

What is a Crime?

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Abstract—This article presents a philosophical account of the nature of crime. It argues that the criminal law contains both fault-based crimes and strict liability offences, and that these two represent different paradigms of liability. It goes on to argue that the gist of fault-based crimes lies in their being public wrongs, not (as is often thought) because they wrong the public, but because the public is responsible for punishing them, i.e. because they merit state punishment. What makes wrongs deserving of punishment is that they are seriously blameworthy, inasmuch as they evince a disrespect for the values violated. But they only merit *state* punishment when they violate important values, not simply due to the well-known pragmatic considerations against the use of the criminal law, but to the intrinsic expressive force of criminal conviction. Finally, the analysis of fault-based crimes points to a role for strict liability in regulating actions that are not seriously blameworthy but do increase the risk of values being damaged.

1. *Introduction*

There are many answers to the question ‘what is a crime?’ To a practising lawyer, a crime is anything prohibited under the criminal law—the criminal law being that branch of law dealing with state punishment. Yet, as many legal commentators point out,¹ not all state punishments are part of the criminal law—civil penalties and civil contempt of court are just two examples. A more accurate test of the scope of the criminal law lies in its adjectival incidents, i.e. in the distinctive ways in which criminal *proceedings* differ from civil proceedings. Briefly put, a legal prohibition is a criminal prohibition when it is subject to criminal proceedings. What characterizes proceedings as criminal are such things as the type of bodies having jurisdiction over the matter (the Crown Court, magistrates courts), the manner in which the proceeding can be commenced (charge, information), the rules of evidence employed (standard of

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¹ E.g. G. Williams, ‘The Definition of Crime’ (1955) *Current Legal Problems* 107, at 130, A. Simester and G. Sullivan, *Criminal Law: Theory and Doctrine* (Oxford: Oxford University Press, 3rd edn, 2007), at 3–4.

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proof, rules on admissibility), and the types of outcome to which the proceeding may give rise (conviction, sentence). The scope of the criminal law can only be set in adjectival terms because there is simply too much variety in the content of those things subject to criminal prohibition. Almost anything can be prohibited under the criminal law, and so there is no substantive unity of the kind found, for example, in contract law.²

Another answer to ‘What is a crime?’ is provided by criminologists. They emphasize the need for a broader, social context. Crimes are not simply artificial creations of the law, like a *cestui que trust*, or a negative covenant. Instead, criminal law has a crucial social dimension. A successful prosecution does not simply result in a defendant being held liable for the breach of a legal prohibition—instead she is *convicted* of committing a *crime*—she is found *guilty* of the *charge* against her. These are socially expressive terms. The criminal law serves an important condemnatory function in social life—it marks out some behaviour as specially reprehensible, so that the machinery of the state needs to be mobilized against it. An account of crime that restricted its attention to the doctrinal analysis of lawyers, then, would miss out on a crucial dimension that helps to explain both the social significance of liability and the use made by the state of criminal liability.³

The two preceding answers are not of course in conflict. They are simply addressing different concerns. The doctrinal analysis is concerned with demarcating the scope of criminal liability within legal liability as a whole—with answering the question ‘What distinguishes criminal from civil liability?’ The criminological account is concerned with locating criminal liability within its social context—with answering the question ‘What is the social construction of criminality?’ In this article, I am interested in exploring a third alternative. In asking ‘What is a crime?’ I am seeking a philosophical understanding of the nature of crime, i.e. an account of the basic features of criminal liability that explains its normative status. Crimes are a special sort of legal wrong, and a philosophical analysis seeks to explain what makes them special—what makes it appropriate for the law to treat them specially, and what types of things merit this special sort of treatment.

Like others, however, I will argue that the first step in understanding the nature of criminal liability is to distinguish fault-based crimes (crimes of *mens rea* as they are known in the common law) from offences of strict liability.⁴ The criminal law as it exists in the common law world encompasses both

² See G. Williams, above n 1 and D. Ormerod, *Smith and Hogan Criminal Law* (Oxford: Oxford University Press, 11th edn, 2005), Ch. 2, especially 9–10, 16–17. On the procedural aspects of criminal law, see also A. Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 *LQR* 225, at 230–2.

³ For a recent overview, see L. Zedner, *Criminal Justice* (Oxford: Oxford University Press, 2004) Ch. 2; and for doctrinal accounts particularly sensitive to these issues, see A. Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 5th edn, 2005), 1–6 and Simester and Sullivan, above n 1 at 1–5.

⁴ See, e.g. A. Brudner, *The Unity of the Common Law* (Berkeley: University of California Press, 1995), Ch. 5.

categories, as both are subject to the same adjectival incidents. But the two represent different paradigms of liability, and it is a defect of the common law that it fails systematically to distinguish the two. Throughout the article, I will mainly be concerned with making sense of fault-based liability, but I will suggest at the end that understanding the relationship between criminal and civil liability sheds light on the role of offences of strict liability. My main claim about fault-based crimes will be the deceptively simple thesis that they are wrongs that merit punishment by the state, i.e. that the state is responsible for punishing. Simple as this thesis may seem, it involves the complicated task of understanding what sorts of wrongs deserve punishment, rather than some other type of response, and which of these wrongs are properly the matters for the state. Before developing this thesis, however, I need to say something about the idea of fault-based liability as a paradigm and about the appropriate methodology for a philosophical account of crime, as well as considering some rival conceptions of crime.

2. *Fault-Based crimes and Strict Liability Offences*

The idea that fault-based crimes form a distinct and significant form of criminal liability is open to two preliminary objections. The first arises from the thought that the distinction is one of degree, rather than kind. After all, 'strict liability' has a narrower and a broader use. In its narrow sense, it refers to crimes that lack any *mens rea* element. In its broad sense, it refers to crimes where some element of the *actus reus* of the offence lacks a corresponding requirement for *mens rea*, i.e. to cases of *constructive* liability.⁵ Criminal liability then seems to lie along a spectrum, from crimes of 'full' *mens rea* (where each element of the *actus reus* has a corresponding element in the *mens rea*) to those of strict liability in its narrow sense (where there is no *mens rea* element at all). In which case are there really two paradigms of criminality? Isn't it all a matter of degree? And doesn't this point to the need for a *unitary* account of criminal liability? In fact, however, appearances are misleading. Although it is true that these internal variations exist, they mask the fact that offences are generally classifiable at one of the two ends. Sometimes an offence involving constructive liability will be a case of fault-based crime, while in others it will be (in substance) an offence of strict liability.⁶ The same is true of offences with a minimal *mens rea* component. In both cases, the appropriate classification will depend upon the particularities of the individual offences. Under the

⁵ The English crime of unlawful and dangerous act manslaughter, for instance, requires the defendant to have killed another while doing something that was both criminal and dangerous (in the sense that it created the risk of *some* harm), but the death of the victim need not have been foreseen by the defendant nor foreseeable by a reasonable person: *Newbury* [1977] AC 500 (HL).

⁶ The arguments in this article neither justify nor rule out the legitimacy of constructive liability in cases of fault-based crime.

current law, where the distinction is not systematically recognized, there will be some crimes that might be regarded as falling under either category, depending upon the reasons for the existence of the offence. But in reality, most offences are readily classifiable as fault-based or strict in the narrower sense. And in what follows, I shall confine the term 'strict liability' to offences that lack any *mens rea*, since these are characteristic of non-fault-based liability.

