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Constitutionalism and the Limits of the Criminal Law

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I. Introduction

Establishing limits to the scope of legitimate criminal law has been one of the central projects of liberal reformers for several centuries. In the twentieth century, most liberal reformers were of a utilitarian bent. As a result, they dealt with criminal justice as just another policy instrument—albeit a particularly coercive one—to be understood in terms of the net benefits it produced. And like all coercive policy instruments, they assumed that the scope of the criminal law should be limited by J. S. Mill’s harm principle.² In recent years, the utilitarian liberal enterprise has come under attack on two fronts. On the one hand, the harm principle has been criticized for failing to constrain the massive expansion of the criminal law in recent decades.³ And on the other hand, the very idea of a utilitarian account of criminal justice has come under attack as fundamentally illegitimate. Because utilitarians treat the criminal justice system as just another policy instrument for minimizing the incidence of undesirable conduct, they are unable to justify the way that the criminal justice system singles out particular individuals for censure and punishment in service of that end.

¹ Thanks to Antony Duff, Larissa Katz, Claes Lernestedt, and Arthur Ripstein for extremely valuable comments on an earlier version of this paper. Thanks also to the Social Sciences and Humanities Research Council of Canada for financial support. Responsibility for the faults of this chapter lies solely with the author.

² *On Liberty* (1859).

³ Bernard E. Harcourt, ‘The Collapse of the Harm Principle’ (1999) 90 *Journal of Criminal Law and Criminology*, 109; R. A. Duff, *Answering for Crime* (Oxford: OUP, 2007) 138: ‘the Harm Principle itself . . . can do little work in limiting the expansion of the criminal law’.

From the failures of the utilitarian project, a new school of criminal law theory has arisen. Two of the most influential criminal theorists of our time, Michael Moore and Antony Duff, have proposed accounts of the criminal justice system based on newfangled versions of legal moralism. They have suggested, each in his own distinctive way, that although we are not entitled to single out particular individuals for censure and punishment merely in order to deter undesirable conduct (as many utilitarians would have it), we *are* entitled to do so as a way of recognizing genuine moral wrongdoing on the part of that individual. Instead of treating that person as a means, the actions of the criminal justice system can then be understood to be respectful of the offender's agency, holding him responsible for his moral wrongdoing.

In short, Moore and Duff have given new life to the old idea that the criminal law's business is to enforce the demands of morality. And their newfangled legal moralism has the virtue not only of justifying the law's treatment of specific offenders; it also provides new tools for setting out limits on criminalization. If we are only justified in convicting and punishing offenders as a way of recognizing their moral wrongdoing, then it follows that criminal offences must all identify forms of genuine moral wrongdoing. Otherwise, we would find ourselves treating as moral wrongdoers individuals who had not actually committed any moral wrong at all. As we shall see later in this chapter, Moore and Duff add a number of other limitations on the scope of the criminal law that they take to flow from their core arguments, but the point for present purposes is that their new take on legal moralism provides new and promising tools to limit the scope of the criminal law—tools that were unavailable to the utilitarian liberal account. Because their accounts open up so many new possibilities and because of the depth and sophistication with which these two writers have developed their accounts, it is not surprising to find that legal moralism has become the new orthodoxy in English-language criminal law theory.

In this chapter, I argue that notwithstanding the many merits of Moore and Duff's legal moralism, their projects fail as accounts of the criminal justice system as we know it. Although they might be morally attractive accounts of something, they are not plausible candidates as theories of *criminal justice* because the institutions they describe are too different in certain key respects from the ones we see in operation across the common law world. The central problem I identify with Moore's account is its inability to explain the law's deep-seated aversion to vigilantism. Because he sees the criminal justice system as just one particularly effective mechanism for delivering deserved punishment, it seems that non-state actors might be entitled to deliver criminal justice wherever they are able to do so effectively. That is, Moore has no tools available to explain why it *must be* the state and

only the state that delivers criminal justice. And yet the law is quite clear that this must be the case. Duff's account, because it is fundamentally relational, is not susceptible to the same criticism: he makes clear that we are answerable in the relevant way only to the polity (and not to private vigilantes) for our crimes (which he calls 'public wrongs'). But because Duff's account models criminal justice on the practice of a community calling its members to account for wrongdoing, it is unable to account for the criminal law's fundamentally coercive nature. We might be answerable to our private moral communities—friends and colleagues, religious communities, and social clubs—for certain wrongs we commit, but those private communities do not have the legitimate authority to impose coercive punishments on us for our wrongs in the same way as the state routinely does through the criminal justice system.

In light of the failure not only of utilitarian liberal accounts of criminal justice but also of these two well-developed accounts of legal moralism, we find ourselves still in search of an account of criminal justice that can show it to be a morally justifiable institution and that can generate moral limits to criminalization. In part III of this chapter, I sketch an account that I believe is capable of doing all this. In order to understand the workings of the account I propose, however, we need to see that its moral justification cannot be spelled out by analogy to some familiar morally justified practice. Indeed, a crucial step of the account I propose is the recognition that the state's coercive practices of criminal justice, though morally legitimate, are justifiable in a way that is wholly unique. The sort of account that I have in mind is liberal, but Kantian rather than utilitarian, and it is part of a larger story about liberal constitutionalism.⁴

The moral justification of the criminal justice system's coercive practices begins with the justification of the state's coercive powers more generally. We begin with the thought that the sort of freedom that should matter to us most in political affairs is that which is best understood in opposition to slavery. The slave is not unfree because of any particular impediment in his way or because of any particular disability; rather, he is unfree because every aspect of his situation (what he may or may not do, possess, etc) is entirely *dependent* on his master's arbitrary choice to permit it. Now, in the absence of law and state, everyone is radically unfree in the same way as the slave:

