

An Examination of the Practicability of Antony Duff and John Gardner's Legal Moralism as a Basis of Criminalisation in Contemporary English Criminal Law

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ABSTRACT

This article critically examines the role played by moral values in the scope and structure of criminal offences. In analysing the nature and practicality of legal moralism as a basis of criminalisation, comparisons will be made to notions of responsibility and judgement, and public accounts of criminal law. For focusing on the use of notions of morality per se, this article will not discuss in detail the differences between accounts of legal moralism and public morality. Based on the account of legal moralism advanced by Antony Duff and John Gardner, this article seeks to offer a revised and more nuanced account of the role played by legal moralism in offering a comprehensive account of the scope and structure of criminalisation based on moral wrongs and the State's jurisdiction in punishing others.

INTRODUCTION

At the broadest level, Legal Moralism stipulates that the basis of criminalising an action should mirror a moral wrongdoing; this equates moral wrongs with criminal wrongs. Such equation has been of topical interest in terms of its justification and applicability towards contemporary social contexts and judicial practices. A justification of criminalisation on grounds of morality must be based on a defensible definition of morality, not one which confuses it with mere feelings of distaste.¹ Legal moralism is generally split into two schools: (i) positive legal moralism, and (ii) negative legal moralism. A positive legal moralist

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¹ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford: OUP 2013) 35-36.

argues that the wrongfulness of an action provides a positive reason to criminalise it for the furtherance of particular objectives; the reason does not have to be conclusive in justifying the criminalisation of the conduct, but it has to be a good reason. A negative moralist, in contrast, argues that wrongfulness is a necessary condition for criminalisation, but it does not provide any positive reason to criminalise; positive reasons for criminalisation lie elsewhere — for example, in the broader social context. The two views are logically independent. To say that the absence of wrongfulness is a conclusive reason against criminalisation is not to say that the presence of wrongfulness is any kind of reason for criminalisation.²

To offer a more thorough examination of the nature of moral values and their use in criminal law, this article focuses on the accounts of legal moralism advanced by Antony Duff and John Gardner, which “take morality very seriously on its own terms”.³ It is because their accounts focus exclusively on the nature of moral values *per se*, and how such values’ suggestion on appropriate behaviours should shape the content of criminal law. Given the existence of copious academic literature on the famous Hart-Devlin debate in the 1960s on the utilitarian nature of moral values in the context of criminal law, the Hart-Devlin debate will not be the subject of this article. This article will be divided into three parts. *PART I* begins with an analysis of the nature of legal moralism and the Millian harm principle, and legal moralism’s relationship with the notion ‘responsibility’ in terms of a defendant’s liability as an autonomous agent. It argues that legal moralism must have recourse to the notion of ‘responsibility’ in order to reflect one’s accountability under criminal law. In the theory-based discussion of this part, references will be made to the contractarian theory of responsibility and the Kantian Categorical Imperative (“CI”). In *PART II*, the article moves on to explore the nature of legal moralism as a normative justification for the general part of criminal law, and its applicability in articulating *mala in se* and *mala prohibita* crimes. It contends that while legal moralism can justify the criminalisation of *mala in se* crimes, it would be impractical to use it as the sole or predominant basis for criminalising *mala prohibita* crimes. The discussion in this part is predominantly theoretical and examples will be used to illustrate the aforementioned concepts; references will also be made to issues of labelling. In *PART III*, it will examine

² Antony Duff, ‘Towards a Modest Legal Moralism’ [2014] *Criminal Law and Philosophy* 217, 218.

³ Michael Thorburn, ‘Criminal law as Public Law’ in Antony Duff and Stuart Green, *The Philosophical Foundations of Criminal Law* (Oxford; New York: OUP 2011) 22-23.

critically the function of legal moralism in making the criminal law a coercive State instrument, offering a hybrid account of jurisdiction-morality values for criminalisation. The crimes of manslaughter and rape will be discussed, and Malcolm Thorburn's public law account of criminal law will be compared to legal moralism in justifying the criminalisation of the aforementioned crimes.

This article argues that Duff and Gardner's accounts of legal moralism, despite reflecting the intrinsic responsibility and moral duties that one ought to owe to another and the public, fail to capture the public element of criminal law in terms of the reflection of one's responsibilities towards the society. A revised account of legal moralism should strike a balance between reflecting the moral qualities of a crime and the moral responsibility and criminal culpability of an individual, whilst articulating their social position in the society.

PART I: THE NATURE OF LEGAL MORALISM AND THE NOTION OF RESPONSIBILITY

1.1 The Foundational Status of Harm and Multifaceted Nature of Morality

1.1.1 The Harm Principle and the Context of Criminal Law

Criminalisation, as an instance of the State deploying its coercive power to prohibit and regulate behaviour, requires robust justifications. The justification(s) offered for criminalising a particular behavior must be able to explain adequately why the targeted behavior should not merely be discouraged but prohibited. A commonly referenced justification is John Stuart Mill's harm principle, which argues that the only purpose of exercising power rightfully over an individual is to "prevent harm to others".⁴ The undesirable nature of 'harm' provides a sound theoretical justification for a State to take actions to minimise its impacts on a polity. However, recourse to the harm principle itself is insufficient, as not all crimes necessitate harm.⁵ Different conceptions on the nature and extent of harm generated by an undesirable activity suggest that it is not argumentatively sound to justify criminalising such activity based on the need to prevent 'harm' itself; an

⁴ John Stuart Mill, *On Liberty* (first published 1859, OUP 2015) 13.

⁵ For example, a heavy commercial vehicle parking on verges, footpaths or the central reservations of roads violates section 19 of the Road Traffic Act 1988 ('RTA'). However, the crime does not cause any harm in the Millian sense.

example is the criminalisation of homosexual relationships before its decriminalisation in 1967.⁶ A pluralism recognising multiple reasons, on both individual and societal levels, for criminalisation should be welcomed, as it reflects a diverse range of wrongs and undesirable outcomes warranting criminal law's response.⁷ Under such plurality, by marking out certain kinds of wrong as apt for criminalisation, the harm principle serves to suggest which wrongs fall within the ambit of criminal law.⁸

In contrast to civil law, a key aspect of criminal law is condemnation. For instance, although both fines and taxes require one to make a payment to the State, they differ in principle. A fine condemns the conduct fined as wrongful,⁹ while a tax usually merely intends to discourage the activity taxed.¹⁰ Although criminal law rarely enforces significant positive obligations,¹¹ it prohibits continuing unlawfulness by the means of negative obligations.¹² In the context of criminalisation, when we attribute responsibility for an action, we consider it as blameworthy, springing from a blameworthy state of mind.¹³ The blameworthy state of mind reflects the defendant's culpable intention and the blameworthy values manifested in their criminal act. In defining a wrongful act as criminal, the law categorises and condemns such conduct as wrong. The underlying wrong is deemed to concern those to whom it speaks to, and warrants the consequences attached to the criminal act.¹⁴ The identification and categorisation of such blameworthiness, however, cannot be done based on the harm principle. This is because the harm principle does not cater to the internal state of mind of the individual – it sheds no light on the *mens rea* of an offence. It does, however, cater

⁶ Section 1, Sexual Offences Act 1967.

⁷ Antony Duff, *Answering for Crime: Responsibility and Liability in Criminal Law* (Oxford: Hart Publishing 2007) 139.

⁸ *ibid* 140.

⁹ *ibid* 81.

¹⁰ Andrew Ashworth, 'Is Criminal Law a Lost Cause?' (2000) 116 LQR 225, 232.

¹¹ For example, contract law may enforce a positive obligation by ordering specific performance.

¹² Ashworth (n 10) 236.

¹³ John Deigh, 'Responsibility' in John Deigh and David Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (New York; Oxford: OUP 2011) 195.

¹⁴ Antony Duff, 'Responsibility, Citizenship, and Criminal Law' in Antony Duff and Stuart Green (eds), *The Philosophical Foundations of Criminal Law* (Oxford; New York: OUP 2011) 127.

to the result of the conduct – following the *actus reus* of the offender – on the victim(s).

Although a lot of wrongs labelled ‘criminal’ are morally condemnable or dubious at least, the actual practice of criminal law is an amalgam of different ideas that have prevailed at different times in the history of the practice. General changes in social attitudes, from being conservative to increasingly liberal in recent decades, have resulted in certain behaviors, which were criminal in the past, becoming decriminalised.¹⁵ Even when moral values may appear as a sound stand-alone justification in delineating the scope and structure of criminalisation, the deployment of criminal law *ex-ante* as an autonomy-restricting device must meet the stringent demands of social regulation that any form of authoritative legal regulation must satisfy.¹⁶ When disagreements arise amongst contrasting moral values, it is difficult for either side to prove its case.¹⁷ This is because the inherent subjectivity of the vast majority of moral values renders the question of their convincingness a matter of extent, not a matter of correctness. Nonetheless, the open-ended nature of moral values does not mean they cannot be used as a sound basis for criminalisation. What is required is an account explaining the role played by morality in an account of criminalisation.