The second objection to regarding fault as a paradigm of criminal liability is not based on any doubt that a contrast can be drawn between crimes of *mens rea* and strict liability offences in the narrow sense. It concedes that the distinction can be drawn, but observes that so too can many other distinctions, e.g. between crimes requiring intention and those that do not, or between result crimes and conduct crimes, or between crimes with a long historical pedigree and more novel offences. Why think that crimes requiring *mens rea* are a *paradigmatic* case of criminal liability? Why focus on this case? The response to this question rests on two major considerations. The first is that the law itself regards *mens rea* as the default condition for criminal liability. The long-standing (if intermittently invoked) presumption of *mens rea* in statutory interpretation is the most prominent illustration of this orientation.⁷ Common law crimes have (almost) always required some *mens rea*,⁸ and it is only out of deference to legislative supremacy that the creation of offences without *mens rea* has been countenanced. The second consideration is that highlighted by the sociological perspective on crime. It is crimes requiring *mens rea* that are the standard case from a non-legal point of view. The idea that someone who is convicted of a crime is a 'criminal' and that the mere act of conviction involves an important element of censure makes more sense when applied to crimes of *mens rea* than when applied to the sort of strict liability offences that result in parking tickets, or fines for failing to submit tax returns on time. Nor is the close relationship between the lay and the legal concept of crime accidental. One key social function of law is to respond to behaviour which in lay terms merits the epithet 'criminal'.⁹ As is often observed, part of the value of criminal law lies in its constituting the most serious form of censure and condemnation open to a community—in singling out certain conduct for this treatment. So the relationship between the legal and lay concepts of crime is symbiotic: designating certain conduct as 'criminal' is meant to convey the seriousness of the wrongdoing, and it is crimes of *mens rea* that best fit this conception of criminality.

⁷ See e.g. *B v DPP* [2000] 2 AC 428 (HL).

⁸ There are a handful of exceptions: see D. Ormerod, above n 2, at 140–1.

⁹ Most markedly in English law with the offence of manslaughter by gross negligence, which requires the jury to ask whether the negligence resulting in death was 'so bad in all the circumstances as to amount to a criminal act': *Adomako* [1995] 1 AC 171, at 187 (HL).

3. *Methodology*

If we allow that there may be a paradigm of criminal liability based on fault, how is the nature of these crimes to be approached? What is the appropriate methodology for an exercise of this kind? A useful comparison can be made with doctrinal accounts of crime. A doctrinal account seeks to determine a *test* that will capture the existing distinction between criminal and civil proceedings in a particular jurisdiction. There will be some doubtful cases on the borderline, and possibly a handful of cases that have been mistakenly classified in the past, but all of the uncontroversial cases must be captured by the test. In addition, the test must be such that it could be applied not only to existing crimes, but to any possible future criminal prohibition.

A philosophical account differs in a number of ways. First of all, it is not concerned to produce a test, i.e. a decision-procedure that could be used to classify proceedings as criminal or civil. The interest is not in the line that divides the two categories, but in the nature of the matters dealt with inside the criminal category. Second, a philosophical account is focused upon the relatively settled and standard cases of crimes that actually exist in contemporary law. It is interested in the type of conduct that is regarded as uncontroversially 'criminal', i.e. it is interested in our existing conception of fault-based crime, not with the fact that a legislature *could* (legally speaking) make anything a crime.

Finally, its criteria for success differ. For a philosophical theory, one criterion is how satisfactorily the theory covers the settled instances. If a theory says that crimes involve public harms, then it counts against that theory that there are instances of crimes which do not seem to involve any public harm. A few counter-examples, however, are not necessarily fatal to an account. A theory need not be entirely passive in the face of our current practice: it may suggest modifications to the contours of that practice. There may, of course, be some fixed points. A theory of crime which concluded that the culpable killing of another human being should not be regarded as criminal would have clearly missed something crucial. But we might not feel so certain if the theory concluded that petty theft or battery involving mere touching should be seen as a civil wrong only. Similarly, that a theory entails that certain conduct is criminal which up to now has not been so regarded does not, in itself, show that the theory is unsatisfactory. What matters, then, is the *overall* fit between the theory and the settled instances of crime, not an exact fit.

Another dimension which a theory must address is to provide an intelligible rationale for the settled instances of crime. It must make sense of the classification and treatment of the conduct as criminal, and do so in terms that we would recognize. Our current understanding of criminal conduct does not consist solely of various settled instances. It also involves a view about some very general characteristics of these settled instances. One such characteristic is

that crimes involve morally wrongful conduct. Another is that the conduct is in some sense *seriously* wrongful. In addition, crimes are the sorts of wrongs which merit punishment. Finally, crimes are public wrongs: they are not simply private wrongs like torts or breach of contract. Consequently, it is appropriate that the state initiates and pursues criminal actions. A theory of crime must provide a rationale that makes sense of these features of our current understanding of crimes, and explains their significance.

There is of course no guarantee that a satisfactory unified account of fault-based crime can be found: perhaps crimes are grouped according to family resemblance rather than some unifying characteristics.¹⁰ Alternatively, it may be that there are further sub-divisions *within* the class of crime which are more significant than any contrast with strict liability offences. Nonetheless, I will argue that fault-based crimes do have a significant internal unity.

4. *Crimes as Public Wrongs*

The most influential approach to understanding the nature of crimes has been in terms of their being public, as opposed to private, wrongs. The conception of crimes as ‘public’ has a long tradition in common law thought. Crimes were regarded as violations of the King’s Peace, and, as such, were liable to being pursued as pleas of the crown. In its modern incarnation, the place of the sovereign as the embodiment of the public is taken by the community, which is regarded as affected by crimes in a way that it is not by civil law wrongs, thus making it the appropriate body to pursue such wrongs. In private law, it is the interests of individuals that are at stake: in crime there is a public interest which goes beyond that of the individuals affected. There are two alternative versions of this approach, one in terms of harm, the other in terms of wrongs. The first emphasizes the *interests* affected by crime, and argues that there is a distinct harm to the community involved in criminal wrongdoing. The second emphasizes the *wrong* done by the crime, and argues that it is a wrong against the community as well as against the individual victim. Influential as they may be, I will argue that both approaches are mistaken in locating the nature of crime in wrongs done *to* the public. Crimes, I will argue, are public wrongs in the sense that they are wrongs that the community is responsible for punishing, but not necessarily wrongs against the public itself.

The first approach, in terms of harm, has been developed by Nozick and Becker, in different ways. Nozick argues that the harm caused by a crime, unlike other private law wrongs, extends beyond the immediate victim to all of those who view themselves as potential victims of the crime.¹¹ An injury caused

¹⁰ On the idea of ‘family resemblance’ see L. Wittgenstein, *Philosophical Investigations* (Oxford: Basil Blackwell, 3rd edn, 1967), at 65–66; and R.J. Fogelin, *Wittgenstein*, (London: Routledge & Kegan Paul, 2nd edn, 1987), at 133–8.

