

Crime and the Distribution of Security

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One familiar way to think about criminalization is to think about the constraints that there are on what can be a crime. For example, we might say that conduct cannot be criminalized unless that conduct is harmful. The harm principle, if it is a true principle, provides a constraint on criminalization. We might bolster our armoury of principles, as Douglas Husak has recently done in his book *Overcriminalization*, by adding further constraints. Husak suggests that alongside a harm constraint there is a wrongfulness constraint and a punishment constraint. Conduct cannot be criminalized unless that conduct is morally and publicly wrongful, and conduct cannot be criminalized unless that conduct is deserving of punishment, or so Husak argues.²

Constraints on criminalization provide an important part of a theory of criminalization. But given that any plausible set of constraints will be quite permissive, we ought also to outline the principles that will help us to evaluate proposals to criminalize conduct where those proposals do not violate the best set of constraints.³ In recent work I have suggested that reflecting on the way in which security is distributed by the set of criminal offences that we adopt makes an important contribution to that project.⁴ Here I want to bolster that idea further by investigating the principles that ought to govern decisions whether to criminalize conduct in the light of alternative ways of regulating that conduct.

Most theories of criminalization do not take seriously the comparison between criminalization and other forms of regulation. Perhaps the idea that is most familiar amongst those who do is the idea that criminal law ought to be used only a ‘last resort’. However, with Husak, I doubt that we can make much good sense of this idea.⁵ What does ‘last’ mean in the phrase ‘last resort’? It can only mean, I think, that there is no better alternative; no alternative that is more just and fair, which makes the principle platitudinous. A principle that we should only criminalize if there is no better alternative is quite vacuous. The ‘last resort’ principle should better be thought of as a reminder that criminalization is difficult to justify, and that is mainly because punishment is difficult to justify (or so I will suggest).

The idea of a last resort does also serve as a useful reminder that there are forms of non-criminal regulation of conduct that may be preferable to criminalization. Given what I have just said, we might then ask when forms of regulation will lead to injustice if they are not supplemented or replaced by crimes. When do we need to criminalize because other forms of regulation would be less just than criminalization? The forms of regulation I have in mind here are civil regulations. Within the category of civil regulations I include both non-criminal ‘regulatory’ offences as well as private wrongs, though it is the former that I will mainly focus on.

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² Husak has other constraints as well, some of which are evidential (the burden of proof, for Husak, is on those who wish to criminalize) and some of which are quasi-constitutional (something cannot be criminalized unless the state has an appropriate interest).

³ See, further, V Tadros ‘The Architecture of Criminalization’ *Criminal Justice Ethics*, forthcoming

⁴ ‘Crimes and Security’ (2008) 71 *Modern Law Review* 940.

⁵ D Husak ‘The Criminal Law as Last Resort’ (204) 24 *OJLS* 207.

The distinction between crimes and regulatory offences has never been made fully transparent in my view, and part of the paper will be devoted to developing some ideas about what the distinction is. This, in turn, will allow the development of some ideas about the *significance* of the criminal law. What can and does the criminal law do that cannot or is not done by other forms of state regulation?

By reflecting on the significance of the criminal justice, we will also be in a better position to evaluate different forms of criminal *injustice*. By reflecting on what the criminal law does, we will be in a better position to know when it is misused. And this will also allow us to see when and why these forms of criminal injustice amount to a failure of state to meet its human rights obligations.

The paper is in five sections. One distinctive feature of criminal law is said to be its condemnatory function. In Section I, I will develop in more detail the special condemnatory role of the criminal law and to show how it is distinct from moral criticism in civil law. Another feature of the criminal law is that conviction for a crime warrants punishment rather than mere penalty. Section II will involve an investigation of the best way to understand that distinction. A further distinctive feature of the criminal law is the particular substantive, evidential and procedural protections that it gives to those accused of wrongdoing. In Section III I will draw on Sections I and II to show why special protections are important in criminal law. In Section IV I will use this investigation to outline distributive and non-distributive questions that ought to be answered in an investigation of when to criminalize and when to penalise. Finally, in Section V, I will outline some views about the nature of criminal injustice, and from that suggest some more distinct ways in which states might fail to meet their human rights obligations in the decision to, or the decision not to, criminalize.

