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What's Legal About Legal Moralism?

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TABLE OF CONTENTS

ABSTRACT

If legal moralism posits a normative connection between culpable wrongdoing and punishment, what should legal moralists say about cases in which responsible agents commit culpable wrongs that have not been proscribed *ex ante* by the state in which they occur? More succinctly, what is the status of the principle of legality according to legal moralists? I argue that the absence of law typically, but perhaps not always, provides a sufficient *non-desert* basis to withhold punishment from culpable wrongdoers whose punishment is deserved. I critically examine the probable implications of this way of accounting for the significance of legality.

I. LEGAL MORALISM AND DESERT

Legal moralists are often challenged to explain whether persons should ever be punished for engaging in various kinds of dubious behaviors that fall outside the core of the criminal law: acts that seem wrongful but do

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not violate the rights of others, are merely offensive, display a vicious character, and the like. How legal moralists should approach these controversies—and how they understand the scope and limits of the substantive criminal law generally—depend on several preliminary matters I will examine here. Clarifying these issues should help to decide how legal moralists might resolve some of these questions.

Any attempt to critically assess a school of thought characterized by an *ism,* such as legal moralism, encounters an immediate difficulty: we must begin by identifying what legal moralism *is.* Here, as elsewhere, this exercise is perilous. Several conceptions of legal moralism are available, and it is not even clear how to decide on the criteria by which one of the alternatives is better or worse at representing the tradition to which it purports to refer.[1] All too often, philosophers who proceed to attack a given *ism* portray it uncharitably in order to make their target more vulnerable.[2] Admittedly, a definition of *legal moralism* is largely stipulative, and legal philosophers remain free to characterize it in nearly any way they like. Still, no definition should be accepted unless it is able to explain why so many of the most thoughtful and sophisticated contemporary penal theorists are attracted to legal moralism.

Without pretending that my subsequent account definitively captures its essence or nature, I hope that both friends and foes of legal moralism recognize the two definitions I now offer as expressing a central tenet about which all or most of the many versions concur. The several characterizations of legal moralism, as I propose to understand them here, share a thesis about a connection between culpable wrongdoing and deserved punishment.[3] According to what I call the *reason* version of legal moralism, *culpable wrongdoing provides a desert-based reason to punish a responsible agent.* If the legal moralist is taken to hold that culpable wrongdoing provides a reason to deserve punishment, it is open to him to contend that something

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1. For a nice taxonomy of positions, see James Edwards, *An Instrumental Legal Moralism*, 3 OXFORD STUD. IN PHIL. OF L. __ (forthcoming 2018).

2. Any number of examples come to mind, as when legal or political philosophers define *positivism, liberalism,* or *paternalism.* I believe that critics of *retributivism* are especially prone to this tendency. *See* Douglas Husak, *Retributivism in Extremis*, 32 L. & PHIL. 3, 5–7 (2013) (illustrating an example of an opponent to retributivism framing the definition of retributivism "narrowly").

3. *See, e.g.*, STEPHEN KERSHNAR, DESERT, RETRIBUTION, AND TORTURE 41–42 (2001). Some legal moralists might protest that their view connects culpable wrongdoing to *criminalization* rather than to *punishment.* I tend to differ on two grounds. First, on my account, the connection between the criminal law and state punishment is conceptual; criminal laws are contrasted from other kinds of law inasmuch as they make offenders eligible for state punishment. Second, connecting culpable wrongdoing with criminalization rather than with punishment may conceal a contrast I want to highlight: between *desert-based* and *non-desert-based* reasons in favor of or against punishment.

other than culpable wrongdoing may also provide a reason to deserve punishment. Thus, punishment may be deserved, even when no culpable wrongdoing has occurred. Many legal moralists will contest this feature of my definition precisely because it has few implications for substantive controversies about the scope and limits of the criminal law. Thus, a second account may be needed. According to what I call the *constraint* version of legal moralism, *punishment is undeserved in the absence of a culpable wrong committed by a responsible agent.* Notice that it is compatible with the constraint version that *no one* deserves to be punished. Conformity with a constraint *against* deserved punishment does not entail that punishment ever *is* deserved. Thus, I imagine that quite a few legal moralists probably combine both the reason and the constraint version of legal moralism: *culpable wrongdoing provides a desert-based reason to punish a responsible agent, and punishment is undeserved in the absence of a culpable committed by a responsible agent.* Again, within *some* vague parameters, theorists are free to formulate and defend their own thesis and label it *legal moralism.* In what follows, I proceed as though the union of these two versions better expresses legal moralism than either one alone. For most of my subsequent purposes, however, I will employ the reason version, although it is important to remain aware that it needs to be supplemented by the constraint version to form a more complete account.

The union of these two definitions enables us to understand the myriad respects in which particular versions—or *conceptions*—of legal moralism can and do differ. I briefly mention only four of these possible differences—and return to some of them later. First, legal moralists might differ about the nature of culpability. Is negligence a mode of culpability, for example, or do persons never become blameworthy on the ground that their conduct deviates from that of a reasonable person in their situation?[4] Second, they may disagree about what punishment *is.* If punishments are necessarily imposed by the state, for example, it is hard to see how anything that is done to culpable wrongdoers by non-state actors can be any part of the punishment these persons deserve.[5] Third, they may not concur about the *strength* of the reason culpable wrongdoers deserve punishment.[6] Is this

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4.   *See* LARRY ALEXANDER & KIMBERLY KESSLER FERZAN WITH STEPHEN J. MORSE, CRIME AND CULPABILITY 69–85 (2009).

