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ORIGINAL PAPER

Criminal Law and Penal Law: The Wrongness Constraint and a Complementary Forfeiture Model

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Abstract
Antony Duff's *The Realm of Criminal Law* offers an appealing moral reconstruction of the criminal law. I agree that the criminal law should be understood to predicate punishment upon sufficient proof that the defendant has committed a public wrong for which she is being held to account and censured. But the criminal law is not *only* about censoring people for public wrongs; it must serve other purposes as well, such as preventing people from committing serious crimes and more generally from violating reasonable regulations. These purposes, and perhaps retributive justice, require the criminal law also to mete out harsh treatment, but only insofar as such treatments are proportional to the culpable wrong committed. The problem for the criminal law is that many mala prohibita crimes consist of a minor wrong but also call for a relatively severe punishment. To accommodate that mismatch, it is necessary to complement the criminal law, as Duff and I conceive of it, with what I call "penal law." Penal law relies on forfeiture to explain why hard treatment is permissible. The forfeiture must be fair, and it comes with its own proportionality limits. But those limits are not as strict as the limits implicit in the criminal law. It allows for penalties that are harsher than the punishments that could justifiably be meted out for many mala prohibita offenses. One and the same act can count as a crime and a penal infraction, and one and the same criminal justice system can and should handle both crimes and the penal infractions. It is, I think, only in that way that we can accommodate both the need to prevent public wrongdoing and the distinct importance of holding people accountable for the commission of public wrongs.

Keywords Criminal law · Punishment · Penalty · Wrongness constraint · Forfeiture · Duff

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1 Introduction

What makes law criminal law? What, in particular, distinguishes it from mere regulations to which a penalty might be attached? Antony Duff argues that the relevant difference is this: "criminal law should be concerned with culpable wrongdoing: not merely with the violation of legal regulations, but with moral wrongdoing that merits condemnation or censure." (18–19)[1] I think this is deeply right. I think it is a deep mistake to treat criminal law as merely a tool that can be used whenever it would serve any of the purposes often associated with the criminal law: deterrence of unwanted behavior, incapacitation of the dangerous, rehabilitation of those with anti-social tendencies, or vindication of the rights of victims. Even if one or more of these purposes would be served, it would be morally wrong in all but the most extreme emergencies for a judge or juror to vote to convict someone of a crime if she knew that the defendant had not committed it. Additionally, the general availability of defenses in the form of justifications and excuses shows that the criminal law generally presumes that it would be wrong to convict defendants if they are not culpable for committing the crimes with which they are charged. Of course, the criminal law contains strict liability offenses and some morally dubious limits on defenses. But Duff's point is that the task of the theorist of criminal law is not simply to account for the law as it is; it is to give a normatively attractive reconstruction of how it ought to be.[2] A proper normative reconstruction of the criminal law—one that presents it as an institution "whose proper role in a political community we can then usefully discuss" (13)—would distinguish as "quasi-crimes" those "offenses that are formally part of the criminal law, but that cannot plausibly be seen or described as censure-worthy wrongs."[3] (19)

Why take condemnation for culpable wrongdoing, and in particular the commission of public wrongs—moral wrongs that the public can take to be part of its "collective business as a polity" (278)—to be essential to the criminal law? I already mentioned the importance of the defenses of justification and excuse. Duff adds that this connection also allows us to make sense of:

> [W]hy we should object so strongly … to statutes that impose strict criminal liability, understood as liability without fault; or to statutes criminalizing conduct that cannot plausibly be portrayed as wrong: the reason is not (only) that people are then subjected to the prospect of material burdens that they had no

[1] All pages in parentheses are to *The Realm of Criminal Law* (Oxford: Oxford University Press, 2018).

[2] Importantly, what Duff offers is a normative argument, not an appeal to a "definitional stop." See H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law,* 2nd edition (Oxford: Oxford University Press, 2008): p. 5.

[3] Duff's use of "quasi-crime" is different from the use in U.S. law, according to which "one can loosely group quasi-criminality into two major categories. The first, where use of the term originated, involves proceedings characterized by adjunctive criminal prosecution, either real or threatened [e.g., civil forfeiture in association with criminal activity]. The second lacks any corresponding criminal charges but presents nonetheless significant infringement of personal freedoms, often accompanied by reputational stigma [e.g., loss of license to practice law]." John Kip Cornwell, "The Quasi-Criminality Revolution," *UMKC L. Rev*. 85 (2017): 311–341, p. 313.

> fair opportunity to avoid, but that they are unjustly portrayed and censured as wrongdoers. (19)

Or as he puts it later, when discussing the deterrence function of the criminal law:

> [T]he legitimacy of deterrence depends on there already being sufficient, non-deterrent, normative reasons for us not to do what the law seeks to deter us from doing: if the criminal law is to have more normative authority than the gunman who coerces us to act as he wishes, what it seeks to deter us from must be something that we anyway, independently of its deterrent threats, have good normative reason not to do. (23)

Of course, if one accepts this connection between criminalization and culpable wrongdoing, one needs an account of why *mala prohibita*—crimes that target behavior that is not pre-legally wrong—concern the kinds of moral wrongs that merit condemnation or censure. But Duff offers a three-step account of those wrongs that I think is, again, deeply right:

