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CHAPTER

## 5 An Instrumental Legal Moralism

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### Abstract

Many writers defend or attack the position nowadays known as legal moralism. According to the most common formulation, legal moralists endorse the following thesis: the fact that  $\phi$ ing is morally wrong is a reason to criminalize  $\phi$ ing. This chapter considers a different kind of legal moralism, here called instrumental legal moralism (ILM). According to ILM: the fact that criminalizing  $\phi$ ing will probably prevent moral wrongs is a reason to criminalize  $\phi$ ing. Section I draws some relevant distinctions. In doing so, it clarifies the difference between ILM and the act-centred legal moralism (ALM) commonly discussed in the literature. Sections II–IV consider two prominent arguments for ALM: the retributivist argument, offered by Michael Moore, and the answerability argument, offered by Antony Duff. The chapter shows that, contrary to the intentions of these authors, both arguments in fact support ILM.

**Keywords:** legal moralism, criminalization, moral wrongdoing, retributivism, answerability

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Many who write about the criminal law defend or attack what is nowadays known as legal moralism. As with so many philosophical labels, this label is not used to refer to a single view. There is, however, one thing on which defenders and attackers seem to agree. As formulated by Antony Duff, Joel Feinberg, H.L.A. Hart, Michael Moore, and others, legal moralism amounts to the following thesis: the fact that  $\phi$ ing is morally wrong is a reason to criminalize  $\phi$ ing.<sup>1</sup> This paper considers a different kind of legal moralism, which I call *instrumental legal moralism* (ILM). Section I distinguishes ILM from the *act-centred legal moralism* (ALM) debated by Duff, Feinberg, Hart, and Moore. It points out that ILM is itself a label which refers to a family of principles, and identifies one such principle—which I call (E)—for further discussion. Section II introduces two prominent arguments for versions of ALM: the *retributivist argument*, offered by Michael Moore, and the *answerability argument*, offered by Antony Duff. The section argues that if we endorse the premises on which these arguments depend, we should—via certain further premises—also endorse (E). In short, if the two arguments are sound, we should endorse ALM and ILM.

p. 154 Section III argues that the two arguments are not sound. This is not because their premises are false, but because ALM does not follow from them.<sup>2</sup> What follows, I argue, is (E). Section IV considers a question left over from earlier in the paper: if (E) is true, does it tell us that preventing all moral wrongs, or only some such wrongs, is a reason to criminalize? As we will see, it appears that the retributivist and answerability arguments only identify a reason to prevent certain *secondary* wrongs.<sup>3</sup> Section IV argues that this is not a plausible conclusion. If preventing certain secondary wrongs is a reason to criminalize, then preventing the corresponding primary wrongs is a reason to criminalize also. Though they are commonly thought to be arguments for ALM, it is to the resulting version of ILM that the retributivist and answerability arguments ultimately lead.

## I

In *Harm to Others*, Joel Feinberg identifies the following principles:

- (A) 'It can be morally legitimate to prohibit conduct on the ground that it is inherently immoral, even though it causes neither harm nor offence to the actor or to others.'<sup>4</sup>
- (B) 'It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is probably no other means that is equally effective at no greater cost to other values.'<sup>5</sup>
- (C) 'It is always a good reason in support of a proposed criminal prohibition that it is probably necessary to prevent serious offence to persons other than the actor and would probably be an effective means to that end if enacted.'<sup>6</sup>

p. 155 Feinberg calls (A) *legal moralism*, (B) *the harm principle*, and (C) *the offence principle*.<sup>7</sup> (B) and (C) are both formulated instrumentally. Whether there is reason to criminalize an act-type depends, in (B) and (C), on the likely effects of the prohibition itself: unless that prohibition will probably be effective in preventing harm or serious offence to others, neither (B) nor (C) identifies any reason to enact it.<sup>8</sup> (A) is different. (A) implies that there is reason to criminalize act-types because of a property which the tokens of that type share: it is the fact they are 'inherently immoral' that gives us reason to prohibit them, irrespective of the effects of creating the prohibition. (A) is thus what I will call an *act-centred principle*; (B) and (C) are *instrumental principles*.

Now consider (D):

- (D) It can be morally legitimate to prohibit conduct on the ground that the conduct causes harm to others.

Like (A), (D) is act-centred. (D) implies that the fact that tokens of some act-type are harmful to others is a reason to prohibit that act-type. This is so irrespective of the effects of creating the prohibition. This shows that we can formulate harm principles that are either act-centred or instrumental.<sup>9</sup> And the same is true of legal moralism. Consider (E):

- (E) It is always a good reason in support of criminalization that it would probably be effective in preventing (eliminating, reducing) moral wrongs, and there is probably no other means that is equally effective at a lesser cost to other values.<sup>10</sup>

Like (B) and (C), (E) is instrumental: unless the prohibition will probably be effective in preventing moral wrongdoing, (E) does not identify any reason to create it.

p. 156 Feinberg is not alone in defining legal moralism in act-centred terms. In *Law, Liberty and Morality*, H.L.A. Hart identifies the question he will consider as follows: '[i]s the fact that certain conduct is by common standards immoral sufficient to justify making that conduct punishable by law?'<sup>11</sup> Those who answer affirmatively endorse legal moralism. And to give this answer is to endorse an act-centred principle: it is to claim that  $\hookrightarrow$  the fact tokens of an act-type are immoral justifies their criminalization. More recent accounts of legal moralism are also act-centred. According to Michael Moore: the 'theory of legal moralism' holds that the fact 'an action is morally wrong is always a legitimate reason to prohibit it with criminal legislation'.<sup>12</sup> And according to Antony Duff, legal moralism 'holds that the wrongfulness of a type of conduct gives us positive reason to criminalize it'.<sup>13</sup>

p. 157 There are important differences between these versions of legal moralism, to some of which we will return. But all amount to act-centred principles.<sup>14</sup> One might say that Patrick Devlin is one legal moralist who endorses an instrumental principle, at least on what H.L.A. Hart dubs the 'moderate' reading of his work.<sup>15</sup> On this reading, Devlin claims that *any* moral wrong could in principle be criminalized legitimately, because the widespread commission of any such wrong could threaten social order, and because criminalization might then be necessary to prevent the harm this disorder would cause.<sup>16</sup> It is true that when read in this way Devlin endorses an instrumental principle. But he endorses (B), not (E). What Devlin claims, in effect, is that there is reason to criminalize any act-type the criminalization of which is probably necessary to prevent  $\hookrightarrow$  harm to others. If this is our principle, he further claims, we cannot rule out the possibility that, at some time or other, any moral wrong might be on the list of act-types to which it applies. Note, though, that neither claim makes Devlin a legal moralist. The principle Devlin endorses, on this reading, is Feinberg's harm principle. True, that principle may tell us that there is reason to criminalize moral wrongs. But the significance given to moral wrongdoing is entirely derivative—it derives entirely from the fact that criminalizing wrongdoing is sometimes likely to prevent harm.<sup>17</sup>

This tells us something about what it is to endorse legal moralism. For the legal moralist, moral wrongdoing has a non-derivative significance. According to *act-centred legal moralism* (ALM):

ALM: the fact that  $\phi$ ing is morally wrong is a reason to criminalize  $\phi$ ing.

To endorse ALM is thus to identify a reason to criminalize that exists irrespective of whether criminalization has any further effects. According to *instrumental legal moralism* (ILM):

ILM: the fact that criminalizing  $\phi$ ing will probably prevent moral wrongdoing is a reason to criminalize  $\phi$ ing.<sup>18</sup>

To endorse ILM is thus to identify a reason to criminalize that exists precisely because criminalization has certain effects. But the effects that matter are not those that matter for (the moderately read) Devlin. For him, the fact that criminalizing  $\phi$ ing would probably prevent wrongdoing is not itself a reason to criminalize anything. There is reason to criminalize  $\phi$ ing only if—and in virtue of the fact that—doing so will probably prevent harm to others. So Devlin does not endorse ILM.<sup>19</sup>

p. 158 Is there any significant difference between ALM and ILM? One might doubt it. But there is no room for doubt.<sup>20</sup> Contrary to what is sometimes assumed, there is no reliable connection between criminalizing an activity and reducing its incidence. Consider pimping and drug pushing. Let's grant that these are both moral wrongs. If we endorse ILM, is that the slightest reason to criminalize them? No. Not only might this be unproductive, it might even be counterproductive. The activities in question might be driven underground where their excesses are much harder to detect and control, and where their potential tax-

invisible profits increase their attractions to the least scrupulous. In such cases, while ALM supports criminalization, ILM does not. What's more, moral wrongs cannot only be prevented by criminalizing the wrongs themselves. We may better prevent pimping and drug-pushing by criminalizing various ancillary activities (such as paying for sex, or possessing and using drugs) than by criminalizing pimping or pushing alone. When these ancillary activities are not wrongs ALM does not support criminalization, but ILM does.<sup>21</sup>

p. 159 We have seen that some prominent legal moralist principles are versions of ALM. In the next section, I begin to consider what might be said in favour of one version of ILM—what I above called principle (E). Before doing so, it is worth clarifying several aspects of the principle I will discuss. First, (E) identifies *only* the existence of a reason to criminalize. Some versions of ALM are much stronger than this. Recall that according to Hart, the legal moralist claims that the immorality of an act-type is 'sufficient to justify making that conduct punishable by law'.<sup>22</sup> Moore sometimes makes similar claims. He writes that on a legal moralist view, ⊢ 'the immorality of behaviour' is a 'sufficient condition with which to justify criminal legislation'.<sup>23</sup> These claims should not be taken at face value. If immorality were a sufficient condition of the permissibility of criminalization, there could be no immoral act that it was impermissible to criminalize. This is not Moore's view, nor was it Devlin's. Moore is clear that some wrongdoing is 'immune to criminalization even according to a legal moralist view of the proper reach of criminal legislation'.<sup>24</sup> I have already claimed that on the 'moderate' reading of his work Devlin was not a legal moralist. But even on what Hart dubs an 'extreme' reading—one which has Devlin give immorality a non-derivative significance—Devlin still accepts that some immoralities cannot permissibly be criminalized. In some cases this would disproportionately invade people's privacy; in others it would be insufficiently tolerant of different ways of life.<sup>25</sup> Devlin claims one must 'balance' competing considerations. He does not claim that the case for criminalizing wrongdoing will never be outweighed.

p. 160 It is more plausible to take Moore and Devlin to be making a more modest claim. They should be taken, I suggest, to be claiming that the fact an act-type is a moral wrong is a *defeasibly sufficient* reason to criminalize that act-type.<sup>26</sup> If some fact, *f*, is a defeasibly sufficient reason to do X, then it is true both (a) that it is not a necessary condition of the permissibility of doing X that there be any additional reason to do it, and (b) that *f* may be (and sometimes is) defeated by reasons not to do X. We have already seen that Moore and Devlin both endorse (b): our reasons to criminalize immoralities may be (and sometimes are) defeated by reasons to protect liberty or privacy. But the fact an act-type is a moral wrong is not, for them, a reason that necessarily requires supplementation. It is the denial of this thesis—of (a)—which Joel Feinberg eventually took to be definitive of his 'liberal' view of criminalization. Having claimed otherwise in *Harm to Others*, Feinberg had come to accept by the time he wrote *Harmless Wrongdoing* that the immorality of an act-type is *itself* a reason to criminalize it.<sup>27</sup> What he continued to deny was that ⊢ this reason is sufficiently weighty on its own. For the liberal, he claimed, it must be supplemented by additional reasons to criminalize, specifically the fact that criminalizing an immorality will probably prevent harm or offence to others.<sup>28</sup> Not so, say Moore and Devlin: all we need show is that certain reasons *not* to criminalize—which would otherwise defeat our reasons to do so—are absent in the case of our proposed offence.