5.   *See* Douglas Husak, *Does the State Have a Monopoly to Punish Crime?*, *in* THE NEW PHILOSOPHY OF CRIMINAL LAW 97 (Chad Flanders & Zachary Hoskins eds., 2016).

6.   *See* Douglas Husak, *Why Punish the Deserving?*, *in* THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS 393, 393, 399–400 (Douglas Husak ed., 2010).

reason very weak, nearly sufficient, or somewhere in-between? Fourth, and perhaps most importantly for present purposes, they might adopt competing theories about which conduct is morally wrong. Even within non-consequentialist traditions, philosophers notoriously disagree about the number, formulation, and application of various deontological constraints.[7] Undoubtedly legal moralists can and do disagree about quite a few additional matters as well.[8] But without adopting a position on the foregoing four issues—especially the latter—no legal moralist should be confident about the topic of this symposium: how to resolve particular debates involving the scope and limits of the criminal law.

My formulation of both the reason and the constraint version is couched in terms of *desert*. Admittedly, conceptions of legal moralism need not use this controversial concept. The very *existence* of desert, especially when it is *negative*, is hotly disputed among moral and political philosophers.[9] Why, then, do I employ it here? Why not just say that legal moralists hold that *culpable wrongdoing provides a reason to punish a responsible agent, and punishment should not be imposed in the absence of a culpable wrong committed by a responsible agent*? My explanation begins by noting that reasons are of different kinds. According to my understanding of legal moralism, the kind of reason in favor of punishment that is generated by culpable wrongdoing is *desert-based*. Culpable wrongdoing does not, for example, create a consequentialist or policy reason to punish. As we will see, a central part of my project attempts to decide which reasons for and against inflictions of punishment involve desert and which do not. Thus, I try to decide which kinds of reasons to inflict or withhold punishment are available or unavailable to the legal moralist. A formulation of legal moralism that generically refers to *justified* punishments conceals a problem I believe needs to be brought into the light—the problem with which I wrestle here.

Although it is not an explicit part of my definition, I assume that many or even most legal moralists would ground their view in a principle of *retributive justice*. A reason to deserve punishment is provided by culpable wrongdoing because punishment conforms to or implements a principle

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7. Rudolf Schuessler, *Violating Strict Deontological Constraints: Excuse or Pardon?*, 9 CRIM. L. & PHIL. 587, 587–88 (2015). See the various interpretations and applications of the Kantian "means principle" in *Symposium on the Means Principle*, 10 CRIM. L. & PHIL. 741 (2016).

8. For example, how much of a theory of punishment can be derived from desert? *See* Douglas Husak, *What Do Criminals Deserve?*, *in* LEGAL MORAL AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL S. MOORE 49, 49–62 (Kimberly Kessler Ferzan & Stephen J. Morse eds., 2016).

9. *See* DEREK PARFIT, ON WHAT MATTERS 263–72 (Samuel Scheffler ed., 2011) (illustrating Kant's rejection of "compatibilism about desert"); *see also* J.L.A. Garcia, *Two Concepts of Desert*, *in* 5 LAW AND PHILOSOPHY 219, 219, 228 (Alan Mabe ed., 1986).

of retributive justice.[10] Legal moralists who derive their view from a principle of retributive justice typically proceed to relate it to a theory of *value*.[11] That is, legal moralists usually presuppose that conformity with a principle of retributive justice is *good*.[12] If conformity with this principle is indeed a good, I assume the goodness in question is *impersonal* rather than *personal*. That is, a world that conforms more closely to a principle of retributive justice contains more value than a world that deviates from it, although the good that results from this conformity need not be good *for* anyone.

I have stressed what all or most accounts share in common to highlight a very important feature I have so far neglected: the *legal* dimension of legal moralism. Notice that neither the reason nor the constraint version of legal moralism mentions the *state*. Nor does either version mention the *law*. As a result of these features of my definition, the problem on which I propose to focus is illustrated by the following scenario. Consider Peter, a responsible agent who commits a culpable wrong.[13] To be more concrete, suppose Peter forcibly sexually penetrates his wife Samantha, despite what he knows to be her unequivocal lack of consent. I assume without argument that Peter commits an act of rape, a clear instance of a culpable wrong. I also assume without argument that Peter commits a *kind* of wrong the state has a basis to criminalize. Then, as I have indicated, legal moralists should infer the existence of a desert-based reason to punish Peter. Suppose further, however, that the jurisdiction in which Peter resides recognizes a spousal rape exemption, so no statute or law proscribes his conduct *ex ante.* Many legal moralists would be quick to say that such a jurisdiction would be warranted to repeal its spousal rape exemption so that Peter's conduct could be punished in the future.[14] But my question is not about whether we have a sound basis for drafting better legislation *ex post*. Instead, I ask what the legal moralist should say about whether a desert-based reason exists to punish Peter *before* the state has repealed its spousal

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10. *See* KERSHNAR, *supra* note 3, at 97–98.
11. *See id.* at 69, 72.
12. *See id.* at 71.
13. For purposes of brevity, I delete the important requirements that the culpable wrongdoer must be a responsible agent who acts without justification or excuse. *See* Larry Alexander, *Culpability, in* THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 218, 225 (John Deigh & David Dolinko eds., 2011) (explaining justification and excuse in relation to culpability).
14. *See, e.g.*, Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 976 (2000).