I. Condemnation of Agents and Actions

The fundamental and basic obligation of states is to treat people with the respect due to them as moral agents. This governs what states may and must do to individuals, including the things that states may and must say about them. That the criminal law has a communicative dimension is often regarded as of central importance in explaining the moral value that criminal justice institutions may have. It is also often regarded as providing a way of understanding criminal justice policy, including not only the decision to criminalise,⁶ but also the theory of criminal responsibility,⁷ criminal trials⁸ and punishment.⁹ Even those, like I myself, who doubt that the idea of communication is important in justifying punishment will agree that the criminal law plays an important communicative role in convicting offenders and through conviction condemning their conduct.¹⁰

⁶ See, for example, S E Marshall and R A Duff 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7; R A Duff *Punishment, Communication and Community* (Oxford: OUP, 2001) 60-4; G Lamond 'What is a Crime?' (2007) 27 *OJLS* 609.

⁷ See V Tadros *Criminal Responsibility* (Oxford: OUP, 2005), particularly ch.3.

⁸ See A Duff, L Farmer, S Marshall and V Tadros *The Trial on Trial (3): Towards a Normative Theory of the Criminal Trial* (Oxford: Hart Publishing, 2007).

⁹ See, for example, J Feinberg 'The Expressive Function of Punishment' in *Doing and Deserving* (Princeton: Princeton University Press, 1970) and R A Duff *Punishment, Communication and Community*.

¹⁰ See, also, H L A Hart *Punishment and Responsibility* 2nd ed. (Oxford: OUP, 2008) 8; T M Scanlon 'Punishment and the Rule of Law' in *The Difficulty of Tolerance* (Cambridge: CUP, 2003).

The communicative function of the criminal justice system might lead to obligations to criminalize as well as constraints on criminalization. As well as regarding it as wrong to criminalize that which cannot be condemned, we might regard the failure to criminalize some conduct that is seriously morally wrongful as a breach of the obligation to condemn. If that is true states have both positive and negative duties of criminalization, which derive from their positive and negative duties regarding condemnation.

What limits and obligations might its communicative role place on the state with respect to its power to criminalize? One influential answer builds on the idea that state condemnation is *public* condemnation: condemnation in the name of the public. Hence, something should be criminalized only if it is publicly wrong: only if it is a wrong that the public have an interest in seeing publicly condemned in their name as citizens.¹¹ So, for example, even if adultery is (at least sometimes) morally wrong, it might be thought impermissible to criminalize adultery on the grounds that the public don't have a legitimate concern in seeing adultery condemned.

Whilst this sounds plausible, the idea is also somewhat puzzling when criminalization is considered alongside other forms of regulation. Here is the puzzle. If a regulation is just, breaching that regulation will be wrong. And if breaching the regulation is wrong, it is normally permissible to condemn a person for that wrong when they have committed it. Furthermore, as regulations are just only if they advance proper state interests, by which we should mean public interests, the public have an interest in all state regulations being adhered to. And hence they have an interest in seeing those who breach the regulations condemned in the name of the public. So, it seems to follow from the view that crimes are public wrongs that all state regulations ought to be criminal regulations.

One way to resist this conclusion is to deny the claim that citizens have an interest in all state regulations being adhered to, and it will be useful to devote a little space to consider that idea. We might go some way with the law and economics movement and suggest that at least some regulations *price* rather than *prohibit*. If the state, through its regulations, prices behaviour, it indicates that 'breach' of the regulation is permissible if the price is paid. Hence, the regulation conditionally permits rather than prohibits.

For example, suppose that a person breaches a contract and pays compensation. If compensation is set appropriately, requiring the person to pay full compensation, it might be argued, it should make no difference to others that the citizen breaches the contract. That, it might be argued, is *definitional* of full compensation: a person is compensated fully for the breach of a regulation by another person insofar as they would be indifferent when presented with a choice between whether the other person adhered to or breached the regulation. If all people are indifferent between adherence to the regulation and breach and compensation, it might be argued, no-one has an interest in the regulation being adhered to, and hence the regulations surrounding breach of contract are best seen as conditionally permissive rather than prohibitive.