⁴ As Alan W. Norrie—no friend of liberal political theory—points out, 'there is something essentially Kantian about the criminal law, and[. . .]this is not susceptible to moral criticism because it is enshrined in the historical structure of modern legal form that it begins with an abstract, formal individualism' in his 'Alan Brudner and the Dialectics of Criminal Law' 14 *New Criminal Law Review* 449 at 451.

everything we do, possess, etc is dependent on the will of others to permit it. And in this sort of context, all of our conduct takes on a sinister cast. Nothing we do is just an exercise of our freedom; we are always simultaneously imposing our unilateral will on others and thereby undermining their claims of freedom. In order to make it possible for us to interact with others in a way that is respectful of everyone's freedom, we need an entity that can put in place a rightful context for our actions. That entity must set out general rules that demarcate everyone's sphere of freedom and it must (in the name of us all) resist any attempt to supplant the law's rules with private preferences. That entity is the liberal constitutional state. The ground of the liberal constitutional state's legitimacy is the simple fact that it—and it alone—can provide the conditions of freedom for all. On this account, the role of the criminal law is to identify when individuals are attempting to supplant the law's rules with their own preferred arrangements and to regulate the use of state power to resist such attempts.

As I shall argue in part IV of this chapter, the liberal constitutionalist account of criminal justice not only fits well with existing practices and puts them into a larger framework within which they are morally justified; it also generates a number of important moral limits to the process of criminalization.

II. Michael Moore and Antony Duff's New Legal Moralism

A. The demise of utilitarian criminal law theory

Michael Moore and Antony Duff developed their positions on the nature and limits of the criminal law in large part as reactions to the failure of traditional utilitarian liberal accounts. In recent years, the failure of utilitarian liberalism that has attracted the most attention has been what Bernard Harcourt has called 'the collapse of the harm principle'. The attacks on the harm principle have come from almost every conceivable angle—we need not linger on the details of the many well-worn arguments. Some charge that it is hopelessly under-inclusive, citing serious forms of harmless or consented-to wrongdoing that it would not cover. Others point out that once we recognize that it is legitimate to criminalize the conduct that creates the risk of harm, the harm principle becomes so broad that it cannot provide meaningful limits to the growth of the criminal law.⁵ Yet others have pointed out that the harm principle has become so empty that it is now routinely used by the very

⁵ These challenges are elegantly summarized in Duff (n 3 above) ch 6, 123ff.

people that utilitarian liberals are meant to be arguing against: those who wish to expand the reach of the criminal law to include forms of private sexual conduct and the use of intoxicants of which they morally disapprove.⁶ Now, whether or not any particular argument against the harm principle succeeds, the overall picture is bleak: it appears to be both over- and under-inclusive and it has now become a rhetorical tool in the hands of the enemies of liberal restraint in the use of the criminal law.

Another important failure of the utilitarian liberal account—and one that goes not only to its usefulness in limiting the scope of the criminal law but also to its ability to provide a justification of the criminal process at all—is its inability to justify the way in which particular individuals are singled out, censured, and punished as criminal wrongdoers. Even the most sophisticated utilitarian accounts of criminal law and punishment, such as the one set forward by H. L. A. Hart, do not address the crucial question of when an individual *deserves* the criminal punishment we impose upon him. Instead, they are really just accounts of when it is *useful* to us to punish individuals for the sake of some desirable social goal, such as deterring future wrongdoing. In his famous essay, ‘Prolegomenon to the Principles of Punishment’,⁷ Hart purports to provide a way to satisfy both the utilitarian liberal’s concern with forward-looking reasons for the institution of punishment and the need to provide a justification of punishment that the particular offender could not reasonably reject. As Hart puts it, a system of punishment could be utilitarian in its general justifying aim while remaining ‘retributivist’⁸ in its principles of distribution. Hart argues that so long as we refrain from punishing whenever the offender did not have a fair opportunity—whether by absence of *mens rea*, or on account of a defence such as duress, necessity, or insanity—to conform his conduct to the law’s demands, we can rest assured that those who are punished genuinely deserve it.

But Hart’s attempt to save the utilitarian liberal account of criminal punishment simply misses the point. What Hart needs is a positive rationale for the punishment of specific offenders that could ensure that those who are

⁶ Harcourt (n 3 above).

⁷ Reprinted in *Punishment and Responsibility: Essays in the Philosophy of Law* 2nd edn (Oxford: OUP, 2008).

⁸ I put the term ‘retributivist’ in quotation marks here to indicate that Hart is re-defining what retributivism is all about in this essay. Rather than concerning himself with moral culpability as a positive reason for punishment (the central claim of traditional retributivists), Hart is concerned with fair choice to have done otherwise as a constraint on the use of punishment for utilitarian reasons. For more, see John Gardner’s introductory essay in *Punishment and Responsibility* (ibid). See also my ‘Three Models of Criminal Law: Deterrence, Accountability, and the Rule of Law’ (forthcoming in *University of Toronto Law Journal*).

punished actually deserve the punishment they receive. But all that he provides is a principle to ensure that *no further injustice* is done by punishing those who did not have a fair opportunity to conform to the law's demands.⁹ Simply because no further injustice is done in this way does not show that it is just to punish within these constraints. Hart is unable to provide any positive rationale for punishing offenders besides its deterrent effect—and this, as we have seen, is simply a tool for promoting our policy objectives. Hart's account of criminal law, like its utilitarian forebears, simply *uses* the punishment of the offender as a deterrent to future criminality. It is first and foremost in order to address this problem with the moral justification of the criminal justice system's treatment of particular offenders that writers such as Moore and Duff have turned to legal moralism.

