, it is of course true that the criminal law does not always make intention relevant to permissibility or to what crime the defendant has perpetrated. The majority of crimes may be committed without intention at all; recklessness is the default mode of culpability in the highly influential Model Penal Code. The most well-known example is murder. All jurisdictions allow a defendant to be convicted of murder even though he does not intend to kill. In fact, a murderer need not even

[34] Admittedly, case law is somewhat unclear about this issue. *Cramer v. United States*, 325 U.S. 1 (1945), clearly requires an intention to aid and comfort the enemy in order to convict a defendant of treason. On the other hand, the Court is hardly clear about what it means by intention, or whether it distinguishes intention from knowledge. For example, it assumes (at p. 31) that "every man intend[s] the natural consequences which ... would reasonably expect to result from his acts."

[35] He purports to identify six different ways that intentions matter to permissibility in Walen "Intentions that Matter for Permissibility," (forthcoming).

[36] Sexual offenses may be dissimilar. The law does not categorize as rape an act of sexual penetration in which the perpetrator lacks the intention on which the victim conditions her consent. For a useful discussion of the contrast between rape and nonconsensual sex, see Duncan (2007).

foresee that his conduct will cause death. The doctrine of implied malice allows a defendant to be convicted of murder when he kills by acting with gross recklessness and manifests an extreme disregard for the value of human life. Few commentators object to the fact that the *mens rea* of murder is less than intention or foresight. The general task of deciding whether given offenses should or should not require a given level of culpability is Herculean; to my knowledge, no criminal theorist has undertaken it systematically, and I do not propose to make any progress here. My sole cautionary remark is that we should not make too much of the example of homicide in inferring that the substantive criminal law can do perfectly well without intention. According to my intuitions, defendants who kill intentionally *do* commit slightly greater wrongs than those who kill by performing grossly reckless actions that manifest an extreme disregard for the value of human life. Although the *degree* of difference in the wrongfulness of these two actions may be too small to warrant treating them as distinct offenses, it does not follow that there is no difference in their quantum of wrongdoing at all.

In order to isolate the phenomenon of how intentions are relevant to permissibility in the penal law, I will focus most of my attention on a single category of offense: criminal attempts.[37] It is well-known that the *actus reus* of a criminal attempt often is completely innocent. As Glanville Williams pointed out years ago, a person does not act wrongfully simply by approaching a haystack with a match. The conduct becomes criminal only when the person intends to commit arson by setting fire to the hay.[38] Attempts are paradigm cases of conduct that is proscribed only when performed with a given intention.[39] Thus they serve as excellent illustrations of the fact that the criminal law as it presently exists frequently makes intentions relevant to the determination of whether a person has behaved permissibly or wrongfully.

IV

Although we may quibble about one example or another, no knowledgeable commentator can doubt that the criminal law as it currently exists often purports to make the intention of the agent relevant not only to the degree to which his actions are wrongful, but also to the more basic determination of whether his actions are wrongful at all. The crucial issue, of course, is whether the criminal law is *correct* to do so. What standard of correctness should be applied to resolve this issue? Following my working hypothesis, I assume that the applicable criteria are derived from moral philosophy. In fact, I can barely envisage an alternative standard of correctness. Those who accept IIP in the moral domain and believe that the criminal law should track moral philosophy closely must think that the penal law has made a colossal blunder in creating offenses for which intention is relevant. If IIP were true, criminal codes would have to be radically re-written to preserve my hypothesis that the penal law should track moral philosophy closely.

[37] These same points about attempts can be made about criminal solicitation. A defendant who sells a pipe to a customer, for example, is guilty of soliciting a drug offense only if he acts with the intention to facilitate a criminal act. Knowledge that the pipe will be used in the commission of a crime is insufficient to ground penal liability.

[38] Williams (1961, p. 625).

[39] The opening paragraph in Antony Duff's masterful treatment describes the centrality of intention to the law of attempts as "commonplace." See Duff (1996, p. 5).