1.1.2 Accounts of Legal Moralism and the Traditional Account of Moral Responsibility

As outlined in the introductory section of this article, the two strands of legal moralism (positive and negative) are logically independent. To say that the absence of wrongfulness is a conclusive reason against criminalisation is not to say that the presence of wrongfulness is any kind of reason for criminalisation.¹⁸ Criminalisation is not necessarily solely dependent upon the existence of a wrong that may be said to warrant criminal law’s response. The focus on wrongfulness as a constituent element of criminalisation can encapsulate the harm principle at a bare minimum. The wrongfulness of an activity concerns the harm the enactment of legislation aims to prevent.

¹⁵ For example, homosexuality was a criminal wrong before 1967 due to the perceived moral indecency it carries; homosexuality was decriminalised under section 1 of the Sexual Offences Act 1967.

¹⁶ Andrew Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Oxford; Portland, 2011) 10.

¹⁷ Ronald Dworkin, *Taking Rights Seriously* (London; Duckworth, 1977) 186.

¹⁸ Duff (n 2).

A strong version of legal moralism provides a more ambitious interpretation of the idea that crimes should be moral wrongs.¹⁹ An advocate of this position is Michael Moore, who argues that the function of criminal law is to attain retributive justice by punishing all and only those who are morally culpable in the ring of some morally wrongful action.²⁰ The infliction of a moral wrong warrants retribution against the wrongdoer. Outside of such ring of action, the accused can and should never be adjudged guilty for any behavior alleged to be criminal. The whole realm of moral wrongdoing should be used as a starting point for determining the scope of criminalisation. However, such an account is unrealistic in delineating the scope of undesirable behavior that should be prohibited. The issue with such premise is twofold. Firstly, it gives no weight to any public perceptions of morality and assumes that the aforesaid starting point is a shared criterion. There is no guarantee that everyone in the community holds similar opinions as to what moral wrongdoing means. Secondly, it may impose punishments which are not necessarily proportionate to the gravity of the crime itself in terms of moral culpability. A lack of moral consensus undermines Moore's theory because it attempts to use the coercive tool (i.e. criminal law) of the State, in a coercive manner (to attain retributive justice), on wrongdoers who might not necessarily share the same moral values as those falling within the realm of wrongdoings in Moore's theory. This generates the potential of subjecting one to moral values which are not commonly subscribed, but they nevertheless underpin the relevant criminal legislation because the legislators themselves deem it necessary.²¹ Given it is very difficult for everyone to share the same moral values, Moore's theory is impractical.

The traditional account of moral responsibility makes mental capacity a necessary condition of being responsible. For example, a mentally capable individual's failure to take care of their disabled sibling may give rise to criminal responsibility for gross negligence manslaughter.²² People are morally responsible for their actions only if their actions issue from their free will. On its strong

¹⁹ Duff (n 7) 84.

²⁰ Michael Moore, *Placing Blame: A Theory of Criminal Law* (Oxford University Press 2010) 33-35.

²¹ For example, to prohibit smoking indoors under Moore's account would subject smokers to a morally unjustified restriction.

²² *R v Barrass* [2011] EWCA Crim 2629.

position, for an agent's action to issue from a free will, it must not be caused completely by external events preceding it. For instance, an intoxicated person's action does not issue from a free will if the intoxicating substance was administered to them without their consent. It is only an individual's subscription of morally wrong values that lead to their subsequent criminal activity, without external factors contributing to the latter. This gives rise to two rejections to legal moralism, with the weak and strong suggestions arguing the insufficiency and uselessness of appeals to moral values respectively. Firstly, the weak rejection suggests that appeals to immorality *per se* can never be sufficient to justify the criminal prohibition of an act. Such reasons must be joined with other reasons that appeal to issues which the prohibition responds to,²³ for example general societal benefits that may be achieved from the criminalisation of such behaviour. Secondly, the strong objection argues that appeals to immorality are in any event weightless and irrelevant to the conduct's impacts on individual and collective welfare. Given the inherent subjectivity of moral values, it would be argumentatively unsound to use moral reasons to underpin the criminalisation of a particular behaviour deemed undesirable. While the two objections raise valid criticisms on the argumentative value of moral values as the ground for criminalisation, they ignore the criminal law's role in delineating one's responsibility towards themselves and others. Although the notion 'moral responsibility' may obscure the actual nature and severity of criminal responsibility, the incorporation of moral values into the notion 'responsibility' provides a clear conceptual framework as to its meaning on both individual and relational levels. It offers a clear understanding as to the meaning of one's responsibility for their behaviour, and one's responsibility to others in a society as manifested in the legal obligation on them to refrain from carrying out certain behaviours.

1.2 The Cruciality of 'Responsibility' in Defining One's Status under Criminal Law

²³ Richard Arneson, 'The Enforcement of Morals Revisited' (2013) 7(3) *Criminal Law and Philosophy* 435, 441.

When one is adjudged legally culpable by a court, the existence of a social consensus on the wrong(s) of their action may be implied.²⁴ This is because as English courts no longer create new common-law offences,²⁵ any guilty conviction must be either for a crime created by an Act of Parliament or a crime not (yet) abolished by an Act of Parliament. The criminality of their activity is based on the observed phenomenon that society considers the aforementioned action as criminal and deserves to be labelled as such. Following so, it is necessary to survey to what extent, and in what ways, moral norms supplement or establish the norms of criminal responsibility. As a tool to prohibit and thus deter particular kinds of behavior deemed undesirable in the society, the society's opinion(s) are crucial starting points in understanding what moral norms are necessary of protection and thus actions encroaching upon or violating against such norms classified criminal.

In the context of legal moralism, when criminals violate moral norms cherished by the society, the criminal law must provide a forceful response in the form of criminal punishment. However, in reality, an acknowledgement of consensus in terms of moral convictions among citizens does not automatically lead to the proposition that we ought to use it as our legal basis for criminalisation. Recognising a relationship between social consensus and criminal law does not mean it will always be possible to find such consensus. Society's views on morality change over time.²⁶ A crime can attempt to answer social concerns of morally dubious activities but fails to explain what responsibilities the defendant breached. The moral fallibility of law necessitates the construction of an account of responsibility which can exist with or without moral values as a constituent element.

An account of criminal law, which focuses solely on the defendant, fails to distinguish between responsibility for an act and responsibility for a crime. Responsibility delineates a certain level of co-operation and mutual understanding between citizens:²⁷ for example, their understanding as to the circumstances under

²⁴ Stuart Green, 'Why it's a Crime to Tear Tag Off a Mattress: Over-Criminalisation and the Moral Content of Regulatory Offences' (1997) 46 *Emory Law Journal* 1533, 1551-1552.

²⁵ *R (on the application of Monica) v Director of Public Prosecutions* [2018] EWHC 3508 (Admin), [85].

²⁶ Green (n 24). See (n 15) above for an example.

²⁷ Ashworth and Horder (n 1) 54.

which an individual should face legal sanctions for their actions which are adjudged to be criminal. Such co-operation is not necessarily only viable when there is a consensus on the nature of a moral value. In delineating responsibility, an individual is also ascribed a *status* in the society. Such status would change following a criminal breach of responsibility. Alice Ristroph accurately highlights that responsibility is a matter of human relationships; it involves agents other than the defendant.²⁸ The personal trait of the defendant, however, does not provide a sufficient basis *per se* for imposing criminal responsibility. A public account of responsibility is required, in the sense that the crime in question warrants a collective response. The 'seriousness' of a wrong cannot be characterised independently of the distinction between 'public' and 'private' wrongs: the difference lies not in the degree of seriousness, but in its social character.

In coating an additional layer to the notion 'responsibility', Sandra Marshall and Antony Duff argue that fundamental wrongs such as murder and rape are crimes because they injure an important '*Rechtsgüter*'.²⁹ A term featured prominently in German discussions of the proper aims and functions of criminal law, *Rechtsgüter* represents the notion of a significant legally protected interest.³⁰ Similar to Ristroph's account, Marshall and Duff's notion of 'responsibility' is grounded in the societal aspect of criminal law, based on matters significant to interpersonal relationships. However, criminalising an activity solely on grounds of injuring a *Rechtsgüter* does not reflect the idea of genuinely 'public' goods.³¹ This is because such 'public' goods cannot be reduced to aggregates of individual goods; such goods have to be values that people can share similar views on and the reason(s) underlying such views. To equate an aggregate of individual goods as a genuine 'public' good assumes that the reasons for the need to uphold each individual good is identical and thus can be assimilated as a 'public' good. The nature of *Rechtsgüter*, however, provides no guarantee on the genuine 'public' nature of a value that is said to underpin the relevant criminal legislation. This is because matters significant to each interpersonal relationship may differ on a case-

²⁸ Alice Ristroph, 'Responsibility for the Criminal Law' in Antony Duff and Stuart Green, (eds), *The Philosophical Foundations of Criminal Law* (Oxford; New York: OUP 2011) 112-114.

²⁹ Sandra Marshall and Antony Duff, 'Criminalisation and Sharing Wrongs' (1998) 11 *Canadian Law and Jurisprudence* 7, 9.

³⁰ An example would be promoting respect for a right not to be physically harmed without lawful justifications.

