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GABRIEL S. MENDLOW

ON THE STATE'S EXCLUSIVE RIGHT TO PUNISH

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ABSTRACT. In a characteristically iconoclastic essay, ''Does the State Have a Monopoly to Punish Crime?'', Douglas Husak argues that the state's moral right to punish crime is all but self-evident while its supposed monopoly on punishment is a fiction. Husak draws this bracing conclusion from a modest, quasi-Lockean premise – that persons and other entities have a right to impose stigmatizing deprivations on those who wrong them. This premise evokes John Locke's far stronger claim that everyone enjoys a natural right to inflict potentially severe sanctions on any wrongdoer. The quasi-Lockean premise also evokes the familiar idea that all criminal wrongdoing is an attack on the broader community, and that law-breakers consequently owe a debt to society that they can repay through punishment. In this essay, I argue that the inferences Husak draws from the quasi-Lockean premise are unsound, but for reasons that reveal important lessons about the state's right to punish crime and about the limits of what we can extract from the venerable idea that a central victim of criminal wrongdoing is the community as a whole. In Part II, I argue that the quasi-Lockean premise does not ground the state's right to punish the kind of wrongs traditionally thought central to the criminal law, namely, wrongs perpetrated on individual human victims. In Part III, I answer Husak's implicit challenge to describe a kind of stigmatizing deprivation – a kind of punishment – that the state alone has a right to inflict. I suggest that no entity but the state may inflict sanctions that constitute prima facie invasions of moral rights.

I. INTRODUCTION

Douglas Husak begins a characteristically iconoclastic essay with a classic two-fold question about punishment, namely, ''why authority to punish is vested in the state – and whether this authority is or ought to be exclusive.''[1] Husak distinguishes this question from the

[1] Douglas N. Husak, ''Does the State Have a Monopoly to Punish Crime?'', in Chad Flanders & Zachary Hoskins (eds.), *The New Philosophy of Criminal Law* (London and New York: Rowman & Littlefield, 2016), p. 97.

issue of whether criminal punishment is justified. Whether it is morally permissible that law-breakers suffer punishment is a separate question from whether the right to inflict such treatment belongs to the state and the state alone. Acknowledging that the second question has "baffled others and given rise to a massive literature,"[2] Husak declares that the answer lies hidden in plain sight. Theorists have struggled to explain the state's right to punish because they have assumed that "the basic problem is to explain why the state has a *monopoly* on punishment, or the *sole* authority to punish."[3] But this assumption is false. A multitude of non-state actors, from schools and athletic leagues to employers and parents, unquestionably possess the right to inflict stigmatizing deprivations on those who commit certain wrongs against them, including wrongs that constitute violations of the criminal law.[4] So the state's right to punish crime is not exclusive, nor is the basis of this right mysterious. If "the authority to punish is most clearly vested in those against whom substantial wrongs are committed,"[5] and if crime is by its nature "conduct that wrongs … the whole community,"[6] then "the problem of why it is *the state* that has the authority to punish crime can be solved relatively easily."[7]

The foundation of this argument is a modest premise – that all sorts of entities, including the state and the political community it represents, enjoy the right to impose stigmatizing deprivations on those who wrong them. Husak's premise evokes the familiar idea that all criminal wrongdoing is an attack on the broader community, and that law-breakers consequently owe a debt to society that they can discharge by submitting to state punishment. Husak's premise also evokes John Locke's far stronger claim that everyone in a state

[2] *Ibid*.

[3] *Ibid*.

[4] See *ibid*., p. 100.

[5] *Ibid*., p. 104.

[6] *Ibid*., pp. 103–104.

[7] *Ibid*., p. 97.

of nature enjoys a right to inflict potentially severe[8] sanctions on anyone[9] who "invad[es]" another's rights.[10] Husak's premise is weaker than Locke's claim in two respects: Husak's premise assigns a punitive right only to victims, and the right that it assigns is a right to inflict sanctions of unspecified severity. Reasoning from this modest, quasi-Lockean starting point, Husak reaches a bracing conclusion: the state's moral right to punish crime is all but self-evident while its supposed monopoly on punishment is a fiction.

I argue in what follows that the inferences Husak draws from the quasi-Lockean premise are unsound, but for reasons that reveal important lessons about the state's right to punish crime and about the limits of what we can extract from the venerable idea that a central victim of criminal wrongdoing is the community as a whole. In Part II, argue that the quasi-Lockean premise does not ground the state's right to punish the kind of wrongs traditionally thought central to the criminal law, namely, wrongs perpetrated on individual human victims. If crimes like murder, rape, and robbery are in the first instance interpersonal wrongs, then the state's right to punish these crimes *as* interpersonal wrongs does not flow in any straightforward way from the state's right to inflict stigmatizing deprivations on those who wrong the state or the political community it represents. In Part III, I address the state's supposed monopoly on punishment. In rejecting the monopoly, Husak implicitly challenges his critics to describe a kind of stigmatizing deprivation that only the state has a right to inflict. I suggest that the germ of an answer to Husak's challenge lies in his own observation that "states [may] have the sole authority to administer severe punishments (perhaps those involving violence), whereas other

[8] Locke's natural right to punish is a right to "bring such evil on any one, who hath transgressed [the Law of Nature], as may make him repent the doing of it, and thereby deter him, and by his Example others, from doing the like mischief." John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge and New York: Cambridge University Press, 1988 [1690]), p. 272 [§8].