In a moment, I will question whether this is adequate as an understanding of full compensation. For the moment I want to question whether this explanation will be available for many civil regulations. There may be some permissive regulations. In these cases, we might call the money that the person breaching the regulation is

¹¹ Marshall and Duff 'Criminalization and Sharing Wrongs' Duff *Punishment, Communication and Community*, and, in a different way, Lamond 'What is a Crime?' (2007) 27 *OJLS* 609.

required to pay a *tax* rather than a *penalty*. If conduct is costly, we might wish to tax it to ensure that others don't bear the costs of that conduct. However, in a just state, most civil regulations will be prohibitive rather than conditionally permissive.

Why ought we to regard many non-criminal regulations and prohibitive rather than conditionally permissive? One reason is that not all victims of wrongdoing can be fully compensated. Perhaps nothing can fully compensate a person for having been raped or murdered. I leave that aside for the moment as I take it that this is only true of a narrow core of criminal wrongdoing.

Another reason, and one that is more important for my purposes, is that breach of a regulation often imposes moral obligations on others, obligations that they would prefer not to have. This follows from the fact that it is often unjust to make people bear the full costs of their conduct even if full compensation were available in principle. Sometimes justice requires others to share the costs of the breach of regulations. In that case, when a person breaches the regulation, and that breach is costly, a burden is imposed on others to bear some of the costs, either by contributing to the well-being of the person harmed or by ameliorating the burden that the person who breaches the prohibition would otherwise suffer.

The welfare state is the most common way in which the costs of wrongdoing are ameliorated. For example, when one person is harmed by the negligent conduct of another, the National Health Service might ameliorate the costs by providing health care to the victim which the negligent person is not expected to pay for. Citizens shoulder this burden through taxation. Alternatively, where the person breaching the prohibition is expected to pay full compensation initially, the welfare state may make provision to ensure that the person who paid the compensation does not fall into poverty. In that way, others bear some of the costs of breach of the regulation.

If it is true that other citizens ought to bear a burden to help to ameliorate the costs of breach of a regulation, those other citizens will reasonably prefer that the regulation is adhered to rather than breached. If regulations are adhered to they will not have to shoulder part of the costs of breach, and they will either be entitled to more private income, or there will be more public money to spend on other projects. Citizens have a moral obligation to adhere to the regulation because failing to do so imposes moral obligations on others to share the costs of breach of the regulation, obligations that others prefer not to have.

So now we can draw a distinction between different remedies for breach of a regulation. Breach of the regulation is taxed if the person breaching the regulation is expected to pay the full costs of their breach. Breach of a regulation is penalised if the person breaching the regulation only bears part of the costs of breach. That determines whether a regulation is better seen as creating a conditional permission to breach, conditional on the person paying compensation, on the one hand or a prohibition on the other. The state ought to prohibit breach of a regulation if breaching that regulation will impose costs on others. That will be so if others have an obligation to share in those costs. If, on the other hand, the person breaching the regulation can, and can be expected to, provide full compensation for breach, breach of that regulation ought to be priced, and the regulation ought not to be regarded as a prohibition but rather as conditionally permissive. I take it that many regulations, on this analysis, will better be seen as prohibitive in a just state.

It is worth pausing to consider one final thought that bolsters the conclusion drawn at the end of the previous paragraph. Whether a regulation is or is not a prohibition is something that probably must be determined in general. This is simply a consequence of the fact that it is difficult to tailor the nature of prohibitions to suit

individual needs and circumstances. The state ought to declare whether its regulations are intended to be prohibitive or rather conditionally permissive. It is required to do this in order that its citizens have adequate guidance about what justice requires of them. If some individuals can, and can be expected, to provide full compensation for breach of a particular regulation but others cannot, we should normally see the regulation as prohibiting everyone. For, if the regulation is just, justice will be done if everyone complies with the regulation but will not be done if some people who cannot be expected to shoulder the whole costs breach the regulation. This suggests that most regulations are better seen as prohibitions. For, in most cases, some people who breach the regulation will not be expected to bear the full costs of breach themselves. Justice will only be done, in that case, by regular compliance.

