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Michael S. Moore

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Legal Moralism Revisited

MICHAEL S. MOORE*

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I. INTRODUCTION

I shall use this occasion mostly to clarify what the legal moralist theory of criminal legislation proclaims to be the proper limits on the reach of criminalization of behavior. But preliminarily, here in this Introduction, I want to remind readers of how the principle is motivated. First, recall what a principle of criminal legislation is. It consists of two closely related items. First of all, it is a principle that sets forth the proper aims of a legislature when that legislature drafts the prohibitions and requirements that constitute

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the “special part” of the substantive criminal law.¹ It is, second, a principle that judges how well legislatures have hit their targets in passing criminal legislation, that is, whether the legislation they pass conforms to the proper limits of coercive legislation.²

Mill’s harm principle is the best known example of a principle of criminal legislation.³ According to the harm principle, legislatures should exclusively aim at, and achieve, coercive legislation that prevents actions harmful to citizens other than the actor and his consenting co-participants.⁴ Actions that merely offend others, breach others’ moral codes, or harm only the actor himself, were not to be prohibited nor were the prevention of such psychic, moral, or self-inflicted harms proper aims of criminal legislation.⁵

An unfortunate tendency of the liberalism that has descended to Western societies since Mill is to regard principles of legislation like Mill’s harm principle as relatively free-standing principles of political philosophy—as if they were self-justifying, in other words. When in reality, Mill’s harm principle was—and has to be for a utilitarian like Mill—but an offshoot, an implication, of Mill’s more general theory of punishment.⁶ Mill was a utilitarian about how punishment is to be justified: such harsh treatment, which is a harm after all, was only to be justified by its prevention of an

1. See MICHAEL S. MOORE, *PLACING BLAME* 32 (1997).

2. This separation of principles of legislation into two sorts of principles, a subjective principle regulating legislative motivation, and an objective principle regulating the content of legislation, has been a consistent theme of my work although to my knowledge has not been a generally observed distinction in this area of political philosophy. See Michael S. Moore, *The Briggs Amendment: It Discriminates Against Homosexuals*, L.A. HERALD EXAMINER, Sept. 14, 1978, at A-18; Michael S. Moore, *The Limits of Legislation*, USC CITES, Fall-Winter 1984, at 23–32; Michael Moore, *Liberty and Drugs*, in *DRUGS AND THE LIMITS OF LIBERALISM* 61, 61 (Pablo De Greiff, ed., 1999), revised and reprinted in MOORE, *supra* note 1, at 739, 739; Michael S. Moore, *Freedom*, 29 HARV. J.L. PUB. POL’Y 9, 15–21 (2005); Michael S. Moore, *A Tale of Two Theories*, 28 CRIM. JUST. ETHICS 27, 27 (2009); Michael S. Moore, *Liberty’s Constraints on What Should Be Made Criminal*, in *CRIMINALIZATION: THE POLITICAL MORALITY OF THE CRIMINAL LAW* 182, 182–212 (R.A. Duff et al. eds., 2014); Michael S. Moore, *Responses and Appreciations*, in *LEGAL, MORAL, AND METAPHYSICAL TRUTHS* 343, 352–57 (Kimberly Kessler Ferzan & Stephen J. Morse eds., 2016); Michael S. Moore, *Liberty and the Constitution*, 21 LEGAL THEORY 156, 156–241 (2015).

3. JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* 80 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

4. *Id.* at 73–81.

5. The four parts to Mill’s harm principle were masterfully restated in Joel Feinberg’s magisterial four volume series, *THE MORAL LIMITS OF THE CRIMINAL LAW*, comprised of the separately published *HARM TO OTHERS* (1984), *OFFENSE TO OTHERS* (1985), *HARM TO SELF* (1986), and *HARMLESS WRONGDOING* (1988).

6. Doug Husak and I have long argued against any free-standing status to principles of criminal legislation and for the tie of such principles to a more general theory of punishment. See DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 57 (2008); MOORE, *supra* note 1, at 70–71.

even greater harm, namely, the harms to others involved in criminal actions.⁷ Thus, the harm principle is to be justified as an implication of the utilitarian theory of punishment, and stands or falls with that theory.⁸

We are now in a position to see what motivates non-utilitarians like me, and Douglas Husak, to principles of criminal legislation other than the harm principle. For neither of us are pure utilitarians about criminal punishment. I have long defended a retributivist theory of punishment, according to which punishment is justified exclusively by the desert of culpable wrongdoers.⁹ Husak has adopted what is usually called a mixed theory of punishment, according to which punishment is justified both by its crime-preventing effects and by the desert of offenders.¹⁰ What these two punishment theories produce—in the way of principles of criminal legislation—are, respectively, the moral wrong principle and the harmful wrong principle.¹¹ Since our topic is the former principle—the defining principle of “legal moralism”—I shall pursue it alone. Nonetheless, much of what I say will also constitute a partial account of the wrongful harm principle.

The moral wrong principle distinctive of legal moralism holds that moral wrongdoing both constitutes a *prima facie* reason to criminalize such behavior and a limit on such criminalization.¹² In a nutshell, *legislators* have a *prima facie* reason to prohibit all actions that are morally wrong, the positive thesis of legal moralism, but they may not prohibit actions that are not morally wrong independently of any law saying that they are wrong, the negative thesis.¹³ Such a principle of criminal legislation follows from the retributive theory of punishment in the following two steps that correspond, respectively, to the positive and the negative theses of legal moralism.¹⁴

7. MILL, *supra* note 3, at 80–81.

8. Mill famously had difficulty squaring his harm principle with his more general utilitarian theory of punishment. See Gerald Dworkin, *Paternalism*, 56 *MONIST* 64 (1972); Moore, *Liberty's Constraints on What May Be Made Criminal*, *supra* note 2, at 190–91.