[9] Locke claims that "if any one in the State of Nature may punish another, for any evil he has done, every one may do so. For in that *State of perfect Equality*, where naturally there is no superiority or jurisdiction of one, over another, what any may do in Prosecution of that Law, every one must needs have a Right to do." *Ibid*., pp. 271–272 [§7].

[10] *Ibid*., p. 271 [§7]. For a sophisticated Lockean account of the state's exclusive right to punish, see John Simmons, "Locke and the Right to Punish," *Philosophy and Public Affairs* 20 (1991). Simmons reaches the anarchistic conclusion that a state's right to punish would be exclusive only if all of its citizens voluntarily transferred their private punitive rights to the state – a condition that no existing political community satisfies. For a theory that builds on Simmons' Lockean starting point but rejects his anarchistic conclusion, see Christopher Heath Wellman, "Rights and State Punishment," *Journal of Philosophy* 106 (2009).

persons and institutions possess only the authority to administer punishments less serious (or nonviolent).''[11] Husak rightly despairs of devising criteria to rank punishments in terms of relative seriousness. As an alternative approach, I propose that we demarcate the state's penal monopoly not by reference to sanctions' severity or ''violence'' but instead by reference to whether given sanctions constitute prima facie invasions of moral rights. My conjecture is that rights-infringing punishments are the exclusive or near-exclusive province of the state.

II. WHY DOES THE STATE HAVE A RIGHT TO PUNISH CRIME?

Husak claims that the state enjoys a quasi-Lockean moral right to impose stigmatizing deprivations on those who wrong it or the political community it represents. This disarmingly straightforward explanation of the state's right to punish presupposes a familiar conception of crime, according to which a crime is a wrong that takes the state or the political community as one of its victims. As Husak claims, ''[t]he state neither does nor should punish *all* wrongs – even when these wrongs are egregious. Instead, the state should proscribe only public wrongs – that is, conduct that wrongs and thus concerns the whole community and not merely those persons who are immediately victimized.''[12] Like other theorists, Husak envisions the category of public wrongs as including traditional *mala in se* crimes like murder, rape, and robbery, all of which wrong individuals. How these crimes also wrong the community Husak does not say. Perhaps interpersonal criminal wrongs cause ''social volatility''[13] or arouse fear in other community members.[14] Or perhaps these crimes wrong the community in a more immediate (non-causal) way, just by injuring the community's constituents or transgressing the community's defining values. Whatever the nature of the wrongs to the community that interpersonal crimes may cause or constitute, my chief contention in this Part is that these wrongs to the community are the only wrongs that the quasi-Lockean premise licenses the state to punish. Penal theorists must look beyond this premise if

[11] Husak, ''Does the State Have a Monopoly to Punish Crime?'', p. 101.

[12] *Ibid*., pp. 103–104.

[13] Lawrence C. Becker, ''Criminal Attempts and the Theory of the Law of Crimes,'' *Philosophy and Public Affairs* 3 (1974), p. 274.

[14] See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 65–671.

they wish to justify the state's right to punish *mala in se* offenders for the wrongs they perpetrate on their individual victims.

I should acknowledge at the outset that my conclusion will bother no one who believes that state punishment is properly imposed only for the wrongs that criminal offenders perpetrate on the broader community. William Blackstone appears to have held something close to this view:

> In all cases … crime includes an injury: every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community. Thus treason in imagining the king's death involves in it conspiracy against an individual, which is also a civil injury: but as this species of treason in [its] consequences principally tends to the dissolution of government, and the destruction thereby of the order and peace of society, this denominates it a crime of the highest magnitude. Murder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set, for others to do the like. Robbery may be considered in the same view: it is an injury to *private* property; but, were that all, a civil satisfaction in damages might atone for it: the *public* mischief is the thing, for the prevention of which our laws have made it a capital offence. In these gross and atrocious injuries the private wrong is swallowed up in the public.…[15]

If, as Blackstone seems to say in this passage, criminal sanctions punish *mala in se* offenders for the "public mischief" that they sow through their interpersonal wrongdoing, rather than punishing them for their interpersonal wrongdoing itself, then the state's moral right to punish *mala in se* offenders rests unproblematically on the quasi-Lockean premise. Dissolving the government, depriving the state of a member, setting a "pernicious example" for others – all are wrongs against the state or the political community. Thus, if an entity like the state may inflict stigmatizing deprivations on those who wrong it (as the quasi-Lockean premise entails), then the state may call a traitor to account for "tend[ing] to … dissol[ve] the government," call a murderer to account for depriving the state of a member, and so on.