¹¹ R. Nozick, *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1974), at 65–71.

to a victim by negligence is a misfortune, and while strangers may sympathize with the victim they are not otherwise distressed in the occurrence. An injury caused by an intentional attack, in contrast, causes widespread *fear* in the community: people who do not know the victim are caused distress and anxiety by what has been done. It is this additional harm done by criminal wrongs which explains why the state takes a role in pursuing them, since the more general community is affected by such actions. Becker, on the other hand, suggests that crimes cause 'social volatility', namely 'the potential for destructive disturbance of fundamental social structures'.¹² Social volatility involves people having to contemplate abandoning their own socially stable behaviour in self-defence, and crimes thereby create the prospect of a breakdown in socially stable behaviour. Thus, social volatility is:

to be regarded as a disvalue in itself, the creation of which, by acts produced by an individual's socially unstable character traits, is a social harm.¹³

Crimes on this account are wrongs which, in isolation, cause people to have to contemplate abandoning their own socially stable behaviour in self-defence. It undermines our assurance that others will act in socially justifiable ways, and thus carries with it this social cost in addition to any harm done to the immediate victim. According to Becker, which types of wrongs produce this reaction may vary from culture to culture. Thus, individual instances of promise-breaking do not produce socially volatile responses in our culture, whereas intentionally harming another does.¹⁴

Both accounts, for all their internal differences, are vulnerable to the same objections. Both claim that it is simply a brute fact which acts create the appropriate type of social harm, be it fear or social volatility. The claim is that crimes of *mens rea* have these requisite effects whereas other harms do not. But this is a mistake. Many crimes do not have this effect, and many activities that are not crimes do. Take the case of crimes against public welfare, such as disclosing classified information, or bribing public officials, or defrauding the revenue. These offences, while very serious, rarely generate any fear among the public. In contrast, many activities that are not crimes do generate general fear—such as reckless strike action by ambulance drivers, or the failure of an employer to make proper provision for pension liabilities, or large groups of football supporters gathering for a match. Again, generally speaking, there is no clamour for these actions to be criminalized despite the apprehension they generate.

¹² L. Becker, 'Criminal Attempts and the Theory of the Law of Crimes' (1974) 3 *Philosophy & Public Affairs* 262, at 273.

¹³ *Ibid* at 274.

¹⁴ *Ibid* at 275.

Why is this? Both fear and (one assumes) social volatility are reactive attitudes, i.e. they are emotions or reactions that are *reason-based*. The degree of apprehension one feels is dependent upon the reasons one has for the apprehension.¹⁵ The reasons that generate fear and social volatility are the perceived risk of the harm befalling one (or those one cares about). So it is not crime that causes fear, but the perceived risk of people becoming victims of crime that does the work. Those who live in a community with very low levels of offending are shocked by a serious crime, but just as they are shocked by any untimely disaster. It is only as the rate of crime-doing rises, and risk of being (or knowing) a victim increases, that people become *fearful* of crime. This is borne out by the fact that the individual criminal who is feared is the *serial* offender: the serial murderer, the serial sex offender. It is the propensity of the perpetrator to offend time and again and to choose their victims at random that generates fear. So what generates fear, ultimately, is the (perceived) *rate* of crime, not crime itself. Furthermore, it is generally only certain crimes—those that create the risk of immediate harm to vital interests—that generate fear or defensive precautions, because they have such a close and obvious effect on the well-being of ourselves and those we care about. Crimes that do serious public harm, such as bribery and tax fraud, normally fail to generate any fear.

An alternative to the public harm account of crime, in terms of public wrongs, has been sketched by Marshall and Duff. They argue that what is distinctive of crimes is that the wrong done to the victim is, at one and the same time, a wrong done to the public at large. Whether a wrong has this status depends upon:

which values are (which should be) so central to a community's identity and self-understanding, to its conception of its members' good, that actions which attack or flout those values are not merely individual matters which the individual victim should pursue for herself, but attacks on the community.¹⁶

To illustrate this thesis, they take the case of a racially motivated attack on an individual. Here the immediate victim is clearly the person who is injured in the attack. But, as Marshall and Duff point out, others sharing the victim's racial background may well feel that the attack was a wrong done to *them* as well as a wrong done to the particular victim. They associate and identify themselves

¹⁵ Of course, as a psychological phenomenon this is not always true: what characterizes phobias is the irrational basis (or degree) of the aversion. But I take it that there *are* good reasons for being fearful of (some) crimes.

¹⁶ S.E. Marshall and R.A. Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, at 20–1. In his later work, Duff's position seems somewhat different: (a) that the wrong is shared by the community because it is a wrong against the victim *as* a member of the community (*Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001) at 60–4; and (b) that the proposal is not meant to provide a criterion for which wrongs are public ones, but is simply saying that those wrongs that are apt for public condemnation are public wrongs: s 6, 'Theories of Criminal Law', *The Stanford Encyclopedia of Philosophy* (Winter 2002 Edition), E.N. Zalta (ed.), <http://plato.stanford.edu/archives/win2002/entries/criminal-law/>.

with the particular victim, and view the attack on the victim as an attack on the group as a whole. The same could be said of a sexual assault: those of the victim's gender may feel the attack as one on them, as they identify with the victim, and are associated with the victim through shared values and mutual concerns.¹⁷ More generally, crimes may be seen as those wrongs to individual citizens which are shared by the whole community 'insofar as the individual goods which are attacked are goods in terms of which the community identifies and understands itself'.¹⁸

But this proposal faces a number of difficulties. To begin with, the most convincing illustrations of the proposal—the cases of racial and sexual attacks—are not representative of crimes. An individual who belongs to the same racial group (or any racial minority) or the same gender can identify with the victim for the very good reason that what motivated the attack was a characteristic which that individual shares with the victim and singles them out from the community as a whole. The individual rightly perceives the attack as *directed* against the victim *because* of some characteristic which the individual shares, and as expressing a violent hostility towards the group to whom the victim and individual both belong. On the other hand, crimes such as murder and theft are rarely motivated by hostility to the living or the property-owning. By and large the criminal shares these characteristics with the victim, and the rest of the community does not perceive the attack on the victim as an attack against the community as a whole. It is not a crime because *we* (or our values) have been attacked, but because the *victim* has been attacked.

On the other hand, to say that some wrongs violate the values in terms of which the community identifies and understands itself seems to be too strong. It claims that the values attacked by crime are *constitutive* of the community's identity, in the sense of values in terms of which people understand themselves and identify with others. But it is unclear that the values protected by the criminal law are constitutive of the community's identity, except in the weak sense that they are the *set* of values that may be distinctive to this community, and distinguish it from other communities. Certainly, it does not seem that members of contemporary communities *identify* with others because, for example, they all value life, or think private property is important to a good life. It is generally through a range of shared activities that are deeply expressive that people come to identify with others (such as religious practice), and it is wrongs against those activities that may be shared. It is more natural to say that the values protected by the criminal law are just important values—values that matter in human life. Of course, different communities will differ on the relative importance or significance of some values, due to the plurality of some

¹⁷ Marshall and Duff, above n 16, at 19.

¹⁸ *Ibid* at 20.

socially dependent values and sheer moral fallibility. They will be the values of that community, in the sense of the things which that community values highly, but not necessarily the values in terms of which members of the community identify themselves with each other.¹⁹

An alternative view of crimes as public wrongs does not see them as violations of values in which the community shares. Instead, it sees them as violations of the law's authority.²⁰ Consider the central case of intentional crimes, i.e. those where the defendant deliberately engages in some prohibited conduct. What marks out these acts from other wrongs is the fact that the defendant acts in *defiance* of the law. The defendant knows that what they are doing is prohibited by the law of the community, but they choose to go ahead in any case, rejecting the claim of the law on them. The seriousness of the wrong involved in criminal behaviour lies in this: that the criminal is unwilling to submit to the authority of the law, and hence unwilling to submit to the authority of the community whose law it is. This explains a number of features of criminal law. Criminal proceedings are normally in the hands of the state because it is the will of the community (as embodied in law) that is being defied. The defendant places their own will above that of the community, and punishment is the response necessary to vindicate the authority of the community.