9. See MOORE, *supra* note 1, at 83–188.

10. HUSAK, *supra* note 6, at 55.

11. See Moore, *A Tale of Two Theories*, *supra* note 2, at 34–35 (citing HUSAK, *supra* note 6, at 87–88, 138–50).

12. See *id.* at 31–32.

13. See *id.*

14. See *id.* at 32–33.

First, and positive, step: *All* moral wrongdoing, *prima facie*,¹⁵ should be prohibited by the criminal law. This, because moral wrongdoing is the touchstone of blameworthiness and desert, and the latter is what justifies punishment for retributivists.¹⁶ It is true that overall blameworthiness is a function of culpability as well as wrongdoing.¹⁷ Yet culpability, rightly conceived, is just wrongdoing in the mind of the actor: a culpable wrongdoer intends, knows, or consciously risks wrongdoing in his own mind as he acts, and that is what makes him culpable. So wrongdoing is central to desert, and desert is alone what justifies criminal sanctions for a retributivist about the criminal law generally.

It might be thought that legislative prohibition of moral wrongdoing still might not be necessary to achieve retributively justified punishment; since culpable wrongdoing deserves punishment, why could courts not punish moral wrongdoers—and thus achieve retributive justice—even in the absence of legislature prohibition? Indeed, isn't this pretty much what we did at Nuremberg with the Nazi war criminals, insofar as they were tried and punished under Article III of the indictment, which was for “crimes against humanity”?¹⁸

As a matter of pure retributive justice, this thought is correct. Yet as I have pointed out over many years,¹⁹ and as Doug Husak in his contribution to this issue also affirms,²⁰ there are other values besides achieving justice in retribution, and some of these can side-constrain or outweigh retributive justice on some occasions. The values going under the name of the “principle of legality” in criminal law is just such a case in point.²¹ Clear, understandable, consistent, prospective, general, public rules like statutes serve the important values of liberty, fairness, efficiency, and democracy.²² Most of the time, thus, such values will dictate that courts do not punish culpable wrongdoing unless that wrongdoing has first been prohibited by legislative enactment.

15. David Brink rightly interprets me to think only that a *prima facie* or *pro tanto* reason to criminalize follows from retributivism. See David O. Brink, *Retributivism and Legal Moralism*, 25 *RATIO JURIS* 496, 500 (2012) (citing MOORE, *supra* note 1, at 88–91).

16. See *id.* at 507.

17. For a more complete exposition of this, see Michael S. Moore, *The Specialness of the General Part of the Criminal Law*, in *THE SANCTITY OF LIFE AND THE CRIMINAL LAW: THE LEGACY OF GLANVILLE WILLIAMS* 69, 69–105 (Dennis J. Baker & Jeremy Horder eds., 2013).

18. See UNITED NATIONS WAR CRIMES COMM'N, 6 *LAW REPORTS OF TRIALS OF WAR CRIMINALS* 4 (1948).

19. MOORE, *supra* note 1, at 186; see also Michael S. Moore, *The Principle of Legality*, in *FOUNDATIONS OF CRIMINAL LAW* 194, 194–95 (Leo Katz et al. eds., 1999).

20. See Douglas N. Husak, *Retribution in Criminal Theory*, 37 *SAN DIEGO L. REV.* 959, 975–77 (2000).

21. Moore, *supra* note 19, at 194.

22. MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR THE CRIMINAL LAW* 239–42 (1993).

Given such a restraint, for retributive justice to be achieved *by courts* requires that legislatures first pass statutes criminalizing the wrongdoing deserving of punishment.

Second, and negative, step: *Only* moral wrongdoings should be prohibited by the criminal law. This, as I say elsewhere,²³ is not merely *prima facie* or *pro tanto*, but is categorical.²⁴ Where there is no blameworthiness to punish if the offender did nothing morally wrong, the criminal law has no business criminalizing. Punishing innocent acts like babysitting, going to lunch with friends, writing clear, concise, and correct essays in criminal law theory, etc., would be unjust because the “offenders” would have done nothing wrong.

It might be thought that *antecedent* wrongdoing is not required for desert. The thought here would be that the law itself *prima facie* obligates citizen obedience to its dictates so that to do anything—no matter how innocent—prohibited by valid criminal law would be morally wrong. This would mean that antecedent moral wrongdoing would not be required because new wrongs could be created by the very laws prohibiting them. Yet, I am one of those “new anarchists” who deny that law qua law obligates citizens, even *prima facie*.²⁵ Staring at a red light stopped at an intersection in the middle of the night, and staying there until the light changes for no other reason than that the law says you should, is blind, stupid, irrational rule-worship. Good for sheep, bad for people. So the law qua law has no such power to create moral wrongdoing where none existed prior to the law’s enactment. So *antecedent* moral wrongdoing is required for desert and blameworthiness to exist for justified punishment.

Putting these two steps together: All and only actions that are morally wrong are the proper subjects of criminal legislation for a retributivist. In the body of this Article I shall seek to clarify this defining feature of the principle of legal moralism. I shall approach such clarification in two steps. First, moral *wrongdoing* requires some “doing,” and just what such “doing” amounts to in the principle needs clarification. Second, moral *wrongdoing*

23. Moore, *Liberty and the Constitution*, *supra* note 2, at 194–95.

24. See David Brink, *Retributivism and Legal Moralism*, *supra* note 15, at 507–10, for the asymmetry in this regard between the positive and the negative parts of the legal moralist principle.

25. The new anarchists (a bad name because they are not really anarchists) prominently include Barry Smith, Heidi Hurd, and Joseph Raz. See JOSEPH H. RAZ, *THE MORALITY OF FREEDOM* 70–105 (1986); Heidi M. Hurd, *Challenging Authority*, 100 *YALE L.J.* 1611, 1612–14 (1991); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 *YALE L.J.* 950, 950–52 (1973).

requires that the doing meriting prohibition and punishment be *wrong*, and just what such wrongness amounts to in this principle needs clarification.

II. THE DOING REQUIRED FOR WRONGDOING

In earlier work,²⁶ I have described the four things that “doings”—for example, actions—are not: they are not involuntary bodily movements, not mere unexecuted intentions or other purely mental acts, not omissions, and not states of character or other status. Let me consider each of these kinds of items that are not doings in turn.