The main drawback of this approach is that most people expect the state to call a murderer to account for *murder*, the interpersonal wrong of malicious killing – and this is precisely the kind of thing that our criminal legal system seemingly allows the state to do. When alleged murderers appear in court, the accusation to which they must answer is that they killed another human being without justification or excuse – not that they deprived the state of a member, sowed public mischief, increased social volatility, or

[15] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1769), vol. 4, pp. 5–6.

aroused fear in other members of the community. While the state's objective in punishing murderers might be to prevent and condemn these broader social harms, we should distinguish between the objectives of a punishment and the *object* of that punishment, that is, between the objectives that the state aims to achieve by condemning a given wrong through punishment, and the wrong thus condemned.

Following R.A. Duff, we should also distinguish between the object of punishment and various possible *conditions* of punishment.[16] Although it might be the case that our criminal legal system punishes offenders for given interpersonal wrongs only on the condition that such wrongs tend to sow public mischief, it doesn't follow that sowing public mischief is or should be the object of any offender's punishment – the wrong for which the offender is called to account, condemned, and sanctioned. On this point, the most prominent contemporary "public wrongs" theorists, Duff and S.E. Marshall, draw a sharp contrast with Blackstone:

> What makes rape and murder criminal, what justifies or demands the attention of the criminal law, is not that the murderer or rapist harms or wrongs the public at large, but what he does to his individual victim: if we are to give the victims their due, the criminal law's attention must be on the wrongs that they have suffered. A better understanding of the idea of a public wrong is … that it is a kind of wrong that properly concerns "the public" – a wrong that is a matter of public interest in the sense that it properly concerns all members of the polity by virtue simply of their shared membership of the political community. The wrong that merits criminalisation, the wrong for which a wrongdoer is called to account, condemned and punished by the criminal law, is the wrong that he does to his individual victim.…[17]

Husak himself endorses this conception of public wrongs in an earlier work, asserting that "criminal conduct must be regarded as a *public* wrong – not in the sense that it is a wrong done *to* the public but rather that it is a wrong that is the *proper concern* of the public."[18] Without abandoning this view, Husak emphasizes in his more recent essay that serious interpersonal wrongdoing also wrongs the broader community, and he proposes that this feature of serious interpersonal wrongdoing is what makes it an appropriate object of state punishment.

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[16] On the distinction between objects and conditions of punishment, see chapter 4 of R.A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford and Portland: Hart Publishing, 2007), and Gabriel S. Mendlow, "The Elusive Object of Punishment," *Legal Theory* 25 (2019).

[17] R.A. Duff & S.E. Marshall, "Public and Private Wrongs," in James Chalmers, Fiona Leverick & Lindsay Farmer (eds.), *Essays In Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh: Edinburgh University Press, 2010), pp. 71–72.

[18] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford and New York: Oxford University Press, 2008), p. 135.

To assess this proposal, we will need to examine how exactly interpersonal wrongdoing might wrong the community. Start with an obvious possibility, that interpersonal wrongdoing wrongs the community ''causally,'' by engendering social ills like tit-for-tat violence and widespread fear. The quasi-Lockean premise plainly licenses the state to condemn and sanction people for causing these social ills. But does the quasi-Lockean premise also license the state to condemn and sanction people for the interpersonal wrongs from which these social ills causally arise? I do not see that it does. When W's wrong to V causes a wrong to T, it doesn't always follow that T may impose a stigmatizing deprivation on W for W's wrong to V. Suppose that you maliciously run another driver off the road, causing her to break her arm as she collides with my mailbox. While it is plausible that I may impose a stigmatizing deprivation on you for damaging my property, it is more doubtful that I may impose a stigmatizing deprivation on you for running the other driver off the road and breaking her arm. Your wrong to her is more serious than your wrong to me: you wronged her intentionally and caused her to suffer serious injury, whereas you wronged me accidentally (recklessly) and caused me to suffer only minor property damage. That your recklessness toward my property arose from your malice toward a human being surely makes a difference to how I should feel about you. It also might make a difference to how harshly I may criticize you for wronging me. But I do not see that it entitles me to impose a stigmatizing deprivation on you for wronging the driver, despite your having wronged the driver by means of the same act through which you wronged me.

If I am right about this example, it shows that T's right to sanction W for wronging V (if such a right exists) doesn't always arise from the fact that W's wrong to V caused a wrong to T. The example doesn't show that T's right to sanction W for wronging V could never arise in this way; no single example could establish this stronger conclusion. But we have good reason to doubt that any such causal relation undergirds the state's right to punish *mala in se* offenders for the wrongs they perpetrate on their individual victims. The social harm that flows from a given *mala in se* crime is uncertain. A single *mala in se* crime may arouse little fear in other community members and risk provoking little retaliation. From the perspective

of the broader community, the social injury may be more like a broken mailbox than a broken arm. The social injury is also unlikely to be an injury that the perpetrator intended, being in most cases a prospective consequence about which the perpetrator was at worst negligent or reckless. The community seemingly stands to the *mala in se* offender as the mailbox owner stands to the malicious driver – entitled to sanction the *mala in se* offender (moderately) for the uncertain social harm caused by the offender's interpersonal wrong, but not entitled *by dint of such causal link alone* to sanction the offender (harshly) for the interpersonal wrong itself.