In order to determine whether a regulation is prohibitive or not requires us to outline three things. First, we need a theory of full compensation. When should we say that there are no victims of the breach of a prohibition? Secondly, we need a theory which determines how to calculate the costs to impose on those breaching the regulations. When should they be made to compensate for the *actual* costs of *their* breach (as tends to happen in private law), or rather for the *expected* costs of breach (as tends to happen in regulatory schemes)? Thirdly, we need a theory which determines when it will be just to require those breaching a prohibition to provide full compensation, and how costs ought to be shared by which other people when this is not the case. Should the burden be shouldered in part by the victim of the breach, or by other citizens through general taxation?

This diversion into civil law shows, contrary to what H L A Hart thought,¹² that we cannot distinguish crimes from other regulations on the grounds that crimes prohibit. Civil regulations are often best seen as prohibitive. It also shows that breach of a civil prohibition will often be a public wrong. It is publicly wrong in that breach of a civil prohibition will often create moral obligations on others to shoulder part of the costs of the breach of the prohibition. Citizens have good reason not to impose those burdens on others, and hence they should adhere to civil regulations.

We can now return to the idea that criminal wrongs are best seen as public wrongs. The reason why this view is problematic should now be clear. Breach of civil regulations is often publicly wrongful as well, in that breach of civil regulations often wrongfully imposes moral obligations on others to share in the costs of breach. Consequently, there is no reason in principle why such breaches cannot be condemned. So it seems that the view that criminal wrongs are public wrongs drives us to the idea that we should criminalize much of the conduct regulated by the civil law. It seems to lack resources to provide a plausible distinction between civil and criminal wrongdoing.¹³

In the light of this concern I propose a different way in which we might distinguish between civil and criminal prohibitions, which also takes seriously the intuitive idea that the criminal law has a special role in condemning wrongdoers. Focusing on the distinction between public and private wrongs, I have suggested, fails to provide a plausible distinction between criminal and civil law. In fact, we have good reason to be sceptical about *all* theories that focus solely on the nature or substance of the wrongdoing as a way of distinguishing between what ought to be civilly regulated and what ought to be criminally regulated.

¹² *Punishment and Responsibility* 2nd ed. (Oxford: OUP, 2008) 6.

¹³ In this respect, it is similar to a deficiency of retributivist accounts of criminalization, on which see V Tadros 'The Architecture of Criminalization'.

Rather, I suggest, we should focus on two things. Firstly, the ways in which criminal and civil substance and procedure tend to distribute risks and burdens between citizens. And secondly, on the fact that criminal law makes people liable to be punished whereas civil law does not.

Criminal procedure and criminal law provide greater protections to those accused of breach through the principles governing the substantive law and through procedure. Criminal prohibitions ought to be narrowly defined around wrongful conduct. Furthermore, offences often do, and ought to, require the prosecution to prove *mens rea*, normally requiring proof of awareness that the harm will be suffered by the victim or something akin to that.¹⁴ Secondly, criminal procedure requires a high standard of proof of all elements of the prohibition, with a range of procedural protections in place to protect citizens against wrongful convictions. Civil prohibitions, in contrast, are defined more broadly, either without *mens rea* or with broader fault standards, and less protection is provided by civil procedure against wrongfully being held liable for breach.

Higher standards of protection are required in the criminal law in part because the criminal law makes defendants liable to be punished if they are convicted. In order to establish that this is so we need to know what is special about punishment, something that I will address later. But the protections that criminal law gives to citizens from being punished also create the conditions under which individuals can rightly be condemned for their conduct.

The idea is as follows. A person can be condemned for their conduct only if the court has knowledge that the person is deserving of that condemnation. It is *only because* criminal offences are defined in a narrow way with *mens rea* and criminal procedure places a high burden on the prosecution that criminal courts can claim knowledge that defendants deserve condemnation.¹⁵

On this view, the reason why the criminal law but not the civil law can condemn defendants for what they have done is not because breach of civil regulations is not publicly wrongful. It often is. It is because civil procedure and substance ensure that establishing that liability ought to be imposed is insufficient to *show* that the person breaching the regulation deserves condemnation for what they have done. Because of the lower standard of proof, for example, the most that the civil law can say is that the person *probably* breached the prohibition. And because civil regulations have weaker (or no) *mens rea* elements, the civil law can only say that the person *would be* worthy of condemnation for breach if they were to have had the requisite degree of fault.