A. *Involuntary Bodily Movements*

Our bodies sometimes do things that we as persons do not. The patella reflex of my left leg, for example, may cause the breakage of your rare Ming vase, but when that happens I did not do the action of breaking it—that is, I didn’t break it. Mere bodily movements causing harm is insufficient for the agency required for *wrongdoing*; needed is some willing by the person whose body it is to cause such bodily movements. Just what the mental state of willing is, and what must be the causal relationship between such willing and the bodily movements willed, are nice questions. But they are questions for another occasion,²⁷ one involving both the philosophy of action and the neuroscience of voluntary motor movement.

B. *Mental Acts of Bare Intending*

The Anglo-American criminal law we now have refuses to criminalize willings unaccompanied by bodily movement as their effects just as it refuses to criminalize bodily movements unaccompanied by willings as their causes.²⁸ Thus, purely mental acts such as “compassing the death of the King” are no longer criminal—although they once were.²⁹

Yet the morality behind this legal abstemiousness is less clear, and accordingly, more interesting. To begin with, there are such things as mental actions, states of mind actively called forth and not merely passively suffered to come into being.³⁰ Making choices, deciding, and forming intentions,

26. MOORE, *supra* note 22, at 245–79.

27. The philosophy of action is explored in MOORE, *supra* note 22, at 113–65; the neuroscience of voluntary motor movement is summarized in Michael S. Moore, *Responsible Choices, Desert-Based Legal Institutions, and the Challenges of Contemporary Neuroscience*, 29 SOC. PHIL. & POL’Y 233, 246–49 (2012).

28. See MOORE, *supra* note 22, at 247.

29. See SIR MATTHEW HALE, 1 HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 107–08 (1847).

30. See PETER GEACH, MENTAL ACTS: THEIR CONTENT AND THEIR OBJECTS 1–2 (1957).

are among such mental actions; they are things we as persons do. Admittedly, the line between mental actions and passively experienced states of mind can sometimes be a nice one to draw; but then so is the line for voluntary motor movements. Was the ancient King that Freud tells us executed one of his subjects for dreaming of the King's death, on the wrong side of that line, or is dreaming a kind of mental action we do in order to stay asleep, as Freud thought?³¹ However such borderline cases are resolved, we do recognize that our personal agency can be involved in producing mental states no less than in producing bodily movements. Such agency-involved production of mental states is a species of action.

Still, one might think our criminal law gets the morality right in seeing no wrongdoing in such purely mental actions as deciding, choosing, intending, etc. This, because such mental acts by definition never "break the skin" and so do not hurt anybody. Yet this last thought proves too much. Attempts that fail, riskings that do not materialize, conspiracies that never proceed beyond agreement, and solicitations without response by the one solicited, also all fail to hurt anyone, so long as the putative victim does not know of such attempts, riskings, agreeings, or solicitings—yet we rightly criminalize each of these four items. True, each of these four under current law requires more than the mental acts of decision; they require in addition an initial albeit partial *execution* of that decision. For attempts, that execution takes the form of actions *going beyond mere preparation*; for liability for risk-imposition, that execution takes the form of doing some act that risks another; for conspiracies, that execution takes the form of doing some act of agreeing—and in some jurisdictions also doing some overt act in execution of that agreeing as well; for solicitation, that execution takes the form of doing some act of verbalizing and successfully communicating one's request or suggestion to another. Yet these legal requirements of execution look for all the world like mere evidentiary requirements, based on the fact that states of mind of other people are hard to prove when there is no behavioral manifestation of such states. Morally, are we not culpable for choosing to do wrong—as well as for trying, risking, agreeing, or soliciting such wrongs? Indeed, is not our *culpability*—although not our overall blameworthiness—pretty constant across the "spectrum of success" for an action: Are we not as culpable for *choosing* to do some wrong, as for *trying*? As for *consciously risking*? As for *attempting*—coming close to success? As for *completed attempting*—doing the last act needed for

31. I discuss Freud's use of the example in MOORE, *supra* note 22, at 261.

success? As for the choice involved in successful *causing*? Are we not as culpable for *choosing* to ask another to do some wrong, as we are for *trying* to get him to agree to do it by asking him, as we are for *agreeing* with him that he will do it, as for our choice to aid or solicit him in cases where he *causes* the harm we agreed he would do?

Now one might object, “but there is no *wrongdoing* in any of these variations—save the last in each series, causing, or aiding of the causing, of the harm chosen—however much sameness there may be in *culpability*; and it is wrongdoing that is the focus of the moral wrong principle.” The objection is not well taken. True enough, in my usual lexicon, an actor who does not succeed in doing the wrongful act he intends, foresees, or consciously risks, does no *wrong*, and he is blamed less because of the “independent significance of wrongdoing” in this sense of wrongdoing.³² Yet such culpable choosers, attempters, riskers, conspirators, and solicitors are properly punished nonetheless because they deserve some punishment—even if less punishment than those who are equally culpable but more successful in their wrongdoing. Such people necessarily do *wrong*, then, in the distinct sense of the word required by the moral wrong principle: they set their mind towards the doing of *wrongful* behavior. The *objects* of their culpable states of intending and believing are wrongful actions, and that is all the “wrongdoing” that is required to satisfy the moral wrong principle.

People often call the inchoate crimes of attempt, risking, conspiracy, and solicitation, “derivative” crimes, and the label is an accurate one. The mental acts that make one culpable in such cases are wrongful in a sense derivative of true, or primary, wrongdoing: such mental acts of culpability are wrongdoings in the minds of those whose mental acts they are.

See all of this and one should also see the artificiality of the line drawn by our current criminal law. Wrongdoing in the derivative sense just articulated is present in the minds of those who choose to do a wrongful act although they have not yet embarked on any overt steps toward doing that act, just as much as wrongdoing—in this derivative sense—is present in cases where that choice gets partially executed in some overt act of attempt, risk-imposition, conspiracy, or solicitation.³³ If we truly could prove such mental acts as reliably as we can prove overt actions, criminal law should

32. Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 237–38 (1994), revised and reprinted in MOORE, *supra* note 1, at 192–93.

33. For apparent disagreement with this, see LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 171–225 (2009). Alexander and Ferzan seem to find so much moral significance in *execution* of intentions and beliefs (into tryings and riskings) that they cut off legal liability at that point. *Id.* at 190.

change so as to conform to morality. And morally, wrongdoing—in the relevant sense of the moral wrong principle—includes such unexecuted “naked” intendings and believings.