To say that the defendant defies the law is not of course to make the tautological point that they violate the prohibitions laid down in criminal law. What is defied by the criminal's intentionally unlawful acts are the *non-criminal* parts of the law. This helps to explain why core forms of criminality have underlying civil wrongs—wrongful death underlying murder, assault underlying offences against the person, and conversion underlying the law of theft. Civil law is the embodiment of the community's collective decisions about the organization of social life which both facilitates individual and collective action and sets boundaries to those actions. The community is the necessary foundation of human flourishing, and this foundation is endangered by those who are unwilling to submit to its collective decisions. Criminal law is the way of vindicating the law's authority and thereby protecting the law's ability to serve the community.

One of the strengths of this account is in identifying a single value that all crimes violate, i.e. the authority of the law. The weaknesses in this account, however, lie precisely in this juridical focus. Normally we think that there are good reasons for criminalizing some wrongs. We think that there are some

¹⁹ Nor are the values constitutive in the sense that they are regarded as important *because* they make the community the type of community that it is.

²⁰ See for some arguments along these lines P. Nicholson, 'Hegel on Crime' (1982) 3 *History of Political Thought* 103 and J. Hampton, 'Mens rea' in E.F. Paul et al. (eds), *Crime, Culpability, and Remedy* (Oxford: Basil Blackwell, 1990). Although there are Hegelian roots to this view, Hegel's own account of crime is different: see G.W.F. Hegel, *Elements of the Philosophy of Right* [A.W. Wood (ed.), Cambridge: Cambridge University Press, 1991], ss 90–104, 218–229, and for a modern interpretation of the common law in Hegelian terms: Brudner, above n 4, Ch. 5.

wrongs which it is appropriate for the community to punish through its laws. But we do not normally think about this in terms of the deliberate violation of civil law or other legal norms. We do not think, for example, that what makes murder appropriate for criminalization is that it involves the deliberate violation of *legal* norms protecting life. It is not in terms of the violation of *the law* that we approach the question of criminalization. Instead, the arguments in favour of criminalization start from the same types of premises that arguments in favour of civil liability are based upon. Indeed, instead of civil legal norms being fundamental to criminal wrongdoing, their role in the case of many central crimes seems to be marginal or redundant. Fault-based crimes are first and foremost moral wrongs, and their wrongfulness turns primarily (if not exclusively) on their violation of (legally independent) moral norms, not legal norms. What makes them appropriate for this type of legal response is not that they involve the knowing defiance of the law, but that they involve the deliberate violation of moral rights and interests, or other moral values. Hence, the traditional association of ordinary crimes with wrongs *mala in se*, i.e. those that are wrong apart from the law.²¹

An equally serious objection to the defiance view of crime is that it entails that *all* deliberate norm-violations should be criminalized. Whenever someone knowingly breaks the law their acts should constitute a crime, because it defies the will of the community as embodied in the law. Yet, there are many areas of intentional wrongdoing, such as trespass and breach of contract, which do not fit this picture. There is no general doctrine that knowingly to breach a legal norm is to commit a crime. Why is this? Could it be argued that the law is simply deficient in this respect? It seems not: what lies behind the idea that trespass, breach of contract and many other intentional unlawful acts should not be criminalized is the view that these wrongs are not sufficiently wrongful to warrant such a step. These intentional wrongs are unlike personal injury and property damage, where intention is sufficient.

Could it be said, however, that these cases simply show that the scope of the criminal law is limited? Could we invoke something along the lines of the harm principle to account for the *limits* of the criminal law, as opposed to its underlying rationale? Might we say that it is only the defiance of *some* laws which merits criminal sanction, not the defiance of *any* law? This would be to locate the problem in the wrong place, however. The weakness of the defiance of law approach lies not so much in its over-extensiveness, but in its emphasis on intentional wrongdoing. Breach of contract, for example, *can* ground a criminal sanction where it is dishonest or fraudulent. So it is not that the type of interest involved in contract law is beyond the criminal law, but

²¹ Note T. Honoré 'Real Laws' in his *Making Law Bind* (Oxford: Oxford University Press, 1987), at 76–7: typical criminal statutes do not prohibit murder, theft, etc., but simply lay down the punishment for their commission, and sometimes provide an authoritative definition of their elements. The underlying assumption seems to be that it is unnecessary to state that these actions are wrong.

that intentional wrongdoing is not always sufficient for a criminal response. In addition, any attempt to limit the reach of the criminal law in terms of the values involved will be problematic for the defiance view because it suggests that defying the law is not the core of criminality. If there are certain values which limit the scope of criminal law, why not locate the gist of criminality in the deliberate violation of these values, rather than in the defiance of the law itself?

The preceding accounts of crimes as public wrongs share a common assumption: that crimes are public wrongs in the sense that they are wrongs *to* the public, whether because they generate fear or social volatility, or because they violate values which the community shares, or because they defy the law itself. The intuitive idea is that unlike private wrongs, where the only victim is an individual, the victim of a public wrong is (solely or additionally) the community. But to view crime in this way is in fact quite unusual. It is more normal to think of criminal law as being focused on the defendant rather than the victim. It is not *who* the victim was that matters, but rather the *type* of wrong committed by the defendant. The victim (where there is one) is relevant to what wrong has been committed, but it is the type of wrong committed by defendants that is crucial to their criminal liability.²²

Accounts of crimes as ‘public’ wrongs place considerable emphasis on the fact that criminal proceedings are typically initiated by the community and are under its control: the individual victim of a crime cannot discontinue or compromise a claim against the wrongdoer—only the community can do that. Thus, it seems that criminal wrongs belong to the community in a way analogous to the way that civil wrongs belong to the individual victim. In the case of crime, the community has an interest in the action in a way that it does not in ‘private’ law, which is a matter purely for individuals. But one cannot assimilate the position of the community over crime to the private law position of a victim over a civil wrong. One point of private law is to promote the autonomy of individuals by giving them the choice whether to pursue an action or not, i.e. to decide for themselves what is in their best interests. But there is no corresponding value in promoting this sort of autonomy in the case of the community: the value of its prosecutorial decisions lies in faithfully reflecting the public interest.²³ It is not the community’s wrong, then, in the sense that it *belongs* to the community, thereby giving it a wide discretion whether to pursue the action, but in the sense that the community is charged with determining whether a proceeding is in the public interest.²⁴

²² Of course, the victim (where there is one) also has a special interest in the defendant being held to account for their wrongdoing, and will have a grievance if (for inappropriate reasons) this fails to occur.

²³ See, for example, the Code for Crown Prosecutors (England and Wales), s 6.

²⁴ In the case of private prosecutions in England and Wales, the community exercises a supervisory jurisdiction through the power to take over and discontinue a prosecution that is not in the public interest: Prosecution of Offences Act 1985, s 6(2). Permitting private prosecutions may be justified as a fail-safe device against the fallibility of prosecuting bodies, so long as these prosecutions are subject to such a supervisory jurisdiction.

5. *Crime and Punishment*

There is a better way to understand crimes as public wrongs, viz., not as wrongs *to* the public but as wrongs that the community is *responsible* for punishing, i.e. whose prosecution is appropriately a case for the community rather than the individual victim. It is not that the community is the victim, but that the community is the appropriate body to bring proceedings and impose punishment. This raises a new question—*which wrongs are the state responsible for punishing?* There are, in fact, two questions here: *which wrongs merit punishment, and which merit state punishment.* To get to the bottom of this, it is best to deal with them in that order.