In other words, breaching civil regulations is often worthy of condemnation. But the substance and procedure of civil law ensures that civil courts normally lack the knowledge that would be required for condemnation of those that breach those regulations. The civil law can prohibit, and in doing so it can indicate that breach of the prohibition, if it is done with fault, will be morally wrongful. But it lacks the epistemic resources to condemn those that breach the regulations for what they have done. Only the criminal law, then, can ‘get personal’. Only the criminal law can condemn the defendant. Because only the criminal law has the ability to create the epistemic conditions under which this is warranted.

¹⁴ It is, of course, heavily contested whether objective definitions of recklessness are justified in the criminal law. For some further thoughts on the issue, see V Tadros *Criminal Responsibility* ch.9.

¹⁵ See further A Duff, L Farmer, S E Marshall and V Tadros *The Trial on Trial (3): Toward a Normative Theory of the Criminal Trial* (Oxford: Hart, 2007) and V Tadros ‘Rethinking the Presumption of Innocence’ (2007) 1 *Criminal Law and Philosophy* 193.

The lesson that is intended by this section is as follows. If the state wishes to see individuals condemned for what they have done it must use the criminal law. But the state may indicate what conduct *will be* wrongful through the civil law. Civil law may indicate what is publicly wrongful, but only the criminal law has the resources to condemn individuals for perpetrating public wrongs.

This also suggests one reason why criminalization of some conduct is required rather than merely permitted. A state that fails to criminalize rape, for example, fails to create a forum in which those who rape can be condemned for what they have done. And it may be that the state has an obligation, perhaps even a human rights obligation, to victims of those crimes to ensure that there is a forum in which offenders can properly be condemned for what they have done. Criminalization of rape, defined in a way that reflects the moral content of the wrong, might be an obligation of the state, even if other schemes of law would have more success in reducing the crime rate.

Even if this is true of central offences such as rape, however, it will not be true of much wrongful conduct. For many wrongs there is some reason to create a forum for public condemnation, but that reason is not strong enough to ground requirement to criminalize. That, I think, is true of both breach of contract and of theft. These things are often morally wrong, but they are not so wrong that it is imperative that we condemn those who breach contracts and those who steal for what they have done. It is surely sufficient that the state, through civil law, indicates that breaching contracts and stealing are wrong without condemning each person who perpetrates those wrongs. If there are strong reasons to criminalize either or both of these things, they are to be found outside the need to condemn wrongdoers for what they have done.

II. Punishments and Penalties

We have already considered and rejected one way in which we might decide whether to criminalize something based on the special role that the criminal law has in condemning conduct. This idea, I suggested, does not determine whether something ought to be criminal or rather civilly regulated in most cases. Only with respect to very serious core crimes can we say that there is an obligation to criminalize. Were there an obligation to criminalize all public wrongs, we would face the unpalatable prospect of criminalizing most of the civil law.

An alternative to the focus on the condemnatory function of the criminal law is a focus on its link to punishment. We might say that some regulation is criminal if and only if punishment is warranted for breach of that regulation. If this is true, we ought to criminalize conduct only on condition that that conduct ought to be punished, and that might provide a constraint on the scope of the criminal law. Civil regulations are to be distinguished from criminal regulations on the grounds that civil regulations warrant penalties rather than punishment.

Husak defends this idea primarily from a retributivist outlook. On this view, punishment is aimed at making people suffer when they deserve to suffer, and people deserve suffering only if they have acted in a way that is morally impermissible. This view faces similar problems to those outlined in the previous section. The breach of any state regulation that is just (other than the rare permissive regulations considered in the previous section) is morally wrong. Hence, retributivism faces the prospect of criminalizing the whole of the civil law.

Husak does also claim that conduct is not punishable if compensation is adequate for the harm suffered. That is a suggestion that I will try to flesh out and

motivate later. But it is also difficult for retributivists to justify. After all, why would a retributivist wish to withhold punishment from ‘civil’ wrongdoers, failing to give them what they deserve? Would it not be in violation of its moral obligations if it did so? So there is always at least some reason to punish those who breach civil regulations, and hence to make those regulations criminal.¹⁶

The proposals that I will develop assume an alternative theory of punishment, one based on general deterrence. Whilst deterrence theories of punishment are often defended by consequentialist moral philosophers, I think that they are better defended in the light of non-consequentialist considerations. I will not have space to defend that theory in any great depth here, and I will restrict myself to a few comments.