> The first step … is to show that we have good reason to create a legal regulation that prohibits or requires a type of conduct; the second step is to show that, once such a regulation has been enacted, we ought to obey it; the conclusion is that the breach of such a regulation then constitutes a public wrong, which we have reason to criminalize… [or] to which criminalization is a potentially appropriate response. (313)

With that account of *mala prohibita*, Duff thinks he can defend what he calls the *strong wrongfulness constraint*, according to which "it is permissible to criminalize some conduct only if that conduct is wrong independently of its being criminalized." (58) Importantly, this account of mala prohibita does not involve the criminal law itself making *mala prohibita* offenses wrong. If it did, there would be no wrongfulness *constraint*.[4] Rather, we have to ask whether there is a morally defensible reason for the law to create regulations, and if so, whether it is wrongful to violate those regulations. If the answer to both questions is yes, then we can say that there is a wrong that *could* form the basis for criminalizing the violation.

My thesis in this paper is that Duff paints a normatively attractive picture of the criminal law, but that there is also good reason for what is formally called criminal law—which, to avoid confusion, I will call "the criminal justice system"—not to be

[4] Victor Tadros offers what he takes to be a counter example to the strong wrongfulness constraint in "Punishment without Liability," in *Wrongs and Crimes* (Oxford: Oxford University Press, 2016): p. 330. In his example, the criminalization of gun ownership reduces the defensive reason to have a gun, making it all-things-considered wrong to have a gun. Duff cannot respond to this by saying that it must be the *regulation* of gun ownership that reduces the defensive reason and undercuts the moral case to own a gun; the success of the regulation might depend on it being a crime to violate it. Nonetheless, I think Duff should be basically unbothered by the example. If it shows that Duff has to allow in some cases of a weak wrongness constraint, in which criminalization cements the conditions of its own legitimacy, so be it. (The weak wrongness constraint holds that it is permissible to criminalize conduct as long as it is in fact wrongful to perform it once it has been criminalized.) From here on I refer only to the "wrongfulness constraint."

limited to the criminal law as defined with reference to the wrongfulness constraint. In other words, there is good reason to complement the criminal law with what I will call "penal law." Penal law, unlike quasi-criminal law (as understood in the United States), is not a distinct set of procedures, some hybrid of civil and criminal procedure.[5] It is also not a marginal part of the criminal justice system, dealing with a separate set of extremely minor infractions that may lack culpability—what the Model Penal Code calls violations.[6] Rather, penal law consists in a distinct sort of justification for the penalties that are an essential part of the criminal justice system, a justification based on forfeiture that does not depend on wrongful action. For the most part, the extension of the concept of crime and penal infraction overlap; there are only some marginal cases in which an actor commits a penal infraction but not a crime. The fundamental importance of the notion of the penal law is to explain why penalties may exceed what would be called for by the criminal law alone.[7]

To be clear about how I use my terms, I reserve the term "punishment" for hard treatment that is meted out in response to wrongdoing.[8] Insofar as hard treatment cannot be justified as an appropriate response to wrongdoing, but can be justified within penal law, I will call it a "penalty."

Without the addition of penal law, the criminal justice system could not adequately deter criminal activity or incapacitate the dangerous.[9] The advantage of penal law, as I will describe it, is that it operates with a different, somewhat looser notion of proportionality. This may seem to undermine the significance of the proportionality limit. But I will argue that it does not, and that it has the virtue of leaving intact the criminal law's commitment to the wrongfulness constraint.[10]

I proceed as follows: First, I discuss two cases in which it seems that overcriminalization, i.e., criminalization of acts that are not public wrongs, is inevitable. Second, I discuss Duff's two-track response to these cases, and argue that it largely succeeds. Third, I argue that it fails in one way: it fails to account for problematic proportionality limits. Fourth, I argue that the penal law must be appealed to in order to justify substantial penalties in cases of mala prohibita wrongs, wrongs in

[5] It is also not like the German concept of *Ordnungswidrigkeitenrecht*, which applies to non-criminal infractions of regulations. (16).

[6] MPC, § 1.04(5).

[7] Larry Alexander, in "The Doomsday Machine: Proportionality, Punishment and Prevention," *The Monist* 63 (1980): 199–227, offers a precursor to the view I articulate here. But he sees the prospects for harsh treatment based on forfeiture as essentially unlimited, except by the requirements of fair notice and a wrongful act. See ibid, p. 213. I think he overlooks ways in which forfeiture is limited by its own principle of proportionality. See section V below.

[8] This is in accord with Doug Husak's statement: "The very *purpose* of a response must be to deprive and to stigmatize before it qualifies as punishment." "Does the State Have a Monopoly to Punish Crime," in Chad Flanders and Zachary Hoskins (eds.), *The New Philosophy of Criminal Law* (London: Rowman and Littlefield, 2016): p. 98.

[9] I now think that what I once described as forfeiture of the right to be presumed law abiding is better located in penal law than criminal law. See Alec Walen, "A Punitive Precondition for Preventive Detention: Lost Status as an Element of a Just Punishment," *San Diego Law Review* 48 (2011): 1229–1272.