The first question is which wrongs merit punishment. A number of preliminary points are relatively straightforward. Punishment, I take it, is the deliberate imposition of a burdensome liability on an individual for some blameworthy conduct in order to censure that conduct.²⁵ Punishment, then, presupposes blameworthy conduct. What makes conduct blameworthy? There are a number of features. The first is that the conduct in question is wrongful. The fundamental form of wrongdoing is the violation of duties. There are other derivative forms of wrongdoing from this, such as attempts to commit wrongs, agreements to do so, assistance in their violation, and so on. The second feature is that the wrongdoer is a responsible agent who acted without either justification or excuse. So the wrongdoer is not insane, nor an infant, and was not acting reasonably in self-defence nor acting under a reasonable mistake.²⁶ The fact that someone is blameworthy, however, still falls short of showing that they deserve to be punished. It establishes only that they are liable to be blamed or criticized for what they have done, and that there are grounds for such censure. Indeed, it does not even show that they should be censured, all things considered. There will be cases, for example, of minor wrongdoing where the wrongdoer is so remorseful that criticism is unnecessary, or they may be so conscious of everyone's knowledge that blame would be out of place.

Punishment goes beyond criticism and blame. Not every act of wrongdoing merits punishment—many wrongs are just not serious enough. But what makes some wrongdoing 'serious enough' to call for punishment? The fundamental answer to this is that it is the type of blameworthy conduct that manifests a *disrespect* for the interest or value that has been violated. What does this mean? To respect a value is to treat it in the way appropriate to its nature. Some values can be promoted, whereas others can only be upheld (or honoured), and others still can be both promoted and upheld. Whatever is

²⁵ On the connections between censure and punishment, see e.g. R.A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986), Ch. 2 and A. von Hirsch, *Censure and Sanctions* (Oxford: Oxford University Press, 1993), especially Ch. 2.

²⁶ One important type of excuse arises where the wrongdoer was unaware of the existence of the *duty* or the risk of its violation, and it is not the case that their ignorance was itself blameworthy.

the case, a failure to respect a value goes beyond the mere failure to be guided by it, i.e. it goes beyond simply violating the value. What marks out the failure to be guided as particularly reprehensible, and thus eligible for punishment, is an *unwillingness* to be guided by the value in the appropriate way. This is most obvious in the case of intentional wrongs, where the wrongdoer deliberately violates some value. But it is also true of cases where the wrongdoer knows that they are violating some value, and those where the wrongdoer is aware that they are taking an unjustified risk of doing so.

Now to speak of punishable wrongs as those that ‘manifest’ a disrespect for some value might be thought to imply that it is the *character* of the offender that is the key here, i.e. that the wrong demonstrates or provides evidence that the offender possesses a certain character trait or vice that it is appropriate to condemn.²⁷ But this would be a mistake. Character is of course relevant to punishment, inasmuch as it bears on the appropriate type and quantum of punishment for some wrong. But it is not what gives a wrong the quality that makes it appropriate for punishment. Someone with a particular character (e.g. the jealous, avaricious or dishonest) may be more inclined to commit certain types of wrongs, but someone with a good character may equally well commit a wrong that merits punishment. What renders the wrong punishable is that the wrongdoer was unwilling to be appropriately guided by the value on *this* occasion. This is the kernel of truth in the defiance account of crime,²⁸ except that the wrongdoer acts in defiance of what is valuable, not (just) the law.

It should also be emphasized that saying that some wrongs manifest a ‘disrespect’ for some value is to say that in committing the wrong the wrongdoer was unwilling to be appropriately guided by the value. Disrespect towards values can be manifested in many other ways, such as holding them in contempt, or regarding them as open to ridicule, or refusing to give them recognition. Such behaviour is wrongful, but does not, in itself, provide grounds for punishment. It is the element of demonstrated unwillingness to be guided by the value in acting that is central to understanding those wrongs liable to punishment, not these other deplorable manifestations of lack of respect. (Again, these attitudes may be relevant to the type and amount of punishment that a wrongdoer deserves, but they are not the key to punishable wrongs.)

So if intentional wrongdoing is a paradigm of the unwillingness to be guided by a value, does this mean that the grounds for punishment are made out *whenever* a wrongdoer purposely violates a duty? No. It is important to

²⁷ See e.g. M. Bayles’ proposal for a character view of culpability in ‘Character, Purpose, and Criminal Responsibility’ (1982) 1 *Law and Philosophy* 5. For a critique of tying culpability to vice see R. A. Duff, ‘Virtue, Vice and Criminal Liability’ (2002) 6 *Buffalo Criminal Law Review* 147.

²⁸ See above nn 11–14.

distinguish between two different things: the violation of a duty and disrespect for a value. Duties are grounded in values—they serve to uphold and/or promote the value—but which breaches of duty manifest a disrespect for the underlying value is highly context-dependent. It is this that helps to explain the wide variety of *mens rea* terms that the law calls upon for different crimes. Take the case of crimes involving the appropriation of others' property. Clearly to do so deliberately without the owner's consent does generally manifest a disrespect for others' property. But the common law has tended to gloss this situation by adding a requirement of acting 'fraudulently' (or 'dishonestly'), to better isolate the cases of disrespect. Not every deliberate violation manifests such an attitude. In some cases, the violation may simply be technical, for example, letting a young child eat something taken from the shelf while still shopping, even if the store has signs forbidding the consumption of goods before purchase. Property norms, in particular, have a wide margin of artificiality—they are specifications of vaguely defined interests—and their deliberate violation does not always amount to a disrespect for interests in property.²⁹ The technical legal definition of what violates the owner's rights may not accord with commonly accepted practices, and thus some violations may not evince any disrespect. In some cases, then, we need to have regard to the wrongdoer's motives (in the sense of their reasons for committing the wrong) in order to determine whether it manifests a disrespect for some interest or value, and intention is not sufficient to establish this.³⁰

On the other hand, intentionally doing physical damage to another's property without their consent normally does demonstrate a disrespect for the owner's interests. The wrongdoer is treating the property as theirs to deal with as they wish, and the disrespect is not lessened even if the wrongdoer is willing to pay for any damage. The wrongdoer manifests a disrespect for the owner's right to determine how the property is used, including the choice whether to sell it to the wrongdoer to be damaged. Even here, however, there is a tendency for the law to incorporate an exonerating condition broader than general defences (e.g. 'without lawful excuse'³¹) to allow for the fact that there are circumstances in which the defendant, though violating the legally defined duty not to damage property, is not manifesting such disrespect.

Turning now to the broader implications of the disrespect view, does it vindicate a widespread claim that punishment may only be based on the

²⁹ On specification, see Finnis, *Natural Law and Natural Rights* (Oxford:Oxford University Press, 1980), at 284–6.

³⁰ Alexander has argued that the central forms of *mens rea* display a unitary vice, viz. insufficient concern for the interests of others, and that all involve imposing an unjustified risk of harm on others: 'Insufficient concern: A Unified Conception of Criminal Culpability' (2000) 88 *California Law Review* 931. The account in the text turns this central claim inside out—the disrespect necessary for punishment can be manifested in a variety of ways, and no form of *mens rea* necessarily displays it in every context. Victor Tadros has also argued that criminal responsibility depends upon actions that manifest 'moral vices', i.e. actions that display an insufficient concern for the interests of others, *Criminal Responsibility* (Oxford: Oxford University Press, 2005), Ch. 3.

³¹ Section 1(1) Criminal Damage Act 1971 (Eng.).

awareness of wrongdoing, and thus that negligence cannot ground punishment?³² No. A standard objection to negligence liability is that the wrongdoer who does not foresee a risk of harm and take sufficient steps to avoid it—when they could and should have done so—does not realize at the time of the wrongdoing that they are violating the standard, i.e. that they are doing anything wrong.³³ It would be unfair to punish them for their oversight. But it is not the lack of awareness per se that makes negligence objectionable as a basis for liability. The problem lies instead in the way that negligence is characterized as failing to do what one (could and) should have done.³⁴ This overlooks the question of *why* the wrongdoer made this omission. The failure may be due to a wide range of reasons, such as miscalculation, or momentary inattentiveness or clumsiness, and these shortcomings do not necessarily show a disrespect for the values damaged by the negligence.