Of course, scholarly criticism of a great many kinds of offense is not new. Most of the criticism during the past few decades has been directed at three targets. First, myriad commentators have demanded the repeal of so-called morals offenses and victimless crimes. Proscriptions of voluntary sexual practices between consenting adults, for example, are widely condemned within the legal community. Second, a large numbers of criminal theorists—roughly half, by my count—are persuaded that consequences should be immaterial to penal liability. These theorists urge that criminal codes be re-written so that results are purged from the definitions of offenses.[40] Third, scholars from all points along the political spectrum have attacked the war on drugs. Many drug offenses are ineffective, counterproductive, and, I believe, unjust.[41] As these three criticisms suggest, it is almost certain that Anglo-American systems of criminal justice are guilty of rampant overcriminalization.[42] Why not subsume offenses that violate IIP within this broad critique? Arguably, crimes that purport to make intentions relevant to permissibility are among those many offenses that are ripe for repeal.

It is important to repeat my observation that each of the above criticisms—about morals offenses, drug proscriptions, and the willingness of the law to make results material to liability—presuppose rather than reject my hypothesis that the criminal law should track moral philosophy closely. For the most part, commentators have demanded the repeal of victimless crimes by contending that they proscribe conduct that is not wrongful and therefore should not be subjected to penal sanctions. Many of the criticisms of drug prohibitions echo a similar theme. Finally, those theorists who insist that consequences should be deleted from the content of substantive offenses do so precisely because they believe that results are immaterial from a moral perspective. Each of these arguments would be a spectacular *non sequitur* unless it is true that the criminal law tracks moral philosophy closely.

Regardless of their merits, each of these three reform proposals is ambitious. Political forces within state and federal jurisdictions have tended to resist them. Even so, the statutory revisions required to implement these changes would not be overly difficult. So-called morals offenses and victimless crimes could be repealed without the need to be replaced. A therapeutic approach to drug abuse would be preferable to our criminal justice model. Finally, statutes that proscribe culpable risk-creation could substitute for "result-crimes." Rewriting criminal codes so that intentions became immaterial to permissibility, however, would be far more problematic than any of the foregoing reforms. Hard questions would arise on both the general and particular levels. As a general matter, if intentions are irrelevant to permissibility, how should we explain our intuitions in those pairs of cases that have led so many philosophers to believe otherwise? More specifically, how should particular statutes be re-written to incorporate whatever alternative account we prefer? The latter challenge has yet to be undertaken, and I admit to skepticism about whether anyone can meet it successfully. But I cannot prove a negative; we will not know whether the substantive criminal law can be revised to incorporate IIP until the effort is made. Criminal theorists who believe IIP is true in the moral domain and want to preserve the hypothesis that the penal law should track moral philosophy closely have no choice but to meet the challenge I pose here.

Far more effort has been expended to solve the general problem I have mentioned. But even though a majority of contemporary moral philosophers appear to accept IIP, they

[40] See Alexander et al. (2008).

[41] See Husak (1992).

[42] See Husak (2008).

differ radically in suggesting how moral theory *should* distinguish cases like *Trolley* from *Transplant*—and the countless other imaginative cases in which intentions might be thought to distinguish permissibility from impermissibility. A dizzying array of candidates has been proposed to preserve the wrongfulness constraint while resisting the view that intentions matter to first-order morality.[43] Are the details of the causal paths through which harms occur the significant factor?[44] Does everything depend on whether the agent acts for an adequate justification—so that cases can be sorted correctly by reference to a conformity or a "mismatch" between his actual reasons and the reasons that would justify his conduct?[45] But how might we evaluate the adequacy of a justification? Should we answer this question by deciding whether anyone could rationally reject a proposed justification as an authoritative guide to conduct?[46] Or should we resort to the Kantian idea that persons may never be used merely as a means but only as an end? If so, how should this elusive idea be understood?[47] Perhaps we should try to explicate a sense of inviolability to identify the harms that may be inflicted on persons. This latter task, however, may be even less straightforward than its competitors. In the able hands of Frances Kamm, the details of inviolability become extraordinarily convoluted, applying the Principle of Permissible Harm as qualified by the Principle of Secondary Permissibility, and invoking the Doctrine of Initial Justification as modified by the Doctrine of Productive Purity.[48] As this brief sketch indicated, the list of alternatives seems endless—and endlessly complex.