C. Omissions

As with mental actions, present Anglo-American criminal law by-and-large does not punish omissions, the exceptions being for situations of close relationships, undertakings, or causal responsibility for the peril of another.³⁴ Yet as with mental actions, the morality here is both subtler and more interesting than the law. Morally, if not legally, we have many positive duties to aid others even when those others are not related to us and are not the victims of either our peril-causing actions or our partial but uncompleted rescue attempts.³⁵ The questions thus arise, first, whether such omitters do not deserve punishment and thus legislative criminalization of their omissions, and second, how one could reconcile such prohibited “not-doings” with the wrongdoing requirement of legal moralism.

As to the first question, about criminalizing more omissions than we currently do, two considerations are pertinent. The first is that the overall blameworthiness of culpably not saving another from death, for example, pales in comparison with the blameworthiness attendant upon culpably causing another’s death, holding the degree of culpability constant in such pair-wise comparisons.³⁶ There is therefore *less* reason to punish omissions versus actions, *ceteris paribus*, because the demands of retributive justice in such cases are less stringent. Secondly, “prohibiting an omission” is in reality requiring an action—namely, the action omitted. Requiring an action diminishes opportunity sets—and thus, positive liberty—more than prohibiting an action, *ceteris paribus*.³⁷ Requiring me to rescue you now effectively prohibits me from taking advantage of all other opportunities otherwise available to me now. So more positive liberty is taken, *ceteris paribus*, by criminalizing omissions than by criminalizing actions.

34. See MOORE, *supra* note 22, at 54–57.

35. See *id.* at 56–57.

36. I defend this in MOORE, *supra* note 22, at 58–59; MOORE, *supra* note 1, at 274–84; and MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 55–59 (2009).

37. See Moore, *Liberty’s Constraints on What Should Be Made Criminal*, *supra* note 2, at 201.

I have used these two considerations in past work to say what it seems to me can plausibly be said to justify Anglo-American criminal law's stinginess in criminalizing omissions.³⁸ And maybe this is right. Yet even if criminal law rightly stays its hand for most omissions, morally there is a blameworthiness for a goodly portion of these. Morality, unlike current Anglo-American criminal law, uniformly imposes positive, deontic duties on each of us to help others. Our obligations are not merely negative—not to hurt others; contrary to the views of extreme libertarians, we also have positive obligations to help even strangers when we can do so at little risk or inconvenience to ourselves. We breach such obligations when we do not render such help, and in some sense of “wrongdoing,” we “do” wrong by such breaches.

So wherever criminal law should come out on omissions, morally we are to blame for a wide class of them and deserve some punishment for them, even if the side-constraint of liberty bars that punishment. Which gets me to my second question about omissions: How can there be *wrongdoing* in an omission, i.e., in a *not-doing* of something? Some theorists answer this question in a very peculiar way. They say that omissions are really a kind of action, that just as there are acts of commission so are there acts of omission.³⁹ This evasion is an unnecessary muddying of the waters. The grain of truth to the evasion is this: the omissions for which one can be blamed are *culpable* omissions, and we are culpable for not-doing something only when we advert to the possibility of doing such a thing and we choose not to.⁴⁰ As with actions, such choice can take the form of an intention that our omission allow some harm to occur to another, or merely a predictive belief that our not doing something will—or at least may, in the case of recklessness—allow another to suffer that harm. In any case, we *choose*, and it is for that choosing that we are culpable and blameworthy.

So the answer to our second question about omissions should be apparent; it is the same as the answer we gave to mental actions as being “wrongdoings” in the derivative sense used in the moral wrong principle. The mental act

38. See sources cited *supra* note 36. There is now a lively literature critiquing this view. See, e.g., Samuel Freeman, *Criminal Liability and the Duty to Aid the Distressed*, 142 U. PENN. L. REV. 1455, 1455–58 (1994); Victor Tadros, *The Wrong and the Free*, in LEGAL, MORAL, AND METAPHYSICAL TRUTHS, *supra* note 2, at 79, 79–94.

39. See, e.g., George P. Fletcher, *On the Irrelevance of Bodily Movements*, 142 U. PENN. L. REV. 1443, 1443–45 (1994).

40. I put aside the possibility of there being negligent omissions that are culpable in the sense that warrants criminal punishment. For defense of this, see Michael S. Moore & Heidi M. Hurd, *Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence*, 5 CRIM. L. & PHIL. 147, 150–52 (2011); see also ALEXANDER & FERZAN, *supra* note 33, at 69–85.

of choosing is a doing, an action; that the object of that choosing is not an action is neither here nor there, for that object is still a *wrong*. If morality makes it wrong not to do something, choosing not to do it is wrongdoing in the sense required by the moral wrong principle.

As before, once one progresses this far in one's thinking, the limits on liability observed by current Anglo-American criminal law appear somewhat artificial. Notice that moral wrongdoing in the sense relevant to the moral wrong principle exists for failures to do some act of saving another even when that act could not have succeeded. So long as the actor believed he could save another through an act posing little danger or inconvenience to himself, and he chose not to do that act, he is culpable, blameworthy, and a wrongdoer in the sense required for the moral wrong principle; this, despite his having no actual ability to have saved the other. His blameworthiness is like that of other inchoate actors. Those who attempt to kill and fail are blameworthy, and so are those who choose not to exercise an ability they think they possess but do not. In the case of attempted causing, the lack of causation prevents full blameworthiness; in the case of inchoate omitting, the lack of counterfactual dependence prevents full blameworthiness.⁴¹ But in both cases, there *is* some blameworthiness, even if less than in the non-inchoate versions of such wrongdoings.

Our criminal law, when it criminalizes omissions, as it does occasionally, currently does not criminalize such inchoate omissions despite the culpability of such persons.⁴² Perhaps the diminished blameworthiness attached to the inchoate version of an already diminished blameworthiness attached to omissions generally, rightly stays the law's hand. Or perhaps our law here again simply makes a mistake.