rape exemption, that is, at the moment the state has not *yet* criminalized his wrongful act.[15]

I assume that many, and perhaps most, legal moralists would be inclined to answer that Peter's punishment would be *un*deserved because no law proscribes what he has done. Why would they hold this view? Since few defenders of legal moralism have explicitly commented on the kind of case I have described, it is hard to be sure. According to the definition of legal moralism I have offered, isn't Peter's conduct a reason he deserves to be punished? If so, why would they think Peter does not deserve to be punished, unless they are prepared to abandon their commitment to legal moralism? If they relate their view to the value of implementing a principle of retributive justice, why should they believe the world contains less value if Peter is punished—because his punishment is undeserved—than if he is not? What is it about their allegiance to legal moralism that allows them to answer that Peter's punishment would be undeserved?

One simple way to respond to the problem I have raised would be to amend my definition. I am sure some theorists will reject my characterization of legal moralism precisely because it makes no reference to the state or its law. Surely legal moralism, they will insist, *just is* a view about the state and its law.[16] Thus, these theorists would revise my definition to hold that culpable wrongdoing provides a reason to deserve punishment *when it violates the law of the state that has jurisdiction.* When legal moralism is amended to apply specifically to the state and its law, its adherents could say that culpable wrongdoing itself provides no desert-based reason to punish Peter. But what is the rationale for including the italicized clause in the definition? Why is this amendment not an ad hoc device designed simply to circumvent the problem on which I focus? Why should anyone think that culpable wrongdoing provides a reason to deserve punishment only when it amounts to the breach of a law enacted *ex ante?*

Most theorists, legal moralist or otherwise, would answer that they support the inclusion of the italicized clause in my definition because they accept the principle of legality. Of course, they *should* accept it. To my knowledge, no prominent theorist openly repudiates the principle of legality, which is sufficiently venerated to be enshrined in ever-useful Latin: *nulla poena sine lege*. For present purposes, I construe the principle of legality

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15. I am not the first theorist to notice that legal moralists struggle to account for the role of the state and its law in exacting retribution. *See* David Dolinko, *Some Thoughts About Retributivism*, 91 ETHICS 537, 542 (1991). Unlike Dolinko, however, I do not believe this problem provides a sound basis for rejecting retributivism.

16. *See* David O. Brink, *Retributivism and Legal Moralism*, 25 RATIO JURIS 496, 496 (2012) (stating that "[l]egal moralism is the thesis that the state can and should criminalize immorality, as such, independently of whether the immorality involves harm").

to preclude state punishment unless the conduct for which it is imposed has been proscribed by the law of the state with jurisdictional authority over the culpable wrongdoer.

Nonetheless, in what follows I will argue that the answer I have attributed to most theorists is *in*correct. In the circumstance I have described, legal moralists should not attempt to amend, qualify, or otherwise fudge the definition I have proposed. In other words, they should accept the implications of my original definition and agree that Peter's culpable wrongdoing provides a reason he deserves to be punished. I will try to defend this answer, mainly by explaining why it is not as implausible as appearances might suggest. My explanation accepts the principle of legality by conceding that the state would not be justified in punishing Peter. More importantly for present purposes, it does so by retaining my original formulation of legal moralism: *culpable wrongdoing provides a reason to deserve punishment*. Instead of accepting the invitation to construe legal moralism as a view *about* the state and its law, I understand it as a view about what might be called the *moral foundation* of the state and its law—a view that can be used to assess and to evaluate the state and its law. In other words, it is not a view that depends on what the law of the state *happens to be*, but is better construed as a view about what the law of the state *ought to be*. After all, a conception of legal moralism as foundational helps to explain why its adherents would appeal to it as the crucial premise of an argument to demand the abolition of the spousal rape exemption. No such appeal is cogent if legal moralism only applies to situations in which the law of the state *already* proscribes instances of culpable wrongdoing. I think most of its adherents *do* interpret legal moralism in this way. At least, I propose to construe legal moralism as foundational in what follows.

The key to my position is that legality is *not* a principle of desert.[17] If the state should not punish Peter when he culpably commits a moral wrong—as I agree to be the case—the basis for opposing his punishment is extraneous to his desert. Non-desert considerations, in other words, preclude the state from punishing him, even though considerations of desert provide a reason in favor of his punishment.[18] According to the version of legal moralism I

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17. *See* Dolinko, *supra* note 15, at 542.

18. *See* Paul H. Robinson, *The A.L.I.'s Proposed Distributive Principle of "Limiting Retributivism": Does It Mean in Practice Anything Other than Pure Desert?*, 7 BUFF. CRIM. L. REV. 3, 14 (2004) (discussing non-desert principles as general deterrence and incapacitation); *see also* Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIM. & JUST. 363, 393 (1997) (discussing non-desert goals as the incapacitation of high-risk offenders).

accept, Peter's culpable wrongdoing itself provides a reason he deserves to be punished, but this reason is not sufficient for state punishment when no law or statute prohibits his conduct *ex ante*. The reason Peter deserves to be punished is not outweighed by a more stringent reason provided by legality that specifies he does not deserve to be punished after all. Instead, although the more stringent reason provided by legality indeed outweighs the reason for the state to punish Peter, the former reason has nothing to do with his desert. In other words, legality provides a non-desert basis to show the state is unjustified, all things considered, in imposing the punishment it has a desert-based reason to suppose that Peter deserves.[19]

II. IMPLICATIONS OF AND WORRIES ABOUT MY POSITION

My position about Peter's case is designed to salvage legal moralism in the face of what otherwise appears to be an inconsistency or an ad hoc effort to reconcile it with the demands of the principle of legality.[20] But my vindication is problematic and comes at a price—albeit a price I believe we should probably be willing to pay. Identifying the likely implications of the position I take about legality should help us to decide whether legal moralism, as conceptualized above, is defensible. Moreover, an assessment of these implications will help to clarify how legal moralists should understand the nature and significance of desert—a concept I have said to be central to their view.