I cannot hope to assess the strengths and weaknesses of each of these views. Let me cut to the bottom line without pretending to examine their merits: Each does a better job with some cases than with others, but none is more plausible as a general account of our intuitions than the explanation they are designed to replace. Do we really believe, for example, that a person who is committed to behaving morally must be instructed on the details of the causal path he will initiate before he should be able to decide whether his conduct is permissible?[49] Similar questions can be raised about each of the foregoing alternatives. If my judgment is correct, the implications for the criminal law are straightforward. It is patently clear that the task of restructuring penal codes cannot get off the ground in the absence of agreement about how criminal offenses should be made to adhere to the wrongfulness constraint without including reference to intentions.

Even if we could settle on a general explanation that provides a more satisfactory account of our intuitions than the supposition that intentions are relevant to permissibility, I cannot envisage how it could be incorporated into the many statutes that would have to be revised. Although this problem resurfaces elsewhere, the law of attempts illustrates it most starkly. Can intentions possibly be deleted from our understanding of what constitutes a criminal attempt? I will mention two strategies that might be employed to account for our considered judgments about the permissibility of a criminal attempt that do not make reference to the intention of the agent. Despite their deficiencies, each of these strategies

[43] I omit even a casual mention of some of the candidates alleged to account for our intuitions while accepting IIP because they already are incorporated into the law (perhaps imperfectly). Thus I do not discuss the distinction between action and omission, for example.

[44] Distinctions among causal paths from agent to harm may or may not be a different way of distinguishing intention from foresight. See Hart (1968, pp. 122–125).

[45] See McCarthy (2002).

[46] See Scanlon (2000).

[47] See Parfit (forthcoming).

[48] Op.Cit. Note 13, pp. 23–30.

[49] See the "appropriate question test" introduced by Enoch (2007).

should be commended for trying to preserve the wrongfulness constraint and thus ensure that the criminal law continues to track moral philosophy closely. This fact is significant. After all, most of us concur that acts of attempted arson, for example, are *wrongful*.[50] If asked: "Is it permissible to try to burn your neighbor's haystack?" almost anyone would answer: "Of course not." If I am correct, however, we cannot specify what is wrongful about such attempts unless we stress the centrality of intention.

At least two strategies might be employed to explain away the apparent significance of intentions in the law of criminal attempts. First, we might tinker with the *actus reus* of an attempt. We could require attempts to be *inherently* dangerous, that is, dangerous on their face, thereby dispensing with the need to peer inside the defendant's head. Thus criminal conduct would be defined without reference to any mental state—not even belief. Unfortunately, this strategy produces highly counterintuitive results—it is both overinclusive and underinclusive—and it is not surprising that no jurisdiction has adopted it. Do we really want to impose liability on a person who creates an objective risk, even when he is totally unaware he is doing so? The criminal law is reluctant to punish nonculpable risky behavior even when harm is actually caused; it should be even more cautious about doing so when no harm occurs. Conversely, the defendant in Williams's example who walks toward the haystack with a match would not be guilty of a criminal attempt despite his plan to commit arson because his act is equivocal and not dangerous in itself. Suppose that our would-be arsonist believed that he had made even more progress toward his objective; he tries to burn the hay by holding his lighter to the straw. In fact, a shrewd policeman has switched substances in the lighter, replacing butane with a nonflammable substance. To my mind, the policeman has done a commendable job of gathering incriminating evidence against the defendant while preventing a risk that harm will actually occur. Any satisfactory account of attempts should hold this defendant to be guilty of attempted arson. Were the facts as he reasonably believed them to be, he would have succeeded in setting fire to the hay.[51] Since his acts do not create an objective risk, however, this first strategy to rethink the law of attempts would not allow him to be convicted. A criminal code pays an enormous price for accepting IIP if it requires this defendant to be acquitted.