Though Moore and Devlin's views are weaker than they first appear, they remain stronger than (E). To repeat, (E) merely identifies a reason to criminalize. If this principle is sound, at least one version of ILM is sound. Because many prominent legal moralist principles are versions of ALM, this would not be an uninteresting conclusion. Perhaps preventing moral wrongs is *also* a defeasibly sufficient reason to criminalize. But the truth of this stronger claim is a matter for another day.

So much for the first clarification. Legal moralists also disagree about *which* immoralities provide reasons to criminalize. On what I will call an *unrestricted view*, all immoralities provide such reasons. This is the view taken by Moore. On a *restricted view*, this is only true of some immoralities. Duff endorses such a view. He argues that there is only reason to criminalize *public* wrongs, where a public wrong is a moral wrong which 'violates the polity's defining values' and thus becomes the 'business' of the wrongdoer's fellow citizens.<sup>29</sup>

p. 161 Strictly speaking, then, we should distinguish between ( $E^U$ ) and ( $E^R$ ), where the former refers to the prevention of any  $\hookrightarrow$  moral wrongdoing, and the latter to the prevention of only certain moral wrongs. Later, we will have reason to distinguish between these two interpretations. For now, I will simply refer to ( $E$ ), leaving open whether the best interpretation of ( $E$ ) is or is not restricted.<sup>30</sup>

As I formulated it above, ( $E$ ) is a principle that identifies reasons to *criminalize*. It is not entirely clear what this means. Feinberg's principles—(A), (B), and (C)—refer respectively to reasons to 'prohibit', to enact 'penal legislation', and to enact a 'criminal prohibition'. (A) thus seems to apply to a wider range of acts than (B) and (C). When I use the term *criminalize*, I am referring to all acts that make it a criminal offence to  $\phi$ .<sup>31</sup> These may or may not be legislative acts. I will assume here that an act creates a criminal offence if it makes  $\phi$ ers liable to conviction and punishment at the conclusion of a criminal process.<sup>32</sup> The reader will have her own views of what such a process amounts to, but nothing turns on this here.

A final clarification, which may by now seem long overdue. So far, I have referred indistinctly to immoralities and moral wrongs, and I have said nothing about what I take either term to mean. Here is a modest proposal:  $\phi$ ing is immoral or morally wrong only if there is moral reason not to  $\phi$ . While this is a plausible necessary condition, it is not plausibly sufficient. What additional properties must the aforementioned moral reasons possess? Consider three possibilities:

- (F) Those reasons defeat any reasons to  $\phi$ ;
- (G) Those reasons add up to a moral duty not to  $\phi$ ;
- (H) Those reasons add up to a moral duty not to  $\phi$ , and are such that  $\phi$ ing is an unjustified and unexcused breach of that duty.

p. 162 Some think that one has a duty not to  $\phi$  only if at least one reason to  $\phi$  is excluded.<sup>33</sup> If this is right, (F) and (G) do not refer to the same property. If the moral reasons not to  $\phi$  outweigh any reasons to  $\phi$ , without  $\hookrightarrow$  excluding any of them, those reasons have the property mentioned in (F) but not that mentioned in (G). Some also think that one can have a duty not to  $\phi$  even if  $\phi$ ing is justified.<sup>34</sup> If this is right, (G) and (H) do not refer to the same property. Here I assume for the sake of argument that the aforementioned properties are indeed distinct. If the moral reasons not to  $\phi$  possess the property referred to in (F) I will say that  $\phi$ ing is *immoral*. If they possess the property referred to in (G) I will say that  $\phi$ ing is a *moral wrong*.<sup>35</sup> If they possess the property referred to in (H) I will say that  $\phi$ ing is a *culpable moral wrong*. This usage is stipulative,<sup>36</sup> but it will make clear which property I am referring to at any given point.

p. 163 In what follows I will assume that ( $E$ ) refers only to culpable moral wrongdoing. It is less clear that there is reason to criminalize whatever will probably prevent commission of *justified* moral wrongs. Take a case in which the only way to save five lives is for me to cut off your arm. Let's say I am justified in saving the five, but that when I do so I wrong you by cutting off your arm. Is there any reason for a third party to prevent me saving the five? Perhaps. Perhaps there is a reason to prevent me cutting off your arm, but this reason is defeated by the reasons to allow me to save five lives. Even if this is not so, it is plausible to think that there is reason to prevent circumstances arising in which this is the choice I face—in which I must choose between wronging you to save five lives and allowing the five to die. Much better if I could save the five without committing the wrong. And to make this option available, of course, is to simultaneously prevent any justified wrong from being committed.<sup>37</sup> I will not pursue this line of thought further here. It will be enough to consider whether the fact that criminalizing  $\phi$ ing will likely prevent culpable wrongdoing is *itself* a reason to criminalize  $\phi$ ing. Remember that to conclude that such a reason exists is not to conclude  $\hookrightarrow$  that there is reason to criminalize culpable wrongs themselves. We may have no such reason. And we may have reason to criminalize other activities entirely. ( $E$ ) is an instrumental not an act-centred principle.

It may be objected that I have omitted from consideration an important legal moralist view. According to that view, the concern of legal moralism is not with what we actually have moral reason not to do, but with what we have moral reason not to do *in the eyes of most members of our society*. This suggests that my modest proposal was already too immodest. I doubt this is correct. As Les Green remarks:

There is no guarantee that the requirements of social morality will not be repugnant, superstitious, absurd, confused, and so forth. We are morally fallible and so are all our customs and practices. Thus, to think that the fact social morality provides adequate warrant for its own enforcement is to think that there are features of social morality that justify enforcing it even when it is repugnant.<sup>38</sup>

Perhaps there are such features. Perhaps the fact that social morality requires us not to  $\phi$  gives the state legitimate authority to prohibit  $\phi$ ing. This is not, I think, a particularly plausible view of authority. But even if it is correct, it does not conflict with my modest proposal. If the state has legitimate authority to prohibit  $\phi$ ing, then once it is prohibited we have moral reason—indeed, a moral duty—not to  $\phi$ .<sup>39</sup> Violation of the requirements of social morality is then also a moral wrong. Things are different, of course, if those requirements generate no moral reasons for action at all. But why, then, would violation of those requirements, or its prevention, be any reason at all to criminalize?<sup>40</sup>

In the absence of a satisfactory answer I set this view aside. That said, the previous paragraph does help clarify an important point. A legal moralist need not claim that the question of whether  $\phi$ ing is a moral wrong is one that must be answered prior to, or independently of, the law. It may be that  $\phi$ ing is a moral wrong *partly because* it is a criminal offence. Once road traffic offences are created, reliance on those laws may make  $\hookrightarrow$  my offending acts especially dangerous. Those acts may then be moral wrongs—they may breach a moral duty I owe to other road-users—even though this would not have been so had the road traffic offences never come into existence. In cases like this, criminalization helps *make* some actions morally wrong.<sup>41</sup> When this is so, (E) holds that there is reason to criminalize  $\phi$ ing if doing so will not only help create the wrong, but will also probably prevent culpable commission of it.

## II

This section considers two prominent arguments for versions of ALM. The first, offered by Michael Moore, derives an act-centred legal moralism from a retributivist theory of punishment. I will call it the *retributivist argument*. The second, offered by Antony Duff, derives an act-centred legal moralism from an account of citizens' duties to answer to one another. I will call it the *answerability argument*. This section does not assess the soundness of either argument. Instead, it argues *from* premises on which the two arguments rely to the soundness of principle (E). This requires defence of certain further premises. But these premises seem to me to be eminently defensible. If I am right, those who endorse ALM because they endorse the retributivist or answerability arguments, should also endorse ILM in the form of (E).

Consider first the retributivist argument. 'The moral wrongness of any sort of behaviour', Moore writes, 'is always some reason to legislate against it in the criminal law'.<sup>42</sup> His argument for this thesis can be summarized as follows:

(1) Retributive justice is done when those who deserve to be punished are given the punishment they deserve;

(2) Society has a duty to make it the case that retributive justice is done;<sup>43</sup>

p. 165 (3)  $\hookrightarrow$  Punishment is deserved by those who culpably commit moral wrongs;<sup>44</sup>

(4) Criminalizing moral wrongs can bring it about that those who culpably commit them are given the

punishment they deserve;<sup>45</sup>

- (5) Therefore, there is reason to criminalize  $\phi$ ing if  $\phi$ ing is a moral wrong.<sup>46</sup>

Consider second the answerability argument. According to Duff, the legal moralist holds that ‘the wrongfulness of a given type of conduct is always a reason in favour of criminalizing it’.<sup>47</sup> A ‘modest’ legal moralist, however, claims only that this is true of some moral wrongs, and Duff claims only that it is true of *public wrongs*.<sup>48</sup> His argument can be summarized as follows:

- (1) We are answerable to others for committing moral wrongs which are their ‘business’;<sup>49</sup>
- (2) A moral wrong which ‘violates the polity’s defining values’ is the ‘business’ of the wrongdoer’s fellow citizens, and is therefore a *public wrong*;<sup>50</sup>
- (3) Citizens have a duty to answer, and call one another to answer, for public wrongs;<sup>51</sup>
- p. 166 (4)  $\hookleftarrow$  Criminalizing public wrongs can bring it about that citizens answer, and are called to answer, for committing those wrongs;<sup>52</sup>
- (5) Therefore, there is reason to criminalize  $\phi$ ing if  $\phi$ ing is a public wrong.<sup>53</sup>

There are important differences between these arguments. As I already mentioned, Duff’s legal moralism is *restricted*. We can now see why. The reasons to criminalize identified by Duff are reasons citizens have in virtue of a particular type of community membership. To be a citizen, Duff claims, is to be a member of a political community which defines itself by reference to certain values;<sup>54</sup> as a member of that community one is answerable to one’s fellow members for ‘violating’ those values—that is, for public wrongs. By calling members to answer, the criminal law sees that their duties to answer, and to call one another to answer, are duties to which those members conform. Moore’s argument is very different. The reasons to criminalize identified by Moore derive from the value of retributive justice itself. That value generates a duty to punish deserving offenders. By bringing about said punishment, the criminal law sees that this duty is one to which society conforms. Because he claims that all culpable moral wrongdoing deserves punishment, Moore’s legal moralism is *unrestricted*.