If punishment is to be justified on the grounds of general deterrence, offenders are made to suffer as a means to improve security of citizens from suffering future wrongs committed by other people. This seems to violate a central non-consequentialist constraint that people are not to be treated as a means. However, the means principle, whilst important, is not best thought of as without exception. From a non-consequentialist perspective, three things might be regarded as important in securing the plausibility of general deterrence as part of the justification of punishment:

- 1) People have an adequate opportunity to avoid suffering punishment given adherence to the rule of law and other principles of criminal law. This permits them to be treated as a means where otherwise there would be a constraint on doing so.
- 2) Breaching the law only renders offenders liable to suffer proportionately to their crime, so citizens are given adequate protection against being made to suffer extensively even if the opportunities that they are given to avoid punishment through a system of public laws turn out to be insufficient.
- 3) The punishment of offenders prevents others suffering a burden that is comparable to that suffered by the offenders who are punished and which they would not otherwise have an opportunity to avoid. So were it not for the fact that offenders are punished, someone else would suffer without adequate protection against that suffering.

Non-consequentialist theories of punishment of this kind have great promise, although they are underdeveloped in the literature.¹⁷ They can be defended using less controversial resources than retributive alternatives and they are resistant to many of the objections that have been raised against consequentialist theories. For example, they rule out punishment of the innocent even if harming them thus creates greater benefits to others. This is on the grounds that a person cannot be used as a means where they have not been given an adequate opportunity to avoid being harmed. And they have resources rule out disproportionate punishments even if this has small additional benefits in security for many people.

What is the distinction between punishment and penalty on this view? Punishment is not distinctive in imposing suffering on people. A person may also suffer as a result of a penalty scheme. The distinction is rather that a penalty scheme is not *aimed* at suffering. Punishment aims at the suffering of wrongdoers to deter

¹⁶ I discuss this in greater detail in ‘The Architecture of Criminalization’.

¹⁷ The broad outlines of such a theory are sketched by T M Scanlon in *What We Owe to Each Other* (265-7) and ‘Punishment and the Rule of Law’ in *the Difficulty of Tolerance* (Cambridge: CUP, 2003).

others. It is, in that case, an example of something bad that it is permissible to do for pursuit of the good. Penalties, in contrast, are aimed at redistributing wealth. They are aimed at ensuring that those that breach regulations bear the costs of breach rather than those that suffer from the breach of the regulations. In other words, penalties aim at redistribution of extant costs whereas punishment aims to reduce suffering of some by imposing suffering on others. Hence, punishment makes people suffer as a means to protect others. Penalties don't.

The greater the scope of the criminal law, on this view, the greater the circumstances in which people can be made to suffer as a means. This also provides a reason why we should be wary of criminalization. People who are punished lose their status as ends in themselves. They are treated merely as a means. And we will wish to protect people from this fate. It is not only the suffering that punishment involves that people will want to be protected from. It is also, and perhaps more importantly, the fact that punishment is justified only if the status of the person punished, as an end in him or herself, is eroded. Finally, that provides a reason not to criminalize: where we criminalize some new action we increase the range of actions the performance which makes the person liable to be treated as a means. We expand the range of things that a person's status is conditional upon. In other words, decisions to criminalize need to be evaluated in terms of their implications for the status of people. Other things equal, we should prefer to reduce the scope of the criminal law because this reduces the range of actions that make us liable to be treated as a means.

We will sometimes want to both penalise and to punish breach of regulations. We penalise in order to ensure that the costs of breach are appropriately redistributed from people who breach to victims of those breaches. We punish in order to reduce the number of victims. And sometimes punishment and penalty can be imposed in the same way: a fine may impose a penalty, in that it gathers resources to compensate victims as well as being intended to make the person suffer. Hence the attraction of fines: through fines we kill two birds with one stone. But this also sometimes makes it difficult to work out whether a regulation is criminal or civil. If the consequence of breach is the imposition of a fine, in order to establish whether the regulation is criminal or civil we need to know the purpose for which the fine is imposed: is it solely to compensate or is it also to deter others. If the latter, then the fine is a punishment, and the regulation should be regarded as criminal.