The second strategy is not only more ingenious, but also more convoluted. Scanlon invites us to contrast two cases in which men buy rat poison. In the first, he buys the poison with the intention of killing rats in his cellar; in the second, he intends to poison his wife. Scanlon admits that the latter but not the former person commits a wrongful act. He denies, however, that the intention to kill is what makes the act wrongful. Instead, the act is wrongful for the same reason it is impermissible for a man (call him Green) to buy rat poison for his neighbor, knowing the latter intends to use it to commit a murder. When Green buys the rat poison to kill his own wife, he simply aids his own plan. Both acts are wrongful because we should not assist in the commission of murders—or own, or those perpetrated by others. Thus Scanlon purports to explain the wrongfulness of Green's act of buying rat poison with the intent to kill without mentioning his intention.

[50] That is, these criminal acts are wrongful in the absence of justification. I put aside the complexities that justifications pose to my account.

[51] Defendants should not always be guilty of a criminal attempt simply because they would be guilty if the facts were as they believed them to be. A number of cases reveal the kernel of truth in theories that require an objective risk in order to impose liability for attempts. When a defendant's act fails to engage in the world in the appropriate causal way—as when he sticks pins in a voodoo doll in an effort to poison his enemy—we should not convict him of a criminal attempt.

Scanlon admits that his "appeal to facilitation may seem forced."[52] Indeed, several problems infect this alleged solution, however, apart from the inherent implausibility its author concedes. First, even though it is (*ceteris paribus*) impermissible to perform an act that increases the probability that one will kill, I see no reason to identify this wrong as the *same* wrong as attempted murder. Once these wrongs are distinguished, we can begin to make comparative judgments about them. Intuitively, it is worse to buy poison with the intent to kill than to buy poison knowing that one's neighbor will use it to kill—even if the probabilities of death are equal in the two cases.[53] If my intuitions are widely shared, Scanlon's efforts do not explain the relevance of intention in determining the *degree* to which an impermissible action is wrongful. This failure is crucial. I believe that IIP is refuted not only by describing a case in which intention makes an otherwise permissible action impermissible, but also by describing a case in which intention makes an otherwise impermissible action worse. In addition, this strategy admits that intentions are relevant to permissibility. It seeks to show that the wrongfulness of such acts can be explained in terms that Scanlon takes to be more basic. As I have said, however, philosophers who reject IIP need not insist that the relevance of intention to permissibility is a *basic* moral principle. At least as a matter of criminal law, disputes about what is basic seem immaterial. The crucial issue is whether intentions matter to permissibility; whether they are relevant to permissibility basically seems beside the point.

Difficulties re-writing statutes (such as those proscribing attempts) do not provide the only obstacle for implementing IIP throughout the criminal domain. Legal theorists who seek to preserve the hypothesis that the criminal law should track moral philosophy closely encounter additional problems. Foremost among these difficulties is what might be called *fair labeling*. As I have indicated, intentions are relevant in existing law not only to *whether* a defendant commits an offense, but also to *what* offense he commits. The role of intention in performing the latter function is just as significant as in the former. As Andrew Ashworth points out, it is important "that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signaled by the law, and that offences should be divided and labeled so as to represent fairly the nature and magnitude of the law-breaking."[54] Labeling is crucial for determining what punishment is just, for evaluating the relevance of prior convictions, and, perhaps most importantly, for sending appropriate expressive signals to the public. The crimes for which persons are convicted should provide an accurate and authoritative description of what defendants have done. When Green buys rat poison, knowing his neighbor intends to use it to kill his wife, he simply does not commit the wrong of attempted murder.