³¹ Examples of such 'public' goods are values collectively upheld and depended upon by the society.

by-case basis, yet Marshall and Duff proposed no explanation as to the jump between aggregate individual goods and 'public' (i.e. the society as a whole) goods. Considering this issue under the notion 'responsibility', it becomes clear that the notion of 'responsibility' should be based upon goods that can be properly said to represent a unified interest on behalf of the society. Such goods, in light of their overarching importance (as identified), should be upheld by holding violators of such goods criminally responsible. The language of 'responsibility' expresses normative judgements about the nature of one's actions in relation to the addressee(s) and their status in relation to other individuals in a society.³²

1.3 Individual Responsibility as an Articulation of Identity and Social Position

1.3.1 *The Categorical Imperative*

In regulating individual behaviour, criminal law requires us to respect one another. Such respect stems from the need for one to constrain their behaviour which, while may advance their interests, is detrimental to the interests of the target of their action that is criminal. We would need to explain why the State should prohibit certain kinds of conduct by defining them as criminal 'wrongs'. Part of the explanation would consist of an account of the respect from the law due to the defendant, whose conduct the State seeks to regulate and prohibit.³³ It would also be necessary to explain the duties one owes to another as shaped, but not forcefully imposed, by the State's guidance. It should be inquired how the combination of the following theoretical accounts remedies the deficiencies of legal moralism.

Immanuel Kant's Categorical Imperative provides an answer to the question of the basis for respecting people. The Kantian perspective is useful because for Duff, the project of legal moralism is to 'explore the implications of the Kantian demand that we should respect other people as rational and autonomous moral agents'.³⁴ It adopts a deontological approach in shaping people's activities and beliefs based on a set of moral imperatives, instead of focusing merely on the need to respect individuals. What makes an imperative moral is its practicality, which

³² Ristroph (n 28) 116-117.

³³ Duff (n 7) 87-88.

³⁴ Antony Duff, *Trials and Punishments* (Cambridge: CUP 1986) 6.

in turn gives the reason for a moral judgement; such practicality has to be universal.³⁵ The CI determines whether our maxims are real, on the assumption that morality is something real.³⁶ Moreover, a Kantian moral agent should be able to act independently of any coercion. In the context of criminal law, this means the respect an individual owes to another should be grounded in at least three elements: practicality, rationality, and morality. For a Kantian, a human practice or institution is rational insofar it is governed by a discernible set of constant and coherent principles. Assuming the Kantian account can be replicated in criminal law, a rational and practical system of criminal law would be governed by a set of moral imperatives constituting its general part. Apart from setting out lists of wrongful conduct and values, such Kantian general part will also set out the list of rational and practical behaviours that one should display; failure to meet such standards may warrant punishment if such failure leads to the commitment of a crime set out in the special part. Under such a framework, legal moralism provides the universality and rationality required for forming the imperatives which stipulate the respect we as moral agents due to others.

However, it is submitted that Kant's CI should not be directly replicated in criminal law. He never held that such will should be necessary for legal fidelity, as it is for moral flourishing. Criminal law concerns compliance with established norms and avoidance of defined wrongs, not subscription to moral norms which contribute to social prosperity. Kant's account, however, is more focused on encouraging individuals to uphold good behaviours, instead of restraining themselves from bad/undesirable ones. Moreover, the imperative is a principle of *right* actions, whereas criminal law principles are principles of *wrong* actions.³⁷ Such distinction suggests that, if the Kantian CI is adopted as the framework of criminal law, criminal law may become over-restrictive in terms of regulating individual behaviour: any action that does not fall within the parameters of 'right' behaviour would be 'criminal'. This imposes strenuous obligations on one's conduct – in that they will be required to exhibit certain moral values in their actions. This may open a Pandora's box of opportunities to further restrict individual behaviour for values and ideals which are not necessarily commonly subscribed. In light of the

³⁵ Theodosios Pelegrinēs, *Kant's Conceptions of the Categorical Imperative and the Will* (London: Zeno, 1980) 101.

³⁶ *ibid* 214.

³⁷ John Gardner, 'On the General Part of Criminal Law' in Antony Duff (ed), *Philosophy and the Criminal Law: Principle and Critique* (Cambridge: CUP 1998) 218-219.

purported rationality and practicality of the Kantian account for articulating a conceptual framework for criminalisation, it should be inquired to what extent it matches the public dimensions and contractarian conceptions of criminal law. It will be argued below that the public dimension and contractarian conception serve to explain, on top of the Kantian requirements of a moral agent, an account of individual responsibility.

1.3.2 The Public Dimension and Contractarian Theory of Criminal Law

The aforementioned Kantian perspective can be supplemented by the public dimension of criminal law and a contractarian theory to offer an adequate account of criminalisation. Matthew Matravers argues that it is difficult for legal moralism to justify the imposition of moral constraints on the pursuit of self-interest.³⁸ In maximising self-interest, one can infringe another's interests.³⁹ Under a social system of mutual respect, the Kantian perspective of moral agents contracting to live together provides a reasonable assurance of mutual compliance towards the 'moral contract' between them.⁴⁰ They are all bound to the 'contracts', with the Kantian demands of moral agency providing guidance on how individuals should behave. However, this still does not equate one committing to contribute to an agenda of social cooperation. In the context of criminal responsibility, a key distinction between Kantianism and contractualism is that the former focuses on the context of humanity and assumes that everyone shares an equal status, while the latter suggests that responsibility can be *created* by individuals within a polity. However, 'moralising' such contracts (i.e. infusing it with moral values) does not necessarily justify the use of criminal law's coercive power. It is also potentially inconsistent with the liberal nature of the England and Wales's legal order.⁴¹ A pure contractarian conception of criminal law is inadequate in encapsulating an account of individual responsibility for two reasons.

³⁸ Matthew Matravers, 'Political Theory and the Criminal Law' in Antony Duff and Stuart Green, (eds), *The Philosophical Foundations of Criminal Law* (Oxford; New York: OUP 2011) 69-70.

³⁹ For example, the maximisation of wealth via stock fraud infringes the victims' right to participate fairly in legitimate trading.

⁴⁰ Matravers (n 38) 71.

⁴¹ See the latter parts of 1.3.2 and *PART III* for more detailed explanations on this point.

The first objection towards a pure contractarian account of criminal law, infused with the Kantian sense of ‘agreement’, is that it is inconsistent with the Kantian demand of using people as ends, not as means to an end. By contracting to live well together, one is technically ‘using’ another to further their means. A contractarian conception illustrates the mutual dependence between individuals in the protection of fundamental moral values. However, given the inconsistency with the aforementioned Kantian demands, such a contract should be seen as furthering the *mutual* objective of upholding universally recognised moral values. It should not be seen as protecting one’s *personal* moral preferences and the benefits they receive from it.

Proceeding to a second objection, a pure contractarian account is also incompatible with the traditional principles of criminal law in a liberal state. Given a ‘contract’ in such context concerns two individuals only, the State’s intervention by virtue of ‘breach of contract’, which in itself is a private matter, is incompatible with the *public* essence of exercise of criminal law (the deployment of coercive State power in restraining and condemning criminal behaviour). Even if there is a convergence of views on universally recognised issues, for example murder, this still does not justify using moral wrongfulness as *the* basis for the State to ‘invoke the contract’ on behalf of an individual and respond to the relevant breach. However, such use of moral wrongfulness as a basis of condemnation is required under a traditional account of legal moralism. It would be necessary for the ‘contract’ to be re-conceptualised as a public matter, of which a ‘breach’ would warrant a State response. A conceptualisation of being responsible for ‘breach of contract’ *because of the defendant’s status in the polity* allows the State to intervene and provide a coercive response. Such artificial construction of status is not permitted under a pure Kantian conception of criminal law. Principles of political morality on the exercise of State powers, in balancing the contractarian account of criminal law and concerns of the general polity, support a more particularist and less paternalistic criminal law than moral principles alone would demand.⁴² In placing moral principles as a constituent element for an account of criminalisation, the role of moral values may be maintained whilst avoiding criticisms of systematising moral wrongfulness into crimes.

⁴² Kenneth Simons, ‘Understanding the Topography of Moral and Criminal Law Norms’ in Antony Duff and Stuart Green, (eds), *The Philosophical Foundations of Criminal Law* (Oxford; New York: OUP 2011) 242.

At this point, one aspect of the original Kantian account considered above remains undiscussed: the independence of moral agents from influences of external factors. Independence is crucial as it directly influences our status as autonomous agents. In light of the inconsistency between the Kantian focus of 'right' actions and the criminal law's focus of 'wrong' actions, it should be examined whether principles of action can be articulated in terms of the moral character of the individual as an autonomous agent, whilst maintaining the independence of an individual when they are deciding on their actions.

1.3.3 The Necessity and Desirability of Independence

Authenticity demands that we strive for independence in our ethical lives. It suggests that one's actions should be based on their ethical values and beliefs, instead of being dictated by external influences. It is damaged when one is made to accept, without critical evaluations, another's judgement in the place of their own about the values their behaviour should display.⁴³ This partially reflects the demand of legal moralism by articulating the nature of 'moral wrongfulness' and the moral values people should not subscribe to. While the wrongfulness constraint does not delineate the scope of 'right' actions, the fact that such 'wrongs' may include controversial values makes it possible to articulate a restrictive framework of moral principles guiding individual actions. Wall coins such articulation of a framework as '*soulcraft*'.⁴⁴ This refers to the use of criminal law to foster an ethical environment that promotes self-respect and good character. Although *soulcraft* provides valuable guidance for one in developing their behaviour, it is inconsistent with the permissive nature of criminal law in England and Wales. It can compromise the authenticity of citizens to whom legislations are directed at by subjecting them to State-dictated principles and rigid manipulations. Compromising the authenticity of citizens and attempts to do so are also inconsistent with the focus of autonomy in criminal law, which emphasises the importance of one being able to act freely within lawful boundaries without external constraints. At this point, it is clear that the CI, despite offering various methods for characterising an individual as an autonomous moral agent, is impractical for determining whether a particular

⁴³ Steven Wall, 'Enforcing Morality' (2013) 7(3) *Criminal Law and Philosophy* 455, 466.