[10] Duff himself "leaves open the possibility than an emergency might force us to abandon or pervert [the criminal law] and 'criminalize' some type of non-wrongful conduct." (261 n. 117) The same would be true for using censure when criminal law does not apply but the penal law does.

which the public wrong is often relatively minor but the need for crime prevention calls for a fair but robust penalty. Finally, I argue that the criminal justice system should be able to accommodate both criminal law and penal law in a way that Duff should accept, by publicly marking when the latter is being used, especially in those cases in which, for some reason, it is important to enforce penalties even though the state cannot establish that the defendant committed a public wrong.

2 Two Illustrations of Inevitable Overcriminalization

I focus the discussion of overcriminalization on two cases: criminalization of sex with a minor and possessing a gun without a license.[11] I focus on these because they are extensively discussed by Duff and because they are also extensively discussed by others: Andrew Cornford and Victor Tadros, respectively.[12]

Starting with sex with a minor, or statutory rape, the problem arises because it is impossible to set a simple age limit below which a person is a child and incapable of consent, and above which he is an adult and capable of consent.[13] Some people mature more quickly than others, so any age picked to be the age of consent is bound to be over-inclusive and under-inclusive. If we seek to protect more children from suffering the psychological trauma of sexual exploitation by older partners, we will impose one of two sorts of costs on those who have the maturity to consent to meaningful sexual relations: either they will miss out on those meaningful experiences or their partners will run the risk of criminal prosecution and punishment. Or, if we seek to prevent people from being punished for having sexual relations with young but consenting partners, we will leave more people open to being exploited by older partners who take advantage of their youth and naivete. The law should presumably balance these two considerations in a reasonable way, but no matter what age is picked to be the age of consent, it will either be both somewhat over- and under-inclusive, or it will be unjustifiably lopsided, protecting against one set of costs by excessively neglecting or imposing another set of costs.

There are, of course, various ways the state might try to handle this problem. It could, for example, require people who want to have sex before they have reached a given age (say, 18 years old) to get a license to do so from a certified expert in developmental psychology. But there are problems with this solution. First, there may not be enough experts. Second, even if there are, someone would have to pay for them. Tax payers might object if forced to pay the bill, but if the cost is put on those who want to have sex, then many poor couples containing a young person who is fully capable of consenting will be unable to get the required license.[14] And even if this

[11] Duff discusses a wide range of other mala prohibita offenses, and I will discuss some other ones as well in section V.

[12] Andrew Cornford, "Rethinking the Wrongness Constraint on Criminalisation," *Law and Philosophy* 36 (2017): 615–649; and Tadros, "Punishment without Liability."

[13] As Duff notes, this is not exactly a *malum prohibitum* crime (64); it is a *malum in se* crime with an *malum prohibitum* boundary.

[14] Duff makes this point. (319 n.164).

cost problem could be met, there would still be reason to worry that the experts might be subject to pressure or simply be incompetent.

Another solution is to reframe the crime so as to target the actual wrong: the sexual exploitation of minors. One way to do so would be to make it presumptively criminal for a person to have sex with a person under a certain age (say, 16), if the older person is older by at least a certain number of years (say, 4), but offer a defense if the minor was in fact mature enough to consent. But while this would help defendants avoid being wrongfully convicted for this crime when they have done no wrong, it too has its costs. As Cornford writes: "By stating clearly that any sexual activity with children is punishable, we can expect … to deter more of the exploitation that [such crimes] target."[15] And he adds that simple "age-of-consent crimes cause less secondary victimization … [because] by putting exploitation in issue in criminal cases, legislators would oblige courts to examine intimate details" of the lives of young people.[16] Thus, there seems to be no way to finely tailor the law to avoid being over-inclusive without at the same time making it either under-inclusive or causing other problematic costs to arise.

Turning to the second case, possession of a gun without a license, the problem is straightforward: many use guns to commit horrible wrongs to others; if they did not have access to guns, they would find it harder to wrong others. Yet, some people have legitimate interests in having guns (e.g., for self-protection or for sport), and are perfectly capable of owning and using their guns without putting anyone at excessive risk of unjust harm.[17] The problem is fundamentally the same as with sex with minors: any approach that avoids going to an unbalanced extreme (assuming that the legitimate reasons to own a gun are sometimes strong enough to outweigh the reasons against) is bound to be both over-inclusive and under-inclusive. Moreover, as with the sex-with-minors case: attempts to finely tailor the licensing of the activity will still be costly and imperfect, and attempts to offer defenses to those who violate the regulations will not only be costly but will weaken their enforcement and their deterrent effect.

The gun-license example might seem to raise a point even more strongly inconsistent with the wrongness constraint than the sex-with-minor's example: the problem of a necessity defense. The thought is that some people might *need* a gun for self-defense in a way that no one *needs* to have sex with a minor.[18] Imagine, for example, Patty, who lives in the country, far from police, and who has received threats on her life. She might face the choice of fleeing her home or keeping a gun for self-defense. If the option of fleeing is sufficiently costly, she could justifiably say that she needs to have access to a gun. The problem is that she might also be the sort of person the law reasonably denies the right to possess a gun (e.g., someone

[15] "Rethinking the Wrongness Constraint on Criminalisation," p. 640.

[16] Ibid, pp. 640–41.

[17] I put aside any discussion of the Second Amendment, as it is clear to me that no reasonable constitution would bar the reasonable regulation of gun ownership.