This same problem resurfaces with other crimes of intention. Recall my example in which Jane but not Jill would be guilty of treason. Commentators who accept IIP might argue that both persons should be guilty of the same offense. They might go on to locate the moral difference between the two cases in second-order morality by holding that Jane (to this extent) is a worse person than Jill, and thus deserves a more severe punishment. But even if one could draft an offense of which both Jane and Jill were guilty, what would this offense be *named*? It seems profoundly mistaken to convict Jill of *treason* when she attends an anti-war rally for the purpose of impressing her boyfriend. Any crime of which both would be guilty would distort the basis of conviction for one person or another.

[52] Op.Cit. Note 30, p. 3.

[53] In conversation, Alec Wallen has questioned my intuition. After all, he points out, one can change one's mind about his intention to kill, but one cannot change the mind of an accessory as easily.

[54] Ashworth (2003, pp. 89–90).

Kidnapping provides yet another example. If Bob and Bart unlawfully restrain their respective victims, but only Bart does so to hold his victim for ransom, the criminal law would fail to provide an accurate characterization of the wrong that Bart has perpetrated by equating it with the wrong committed by Bob. Bart is guilty of *kidnapping*, and his conviction should convey the stigma this label connotes.

I suspect that one reason IIP may seem more plausible in the moral domain than in its criminal counterpart is because fair labeling may be somewhat less important in the former. In defending IIP, Jonathan Bennett writes: "The morality I consult as a guide to my conduct does also guide my intentions, but not by telling me what I may or may not intend. It speaks to me of what I may or may not do, and of what are or are not good reasons for various kinds of action; and in that way it guides my intentions without speaking to me about them."[55] But even if Bennett were correct that morality guides conduct without "speaking to me about [my intentions]," both morality and law have functions other than that of guiding conduct. In both domains, we have reason to assess what persons have done after they have done it, and intentions often are indispensable if this function is to be performed. The practical significance of this function, however, becomes more urgent in the criminal context. The content of the penal law not only guides conduct ex ante, but also allows us to make official ex post judgments about the wrongs persons have done. We need to be precise not only about whether a defendant has engaged in wrongful conduct, but also about the nature of the wrongful conduct in which he has engaged. Since morality lacks an authority to occupy the role of the legislator in defining wrongs—as well as that of the judge who makes an official pronouncement of the wrong that defendants have perpetrated and the sentence they must endure—the importance of fair labeling is less acute.

Admittedly, a complete theory of fair labeling is difficult. Why should the criminal law have familiar labels for some crimes but not for others? In answering such questions, we have little choice but to rely on conventions to provide accurate descriptions of the wrongs persons have perpetrated. To characterize the person who negligently creates an objective risk of death as having committed an attempted murder exaggerates the magnitude of the wrong he has done. By the same token, to describe the person who intentionally tries to kill as guilty of some other offense is likely to deprecate the severity of his wrong. Such a defendant is guilty of *attempted murder*, with all of the stigma conveyed by this label. Since many of the wrongs our conventions describe cannot be committed in the absence of intention, I anticipate insuperable difficulties in preserving the principle of fair labeling in any plan to re-write criminal codes to implement IIP throughout the penal law. Legislators may succeed in coining new labels for the offenses defendants commit. Conventions change more slowly, however, and play a role in fair labeling I believe to be indispensable.

V

We might be tempted to respond to the foregoing predicament by revisiting my initial hypothesis that the criminal law should track moral philosophy closely, at least as pertains to IIP. By taking this step, we might resign ourselves to the fact that the penal law frequently punishes conduct that is not morally wrongful. We could continue to punish the conduct we currently proscribe, such as criminal attempts, notwithstanding our concession that much of it is morally permissible. Although I do not regard this alleged solution as

[55] Bennett (1981, p. 97).

logically incoherent, it is important to be clear about why it is problematic. The costs of adopting it are high. Indeed, they strike me as just short of astronomical.