Assume that the premises of both these arguments are true. By taking some of these premises, and adding some further premises, we can construct two arguments for (E). Consider first the following argument, which builds on the retributivist argument:

- p. 167 (1) If there is reason for A to bring about x, and y is better than x, there is reason for A to bring about y;
- (2) Officials have reason to give those who culpably commit moral wrongs the punishment they deserve;
- (3) *Ceteris paribus*, it is better if instances of culpable moral wrongdoing do not occur than if those who culpably commit moral wrongs are given the punishment they deserve;
- (4) Criminalizing  $\phi$ ing will probably prevent culpable moral wrongdoing;
- (5) Therefore—*ceteris paribus*—the fact that criminalizing  $\phi$ ing will probably prevent culpable moral wrongdoing is a reason to criminalize  $\phi$ ing.

Premise (2) of this argument is entailed by the retributivist argument.<sup>55</sup> I return to (1) in due course. To deny (3) is to claim that, all else being equal, it is no worse if people commit wrongs deserving of punishment and are then punished, than if they never commit such wrongs at all. This claim is hard to accept. Imagine that if Molly stays in tomorrow morning, she will not culpably commit a wrong. If she goes out, Molly will culpably commit the wrong and Alice will give Molly the punishment she deserves. *Ceteris paribus*, it seems obvious that it would be better if Molly stayed in tomorrow morning. We might explain this in two ways. According



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to a first explanation, the imposition of deserved punishment is intrinsically good.<sup>56</sup> But nothing counts as punishment if it does not make the person punished worse off.<sup>57</sup> So in addition to its intrinsic goodness, deserved punishment necessarily brings with it some countervailing badness. Culpable wrongdoing, on the other hand, does not necessarily bring with it anything good. And in addition to whatever impersonal badness it has, culpable wrongdoing is also bad *for people*. Some wrongs cannot be committed without damaging the lives of victims. And the culpable commission of any wrong damages the life of the wrongdoer herself.<sup>58</sup> Because all this damage will be done if Molly culpably commits a wrong, in addition to the damage done by deserved punishment itself, it would be better, *ceteris paribus*, if Molly stayed in and did not act wrongly.

Some would object to this first explanation for the following reason. According to the retributivist argument, to impose deserved punishment is to do a type of justice. But justice ought to be done, so the objection goes, not because of the good that doing justice brings into the world. Justice ought to be done irrespective of whether good is thereby brought into the world.<sup>59</sup> Even if we grant that this is true, it does not threaten (3). To see why, note that justice is not the only thing that ought to be done. It is also the case that each of us ought to refrain from culpably committing wrongs. Now return to the case in which staying in tomorrow morning will prevent Molly culpably committing a wrong. *Ceteris paribus*, if Molly stays in she will act as she ought to act by refraining from wrongdoing. If Molly goes out, Alice will act as she ought to act by imposing just punishment for Molly's wrong. It might thus seem that we should be indifferent as to where Molly spends her morning. But if she goes out, Molly will act as she ought *not* to act, by culpably committing a wrong.<sup>60</sup> *Ceteris paribus*, it would thus be better if Molly stayed in, and the culpable wrong did not occur. This gives us a second explanation of the truth of (3).

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What other challenges might be made to the argument offered above? One possibility is that an objector might deny (4). They might deny, that is, that criminalization is capable of reducing the incidence of culpable wrongdoing. But it seems implausible to claim that criminalization could *never* have this effect,<sup>61</sup> and (E) applies only to cases where it will probably do so. If there are few such cases, (E) will rarely support criminalization. But this does nothing to show that (E) is not a sound principle. Alternatively, one might object that even if criminalizing  $\phi$ ing would probably reduce the incidence of culpable wrongdoing, there is only reason to criminalize  $\phi$ ing if there is probably no other means that would be equally effective at a lesser cost to other values. If this is correct, (4) and (5) should be reformulated as follows:

(4a) Criminalizing  $\phi$ ing will probably prevent culpable moral wrongdoing, and there is probably no other means that is equally effective at a lesser cost to other values;

(5a) Therefore—*ceteris paribus*—it is always a good reason in support of criminalization that it will probably be effective in preventing culpable moral wrongs, and there is probably no other means that is equally effective at a lesser cost to other values.

This is not a concession. Aside from the *ceteris paribus* clause, (5a) is simply (E) as I first formulated it in Section I.<sup>62</sup> The presence of this clause, however, suggests a further possible objection. One might object that when the better world mentioned in (3) is brought about via criminalization, all else is not equal, and that on closer inspection this world is not in fact better at all. Consider the following remarks:

there are two considerations that suggest that the only function of our criminal law is the achievement of retributive justice. One is the tension that exists between crime-prevention and retributive goals. This tension is due to retributivism's inability to share the stage with any other punishment goal. To achieve retributive justice, the punishment must be inflicted because the offender did the offence. To the extent that someone is punished for reasons other than that he deserves to be punished, retributive justice is not achieved.<sup>63</sup>



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Moore's remarks suggest the following objection: even if it is a good thing that instances of culpable wrongdoing do not occur, things are worse (or no better) all-things-considered if those wrongdoers who remain will not face retributive justice; and when law-makers aim to prevent wrongdoing, ↪ retributive justice will not be done. This argument, however, depends on a non sequitur. It assumes that the legitimate aims of those who criminalize and those who punish are identical, such that if law-makers criminalize  $\phi$ ing in order to prevent some culpable wrong, judges may (or even must) punish offenders for those same reasons.<sup>64</sup> This assumption should be rejected. The act of criminalization is a very different act to that of punishment: to criminalizing  $\phi$ ing is, inter alia, to make  $\phi$ ers *liable* to punishment; but it is not to impose it. The two acts can thus be performed for different reasons. One can criminalize in order to prevent, without punishing in order to prevent. And one can punish in order to hand out just deserts, without criminalizing in order to hand out any deserts at all. To say that officials legitimately aim to prevent culpable wrongdoing when they criminalize, is thus to say nothing about the reasons for which officials legitimately act when they punish. The cost Moore identifies thus need not be borne by those who endorse (E).<sup>65</sup>

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Moore's objection might also be rejected for a second reason. (E) identifies a particular reason to criminalize certain act-types. This is to say that it identifies a consideration that counts in favour of their criminalization.<sup>66</sup> It is not necessarily to say that legislators legitimately criminalize *for that very reason*. There is a difference, to put it another way, between normative and motivating reasons: between the considerations that count in favour of my doing something, and the considerations that motivate me in doing it. Not all considerations of the former kind ought to be considerations of the latter kind. It is those that should not which are *excluded* in Joseph Raz's sense of that word.<sup>67</sup> The point in the previous paragraph was that (E) is consistent with the exclusion, when it comes to punishment, of normative reasons to prevent wrongdoing. The point here is that (E) is also consistent with the exclusion of those reasons when it comes to legislation itself. I use the word 'may' here advisedly: (E) does not itself commit us either way. But this is enough ↪ to dispose of the Moore-inspired worry about (E)'s implications for the reasons for which sentencing officials may act. (E) has no such implications. So we are yet to see why the above argument for (E) does not go through. We are yet to see, in other words, why the world in which criminalization reduces the incidence of culpable wrongdoing is never a better world.<sup>68</sup>

Let us now turn to a second argument for (E),<sup>69</sup> which builds on some of the premises of the answerability argument:

- (1) If there is reason for A to bring about x, and y is better than x, there is reason for A to bring about y;
- (2) Citizens have reason to answer, and call one another to answer, for public wrongs;
- (3) *Ceteris paribus*, it is better if instances of public wrongdoing do not occur than if those who commit such wrongs answer, and are called to answer, for their commission;
- (4) Criminalizing  $\phi$ ing can bring it about that there are fewer public wrongdoers;
- (5) Therefore—*ceteris paribus*—that criminalizing  $\phi$ ing will probably prevent public wrongdoing is a reason to criminalize  $\phi$ ing.

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(2) is entailed by the answerability argument.<sup>70</sup> I set aside (4), having already considered objections to the equivalent premise of the retributivist argument. One might deny (3). But we can again rely on the case of Molly and Alice. If all else is equal, it would be better if Molly stayed in tomorrow morning and did not commit a public wrong, than if Molly went out, committed the wrong and Alice called her to answer for doing so.<sup>71</sup> It might be argued that all else is *not* equal when prevention is achieved via criminalization. Perhaps those who criminalize in order to prevent culpable wrongdoing treat potential offenders with disrespect. ↪ Duff argues that when legislators have preventive aims, potential offenders face a criminal law that

creates a new reason—the threat of punishment—to make it in their interest to obey laws that they would otherwise have no such reason to obey. But this is no longer to address them as autonomous agents in a language to which they will listen. It is to seek to coerce their obedience by threats which treat them like ‘dog[s] instead of with the freedom and respect due to [them]’ as moral agents.<sup>72</sup>

p. 173 Duff’s remarks suggest the following possible objection: even if it is a good thing that culpable wrongs do not occur, things are worse (or no better) all-things-considered if the law achieves this by treating people disrespectfully; and when legislators aim to prevent wrongdoing (at least via the criminal law) this is just what they do. This objection fails.<sup>73</sup> We do not always treat others with disrespect by creating new reasons for action for them, even when we create those reasons in order to prevent them acting in some way. If you are about to attack me, I create a new reason for you to refrain if I am ready and willing to act in justified self-defence. Though you always had moral reasons not to attack me, you now have an additional prudential reason not to do so, a reason given by the injury I will inflict if you attack. Imagine I now warn you of my readiness to self-defend, in the hope that this will prevent your attack. It seems clear that I need not show you disrespect in doing this.<sup>74</sup> And the same, it seems, can be true of those who criminalize in order to prevent wrongs. When we criminalize  $\phi$ ing we make it the case that those who  $\phi$  are liable to punishment. Let’s assume the punishments to which  $\phi$ ers are made liable are morally justified, on whatever theory of morally justified punishment is correct. That judges are now ready to impose these punishments creates an additional prudential reason not to  $\phi$ . If we criminalize in order to prevent wrongdoing, we warn potential  $\phi$ ers that morally justified punishment may be imposed on them if they  $\phi$ , in the hope that this will prevent them  $\phi$ ing. Just as in the self-defence case, we are warning others that if they act in certain ways, we will do

↳ what we are morally justified in doing, and we issue the warning to prevent them from acting in those ways. But if this does not show disrespect in the self-defence case, there is no reason to think it must show disrespect in the case of criminalization. If it does not, the cost identified by Duff need not be borne by those who endorse (E).<sup>75</sup>

p. 174 The Duff-inspired objection might also be rejected for a second reason. According to the objection, it is disrespectful to assume that unless one creates prudential reasons for them not to  $\phi$ , others will  $\phi$  in violation of their moral duties. Yet, so the objection goes, this is precisely what one assumes when one criminalizes in order to prevent wrongs. If the previous paragraph is correct, there need be nothing disrespectful in what I have just described. We can now add that those who criminalize in order to prevent wrongs need not make the offending assumption. To see this, notice that in some cases we can prevent wrongs only if enough people contribute to the production of goods that help to prevent them;<sup>76</sup> yet each of us has a duty to make a contribution only if we can be assured that enough people will do the same. Such cases arise most commonly when the contribution is costly to make, such that we have a duty to make it only if this is likely to do a sufficient amount of good. Now imagine it is possible to provide the requisite assurance only by making it a crime to fail to contribute. Only the prospect of conviction and punishment is likely to get enough people to do their part.<sup>77</sup> In such a case, failure to contribute is criminalized in order to prevent wrongs, by getting enough people to contribute to the aforementioned goods. But the assumption is *not* that, absent criminalization, people will violate a moral duty to contribute. The assumption is rather that, absent criminalization, it is morally permissible *not* to contribute, but that ↳ acting permissibly will produce an outcome that is bad for everyone. By criminalizing we prevent this bad outcome from coming about. The key point here is that those who criminalize in such cases do not show anyone disrespect: they do not make what I called above the offending assumption. So we are yet to see why the argument for (E) set out above does not go through.