Substance and Procedure

A further distinction between criminal and civil regulations has to do with the procedural and substantive protections that are provided against being held liable in each case. Criminal offences ought normally to require the prosecution to establish *mens rea* as well as having a full range of defences available. Civil regulations, in contrast, may be offences of strict liability and only a more limited set of defences will be available to avoid civil liability. Criminal convictions are warranted only if the prosecution has proved all offence and defence conditions beyond reasonable doubt. Civil liability may be imposed on a lower standard of proof, as is commonly the case in private law, and with respect to defences in civil regulations. There are also a range of evidential and procedural protections that are available in the criminal law that need not be available in the civil law, including greater rights to legal representation, participation (and non-participation) rights, tighter constraints on the admissibility of evidence, and so on.

Civil regulations thus give citizens less protection against liability when compared with criminal regulations in two ways: by making it easier to avoid breaching the regulation and by lowering the procedural and evidential standards for the imposition of liability. Of course, *mens rea* terms in criminal law do not only provide protection against liability, they also serve to mark out the nature of criminal wrongs, and that is important for condemnatory purposes. Here my focus is on protection against liability to suffer punishment or penalty rather than condemnation.

How might we justify weaker substantive and procedural standards in civil regulations? In private law, we can justify this from the perspective of victims. Higher standards would make it more difficult for them to claim compensation. We balance protecting the interests of plaintiffs and defendants in private law. Things are more complicated when we consider civil regulations, but the complications will also be instructive.

Suppose that we develop civil regulations to control some behaviour where breach of the regulations is costly. Fines are imposed which are aimed at compensating those who are harmed by breach of the regulations. Why might we choose a scheme like this over a private law scheme?

First, we do not require private citizens to bring actions against those that harm them, and we thus make it less burdensome on them to mitigate the harm that they have suffered. Secondly, we may distribute the costs of the conduct regulated more fairly amongst those that breach the regulations. We might reduce the influence of luck in the magnitude of the harm that is caused by the breach. All of those who breach in a similar way might be made to pay equal costs regardless of the harm that they cause. Between their contributions can be set in a way that is sufficient to compensate all those who are harmed, or, as we will see, it may do less than that. Thirdly, we may ensure that whether those harmed by the regulated conduct are compensated is less sensitive to luck. Compensation might be provided to victims of breach where the person who breached the regulation cannot be found, or where that person has insufficient funds to pay, or where the person breaching the regulation was not at fault. Fourthly, it may be easier to ensure that those breaching the regulations shoulder a fair burden of the costs of investigation, prosecution and enforcement through a scheme of civil regulations than it is in private law.

With respect to any such scheme, there is also the possibility that part of the costs of breach will be borne by the taxpayer rather than by those who breach the regulations or victims of breach. That may occur directly, by taxation being paid into a compensation scheme, or indirectly through provision of subsidised or free health care and other features of the welfare state.

In the light of this, how might we justify reducing substantive and procedural protections against liability? We might do so in order to increase the number of people on whom liability is imposed, reducing the amount that must be paid by each. Suppose that we fix the cost that is borne by the taxpayer and the cost that is borne by victims of breach. By increasing the number of people who are held liable, the amount that each must pay in compensation is reduced.

In doing so, we reduce the protections that people have against being held liable. But we reduce the burden on each person who is held liable. And it may be in the interests of each person to have a greater risk of being held liable imposed on them but with a reduced quantity of liability. In this way, on the one hand we tend to distribute costs of breach of the regulation to people who had an opportunity to avoid bearing those costs, in that the taxpayer or the victim, who have little opportunity to avoid bearing the cost, do not foot the bill. On the other hand, we do limit the

opportunity to avoid bearing the cost to some degree by reducing protections on the imposition of liability. Even if regulations are announced in advance, it may be difficult and costly to avoid liability if the regulation is strict liability and if evidential standards are reduced. We do that in order that each person who is held liable does not bear too great a burden.¹⁸ Hence, civil regulations might be thought a compromise measure between either on the one hand distributing the costs to all citizens through general taxation or by making the victim bear the costs, or on the other hand giving maximum protection against being held liable but distributing the costs of liability very narrowly.