As I have indicated, abandoning the hypothesis that the criminal law should track moral philosophy closely would deprive theorists of their most familiar and powerful resource for critiquing legal doctrine. All of the articles and commentaries that question legal positions on moral grounds would immediately be seen to suffer from a methodological defect. This conclusion alone should persuade us to retain the wrongfulness constraint. But the costs of this proposed response extend further. This solution would require us to rethink several of the most central concepts in criminal law theory. I will briefly mention two such concepts before discussing an even more fundamental problem with this response. Virtually every building block in criminal theory would have to be reconceptualized if this path were taken.

First, consider the contrast between *justification* and *excuse*. Although no consensus exists about exactly how this distinction should be drawn,[56] a typical account is as follows. Justifications are defenses that apply when conduct is permissible, even though defendants commit a criminal offense. Excuses are defenses that apply when agents are not to blame for what they have done, even though they commit a criminal offense without justification. As far as I am aware, each of the many variations on this theme shares the same central point: justifications render conduct permissible. If we abandon the wrongfulness constraint and concede that many of the offenses our code should retain are permissible, it is hard to see what a justification could justify. This result is exceedingly odd. Nearly all of us agree, for example, that (genuine and not putative) cases of self-defense describe circumstances in which persons are permitted to commit the presumptive wrong of deliberately killing another. For the same reason, persons are justified in attempting to kill another in these same circumstances, even when their attempts fail and their victims survive. A justification for attempted murders in self-defense is needed because acts of attempted murder are generally wrongful. If a particular act of attempting to kill in self-defense were not wrongful in the absence of justification, it is unclear why persons would require a justification to engage in it. But nearly everyone concedes that a justification is needed; self-defense typically is regarded as a paradigm case of a justification for a presumptive wrong.[57] Our concept of excuse would be infected by a similar problem. Excuses are usually thought to exempt persons from blame for their wrongful conduct. If the conduct in question is permissible—as will often be the case if criminal law abandons the wrongfulness constraint—why would it require an excuse? It will not suffice to answer that the conduct requires an excuse because it is unjustified. Although it may be true that excused conduct is unjustified, this response does not address the underlying difficulty I have described. As I have argued, permissible conduct no more requires a justification than an excuse.

I see no way to resolve this problem without a fundamental and drastic rethinking of our concepts of justification and excuse. I have no idea about how these reconceptualizations might proceed, so I leave this task as one of many challenges for those theorists who propose to abandon the wrongfulness constraint in the substantive criminal law and thereby reject my hypothesis that the criminal law tracks morality closely. I tend to believe that justifications bear on conduct and excuses bear on agents—despite the formidable difficulties in deciding when a given factor is material to one or the other. But this device to contrast justification from excuse becomes tenuous if criminal offenses are not wrongful.

[56] For some complexities about how the distinction should be drawn, see Husak (2005a).

[57] For an apparent exception to what I claim that "everyone concedes," see Westen (2006).

If we believe that Jill's intention to impress her boyfriend while demonstrating in an anti-war protest bears on her character rather than on her action, her lack of intention to aid the enemy would appear to qualify as an excuse for the offense of treason. I would think that the invitation to convert what presently is the absence of an element in the definition of the offense into an excuse for committing that offense is a recipe for confusion.[58]