B. Moore's retributivist moralism

In *Placing Blame*, Michael Moore argues that we should think of the criminal justice system as what he calls a 'functional kind'—a thing that is defined in terms of the function it is to serve—the function of which is 'to attain retributive justice . . . [by] punish[ing] all and only those who are morally culpable in the doing of some morally wrongful action'.¹⁰ That is, the very point of criminal law has nothing whatever to do with its deterrent value (or any other future benefits that might accrue as a result of its operation). Rather, its point is simply to give moral wrongdoers what they deserve simply because they deserve it. This move—the retributivist argument that we should punish wrongdoers *just because they deserve it*—is an old and familiar one that was long seen as a retrograde impulse to be avoided by a civilized system of punishment. H. L. A. Hart famously rejected retributivism in the following terms:

It represents as a value to be pursued at the cost of human suffering the bare expression of moral condemnation, and treats the infliction of suffering as a uniquely appropriate or 'emphatic' mode of expression. But is this really intelligible? . . . [It] is uncomfortably close to human sacrifice as an expression of religious worship.¹¹

But Michael Moore embraces this position on the grounds that it and it alone can justify the institution of criminal punishment. Far from being barbaric,

⁹ John Gardner makes a similar point in the introduction to Hart (n 7 above) xxv. Indeed, he goes so far as to say that Hart's account is not actually an account of punishment at all, even by the very definition of punishment Hart himself set out.

¹⁰ *Placing Blame* (Oxford: OUP, 1997) 33–5.

¹¹ H. L. A. Hart, *Law, Liberty and Morality* (Palo Alto, CA: Stanford University Press, 1962) 65.

Moore argues, it is a sign of respect for persons that we only punish them when they personally deserve such punishment, and not merely as a tool for some future good to come of it.

Objectionable as some utilitarian liberals might take retributivism to be, it has now become a well-accepted position within criminal law theory. Indeed, as John Braithwaite and Philip Pettit point out, ‘the new retributivism has sounded the death-knell of traditional, consequentialist approaches to criminal justice’.¹² If this is the case, of course, then it becomes crucially important to the moral justification of punishment that the criminal law should track the demands of morality fairly closely—for it is only morally justifiable on the retributivist picture to punish those who have actually engaged in morally wrongful conduct. For this reason, Moore embraces a newfangled form of legal moralism. But we should make clear that Moore’s legal moralism is radically different from another position of the same name espoused by Patrick Devlin in the twentieth century (and by James FitzJames Stephen before him in the nineteenth century). Whereas Devlin thought that the criminal law could legitimately be used to enforce the morality of a given society in order to prevent societal collapse (irrespective of whether its demands in fact reflected the demands of true morality), Moore takes the fit of criminal law with the demands of true morality to be crucial. That is, whereas Moore is concerned with the enforcement of morality as such, Devlin is interested in the enforcement only of *what people take to be* the demands of morality as a means to the pursuit of his real end, which is preserving social cohesion. In this way, Devlin is not really a legal moralist in Moore’s sense at all.

Although Moore’s position is sharply different from Devlin’s, it is nonetheless deeply illiberal. At best, it is what he quite candidly calls ‘liberal-in-content if illiberal-in-form’:¹³ it provides illiberal arguments for designing a system of criminal law that would look a lot like the sort of system of which a liberal would approve. Moore goes to great lengths to ensure that his position is not obviously illiberal in its content: he is quick to supplement his legal moralism with other limits on criminalization: (1) it is morally worthwhile to allow people to make some choices for themselves even if they make the wrong choice (the autonomy principle); (2) it may be too costly to criminalize some kinds of moral wrongs, say, because this might induce contempt for the criminal law if they are never enforced (the utility principle); and (3) legislators should be modest in their view of their own ability to determine

¹² John Braithwaite and Philip Pettit, *Not Just Deserts: A Republic Theory of Criminal Justice* (Oxford: OUP, 1990) 209.

¹³ Moore (n 10 above) 80.

what is genuinely morally wrong conduct (the epistemic modesty principle).¹⁴ Nevertheless, Moore's *argument* is deeply illiberal in its basic structure. According to his account, the point of criminal law is not to protect individual liberty but to interfere with it in the grossest ways imaginable in order to enforce the demands of morality.

C. The problem of vigilantism

There are good reasons of political theory for liberals to be suspicious of Michael Moore's retributivism, but there are other reasons to reject his view that should be of interest to criminal law theorists of any political stripe. That is, even if we were to accept Moore's claim that the criminal justice system is a tool for enforcing morality and that we impose criminal punishment simply because people morally deserve to suffer for their wrongdoing, we ought still to be sceptical of his enterprise on grounds of lack of fit with existing doctrine. Put another way, even if we think it is an attractive theory, it is not a theory of *criminal justice* in a form we can recognize. The problem of fit that is most problematic for Moore is raised by the phenomenon of vigilantism. If Moore is right that the criminal justice system is simply a tool for bringing about retributive justice, then what reasons might we have to object if private citizens were to take it upon themselves to hold trials and to punish offenders? It seems that there is no reason in principle why we should object: so long as the vigilante 'gets it right' and punishes only those who have committed moral wrongs (and does so for that reason and in proportion to the offender's desert), it seems that Moore would have no principled reason to object to this practice.