⁴⁴ *ibid* 466-470.

action is morally 'wrong'. It may also transform criminal law into an over-paternalistic instrument.

1.4 A Relational Perspective of Responsibility as an Accurate Illustration of Interpersonal Relationships in Criminal Law

The relational perspective suggests that 'responsibility' is best articulated if we understand it relationally.⁴⁵ This refers to the responsibility one owes to another as a member of a polity. The responsibilities are generated by virtue of one's membership of the polity, according to the standards and expectations of behaviour that the polity imposes on an individual. In the legal moralism context, this suggests that moral theories must be formulated as useful rules and standards for action. This allows the law to articulate the protections one is guaranteed by the moral responsibilities others owe to them, the breach of which would constitute a criminal offence. In contrast to the individual account discussed above, the relational perspective shifts the focus onto the impacts of the wrongdoer's action. It also provides an adequate account of criminal defences by showing why despite the satisfaction of the constituent elements of a crime, the defendant has a defence.

However, advocates of this perspective would need to explain why justifications or excuses would also necessarily be relational. This is because they form an integral part of criminal law by providing reasons on which an accused, despite their criminal behaviour, should not bear responsibility for the actions in question. In this context, John Gardner identified two explanations for responsibility. The Hobbesian view suggests that as rational beings we all want to avoid responsibility, i.e. refusing to accept responsibility and thus avoid consequences which flows from the acceptance of responsibility; in contrast, the Aristotelian view suggests that as rational beings we all want to assert and accept responsibility.⁴⁶ Between them, the Aristotelian view of responsibility matches the nature of English criminal defences, as such view requires one to provide an adequate account of one's actions for raising a successful defence. It also recognises one's criminal responsibility within the polity they belong to.⁴⁷ In

⁴⁵ John Gardner, 'The Mark of Responsibility' (2003) 23(2) *Oxford Journal of Legal Studies* 157, 164.

⁴⁶ *ibid* 165.

⁴⁷ This warrants the State's intervention by virtue of conviction.

offering an adequate account of belonging in a polity by virtue of explaining one's responsibility therein, it is necessary to illuminate the nature of the relationship between the defendant and the rest of the society, and why it is valuable.⁴⁸ For one to show actual responsibility, they must not only prove their responsibility to the community, but also why such responsibility *matters*. An explanation which lacks either element would not elucidate their position under criminal law and any responsibility they might bear therein, making the purported contribution futile. John Gardner argues that persuading one to accept an inadequate rational explanation of another's criminal responsibility is, for humans as rational beings, a 'pyrrhic victory'.⁴⁹ Being inadequate in substance, making one accept such an explanation would fail to articulate and justify the true extent of the responsibility that they should be deemed to owe to society. In the course of offering such an explanation, one provides an account of their responsibility and the nature of their actions to the victim(s) and the community. Such an account articulates their relationship with the aforementioned parties in light of their alleged criminal engagement. At this point, moral wrongdoings are not only affecting the defendant's character and the victim's well-being, but also the society by the *imbalance* between the defendant and the rest of the society in terms of moral status. The defendant, having failed to adhere to the moral values underpinning the law they violated, thus is adjudged as 'guilty' and different from other citizens. Their participation in the polity makes them answerable to their fellow members, in particular to the victim(s) of their crime, when they were facing prosecution.

Such perspective supplements the lack of public appeal in legal moralism by recognising that discussions on criminal wrongdoing should include other members of a polity. The effects of wrongdoing concern both the defendant and the general community due to the change in the relationship as caused by the wrongdoing itself. The key is for one to have structured explanatory dialogues in public, the object of explanation being other members of the polity.⁵⁰ One's ability to offer a rational explanation for their actions can be affected by the moral values they subscribe to. The more morally evil the values they subscribe to, the less

⁴⁸ William Lucy, *Law's Judgement* (Hart Publishing 2017) 205.

⁴⁹ Gardner (n 45) 166. The necessary connection between law and morality displayed here reflects John Gardner's jurisprudential stance as a hard positivist. For an example of his general argument in favour of a necessary connection between law and morality, see John Gardner, 'Legal Positivism: 5½ myths' 46 *American Journal of Jurisprudence* (2001) 199.

⁵⁰ *ibid* 167.

likely the explanation can be rational and accepted by the community. The notion ‘moral wrongfulness’ in legal moralism serves as an independent criterion in determining whether the moral characters reflected in a defendant’s action fall into the realm of criminal wrong. If it does, the defendant is guilty; if it does not, this implies a valid defence is raised. In bridging the traditional account of moral responsibility with notions of ‘responsibility’ discussed in this part, one must be able to give a rational account of their actions to the general public and, if applicable, the victim. A logical explanation of such responsibility invites an examination on the roles of the general and specific parts of criminal law in defining criminal responsibility. It also asks to what extent does legal moralism serve as a guiding structure in the criminalisation of *mala in se* and *mala prohibita* crimes.

PART II: THE GENERAL PART OF CRIMINAL LAW AND THE CLASSIFICATION OF CRIMES IN THE SPECIFIC PART

2.1 The Importance of Labelling in the Context of Criminalisation

The question for a legal moralist, in providing an account of the classification of crimes into *mala in se* and *mala prohibita* crimes, is the influence of moral values in the aforementioned classifications. It will be argued that whilst it is not difficult to justify the criminalisation of *mala in se* crimes based on a traditional account of legal moralism, it would be extremely difficult for it to justify the criminalisation of *mala prohibita* crimes. Before moving on, it is useful to first clarify what the two types of offences mean: *Mala in se* crimes are pre-legally wrong: wrongs *recognised* by at least the majority of a society; in contrast, *mala prohibita* crimes are not pre-legally wrong, and are only criminal by virtue of legislation (or by common law).⁵¹

To clarify conceptually the process of criminalisation, it is necessary to consider ‘whether they are legally or only sociologically defined processes’.⁵² The process of criminalisation, in elucidating the systematic and constitutional functions of criminal law, should be established from the wider social and political contexts of the principles it attempts to uphold. In *PART I*, it was explained why

⁵¹ *Monica* (n 25).

⁵² Frank Meyer, ‘Towards a Modest Legal Moralism: Concept, Open Questions, and Potential Extensions’ (2014) 8(1) *Criminal Law and Philosophy* 237, 241.

it is more realistic to view criminal law from a societal perspective. Criminal law (and the imposition of criminal responsibility) is not only an individual matter; it is also an instance of State response to certain wrongdoings and a matter of interpersonal relationships. Criminal law is also a matter of judgement: the imposition of a *label*. In general, to label means description without any accompanying attempt of categorisation. The imposition of a label *per se* does not provide the reasons for which the label was imposed in the first place and the associated consequences. However, it would be impractical to operate a purely descriptive system of criminal law, whereby the offender's conduct is set out in narrative form without any attempts of categorising a group of labels sharing similar gravity or characteristics into one category.⁵³ This is because a purely descriptive system is not required to elucidate upon the nature of a crime and the reason(s) for which it is classified as a criminal activity; its function is merely to state the existence of such offence *simpliciter*. From the perspective of a legal moralist, a practical system of criminal law would impose on the convicted defendant a label reflecting the moral gravity of the crime. An example would be the differentiation between murder and manslaughter, and the details on and reasons for distinguishing between the different types of offences. Labelling does not only concern the crime itself, but more importantly, the defendant's legal and social statuses. This is because the label (flowing from the conviction) will be associated with the defendant's future life in the form of a criminal record, possibly tainting it and causing them to suffer from, *inter alia*, less favourable treatment and stigmatisation.

A criminal label is only appropriate if it is based accurately on the crime's essence and the relevant background context. From the context of the act in question, the nature and essence of the act can be elucidated, thus allowing an appropriate label to be attached. For example, the notion 'causing death' in the offence 'causing death by dangerous driving'⁵⁴ reflects its non-murderous nature.⁵⁵ The basis of criminalisation is the dangerous nature of the act and lack of regard the driver has for the safety of other road users. If the legislature fails to substantiate the reasons for criminalisation, any label imposed would be

⁵³ James Chamlers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) MLR 217, 223.

⁵⁴ (n 5) section 2.