On the other hand, that negligence does not *necessarily* show a disrespect for the value damaged does not mean that it *cannot* do so. As has often been pointed out, the failure to attend to a risk may be due to an indifference to the value put at risk, and this *is* a form of disrespect.³⁵ The problem with negligence, then, is not that it dispenses with the need for advertence to the wrongdoing, but its characterization in terms of whether the wrongdoer could and should have foreseen the risk of their actions and taken adequate precautions. *Why* the inadvertence occurred is not considered, and thus cases which do not manifest a disrespect are included, such as those where the wrongdoer was merely tired or distracted from seeing the risk. The characterization of negligence in terms of capacity and opportunity (and the corresponding characterization for inadvertent recklessness³⁶) does not draw the right distinction between those failures to see a risk or take adequate precautions against them that are due to mere error or other shortcomings, and those that are due to a failure to respect the value.³⁷

³² See e.g. Alexander, above n 30, at 949–53 and M. Moore ‘Choice, Character, and Excuse’ in E.F. Paul et al. (eds) *Crime, Culpability, and Remedy* (Oxford: Basil Blackwell, 1990) cf. Moore’s later views in *Placing Blame* (Oxford: Oxford University Press, 1997) Ch. 9 and 588–92.

³³ There is a second important objection to negligence based on the use of an *objective* standard of care that some people are incapable of meeting. But negligence can be made relative to the capacities of the wrongdoer, and it is this case that is the most relevant.

³⁴ See e.g. H.L.A. Hart’s defence of negligence as culpable where the defendant fails to do what the reasonable person would have done despite having the mental and physical capacities at the time to do so—‘Negligence, Mens Rea, and Criminal Responsibility’ *Punishment and Responsibility* (Oxford: Oxford University Press, 1968)—and A.P. Simester’s alternative in terms of whether the defendant failed to do what they could reasonably have done given their mental and physical capacities: ‘Can Negligence be Culpable?’ in J. Horder (ed.), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford: Oxford University Press, 2000).

³⁵ See, in particular, R.A. Duff’s work on ‘practical indifference’ in recklessness, e.g. *Intention, Agency and Criminal Liability* (Oxford: Basil Blackwell, 1990), Ch. 7. See also J. Horder, ‘Gross Negligence and Criminal Culpability’ (1997) 47 *University of Toronto Law Journal* 495, at 500–9.

³⁶ See e.g. clause 2 of the draft bill ‘Involuntary Manslaughter’ in *Legislating the Criminal Code: Involuntary Manslaughter* (Law Commission Report 237, 1996).

³⁷ In the context of homicide, see the interesting discussion of reckless indifference in *A New Homicide Act for England and Wales?* (Law Commission Consultation Paper 177, 2005), §§3.149–3.170. On recklessness, see also V. Tadros ‘Recklessness and the Duty to Take Care’ in S. Shute and A.P. Simester (eds) *Criminal Law Theory: Doctrines of the General Part* (Oxford: Oxford University Press, 2002).

These considerations also bear on the way that recklessness is often understood in the law. Legally speaking, the taking of a risk is only reckless when it was *unjustified* to act in that way. Many jurisdictions regard the question of whether an act was reckless as turning on whether the risk of harm was objectively unjustified, regardless of whether the defendant thought it so.³⁸ But the defendant only manifests a disrespect if she acted despite knowing that the risk was unjustifiable, or being uncertain whether it was unjustified and not taking further steps to allay those doubts, or failing to consider whether the risk was unjustifiable because of a lack of respect for the value in question.

That a wrong manifests an attitude of disrespect for some value, then, marks out the wrong as punishable. But, as in the case of blame, it only marks out the wrongdoer as *liable* for punishment and provides a reason in favour of doing so. The strength of the reason in favour of punishment will depend upon the overall gravity of the wrong, which depends in turn on the importance of the interest or value at stake, the degree of violation (or risk of violation) that the wrong created, and the kind of disrespect shown by the wrongdoer. Punishment is a form of censure that goes beyond simply bringing the wrongdoing to the attention of the offender and confronting them with it. But there is an enormous range of punishments, from public condemnation to forfeiture of life. Hence the 'seriousness' of the wrongdoing (the aspect that renders it liable to punishment) is merely one dimension of the ultimate 'gravity' of the wrong (how deserving of punishment it is). And even in the case of grave wrongs, there is always the question of whether the wrongdoer should be punished all things considered, since there may be extenuating circumstances militating against punishment.

What of the second issue raised earlier? Which wrongs not only merit punishment, but merit punishment by the *state*? As was noted above, crimes are those wrongs that the *state* is responsible for punishing. Punishment is obviously not a practice confined to the state. It takes place throughout society: in the family, in schools, in workplaces, in unions, in sporting associations, in professions and in public bodies, among others. What is characteristic of the other sites of punishment in social life is that they occur in social institutions which are responsible for their members and (some of) their members' actions. The institution is responsible for the wrongdoing of its members when they take place in the course of the institution's activities or when they call into question the desirability of the continued membership of the wrongdoer. The general community differs from other social institutions in a number of ways. First of all, it is potentially responsible for all of the activities that take place within the community, not simply a limited range of them. Second, because it has control and authority over a physical territory, it is

³⁸ See, e.g. *R v G* [2003] UKHL 50, [41].

responsible for whatever happens within that territory, whether to members or non-members (even when both the wronged and the wrongdoer are non-members).³⁹ Third, it generally does not have the option of expelling a wrongdoer from the polity, but must have some other type of response.

Which wrongs then fall within the scope of the state's authority? In principle, any serious violation of a value that the state is responsible for supporting is a candidate for criminal punishment. The broader the range of values and activities that are properly the responsibility of the state, the broader the scope for the criminal law. Thus, if all values are supportable by public action then all forms of serious immorality are potentially within the criminal law, whereas if a more limited range of values are the responsibility of the state the criminal law will be similarly circumscribed.⁴⁰ Of course, it might be wondered whether state punishment really does extend (even potentially) to *every* value it may support.⁴¹ Surely, for instance, there is a distinction between those values that a state is *required* to support, and those that it is merely at liberty to support. If the state is required to support some value, then it would be wrong to fail to do so, whereas it is not wrong to fail to support a value that it is simply at liberty to promote. Hence, it might be thought, only serious violations of mandatory values (those the state is required to support) could ground punishment. The state is not *responsible* for supporting merely permissible values, so how can it be responsible for punishing their violation? Appealing as this line of argument might seem, the conclusion does not follow from its premisses. If the state is permitted to support a value, then there is nothing in the argument to establish that it may not do so by punishing serious violations of that value. What is needed is not an argument that some values are mandatory and others merely permissive, but that some values (possibly including mandatory ones) may not be supported by *coercive* means, whereas others may.

There are, of course, many possibilities along these lines.⁴² On one orthodox view of rights, if one has a right to do something then that may include the

³⁹ In addition, it has a residual authority over those who commit wrongs *against* its members, even when this occurs outside its territory, if there is no more appropriate body willing to take such action. (There is also a further question of the existence of 'universal jurisdiction' over certain crimes like piracy and genocide, even when it takes place outside the state's territory and none of its members are involved as either victims or wrongdoers. The better view is probably that the world community has jurisdiction over these wrongs, because they merit condemnation in the name of the world community, but that for practical reasons this jurisdiction is delegated to national states in order to ensure that these crimes are punished.)