One such implication may or may not be surprising. If Peter's culpable wrongdoing provides a desert-based reason to punish him, and no competing consideration shows he does not deserve to be punished, and yet the state lacks an all-things-considered justification to punish him, it follows that desert is not all that is needed to justify state punishment. We should not construe legal moralism—or retributivism—to state that desert *suffices* to justify state punishment. The demands of legality, which I have categorized as a non-desert consideration, must be satisfied before the state would be justified, all things considered, in inflicting even those punishments that are deserved. Legal moralists who insist that desert provides an all-things-

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19. For one definition of "all-things-considered" justifications, see Mitchell N. Bernan, *Modest Retributivism*, *in* LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL S. MOORE 35, 42 (Kimberly Kessler Ferzan & Stephen J. Morse eds., 2016), defining all-things-considered justifications as an "act or practice [that] is morally permitted in light of all considerations."

20. Although my subsequent efforts focus on the school of thought of legal moralism in particular, I do not believe that difficulties connecting deserved punishment with an all-things-considered justification of punishment arise only within this tradition. The problem is more general. We might be puzzled to explain what role legality plays in *any* theory about the circumstances under which a reason has been given to suppose that punishment should be imposed.

considered justification of punishment must be pressed to provide an alternative account of why Peter should not be punished by the state when his culpable wrongdoing has not been proscribed *ex ante.*

How do I defend my conceptualization of legality as necessary for state punishment but extraneous to desert? More generally, how should we distinguish those normative considerations that we agree to bear on the all-things-considered justification of state punishment that are or are not matters of desert? Although I lack a comprehensive theory of desert, I presuppose at a minimum that desert is a *reason-giving property* of responsible agents. That is, the proposition "*A* deserves X by performing Ω" gives some actual or possible person, *S*, a reason to give X to *A*. Whatever else Ω might include, I assume culpable wrongdoing is an excellent candidate; it affects desert and thereby alters how some actual or possible person, *S*, has a reason to treat *A*. But it is hard to see how the absence of a *law* proscribing *A*'s culpable wrongdoing can affect his desert. That is, Ω does not include "culpable wrongdoing only when proscribed by law."

Why not? Here is one suggestion: The absence of a law prohibiting *A*'s conduct is totally outside of his control, and variables totally outside of one's control are hard to rationalize in terms of desert. Of course, moral and legal philosophers notoriously disagree about what is and is not under an agent's control.[21] But if the state lacks an all-things-considered justification to punish Peter, as I concede to be the case, the basis for reaching this conclusion does not seem to depend on anything that can plausibly be thought to be under his control and thus material to his desert. The legal moralist as I have portrayed her is correct to contend that desert provides a desert-based reason to punish Peter, even though the state would not be justified in punishing him, all things considered.

Perhaps resistance to this conclusion can be softened by noticing that quite a few other variables that are material to whether the state would be justified in punishing Peter are not germane to his desert. Perhaps territorial jurisdiction is the most obvious such variable.[22] If Peter is a Canadian tourist who rapes his wife in Kenya, where the spousal rape exemption continues

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    21.   *See* Paul Litton, *Responsibility Status of the Psychopath: On Moral Reasoning and Rational Self-Governance*, 39 RUTGERS L.J. 349, 352 (2008) (discussing the disagreement about what constitutes control).

    22.   For worries about how legal moralists resolve matters of jurisdiction, see R.A. Duff, *Legal Moralism and Public Wrongs*, *in* LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL S. MOORE 95, 99–100 (Kimberly Kessler Ferzan & Stephen J. Morse eds., 2016).

to exist, the state of Mexico would lack an all-things-considered justification for punishing him. But Mexico's lack of an all-things-considered justification for punishing Peter has nothing to do with his lack of desert. A desert-based reason *does* exist to punish Peter, although this reason is not available to the state of Mexico. As I construe legality, it operates similarly to jurisdiction.

I do not think my conceptualization of legal moralism requires us to deny that the reasons generated by desert are inherently *relational*. If "*A* deserves X by performing Ω," some actual or possible person, *S*, has a reason to give X to *A*. On one view, Peter's culpable wrongdoing provides a reason he deserves to be punished, even if he perpetrates spousal rape on the planet Mars. This view might be said to involve a commitment to *cosmic desert*. On a second view, however, Peter's culpable wrongdoing provides a reason he deserves to be punished only by some person or institution to which he is suitably related.[23] Each of these two views of desert has its strengths and weaknesses; I tentatively prefer the relational view but admit to uncertainty about it.