⁵⁵ If the defendant is driving with the purpose of killing the victim, they would have been charged with murder instead.

controversial as it would be difficult for legislators to justify their approach to the disputed act. Furthermore, labelling signifies the degree of condemnation that should be attributed to the offender, indicating to the society how the offender should be regarded as. Criminal law speaks to society as well as wrongdoers when they are convicted under it.⁵⁶

2.2 The Multifaceted Nature of the General Part of Criminal Law and its Contributions to the Special Part

The criminal law of England and Wales is composed of two parts. The 'general' part is made up of theories that cross the boundaries between different families of criminal offences; it focuses on the meaning of those individual doctrines and their applicabilities. On the other hand, the 'special' part supplies the details of criminal offences and arranges them into 'families' of offences.⁵⁷ For example, the crime of murder is underpinned by a general part principle and/or value of immorality to deprive one their right to life without lawful justifications, and supplemented by the respective *actus reus* and *mens rea* as defined by common law.⁵⁸

The principles of criminal law applicable to their justifications fall within the general part.⁵⁹ If a traditional account of legal moralism is adopted as our sole or predominant basis of criminalisation, moral wrongfulness would guide our development of criminal law, supplemented by other policy objectives. The constituent elements of each crime, i.e. the special part, would also be influenced by a 'moralistic' general part. Given criminal law answers to practical reasons and

⁵⁶ Chamlers and Leverick (n 53) 226.

⁵⁷ Gardner (n 37) 205.

⁵⁸ The *actus reus* for murder in common law was defined by Sir Edward Coke in *Institutes of the Laws of England* (1797), a document widely recognised as a foundational document of the common law: 'Murder is when a man of sound memory and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in rerum natura under the King's peace, with malice aforesaid, either expressed by the party or implied by law, so as the party wounded, or hurt, etc. die of the wound or hurt, etc. within a year and a day of the same.' The *mens rea* for murder in common law was either an intent to kill (*R v Matthews & Alleyne* [2003] EWCA Crim 192) or intention to cause grievous bodily harm (*R v Woollin* [1999] AC 82).

⁵⁹ Stephen Shute and Andrew Simester, 'On the General Part in Criminal Law' in Stephen Shute and Andrew Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (Oxford, OUP 2002) 4.

principles guiding the State's exercise of coercive power, the resolutions it provides to legal and factual disputes falling within its ambit must be comprehensive and conclusive. Rationality detests loose ends in legal questions.⁶⁰

Regarding the addressees of criminal law as the same poses the threat of ignorance, or at least omitting, of a great deal of information about their character and conduct, and the factual matrix of their cases. This gives rise to questions on the appropriateness of the premise of such account of criminalisation.⁶¹ For example, attributing the same level of responsibility to a defendant with PTSD and a mentally sound patient ignores the former's mental incapacities. This may lead to accusations of unfair labelling. The content of the general part is derived from and can be supplemented by abstract form offences in the special part. Likewise, one's views about crimes, in terms of their essence and reasons for deterrence against them, are influenced by principles in the general part. For example, principles derived from *mala in se* crimes are likely to be radically dissimilar from those derived from a broader sample of crimes, including crimes with moral characters which are not inherently 'wrong'.⁶² This is because the principles derived from the respective types of crimes, given the difference in terms of the gravity of their nature and consequences, are unlikely to be of the same importance. Therefore, for a legal moralist, it is pertinent to guarantee that the use of moral values in justifying the criminalisation of particular behaviours will reflect the gravity of the crime in terms of the label imposed on the accused and the consequences the accused faces in the case of a conviction. This ensures that the demand for moral agency picks up the law's claim to moral authority. This requirement is met if we regard the word 'moral' as indicating the *fundamentality* of the relevant considerations in labelling an act criminal. In recognising a favour of pluralism on top of consistent moral concerns, this captures at least both traditional *mala in se* and *mala prohibita* crimes. However, it will be argued below that legal moralism faces enormous difficulties in criminalising the latter on their traditional reading.

⁶⁰ Gardner (n 37) 206-207.

⁶¹ Lucy (n 48) 205.

⁶² Donald Husak, 'Malum Prohibitum and Retributivism' in Antony Duff and Stuart Green (eds), *Defining Crimes: Essays on the Special Part of Criminal Law* (Oxford; New York: OUP 2005) 66.

2.3 The Varying Influences of Morality in *Malum In Se* and *Malum Prohibitum*

A viable theory of criminalisation must be able to specify the conditions under which criminalisation would not be justified.⁶³ These conditions serve to filter out claims of criminalisation which, despite being cogent on the surface of the argument, are inappropriate when taking into account other factors, for example the actual need for criminalisation and the balance of societal benefits and detriments as a result of criminalisation. Moreover, these conditions are crucial as it caters to social concerns and external influences which may render the criminalisation of 'borderline' offences an unviable option. It would be difficult to explain why the criminalisation of an activity can be warranted unless it is shown that the agent has committed a wrong sufficiently severe to warrant the criminal law's response. In classifying crimes based on the character of their wrongfulness, two categories of crimes may be identified: *malum in se* and *malum prohibitum*.

2.3.1 *Malum In Se*

Mala in se crimes involve attacks on the common goods of a polity, that every reasonable man in the community would identify as 'wrong' (not as a matter of law). In such cases, the role of criminal law is to acknowledge, rather than designate, the wrongfulness of an act through a declaration of criminalisation. An example is murder — an act which every reasonable man would agree is wrongful. They would agree it is morally culpable for one to deprive another of the right to life unless defences are available. Other *mala in se* crimes include rape⁶⁴ and wounding with intent to do grievous bodily harm.⁶⁵ Such crimes do not need to be solely a moral wrong. For a legal moralist, it is easy to justify the criminalisation of *mala in se* crimes. The moral wrong is the wrongfulness of the conduct itself. Adequate responses from a legal moralist will need to take into account and make salient the wrong.⁶⁶

⁶³ *ibid* 73.

⁶⁴ Section 1(1), Sexual Offences Act 2003 ('SOA').

⁶⁵ Section 18, Offences Against the Person Act 1861 ('OAPA').

⁶⁶ Duff (n 2) 231.

When speaking of acting 'morally', we are attempting to protect ourselves from consequences we deem harmful. A great deal of morality is concerned with harm prevention. Central provisions of the criminal law prohibiting heinous crimes, for example murder and rape, are concerned to prevent serious moral wrongs;⁶⁷ they fall within the wrongfulness constraint easily. As *mala in se* crimes violate fundamental moral understandings cherished by reasonable men in a community and pose grave harms to the wronged victims, moral values can easily support the legal, institutional, and political justifications for their criminalisation.

2.3.2 *Malum Prohibitum*

The reasons not to commit *mala prohibita* crimes are post- rather than pre-legal. Although some reasonable men may consider such acts to be morally wrongful, the consensus generated is unlikely to be as strong as *mala in se* crimes. For example, while some may argue that drink-driving⁶⁸ is a moral wrong as it abuses the freedom of consuming alcohol against the safety of other road users, others may contend that no criminalisation is warranted unless the defendant endangers their safety by intoxicating themselves. In such a case, positive legal moralism would fail to explain why the nature of the action itself warrants the criminal law's response. It is because it implies that the combined acts of drinking and driving could always be sufficient to justify criminalisation.⁶⁹ Even if retreating to a negative account, criminalisation would still be difficult to justify as the relevant moral contentions imply there are competing issues and claims to balance. Not only is the satisfaction of the wrongfulness constraint debatable, but it would also be difficult for a reason to serve as *the* determinative negative reason for criminalisation.

The existence of *mala prohibita* crimes also requires doctrines in the general part to provide a principled basis of criminalisation which can be independent of morality.⁷⁰ Such basis should not afford moral values a significant weight. The general part, in using moral wrongfulness as guiding principles, should have regard to objectives the criminalisation of an act seeks to achieve. For example,

⁶⁷ Thom Brooks, 'Unlocking Morality from Criminal Law' (2017) 14(3) *Journal of Moral Philosophy* 339, 342-343.

⁶⁸ (n 5) section 4(1).

⁶⁹ David Brink, 'Retributivism and Legal Moralism' (2012) 25(4) *Ratio Juris* 496, 507.

⁷⁰ Husak (n 62) 67-68.

parking offences are not created gratuitously, but as an element of some general transportation strategies. In such an instance, the law acts as a conduit to the strategic objectives. Correspondingly, the reasons for one to refrain from committing such offence are twofold: (i) respect of the law's authority, and (ii) respect of the further objectives underlying criminalisation. At this point, the objectives themselves can incorporate moral values of, for instance, mutual respect between road-users.

Although *mala prohibita* crimes are generally less severe compared to *mala in se* crimes, this does not diminish the requisite cogency of justifications underlying their criminalisation. In using 'objectives' as a yardstick, the focus of criminalisation may deviate from its structure. This leads to a failure to respond to the problems giving rise to propositions of criminalisation in the first place. It is usually very hard to discern moral values that underpin *mala prohibita* crimes: there are either significant controversies, or there is only trivial attention to the moral basis of the crimes. To remedy such a deficiency, Antony Duff suggests that a *malum prohibitum* crime should be framed as an act that is not wrongful before the legal regulation that prohibits it; the key is to separate the questions of *enactment* and *enforcement* of legislation of the crime.⁷¹ The former question concerns a decision to regulate the act, and the latter question concerns the necessity of a legal mechanism delineating the details of regulation. This proposal is worthy of examination as it connotes the notion of responsibility discussed in *PART I*.

For *mala prohibita* crimes, the claim 'because it is the law' is part of a citizen's reason for action. Any claims to obedience based solely on this phrase are tautological. However, the enactment of criminal legislation generates a sense of citizenry responsibility to comply with the legislation. The prohibited act is now publicly marked. Once the relevant legislation is enacted, every concerned individual⁷² would have a moral responsibility to respect others coming under its protection. Every individual enjoys an equal moral status before it. It is not only a responsibility to the individual themselves as a moral agent, but also to the concerned *group* of individuals. A breach of such responsibility thus constitutes a

⁷¹ Duff (n 7) 90-92; Duff (n 14) 128-129.