Of course, there might be reasons of administrative efficiency to insist that we ought usually to defer to the authorities in such matters: police officers are usually better trained than ordinary citizens in the use of force; they usually operate as part of a large and well-organized team that will carry out its purposes more efficiently than private citizens acting on their own initiative; and offenders (and others) might reasonably rely on the fact that it is the state's agents and not others who administer criminal justice. Notwithstanding all of these considerations, however, it remains an open question for Moore, to be decided on the balance of reasons in the particular case, whether the state or private citizens should be the one to run trials, and to punish wrongdoers. And it would seem that in some situations, at least, these reasons of efficiency and coordination will be outweighed by reasons of retributive

¹⁴ Ibid 75ff.

justice. Where we know that a serious moral wrongdoer will escape punishment unless we carry it out, for instance, it seems that we have a good case to make for taking the law into our own hands.

As I have argued at length elsewhere, however, the law in virtually every common law jurisdiction is deeply hostile to vigilantism.¹⁵ It is not just that the balance of reasons usually favours a state monopoly of legitimate violence; rather, it appears to be a central commitment of the legal system to maintain this state monopoly.¹⁶ Whereas the criminal law treats duly authorized state officials who carry out the procedures of criminal justice as fully justified—whether they are police officers effecting wiretaps, searching for evidence, or making arrests or whether they are corrections officials administering punishment—it treats the efforts of private citizens to do any of these things as serious crimes. And the few situations where the law permits private citizens to take the enforcement of the law into their own hands are closely circumscribed. The right of a private citizen to use force to prevent the commission of an offence, to effect an arrest, or to prevent the destruction of life or property is much narrower than the powers of duly authorized state officials to do the same. In the few cases where private citizens are entitled to do these things, it turns in virtually every case on the unavailability of state officials. There is a clear trend in the criminal law of the English-speaking world toward treating private citizens who carry out any of these functions as mere emergency stand-ins for state officials—not as individuals who are equally entitled to carry out retributive justice, as Moore’s model might suggest.

D. Antony Duff’s ‘calling to account’ model

Antony Duff’s account of the criminal justice system, like Moore’s, is born of dissatisfaction with the traditional utilitarian liberal account’s inability to justify the way we single out specific offenders for censure and punishment. But it is importantly different from Moore’s position in at least two crucial respects: (1) whereas Moore’s argument is focused on punishment as rendering retributive justice, Duff’s emphasis is on the trial as a locus for calling individuals to account; and (2) in Duff’s relational account of criminal

¹⁵ See ‘Reinventing the Nightwatchman State?’ (2010) 60 *University of Toronto Law Journal* 425; see also ‘Justifications, Powers, and Authority’ (2008) 117(6) *Yale Law Journal* 1070. But see John Gardner’s reply to the latter article in which he challenges this claim: ‘Justification under Authority’ (2010) 23 *Canadian Journal of Law and Jurisprudence* 71.

¹⁶ The sociologist Max Weber famously stated this point as follows: ‘Today, however, we have to say that the state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory’; Max Weber, ‘Politics as a Vocation’ in H. H. Gerth and C. Wright Mills (trs and eds), *From Max Weber: Essays in Sociology* (New York: OUP, 1958) 78.

justice, we are answerable *only to the polity* (and not to other private actors who might take the law into their own hands) for ‘public wrongs’ that violate the basic values of the polity. Together, they give Duff’s legal moralism an altogether different cast from Michael Moore’s, allowing him to avoid both of the major problems with the Moore account.

Duff’s most basic point, which is at the root of both of the differences with Moore identified above, is that we should not think of the criminal justice system simply as a delivery mechanism for deserved punishment. It is just not obvious, Duff maintains, that morality *requires* that wrongdoers be punished—and therefore, it is not obvious that the state is simply carrying out what needs to be done when it punishes wrongdoers. But we can make sense of the criminal justice system as a morally justified enterprise without recourse to this highly controversial retributivist premise, Duff argues, if we think of it not as a punishment-delivery mechanism but as an institution for holding one another accountable for our violations of shared moral values. Where individuals live together in a moral community—be that a family, a community of scholars, a religious group, a polity, etc—part of what this means is that we are thereby committed to living according to a certain set of values. And this, in turn, means that we are committed to holding one another responsible for conduct that violates these basic values. Calling members of the community to account for violating those norms is just part of what it means to hold those values as defining norms of our community. If we were regularly to see such a wrong committed and not to do anything, this would mean that our community is no longer defined in terms of those values. And if we were regularly to see a particular person violate the norms of our community but fail to call him to account for his conduct, we would be failing to treat his as a responsible agent. It is only those whom we view as not responsible—small children, animals, the insane, etc—whom we do not call to account for their conduct. It is just part of what it means to stand in a moral community with someone to be committed to holding one another accountable for wrongs against the defining values of that community.

If we think of the polity as an unusually large, institutionalized, and formalized moral community, then Duff’s two key differences with Moore are clear to see. It is the trial rather than punishment that is the core of the criminal justice system because the basic point of criminal justice is for the polity to call its members to account for their wrongs and it is at trial that the polity presents individuals with evidence of their wrongdoing and asks them to answer for their conduct. Duff’s account of the criminal trial is highly nuanced, but his main point is that it is not simply a mechanism for determining whether or not punishment is appropriate (as retributivists such

as Moore would suggest) but is, rather, an end in itself—for it is in carrying out the process of the trial that the community calls the accused to account and that the accused is given an opportunity to answer the charges made against him.

Duff's second difference from Moore is at least a partial answer to the problem of vigilantism. That is, because he argues that moral answerability is a relational concept, Duff is able to explain why it must be the political community as a whole acting through the state that brings individuals to justice in criminal law. Although we might all have our opinions about the conduct of others—our friends may think worse of us for failing to do our duty to our children, our students, or our spouse—we must stand in the right relationship to hold someone to account for their wrongdoing. For example, our friends cannot properly call us to account for wrongs done to our students, our children, or our spouse because they are not party to those moral communities; they do not have the standing to accept or reject our answers for why we acted as we did, nor to absolve us for our wrongdoing. Similarly, the vigilante may have his opinions about the public wrongs of others, but he lacks the standing to call us to account formally for those wrongs. It is only the polity as a whole to whom we are answerable for our public wrongs.