Regardless of how or whether we conceptualize the desert-claims of legal moralism as relational, the implications of my position may even be more noteworthy than I have indicated thus far. If I am correct that the *absence* of a law proscribing Peter's conduct does not alter his desert, it is equally true that the *presence* of a law proscribing his conduct is immaterial to his desert. Assume now that the spousal rape exemption has been abolished in the jurisdiction with authority over Peter. Suppose Peter* breaches a newly enacted statute prohibiting spousal rape when he again forcibly penetrates Samantha without her consent. The existence of this law obviously alters the all-things-considered justification of state punishment. But does the existence of this new law alter Peter's* desert? In other words, is the case for supposing Peter* deserves to be punished strengthened relative to the original case in which Peter's conduct was *not* prohibited by law? No basis for reaching an affirmative answer can be derived from legal moralism as I have defined it—or, indeed, from any other source of which I am aware. Just as the absence of a law proscribing Peter's conduct does not decrease his desert, the presence of a law proscribing Peter's* conduct does not increase his desert. In either scenario, the law itself is immaterial to what Peter and Peter* deserve.

If I am correct thus far, a more general question emerges: If legal moralism should be construed to hold that culpable wrongdoing *per se* provides a reason punishment is deserved, what role is left for *law* to play? Expressed differently and more bluntly, why should legal moralists who ground the rationale for punishment in considerations of desert and principles

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23. Of course, the nature of this "suitable relationship" requires explication.

of retributive justice care about the content of the law at all? When the question is posed in this way, the position I have attributed to legal moralists sounds even more counterintuitive than anything said to this point. I need to identify the probable source of these intuitive reservations and explain why we should not be overly troubled by them.

To offset these worries, I need to explain why the content of the law matters. I do not deny that the existence of the law *can* and often *does* make a normative difference to our moral judgments about how people may be treated. I simply deny that the difference the law can make is a difference in their *desert*. Law may be needed for several non-desert reasons. For example, law might be needed to provide notice to prospective wrongdoers, which in turn is required to give them a fair opportunity to avoid the hardships inherent in punishment. To illustrate how the notice that law provides can make a difference to our normative judgments about how persons may be treated without making a difference to their desert, consider an example involving two terrorists, Mutt and Jeff. Mutt bursts into a classroom, killing each of six students immediately. Jeff also bursts into a classroom, threatening to kill each of six students unless they leave within plenty of time to vacate the room. When no one leaves, Jeff, like Mutt, massacres all six. Normative objections can be raised against Mutt's conduct to which Jeff is immune; unlike Jeff, he acted worse inasmuch as he gave his victims no reasonable opportunity to avoid being killed. But we should not be tempted to explain the normative difference between Mutt and Jeff in terms of desert—either their desert or that of their victims. Both Mutt and Jeff culpably commit a grievous moral wrong and treat their victims contrary to their desert. This example helps to show that agents who are notified that they will be harmed if they perform a given act do not thereby become more deserving of harm when they perform that act. Conversely, agents who are not notified that they will be harmed if they perform a given act do not thereby become less deserving of harm when they perform that act. The importance of law, fair notice, and the value of a reasonable opportunity to avoid harm, however valuable, can be explained without reference to desert. The state indeed treats Peter worse than Peter*, but not because Peter is less deserving of punishment than Peter*.

This position can be tested further by imagining yet a third variant of my example of Peter and Samantha. Suppose Peter** believes spousal rape *is* proscribed by law, even though he is mistaken and no law prohibits it. If Peter** were prosecuted for raping Samantha, he would be relieved to learn that the law would demand his acquittal. But we should not say that

he should be acquitted because he lacked a fair opportunity to avoid punishment. Law makes a difference to whether the state has an all-things-considered justification to punish Peter**, but the difference it makes has nothing to do with the unfairness to which Mutt subjects the students in my foregoing example. Legality plays a crucial but heretofore unspecified role in whether the state has an all-things-considered justification to punish any of the three Peters I have described, but that role cannot be explained in terms of desert.

When I said that a desert-based reason has been given to punish Peter and Peter** for committing a culpable wrong that is *not* proscribed, but that an identical desert-based reason has been given to punish Peter* for committing the same culpable wrong that *is* proscribed, I am of course referring to *moral* desert. Unless the concept is unintelligible, as I sometimes suspect,[24] I am prepared to admit that Peter*, but not Peter or Peter**, is *legally* deserving of *state* punishment. Legal theorists would be sure to protest vehemently if the state were to punish either Peter or Peter** in violation of the principle of legality. They should be pressed to identify the exact basis of their outrage. Does their complaint involve desert? If so, does their complaint solely involve *legal* desert—that Peter and Peter** are treated contrary to their desert according to law? Whatever the answer, it is moral rather than legal desert with which I am concerned.

When Peter rapes Samantha, I have indicated that legal moralists believe there to be a desert-based reason to punish him. On my interpretation of desert as a reason-giving property, it follows that some actual or possible person has a reason to inflict this punishment. It may be controversial, however, exactly *who* has a reason to punish Peter. If the state does not have it, who does?[25] At least *one* answer, however, is obvious to me: *Samantha* has a reason to treat Peter as he deserves, that is, to punish him. Perhaps friends and relatives of Samantha, and a great many others, have this reason too. Thus, I am emphatic that legal moralism or legality should not be construed to stand in the way of treating Peter as he deserves. Legal moralism and legality only stand in the way of the *state* treating Peter as he deserves.