⁷² The qualification 'concerned' is added since *mala prohibita* crimes often respond to issues which do not concern the whole community. For example, an adult without a driver's licence is not a 'concerned individual' vis-a-vis a law laying down speed limits on highways.

moral wrong. It is because it equates to putting themselves in an unequal position compared to others, obtaining advantages they would otherwise not receive. In criticising Antony Duff's account, Thom Brooks suggests it may trivialise non-*mala in se* crimes as crimes which we merely have some good reason to criminalise.⁷³ Whilst Antony Duff's account may trivialise the non-moral reasons relevant to criminalisation under legal moralism, it is submitted that a recourse to the notion 'responsibility' strengthens the basis of criminalisation by illustrating the defendant's violation of established moral norms and responsibility to respect the law. The question of enforcement can then replace the inquiry on a good reason for criminalization; the key question would become whether the satisfaction of such good reason *per se* would be sufficient to include it under the ambit of the now-criminalised act. Such responsibility, unlike responsibility under *mala in se* crimes, is *artificially constructed*. Responsibility under *mala in se* crimes, in contrast, arises from the wrong inherent in the act itself.

2.4 The Insufficiency of Mere Categorisation of Crimes in Explaining the Coercive Nature of Criminal Law

In the preceding analysis, it is argued that private moral accounts provide weak justifications. When the 'we' are to 'do something' as a polity, or a government acting on a polity's behalf, the claim that 'X is our business' must be grounded in some conceptions of the *res publica* — of what the policy's enterprise of norms and values includes. In recognising the collective nature of the action and making the relevant wrong(s) salient, it is also necessary to provide a normative account of the nature of the act in question.⁷⁴ By making the wrong and any unspoken moral principles salient, the general part of criminal law becomes more well-equipped in placing moral values as a significant concern in detailing the particulars of a proposed offence.

The criminalisation question cannot be detached from the wider social and political contexts.⁷⁵ It needs to be answered with a normative account underpinning the condemnable nature of offences and the purposes of labelling such behaviour as 'criminal'. The notion 'public wrong', despite ostensibly encompassing both general and specific parts of the criminal law, only offers

⁷³ Brooks (n 67) 344.

⁷⁴ Meyer (n 52) 240-241.

⁷⁵ *ibid* 241.

limited coverage for *mala in se* crimes.⁷⁶ For instance, to argue rape and murder are public wrongs because they injure public morality distorts the focus on the type of wrongfulness that makes them criminalisable. The wrongfulness of rape and murder that renders them criminal offences is not solely grounded on their offensiveness to public morality. Their fundamental wrongfulness concerns a simpler issue: an unjustifiable attack against and injury to one's bodily integrity. The criminal law is not merely moral law given institutional form. It is a component of the political structure of the State, which caters to both individual and public interests. Furthermore, the notion becomes more problematic in the context of *mala prohibita* crimes. In defending the applicability of legal moralism in justifying the criminalisation of such crimes, Antony Duff argues they can be specified on the ground of citizenship.⁷⁷ By virtue of being a citizen of a particular society, they are expected to be guided by their moral values reflected in those crimes (and accordingly reject those which are deemed undesirable). Their status as a citizen in a polity is defined by the moral reason(s) to obey the law, such that those not guided by them are subject to criminal sanctions. Whilst appeals to citizenship allow citizens to bind themselves together and provide a consistent account in making a *malum prohibitum* crime defendant answerable publicly, it does not accord with the structure of interpersonal relationships.⁷⁸ The assumption therein is that every member of the polity shares an equal interest in the defendant's actions. While the notion 'citizenship' illustrates the importance of commitment to established norms, a normative account based on legal moralism should nonetheless respond to the nature of human relationships and the private jurisdiction of each individual.

PART III: THE RELATIONSHIP BETWEEN PRIVATE AND PUBLIC ASPECTS OF MORAL WRONGS – A PUBLIC LAW PERSPECTIVE

3.1 Criminal Law as A Matter of Jurisdiction Rather than Morals

Criminal law concerns the exercise of public power by the State; it is not private enforcement of morals. A crime is an official recognition of a wrongful act. An account of criminal law failing to reflect the public nature of the exercise

⁷⁶ Duff (n 7) 141.

⁷⁷ *ibid* 92-93.

⁷⁸ Thorburn (n 3) 22-23.

of such coercive power is inadequate. The 'public' character of a crime is an implication, rather than ground, of its criminalisable character. An appeal to the public character of a crime encourages a consistent normative account to be given because it focuses attention on the idea of 'public'.⁷⁹ Private moral practices, on the other hand, may differ widely from one group of people to another on what is a 'wrong'. Given the differing degree and perceptions on the meaning of 'wrong', it would be dangerous for individuals to be able to use the coercive power of criminal law to punish others on the ground that they have violated private, personal moral codes.

In criticising legal moralism as impractical and failing to appeal to the public aspects of the criminal justice system, Michael Thorburn proposes a 'public law account' of criminal justice, focusing on the legitimacy of the use of State power.⁸⁰ This account offers a direct rebuttal against the positions advanced by Antony Duff and John Gardner. On this account, criminal law delineates and regulates the 'private' jurisdiction of individuals; this refers to the sphere of autonomy within which individuals are allowed to act freely solely based on their own will. It would also see the use of the State's power as a matter of exercising its 'public' jurisdiction. State power would be exercised for protecting both private and public jurisdictions in the case of an unjustified transgression of either of them by an individual. The question criminal law should focus on, Thorburn argues, is the wrongfulness in *usurping* jurisdiction.⁸¹ In identifying jurisdiction as a key tenet justifying the use of State power, Thorburn accurately recognises that it would be impractical and unjustified for the exercise of such power to be grounded solely in the wrongs committed by the defendant. The occurrence of wrong by a morally objectionable act does not *per se* warrant the deployment of criminal law to prohibit it.

'Jurisdiction' of individuals is important in the context of the present article because it appeals directly to the structure of interpersonal relationships, a matter discussed in *PART I*. The key point of defining and allocating jurisdictions is to allow them to be exercised by its holders. In criminal law, jurisdiction is crucial because the State needs to maintain the equal legal and moral status of individuals, the latter of which is balanced by the use of criminal sanctions in the case of any

⁷⁹ Duff (n 7) 142.

⁸⁰ Thorburn (n 3) 24.

⁸¹ *ibid* 41.

violations by one. It does so by allocating spheres of jurisdictions to individuals reflective of their status.⁸² If legal moralism is applied in full force in such context, there will be an ill-substantiated distribution of jurisdictions. This is because it would fail to explain why it is the State, and the State only, that should use its power to respond to the wrong(s) committed by the defendant, and the private moral injuries suffered by the victim. By focusing on the wrongfulness of a particular infringement of jurisdiction, although a common view of the ‘wrong’ in question can be elucidated, it does not explain whether such use of State power is appropriate. A convincing account of criminal law must specify some values that can be considered as part of the polity’s self-definition. Whilst this ostensibly resembles the concept of *soulcraft* discussed in *PART I*, the present values are different — they have a clear and indisputable position in a liberal legal order.⁸³ *Soulcraft*, on the other hand, is more concerned with the promotion of one’s ascription to ethical values and realising them in their actions.

3.1.1 *The Relationship Between State Powers and Political Authority*

A liberal state guarantees its citizens that they can have their moral preferences without the need to worry whether such preferences will undermine their status as moral equals. While a focus on ‘jurisdiction’ presents no logical flaws in shaping interpersonal relationships and the spheres of State power, it is difficult to see why the law should solely or predominantly focus on them. Such focus ignores the moral status of an individual in defining oneself in a community. It only focuses on the limits of the sphere of permissible activity, without providing an account for the content of values and principles within the sphere of permissible activity. Moreover, a public law explanation may also fail to define the character of the moral wrong underlying a criminal act in the general part of criminal law by only focusing on the State’s exercise of power, but not the reasons underlying so.

The seriousness of a wrong is unlikely to have sufficient gravity to warrant criminalisation *per se* unless the wrong is first shown to be a public one.⁸⁴ The bulk

⁸² For example, a doctor has jurisdiction to perform treatment in a medical emergency in order to save a patient’s life.

⁸³ Thorburn (n 3) 23-24.

⁸⁴ Duff (n 7) 144. Wrongs satisfying such gravity are likely to be the most serious *mala in se* crimes, for example murder.

of the law must at least represent the majority's view of common goods. Where individual self-interests are likely to conflict with one another, it is necessary to uphold the promise of equality before criminal law, thus justifying the use of State power.⁸⁵ Whilst the classification of an act as 'criminal' marks a public response, this does not by itself make the crime affect the 'public' as a whole. In contrast, some wrongs remain a public matter even if committed in private and are solely targeted against the victim. An example is violent domestic abuse:⁸⁶ it is a wrong against interested individuals, and frequently, women in general. Compared to a public law account, a moralistic account may import an illiberal conception of criminal law. That being said, if Michael Thorburn's account is to be preferred, its examination cannot be reliant on the public perceptions of criminal law. It is necessary to check against the exercise of jurisdiction not as a matter of fact, but mutual respect for moral values between individuals. It is because a sole focus on a public law account may ignore the moral values which shape the status of an individual in a polity. It also ignores the mutual contributions between individuals to uphold moral values, and any changes in *moral* status if one fails to do so. Therefore, in terms of involvement of State power and public law concerns, the political aspect of criminal law should be understood as part of a larger institution of the State's exercise of political power.⁸⁷ The next section will discuss how the conception of crimes as a hybrid matter of public law and morality, instead of solely relying on either account, provides a comprehensive account of criminalisation and articulates the nature of interpersonal relationships.