Let us turn finally to (1). Some think that if some action is of value, that either is, or entails that there is, a reason to do it.<sup>78</sup> Duff denies this:

I agree that values speak to us all, that they invite appropriate responses from us all, but I do not think that they always speak to us all as agents: sometimes the appropriate response to a value is a recognition with no practical implications, not because I am not well placed to help realize the value, but because it is not connected to me as an agent. The site of agency is not the whole world; my agency is grounded in the more limited, particular forms of life in which I function, and find my reasons for action.<sup>79</sup>

These remarks suggest a possible challenge to (1): even if y is better than x, and there is reason for A to bring about x, it may not follow that there is reason for A to bring about y. There will be no such reason if the value which makes y better is not 'connected to [A] as an agent'. Grant for the sake of argument that this is correct. In the argument under consideration, to bring about x is to bring it about that people answer, and are called to answer, for public wrongs; to bring about y is to bring it about that there are fewer such wrongs. But public wrongs *just are* wrongs which are the 'business' of the members of the political community. As Duff and Marshall put it, they are wrongs that are of 'concern' to the public at large.<sup>80</sup> So it cannot be said that those wrongs are not connected to citizens as agents. The challenge in question thus fails.

### III

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Section II considered two arguments for ALM: the retributivist argument and the answerability argument. It did not challenge the soundness of either argument, but contended that, with the addition of certain further premises, these arguments also support (E) and thus support a version of ILM. In this section, I deny that the two arguments are sound arguments for ALM. My claim is not that they depend on false premises. It is rather that ALM does not follow from them. What does follow, I argue, is ILM in the form of (E). Properly understood, the conclusion of both arguments is that there is reason to criminalize  $\phi$ ing in virtue of the fact that criminalizing  $\phi$ ing will probably prevent certain wrongs. But neither argument supports the criminalization of moral wrongdoing in virtue of the fact that it is moral wrongdoing. So neither the retributivist nor the answerability argument supports ALM.

Recall the initial premises of the retributivist argument:

- (1) Retributive justice is done when those who deserve to be punished are given the punishment they deserve;
- (2) Society has a duty to make it the case that retributive justice is done;
- (3) Punishment is deserved by those who culpably commit moral wrongs.

Moore makes clear that when he claims a person deserves to be punished he is referring to a more general principle:

One more general principle that does not seem clouded in metaphor is a general principle of desert. Such a principle arises because of what might be called the 'secondary' moral rights and duties we all possess. I have a primary duty not to break (most of) my promises and another primary duty not to injure or kill (most of) my fellow persons. ... I also have what I shall call secondary duties and rights—respectively, a duty either to perform my promise, even belatedly, or in some other way to put the promisee in as good a position as he would have been in had I kept my promise; a duty to correct the injustice that I have caused in injuring or killing another by making amends in whatever way I can, including compensation. ... It is breach of these secondary duties that warrants the judgment that I ought to be made to keep my promise or pay its equivalent, or that I ought to be

made to compensate the victims of my violence. ... We idiomatically make this 'ought' judgment using the word 'desert'.<sup>81</sup>

To say that a culpable wrongdoer deserves punishment is to make use of this general principle:

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The retributive principle—that offenders should be punished because and only because they have culpably done wrong—is an instance of this more general principle of desert. We all have primary duties not to do the sort of acts that *malum in se* criminal statutes prohibit. We also have secondary duties to allow ourselves to be made to suffer if we have violated these primary duties. The trigger for these secondary duties is again our culpability in violating the primary duties that define wrongdoing.<sup>82</sup>

To say that A deserves to be punished is thus to say that A has a secondary duty to allow herself to be punished—a duty, as I will put it from now on, to 'take the punishment'. Retributive justice is done when the punishment imposed on A is the punishment A has a secondary duty to take. Premise (1) of the retributivist argument must be understood accordingly. We know from premise (3) that those who have the aforementioned secondary duty are culpable wrongdoers. Their secondary duty exists *because* they breached a primary duty—this is what makes them wrongdoers—and did so culpably. Premise (2) of the argument identifies a further duty: a duty to make it the case that retributively just punishments are imposed.

Consider now the remainder of the retributivist argument:

(4) Criminalizing moral wrongs can bring it about that culpable wrongdoers are given the punishment they deserve;

(5) Therefore, there is reason to criminalize  $\phi$ ing if  $\phi$ ing is a moral wrong.

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Premise (4) is crucial. If criminalizing moral wrongs could not bring about deserved punishment, the retributivist argument would identify no reason to criminalize those wrongs. That it can bring about deserved punishment is a reason to criminalize because such punishments, premise (1) tells us, are retributively just, and because society, premise (3) tells us, has a duty to bring about retributive justice. What we now know is that to bring about retributive justice is to bring it about that culpable wrongdoers conform to their secondary duty to take the punishment.<sup>83</sup> We saw in Section II that to fail to conform to a moral duty is to commit a moral wrong. Are the aforementioned secondary duties also moral duties? It is plausible to think that they are.<sup>84</sup> If this is right, to bring about retributive justice is to prevent certain moral wrongs—the moral wrongs that would be committed were culpable wrongdoers to breach the secondary duties I just mentioned. To claim that bringing about retributively just punishment is a reason to criminalize  $\phi$ ing—the claim on which, as we just saw, the retributivist argument depends—is thus to claim that preventing the aforementioned secondary wrongs is a reason to criminalize  $\phi$ ing.

It is worth re-emphasizing at this point that criminalization is not punishment. True, when law-makers create a criminal offence they make offenders *liable* to punishment. But whether anyone is actually punished—let alone given the punishment they deserve—depends on the actions of private individuals (who may or may not offend) and various public officials (police officers, prosecutors, trial judges, sentencing judges, etc.). Strictly speaking, then, criminalization can at most make it highly likely that the wrongs identified in the previous paragraph will be prevented. The retributivist argument is thus best read as claiming that this likelihood is itself a reason to criminalize.<sup>85</sup>

Let us now return to (E). I pointed out earlier that both restricted and unrestricted versions of this principle are possible. According to what I called (E<sup>R</sup>):

(E<sup>R</sup>): It is a good reason in support of criminalization that it would probably be effective in preventing (eliminating, reducing) certain moral wrongs, and there is probably no other means that is equally effective at a lesser cost to other values.

p. 178 The last three paragraphs showed that the retributivist argument is *itself* an argument for one version of (E<sup>R</sup>). Properly understood, that argument identifies a reason to criminalize  $\phi$ ing when and because criminalizing  $\phi$ ing will probably prevent certain *secondary* wrongs. It is true that in many legal systems, criminalizing moral wrongs *themselves* will probably  $\hookrightarrow$  prevent these wrongs: criminalizing murder, rape, and theft, for instance, will bring it about that deserved punishment is taken by murderers, rapists, and thieves. In those legal systems, the retributivist argument thus *does* identify a reason to criminalize the primary moral wrongs of murder, rape, and theft.<sup>86</sup> But like Devlin's argument, when given Hart's 'moderate' reading, the significance given to the fact that  $\phi$ ing is a moral wrong is derivative—it derives from the fact that criminalizing  $\phi$ ing will probably prevent secondary wrongs.<sup>87</sup> According to ALM, there is reason to criminalize moral wrongs irrespective of the effects of doing so, in virtue of the fact that they are moral wrongs. The retributivist argument does not support this claim. But unlike Devlin's argument, it does support (E<sup>R</sup>): it identifies a reason to criminalize  $\phi$ ing in virtue of the fact that doing so will probably prevent a particular secondary wrong: the wrong of failing to take the punishment, as committed by culpable wrongdoers.

Two further points are worth making at this stage. First, nothing in the previous paragraph rules out the possibility that a refusal to do one's secondary duty might sometimes be *justified*. Perhaps offenders are justified in resisting punishment if state officials have secured their presence in court only by breaking the law, or if the regime of which those officials are part lacks legitimacy.<sup>88</sup> Recall from Section I that, as interpreted here, (E)—and so (E<sup>R</sup>)—states only that there is reason to prevent *culpable* moral wrongdoing: it does not identify a reason to prevent the *justified* commission of secondary wrongs. We can therefore accept that officials have no reason to impose punishment on those justified in resisting it. There is nothing in this acceptance which conflicts with (E<sup>R</sup>).

p. 179 Second, the argument of this section relies on Moore's claim that to deserve some punishment is to have a secondary duty to take it. Does it follow that if a rival understanding of desert were forthcoming—one  $\hookrightarrow$  which does not cash out wrongdoers' deserts in terms of secondary duties—the retributivist argument would no longer be an argument for (E<sup>R</sup>)? It does not. It is true, of course, that if culpable wrongdoers do not have a secondary duty to take the punishment, punishing them cannot prevent the secondary wrong of failing to take it. But this does not mean that the retributivist argument is no longer an argument for (E<sup>R</sup>). According to the retributivist argument, there is reason to criminalize when and because criminalization can bring about deserved punishment (however desert is understood). The reason to bring about deserved punishment is that society thereby conforms to its duty to do retributive justice.<sup>89</sup> We already saw that failing to conform to a duty of justice is plausibly thought of as a moral wrong. If this is correct, the reason to criminalize identified by the retributivist argument is a reason to prevent society committing the moral wrong of failing to do retributive justice. It follows that the retributivist argument remains an argument for (E<sup>R</sup>): it remains an argument that there is reason to criminalize in virtue of the fact that doing so will probably prevent a particular moral wrong.<sup>90</sup>

Let us now turn to the answerability argument. Recall premise (3) of that argument:

(3) Citizens have a duty to answer, and call one another to answer, for public wrongs.