Justification and excuse are hardly the only central concepts in penal theory that would have to be rethought if we abandon the supposition that criminal offenses are wrongful. Proportionality is another important concept in the philosophy of criminal law. Typically, proportionality is construed to require that the severity of the punishment must be a function of the seriousness of the crime.[59] Efforts to implement this principle have proved exceedingly difficult.[60] Despite these obstacles, few theorists are prepared to conclude that the principle should be scrapped. In its absence, our scheme of punishment would fail to conform to standards of justice. But how can we possibly implement a principle of proportionality unless penal offenses are wrongful? The seriousness of a crime is partly a function of its degree of wrongfulness. Presumably, rape qualifies for a more severe sanction than theft because it is a worse crime to commit. A particular crime that was not wrongful to perpetrate would presumably lack *any* degree of seriousness, so it is hard to see how a principle of proportionality could be applied to it.[61] Again, perhaps a theorist who seeks to implement IIP throughout the criminal domain can reformulate the principle of proportionality so that it can be applied even to offenses that are permissible. Alternatively, he may be able to devise a measure of the seriousness of crime that does not include its degree of wrongfulness. I remain to be convinced that these tasks can be completed. But I cannot prove that my skepticism is warranted, and we will not know until a theorist emerges to undertake this challenge.

To my mind, however, the most fundamental difficulty arises when we seek to justify the punitive responses the state inflicts upon criminals. Abandoning the hypothesis that the criminal law tracks moral philosophy closely would make punishment extraordinarily difficult to defend. It is no secret that punishment is hard enough to justify even when it is imposed for criminal conduct that everyone agrees to be morally deficient. But if we concede that given instances of criminal behavior are morally permissible, how can we possibly believe that the state is justified in punishing them? Suppose a defendant were about to be punished, and demanded to know what he had done to merit the hard treatment and censure the state was about to inflict. Could we seriously answer that he has done nothing wrong but that his punishment is justified nonetheless? Why would anyone propose to censure conduct unless it is wrongful? It is barely coherent to contend that persons should be punished for behaving permissibly.[62]

[58] At the very least, excuses would no longer have the practical significance they currently are afforded in criminal procedure. In existing law, the categorization of an issue that pertains to liability as a defense has important consequences for allocations of the burdens of proof. Surely we would not want to infer that states could place the burden of proof for intention on the defendant because we had categorized the absence of intention as an excuse instead of treating the presence of intention as an element in the definition of treason. For a pioneering discussion of some of these issues, see Fletcher (1978, §7.4).

[59] See Ashworth and von Hirsch (2005).

[60] See Lee (2005).

[61] Elsewhere, I have argued that proportionate punishments cannot be imposed on drug offenders because we lack good reason to believe that many of the offenses they perpetrate are wrongful. See Husak (1998, p. 187). The general point remains true even if one disagrees with my judgment about drug offenses.

[62] Some legal philosophers go further, and regard this claim as literally incoherent. See Zaibert (2006, p. 27).

The pros and cons of particular theories of punishment are familiar to legal philosophers, and I make no effort to rehearse them here. I simply point out that each of the plausible candidates for a viable theory presupposes that the conduct to be punished is impermissible.[63] Deterrence theories are sensible only if persons have engaged in conduct that should be avoided. In this tradition, wrongful conduct *just is* conduct the state should deter. Retributive theories seek to explain the conditions under which punishment is deserved. How can anyone deserve to be punished for behaving permissibly? Expressive and communicative theories assume that criminal behavior merits the punitive responses expressed or communicated. These reactions are appropriate only when triggered by conduct that is wrongful. In short, it is hard to imagine how a justification for penal sanctions could be fashioned that did not begin with the assumption that the conduct to be punished is wrongful.[64]

Can these problems be overcome? I briefly mention two possible strategies for circumventing the wrongfulness constraint, neither of which is promising. First, we might contend that the criminal law requires a special kind of wrongfulness, a kind of wrongfulness that is similar to but not identical to moral wrongfulness. We can continue to use the concept of wrongfulness to contrast justification from excuse, to give content to the principle of proportionality, and to help justify the infliction of punishment—as long as we are careful not to equate this special kind of wrongfulness with *moral* wrongfulness. Perhaps we should simply say that it is wrongful to violate a duly enacted criminal law in a basically just society, regardless of the content of that law.