Earlier I said that legal moralists might differ among themselves about what punishment *is*.[26] Fully aware of this possible disagreement, let me indicate without supporting argument what I take punishment to be in

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    24.   *See* Mark Greenberg, *How Mistakes Excuse: Genuine Desert*, 11 APA NEWSL. PHIL. & L. 8, 10 (2011), http://c.ymcdn.com/sites/www.apaonline.org/resource/collection/305C30F7-608F-411F-9CFA-BE03BEBCE990/v11n1_Law.pdf [https://perma.cc/UCL3-BQVX].
    25.   Might we say that a *possible* state, which *has* proscribed spousal rape, has this reason?
    26.   *See supra* Part I.

order to support my claim that Samantha has a reason to inflict it. Punishment, as I understand it, is a stigmatizing deprivation intentionally imposed for what someone has done. Pursuant to this definition, I think it is apparent not only that Samantha has a reason to punish Peter, but also that most of us would hold her to be justified to do so. Of course, Samantha's punishment cannot be disproportionate to the seriousness of his offense. Nor may she impose some of the *kinds* of deprivation that are reserved for the state, for example, by confining Peter to a makeshift prison she has constructed in her basement.[27] At the very least, however, Samantha would be entitled to have a variety of reactive attitudes toward Peter as a result of what he has done. But Samantha would not only be entitled to change her attitudes about Peter; it would be appropriate for her to change her behavior as well. Surely, she would be justified to shun Peter, bar him from her house, and tell her friends what he has done so they will dissociate from him as well.[28] These deprivations would be intended not only to protect Samantha from future harm, but to stigmatize Peter for what he has done in the past. If I am correct, these sanctions amount to *punishments*. According to the view I have attributed to the legal moralist, Peter's culpable wrongdoing provides a desert-based reason to punish Peter, and the most obvious candidate to impose this punishment is Samantha herself.[29]

Because the state accepts the principle of legality, it may punish Peter*, but not Peter or Peter**. Why should legality make this difference?[30] If

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27. Exactly *why* some severe modes of punishment are available to the state and not to private actors raises a number of questions for which I have no clear answer.

28. I borrow the term "dissociate" from Leora Dahan Katz. *See* Leora Dahan Katz, Response Retributivism (unpublished manuscript) (on file with author) (arguing that to meaningfully dissociate from the devaluation inherent in the action of the wrongdoer, there is a duty to respond negatively and impose burdens upon wrongdoers in response to their wrongdoing).

29. For arguments that state punishments are continuous with those imposed by private actors, see LEO ZAIBERT, PUNISHMENT AND RETRIBUTION 61 (2006).

30. Michael Moore is among the handful of exceptions who discuss the significance of legality to legal moralists. He does so in the context of defending the *actus reus* requirement, writing that this requirement and the rule of law serve a "heuristic function" by increasing the probability that "judges can best punish moral wrongs by punishing legally prohibited acts." MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 243 (1993). He later writes that "the principle of legality" is among those "collective goods" that "override the achievement of retributive justice." MICHAEL MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 186–87 (1997). These remarks are on the right track. If my subsequent comments are cogent, however, Moore's view is not exactly correct. First, I am unsure why legality should have much to do with *actus reus*. More importantly, the principle of legality does not override the achievement

Samantha may punish Peter, why can't the state do so as well? This question is surprisingly difficult; I do not exaggerate in saying that an extended defense of the principle of legality in criminal theory has yet to be offered.[31] Suppose Peter is arrested and prosecuted. He should be able to successfully plead legality as a *defense*. I believe we can gain some insight into the significance of legality by determining what *kind* of defense he would plead. Paul Robinson usefully identifies a number of what he calls *non-exculpatory public policy defenses*—grounds on which punitive sanctions should not be inflicted, even though the defendant may deserve them.[32] I propose that Peter's defense should be conceptualized similarly: as an instance of a public policy defense that precludes the state from having an all-things-considered justification for punishing him, notwithstanding his desert.[33] But this proposal is a conclusion in search of an argument. The details of the public policy bases for recognizing such defenses as double jeopardy and diplomatic immunity are very different.[34] In what follows, I will try to briefly describe the nature of the public policy, non-desert consideration that militates against state punishment of Peter. Although I will express some misgivings about my rationale, I challenge those criminal theorists who find my efforts to be unpersuasive to offer a better account of the kind of defense Peter would plead.

I hazard the following response to the problem of why legality precludes state punishment even though it does not affect desert. In an ideal realm, where everyone agrees upon the content of morality, the principle of legality would not preclude the state from imposing punishment. The state would have a reason to punish persons such as Peter who commit culpable wrongs; a legislature would have no need to proscribe these wrongs in advance. Samantha, after all, has not proscribed Peter's wrong in advance in order to have a reason to punish him; why, then, should the state have to do what she need not do? The answer must be drawn from political philosophy, from considerations that govern and limit the power of states. Not all impositions

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of retributive justice; it does not preclude the justifiability of all punishments, such as those imposed by victims of wrongdoing. It only disables the *state* from pursuing retribution.

31.   For one such attempt, see Peter Westen, *Two Rules of Legality in Criminal Law*, 26 L. & PHIL. 229, 229 (2007).

32.   *See* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUMB. L. REV. 199, 229–32 (1982).