This premise identifies two duties of citizenship: a duty to answer to one's fellow citizens for one's own commission of public wrongs, and a duty to call other citizens who commit public wrongs to answer for doing so. Duff describes these duties in the following terms:

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The criminal law gives institutional form to a particular subset of what we might call secondary associative obligations: associative because they are obligations we owe to our fellow citizens in virtue of our shared membership of the polity; secondary because they concern our civic response to breaches of the primary obligations that the criminal law presupposes—to commissions of the kind of wrongs with which the criminal law is concerned. As citizens we have a special duty to attend to public wrongs committed within the polity: a duty to respond to such wrongs by calling the wrongdoer to public account, which we owe to both  $\hookrightarrow$  victim and wrongdoer; a duty to answer to our fellows for our own commissions of such wrongs, and to answer to any accusations of such wrongdoing that are reasonably brought against us.<sup>91</sup>

As this passage makes clear, the duty to answer for committing public wrongs is a *secondary* duty—a duty one has when and because one violates a primary duty and commits a public wrong. This is the first duty mentioned in (3)—a secondary duty of wrongdoers themselves. The other duty mentioned in (3) is a further secondary duty—a duty one has when and because *other* citizens have breached their primary duties and committed public wrongs.

Consider now the remainder of the answerability argument:

(4) Criminalizing public wrongs can bring it about that citizens answer, and are called to answer, for committing those wrongs;

(5) Therefore, there is reason to criminalize  $\phi$ ing if  $\phi$ ing is a public wrong.

Premise (4) is crucial. The answerability argument succeeds only if it identifies some fact that gives us reason to criminalize  $\phi$ ing. (4) identifies that fact: that criminalizing  $\phi$ ing can bring it about that citizens are called to answer for public wrongs. This fact is reason-giving precisely because of the secondary duties we just mentioned. When the criminal law brings it about that wrongdoers are called to answer for public wrongs, citizens conform to their secondary duty to so call them.<sup>92</sup> And by calling public wrongdoers to answer, one makes it more likely that they will give the answers they owe. When such answers are given, public wrongdoers conform to *their* secondary duties as wrongdoers. It follows that to bring it about that citizens are called to answer for public wrongs, just is to prevent certain moral wrongs—the moral wrongs which would be committed were offenders to fail to answer, and were citizens to fail to call them. When Duff claims that calling citizens to answer for public wrongs is a reason to criminalize—the claim on which, as we just saw, the answerability argument depends—he is thus claiming that preventing the aforementioned secondary wrongs is a reason to criminalize.

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It is worth repeating that creating a criminal offence at most makes it highly likely that wrong-prevention of the kind discussed above will  $\hookrightarrow$  actually occur. This depends, again, on how potential offenders and various officials react to the new offence.<sup>93</sup> Properly understood, then, the answerability argument is another argument for (E<sup>R</sup>). It identifies a reason to criminalize  $\phi$ ing in virtue of the fact that criminalizing  $\phi$ ing will probably prevent certain secondary wrongs.<sup>94</sup> It is true that in many legal systems, these wrongs probably *will* be prevented by criminalizing public wrongs themselves—this will likely result in public wrongdoers being called to answer, and in them offering the answers they owe. In those legal systems, the answerability argument *does* identify a reason to criminalize public wrongs. But as with the retributivist argument, the significance this gives to the fact that  $\phi$ ing is a moral wrong is derivative—it derives entirely from the fact that criminalizing  $\phi$ ing will prevent the secondary wrongs of failing to answer, and failing to call others to answer. And to repeat, ALM states that there is reason to criminalize moral wrongs irrespective of the effects of doing so, in virtue of the fact that they are moral wrongs. The answerability argument does not support this claim.<sup>95</sup>



p. 182 Section III concluded that the retributivist and answerability arguments are both arguments for (E<sup>R</sup>). Both arguments identify a reason to criminalize  $\phi$ ing in virtue of the fact that criminalization will probably prevent certain secondary wrongs. Both are thus arguments for ILM not ALM.  $\hookrightarrow$  The argument of the present section is as follows: if preventing *secondary* wrongs is a reason to criminalize, then preventing the corresponding *primary* wrongs is also such a reason. If getting people to take the punishment or answer for robbery is a reason to criminalize, then getting people not to rob is also such a reason. This matters because, as we saw in Section I,<sup>96</sup> reasons to prevent primary wrongs are often reasons to criminalize more than just the wrongs themselves. If I am right, endorsement of the retributivist or the answerability argument should also lead one to endorse the existence of such reasons.

To make the argument, I must say something about secondary wrongs. We already know that to commit a secondary wrong is to violate a secondary duty. What makes a duty secondary? Clearly the answer has something to do with its relationship to some other duty. Earlier I wrote that secondary duties exist when and because another duty—what I called a primary duty—has been breached. But this is little advance. John Gardner suggests that the answer is given by what he calls *the continuity thesis*. To understand Gardner's suggestion, we must distinguish between reasons and obligations. An obligation, of course, is itself a type of reason: if I have an obligation to pay you £5, I have a reason to do so. But while obligations 'are individuated according to the action that they make obligatory', each 'reason for action is potentially a reason for multiple actions'.<sup>97</sup> Let's say that having promised to take my daughter to the beach today, I have an obligation to take her.<sup>98</sup> It follows that I have a reason to take her. This reason is also a reason to do various other things that contribute to our going to the beach. It is a reason to clear enough time in my schedule, and to ensure we have enough petrol in the car. Now imagine I sleep all day and never make it to the beach. Clearly I cannot conform to my obligation—the action it made obligatory can no longer be performed. But it is plausible to think that I now have certain *other* obligations, to which I still can conform, and which are in some way related to my original obligation—an obligation to apologize,  $\hookrightarrow$  to take my daughter somewhere tomorrow, or the next time I am free. Why think I have such obligations? In Gardner's words,

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Once the time for performance of a primary obligation is past, so that it can no longer be performed, one can often nevertheless still contribute to satisfaction of some or all of the reasons that added up to make the action obligatory. Those reasons, not having been satisfied by performance of the primary obligation, are still with us awaiting satisfaction and since they cannot now be satisfied by performance of that obligation, they call for satisfaction in some other way. They call for next-best satisfaction, the closest to full satisfaction that is still available. We need to know the rationale of the obligation, of course, so that we can work out what counts as next best. But once we have it we also have the rationale, all else being equal, for a secondary obligation, which is an obligation to do the next-best thing. If all else is equal, the reasons that were capable of justifying a primary obligation are also capable of justifying a secondary one.<sup>99</sup>

Gardner's point here is that when we have an obligation to act in some way, there will typically be various reasons which contribute to making that action obligatory. Among the reasons that contribute to my having an obligation to take my daughter to the beach, are reasons to make my daughter happy and not to disappoint her. When I can no longer conform to my obligation to take her today these reasons do not simply disappear. They continue to count in favour of various actions I can still perform—including taking my daughter somewhere tomorrow, or the next time I am free. They count in favour, we can say, of doing *the next-best thing*. And in some cases these reasons will add up to a new obligation—an obligation to do the next-best thing by, say, taking my daughter ice-skating tomorrow. It is obligations of this kind to which we refer when we talk of secondary duties.

The normative significance of secondary duties is not, of course, limited to duty-bearers themselves. Imagine I breach my primary duty not to injure you, and deliberately cut off your arm. It is plausible to think I have a secondary duty to pay you compensation. That duty is a reason for me to pay you compensation. It is also a reason for at least some other people to do what will contribute to my paying it. One such class of people is the class of public officials, who can so contribute by making compensatory damages available in the law of tort, and awarding you damages if you successfully make a claim. Those officials have reason to do what will contribute to my paying compensation, because they have a reason to do what will contribute to my doing my secondary duty to pay it.

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Section III showed us that the retributivist and answerability arguments are built on the same logic. According to both arguments, officials have reason to criminalize when and because criminalization is likely to get wrongdoers to do what they have secondary duties to do. Consider a case of robbery. The robber has breached a primary duty, and done so culpably. According to the retributivist argument, the robber has a secondary duty to take the punishment for robbery. Gardner's discussion helps us see that when we make this last claim, we claim that the continued application of the reasons not to commit robbery—which gave rise to the primary duty not to do so—now count in favour of the robber taking the punishment for robbery. Taking that punishment is (part of) doing the next-best thing.<sup>100</sup> The reason to criminalize identified by the retributivist argument is a reason for officials to do what will contribute to the robber doing (part of) that thing.<sup>101</sup>

The answerability argument identifies rather different secondary duties. Not only are they duties to do different things—to answer and call to answer—they are duties of a different kind. In Duff's words they are 'associative obligations': obligations 'we owe to our fellow citizens in virtue of our shared membership of the polity'.<sup>102</sup> Why think that answering for public wrongs, and calling others to answer for them, are among the associative obligations citizens have? To see Duff's answer, notice that when he discusses our reasons to criminalize, he writes that

the reasons that we have to criminalize such core wrongs as murder, rape and other attacks on the person do not depend on the contingency of whether criminalization will efficiently prevent them. Those reasons have to do, rather, with what it is for a polity to take its defining values seriously, and for its members to take each other seriously as participants in the shared way of life who are bound and protected by those values.<sup>103</sup>

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If a polity is to do this—if it is not to 'betray its values'<sup>104</sup>—the members must call one another to answer for wrongs that violate them: for public wrongs. This suggests that citizens' duties to answer for such wrongs, and call each other to answer, exist because failing to do so would betray, or fail to take seriously, the values by which the polity defines itself. It suggests that we ultimately have reason to criminalize the wrongs Duff mentions, because doing so avoids this kind of self-betrayal. Whatever one thinks of this last claim,<sup>105</sup> the key point here is this: according to Duff, our duties to answer, and call others to answer, are secondary duties. On the view we borrowed from Gardner, they are thus duties to do the next-best thing. The reasons which add up to give us these duties—for Duff, reasons to do what will take the community's values seriously—are reasons to which we can no longer fully conform. Once the primary (public) wrong of murder, rape, or robbery has been committed, we conform as fully as we can by offering answers to our fellow citizens, and by calling others to answer too. The reason to criminalize identified by the answerability argument, is a reason for officials to do what will contribute to this next-best conformity.

Let us now return to (E<sup>R</sup>):

(E<sup>R</sup>): It is a good reason in support of criminalization that it would probably be effective in preventing (eliminating, reducing) certain culpable moral wrongs, and there is probably no other means that is equally effective at a lesser cost to other values.