It is this emphasis on the relational nature of accountability that provides Duff with a new and promising criterion for limiting the scope of the criminal law. Whereas Michael Moore was forced to add further constraints on the criminal law based on autonomy, utility, and epistemic modesty in order to ensure that it could be 'liberal in content' (if not in form), Duff builds in a more robust limit to the scope of the criminal law from the very beginning. We are not even *in principle* answerable to the polity in the criminal law for all of our moral wrongs, Duff insists. We are answerable to the polity in criminal law only for those wrongs that are 'violation[s] of the core values by which we define ourselves as a polity'.¹⁷ Accordingly, it is *ab initio* inappropriate to criminalize conduct that is not a violation of those core political values. Clearly, respect for life, individual autonomy, and property are all defining values of the liberal polity, so wrongs against these are proper subjects of criminal law. But other important moral values—truthfulness, respect for other persons, animals, and the environment, and so on—will be a good deal more controversial and more difficult to convert into robust limits to the criminal law. But perhaps this is all we can ask from a theory of criminalization: although he does not provide any bright-line rules about

¹⁷ Duff (n 3 above) 141.

what is in and what is out, Duff at least sets out a plausible set of principles that can guide our discussion about the limits of the criminal law.

E. Coercion vs calling to account

Duff's account of criminal justice is rich and highly nuanced and, as we have just seen, it is able to solve quite neatly the two major problems with Moore's retributivist moralism. According to Duff's account, we can still make sense of criminal justice without having to endorse the controversial retributivist claim that the guilty deserve to suffer and we can also explain why it is that the criminal law is so averse to vigilante action. But Duff's account is nevertheless vulnerable to a somewhat different problem, for the fact remains that we are answerable in the criminal process quite differently from the way in which we are answerable to anyone else for wrongdoing. So long as our attention in criminal justice is on the trial alone, Duff's account seems highly plausible. But at some point, we need to recognize the crucial role played by coercive punishment. The process of calling to account might have a close analogue in our ordinary moral life—our friends, our spouse, our students, and others may have the moral standing to identify relevant wrongs and to demand an answer from us for them—but criminal punishment seems to have no parallel in ordinary life. Although we might say that we are being 'punished' by our friends, spouse, business associates, religious community, etc for our wrongdoing, this should be understood to be a categorically different sort of reaction from the punishment that the state is able (and, I argue, entitled) to mete out to criminal wrongdoers. Outside the criminal process, individuals may withhold benefits from us or withdraw from associating with us, etc, but they are not entitled to take away our vested entitlements or to deprive us of liberty as the state may do in response to crime. An account of the criminal justice process must be able to explain its uniquely coercive nature. So although there is much to recommend Duff's account of criminal justice, it seems to take as its object an institution that is too different from the modern criminal justice system we know to be anything we could call a theory of *criminal justice*.

III. Constitutionalism and the Criminal Law

In this part of the chapter, I set out a different account of criminal justice from both the utilitarian liberal account of H. L. A. Hart and the moralist accounts of Michael Moore and Antony Duff. In setting out my alternative,

however, I draw a number of lessons from Moore and Duff's important contributions. First, I recognize that I must be able to demonstrate how the criminal justice system's treatment of individual offenders is consistent with respect for their personhood. It is not enough, as the utilitarian does, simply to show that the coercion and censure endured by offenders (and even by criminal suspects who turn out to be innocent) is able to bring about substantial social benefit and that the costs of bringing about that benefit are fairly distributed.¹⁸ Criminal justice is not just a policy instrument for sharing the costs of bringing about a social good; rather, it is an instrument for identifying wrongdoers and censuring them as such. Our account of criminal justice must make sense of that practice. Second, I also draw lessons from the failings of Moore and Duff's efforts. However attractive it might be to analogize the criminal justice process to a familiar morally justifiable practice, that temptation is to be resisted. There are features of the criminal justice system—most importantly, its state-dominated character and its coerciveness—that make it unlike other moral practices. Accordingly, any successful account of the criminal justice system is going to have to establish its moral legitimacy in an altogether different way from other practices, according to a form of argument that does not simply rely on an analogy.

The sort of argument that I believe can establish the legitimacy of a criminal justice system of the familiar kind begins by establishing the place of criminal justice within a larger framework of constitutionalism. Since we cannot simply analogize its operations to familiar moral practices of calling to account or private 'punishment', we should, instead, see it as part of the operations of a legitimate constitutional state. Before we return to the structure and justification of the criminal justice system, then, let us turn briefly to some larger questions in the foundations of the state's legitimacy.

A. Constitutionalism

Within the liberal political tradition, there is an important camp that sees law and the state not as instruments for bringing about specific outcomes (maximizing utility, punishing wrongdoers, etc) but rather as setting out the necessary context within which we can be free and independent persons even as we live together with others. A familiar way in which this argument is often introduced is with the thought that in the state of nature—ie in the absence of law and state—individuals can never be their own masters. The

¹⁸ It is this second aspect of the utilitarian account that Hart believed could save it from the charge that we were simply using individuals in furtherance of our social project.

sort of unfreedom we suffer in the state of nature, according to this way of thinking, is akin to the unfreedom of the slave. Whether or not the slave's master actually restrains him from acting as he chooses to act, the slave is dependent on his master simply to allow his self-chosen arrangements to stand. Similarly, in the state of nature, whether or not we are actually restrained from doing certain things and whether or not those around us actually make our lives miserable by taking things out of our possession, injuring us, and so on, everything we do, possess, fail to do, etc is dependent on the arbitrary choice of others to let it stand. The trouble is that in such a context, the meaning of all our conduct is the same: we can never just exercise our own freedom in a way that is consistent with the equal claims of freedom of others. Because there is no system in place to demarcate each person's sphere of freedom, every act we undertake is an assault upon the freedom of others. We can make this point in a number of different ways. The philosopher Immanuel Kant states that 'any action is *right* if it can co-exist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom according to universal law'.¹⁹ But we may put the point slightly differently to much the same effect by saying that to live in moral community with others, we need assurance not only that we are free in the relevant way, but that others with whom we associate are free as well.