D. States of Character and Other Status

Being greedy, as opposed to doing greedy acts, being an addict, as opposed to using drugs, being tall, stupid, indifferent, or rich, are not doings in any sense relevant to the moral wrong principle.⁴³ One does no wrong by

41. See MOORE, CAUSATION AND RESPONSIBILITY, *supra* note 36, at 444–52, for defense of the view that counterfactual dependence substitutes for causation in connecting omissions to harms for non-inchoate, omissive wrongdoing.

42. See Michael T. Cahill, *Attempt by Omission*, 94 IOWA L. REV. 1207, 1209–11 (2009).

43. See MOORE, *supra* note 22, at 278–79.

being pugnacious, stupid, or short, however undesirable possession of such traits may be.⁴⁴

This is as true of character traits that are vices as much as of those that are virtues or are morally neutral. *Being* of such-and-such a character is not *doing* something. True enough, there may be some occasions where we might be said to *choose* our character. And thus there might be negatively evaluated *doings* in such choosings of vicious character traits. Whether such choosings should be considered *wrongdoings*, and thus the proper subject of criminalization under the moral wrong principle, I defer to the later discussion of the meaning of “wrong.” The preliminary point here is to observe that most traits are not chosen by us so much as they are simply true of us; as such, there is no *wrongdoing* involved in possessing such traits, even when such traits are in some sense morally bad to have.

III. THE WRONGS REQUIRED FOR WRONGDOING

I now turn to my second main topic in clarifying the moral wrong principle’s content: Assuming we have a doing, what about that doing makes it wrong in the sense relevant for the moral wrong principle? As we have seen, the “doing” part of wrongdoing limits the things that can be wrong to: acts, choices—intentions and beliefs—to act, and choices not to act. But what do we mean by “wrong”?

Consider the following possibilities.⁴⁵ “Wrongdoing” here might mean acts⁴⁶ that:

1. One has any sort of practical reason not to do;
2. One all things considered ought not to do;
3. One morally ought not to do;
4. One as a matter of deontic obligation ought not to do;
5. One as a matter of deontological obligation ought not to do;
6. One as a matter of an obligation owed to another person ought not to do;
7. One morally ought not to do when one’s duty in this regard is the mere correlative of another’s more basic moral right that one not do such a thing; or
8. One ought not to do because it is violative of a duty of public—as opposed to private—morality.

44. *See id.* at 279.

45. These eight possibilities are charted on a flow chart in the Appendix.

46. I intend also to include omissions here; but the various possibilities charted in the text require different formulations for omissions than for actions. *See* Michael S. Moore, *Liberty and Supererogation*, 6 ANN. REV. L. & ETHICS 111, 111–28 (1998).

Each of these interpretations of “wrong” has some salience in the literature on criminalization. Those who despair of hiving off distinctively *moral* reasons or *moral* oughts from prudential and all other kinds of reasons for action, identify moral reasons as all of practical reason. Thus, numbers 1 or 2 above. Those who can distinguish the morally indifferent from the morally charged, will move down the list, at least to number 3. Yet if they despair of distinguishing aretaic oughts from deontic oughts, they will go no further. Those without this latter despair but with the convictions typical of the liberal state will move down at least to number 4; but if they think the only wrongdoing that is punishable is deontological—as opposed to consequentialist—wrongdoing they will go on to number 5.

Items 6, 7, and 8 will be preferred by those wishing to discriminate within the class of deontic or even deontological obligations. Joel Feinberg’s distinction of “non-grievance,” from “grievance” wrongs, and the criminalization only of the latter, depends either on distinction between number 6 (duties *tout cour*, versus duties *to* someone) or number 7 (duties of which rights are merely the correlative, or duties where the rights are primary and the duties are merely the correlatives).⁴⁷ Doug Husak’s⁴⁸ and Antony Duff’s⁴⁹ distinction between “private” from “public” wrongs, and the criminalization only of the latter, depends on number 8, the distinction between a private part, as opposed to a public part, of morality.

There is much to be said about all of these distinctions, some of which I have said elsewhere.⁵⁰ One understands the motive for the narrowing impulse behind numbers 6, 7, and 8, for example: it is to rid the moral wrong principle of a seeming *over*-breadth, licensing as it seemingly is of prohibiting the breaking of promises, lying, sexual infidelity, and myriad other forms of daily immoralities that intuitively seem unfit for criminalization. But elsewhere I have sought to show how difficult it is to draw lines between supposedly public versus private morality, and how one can deal with minor immoralities on grounds of being, well, minor, that is, not of sufficient warrant that the good of their punishment outweighs the values standing behind the presumption in favor of liberty.⁵¹

47. JOEL FEINBERG, HARMLESS WRONGDOING 18–19 (1998).

48. HUSAK, *supra* note 6, at 135–39.

49. S.E. Marshall & R.A. Duff, *Criminalization and Sharing Wrongs*, 11 CAN. J.L. & JURIS. 7, 7–8, 15–16 (1998).

50. See, e.g., Moore, *Liberty and Drugs*, *supra* note 2, at 75.

51. Moore, *Liberty’s Constraints on What May Be Made Criminal*, *supra* note 2, at 197–202.

Likewise, numbers 1 and 2 may well be motivated by the intuitive justifiability of many *malum prohibitum* offenses, such as tax evasion, traffic offenses, avoiding the draft, voter fraud, etc. Yet this seeming *under*-breadth to the moral wrong principle I have sought to correct by the inclusion within deontic morality of public duties like those to support just institutions and those obligating each member of a society to solve co-ordination games and not free-ride in prisoner's dilemmas type situations.⁵²

Likewise, number 5 seeks to narrow what the moral wrong principle permits, and to my mind does so in a more plausible way than would numbers 6, 7, or 8. For it is true that the core prohibitions of the *malum in se* crimes of most criminal codes are built on deontological kinds of moral obligations such as the obligations not to kill, rape, assault, disfigure, or steal from others. Yet though I defend a deontological version of deontic morality,⁵³ we must allow that there are consequentialist moral obligations too. More than that, breach of these “merely” consequentialist obligations can also constitute the kinds of moral wrongs meriting criminal prohibition and punishment.