33.   Robinson himself seemingly construes the defense Peter would plead as a "failure of proof" defense, which he generally claims to apply when "all elements of the offense charged cannot be proven." *Id.* at 204. But this way to conceptualize the defense in Peter's case is peculiar; the lack of state standing to punish is not due to failures of *proof*.

34.   *See, e.g.*, Peter Campbell Brown, *The Defense of Diplomatic Immunity*, 334 INS. L.J. 812 (1950). *But see, e.g.*, Susan R. Klein, *Double Jeopardy's Demise*, 88 CALIF. L. REV. 1001 (2000) (reviewing GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW (1998)).

of punishment are so constrained. Perhaps divine justice is immune from this restriction; I doubt that theologians insist that god must abstain from exacting retribution against sinners unless he has specifically proscribed their sins *ex ante*.[35] In any event, criminal justice in the real world *is* so constrained. On the planet we inhabit, we have ample reason to employ a *surrogate* for morality, which does the real normative work. This surrogate, of course, is statutory law. A separate treatise would be needed to recount the many advantages of resorting to statutory law in criminal justice rather than making a direct appeal to morality,[36] so the explanation I will provide is cursory.

The main, but not the only, reason to employ legislation is that laypersons and legal officials alike remain uncertain and divided about the content of our moral duties, and an authoritative device is needed to allow the political process to function while these disputes are ongoing.[37] Good citizens as well as bad have caused havoc because of their misplaced confidence about what morality permits and prohibits.[38] The state uses statutory law rather than morality to identify persons eligible for liability and punishment because direct recourse to the factor that is normatively relevant to their desert—morality itself—would be too divisive and uncertain. Even if there is a "right answer" to all moral disputes, we cannot expect people to concur about what that answer is. Even when we generally agree about what is morally permissible or impermissible, the most experienced philosophers continue to debate about the details—where law is most needed.[39] Since we lack a mechanism to settle on a canonical formulation of moral wrongs, law is our next best option. As every legal theorist can attest, of course, statutory law itself is far less certain than we might prefer.[40]

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35.   Can clever sinners really escape their just deserts by finding loopholes in god's commands? For a discussion of Jewish loopholers who try to avoid prohibitions of work on the Sabbath, see LEO KATZ, WHY THE LAW IS SO PERVERSE PART II 71–136 (2011).

36.   *See generally* FREDERICK SCHAUER, THE FORCE OF LAW (2015) (arguing that the coercive force of the law, rather than an internalization of its principles as morals, drives people to obey the law).

37.   One might call this the *settlement function* of law. *See* LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 181–223 (2001).

38.   *See, e.g.*, State v. Singleton, 48 A.3d 285, 293 (N.J. 2012) (explaining that the defendant believed it morally right to kill his girlfriend because God told him to do so).

39.   *See* ALEXANDER & SHERWIN, *supra* note 37.

40.   But perhaps some vagueness is good. *See* Timothy Endicott, *The Value of Vagueness*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 14 (Andrei Marmor & Scott Soames eds., 2011).

But one can only imagine the chaos that would ensue if a system of criminal justice empowered officials to enforce the rules of morality without the need to express them *ex ante* in statutes.[41]

In the absence of a pre-existing statute, legal officials should probably lack confidence—beyond a reasonable doubt—that the type of case represented by Peter is before them. I have *stipulated* that Peter commits a culpable wrong, but I fear that others will disagree. After all, many states apparently *did* disagree until fairly recently in legal history.[42] How confident must we be that we are presented with an instance of culpable wrongdoing when the legislature of the democratic state in which we reside has failed to criminalize it? Just as we should withhold the power to conduct illegal searches or to punish persons long after their wrongdoing has occurred, we should withhold the power to enforce the rules of morality without first codifying them in statutes. Historical examples from Nazi Germany and the Soviet Union in which states claimed the authority to punish wrongdoers who did not clearly violate the law—which involve the infamous *principle of analogy*—serve as chilling reminders that such powers are best withheld.[43] In short, a world in which states directly punish immorality rather than wrongs specifically codified in statutory law would grant too much power to legal officials.[44] Allowing persons such as Peter to evade state punishment seems like a small price to pay to keep political power within acceptable boundaries.

Although I accept the foregoing account of why legality is required to justify state punishment, I admit to misgivings about it. I have simply alleged that the non-desert consideration provided by legality outweighs the desert consideration provided by culpable wrongdoing in constructing an all-things-considered justification of state punishment. But why should the balance always tip in this way? Is there an independent reason to weight these two factors as I have done? My answer has been that a direct appeal to morality itself—the normatively relevant factor—is too uncertain and divisive. But how plausible is this answer in cases in which morality is crystal clear? Spousal rape *may* not be a good example. We must resist the tendency to apply our contemporary judgments to conduct that may have been morally uncertain at the time it was performed. Even slavery, an

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41. Many philosophers have written extensively about how democratic systems of law should respond to the inevitability of disagreement. See JOHN RAWLS, POLITICAL LIBERALISM 54–58 (1993), for a discussion of the *burdens of judgment*.

42. *See* Judith A. Lincoln, *Abolishing the Marital Rape Exemption: The First Step in Protecting Married Women from Spousal Rape*, 25 WAYNE L. REV. 1219, 1227–30 (1989).

43. *See* Note, *The Use of Analogy in Criminal Law*, 47 COLUM. L. REV. 613, 615–19 (1947).