[18] I discuss a variation on the sex-with-a-minor case, in section VI below, in which there is a strong moral reason for the defendant to have sex with a minor. But even in that case, I think it's a stretch to say that the necessity defense would apply.

with a felony record). If her need is great enough, then she does no wrong in getting the gun. Yet it might seem that the law must be free to use somewhat crude tests like prior felony record to decide who may be denied the right to own a gun. Thus, it may seem that the law must sometimes come into stark conflict with the wrongness constraint: it can rightfully punish even those whose acts are justified by necessity.[19]

I raise this example to explain why it is *not* the sort of problem Duff has to wrestle with. First, if Patty did something sufficiently violent in the past, then she may have forfeited her right to have a gun, and then she cannot complain if she has to bear unusually large costs to avoid the threat to her life. Second, if we suppose that she has not forfeited her right to own a gun, and has, in the context in which she lives, a right to carry a gun for self-defense, then the state cannot blithely refuse to recognize her necessity defense. Granted, the necessity defense as it is actually used is not fully attuned to the moral case for necessity. For example, the standard line on the defense is that it is unavailable if the legislature chose to make it unavailable.[20] But that limit on the defense is a bow to legal positivism; it does not make the law morally defensible. Neither the criminal law nor penal law (for reasons I explain in section V) should refuse the grant someone the benefit of the necessity defense when it applies.

Third, and most importantly, the sense of unavoidable conflict in the case mostly likely turns on the fact that the individual and the state often exist in different epistemic conditions. The state should grant the necessity defense only if Patty has presented sufficient evidence to establish it (supposing the burden of persuasion is and can justly be on her). The state may have good epistemic reason to doubt certain evidence, say, of the intensity of the threat she faces, while Patty may have good epistemic reason to think the threat is acute. Suppose Patty is right: the threat is acute and it justifies her carrying a gun. The state might still rightly refuse to grant her the necessity defense. But that does *not* imply that it has the right to "infringe her rights."[21] What it shows is no different from what is shown by the state having the right to punish people who are in fact innocent if it has convicted them at trial after introducing evidence that established their guilt beyond a reasonable doubt. In such cases of punishing the innocent, the state in fact wrongs the person, but it acts as it should, given what it knows. The same is true in cases in which the state wrongly denies a person a defense because the person is unable to establish it to the relevant standard of proof (whatever that is). These are not cases of rightfully (in a fact-relative sense) wronging (in a fact-relative sense). These are cases of rightfully (in an evidence-relative sense) wronging (in a fact-relative sense). Such cases are regrettable, but they don't show anything about the right of the state to punish someone who it recognizes or ought to recognize as having a necessity defense.

[19] Tadros explores this argument in "Punishment without Liability," pp. 333–336.

[20] See Joshua Dressler, *Understanding Criminal Law* 7th ed. (New Providence, NJ: Lexis Nexis Press, 2015): p. 290.

[21] I reject the idea of rightfully infringing rights and thereby wronging people (outside of extreme emergencies) in Alec Walen, *The Mechanics of Claims and Permissible Killing in War* (New York: Oxford University Press, 2019), esp. chapter 4.

In sum, the problem for Duff is this and only this: that the state seems to have the right to criminalize activity even when it is not morally wrong to perform it, at least if it is not so important to perform it that the state must grant a necessity defense.

3 Duff's Two-Pronged Response to the Problem of Overcriminalization

Duff offers two responses to the challenge of inevitable overcriminalization. He argues that we can go quite far, perhaps all the way, to meeting the objection by arguing that there *is* a public wrong in failing to respect well-motivated regulations. And he complements that argument with appeal to a *de minimis* principle, according to which even if legislation is overbroad those who enforce it can tailor it well enough to avoid convicting people of crimes when they have done no wrong.[22]

Duff's primary move is to argue that we should use a broad conception of the relevant public wrong. His point is that the duty to avoid imposing a "risk of the substantive mischief against which [the regulations in question] are aimed" (331) can impose on people secondary duties "to provide the assurance of [their] trustworthiness that [their] fellow citizens are entitled to require."[23] (329) I will explain using the gun-license example.

Suppose there are gun regulations in place that are "well-suited to their protective aim." (329) Even if there are people who have a legitimate reason to own a gun, they should recognize that their fellow citizens need "a way of reliably distinguishing them from those who should not be allowed to own guns." (330) The purpose of gun regulations, then, is "not just to exclude from gun ownership those whom we have reason not to trust as gun owners, but also to specify the formal methods by which we can assure each other that those who own guns can be trusted to do so safely." (329) Even if someone knows that she is in the category of those who should be trusted to own a gun, she should recognize the legitimacy of a regulation that demands that she establish that fact to others. If she flouts the regulation, she commits a *pro tanto* public wrong: the wrong of failing to respect the legitimate demands of her fellow citizens that *all* citizens refrain from owning and using guns unless they provide sufficient publicly acceptable evidence that they can be trusted to do so.

As discussed in the last section, Patty may do no wrong, all things considered, if she carries a gun even without meeting the state's regulatory demands. This situation could arise if, from a fact-relative point of view, the state should make an exception for her, but it fails to do so. And to be clear, a pro tanto wrong is not itself

[22] Duff has a third argument as well, one which appeals to an idea we already saw: that "the legitimacy of deterrence depends on there already being sufficient, non-deterrent, normative reasons for us not to do what the law seeks to deter us from doing," (23) The thought is that if one does not have sufficient moral reason to avoid doing what the criminal law seeks to deter, then the law's use of deterring threats is unjust, like Austin's proverbial coercive gunman. I respond to that argument at the end of section VI.