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We have seen that for defenders of the retributivist and answerability arguments, the moral wrongs mentioned in (E<sup>R</sup>) are certain secondary wrongs. To say that law-makers have reason to prevent such wrongs, is to say that law-makers have reason to bring it about that potential secondary wrongdoers conform to their secondary duties. Such duties, I have suggested, are duties to do the next-best thing. This raises an obvious question: if law-makers have reason to bring it about that we do the next-best thing, why should they have no reason to bring it about that we do the best thing? Why, that is, should they have no reason to bring it about that we conform not just to our secondary duties, but to our primary duties too? Recall that when we commit wrongs, we have duties to do the next-best thing precisely because the reasons that gave us our now-violated primary duty continue to apply to us. If law-makers have reason to prevent our secondary wrongs—in virtue of their being secondary wrongs—the reasons that gave us those primary duties must be reasons not just for us, but for law-makers too. They must give law-makers reason to do what will contribute to our conformity. But if this is so, law-makers surely have reason to do not only that which will contribute to our conforming *imperfectly*, but also to do that which will contribute to our conforming *perfectly*. To conform perfectly is, of course, to conform to the primary duty to which the reasons in question initially gave rise. If law-makers have reason to bring about perfect conformity, they have reason to prevent commission of primary wrongs.

We can see the point another way by returning to our parental example. In that example, I have a primary duty to take my daughter to the beach today but fail to do so. Let's now add that I have a secondary duty to take her ice-skating tomorrow. We have seen that my reasons not to disappoint my daughter contribute to the existence of the primary duty, so they contribute to the existence of the secondary duty also. Now let's say my sister, who lives nearby, hears of my failure. She phones me and tries to persuade me to do my duty by taking my daughter skating tomorrow. Assuming she has a chance of persuading me, it seems clear that this is something my sister has reason to do. She has reason, to generalize, to do what will contribute to my conforming to my secondary duty. She has this reason because my daughter's disappointment is reason-giving for her too. But if this is so now, why not yesterday? Why wouldn't my daughter's disappointment also have given my sister a reason to phone me up yesterday, and try to persuade me to take my daughter to the beach? It doesn't seem plausible to think that this reason becomes a reason for my sister only after I've failed to conform to it, when I can only do so imperfectly. And if that's right, my sister has reason to get me to conform to my primary duty, which is to say that she has reason to prevent my commission of primary wrongs.

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As for my sister, it seems to me, so for the criminal law. It is not plausible to think that the reasons that give us primary and secondary duties are reason-giving for law-makers only after the primary duties have been breached. And if they are not, those law-makers have reason to prevent not just secondary wrongs, but primary wrongs too. One might point out, of course, that just because law-makers have reason to prevent primary wrongs, it doesn't follow that they have reason to do so via criminalization. My sister has reason to phone me only if she has a chance of persuading me to go skating. And perhaps she has no reason to phone if there are equally effective ways of getting me to go which are less costly all-things-considered. So be it. The principle we are discussing builds in both these conditions. (E) states that there is reason to criminalize only if this will likely be effective, and there is probably no other means that would be equally effective at a lesser cost to other values. The argument here is that when these conditions are met, there is reason to criminalize that which will prevent primary wrongs, and, if this fails, secondary wrongs also. This, ultimately, is the position that supporters of the retributivist and answerability arguments should accept.

## V

I began by distinguishing between two types of legal moralism—between ALM and ILM. I pointed out that many prominent formulations of legal moralism are act-centred. This is not to say that the writers in

question reject ILM. The distinction between act-centred and instrumental principles is not widely appreciated. Perhaps some really mean to sign up to ILM, despite the way they often formulate their views.<sup>106</sup> This paper has argued that this is precisely what they should do. If I am right, two prominent arguments for versions of ALM are themselves arguments that offer support for ILM. I showed this in two ways. First, by pointing out that even if both arguments are sound, their premises can also be used to construct plausible arguments for versions of ILM. Second, by showing that neither argument is in fact a sound argument for ALM: it is ILM, not ALM, which follows from their premises. One might doubt that all of this matters much. One might point to my own admission that the version of ILM supported by the retributivist and answerability arguments will very often identify a reason to criminalize primary moral wrongs themselves, because doing so will very often prevent (culpable commission of) secondary wrongs.<sup>107</sup> One might claim that this shows that ILM has the same implications for criminalization as ALM. But that is too quick. Section IV argued that we should reject a version of ILM restricted to the prevention of secondary wrongs. Once we accept that preventing (culpable commission of) primary wrongs is a reason to criminalize, we should also accept that there will sometimes be reason to criminalize more than the primary wrongs themselves.<sup>108</sup>

That there is reason to criminalize something does not, of course, entail that it is permissibly criminalized. Even if there is reason to criminalize conduct that is not morally wrong, there may be constraints that render it impermissible to do so. Nothing I have said here denies that this is so. But if my argument is correct, one shortcut to conclusions about permissible criminalization is unavailable. One cannot argue that because there is *no* reason to criminalize what is not wrong, it is only ever permissible to criminalize wrongs. One cannot argue, as do Antony Duff and Sandra Marshall, that because there is *only* reason to criminalize public wrongs, it is only ever permissible to criminalize such wrongs.<sup>109</sup> Instead, one must explain why, despite the existence of reasons to criminalize more than the wrongs themselves, it is impermissible to do what those reasons count in favour of doing.<sup>110</sup> Whether such an explanation can be provided is a matter for another day. These remarks, however, should be enough to show that, *pace* my imagined doubter, the truth of ILM is not unimportant. Whether legal moralists should sign up, qua legal moralists, to act-centred or instrumental principles—the question this paper has begun to explore—is therefore a question worthy of further attention.<sup>111</sup>

## Notes

- 1 As we will see, there is disagreement about almost everything else, including (a) whether this is true of all moral wrongs, (b) what it is for something to be a moral wrong, and (c) the type of reason to which legal moralism refers. It is worth noting that some take legal moralism to encompass not only the thesis mentioned in the text, but also theses concerning the use of criminal law to perfect character, or preserve certain ways of life. I do not consider this broader reading here, restricting my discussion to what Feinberg calls 'legal moralism in the strict sense': see J. Feinberg, *Harmless Wrongdoing* (OUP 1988), 4.
- 2 Which is not to say the premises are true. I leave this open.
- 3 What counts as a secondary wrong, and which secondary wrongs law-makers have reason to prevent via criminalization, are questions discussed in Sections III and IV.
- 4 J. Feinberg, *Harm to Others* (OUP 1984), 27.
- 5 *Ibid.*, 26.
- 6 *Ibid.*
- 7 These principles are not mutually exclusive. Each identifies a reason to criminalize, not a constraint on permissible criminalization.
- 8 Other principles may, of course, identify further such reasons.
- 9 Some criticisms of 'the harm principle' succeed only on the assumption that it is an act-centred principle. But there are many possible harm principles, including instrumental principles. For discussion, see J. Edwards, 'Harm Principles', *Legal Theory* 20 (2014): 253.

- 10 I here slightly modify what Feinberg calls the necessity clause of (B), according to which there is reason to criminalize only if 'there is probably no other means that is equally effective at no greater cost to other values'. Feinberg's formulation implies that there is *no* reason to criminalize if there probably is an equally effective means which comes at the *same* cost to other values. I do not see why. If the effectiveness and costliness of two measures is identical, then *ceteris paribus* we have reason to use either one.
- 11 H.L.A. Hart, *Law, Liberty and Morality* (Stanford 1963), 4.
- 12 M. Moore, *Placing Blame* (OUP 1997), 70.
- 13 See R.A. Duff, 'Towards A Modest Legal Moralism', *Criminal Law and Philosophy* 8 (2014): 217, 218. As we will see, for Duff this is true only of those moral wrongs he calls *public* wrongs.
- 14 For other discussions which treat legal moralism as act-centred, see J. Murphy, 'Another Look at Legal Moralism', *Ethics* 77 (1966): 50, 51 ("the legal moralist maintains that criminal sanctions are demanded even when no obvious harm to others occurs. The intrinsic heinousness of sexual deviation, for example, is sufficient to justify its prohibition"); L. Alexander, 'The Legal Enforcement of Morality', in R. Frey and C. Wellman (eds.), *A Companion to Applied Ethics* (Wiley 2003), 128, 129 ("the immorality of conduct is a sufficient condition for legal proscription"); A.P. Simester, 'Enforcing Morality', in A. Marmor (ed.), *The Routledge Companion to Philosophy of Law* (Routledge 2012), 481 ("according to a school of thought known as legal moralism, an action can warrant proscription simply on the ground of its moral wrongfulness"); D. Brink, 'Retributivism and Legal Moralism', *Ratio Juris* 25 (2012): 496, 504 ("Legal moralism is the thesis that the state can and should regulate immorality, as such"); D. Scoccia, 'In Defense of "Pure" Legal Moralism', *Criminal Law and Philosophy* 7 (2013): 513, 515 ("if critical morality judges some act-type to be harmlessly wrong, then it should be criminalized unless the prudential costs of doing so outweigh the moral benefits"); R. Arneson, 'The Enforcement of Morals Revisited', *Criminal Law and Philosophy* 7 (2013): 435, 439 ("criminal prohibition of a type of conduct can be justified by an appeal to the immorality of conduct of that type independently of whether or not prohibiting it would prevent harm to any individual persons or advance the welfare of any individual persons").
- 15 Hart, *Law, Liberty and Morality*, 48.
- 16 P. Devlin, *The Enforcement of Morals* (OUP 1965), 12–14.
- 17 As Duff puts it, on Devlin's view 'what gives us reason to criminalize [some act-type] is not its (perceived) wrongfulness as such, but the harm that it might, if not criminalized, cause to the stability and cohesion of society'. Duff concludes that Devlin 'was no legal moralist'. See R.A. Duff, 'Towards a Theory of Criminal Law', *Aristotelian Society* 84, Supp. Vol. 1 (2010): 8, n.12.
- 18 I here suppress an additional condition, which I built into (E) above, namely that, 'there is probably no other means that is equally effective at a lesser cost to other values'. I return to this condition below.
- 19 This is to take issue with Joel Feinberg, who distinguishes between pure and impure versions of legal moralism and puts Devlin in the latter camp. It turns out, however, that the impure legal moralist is simply a defender of Feinberg's harm principle, who disagrees with Feinberg about the empirical question of what that principle permits—see Feinberg, *Harmless Wrongdoing*, 8. It is therefore confusing for Feinberg to *also* claim that liberals who think that the harm and offence principles (what I have called (B) and (C)) identify the *only* reasons to criminalize, also *deny* the truth of legal moralism—see Feinberg, *Harmless Wrongdoing*, 3. If this latter claim is right, impure legal moralism cannot be a type of legal moralism after all.
- 20 This paragraph draws on J. Gardner and J. Edwards, 'Criminal Law', in H. LaFollette (ed.), *The International Encyclopedia of Ethics* (Wiley 2013).
- 21 Many characterize the debate between legal moralists and their opponents as a debate about the 'enforcement' of morality. Hart and Devlin write in these terms, and the language can be found throughout the subsequent literature: see e.g. G. Dworkin, 'Devlin was Right: Law and the Enforcement of Morality', *William and Mary Law Review* 40 (1999): 927; S. Wall, 'Enforcing Morality', *Criminal Law and Philosophy* 7 (2013): 455; Arneson, 'The Enforcement of Morals Revisited'. Unfortunately, the language of enforcement is itself ambiguous between ALM and ILM. Do we enforce morality by criminalizing immoralities, or by criminalizing act-types criminalization of which will probably prevent those immoralities?
- 22 Hart, *Law, Liberty and Morality*, 48.
- 23 Moore, *Placing Blame*, 645.
- 24 Moore, 'A Tale of Two Theories', *Criminal Justice Ethics* 28 (2009): 27, 33. For discussion of various reasons not to criminalize wrongdoing, see Moore, *Placing Blame*, 661–5, 739–95.
- 25 Devlin, *The Enforcement of Morals*, 16–19.
- 26 Moore's reply to David Dolinko's criticism of his retributivist theory of punishment suggests that this reading is one that Moore would accept: see Moore, *Placing Blame*, 173–4.
- 27 In *Harm to Others*, Feinberg defines liberalism as 'the view that the harm and offense principles, duly clarified and qualified, between them exhaust the class of morally relevant reasons for criminal prohibitions. Paternalistic and