Some theorists may insist that the social ill that grounds the state's right to punish a given *mala in se* offender isn't the uncertain communal harm caused by that one offender's interpersonal wrong. It is rather the certain and substantial harm caused by *mala in se* crimes taken as a group, together with the retaliatory violence that would ensue if the state never punished *mala in se* offenders for the wrongs they perpetrate on their human victims. I will not gainsay the magnitude or moral importance of these aggregate and counterfactual social harms. No theorist should. The only point I wish to make is that if a theorist cites these aggregate and counterfactual harms as grounds of the state's right to punish *mala in se* offenders for the wrongs they perpetrate on their individual victims, then the theorist does not derive the state's right to punish from the quasi-Lockean premise.

An alternative foothold for a theorist wishing to ground the state's right to punish crime in the quasi-Lockean premise is the possibility that interpersonal criminal wrongdoing wrongs a community in a kind of immediate, non-causal way – perhaps in something like the way that a bigoted insult can wrong the relevant group to which the insult's target belongs. A superficially attractive version of this idea that we should set aside is this: that an act of interpersonal wrongdoing wrongs a community *qua* corporate body just by virtue of its wronging one of the body's components. We should set this idea aside because it cannot explain the full scope of a state's penal authority. States unapologetically claim the right to punish wrongs perpetrated against victims who are not constituents of the relevant political community, such as visitors, non-citizen residents, and people whose only connection to the state is that they were

dragged to its territory against their will. If a state's right to punish these wrongs derives from the same source as its right to punish wrongdoing perpetrated against citizens, then that source must be something other than a corporate body's (supposed) right to inflict sanctions on those who wrong its constituents.

Mindful of this issue, one theorist has proposed that interpersonal wrongdoing falls within the ambit of the state's penal authority not because such wrongdoing is an attack on the political community's constituents but because such wrongdoing is an attack on the political community's defining values. Duff develops this idea in his recent book *The Realm of Criminal Law*, where he depicts the criminal law as a "code of ethics" for a political community and likens the state's punitive authority to that of non-state institutions, like universities and professional licensing bodies, that govern communities oriented around a set of shared values. Duff observes that all of these entities claim the right to sanction their members for varieties of interpersonal wrongdoing inconsistent with the central values of the relevant community. Medical licensing bodies claim the right to sanction physicians for fraud, drunk driving, and other acts inconsistent with membership in a profession dedicated to respecting people's dignity and physical wellbeing. Universities claim the right to sanction academics and their students for plagiarism, cheating, and other acts inconsistent with membership in an institution dedicated to the pursuit of truth and the reward of merit. Likewise, argues Duff, the state appropriately claims the right to sanction people within its territory for murder, rape, and other acts "clearly inconsistent with … any remotely plausible conception of civil order – any conception, that is, of how the members of a polity can live together as citizens."[19] Duff explains that a polity's civil order is "the normative ordering of its civic life – of its existence as a polity. That normative ordering is structured by the set of goals and values through which a polity constitutes itself … as a political community…."[20] A crime like murder or rape "violates [the] civil order, even if it remains undetected, because it is … an attack on … one of

[19] R.A. Duff, *The Realm of Criminal Law* (Oxford and New York: Oxford University Press, 2018), p. 300.

[20] *Ibid.*, p. 7.

the central values by which that order is structured – one of the values essential to the polity's civic life.''[21]

If, as Duff supposes, the state's right to punish serious interpersonal wrongdoing flows from the same source as does the right of any institution to enact and enforce a ''code of ethics'' upholding the relevant community's defining values, is this source in fact the quasi-Lockean premise? I am doubtful. For present purposes, I grant that when a person's conduct affects a community in a way that violates its defining values, the person commits a wrong against the community. Suppose that a student plagiarizes a classmate's work. If the cheating goes undetected, it doesn't wrong the school community ''causally'': it doesn't breed resentment, undermine trust, or encourage others to cheat. But it still constitutes an attack on the school's central values, violating principles of honesty, integrity, and mutual respect that define a school as an academic community. Arguably, a student who violates these principles by stealing a classmate's ideas not only wrongs her classmate but also wrongs her school, just by violating its defining values. Yet it is a further question whether the school must cite this supposed wrong against itself in order to justify sanctioning the student for the wrong she perpetrated on her classmate. Must an institution identify itself as a third-party victim of a member's interpersonal wrong or else disclaim the right to punish her for that wrong? Duff does not presuppose, much less assert, that a third party may call someone to account for wronging another only if the third party is in some sense a victim of the underlying wrong.