[23] Tadros seems to miss this explanation for the duty; he sees the ground of the duty as nothing but the duty to avoid causing, directly or indirectly, the sorts of harms that a law aims to prevent.

a sound basis for condemnation and punishment. If the wrong-making reasons are outweighed by justificatory reasons, Patty commits no wrong all things considered, and then it would be wrong to condemn her.[24]

But the state also cannot be blamed if it takes her to have a duty not to carry a gun unless she makes an adequate showing that she should be trusted to carry one. She *does* have a duty, barring emergency circumstances, to at least try to make that showing before carrying a gun. And from the state's point of view, if she flouts the law, and if it makes all reasonable accommodations to necessity, it can take her to be failing "to provide the assurance of [her] trustworthiness that [her] fellow citizens are entitled to require." (329) In other words, it can take her to have committed a public wrong that "makes its criminalization in principle appropriate." (329)

To complement this argument, Duff appeals to the *de minimis* principle. The idea is that police should not arrest, prosecutors should not prosecute, and courts should not convict defendants whose "conduct did not actually cause or threaten the harm or evil sought to be prevented by the law defining the office or did so only to an extent too trivial to warrant the condemnation of conviction." (320)[25] This principle helps fine-tune the law that might otherwise be overbroad. There is, of course, reason to worry that many officers in the criminal justice system are likely to be officious rather than attuned to the spirit of the law. But even so, appeal to the *de minimis* principle can still help Duff because it is merely an ancillary argument, meant to soften the edges of laws that are overinclusive. The primary argument is still that the criminal law is entitled to treat people as committing a public wrong if they fail to abide by reasonable regulations that require them to establish to their fellow citizens that they are entitled to do so.

4 The Problem with Proportionality

In this section, I argue that even if Duff's account of public wrongs associated with mala prohibita succeeds, it fails to account for problematic proportionality limits. Sticking with the gun-license example, even if Patty's failure to reassure her fellow citizens of her trustworthiness is a public wrong, it would be, as Duff himself admits, "a lesser wrong than that committed by one whose ownership of a gun is substantively dangerous." (329) The problem this raises is that a lesser wrong would seem to ground a lesser punishment than a greater wrong.[26] But if the state punishes only for the lesser wrong, it may punish too little given the importance of preventing the greater wrong.

[24] Again, see footnote 10, there might be extreme circumstances that would justify condemnation of non-wrongful action. But this sort of misleading communication should not be a regular part of either the criminal law *or* penal law.

[25] Duff is here quoting the Model Penal Code, § 2.12.

[26] See Stuart Green, "Legal Moralism, Overinclusive Offenses, and the Problem of Wrongfulness Conflation," *Criminal Law and Philosophy* (this issue).

This problem may not have attracted Duff's attention, given that he is focused on establishing the wrongfulness constraint and has hardly anything to say, at least in *The Realm of Criminal Law*, about hard treatment and proportionality.[27] But even though he is not in this book very much concerned with punishment beyond condemnation, he does recognize that it is an important feature of the criminal law's full justification that it "involve some materially burdensome imposition."[28] (223) This could be, as he says, for retributive reasons, or it could be for instrumental reasons: that hard treatment will serve to deter, incapacitate, or even rehabilitate wrongdoers. (223) Either way, once we accept that the criminal law should mete out hard treatment, it becomes important to say how much it may mete out.

I think it is important to recognize the sense in which the idea of a proportionality limit, limiting the severity of the punishment by the gravity of the culpable wrong done, seems to be a peculiarly retributive notion. It seems to presuppose that the punishment must, in some sense, be deserved for the wrong done. Even negative retributivists—who don't think wrongdoing gives us a reason to punish—still typically invoke a notion of desert to set limits on punishment.[29] But one does not have to believe that suffering is ever intrinsically good to get the necessary connection between the punishment and the wrong done. One could, for example, think that the severity of the punishment should be calibrated to express the seriousness of the condemnation, which should be tied to the gravity of the wrong. Or one could tie the magnitude of the punishment to the magnitude of the debt to society, which would, in turn, reflect the gravity of the wrong done. However the connection is made, the point is that the criminal law contains an internal logic linking the severity of the punishment to the gravity of the wrong done. And by that logic, Duff's account of the wrong done by someone like Patty implies that she should receive only a light punishment.

The problem, again, is that this would undermine the law's ability to prevent the sorts of wrongs that the criminal law is meant to prevent. The fundamental reason for criminalizing things like gun possession without a license is not to express condemnation of those who violate regulations concerning gun possession; it is to effectively prevent the possession of guns by people who would pose an unwanted danger if armed. If the state had to prove that they committed some more serious wrong, such as misuse of a gun, before it could inflict truly hard treatment, the state would have much more trouble keeping guns out of the hands of people who should not have them. More generally, limiting the severity of the hard treatment by the

[27] Indeed, Duff mentions proportionality only in passing (and self-consciously so): "I will not engage in [a discussion of proportionality] here, save to note that some notion of proportionality is essential to the very idea of punishment, since punishment must be *for* an offence." (38)

[28] Hard treatment was more central to Duff in earlier work. For example, in *Punishment, Communication, and Community* (New York: Oxford University Press, 2001), p. 82, he endorsed this: "We should use hard treatment punishments of certain kinds because they can serve the communicative aims of punishment more adequately than can mere convictions or symbolic punishments."