⁴⁰ The scope of the state's proper role in community life is, of course, a controversial question in political philosophy that this article does not attempt to address.

⁴¹ A. Duff, 'Theories of Criminal Law' *The Stanford Encyclopedia of Philosophy* (Winter 2002 edn), E.N. Zalta (ed.), <http://plato.stanford.edu/archives/win2002/entries/criminal-law/> s 6.

⁴² Such as the 'harm principle', i.e. the principle that only harms (or perhaps harms to others) should be coercively restrained. For some sceptical evaluations of this limiting role of the harm principle, see J. Stanton-Ife, 'The Limits of Law' *The Stanford Encyclopedia of Philosophy* (Spring 2006 edn), E.N. Zalta (ed.), <http://plato.stanford.edu/archives/spr2006/entries/law-limits/> and L. Alexander, 'The Philosophy of Criminal Law' in J. Coleman and S. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Legal Philosophy* (Oxford: Oxford University Press, 2002), at 851–64.

right to do it even when it would be wrong to do so.⁴³ A classic illustration is freedom of speech, which permits a speaker to say many things that they should not say (because they are untrue, or hurtful, or offensive). So there may be cases where a wrong is not punishable because it falls within the scope of some right.⁴⁴ Another possible illustration concerns certain personal values which are not the business of those who are strangers to the parties involved. Part of the value of some types of relationships is that the parties place trust in each other and render themselves vulnerable to being let down by each other. It is only the parties and those who know them who have any standing to criticize such behaviour because it is so intimate, and it would be an intrusion for others to involve themselves.

There is, however, an intrinsic limitation on state punishment quite apart from any of these. It is not enough to say that a wrong is a *candidate* for such punishment, i.e. that it lies within the scope of the state's responsibility—it must also be the case that it is the type of wrong that *ought* to be punished by the state. The only wrongs that should be criminalized are those that are reasonably grave, i.e. that involve the violation of an important value. Why is this? State punishment, by its very nature, is imposed in the name of the whole community, not merely in the name of some other institution of civil society. The condemnatory force of that judgment is correspondingly greater, and given that expressive power the wrong must be sufficiently grave to warrant such condemnation. Regardless of what other consequences follow, to be found to have committed a crime involves being convicted by a court, i.e. being adjudged to have been *guilty* of committing a crime. Conviction is an authoritative judgment on behalf of the community that the defendant has committed such a serious violation of some value that it calls for punishment *by* the community. The defendant is being held to account in the face of the whole community, and consequently this must not be a disproportionate response to the gravity of the wrongdoing. The force of such public conviction means that in the case of many wrongs it would be manifestly excessive to impose it, because it would be too severe or too blunt an instrument of censure. So punishment by the state must be necessary to bring home to the perpetrator

⁴³ J. Waldron, 'A Right to do Wrong' in his *Liberal Rights* (Cambridge: Cambridge University Press, 1993).

⁴⁴ If there was a general right to liberty this would have a more systematic effect on criminalization, e.g. by creating a threshold against wrongs being punished. For a defence of such a right see M. Moore, *Placing Blame*, Ch. 18. See also, D. Husak's argument that there is a right not to be *punished* in 'The Criminal Law as Last Resort' (2004) 24 *Oxford Journal of Legal Studies* 207, at 232–5. Among non-rights-based arguments, the most prominent is one advanced by Raz over the value of personal autonomy. According to Raz all coercion infringes personal autonomy, and the only justification for such infringement by the state is the promotion of autonomy (the agent's or others') itself: *The Morality of Freedom* (Oxford: Oxford University Press, 1986), at 412–20. But this only follows if there are no situations in which it can be more important to secure conformity to a value other than autonomy than to avoid the use of coercion. A more limited general presumption against punishment could, however, be based on his argument, viz., that wrongs may only be punished where this is worth the invasion of personal autonomy. Depending upon the importance of personal autonomy, this could set quite a high threshold.

and the wider community the gravity of the wrongdoing. By its very nature it is inappropriate for dealing with wrongs that are not grave enough to merit such public condemnation.⁴⁵

Of course, that a wrong is grave enough for public condemnation is not enough to show that it should be criminalized. There is always the question of whether criminalization will do more harm than good.⁴⁶ For instance, the wrong must be one that justifies the considerable practical (and personal) costs of mobilizing the official structures of law-enforcement. Is it worthwhile to devote scarce resources and to burden individuals for wrongs of this kind, or would it simply be wasteful to do so? It must also be the sort of wrong that the rather insensitive bureaucratic mechanisms of the law can hope to assess accurately, rather than one that turns on fine points of who had what grievance when, or requires the type of evidence that is extremely difficult to obtain. Finally, given the inherent fallibility of legal processes, the vindication of the value through state punishment must be worth the price of the inevitable wrongful convictions that will flow from criminalization. All of these considerations point to a fair threshold of gravity for criminalization.

These practical problems are the ones that raise the strongest doubts about negligence and inadvertent recklessness as a general basis for criminal liability.⁴⁷ As explained above, advertence is not essential to committing a wrong serious enough to merit punishment. But in cases of inadvertence, what is key is *why* the defendant failed to see the risk or take proper precautions against it when they could and should have done so. In many cases, this is a very fine point, and runs the risk of defendants being convicted by a jury because of their unsavoury character traits rather than their reasons for committing the particular wrong in question.⁴⁸ There must be real doubts about the ability of the legal process to determine such sensitive points reliably, and whether it is generally worth the risk of wrongful convictions to ask it to try to do so.⁴⁹

For a liberal society the types of wrongs that will be grave enough for punishment will tend to reflect the great importance attached to individual autonomy. It is those wrongs that infringe physical inviolability, or damage individuals' capacities to engage in valuable activities, or the activities themselves that will be most prominent,⁵⁰ as will those wrongs that damage

⁴⁵ Likewise, it would be inadequate for some wrongs to be condemned by some body or person other than the community as a whole.

⁴⁶ A useful summary of a wider range of these problems can be found in M. Moore, *Placing Blame* above n 32 at 663–5. And even if a crime is created, there is still the question in each case of whether charges should be brought.

⁴⁷ There may be special circumstances, however, where these concerns may be allayed.

⁴⁸ It is also difficult fairly to present a jury with the idea of a personalized standard of negligence.

⁴⁹ There are other ways in which moral considerations are altered in being translated into legal doctrine. The most obvious in the case of crime is the lack of a general defence of mistake of law. And nothing said here touches on the question of the appropriate standards and burdens of proof for different types of crime.

⁵⁰ For an account of personal autonomy along these lines see Raz, above n 44, Ch. 14.

the public institutions and practices underpinning such activities. It is the type of conduct that tends to undermine the possibility of the flourishing of individual life in community that will require and be worth the type of censure of the criminal law.

The key to the nature of crime, then, lies in understanding that they are public wrongs not because they are wrongs *to* the public, but because they are wrongs that the public is responsible for punishing. There is a public interest in crimes not because the public's interests are necessarily affected, but because the public is the appropriate body to bring proceedings and punish them. Crimes are a sub-set of the wrongs that generally merit punishment. That larger class is composed of those blameworthy wrongs that manifest a disrespect for the value violated, because they evince an unwillingness to be guided appropriately by the value at the time the wrongdoer acted. The state, however, is only concerned with the graver cases of such wrongdoing, because of the condemnatory force of conviction in the name of the community as a whole.