A prime example of a consequentialist obligation is the obligation to rescue strangers where one can do so at little risk or inconvenience to oneself. With non-strangers, such as one's own children, such an obligation is deontological and not agent-neutral—despite being a positive obligation and thus unlike the negative obligations more typical of deontological morality. We test the deontological nature of the obligation by the ease with which it can be erased by good consequences⁵⁴: by my lights we are each obligated to rescue one child of our own even though doing so precludes us from rescuing two, three, or more children of others. This shows that the obligation is not agent-neutral and not consequentialist since it is not erased by the better consequences—judged agent-neutrally—of saving more children. Whereas with strangers, clearly I may—and perhaps must—omit to rescue one drowning stranger because I thereby can use the one rope in my possession to rescue two.⁵⁵ My obligation in the latter case is agent-neutral and consequentialist. But despite this character, breach of such obligation is still a possible subject of proper criminal legislation, subject to the *caveat* above discussed about liberty.

A real issue exists as to the line drawn between number 3 and number 4. Number 3 is the meaning to be given “wrong” in what is usually called

52. See *id.* at 196–97.

53. Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/ethics-deontological/> (last updated Oct. 17, 2016).

54. See Michael S. Moore, *Patrolling the Borders of Consequentialist Justification*, 27 LAW & PHIL. 35, 35–38, 94 (2008).

55. MOORE, CAUSATION AND RESPONSIBILITY, *supra* note 36, at 55–59, 448.

a perfectionist state, a state where it is thought proper to use the criminal law to perfect human virtue. Number 4 is the meaning of wrong that a legal moralist such as myself must defend, for this defines the liberal state in a way that eschews using the criminal law as a means of perfecting human virtue; a liberal state so defined contents itself instead with the more modest goal of using the criminal law to prevent and punish breach of deontic moral obligation, leaving the perfection of virtue to other kinds of law that are non-punitive and to other social institutions. A perfectionist state defines “wrong” broadly so as to include within the proper reach of the criminal law failure to attain aretaic ideals as well as breach of deontic obligation.⁵⁶ A liberal—legal moralist—state defines “wrong” more narrowly so as only to include the deontic part of morality in its definition; the aretaic part, while recognized as being a part of morality, is thought unfit for promotion by the criminal law.⁵⁷

Two questions jump out at one from this contrast of the perfectionist and the liberal state. One is the conceptual question: Where is the divide within morality, such that one can allocate some moral failures to failures to achieve aretaic ideals and others to breach of moral obligation? Both are moral failures in that the actor does not do what, morally speaking, he ought to do—so how do we tell the difference? The second question is a normative one: Given that a society would be a morally better one if its citizens not only observed the social minimum by not breaching their deontic obligations but also realized states of virtue,⁵⁸ why shouldn’t the criminal law prevent and punish failures of virtue as much as it also prevents and punishes breach of obligation?

There is perhaps a temptation at this point to answer the first and conceptual question in a certain way that will then allow one to duck having to answer the second question altogether. I refer to the thought, common amongst virtue-ethicists,⁵⁹ that the domain of the aretaic part of morality is wholly concerned with: (1) character traits which endure over time, and (2) with momentary inner states of mood, attitude, feeling, wish, or disposition. But what is crucial to the thought is that virtue does *not* deal with actions or omissions. The idea is that virtue ethics deal with who we are and who we ought to be, both in general, i.e., over time, and at any given moment. But

56. See Moore, *Liberty and Drugs*, *supra* note 2, at 76–79.

57. See *id.* at 74–75.

58. See *id.* at 77.

59. See, e.g., Heidi M. Hurd, *Duties Beyond the Call of Duty*, 6 ANN. REV. L. & ETHICS 3, 19 (1999).

it does not deal with what we *do*, and for that reason alone is irrelevant to any principle of wrong-*doing*.

This would of course be convenient for liberalism if it worked, showing us right off why aretaic ethics is irrelevant to wrongdoing; but unfortunately, it does not work. For there are strictly aretaic categories of moral disapproval that apply to actions and omissions, and not just to character traits, and to inner states of wish, feeling, attitude, etc.⁶⁰

Consider three examples, the first of which Camus gave a version of in his novel, *The Fall*⁶¹: you are on a bridge over the Seine in Paris, and you see a woman drowning in the river; the night is dark, the river is swift and its banks steeply walled, and a quite warranted fear of your own drowning prevents you from jumping in.⁶² She drowns.⁶³ The second kind of case is one coming from the bankruptcy literature: you have the moral as well as legal right to be repaid a debt another owes you; yet he is in dire circumstances, and you do not need the money, not immediately at least; yet you neither forgive nor even postpone collection efforts on the debt, and these collection efforts gain you a modest recovery while they occasion the debtor much distress. The third is a familiar staple of the current aretaic literature: your sister needs a kidney to save her life; her blood type is rare but you are a match; you refuse to give her a kidney for fear that, although one kidney is adequate for most lives, that is not always the case, and so you refuse; your sister dies.⁶⁴

These three kinds of examples are often used to illustrate three kinds of moral failure of an aretaic kind: the first, absence of supererogation; the second, presence of suberogation; the third, both absence of supererogation and presence of suberogation—awkwardly called in the literature, “quasi-supererogation,” or sometimes, “quasi-erogation.”⁶⁵ Briefly, these aretaic categories are defined as follows.⁶⁶ A supererogatory action is one a person is not obligated to do, but doing it redounds to their moral credit while not doing it garners no moral blame.⁶⁷ A suberogatory action is an action one had no obligation not to do, for example, one had a weak permission to do it, but nonetheless the doing of such action is morally odious, untoward, not fitting of a decent human being, or something like that; whereas refraining from doing such an action merits no moral praise—any more than does

60. See Moore, *supra* note 46, at 130.

61. ALBERT CAMUS, *THE FALL* 69–70 (1956).

62. *Id.* at 70.

63. *Id.*

64. See Moore, *supra* note 46, at 124.

65. See *id.* at 121–24.

66. For a more complete exposition, as well as an introduction to the literature, see *id.* at 121–25, and Hurd, *supra* note 59, at 5–6.