In short, we need a systematic answer to a systematic problem, and law and state provide that answer. Unlike any private actor, the state claims to speak in the name of everyone's claim of freedom equally. For this reason, the state is the unique instrumentality through which we may collectively ensure our freedom as independence. It speaks for us all together in setting down general laws that define the scope of everyone's freedom in the same way, but it does not speak for anyone in particular—and so, in that way, the state's actions are not to be confused with the partisan choices of some particular individuals. We also act through the state in order to ensure that no-one shall fall into a situation of such poverty that he is entirely dependent on the charity of others in order to live his life, or that anyone should be so ignorant of the ways of the world that he should be dependent on others to live his life, etc. In short, we act together with others through the instrumentality of the state in order to secure for *all* of us the conditions of freedom as independence. We need to act through the state to do all this because only if we do so may we be sure that all those with whom we come into contact shall be secure in their freedom in the

¹⁹ *The Metaphysics of Morals* in Mary Gregor (tr and ed), *Cambridge Edition of the Works of Immanuel Kant; Practical Philosophy* (New York: CUP, 1996) 387.

same way—and therefore, our interactions with them will be as free and independent moral agents, a precondition of right action.

The point of the constitutional state, then, is not to accomplish some important moral task such as maximizing utility or punishing moral wrongdoers. Rather, its purpose is the much more basic one of setting the framework within which we may interact with others in a way that preserves the freedom and dignity of all. The state in this model takes no role in ensuring that individuals exercise their freedom in the best way possible. Indeed, part of the liberal project is precisely to allow individuals to make that choice for themselves—to give them what Jeremy Waldron calls ‘a right to do wrong’.²⁰ But that does not mean that the state’s work is morally neutral—far from it. Because the state’s existence is necessary in order for any of us to interact with others as free and equal moral agents, it is a matter of moral necessity. Without the framework of law and the state in place, our conduct—no matter how well-meaning—must always be an imposition of our private will on others, undermining their freedom and dignity.

In order to carry out its morally necessary task, it is not enough for the state merely to use its moral authority to guide individuals to the right way of acting. For the point is not for the state to guide individuals to the right acts. Rather, its purpose is to set in place a framework within which our conduct can have a certain meaning. And to set out that framework, it is necessary for the state to ensure that the conditions of equal freedom *actually obtain* between people. And, as we have seen, this means that the state’s role is not simply that of an authority indicating to us how we ought to act that might require some coercive enforcement as backup; rather, it is *ab initio* a coercive role. In order for my conduct to be consistent with the freedom of all, I must be assured that I am acting in a certain sort of normative context—so it is up to the state to ensure that that normative context is in place. And this, as we shall see, requires the state to use coercive force.

B. Constitutionalism and the criminal law

According to the liberal constitutionalism story as I have been spelling it out so far, the two features of the criminal law that were missing from Moore and Duff’s accounts come out as central features not only of the criminal law but of the legal order more generally: it is uniquely a matter of state action (for when private actors start enforcing the rules, this undermines the equality of all, rather than supporting it), and it is fundamentally coercive (for the point

²⁰ ‘A Right to do Wrong’ in *Liberal Rights: Collected Paper 1981–1991* (New York: CUP, 1993).

of the legal order is not simply to guide people toward what they ought to do but, rather, to ensure that a certain set of arrangements *actually obtains*). But what is the special role of the criminal law in this picture?

Within a liberal constitutional order, there are several different sorts of legal regulation. One sort of legal regulation is concerned with setting out and enforcing the boundaries between individuals' private rights claims. Private wrongs are acts that violate the terms of equal freedom that the state has put in place through the legal order. Thus, when one person culpably causes injury to another's person or property (whether intentionally, or through negligence), he has wronged that person. Through the institutions of the private law, the state ensures that the victim of such an injury may obtain compensation for any resulting injury from the wrongdoer in order to undo any factual injury to the rights claim. It is crucial to the framework of rights that we have such a system of private law in place and that the state back it up with its coercive power, for it is primarily through this mechanism that we are able to ensure that each person's sphere of freedom is sacrosanct. A second sort of legal ordering arises in the area of public law, where the state establishes programmes designed to ensure the independence of all, such as progressive income tax, public education, public health care, the regulation of markets, etc. In order for those programmes to function properly, it is often necessary to attach penalties to conduct that is at odds with its proper operation. But because these penalties—usually in the form of fines for regulatory offences—are imposed primarily as incentives to action, they are often (quite appropriately) imposed without any fault standard at all. Their purpose is not punitive as such; they are designed merely to encourage the desired behaviour.