3.2 The Comprehensiveness of a Hybrid Account in Explaining Offences Causing Physical Harm to Another

This section examines two offences: manslaughter resulting from loss of control⁸⁸ and rape.⁸⁹ It argues that a traditional account of legal moralism does not provide a comprehensive solution in substantiating their criminalisation. It will also discuss the potential limits of enforcement of 'jurisdiction' in the context

⁸⁵ Dworkin (n 17) 205.

⁸⁶ Domestic abuse can take place in a wide variety of forms against not only spouses but also other members of the family, for example children. The most relevant legislation criminalising different types of domestic abuse is the Domestic Violence, Crimes and Victims Act 2004.

⁸⁷ Brooks (n 67) 349.

⁸⁸ Sections 54-56, Coroners Justice Act 2009 ('CJA').

⁸⁹ (n 64) section 1.

of the two offences below, arguing it can be remedied by recourse to moral values and a moral definition of ‘wrong’. This discussion aims to establish that private wrongs, in light of the deficiencies of legal moralism as identified in *Parts I* and *II*, can and should be criminalised under a jurisdiction-morality hybrid account.

3.2.1 *Voluntary Manslaughter by Loss of Control*

The reason for the present focus is twofold: firstly, this subsection examines situations where the defendant’s moral qualities are highly disputed, instead of instances where one suffers an abnormality of mind. Secondly, this partial defence reflects the Aristotelian account of responsibility. Voluntary manslaughter by loss of control is *prima facie* a private matter. On a literal interpretation, it focuses only on the relationship between the victim and the defendant. If successfully established, it gives rise to a manslaughter conviction instead of murder.⁹⁰ As a *malum in se* crime, it satisfies a legal moralist’s principles for criminalisation with flying colours. However, the recognition of the act of killing as non-murderous ostensibly defeats the premise of moral wrongfulness. As the defendant is deemed *justified* in acting in a *wrong* way, it must be inquired whether moral values can have any influence in defining the Homicide Offence.

Kate Fitzgibbon argues the Homicide Offence recognises that the emotion of fear can lead to the perpetration of lethal violence which warrants a manslaughter label.⁹¹ Section 54(1) CJA 2009, in stating the contribution of ‘qualifying triggers’⁹² to the defence, recognises the non-murderous moral quality of the defendant’s intention. On the other hand, the exclusion of section 55(6) factors as valid triggers recognise the limits of using moral fallibility as a justification for imposing a manslaughter but not murder label. Whilst the elucidation of the nature of qualifying triggers demonstrates a considerable influence of moral values on the Homicide Offence, the controversial moral quality of the act renders its use as the sole or predominant basis of criminalisation unsafe. Section 54(4), in excluding ‘desire for revenge’ as a valid loss of control,

⁹⁰ For the purposes of the present discussion (unless otherwise specified), the partial defence will be referred to as ‘**the Homicide Offence**’, as its successful establishment does not result in an acquittal.

⁹¹ Kate Fitzgibbon, ‘Replacing provocation in England and Wales: Examining the Partial Defence of Loss of Control’ (2013) 40(2) *Journal of Law and Society* 280, 305.

⁹² (n 88) sections 55(3)-(5).

recognises two issues. Firstly, it recognises the deliberate infringement of another's private jurisdiction of their right to life as an inapplicable circumstance for the partial defence. Secondly, it recognises the desire for revenge as a moral wrong which does not warrant any exemptions from the coercive power of criminal law. Although the latter issue can be argued as evidence of the influence of legal moralism, it is weak evidence. A desire for revenge is a private moral practice, thus not necessarily warranting the use of State power. Similarly, for the qualifying triggers discussed above, a traditional legal moralist view does not directly explain why the application of triggers make the crime non-murderous, as the triggers focus on the issue of moral *fallibility*, not moral wrongs.

In *R v Dames*,⁹³ the defendant was deemed to have incited violence under section 55(6)(a). On the scope of section 54(1), the Court of Appeal stated that provided there was a loss of self-control, it is immaterial whether the loss was sudden or not.⁹⁴ The moral wrong in question does not have to be constituted by an exhaustive list of short-term factors; it may encompass long-term issues contributing to the moral quality of the defendant's mindset. The court's decision on the ambit of section 55 also illustrates that an interpersonal account of criminal law helps encompass the moral qualities of the defendant: 'Neither qualifying trigger is available to the defendant who has deliberately sought to provide himself with an excuse to use violence'.⁹⁵ This shows how a jurisdiction-morality account can best represent the Homicide Offence in question and other *mala in se* crimes. Firstly, in terms of the moral qualities of the defendant in 'seeking revenge', which is what the legislation is aiming to prohibit. Secondly, in terms of the status of the victim, as the one for whom the defendant is responsible for. Moreover, the high threshold for bad behaviour amounting to an excuse for the use of violence⁹⁶ shows that only a serious moral wrong can amount to a 'murderous' infringement of jurisdiction, thus warranting the State to impose a murder rather than manslaughter label.

From the preceding analysis, it can be seen that the loss of self-control and violation of the victim's jurisdiction is, on Thorburn's account, *prima facie* a moral wrong. The recognition that there are instances where people would lose their

⁹³ [2013] EWCA Crim 322.

⁹⁴ *ibid* [54].

⁹⁵ *ibid* [57].

⁹⁶ *ibid* [58].

control and kill another reflects the limitation on the exercise of State power in convicting one of murder rather than manslaughter. Building on the public response warranted by the killing and the fundamentality of the right not to be harmed without lawful justifications, the Homicide Offence recognises that the influence of moral values can and should adjust accordingly in light of the factual matrix. This is not considered in detail in a traditional account of legal moralism. The aforementioned flexibility is supported by the ‘non-deliberate’ transgression into another’s jurisdiction and the subsequent State response in labelling the defendant as a criminal. In particular, the justifications for State interventions in exercising its coercive power in such cases reflect that a positive legal moralist’s sole focus on the wrong *itself* is impractical. A sole focus on the *wrong* of killing, thus ignoring the contributory factors underlying the act, would *ipso facto* mean all convictions on manslaughter are murder.

3.2.2 Rape

Similar to the Homicide Offence discussed above, rape is a *malum in se* crime. The physical and psychological harms rape victims suffer are undeniably grave. Even if the victim does not suffer any physical harm, the psychological trauma also warrants the State to ensure, by the means of criminal legislation, that such trauma would not be inflicted on anyone. In terms of the *mens rea* of the offence, section 1(1)(c) SOA 2003 states that one commits the offence if one does not reasonably believe the victim consented. This reflects the moral values the offence aims to protect: the respect for another’s bodily integrity and jurisdiction over their sexual autonomy. In *R v Brabam*,⁹⁷ the Court of Appeal recognised that the 2003 Act deliberately did not make genuine belief in consent sufficient.⁹⁸ A defendant’s claim of delusional belief of consent cannot in law render a reasonable belief that the victim consented when she did not.⁹⁹ The recognition of an objective standard of assessment on the issue of belief illustrates the influence of universally recognised wrongs in justifying the criminalisation of illegitimate intrusions of bodily integrity.¹⁰⁰ The lack of consent from the victim and reasonable belief from the defendant also upset the sexual equality between them, with the perpetrator intruding into the sexual autonomy jurisdiction of the victim.

⁹⁷ [2013] EWCA Crim 3.

⁹⁸ *ibid* [36].

⁹⁹ *ibid* [35].

¹⁰⁰ As expressed by the sexual autonomy guaranteed to everyone under the Act.

This also results in inequality in terms of moral status between the parties, with the defendant treating the victim as a means to their sexual desires.¹⁰¹ The violation of jurisdiction by the perpetrator triggers the State's jurisdiction to maintain moral and sexual equality between the parties.

While archetypal rape cases involve immediate inflictions of physical and psychological harms, rape victims can suffer no physical and psychological harm.¹⁰² Such a scenario arises when the victim was unconscious during the incident, suffered no physical injuries, and was unaware of the incident until informed by a third party.¹⁰³ Criminalising such act is *prima facie* inconsistent with the harm principle and legal moralism, as neither harm nor moral wrongs were caused and committed to the victim until and/or unless they were informed of the incident. Without being informed by a third party, the victim may never know about the incident. However, the aforementioned theories do not prevent the law from showing sensitivity to other features of those wrongs in defining them for legal purposes.¹⁰⁴ In the present context, this begs the question of whether the character of the wrongfulness of the action is reflected by the notion of 'wrong' in the legal moralist's sense. Although legal moralism in such instance cannot be applicable in full force, it remains an open question what the exact nature of the wrong in such case of rape is.