It is significant that no such principle governs our ordinary practices of blaming and holding responsible. In interpersonal morality, the right to call wrongdoers to account does not belong only to the people wronged, even if (as I will emphasize in a moment) those most directly wronged enjoy a kind of moral priority. My right to condemn you for wronging my spouse or child does not seem to depend on its being the case that, by wronging them, you wronged me. Even if your wrong to my spouse or child did somehow wrong me, it would ordinarily be gratuitous or narcissistic of me to justify taking you to task by calling myself your victim. Notably, while Duff deems core *mala in se* crimes like murder and rape

[21] *Ibid.*, pp. 218–219.

"attack[s] on"[22] the polity's defining values, he does not call them attacks on (or wrongs to) the polity itself. In justifying the state's right to punish, Duff does not rely on the quasi-Lockean premise.

I began this Part by proposing that the quasi-Lockean premise is insufficient to justify the state's penal authority, and now I am suggesting that it might also be unnecessary. I do not believe that it is altogether irrelevant, however. Although the quasi-Lockean premise doesn't justify the state's authority to punish interpersonal wrongdoing, it might help justify the state's authority to *prosecute* such wrongdoing. More exactly, the quasi-Lockean premise might help rebut the concern that the state *qua* prosecutor impermissibly transgresses victim-centric norms of interpersonal morality when it plays the role of exclusive accuser. I have referred to this concern elsewhere as the moral ambiguity of public prosecution.[23] I will end this Part with some thoughts on how the quasi-Lockean premise might help bring the ambiguity closer to a resolution.

The moral ambiguity of public prosecution arises because of the way the Anglo-American prosecutorial system operates as an institutional analog of the interpersonal moral practices of blaming and holding responsible, at least in regard to serious crimes involving a human victim.[24] Although the Anglo-American felony prosecutorial system's most salient functions are crime reduction and social control, a characteristic way in which the system serves these functions is by expressing blame and demanding answers. The formal charge that initiates a felony case constitutes an accusation of wrongdoing, which, like a well-grounded moral accusation, obliges the defendant either to accept responsibility (i.e., plead guilty) or to deny responsibility outright or tender a justification or excuse (i.e., contest the accusation in a trial). Even when a felony defendant forgoes trial under the threat of severe punishment, the ensuing guilty plea hearing and sentencing proceeding still often resemble moral encounters, in which the accused accepts responsibility and expresses

[22] *Ibid.*, p. 219.

[23] See Gabriel S. Mendlow, "The Moral Ambiguity of Public Prosecution," *The Yale Law Journal* 130 (2021).

[24] For discussion of how the Anglo-American system for prosecuting serious crime embodies the morality of accusation and answer, see R.A. Duff, *Trials and Punishments* (Cambridge and New York: Cambridge University Press, 1986), pp. 99–143, and Antony Duff et al. (eds.), *The Trial on Trial: Volume Three: Towards a Normative Theory of the Criminal Trial* (Oxford and Portland: Hart Publishing, 2007), pp. 55–161.

contrition (whether or not sincerely) and the tribunal imposes a censorious sanction.

The victim's formal absence from these morally-inflected proceedings marks a conspicuous departure from our ordinary practices of blaming and holding responsible, which place victims of wrongdoing at the center. Under what I take to be conventional norms of interpersonal morality,[25] victims decide how and when to express condemnation, whether to impose a sanction, what kind of sanction to impose, whether to offer forgiveness, and whether to accept an apology. Third parties to a moral wrong stand aside (and often stand mute) as victims call wrongdoers to account. Third parties are slow to forgive wrongdoers when victims have not done so, and third parties are reluctant to condemn wrongdoers when victims have offered forgiveness. No such deference to a victim's moral standing characterizes our system of exclusive public prosecution. The state acts as sole accuser, allowing victims to participate largely as a matter of grace. The practice of public prosecution thus seems to disregard the victim's superior moral standing. Although the state *qua* prosecutor does not utterly prevent victims from censuring their wrongdoers (victims are free to condemn informally), physically silencing a victim is not the only way that a third party can contravene a victim's superior standing. Another is for the third party to make itself the center of attention in a public, high stakes moral encounter that pushes the victim to the side. The problem is not that the state-centric prosecutorial model adversely affects a victim's wellbeing, as victims' advocates and other commentators have argued.[26] The problem is rather that the state-centric model, whether or not it reduces victims' wellbeing, subverts norms of interpersonal morality even as it purports to give them institutional effect. It elevates a third party blamer (the state) over a party possessed of a seemingly superior caliber of moral standing (the victim).[27] Critics of

[25] For further discussion of these norms, see Mendlow, "The Moral Ambiguity of Prosecution," pp. 1168–1171.