The criminal law is not directly concerned with either of these sorts of regimes. Rather, in criminal law, we are concerned with the efforts of private actors who try to supplant the law's neutral ordering with their own favoured arrangements. The wrongs of criminal law, on this model, are not primarily concerned with the fact that an injury has been done to some specific individual or that the requirements of a particular regulatory regime have been violated. Rather, the criminal law's concern is with someone's efforts to undermine the whole system of equal freedom itself. The difference can be seen clearly in the distinction between civil negligence, which is a matter for compensation in private law, and criminal wrongdoing, which usually requires a higher fault standard. Criminal wrongs are those that demonstrate a willingness on the part of the offender to displace the legal rules themselves—they are concerned not merely with an injury to some specific rights claim, but to the very idea of living together under law rather than subject to the wishes of specific individuals. The criminal actively disregards the law's

requirements and substitutes his own preferences; the tortfeasor may be guilty of nothing more than a culpable failure actually to conform to the law's requirements.

In an important sense, then, the criminal law truly is what Nils Jareborg calls *ultima ratio*.²¹ But it is *ultima ratio* (a last resort) not merely in the sense that we ought to use regulatory instruments other than the criminal law to control behaviour if we can—that criminal law is the bluntest and most dangerous regulatory instrument at the state's disposal. It is *ultima ratio* in the deeper sense that it is a necessary last resort (or backstop) to the whole project of living together with others under law. For it is all very well to have in place a set of laws that demarcate each person's sphere of rights and even to have a legal regime in place enabling individuals to seek damages to undo the effect of wrongs done to them. But unless we have in place a system to address those who would disregard the whole system—whether by supplanting their will for some particular legal arrangement or by flouting some specific order from a court requiring the payment of damages or enjoining a certain course of action—no other part of the legal system can perform its part in setting out the framework of equal freedom for us all.

On the constitutionalist account of criminal law, then, it is not the point of the criminal law (as Moore or Duff might argue) to bring people to account or to punish them simply for doing things that we could identify as morally wrong on our own, nor is it simply to minimize the incidence of undesirable conduct at the lowest cost (as utilitarians might suggest). Rather, its role is tied tightly to the very survival of the framework of rights that makes it possible for us to interact with others on terms of equal freedom. So the criminal law's legitimacy is, ultimately, tied to its morally necessary role as ultimate guarantor of that moral ordering. But the *way* in which we establish the moral legitimacy of the criminal law is quite different from the methods proposed by Moore, Duff, and other legal moralists. The criminal justice system is morally legitimate not because it is analogous to some other, familiar, morally acceptable practice. Rather, it is morally legitimate because it performs a morally necessary function that is unlike that performed by any other practice.

One final point is worth mentioning before we turn to the limits of the criminal law under the liberal constitutionalist account. That is, some might argue that an account of criminal law that is concerned with attempted usurpations of the law's authority to establish the relations that obtain between persons does not fit with our settled understanding of what makes

²¹ Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2004) 2 *Ohio State Journal of Criminal Law* 521.

conduct criminal in the first place. Surely (one might argue) the core crimes of murder, rape, assault, theft, and so on are of concern to the criminal law not simply because the offender sought to supplant the law's terms of interaction with his own will, but for the much more straightforward reason that he wronged someone very seriously by killing her, raping her, etc.²² Of course, it would seem odd in the extreme to suggest that the law was indifferent to the wrong done to the particular victim and was merely interested in maintaining its own position of authority in all these cases. But that is not my suggestion. Rather, what makes all such conduct wrongful for the purposes of the criminal law is that the offender has intentionally undermined the possibility of interacting with others as free choosers who are entitled to live under the terms of interaction set out by the law. He has done so by treating that person as a mere object who may be dealt with in whatever way he wishes. The wrong of rape—and of murder, assault, etc—is precisely the objectification of one person by another, but that objectification is of concern to the state because it is the state's job to ensure the survival of the system that makes it possible for us all to interact on terms that preserve the status of us all as free and equal moral agents.

IV. Constitutionalism and the Limits of the Criminal Law

In this section, I conclude with a round-up of some of the more important implications of the constitutionalist account of criminal justice for debates on the limits of the criminal law. Although there are many more,²³ I shall focus on two: the enforcement of moral norms against selfishness and the role of subjective *mens rea*.

A. Immorality and selfishness

Thinking of criminal law in the way I suggest renders certain aspect of criminal law a good deal less problematic than they would otherwise be. Those who, like Moore and Duff, take it to be a system for enforcing the demands of morality directly often have difficulty explaining why the

²² Thanks to Antony Duff for raising this issue with me.

²³ As indicated in the discussion of part III, one further implication is that the criminal law—and the law generally—should be directed at securing the conditions of independence for all, and *only* at that end. I do not treat this point here only because it is too large a topic. However, it is probably the most powerful and most radical implication of the constitutionalist story for the limits of criminal law.

criminal law is so averse to punishing selfish behaviour and why it is so willing to punish those who engage in morally laudable civil disobedience. But once we recast the role of criminal law in terms of its function as enforcer of last resort of the legal order as a whole, it becomes a good deal clearer why the law refuses to enforce certain moral demands.

According to the liberal constitutionalist story set out above, law's role generally is not to guide us (much less to coerce us) to exercise our free choice in one way or another. Indeed, the whole point of the story is to set out a framework within which we may exercise our free choice as we see fit. Whereas morality is concerned first and foremost with *guiding the exercise* of our free choice to decide what we shall do with ourselves and with what is ours (whether to be generous with our property or not; whether to be courageous in the use of our bodies or not, etc), law concerns itself with *defining the scope* of our powers to decide such questions. Thus, the law tells us that we are not entitled to be 'generous' with the property of another because it simply does not belong to us; and we should not choose to be 'courageous' in dealing with a wrongful attacker when we have a clear avenue of escape because this is the job of the police department; and so on.