[29] I have come to view negative retributivism as incoherent: if punishment is deserved, that provides a reason to punish.

magnitude of the wrong would seriously undermine the effectiveness of the criminal justice system when it comes to mala prohibita crimes.

5 A Role for Penal Law

The problem raised in the previous section—that limiting punishment to reflect the gravity of the wrong done would unacceptably undermine the effectiveness of the criminal justice system—can be overcome if the criminal law can be complemented by another justification for hard treatment, one that has a more flexible notion of proportional treatment associated with it. This is where I think the notion of penal law, framed by the notion of fair forfeiture of the right not to be suffer hard treatment, can be helpful. The thought is that harsh penalties can be imposed on people insofar as (a) they had a fair opportunity to avoid them, (b) the penalties strike a fair balance between the claims of individuals not to have to bear them and the claims of the state to take effective measures to promote important public ends, and (c) they do not undermine the overall fairness of the criminal justice system.

Before continuing, I should pursue a clarificatory aside about forfeiture's role in the criminal law. As I understand it, criminal punishment involves forfeiture too. As Christopher Wellman points out, given that people generally have a right not to be punished, the justification of punishment presumably depends on their having "forfeited their rights against hard treatment."[30] But I disagree with Wellman's thesis that a full account of permissibility of punishment can be had without appealing to the justificatory aims of punishment. Without appeal to those aims, I think we get no sense for the proportionality limits on punishment, and thus get no sense for how, much less why, forfeiture works.[31] My point in emphasizing forfeiture in the context of penal law is not to suggest that it applies in penal law but not criminal law. My point is to emphasize that in the penal law the right not to suffer hard treatment is forfeited for reasons distinct from those at work in the criminal law, and that those reasons need to be analyzed separately to understand how they lead to different proportionality limits.

It is also important to say up front that the idea that the penal law has looser limits on when hard treatment may be imposed obviously threatens to erode the significance of proportional limits on punishment. I therefore start my defense of the role of penal law with an explanation of why it does not do so. It is the third clause describing what it means to have a fair notion of forfeiture—that it not undermine the overall fairness of the criminal justice system—that is key. In particular, the key

[30] *Rights Forfeiture and Punishment* (New York: Oxford University Press, 2017): p. 4.

[31] This is not the only part of Wellman's account with which I disagree. But I'll limit myself here to pointing out one more disagreement. I reject his claim that forfeiture of a right functions like waiver of a right. Ibid, pp. 20–21. Waiver is directly tied to respect for autonomy and respect for autonomy can screen off appeal to the other substantive values in play. Forfeiture is less completely tied to autonomy; it is also tied to the fairness of holding that a right has been forfeited. The goods in the balance that sets when forfeiture may fairly be established are thus not screened off from a final determination of what may be done in the same way they are for waiver.

is to respect the notion of proportionality in the criminal law in those cases where the call to respect it is felt most clearly.

To explain where the limits of proportionality are felt most clearly, we should start by admitting how hard it is to know how to combine into one number, one that captures the severity of the punishment, the three elements that standardly figure into a proportionality assessment. These elements are the severity of the wrong threatened, the culpability of the actor in threatening it, and whether the actor actually caused, or had a significant role in causing, the harm that the law sought to prevent. But even if one cannot say exactly how those elements combine, one can say, with regard to each of these three elements, that insofar as the rest are held equal, variation should make the right sort of difference. For example, holding constant the mens rea of purpose and the successful completion of the crime under consideration, wrongfully killing is worse than wrongfully causing severe bodily injury, which is worse than wrongfully causing minor bodily injury. Thus, the punishment for intentional murder should be substantially more severe than that for intentionally causing minor bodily injury. Or, holding the harm constant, causing it purposely should be punished more severely than causing it recklessly, which should be punished more severely than causing it negligently (if negligence should be a basis for punishment at all).

These relationships need to be respected for the criminal justice system to retain an overall sense of fairness. Thus, even if there is a problem, say, with a rash of reckless homicide cases (whether with guns or cars or other means), it would be unfair to impose more hard treatment for reckless manslaughter than for purposeful murder. Even if the interests the state has in deterring reckless manslaughter were considered quite important, and even if people have a fair opportunity to avoid reckless manslaughter, the proportionality limit inherent in the criminal law would not allow an inversion in the sentencing formula, punishing manslaughter more seriously than murder.