67. See Moore, *supra* note 46, at 121–22.

refraining from doing what one was obligated not to do usually merit any moral praise.⁶⁸ A quasi-erogatory action is one where a person, while not obligated to do or refrain from doing such an action, nonetheless merits moral praise if the action is done and moral condemnation if it is not done.⁶⁹

Notice that these three aretaic categories all apply to actions and omissions. They illustrate how the categories of aretaic evaluation are not limited to character traits or inner momentary states of mind. It is just this sameness of subject-matter that allows one to join these aretaic categories to the deontic categories of the required, the forbidden, the permitted, and the indifferent, to form a comprehensive logic of moral judgment.⁷⁰

Since actions and omissions can be aretaically as well as deontically condemned, my two questions recur: How do we know when a moral failure is deontic or aretaic? And: Why shouldn't the criminal law seek to prevent and punish both kinds of moral shortcomings?

One can illustrate the first of these questions by a recently proposed theory of bankruptcy discharge. According to Ralph Brubaker's and Heidi Hurd's new book,⁷¹ discharging the debts of bankrupts is not required by theories of distributive justice but rather, by the virtue of a society or its members in forgiving those for whom repayment is impossibly onerous. Suppose we are advising a creditor whose debtor has asked for relief, and we conclude that the creditor morally *ought* to give the relief requested. How can we tell if the moral ought is deontic—a duty of distributive justice perhaps—or aretaic?

A number of familiar answers to this question will not do. One of these we have considered and put aside before. This was the jurisdictional allocation of the deontic as the appropriate scheme of evaluation for actions and the aretaic as the scheme of evaluation of character traits and inner states of feeling and attitude. As we saw, while the deontic indeed does not evaluate character traits and inner states, the aretaic evaluates not only those but actions and omissions as well.⁷² There is thus no jurisdictional or subject matter division between the deontic and the aretaic that can help us here.

68. *See id.* at 123.

69. *See id.* at 124.

70. *See id.* at 125–26, where I modify Aristotle's deontic square of opposition into a combined deontic/aretaic twelve-sided figure.

71. HEIDI M. HURD & RALPH BRUBAKER, *DEBTS AND THE DEMANDS OF CONSCIENCE: THE VIRTUE OF BANKRUPTCY* (forthcoming 2017).

72. *See supra* text accompanying notes 59–60.

A second suggestion builds on the moral heroism involved in well known cases of supererogation. Saintliness is often attributed to supererogators because of the sacrifice of their own interests, projects, and welfare for another's good—Mother Theresa comes to mind. One thus might seek to distinguish the aretaic from the deontic by the kind and level of self-sacrifice demanded, the aretaic requiring the saintly level and the deontic considerably less if any at all. Three points, however. One is that there is no such moral heroism relevant to the aretaic categories other than the supererogatory; the suberogatory does not involve saintliness or its absence. Secondly, one suspects that not all supererogatory acts require heroic amounts of self-sacrifice either,⁷³ even if the dramatic cases garnering the most publicity are of this kind. Thirdly, doing one's deontic duties is not always a walk in the park either. Witness the role Kant assigned to God in his ethics, which was to guarantee happiness to the dutiful since there was no other guarantee they would achieve it. Excuses such as duress, addiction, provocation, and necessity exist precisely because doing one's duty sometimes is too hard to be punished for failing.

A third suggestion proceeds from the thought—which is plausible although contested—that there are no deontic duties to self, and that such “duties” are therefore in reality aretaic and not deontic; and that deontic duties are the moral categories that deal with what we ought to do because of the interests of others.⁷⁴ One could thus distinguish the aretaic as dealing only with the oughts of self-improvement—namely, to be a better person.⁷⁵

The problem with this third view lies on both sides of the suggested divide. On the deontic side, while it is plausible that deontic duties to self make no sense, there are plausibly duties *tout cour*, that is, duties owing to no one.⁷⁶ Destroying the reputation of a dead person, for example, or mutilating a corpse. The suggested distinction does not allow us to classify such duties *tout cour* as either deontic or aretaic—when to my mind they seem plainly to be deontic. Moreover, the category of the aretaic refuses to be cabined to just self-directed duties. The woman in peril in the Seine and the sister who needed a kidney, in the earlier examples of failure of supererogous or presence of suberogation, illustrate how aretaic oughts can involve others beside the actor.

A fourth suggestion modifies the third in the following way: while the woman drowning in the Seine and the kidney-needing sister are persons

73. See Moore, *supra* note 46, at 121–22.

74. See MOORE, CAUSATION AND RESPONSIBILITY, *supra* note 36, at 57.

75. See Moore, *supra* note 46, at 131.

76. Whether there are such duties is an old debate in ethics. For the classic expositions, see G.E. MOORE, PRINCIPIA ETHICA 81–85 (reprint 1954) (1903), and HENRY SIDGWICK, THE METHODS OF ETHICS 113–15 (7th ed. 1981).

with respect to which one morally ought to act, neither the woman nor the sister have any right that the aretaic oughts be fulfilled. Put simply, the idea is that no one has a right that we be virtuous, recognizing that it would be good if we were. Whereas, this thought would continue, deontic oughts always correlate the duties of one person with the rights of another person to whom the duty is owed.⁷⁷

The first part of this contrast seems plausible—no one except God has a right that we be virtuous, and for those of us who are not theists, that means no one has such a right. Still, the second part of the contrast is more suspect. If there are duties *tout cour* as above described, then even deontic duties do not always have a correlative rights-holder because they do not even have a person to whom such duties are owed. And, further, even in cases where there is a person to whom one can say the deontic duty is owed, such duty will not exist *because* that person has a right to the exercise of the correlative duty. Joel Feinberg imagines instances of “non-grievance” wrongs, which, while they may be wrongs with respect to some particular person, they are not wrongs because they violate the rights of that person.⁷⁸ So again, the deontic refuses to be cabined by the suggested criterion that the oughts involved are rights-based oughts.

A fifth suggestion arises from the fact that violations of our primary duties of justice give rise to secondary duties of repair or punishment; whereas the three aretaic failures charted earlier do not give rise to such secondary duties. If I have thrown you into the Seine, I have a duty to prevent your death if I can, and if I can’t—or won’t—I have a secondary duty to compensate, i.e., corrective justice, and a secondary duty to suffer harsh treatment and censure, i.e., retributive justice. Whereas if my failure is aretaic—I refuse to take the serious risk of drowning myself attendant upon any attempt at rescue—neither the preventative nor either of these secondary duties arise.