[26] For a history of the victims' movement and a proposal about a "dual-track" criminal process designed to enhance the wellbeing of victims without diminishing the wellbeing of offenders, see Nicola Lacey & Hanna Pickard, "A Dual-Process Approach to Criminal Law: Victims and the Clinical Model of Responsibility without Blame," *The Journal of Political Philosophy* 27 (2019).

[27] I say "seemingly superior" because I am not fully confident in the victim-centered conception of moral standing, which subordinates the standing of third parties to the standing of victims. I leave open the possibility that this conception of moral standing is unsound, and that "a collective third party like a political community enjoys a caliber of moral standing that rivals or surpasses that of a victim." Mendlow, "The Moral Ambiguity of Public Prosecution," p. 1153.

truth commissions and amnesties have claimed that such initiatives risk preempting the victim's prerogative to forgive.[28] I have claimed something similar about the state-centric model of criminal prosecution: it risks preempting the victim's prerogative to blame.[29]

I do not believe that the state-centric model is wholly unjustifiable, however. A third party without standing (or with inferior standing) might be justified in calling a wrongdoer to account if the intervention would produce substantial good or avert substantial harm or injustice.[30] So the state might be justified in calling interpersonal wrongdoers to account through the criminal process, notwithstanding victims' seemingly superior moral standing,[31] given that a victim-managed prosecutorial system would likely produce serious injustices and inequities.[32] The case for a state-centric model looks (even) stronger in the light of the quasi-Lockean premise. The premise justifies the state in calling people to account for any wrongs against the political community that their interpersonal wrongdoing may cause or constitute. The premise accordingly justifies the state in hauling people into court for the *acts* through which they perpetrate interpersonal wrongs. What remains to be justified – *all* that remains to be justified – is the state's calling people to account for these same acts insofar as they wrong their direct victims. The quasi-Lockean premise thus diminishes the justificatory burden facing a proponent of the state-centric model of criminal prosecution, even if the premise does not secure on its own the state's right to punish *mala in se* offenders for their interpersonal wrongdoing.

III. IS THE STATE'S RIGHT TO PUNISH *EXCLUSIVE*?

Whatever the true basis of the state's right to punish, if Husak is correct in asserting that various entities beside the state enjoy the right to inflict stigmatizing deprivations on those who wrong them, then the state's claim to a monopoly on (justified) punishment is

[28] See generally Trudy Govier & Wilhelm Verwoerd, "Forgiveness: The Victim's Prerogative," *South African Journal of Philosophy* 21 (2002).

[29] See Mendlow, "The Moral Ambiguity of Prosecution," pp. 1165–1171.

[30] See *ibid.*, pp. 1171–1182.

[31] Although the superior moral standing of crime victims doesn't defeat the case for a state-centric prosecutorial model, it does weigh in favor of granting victims certain procedural rights. See *ibid.*, pp. 1171–1182.

[32] For an alternative defense of the state-centric prosecutorial model, see Matt Matravers, "The Victim, the State, and Civil Society," in Bottoms and Roberts, *Hearing the Victim*.

open to dispute. Husak, for one, vehemently disputes it. After declaring the state's purported monopoly a fiction, he observes that "[m]any arguments to the contrary transform what initially appears to be an important substantive claim [i.e., that the state has a monopoly on punishment] into an uninformative tautology [i.e., that the state has a monopoly on *state* punishment]."[33] Husak considers that a theorist might fall back on the claim that "states have a monopoly to administer punishments *for crime*."[34] But this claim is obviously false, says Husak, if it means that only the state may punish people for violating the criminal law, for an intercollegiate athletics program surely may punish a competitor for using a banned performance-enhancing substance where using that substance is also a crime.[35] Behind this dialectic lies not only Husak's quasi-Lockean premise but also his capacious conception of punishment. Husak counts as a punishment any treatment designed to impose a stigmatizing deprivation. Stigmatizing deprivations range widely in severity, from a cold shoulder to a lifetime of incarceration. Within this broad category, is there a subcategory of sanctions that only the state has the right to inflict?

Husak anticipates this possibility, imagining that a theorist might assert that "states have the sole authority to punish *beyond a specified limit of severity*[, namely,] … the point at which punishments involve *violence*."[36] Husak calls this assertion "a significant substantive claim,"[37] and he allows that it might be true. But he declines to defend it. "[I]f we are to decide whether the state has the sole authority to impose severe punishments," he writes, "we must have criteria to measure the relative severity of alternative modes of sanctions (and to determine whether they involve violence).… It is surprisingly difficult to devise a metric by reference to which one form of punishment can be assessed to be more or less serious than another."[38] The implication is that anyone who would demarcate a state penal monopoly must perform two all but impossible tasks: (i) rank sanctions in terms of severity and (ii) locate a point in the

[33] Husak, "Does the State Have a Monopoly to Punish Crime?", p. 97.
[34] *Ibid.*, p. 100.
[35] See *ibid.*, p. 99.
[36] *Ibid.*, p. 101.
[37] *Ibid.*
[38] *Ibid.*

ranking that divides sanctions that non-state actors have a right to inflict from sanctions so severe that only the state has a right to inflict them.