In recognising the lack of a necessary link between harm and rape, John Gardner and Stephen Shute argue that the wrongfulness of rape lies in the violation of use-value; its criminalisation should be grounded on the failure of the perpetrator to respect the victim's choice to use their body for activities other than sexual intercourse.¹⁰⁵ As there are no differences between male and female in terms of sexual autonomy, it would be sound to proceed on the premise that everyone has an equal bodily-value to determine their sexual engagements. Whilst the focus on bodily value diminishes the focus on moral wrongs concerning the degradation of the victim's body *upon notification* by the third party, this approach has three advantages in strengthening an account of criminalisation. Firstly, it

¹⁰¹ In light of the perceived sexual equality between individuals.

¹⁰² Section 1(1) SOA 2003 did not stipulate any infliction of harm a condition of conviction.

¹⁰³ For example, the police informing the victim after the rapist is arrested.

¹⁰⁴ John Gardner and Stephen Shute, 'The Wrongfulness of Rape' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford: OUP 2000) 196.

¹⁰⁵ *ibid* 198, 203-205.

recognises the underlying moral wrong and failure for the perpetrator to respect the use-value of another's body. Secondly, it recognises the respective private jurisdictions of individuals and the prohibition on violation of jurisdiction even though no tangible harm is caused. Thirdly, the focus on use-value in articulating offences succinctly places everyone on an equal plane regarding their right to choose how to use their own body. The violation of bodily-value as a moral value triggers the State's jurisdiction to maintain the equality of bodily-value and respect for its use among all members of a polity. A hybrid account effectively articulates the moral values the State chooses to protect, and the necessity to ensure no individual usurps another's private jurisdiction over the use of their own body.

3.3 The Benefits of an Overarching Protection for Interested Individuals by Public Goods and Common Values

In explaining the need to prevent the conflation of individual and common goods under the notion 'morality', Sandra Marshall and Antony Duff propose that criminal law should aim to protect public or collective goods.¹⁰⁶ It should ask whether any individual goods should count as 'common' goods, thus falling under criminal law's protection.¹⁰⁷ For instance, convicting a rapist does not only punish him for his actions, but also making clear *to the community* that they need to see the wrong done to the victim as a wrong done to 'us'.¹⁰⁸ In *R v R*,¹⁰⁹ a husband was convicted of raping his wife. Although the case concerned a marital relationship, it was recognised that the law should evolve in light of changing social, economic, and cultural developments. Marriage was no longer seen as embodying sexual entitlements for men, and all women are afforded equal protection under rape laws. The gradual recognition of marriage as a partnership of equals justifies the criminalisation of marital rape.¹¹⁰ This amounts to a recognition that the harms caused by marital rape are same as non-marital rape,¹¹¹ insofar as women define themselves as a community united by mutual concerns. The immorality of rape against the victim thus concerns all interested individuals. It shows how attacks

¹⁰⁶ Marshall and Duff (n 29) 9.

¹⁰⁷ *ibid* 11.

¹⁰⁸ *ibid* 19.

¹⁰⁹ [1992] 1 AC 599.

¹¹⁰ *ibid* 616 and 619.

¹¹¹ In the context of marital rape, this refers to a general group of women sharing a wrong committed to a member of the group.

on an individual's right(s) under a *Rechtsgüter* can be understood as being simultaneously wrongs against the community the individual belongs to.

A holistic justification of criminalisation in the aforementioned 'public interest' account necessitates the conclusion that the violation of such interest triggers the State's jurisdiction in defending cherished moral values. It also needs to specify some values that can be claimed to be public, the breach of which would necessitate public condemnation.¹¹² That being said, moral wrongs still play a considerable role in delineating the scope of the State's jurisdiction in terms of punishment. The violation of egregious wrongs, for example a desire to revenge under a purported act of manslaughter, would trigger the State's jurisdiction in convicting the defendant of murder instead of manslaughter. In using moral values to sketch the boundaries of the State's jurisdiction in exercising its coercive powers, an account of criminalisation reflects a communal respect for moral values, and the consequences one faces if one fails to observe so. Such an account also shows what responsibilities one owes to another and the protection one enjoys from other's adherence to their responsibilities. It also illustrates the responses one would receive from the State if one fails to observe such responsibilities. Therefore, as a matter of regulating interpersonal relationships and circumstances of State interventions, an account of criminalisation must be conceived as a hybrid account consisting of elements in terms of jurisdiction and morality concerns.

CONCLUSION AND FURTHER REMARKS

This article has argued that it would be impractical for an account of criminalisation to be based solely or predominantly on moral concerns. The account of legal moralism offered by Antony Duff and John Gardner attempts to draw close comparisons between moral wrongs and criminal wrongs, allowing the law to appeal to moral principles in guiding individual behaviour. While a predominant focus on wrong reflects the issues criminal law is designed to tackle, it does not appeal to an individual's status and responsibilities as a member of a polity. It is not only necessary for one to be responsible as a member of a polity, but also to other citizens and the State. In elucidating the nature of acts within the ambit of criminal law, the criminal law also imposes a label of guilt reflective of

¹¹² Duff (n 7) 143-144.

the gravity of the crime in question. As criminal law concerns the exercise of State coercive power, an account of criminalisation requires its foundations and principles to appeal to its public aspects and be accountable to its addressees. To warrant the use of criminal law as a legitimate State instrument, legal moralism would need to reflect its public essence, issues of individual responsibilities, and conflicting opinions on the moral characters of a purported criminal act.

Although a comprehensive account of criminalisation encapsulating defences cannot be sketched in the limited space of this article, such an account can be strengthened by addressing the moral foundations and normative contours of criminal defences. As an account of criminal wrongs, legal moralism provides no direct explanation as to the scope and structure of criminal defences. In defending against a criminal charge, the defendant offers at least one reason for their acts and why they should be acquitted. Whatever notions of ‘motivating’ or ‘explanatory’ reasons based on which one claims to have good reason to act, such reasons are constituted by our desires and choices, and social norms and concerns.¹¹³ They can be based on moral preferences. For legal moralism to play a larger role than the limited position suggested in this article, it would be desirable for an account of criminalisation to respond to such moral preferences as well.

Criminal defences are not merely a matter of reflecting the moral innocence or blamelessness of defendants. It also restrains the State’s use of its coercive powers. Therefore, an account of criminalisation delineating the normative contours of criminal defences necessarily sketches the limits on the exercise of State jurisdiction in responding to alleged criminal behaviour. Such an account should at least offer a theoretical framework regarding the scope and structure of justificatory defences and exculpatory defences. Firstly, for justificatory defences, an account of criminalisation should not only explain the purported moral innocence of the defendant, but also the respective restraints on the use of State power to label the act in question as ‘criminal’. It is because such claims to moral innocence are likely to be controversial.¹¹⁴ Norms not encapsulated under the wrongfulness constraint may be deployed as a basis of a justificatory defence.¹¹⁵ That being said, an account of criminalisation delineating the limits of State

¹¹³ Antony Duff, ‘Rethinking Justifications’ (2004) 39 *Tulsa Law Review* 829, 839.

¹¹⁴ For example, disagreements surrounding a citizen’s right to arrest a suspected offender under section 3(1) of the Criminal Law Act 1967.

¹¹⁵ Duff (n 7) 266.

jurisdiction in, for example, exercising its coercive power against a successful claim of self-defence, may strengthen the normative justification for an acquittal. It is necessary to determine the 'decision-maker' authority of the defendant to define their legal and moral status. Secondly, for exculpatory defences, an account of criminalisation should explain why even if the defendant has committed a moral wrong recognised by the criminal law, it would be unjust to condemn them for not acting differently and better during the incident.¹¹⁶ While it is not necessarily the case that a defendant will be acquitted under an exculpatory defence,¹¹⁷ they are absolved from the criminal responsibility following a conviction. This gives rise to a scenario where a defendant's wrong falls under the wrongfulness constraint, but an exculpatory defence absolves them of any criminal responsibility they would face if the defence fails. Legal moralism, however, provides no direct explanation to such logical contradiction. This calls for an account of criminalisation that is not solely or predominantly based on moral values.

When determining whether the accused is blameworthy, two layers of analysis are necessary: whether the person did anything wrong, and whether the person is responsible for doing it.¹¹⁸ In doing so, an account of criminalisation sketches the process of imposing a judgement on the defendant based on the defence(s) advanced. While questions on the moral character of the defendant serve to articulate their status in the polity they belong to, such questions miss out the relational aspect of individual jurisdictions with one another. English criminal law, in treating every individual as a free and equal moral agent,¹¹⁹ recognises that everyone has their private spheres of actions and beliefs. Beyond discourses on the roles of morality, an adequate account of criminal defences should provide an explanation of the respective restrictions on the State's jurisdictions in exercising its coercive power in light of a successful defence. Therefore, a comprehensive account of criminalisation based on legal moralism can and should address the roles played by morality in both criminal offences and defences. In doing so, it should also articulate the nature of one's responsibility and status in the polity to

¹¹⁶ Duff (n 113) 840.

¹¹⁷ For example, a successful plea of the insanity defence results in a special verdict of 'not guilty by reason of insanity'. It does not result in an acquittal.

¹¹⁸ Gardner (n 37) 237.

¹¹⁹ Thorburn (n 3) 42.

provide a well-substantiated account to the enterprise of criminal law as an exercise of State's coercive power against individuals.