- moralistic considerations ... have no weight at all'. See Feinberg, *Harm to Others*, 14–15. In *Harmless Wrongdoing*, Feinberg writes that this position is 'obviously too extreme', and that immorality 'of any description is at least some kind of reason' to criminalize. See Feinberg, *Harmless Wrongdoing*, 322.
- 28 Feinberg calls this view 'bold liberalism'. On a more cautious view, by which Feinberg is at times tempted, the additional reasons are not always necessary. See Feinberg, *Harmless Wrongdoing*, 324–7. Andrew Simester and Andreas von Hirsch take a similar view to Feinberg. Though the wrongfulness of  $\phi$ ing is, they claim, a reason to criminalize, this reason always requires supplementation by further such reasons, specifically the fact that criminalization will probably prevent harm. This is the effect of what the authors call the *non-qualifying thesis*: see A.P. Simester and A. von Hirsch, *Crimes, Harms and Wrongs* (Hart 1982/2011), 29.
- 29 R.A. Duff, 'Responsibility, Citizenship and Criminal Law', in R.A. Duff and S. Green (eds.), *Philosophical Foundations of Criminal Law* (OUP 2011), 139. Duff has recently called his view a 'modest' legal moralism, because it is both (i) restricted, and (ii) 'holds only that we have reason to criminalize [public wrongs], whilst recognizing that we might have weightier countervailing reasons either for doing nothing formally, or for preferring legal mechanisms other than that of criminalization'—see Duff, 'Towards A Modest Legal Moralism', 230–1. Strictly speaking, (ii) is compatible with holding that the fact an act-type is a public wrong is a defeasibly sufficient reason to criminalize that act-type. Elsewhere, however, Duff writes that this fact is only a 'relevant' reason, which is not in itself 'powerful' and only becomes a 'good reason' when further conditions are met. One such condition is that any response to the wrong ought to be one that condemns wrongdoers—see Duff, 'Towards a Theory of Criminal Law', 21. If Duff's view is that this condition identifies an additional reason to criminalize that is necessary for permissibility, he denies that the reason mentioned in (ii) is defeasibly sufficient.
- 30 Doesn't the possibility of restricted legal moralism convert (B) into a type of legal moralism after all? And doesn't this suggest that the opposition between the 'moderate' Devlin and legal moralism is a false opposition? It does not. Just as there can be harmless wrongdoing, there can be wrongless harming. *Pace* Feinberg, (B) identifies a reason to prevent harms whether wrongfully inflicted or not, so (B) is not a type of legal moralism.
- 31 I am thus referring to what Lacey calls 'formal' criminalization. See N. Lacey, 'Historicising Criminalisation: Conceptual and Empirical Issues', *Modern Law Review* 72 (2009): 936.
- 32 If they have not successfully proved a defence.
- 33 See J. Raz, 'Promises and Obligations', in P.M.S. Hacker and J. Raz (eds.), *Law, Morality, and Society* (OUP 1977).
- 34 See J. Gardner, *Offences and Defences* (OUP 2007), chs. 4–5.
- 35 This distinction between the immoral and the morally wrong is made in Simester, 'Enforcing Morality', 481, and J.R. Edwards and A.P. Simester, 'Wrongfulness and Prohibitions', *Criminal Law and Philosophy* 8 (2014): 171.
- 36 I do not mean, in particular, to take a position in debates about the nature of culpability. For disagreement about whether committing a moral wrong without justification or excuse is necessarily culpable, see Gardner, *Offences and Defences*, 225–35; A.P. Simester, 'A Disintegrated Theory of Culpability', in D. Baker and J. Horder (eds.), *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams* (CUP 2013), 178.
- 37 The possibility of justified wrongdoing ceases to exist because I was justified in wronging you only when and because my one remaining option was to save the five. This is no longer the case.
- 38 L. Green, 'Should Law Improve Morality?' *Criminal Law and Philosophy* 7 (2013): 473, 476.
- 39 I assume here that to have legitimate authority is to have a normative power to, among other things, impose duties on those over whom one has authority.
- 40 One might think, of course, that the fact there is widely thought to be moral reason not to  $\phi$  establishes that there is moral reason not to  $\phi$ . So be it. The modest proposal I made earlier takes no position on the nature of moral reasons, so there is no conflict here.
- 41 For discussion of this possibility in the criminal law, see Simester and von Hirsch, *Crimes, Harms and Wrongs*, 24–9. For general discussion, see A.M. Honoré, 'The Dependence of Morality on Law', *Oxford Journal of Legal Studies* 13 (1993): 1.
- 42 Moore, *Placing Blame*, 72. As he also puts it, 'the immorality of conduct, no matter how slight, constitutes a prima facie reason to criminalize the behaviour': *ibid.*, 187.
- 43 'For a retributivist, the moral responsibility of an offender also gives society the *duty* to punish. Retributivism, in other words, is truly a theory of justice such that, if it is true, we have an obligation to set up institutions so that retribution is achieved': *ibid.*, 91; see also 104, 154.
- 44 For Moore, 'the desert that triggers retributive punishment is itself a product of the moral wrong(s) done by an individual, and the moral culpability with which he did those wrongs': *ibid.*, 71.
- 45 The achievement of retributive justice, Moore claims, is the criminal law's 'function', and we determine the function of a thing by identifying the goods it can bring about: *ibid.*, 23–30. Note that criminalization also clears away an objection to the doing of retributive justice that would otherwise exist, namely the unfairness of punishing those whose actions were not prohibited at the time of acting: *ibid.*, 71, 187.



46 As we saw above, Moore claims that this reason is defeasibly sufficient.  
 47 Duff, 'Towards A Modest Legal Moralism', 218.  
 48 Ibid., 222.  
 49 'Retrospective responsibility is responsibility as answerability: to be held retrospectively responsible is to be called to answer for my actions, by those who have the standing to do so—to be called on to explain my actions, and if necessary to justify or excuse them, or accept censure for them. That is how we properly treat each other in extra-legal moral contexts: if another's wrongdoing is my business, I respond properly by calling her to answer for it': see Duff, 'Towards a Theory of Criminal Law', 16.  
 50 A public wrong is 'one that is the business of the public—of all members of the polity in virtue simply of their membership as citizens': *ibid.*, 9; a wrong is the business of the public when and because it 'violates the polity's defining values': see Duff, 'Responsibility, Citizenship and Criminal Law', 139. See also R.A. Duff, *Answering for Crime* (Hart 2007), 140ff.  
 51 'As citizens we have a special duty to attend to public wrongs committed within the polity: a duty to respond to such wrongs by calling the wrongdoer to public account which we owe to both victim and wrongdoer; a duty to answer to our fellows for our own commissions of such wrongs': see Duff, 'Responsibility, Citizenship and Criminal Law', 140.  
 52 '[I]f another's wrongdoing is my business, I respond properly by calling her to answer for it; that is how I take both her and her wrongful conduct seriously. And *that is what the criminal law does in relation to public wrongdoing*: it calls alleged perpetrators of such wrongs to account, and holds them formally answerable for their commissions of such wrongs through the criminal trial': see Duff, 'Towards a Theory of Criminal Law', 16 (my emphasis).  
 53 The argument relies on the assumption, made by Duff, that state officials—including those who create criminal offences—should act on behalf of the citizenry: the fact that those citizens have a duty to  $\phi$  gives state officials reason to do what will help citizens conform to that duty. See Duff, *Answering for Crime*, 49. I do not challenge this assumption here.  
 54 'The polity is a distinct community, engaged in a distinctive enterprise of living together, structured by a set of values that help to define that enterprise, and by a distinction that any community must draw between what is "public" and what is "private"': see Duff, 'Towards a Theory of Criminal Law', 5.  
 55 If premises (1)–(3) of that argument are true, society has a duty to impose deserved punishments on culpable wrongdoers. It follows that officials have at least some reason to impose these punishments.  
 56 This is Moore's view. For him, 'the good that punishment achieves is that someone who deserves it gets it. Punishment of the guilty is thus for the retributivist an *intrinsic* good.' See Moore, *Placing Blame*, 87–8.  
 57 See e.g. D. Boonin, *The Problem of Punishment* (CUP 2011), 6–7.  
 58 I do not mean that culpable wrongdoing damages lives because it has bad effects. I mean rather that culpable wrongdoing damages lives *in and of itself*—our lives go worse in virtue of our acting wrongly without justification or excuse. Why? Because it is worse for us, all else being equal, to live with reasons for regret, and culpable wrongdoing gives us such reasons. For further discussion, see J. Gardner, 'Wrongs and Faults', in A.P. Simester (ed.), *Appraising Strict Liability* (OUP 2005).  
 59 For possible defences of this claim, see M. Berman, 'Two Kinds of Retributivism', in R.A. Duff and S. Green (eds.), *Philosophical Foundations of Criminal Law* (OUP 2011).  
 60 Notice that it is *not* true that if Molly stays in, Alice will act as she ought not to act. This is not true because if Molly stays in, she will not culpably commit a wrong, and there will be no retributive justice for Alice to (fail to) do.  
 61 And there is some empirical evidence that it can. This evidence suggests that criminalizing conduct which was permitted (as opposed to increasing the severity of the sentences on offer for conduct already criminalized) *can* reduce the incidence of that conduct: see e.g. A. von Hirsch, A. Bottoms, E. Burney, and P.-O. Wikström, *Criminal Deterrence and Sentencing Severity* (Hart 1999).  
 62 The addition of the word 'culpable' is necessary in light of the text to n.37.  
 63 Moore, *Placing Blame*, 27–8.  
 64 It also assumes that retributive justice is only done if punishment is imposed for the reason that it is deserved. I grant this for the sake of argument.  
 65 This argument is pursued at greater length in J.R. Edwards and A.P. Simester, 'Prevention with a Moral Voice', in A.P. Simester, A. Du-Bois Pedain, and U. Neumann, *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart 2014).  
 66 'Any attempt to explain what it is to be a reason for something seems to me to lead back to the same idea: a consideration that counts in favor of it': see T.M. Scanlon, *What We Owe to Each Other* (Harvard University Press 1998), 17.  
 67 On exclusion, see J. Raz, *Practical Reason and Norms* (OUP 1975), ch. 1.  
 68 Which is not to say that it always is. Hence the *ceteris paribus* clause in (5) and (5a).  
 69 This second argument is an argument for a restricted version of (E), but as mentioned above I set aside for present purposes the question of whether the best version of (E) is or is not restricted.  
 70 Premise (3) of the answerability argument states that citizens 'have a duty to answer, and call one another to answer, for public wrongs'. This entails that they have a reason to do so.