I agree that these tasks are hard, but I think we can demarcate a state penal monopoly without performing them. Rather than ranking sanctions in terms of severity and drawing a bright line through a murky grey middle, we could ask whether a given sanction constitutes a prima facie rights violation – an imposition that intrudes on a domain protected by a moral right. My conjecture is that sanctions that constitute prima facie rights violations are the exclusive or near-exclusive province of the state. Fines, imprisonment, forced labor – each of these paradigmatic criminal sanctions impinges on a domain usually thought protected by a moral right. Compare interpersonal sanctions. If you wrong me, I may punish you in various informal ways – by withdrawing my affection or respect, by shunning you, by boycotting your business. None of these actions is a prima facie violation of your rights. Absent some special arrangement or relationship, you have no right to my affection, respect, companionship, or patronage. Although it is possible for me to wrong you by withdrawing one of these things, the reason why such withdrawal is wrongful, when it is, is not that you have a right to what I am withdrawing. It is something else – that my withdrawal is unfair, perhaps, or mean-spirited. You of course may have a right not to be treated unfairly; you even may have a right not to be treated meanly. But I do not ordinarily impinge on the domains these rights protect when my withdrawal of affection is a justified sanction. By contrast, the state impinges on the domains that moral rights to property and freedom protect whenever it fines and incarcerates someone, even if it does so with ample justification. Paradigmatic criminal punishments constitute prima facie rights invasions. Justified *non-criminal* punishments (almost) never do.[39] Or so I am suggesting.

This suggestion is only as plausible as its ability to withstand counterexamples. One source of possible counterexamples is the phenomenon of institutional punishment, which in its harsher forms can resemble a criminal penalty. Athletic leagues and professional licensing bodies routinely impose monetary fines, for example, a kind of sanction that might seem to intrude on a domain protected

[39] One possible exception is parental punishment, as I discuss below.

by the right to private property. Does the apparent permissibility of this practice undermine my conjecture? I don't believe it does. If your participation in an institution is wholly consensual, so is your vulnerability to any sanction the institution might foreseeably inflict on you for violating its rules. But if your vulnerability to a sanction is wholly consensual, then the sanction isn't a prima facie violation of your rights. By consenting to the institutional arrangement, you voluntarily contract the domain that the relevant rights protect.

This kind of domain contraction is a familiar aspect of participating in an institution or social practice. Several popular sports allow players to tackle opponents by grabbing them and forcing them to the ground. Outside of a sporting context, this kind of action ordinarily constitutes a prima facie violation of the target's moral right not to be touched. To justify the action in a non-sporting context – to establish that it is not a rights violation, all things considered – we must identify factors of greater moral significance than the right being infringed and explain why these factors either override the right or indicate that the target cannot claim the right's protection. No such explanation is necessary when a player executes a tackle in a game of rugby or American football. We need only state the rules of the sport and observe that the target's participation is consensual. Because the target's consent contracts the domain protected by the target's right not to be touched, the ensuing tackle isn't a prima facie rights violation rendered all-things-considered justified by the target's consent; it is no rights invasion at all.

Another source of possible counterexamples to my conjecture is the phenomenon of parental punishment. In material terms, much parental discipline is far harsher than other accepted forms of non-state punishment. Few private actors in a liberal society would claim the right to confiscate a person's property or confine a person to their dwelling, much less to a single room or single chair. But parents do these things frequently, and often with apparent justification. Time outs, groundings, and the confiscation of toys, electronic devices, and allowance money – all of these familiar forms of parental discipline involve substantial deprivations of property or freedom. If these deprivations constitute prima facie rights violations, then I must concede that a special kind of non-state actor – a parent or guardian – enjoys the right to impose punishments that intrude on

moral rights.[40] Far from ad hoc, this concession is in the spirit of the thesis to which it is an exception: to their children, parents are like the state.

I am unconvinced that the concession is required, however. Parents routinely limit their children's movement and take away their possessions, not just to punish them but also for a variety of non-punitive reasons – e.g., to prevent injury, to eliminate distraction, to promote healthy development, to reduce the burdens of parental supervision. We should be reluctant to portray these ordinary parenting techniques as prima facie rights invasions rendered permissible by the benefits they may (or may not) produce. An alternative explanation of their permissibility is that children's liberty and property rights protect a more restricted domain against their parents and others acting *in loco parentis* than against everyone else. The idea that children's liberty and property rights might be limited in this way finds support in both will-based and interest-based theories of the function of rights.[41] A "will" theorist might argue that a child's proxy or representative would not choose to insulate the child's liberty or property from reasoned and well-intentioned interference by the child's guardian. An "interest" theorist might argue that a child's interest in freedom of movement or in control over personal possessions is of sufficient importance to impose a duty of non-interference on outsiders but of insufficient importance to impose a similar duty on the child's guardian. I see no need to resolve any of these issues here. No question about the rights of children is beyond controversy, including which rights they have and against whom they have them.[42]

My proposal for delineating a state monopoly on punishment leaves room for considerable disagreement about the content of our moral rights. For example, the proposal is unaffected if we do not actually have a moral right to private property, as some theorists believe. On my approach, the only conditions necessary for the state to possess something properly called a monopoly on punishment are (i) that the state enjoy the moral authority to impose at least some

[40] I thank an anonymous referee for suggesting this possibility.