When we think of the criminal law as concerned with the enforcement of the law rather than with the enforcement of morals, we are able to make sense of these apparent conflicts a good deal more easily. The law gives us a 'right to do wrong' with our own bodies and property—to disregard the requests of others for assistance (whether this is donating money, lending property, or offering physical assistance with our bodies).²⁴ But the law also prohibits us from doing what seems like 'the right thing' when it is not our business (as it prohibits vigilantes from bringing wrongdoers to justice or Robin Hoods from using the property of others to be generous to the needy). Although there is clearly a sort of moral ideal—an ideal of freedom as independence—at work in the law's articulation of rights, it is a moral ideal about the appropriate starting points for the operation of ordinary individual morality, not its conclusions.

B. Mens rea

Traditional criminal law jurisprudence insists that true crimes must be defined in terms of subjective fault.²⁵ Now, if the criminal law were truly a

²⁴ For a longer list of examples, see my chapter: 'Criminal Law as Public Law' in R. A. Duff and Stuart Green (eds), *The Philosophical Foundations of the Criminal Law* (Oxford: OUP, 2011).

²⁵ See eg, Jerome Hall, 'Negligent Behaviour Should be Excluded from Penal Liability' (1963) 63 *Columbia Law Review* 632.

repository of moral norms, this insistence would seem to be out of place: moral norms are very often defined in terms of objective fault or, in many cases, no fault at all. If I knock over your valuable vase, I am answerable to you morally for doing so even though I took every reasonable precaution to avoid doing so (and my answer will consist simply in pointing out that I took such precautions and perhaps adding that I feel something like what Bernard Williams called ‘agent-regret’).²⁶ But I am not answerable in criminal law for this sort of occurrence. It is not simply that I ought not to be punished if I took every precaution to avoid the injury to your vase; there is not even a criminal wrong here for which I ought to provide some defence. This suggests that there is a significant difference between the sorts of wrongs that concern us in criminal law and ordinary moral wrongdoing. Although liability to moral criticism (like liability to criminal punishment) is not usually strict, there is nevertheless a sharp disconnect between the way we define a *prima facie* moral wrong and the way we define a *prima facie* criminal wrong.

In recent years, of course, one of the ways in which the criminal law has expanded so quickly has been to include prohibitions where the fault standard is objective, where responsibility is strict, or (increasingly) where even liability to punishment is strict.²⁷ So it would be grossly inaccurate to suggest that today’s criminal law pays much attention to the criminal law requirement of subjective *mens rea*. Nevertheless, part of the idea of criminal law for many years—part of what distinguishes it from other areas of the law that deal with wrongs such as tort law—has been its insistence that subject fault is, if not the required fault standard, at least the norm.²⁸ A principled insistence that crimes ought to be defined in terms of subjective fault would provide a significant mechanism for limiting the scope of the criminal law.

The focus of attention for prominent legal moralists such as Michael Moore and Antony Duff has been on strict liability and strict responsibility. Both Moore and Duff have argued (rightly) that we ought not to be liable to criminal punishment (indeed, we ought not even to be obliged to answer for our conduct) without some showing of fault on our part. But their arguments

²⁶ Bernard A. O. Williams, ‘Moral Luck’ in *Moral Luck: Philosophical Papers, 1973–1980* (New York: CUP, 1981). On agent regret, see also David Enoch, ‘Being Responsible, Taking Responsibility, and Penumbral Agency’ (unpublished manuscript on file with author).

²⁷ See Andrew Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 *Law Quarterly Rev* 225 for examples.

²⁸ When we say that subjective *mens rea* is required for true crimes, this does not mean subjective *mens rea* with respect to consequences. All that is required is subjective awareness that one is engaging in conduct that one ought to have known was criminal. For a thoughtful consideration of the need for subjective *mens rea* in true crimes, see Alan Brudner, ‘Subjective Fault for Crime: A Reinterpretation’ (2008) 14 *Legal Theory* 1.

do not go far enough. The point that flows from the constitutionalist position on criminal law goes much further than simply insisting on *some* fault requirement in criminal law. The insistence of the constitutionalist position is that criminal law, unlike tort and most other areas of law, is concerned with conduct that is designed to supplant the law's norms themselves. We are not criminally liable merely for violating the law's demands; rather, we are criminally liable only when our conduct is best understood as an attempt to supplant the law's norms and to replace them with our own preferences. And this requires at the very least proof of subjective *mens rea*.

V. Conclusion

Over the past 30 years, criminal law theory has moved away from the utilitarianism that dominated so much legal thinking in the twentieth century toward a newfangled legal moralism that models the structure of criminal law on that of moral wrongdoing. The moralism of Michael Moore and Antony Duff shows criminal justice to be an enterprise that takes seriously the offender's right not to be used as a mere tool for the deterrence of undesirable conduct. But, as we have seen, their accounts are of practices so different from the criminal justice system as we know it today that it is difficult to call them theories of *criminal justice* at all. Instead, in this chapter, I have proposed an account of criminal justice that takes it to be part of a larger project of liberal constitutionalism. In this way, I argue that criminal justice can be vindicated as the state-dominated, coercive institution it is. Moreover, this account of criminal justice is able to generate a number of meaningful limits on the expansion of criminal law, as well. I identify two such limits in this chapter—the criminalization of selfishness in the exercise of private rights and the requirement of subjective *mens rea*—but there are others, as well. Of course, like any plausible account of the limits of criminal law, my account does not provide a clear criterion for exclusion that can be neatly applied to specific cases. Instead, it provides only a way of thinking about questions of criminalization and about the role of criminal justice in our lives. When it is the state's job simply to preserve the conditions of freedom for all (rather than to guide us to the morally right path in our private conduct), it stands to reason that the scope of the criminal law should be fairly narrow.