- 71 In defending the equivalent premise of the previous argument I gave two explanations. Suffice it to say that similar explanations could be offered here.
- 72 R.A. Duff, *Punishment, Communication, and Community* (OUP 2001), 85.
- 73 We already saw that (E) does not itself tell us anything about the reasons for which law-makers legitimately act. But I set this reply aside here.
- 74 In particular, it is hard to see why I am no longer addressing you as an 'autonomous agent'. Much depends, of course, on what is meant by autonomy. But it seems that my warning *assumes* you are autonomous in one sense—that you are capable of responding to the reasons to which the warning draws your attention. Why else bother issuing it?
- 75 For further discussion, see Edwards and Simester, 'Prevention with a Moral Voice'.
- 76 The goods I have in mind include affordable housing, community centres, policing, schools, etc.
- 77 Victor Tadros mentions taxation as one example. In some cases, 'tax avoidance is wrong only on condition that sufficient other people pay their taxes. If I pay my taxes and others do not do so, not only is my absolute level of wealth reduced for the sake of some goal, my *comparative* level of wealth is reduced. The value of the money that I have depends on how much others have. Their bargaining position becomes stronger if they have more than I, and that will increase the burden that I bear by paying taxes. For this reason it is often wrong to demand that citizens pay taxes unless sufficient assurance is given that others will pay. The threat of punishment is probably a necessary condition of ensuring that enough people pay their taxes to render all cases of tax evasion wrong.' See V. Tadros, 'Wrongness and Criminalisation', in A. Marmor (ed.), *The Routledge Companion to Philosophy of Law* (Routledge 2012), 171.
- 78 See e.g. J. Raz, 'Facing Up: A Reply', *Southern California Law Review* 62 (1989): 1153, 1230.
- 79 R.A. Duff, 'In Response', in R. Cruft, M. Kramer, and M. Reiff (eds.), *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (OUP 2011), 351, 357–61.
- 80 R.A. Duff and S.E. Marshall, 'Criminalization and Sharing Wrongs', *Canadian Journal of Law and Jurisprudence* 11 (1998): 7.
- 81 Moore, *Placing Blame*, 171.
- 82 *Ibid.*, 172.
- 83 It might be said that the duty to take the punishment is a duty not to resist or complain *if* one happens to be punished. On this interpretation, that duty is itself no reason to punish culpable wrongdoers. But this implies that the *desert* of culpable wrongdoers is also no reason to punish them: as we already saw, it is the secondary duty to take the punishment in which the desert of culpable wrongdoers consists. I assume in what follows that the duty to take the punishment is better understood in a different way: as a duty to which culpable wrongdoers conform if and only if they are punished.
- 84 If there really are principles of retributive justice, those principles are presumably moral principles, and the duty to take retributively just punishment is presumably a moral duty.
- 85 It might be said in reply that even if criminalization is not likely to result in *more* retributive justice being done, there is still reason to do it because criminalization will make doing retributive justice *legitimate*. Whether or not we should accept this claim about legitimacy, the suggested reading of the retributivist argument does not make it any less instrumental. The fact that criminalization makes the doing of retributive justice legitimate is a reason to criminalize *only if* criminalization is likely to result in some retributive justice being done in the criminal courts.
- 86 It will also identify a reason to criminalize *other* actions if criminalizing those others actions is likely to bring about retributively just punishment. One might doubt that this could be the case. One might doubt it if one thinks that retributively just punishment must be imposed *for* culpable wrongdoing rather than for anything else. Doesn't criminalizing other actions mean that punishment will necessarily be imposed for those actions? It does not. Morally salient facts that do not show up in offence-definitions, and which thus are not grounds for conviction, may still be grounds for punishments imposed by the criminal courts. Those punishments may thus still be imposed for culpable commission of a wrong.
- 87 Remember: if criminalizing  $\phi$ ing will not bring about any retributive justice, the retributivist argument identifies no reason to criminalize.
- 88 For discussion, see R.A. Duff, 'Blame, Moral Standing and Legitimacy of the Criminal Trial', *Ratio* 23 (2010): 123.
- 89 Recall that according to premise (2), society has a duty to make it the case that retributive justice is done.
- 90 Or its culpable commission—see the previous paragraph.
- 91 Duff, 'Responsibility, Citizenship and Criminal Law', 140. Duff uses the terms duty and obligation interchangeably. I follow him in doing so both here and in Section IV.
- 92 Or count as having done so because their servant, the state, brings this about.
- 93 As made clear in Section I, to criminalize  $\phi$ ing, as the term is used here, is to make it a criminal offence to  $\phi$ . There can be no guarantee that this will be followed up in any particular way.
- 94 Or at least the culpable commission of them. As suggested above, we may sometimes be justified in breaching secondary duties. If criminalization would probably only prevent justified breaches, (E) would identify no reason to criminalize.
- 95 It might be said in reply that a version of ALM can be defended in a different way, by reference to the intrinsic value of

expressing disapproval of public wrongs. If this is intrinsically valuable, there appears to be a reason to criminalize such wrongs irrespective of whether this has any preventive effects (assuming, of course, that criminalization expresses disapproval). This argument warrants sustained attention that I cannot give it here. But it is worth noting that it is not clear that Duff accepts it. In his view, to express disapproval, then fail to do anything about violations of the polity's values, 'would be to betray those values, and would fail to do justice both to the victims and to the perpetrators of such violations'. This is particularly important for Duff, because for him our reasons to criminalize 'have to do ... with what it is for a polity to take its defining values seriously'. In his view a polity does this only if it calls public wrongdoers to answer. If this latter claim is correct, it seems there is only reason to criminalize public wrongs if doing so *would* probably result in public wrongdoers being called to answer: otherwise, criminalization would only amount to a betrayal of the very values the state should be taking seriously. See Duff, 'Towards a Theory of Criminal Law', 15–16.

- 96 See text to n.21 above. It is worth repeating that it does not follow from the fact that there is *reason* to criminalize an activity that it is *permissible* to criminalize that activity. We often have reason to do what we are not permitted to do.
- 97 J. Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice', *Law and Philosophy* 30 (2011): 1, 29–31.
- 98 I here adapt an example devised by Neil MacCormick, and also discussed by Gardner. See N. MacCormick, 'The Obligation of Reparation', in his *Legal Right and Social Democracy* (OUP 1982), 212; Gardner, 'What is Tort Law For?', 28ff.
- 99 Gardner, 'What is Tort Law For?', 33.
- 100 Only part, because the robber may have other secondary duties, including those identified by the answerability argument.
- 101 Could it be argued that even if secondary duties to *compensate* are duties to do the next best thing, other secondary duties, including duties to take the punishment, are not duties of this kind? I cannot rule this out here. Two comments, however, are worth making. First, we saw in Section III that in Moore's view duties to compensate *and* duties to take punishment are instances of the same 'general principle'. This suggests that for Moore they are not duties of different kinds. Second, the suggestion that secondary duties to take punishment are duties to do the next best thing is a suggestion that has been defended by others: see e.g. V. Tadros, *The Ends of Harm* (OUP 2011), ch. 12. It is true that Tadros and Moore disagree about the *content* of the relevant duties. But this is compatible with their disagreement being one about what the next-best thing really is.
- 102 Duff, 'Responsibility, Citizenship and Criminal Law', 140.
- 103 Duff, 'Towards a Theory of Criminal Law', 15.
- 104 Ibid.
- 105 For criticism, see J.R. Edwards and A.P. Simester, 'What's Public About Crime?', *Oxford Journal of Legal Studies* 37 (2017): 105.
- 106 Feinberg, in particular, at times writes as though he endorses a version of ILM, despite consistently giving a canonical formulation of legal moralism in act-centred terms. In *Harmless Wrongdoing*, he writes that a presumptive case for legal moralism can be made by arguing that 'it is always right, other things being equal, to prevent evils; that the need to prevent evils of any description is a good kind of reason in support of a legal prohibition'. See Feinberg, *Harmless Wrongdoing*, 5. This is an argument for ILM, not ALM. Similarly, Richard Arneson writes that '[i]f conduct of a certain type is conceded to be immoral, aren't we already conceding there is reason, though perhaps not conclusive reason, for prohibition?' He thinks the answer is affirmative because he accepts Gerald Dworkin's claim that, at least *ceteris paribus*, 'immoral conduct should be discouraged' by whoever is in a position to 'lower its incidence'. But if this is the thought, there is no reason at all to criminalize immoral conduct when doing so will not prevent it, and there is reason to prohibit ancillary activities when doing so will prevent immoral conduct. So while Arneson writes as if he means to defend ALM, he is really offering a defence of ILM. See Arneson, 'The Enforcement of Morals Revisited', 441.
- 107 On the retributivist argument, the wrong of failing to take deserved punishment; on the answerability argument, the wrongs of failing to answer, and to call others to answer, for public wrongs.
- 108 Assuming, of course, that there are no alternative ways of doing so which come at a lesser cost in other values.
- 109 See Duff, 'Towards A Modest Legal Moralism', 217; Duff, 'Towards a Theory of Criminal Law', 9; R.A. Duff and S.E. Marshall, 'Public and Private Wrongs', in J. Chalmers, F. Leverick, and L. Farmer (eds.), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh 2010), 75.
- 110 Arneson puts the challenge as follows: if 'immoral conduct should be discouraged, and in many circumstances criminal prohibition can discourage immoral conduct, lower its incidence ... how can there be a bar of principle against legal moralism? Isn't this like proclaiming that there is a bar of principle against using a hammer for a certain type of job, no matter how useful or cost-effective, in given circumstances, using a hammer for that job would be?' See Arneson, 'The Enforcement of Morals Revisited', 441.
- 111 Thanks to James Chalmers, Lindsay Farmer, José Manuel Fernández, John Gardner, Ambrose Lee, Fiona Leverick, Ezequiel Monti, Andrew Simester, Findlay Stark, and Patrick Tomlin for comments on earlier versions of this paper.