Although I suspect that some theorists will be attracted to this proposed solution, I regard it as an evasion. I see no difference between claiming (a) that the wrongfulness inherent in violations of the criminal law is a special kind of wrongfulness that deviates from moral wrongfulness, and (b) that the wrongfulness inherent in violations of the criminal law is not wrongfulness at all. At the very least, theorists who pursue this train of thought owe us an account of the special kind of wrongfulness inherent in criminal liability as well as a rationale for characterizing it as a kind of wrongfulness rather than as an alternative to it. I can scarcely conceal my skepticism.

A second possible strategy has a bit more plausibility. We must be reminded of the device by which many defenders of IIP seek to salvage our moral intuitions in the pairs of cases I have discussed. Although these defenders maintain that intentions are irrelevant to the permissibility of *actions*, they readily concede that intentions are relevant to the evaluation of *persons*. Even though many criminal offenses are permissible, the persons who commit them still turn out to deserve blame. Isn't this concession all that is required to justify punishment? Since we literally punish persons and not actions—indeed, we *can* only punish persons—why should the concession that criminal conduct is morally permissible be problematic? We may remain confident that only those persons whose character merits blame will be punished. Despite the appeal of this second strategy, I contend that we pay a steep price for adopting it. Although I do not purport to rehearse each of its many difficulties here, two problems are especially formidable.

First, this strategy jeopardizes the principle of legality. Even though it is literally true that we punish persons rather than actions, we punish persons *for* their actions. If we adopt this proposed solution, however, it is no longer true that criminal defendants are punished for

[63] For a rare exception, see Mabbott (1969, p. 39).

[64] Thus I have argued that all plausible justifications of punishment impose constraints on criminalization. See Husak Op.Cit. Note 42, Chapter Two. Again, *mala prohibita* offenses are not exceptions to this generalization. See Op.Cit. Note 5.

their crimes. Instead, they are punished *for* their character. What, then, is the significance of criminal conduct to punishment? Why retain the principle of legality and require persons to have committed a criminal offense at all? Surely criminal conduct does not serve merely as evidence of what we really punish persons for, since other kinds of evidence of bad character may be equally reliable. To be sure, a few distinguished legal philosophers have addressed such questions in the course of defending "character theories" of penal liability. According to Victor Tadros, for example, criminal conduct is subject to punishment only when it somehow reflects on defendants as persons.[65] Sensibly, however, Tadros goes on to hold that only wrongful conduct reflects on persons in the way needed to justify criminal responsibility.[66] How could permissible behavior reflect on character in whatever manner is required to defend impositions of penal liability? Second, even if a criminal offense *is* required to justify punishment, why focus only on the particular offense the defendant has committed? Once the inquiry shifts to the criminal and away from his crime, why not take *all* aspects of his character into account in justifying punishment, rather than simply those features that somehow relate to his criminal conduct? I do not insist that these two questions cannot be answered; they are familiar to theorists who have sought to justify punishment for character rather than for conduct. I simply mention that these difficulties are formidable for those who propose to implement IIP throughout the substantive penal law by abandoning the initial hypothesis that the criminal law tracks morality closely.

Conclusion

Nothing I have said is directly designed to provide new reasons to oppose IIP in the domain of morality. I simply point out that the existing penal law rejects IIP, and would pay an enormous price to adopt its analogue throughout the substantive criminal law. Perhaps this price is not as high as I have supposed; I know no way to quantify it with any precision. Alternatively, criminal theorists might demonstrate that the penal law can implement IIP more easily than I have imagined. Finally, even if I am right that the price is high and the implementation of IIP is difficult, some theorists may regard this price as necessary to pay. After all, if the criminal law should track moral philosophy closely—as I believe it should—and moral theory accepts IIP—as many contemporary theorists contend—it follows that criminal theory has little choice but to undertake the revisions I have described. Although my skepticism should be apparent, we cannot resolve this matter until some theorist rises to the challenge and provides the details of how IIP might be implemented effectively throughout the criminal domain.

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[65] See Tadros (2005).

[66] Id, p. 74.

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