44. See Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1998), for a rigorous review of Blackstone's famous maxim.

institution no sensible person defends today, was regarded as morally acceptable throughout most of human history. But what about acts of genocide and mass murder perpetrated in the twentieth century? Surely, a consensus has emerged that these practices are monstrous, even if a state has failed to proscribe them. Perhaps the atrocities for which Nazis were tried at Nuremberg provide the best example of a context in which legality does *not* outweigh the desert-based reason to punish.[45] The moral desert of the Nazis was enormous, and the case against punishment provided by legality was weak. These examples, however, are almost certain to be unusual. Almost without exception, the non-desert factor of legality outweighs the desert factor of culpable wrongdoing in the domain of state punishment.

Thus legality creates a decisive barrier against the infliction of state punishment on persons such as Peter and Peter**, who culpably commit a moral wrong that is not proscribed by law. But the barrier to state punishment is not that it would treat Peter or Peter** in a way he does not deserve: Peter would not be treated contrary to his desert if the state punished him. Hence, I conclude that if the state should abstain from punishment, as I have conceded to be the case, the rationale must involve considerations other than desert. To my mind, the best rationale refers to practical realities— to the lack of confidence that such persons can be correctly identified. Any procedure to detect culpable wrongdoers without reference to law would be bound to generate social turmoil. Again, the legal practice of acquitting individuals who deserve the stigmatizing deprivations inherent in state punishment but whose conduct is not proscribed *ex ante* by law is the price we must pay for a political system that brings about tremendous benefits relative to no system at all or to a system that dispenses with legality altogether.

At the end of the day, how should we feel about Peter? He deserves punishment, but, unlike Peter*, it is at least controversial whether anyone other than Samantha, and those who act on her behalf, is justified to administer it. I assume Samantha is permitted *not* to punish; what if she elects not to do so? If I am correct to ground legal moralism in a principle of retributive justice, it follows that the value of retributive justice is not served if no one treats Peter as he deserves.[46] Citizens should not be elated

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45.   *See generally* F. Regan Nerone, *The Legality of Nuremberg*, 4 DUQ. U. L. REV. 146 (1966) (discussing the magnitude of Nazis' crimes, their desert, and the legality of punishment).

46.   My position gives rise to familiar puzzles about the value of mercy—puzzles I will not explore here. See Heidi M. Hurd, *The Morality of Mercy*, 4 OHIO ST. J. CRIM. L.

when policy grounds are invoked to preclude the state from treating persons as they deserve. Public policy defenses frequently are applied to acquit those who morally deserve to be punished. The unease we feel about this result, of course, is what gives us a motivation to amend the law so that state punishment would be justified, all things considered, in the future. In the case of Peter, this motivation should lead to an abolition of the spousal rape exemption.[47]

Thus, the state lacks a justification for punishing Peter, but Samantha has a justification to punish him. I suggested that others might have this reason as well. But who? Suppose we return to the suggestion that the desert considerations created by culpable wrongdoing are relational in the following sense: those who are *wronged* by a given act of wrongdoing are the clearest candidates to have standing to inflict the punishment the wrongdoer deserves. Although I am tempted to think that culpable wrongdoing *is* relational in this way, I have no conclusive argument about why this is so. Suppose, however, that only those who are *wronged* by an act have standing to punish it. We might describe such persons as *victims*. The following substantive thesis is implied if this view is correct: unless there is a sense in which the state is wronged or victimized by given instances of culpable wrongs, we have no clear basis for why it has standing to punish those who perpetrate them. Restricting the culpable wrongs the state may punish to *public* wrongs is a way to ensure the state has the standing to punish them.[48]

I conclude by briefly considering the application of this thesis to cases that have long divided philosophers of criminal law and gives rise to disputes about whether legal moralism provides a sensible framework for criminalization—for a view about the scope and limits of the criminal sanction that animates our symposium. Criminal paternalism, for example, would allow persons to be punished when their acts cause significant harms to the very persons who commit them.[49] One of many possible ways to block states from punishing persons for paternalistic reasons is to contend that morality is necessarily other-regarding.[50] When persons behave imprudently or foolishly—by taking huge and unnecessary risks with their own health or welfare, for example—any negative judgment we might apply is not a *moral* judgment. However foolish it may be to weld metals without protective goggles, for example, the agent is not deficient from a

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389 (2007), for a discussion of such puzzles surrounding the proper place of mercy in a retributive justice system.

    47.   *See* Lincoln, *supra* note 42, at 1219–20.

    48.   *See* Duff, *supra* note 22, at 100–03.

    49.   *See generally* PATERNALISM: THEORY AND PRACTICE (Christian Coons & Michael Weber eds., 2013).

    50.   *See also* Douglas Husak, *Penal Paternalism*, *in* PATERNALISM: THEORY AND PRACTICE 39 (Christian Coons & Michael Weber eds., 2013).

moral point of view. I am undecided about whether morality *is* necessarily other-regarding. In any event, an additional reason to suppose that the state may not punish persons for paternalistic reasons, *even if* their conduct is wrongful, is that the state lacks standing to do so. The state may lack standing to punish because only those who are wronged or victimized by a wrongful act have a reason to punish it. To the extent that the conduct in question is self-regarding, it is hard to see how it wrongs anyone who then would gain standing to punish. Self-regarding wrongs, if they are wrongs at all, are not *public* wrongs. Thus, legal moralism as I have construed it may have important implications for the scope and limits of the substantive criminal law.