The problem here is not one of fit—for I believe these implications hold. Rather, it is a question of whether the tail is not wagging the dog in relying on this difference in secondary duties to mark the difference between the deontic and the aretaic. After all, if we were asked why we impose secondary duties of prevention, repair and punishment in the one case and not on the other, we would surely reply that the first involved a violation of justice while the second only involved a failure of virtue.

77. See MOORE, CAUSATION AND RESPONSIBILITY, *supra* note 36, at 456.

78. FEINBERG, *supra* note 47, at 18.

My own answer to our present quandary is this: It should occasion little surprise that in an individual case—like that posed earlier of an individual creditor pursuing an individual debtor in need—we are bereft of any strong indicators whether our duties in such a case are aretaic or deontic. We may have some intuitions in either direction, although those may well be blurry. In any case, what is needed to draw this distinction systematically is nothing less than a fully worked out theory of justice. With such a theory, the aretaic can then simply be the residue of the “morally untoward” once the deontic is subtracted. Only by working out what a theory of what distributive justice demands in cases of debt forgiveness, for example—as Brubaker and Hurd do in their book⁷⁹—can then one say with confidence that forgiving some debtor in need is only aretaic and not deontic. No small task, to be sure, but one we need to do to design legal institutions generally.

Coming to my second and normative question, there are usually two answers given by liberals such as myself as to why we should not use the criminal law to inculcate virtue as well as to prevent and punish culpable wrongdoing. One lies in the mantra, “you cannot coerce virtue.” Like many such mantras, this one has some truth to it. One cannot, directly and immediately, coerce virtue because to coerce it may well be to eliminate it. Take the virtue of benevolence: coerce the giving of gifts to those less fortunate, and the virtue of benevolence is transformed into the calculation of prudence for many. Still, the point is somewhat overrated. In the long run, and indirectly, coercing people to do what it would be virtuous to do might well inculcate in them the habits that would make their future giving virtuous.

In any case, liberalism is better defended by saying that the state *should not* be coercing virtue, rather than by saying that it *cannot* do so. Yet why shouldn't a state coerce virtue? Wouldn't a society of virtuous people be a better society than one made up of those with morally indifferent characters? The answer to that last question is surely yes, but that is hardly the end of the matter. Unaddressed is the question of means: *How* may the state make itself better in this way? Inculcating virtue with incentives, subsidies, nudges, and the like, may well be justified in a liberal state. But using the coercive apparatus of the criminal law would not be so justified. After all, criminal law does not just incentivize future behavior; uniquely amongst areas of law, it punishes past behavior. This latter bit it can fairly do only to those who deserve punishment. Culpable wrongdoing deserves punishment; aretaic failures do not.

79. HURD & BRUBAKER, *supra* note 71.

Saying exactly why aretaic failures do not deserve punishment is a tricky business.⁸⁰ Particularly for someone like me, whose epistemic route to justifying retributive justice for culpable wrongdoers was through the virtuousness of the guilt such wrongdoers should feel. Surely aretaic failures generate guilt as well, and as surely that guilt is virtuous to feel for aretaic failures as well as deontic ones? Indeed, Camus's protagonist in *The Fall* starts to unravel his view of his moral worth with his guilt at the aretaic failure described earlier.⁸¹ My earlier argument in this regard was based on the different quality of the guilt actually felt, and that was virtuous to feel, in cases of aretaic failure: such guilt was self-focused in a way that guilt for deontic failure was not.⁸² To that qualitative difference was added a quantitative difference as well: deontic failures call for more guilt feelings than do aretaic failures.

IV. CONCLUSION

At least in lay circles, for the last century and a half Mill's harm principle has been the dominant theory as to what limits on criminal legislation should be observed by liberal democratic states.⁸³ Yet surely much of the longevity of the harm principle's popularity has been due to its proxying function: because many causings of harms to others are moral wrongs, and because many moral wrongs involve causing harm to others, the harm principle can serve as a rough proxy for what is really doing the heavy lifting here, the moral wrong principle definitive of legal moralism.⁸⁴

Sometimes the proxying function fails at the edges, as is true for wrongless harms and harmless wrongs. Sometimes the proxying function fails more centrally, as is true of the way the harm principle would treat omissions—either punishing all of them because they are harm causings or none of them because they are not harm causings, but in either case not fitting what we actually do, which is to punish just some kinds of omissions. But even when the harm principle adequately proxies the moral wrong principle, it is important that we be clear about what actually limits the

80. I say some rather conclusory things in this regard in MOORE, *supra* note 22, at 52–53.

81. CAMUS, *supra* note 61, at 69–70.

82. Moore, *supra* note 46, at 142.

83. See MILL, *supra* note 3, at 73–81.

84. Joseph Raz, in THE MORALITY OF FREEDOM, *supra* note 25, at 420–21, concedes as much to the harm principle, but no more.

definition of crime in a just state. Such clarity tells legislators at what they should aim in their criminal legislation, and why wrongs rather than harms should be their aim. Such clarity also transforms the misleading debate between Millian liberals and social conservatives about whether so-called “moral legislation” can be justified even when properly motivated. Liberals have pretended that the conservatives have the wrong sort of justification—“to protect morality”—when in fact conservatives have it right: criminal prohibitions are rightly justified by their prevention and punishment of moral wrongs. What legal moralism shows actually to be at issue with respect to social conservatives’ arguments in cases of abortion, homosexuality, incest, and the like, is not whether social conservatives are wrong to rely on morality to defend their legislation, but whether they rely on the wrong morality. The debate between liberals and social conservatives is thus at this first-order moral level, not some meta-level that pretends to a neutrality above the moral fray. Finally, such clarity also gives content to our most important natural and constitutional right, the right to be free of *unwarranted* governmental coercion.⁸⁵ It does this by clarifying what makes governmental coercion unwarranted, and by charting when that it is the case.

85. Moore, *Liberty and the Constitution*, *supra* note 2, at 156.

V. APPENDIX

FLOW CHART OF POSSIBLE PARTS OF MORALITY AS APT FOR USE IN
CRIMINAL LEGISLATION