[41] On the debate between will-based and interest-based theories of the function of rights, see Leif Wenar, "Rights," in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2020).

[42] See generally David Williams Archard, "Children's Rights," in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2018).

stigmatizing deprivations that intrude on domains protected by moral rights and (ii) that non-state actors all but uniformly lack such authority. These two conditions are compatible with a wide range of views about the nature and scope of our moral rights. They are even compatible with Locke's radical claim that individuals in a state of nature enjoy the right to impose rights-invading sanctions on all wrongdoers, which they transfer to the state upon entering society. In a state of nature, there is no state and *a fortiori* no possibility of a state monopoly on punishment. I take no position here on what sort of sanctions individuals have a right to inflict outside of a functioning society. I claim merely that within a functioning society non-state actors lack the right to inflict sanctions that constitute prima facie violations of moral rights. If this claim is false, my strategy for delineating a state penal monopoly fails. My strategy also fails if every sanction that intrudes on a core moral domain is unjustifiable, in which case we should at the very least abolish prison. I take no firm position here on this issue either.

My strategy for delineating the state's monopoly on punishment highlights one of two reasons why criminal punishment is especially difficult to justify. The reason it highlights is that criminal punishment is unusually intrusive: it impinges on domains protected by core moral rights. The other reason why criminal punishment is especially difficult to justify is that states characteristically claim the right to impose criminal punishment in circumstances that are not exceptional – circumstances where there is no immediate need for treatment of unusual intrusiveness because there is no imminent harm to be averted. Even if what ultimately justifies the practice of state punishment is that criminal sanctions in the aggregate avert great harm, no one could credibly claim that every individual sanction averts a great harm, much less that every individual sanction averts an immediate harm. Yet establishing these claims is precisely the justificatory burden that confronts any non-state actor who would mete out treatment of a material severity equivalent to that of a typical criminal punishment. States do not have a monopoly on justifiably confining people or even on justifiably killing them. Lone human beings may do these things, too. But lone human beings living under a functioning state may confine and kill people only when doing so is necessary to avert a substantial and imminent

harm. They may not confine and kill people solely in order to inflict stigmatizing deprivations.

Max Weber described the state as a "human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory."[43] Shorn of its context, this statement is not exactly true.[44] No political entity has a monopoly on the legitimate use of physical force. There will always be circumstances in which private individuals enjoy the moral right to use physical force, even force of extraordinary severity. But if criminal punishment as we currently practice it is ever justified – if the state is ever justified in confining people who present no provable imminent threat – then the state does seem to have a monopoly on the legitimate use of extraordinary force *in non-exigent circumstances*. What sets the state apart from other entities is that its threshold of justification for extraordinary force is supposedly so much lower. While private actors living under a functioning state may use extraordinary force only to thwart an emergency, the state supposedly may use such force merely to sanction a wrongdoer. When the state punishes, it engages in rights-invading conduct not as an ad hoc response to exigency but as a matter of routine policy.

IV. CONCLUSION

People often claim that criminal wrongdoing is an attack on the political community, and that law-breakers consequently owe a debt to society that they can repay through punishment. This familiar claim draws on what I have called the quasi-Lockean premise – that persons and other entities enjoy the right to impose stigmatizing deprivations on those who wrong them. Husak sees the quasi-Lockean premise as the key to a classic two-fold question about the state's right to punish crime – namely, why the state possesses that right, and whether the right is exclusive. Skeptical of this approach, I have sought to show the limits of what we can extract from the venerable idea that a central victim of criminal wrongdoing is the broader community. As I have argued, the quasi-Lockean premise

[43] Max Weber, "Politics as a Vocation," in H. H. Gerth & C. Wright Mills (eds.), *From Max Weber: Essays in Sociology* (Abingdon and New York: Routledge, 2009), p. 78.

[44] The context is this: "[A] state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory. … [T]he right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it." *Ibid*.

does not entail or ground the widely-endorsed proposition that the state may sanction and condemn *mala in se* offenders for wronging their individual victims. Nor does the quasi-Lockean premise entail that the state lacks a monopoly on punishment. For the state may yet possess an exclusive right to inflict sanctions that intrude on core moral rights. I do not claim to have justified this purported monopoly – this exclusive authority to inflict rights-intruding treatments in non-exigent circumstances. But I hope at least to have brought into relief the key features in need of justification.

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University of Michigan Law School, 625 S. State Street, Ann Arbor, MI, 48104, USA
E-mail: mendlow@umich.edu