6. *The Relationship Between Crimes and Strict Liability Offences*

If crime involves seriously blameworthy action meriting punishment, does this shed any light on the relationship between crime (i.e. fault-based crime) and strict liability offences, i.e. those that impose liability whether or not the offence is seriously blameworthy? Yes and no. The existing use of strict liability in the common law is notoriously *ad hoc*, ranging from minor regulatory cases such as parking tickets to very serious cases of wrongdoing such as importation of drugs and statutory rape.⁵¹ The rationales for the use of strict liability are generally pragmatic, i.e. that in the particular circumstances of this type of offence considerations of cost-effectiveness, administrative convenience, or difficulties of proof require dispensing with any requirement of fault.⁵² An account of crime does not throw any light on the pragmatic resort to strict liability. On the other hand, the account of crime in terms of seriously blameworthy conduct does point the way to understanding the possible place of strict liability in a system of laws.

This role for strict liability can best be understood by first considering the relationship between crimes on the one hand and civil and public law on the other. The core of the law is found in civil and public law, which define the interests and values the law protects and promotes, and the institutions that the

⁵¹ See, for instance, 'rape of a child under 13' (s 5 Sexual Offences Act 2003, England and Wales) which does not require any *mens rea* as to the victim's age (nor lack of consent for the *actus reus*).

⁵² See e.g. A.P. Simester, 'Is Strict Liability Always Wrong?' in A.P. Simester (ed.), *Appraising Strict Liability* (Oxford: Oxford University Press, 2005), especially at 25–33. For further discussions of strict liability see the other essays in the *Appraising Strict Liability* volume.

law creates and supports for the good of the community. The difference between crime and civil liability lies in the different ways in which they promote the interests at stake. Civil law protects private interests by determining the circumstances in which one party will be liable to another for the infringement of those interests. The wrongdoer must make good any loss or harm done to the other party. Many crimes, especially traditional crimes against the person and property, have a civil law analogue. The same interest underwrites both the civil claim and the criminal wrong. The criminal law serves those interests and values in two ways that differ from the civil law. It censures conduct that manifests a disrespect for the interests, whether or not the interests are ultimately violated (through endangerment, attempt, incitement, conspiracy), and the degree of censure is not simply correlated to the extent of the violation (even in cases where there is a violation), i.e. it does not depend simply on the damage done. Similarly, the criminal law protects public interests by serving to maintain the integrity and viability of public institutions and practices.

But this still leaves a gap. Private and public interests are protected when they are actually violated, and both are protected where there is seriously blameworthy conduct that is directed towards their violation (or makes it more likely). Conduct that simply increases the risk of such violation without being seriously blameworthy, however, is not covered. It is this gap that strict liability can fill. Strict liability can reduce the risks of harms to private and public interests by regulating certain forms of conduct. They can do this by setting out schemes of conduct that have the effect of co-ordinating risk reduction or the promotion of certain goods. And they can provide for penalties in the case of breach in order to motivate compliance. Many existing strict liability offences of a regulatory nature appear to serve just this purpose.⁵³

Strict liability, then, can be a means of promoting and protecting private and public interests in ways that civil and criminal law, by their very nature, are unable to deliver. These means are *instrumentally* valuable, as they promote other interests and values.⁵⁴ And this leads to a final twist. Because these means are themselves valuable, conduct which demonstrates a disrespect for such schemes can itself merit punishment. This disrespect can be manifested in a number of ways. The persistent polluter and the serial illegal parker do so by their *course* of conduct. The tax evader and falsifier of Ministry of Transport (MOT) certificates do so in individual acts. Since crimes protect and promote private and public interests, they can extend to seriously blameworthy conduct that violates standards established by strict liability offences.⁵⁵ In a way this

⁵³ E.g. motoring offences, health and safety and food standards.

⁵⁴ Arguably some are also intrinsically valuable because they enable members of the community to *co-operate* in ways that serve the good of the community as a whole: participation in such schemes realises a form of social solidarity which is itself intrinsically valuable.

⁵⁵ It is a mistake then to think that matters dealt with by 'regulatory offences' are not apt for the criminal law: it is simply that the conduct must be shown to merit punishment.

should come as no surprise. One of the well-established schemes of social co-ordination and co-operation is the *system* of property interests that are created by the civil law. Actions that violate the interests specified by the scheme may merit criminal liability, but so too can actions that, without directly violating anyone's interests, violate the *institution* of property. Hence the long-standing offences of counterfeiting notes and coins: these do not necessarily violate any individual's interests in their holdings, but they do show a disrespect for the institution of property.

In the end then, there is a role for strict liability complementary to the civil law and crime. Civil law provides interests and values with *direct* protection, since it turns on the actual violation of the interest or value. Strict liability, in contrast, *indirectly* protects interests and values, by creating schemes designed to reduce the chances of violation, and by helping to promote certain values. Crimes protect and promote values by punishing those actions which manifest a disrespect for interests and values, whether those interests and values are private or public, and whether they are individual interests or collective schemes of co-ordination, and whether or not those actions succeed in damaging the interest or value. None of this, of course, constitutes a defence of the current use of strict liability, which goes well beyond the role outlined. Nor does it address the issues of the justifiable scope and limits of strict liability. It simply lays out the role for strict liability in a system of laws.

7. Conclusion

Crimes are the sorts of serious wrongs that merit state punishment of the wrongdoer. They are not crimes because they are wrongs *to* the public, though they can be that, nor because they harm the public, though they can do that as well. They are crimes because they are the sort of wrongs that merit punishment *by* the state. Does this amount to a form of legal moralism? It depends, of course, on what one means by 'legal moralism'. Not in the sense of supporting the punishment of violations of *conventional* morality, since it is only conduct which is genuinely morally wrongful that should be criminalized.⁵⁶ Nor in the sense of claiming that the mere immorality of some conduct provides grounds for criminalization. Many forms of wrongdoing call for forms of criticisms and censure other than punishment. Even within the class of wrongs, it is only wrongs that manifest an unwillingness to be guided by the value violated that merit punishment. Furthermore, the expressive power of state punishment at the point of conviction (let alone sentence), means that these wrongs must be *grave* before they may be criminalized.

⁵⁶ So it does not follow Devlin's approach (P. Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965), especially Ch. 1).

If this is a form of legal moralism it is a very narrow form of legal moralism.⁵⁷ And it is subject to many further restrictions. The practical limitations and fallibility of legal processes rule out certain types of wrongs and certain forms of unwillingness for criminalization. Beyond this, there are special values and rights that limit state intervention. Even on a perfectionist political morality then, let alone an anti-perfectionist one, the scope of the criminal law is very circumscribed.⁵⁸

The common law does not, of course, fully reflect this analysis. The practice of folding strict liability offences into the ambit of the criminal law diminishes the doctrinal purity of the latter and dilutes its expressive role in social life. More particularly, the failure to draw a systematic distinction between fault-based crimes and strict liability offences creates confusion over the proper basis for punishment, as it erases the important distinction between penalties and punishments.⁵⁹ The law cannot, of course, be expected to reflect every morally significant distinction in its doctrines. But the conflation of fault-based and strict liability within the criminal law stands in the way of a proper understanding of their different rationales, functions and limits.

⁵⁷ For an alternative legal moralist approach to criminal law see Moore *Placing Blame* above n 32.

⁵⁸ It is an open question whether the invocation of the harm principle would radically alter this picture, even if that principle could be successfully defended.

⁵⁹ See J. Feinberg, 'The Expressive Function of Punishment' in his *Doing and Deserving* (Princeton: Princeton University Press, 1970), especially at 95–8.