But that sort of limit does not straightforwardly apply when we shift to mala prohibita crimes in which the harm directly connected with the wrong is slight to nonexistent. Merely owning a gun without a license, for example, may not impose harm on anyone. It is statistically connected to serious harms, but one cannot use that fact in any straightforward way. First, there is no privileged way to set the reference class by which we assess just how likely various harms would be if those who should not have licenses to own guns do or do not own them.[32] Second, even if there were, we would not straightforwardly discount the punishment by the risk. We would not, for example, punish an act that knowingly imposed a 0.1% chance of death on innocents with a punishment 1/1000 as severe (whatever that would mean) as that given for murder. Rather, the whole point of moving to a mala prohibita regime is to define new rules that are to be respected because the state has reasonably concluded that it is better to require citizens to respect those rules than not. The proportionality limits,

[32] See John Oberdiek, *Imposing Risk: A Normative Framework* (New York: Oxford University Press, 2017), chapters 1 and 2 for a discussion of this and related problems.

therefore, must be set in a different way, without reference to the minor wrong of failing to respect the regulation as it should be respected.

I turn now to offer a positive account of how to set the proportionality limit for mala prohibita crimes. To do so, I consider each of the elements of fair forfeiture. I have room here to say only a few words about each, but I think it especially important to flag the first element—fair opportunity to avoid punishment—and to argue, if briefly, that a line of thought running through U.S. law on so called "public welfare offenses" (i.e., mala prohibita offenses), holding that they could be strict liability offenses, is particularly inane.

One of the early public welfare cases in the United States upheld a sentence of up to 5 years for selling derivatives of opium and coca leaves without the order form required by the Narcotics Act of 1914.[33] The Court held that "Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided."[34] To appreciate the depravity of this holding, imagine a case involving someone who sold a drug without using the relevant form but only after having been authoritatively told by his supplier that it contained no derivatives of opium or coca leaves. The Court so valued efficient enforcement of the law that it was willing to uphold a five-year sentence in that sort of case. Ironically such enforcement isn't even efficient; it inflicts harm on those who used all due care, and thus is likely to suppress productive activity and drive the careful out of such businesses, leaving only the reckless behind.[35] But more importantly, it is unjust and there is no excuse for punishing those who use all due care. Outside of true emergencies, there is no call to weigh injustice against harm; one must simply avoid acting unjustly.[36]

In sum, it is simply a mistake to link mala prohibita crimes, and the notion of penal law, with strict liability. The requirement of a fair opportunity to avoid the penalty is not met, at least in cases in which there are morally legitimate reasons to engage in that type of activity, by saying that the risk can be avoided by avoiding the activity altogether. And likewise, all the justifications and excuses that apply to mala in se crimes should apply to mala prohibita crimes—it would be unfair to penalize someone for doing something that she is morally called upon to do or that she should not be held responsible for doing.

Assuming a person has a fair opportunity to avoid running afoul of the law, then the next standard is a fair balance between a person's interest in avoiding severe penalties and the state's interest in preventing the unwanted activity. The personal side of the balance calls for parsimony in punishment. But the state's side allows the state to set higher penalties for a variety of consequentialist reasons, such as that

[33] United States v. Balint, 258 U.S. 250 (1922).

[34] Ibid, p. 254.

[35] See Stephen Schulhofer, "Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law," 122 *U. Pa. L. Rev.* 122 (1974): 1497–1607, p. 1587.

[36] I defend this view of "threshold deontology" in *The Mechanics of Claims and Permissible Killing in War*, chapter 4, section 3.

the crime is unusually hard to detect or to deter, or that the harm connected with it is particularly severe. This would give the state a fair degree of flexibility. But this flexibility is not unlimited. The third restriction, that forfeiture may not undermine the criminal justice system's notion of proportionality, would put outer limits on what the state could do. For example, if the ultimate harm motivating drug labeling laws is to protect people from being harmed by taking drugs they should not take, it would make no sense to impose harder treatment on those who intentionally mislabel and put people at risk than on those who recklessly poison. Likewise, it would make no sense to impose harder treatment on someone who owns a gun without a license than on someone who recklessly endangers another with a gun.

Having now tried to explain how this notion of fair forfeiture can allow penalties that exceed the punishments that would be allowed by the criminal law itself, based on the minor wrong inherent in many mala prohibita crimes, I want to wrap up this section by clarifying why I say that this shows the presence of penal law in the criminal justice system. One might ask: why call it penal law, as though that is distinct from criminal law, if all of the examples involve mala prohibita *crimes*. The answer is two-fold. First, even though a crime has been committed in all of the cases discussed so far, the crime is not what explains the justifiability of most of the hard treatment. What explains the justifiability of most of the hard treatment is the fact that the person can be fairly held, in virtue of having performed the act in question, to have forfeited her right not to be penalized to that extent. That notion of forfeiture, cut off from the magnitude of culpable wrongdoing, is one manifestation of the operation of penal law in the criminal justice system. Second, the penal law allows the imposition of penalties for regulatory infractions even when the criminal law could not find that a crime has been committed, though, as I argue in the next section, not to such an extent that the wrongness constraint is rendered meaningless.

6 Non-overlap Between Crimes and Penal Infractions

In this section, I address a problem raised by the second manifestation of the penal law: that it may lead the state to impose hard treatment through the criminal justice system even when the state cannot establish that the defendant acted wrongly. The problem is that this might seem to threaten the significance of the wrongfulness constraint. More specifically, the threat is that it will either seem that punishment for wrongdoing is being meted out even when it is not, or that the difference will seem insignificant in the face of the manifest undesirability of hard treatment, whatever the basis for it. My response is that there should be relatively little non-overlap, that the difference can clearly be marked, and that people do care about the message sent with hard treatment and not just the hard treatment itself.

To see why there should be relatively little non-overlap, we must turn to why non-overlap should arise. One reason is that there are certain kinds of cases, such as the case of sex with a minor, in which the necessity defense may be unavailable even though the act is not wrong all things considered. This could happen because of a confluence of two factors: (1) the reasons in favor of the act are not so compelling that the defense of necessity has to be considered, and (2) there are good reasons to

limit the defense because of things like the threat of secondary victimization and loss of deterrence value. But such cases, I think, would be relatively rare. In the standard case, the standard range of defenses should be available, and if a defendant cannot establish a defense then the state is entitled to treat her as having committed a crime.

Duff seems to reject even this possibility. He writes about non-criminal regulation:

> [E]ither the regulations have a proper, civic claim on the obedience of those subject to them, in which case breaking them should be marked as wrong (and those accused of breaches should be entitled to the protections that the criminal law offers); or they have no such claim, in which case we have no right to seek to secure obedience to them by threat of penalties. (285)[37]

I think, however, that this statement by Duff misunderstands the basis for forfeiture. The test for forfeiture is not whether what one did was wrong or not. Many examples of forfeiture involve no wrongful action, just a person having made a responsible choice such that the fair thing to do is to put some burden on her rather than another.[38] So there is nothing fundamentally incoherent in seeking to secure obedience with threats of penalties even when it would not be wrong to be disobedient. In a well-organized society, the interests that individuals are morally entitled to pursue should line up fairly well with the interests society is justified in protecting. But it would be utopian to expect complete alignment. We can demand of society that it not penalize people for doing what is morally mandatory or supported by a strong case of necessity. But when the acts in question are merely morally permissible, we should expect some tension to arise. In those cases, the law is not behaving merely like a coercive gunman; it is pursuing its own moral reasons and giving individuals whose moral interests do not align with it prudential reasons to behave as if they do.

This response may seem to give away too much, cutting all connection between the penal law and criminal law. But I think that too is a mistake. Though forfeiture does not presuppose wrongdoing in general, it only makes sense to impose penal threats when it is important to reinforce reasonable regulations. And in those contexts, the failure to abide by those regulations is still a pro tanto public wrong. Therefore, it is only in those relatively rare cases in which the state has good reason to deny access to defenses that would normally apply that the state should be able to establish a basis for a penalty without also proving that the defendant committed a crime.

When those rare cases arise, there is also no reason the state should not mark that fact at sentencing. The judge can and should make it clear, when culpable wrongdoing

[37] This echoes his point about the justifiability of deterrence depending "on there already being sufficient, non-deterrent, normative reasons for us not to do what the law seeks to deter us from doing." (23) I now return to that argument, as I said I would in note 22.

[38] Jeff McMahan influentially pushes this notion of forfeiture of the right not to be killed, based on mere responsible choice, in *Killing in War* (New York: Oxford University Press, 2009). If the right not to be killed can be forfeited without wrongdoing, then surely the right not to be penalized can be forfeited without wrongdoing.

has not been established, that she is sentencing the defendant *merely* for a penal infraction, and not finding her *guilty* of a crime.

Finally, we come back to the third worry that no one would care about such a fine distinction, that people simply care about whether the state is going to impose hard treatment on them or not. This is an empirical claim, obviously, and I don't have data to back up this hunch. But my sense for human psychology is that people *do* care about the sorts of justifications that are given for what is done to them, and they *do* care about the message that is being sent. For example, loss of liberty because one is a prisoner of war (POW) is just as dire as loss of liberty because one is sentenced to prison for a crime; in some ways the former is even worse, as its duration is indefinite. But POWs know that they are not being condemned; they are merely being detained because the detaining power is trying to limit their enemy's fighting ability. Likewise, I think people distinguish civil penalties from criminal fines. In the same spirit, I think they would care about whether the judge at sentencing finds them guilty and sentences them with a mix of punishment and penalty or *merely* finds them to have committed a penal infraction.

7 Conclusion

Duff's *The Realm of Criminal Law* offers an appealing moral reconstruction of the criminal law. I agree that the criminal law should be understood to predicate punishment upon sufficient proof that the defendant has committed a public wrong for which she is being held to account and censured. But the criminal law is not *only* about censoring people for public wrongs; it must serve other purposes as well, such as preventing people from committing serious crimes and more generally from violating reasonable regulations. These purposes, and perhaps retributive justice, require the criminal law also to mete out harsh treatment, but only insofar as such treatments are proportional to the culpable wrong committed. The problem for the criminal law is that many mala prohibita crimes consist of a minor wrong but also call for a relatively severe punishment. To accommodate that mismatch, it is necessary to complement the criminal law, as Duff conceives of it, with penal law. Penal law relies on forfeiture to explain why hard treatment is permissible. The forfeiture must be fair, and it comes with its own proportionality limits. But those limits are not as strict as the limits implicit in the criminal law. It allows for penalties that are harsher than the punishments that could justifiably be meted out for many mala prohibita offenses. One and the same act can count as a crime and a penal infraction, and one and the same criminal justice system can and should handle both crimes and the penal infractions. It is, I think, only in that way that we can accommodate both the need to prevent public wrongdoing and the distinct importance of holding people accountable for the commission of public wrongs.

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