The question that must now be faced is why this kind of analysis is not available for the criminal law. In the criminal case, could we not also reduce the protections available in order to distribute burdens more effectively? There are two parts of the answer to this question. The first focuses on punishment and the second on the epistemic and procedural requirements for condemnation.

Let's focus on punishment first. It is *possible* to distribute the burden of punishment more broadly by reducing protections to each person, assuming that general deterrence provides the main justification of punishment. To see this, suppose that there is a particular deterrent effect that we currently achieve. We could achieve the same deterrent effect by reducing protections provided to each person and at the same time reducing the severity of the punishment. Reducing the severity of the punishment would reduce the deterrent effect to a degree, but this could be compensated for by the extra deterrent effect of making it more likely that a wrongdoer will be convicted. If we were to do that we would effectively share the burden of deterrence more widely amongst people who are convicted.

Of course, only some people who are convicted are wrongdoers, so we increase the risk to each citizen that they will be wrongfully convicted. And hence we increase the risk that the citizen will be used in a way that is difficult or impossible for them to avoid. A system that does this reduces the control that each person has to be used as a means. As people have good reason to value having control over whether they are used as a means, we have good reason to reject this system. And that reason is even stronger when the agent that would so treat them is the state.¹⁹ We would prefer to keep control over our status as ends in ourselves, particularly when our status is eroded by the state, even if greater burdens are in consequence imposed on those people who voluntarily violate the law and are convicted of a criminal offence.

In other words, we have powerful reason to ensure that our status as an end rather than a means is protected by ensuring that it is eroded only when we have a proper opportunity to avoid that erosion. That is so even though people who do not avoid being treated in that way each suffer a greater burden in consequence. We are willing to distribute suffering more narrowly and at a greater cost to each person in order to do more to protect our status as ends in ourselves.

Now let's turn to condemnation. I have explored the question of the role of condemnation in justifying high standards of protection in criminal cases and I will

¹⁸ Stephen Perry notes that strict liability in tort law is normally defended by libertarians, who claim that one must bear the full benefits and the full costs of one's actions. See 'Risk, Harm, and Responsibility' in D G Owen *Philosophical Foundations of Tort Law* (Oxford: OUP, 1995) 339-345. Perry rightly notes that this implausibly assumes that bringing about harm is a one way street rather than an interaction between two people. The argument here that those concerned with distributive justice might also favour strict liability on different grounds to Perry, grounds that avoid his objection.

¹⁹ See also T Nagel *Equality and Partiality* (Oxford: OUP, 1991) 142-3.

reiterate the main ideas only briefly here.²⁰ The suggestion is that high standards of protection must be provided in criminal cases because of two features of condemnation.

Firstly, condemnation is appropriate only if we know that it has a proper factual and normative basis. There are high epistemic standards that must be met to justify condemnation. If we only have a belief that the defendant *might* have perpetrated a moral wrong, the best we can say is what the civil law says: that *if* the defendant has perpetrated the moral wrong that we have reason to suspect him of perpetrating, his conduct would be worthy of condemnation. In order for those standards to be met, it is insufficient that the prosecution must establish that the defendant committed the offence beyond a reasonable doubt. At least two further things must be established: that the defendant lacked a valid defence that would render it morally permissible to commit the offence and that the offence describes something which is morally wrong.

Of course, there are also sometimes reasons of accuracy for allowing some trial protections when benefits and burdens are being distributed. But, for one thing, accuracy itself is to be understood differently in civil trials than in criminal trials. Procedures are accurate in civil trials insofar as they tend to distribute burdens and benefits fairly between people in the way outlined above. A system that fails to impose liability often enough is also to be regarded as inaccurate, in that it requires victims or taxpayers to shoulder the burden of the regulated conduct when justice requires that burden to be borne by the person who breached the regulation. Accuracy in criminal trials, in contrast, is importantly focused on the defendant: trials must be accurate in part because condemnation of the defendant must be warranted. That is nothing to do with distribution. A failure to hold the defendant responsible does not render the verdict inaccurate, in that a not guilty verdict does not declare that the defendant *is* innocent, only that he is to be *treated* as innocent.²¹

Secondly, public condemnation of a person ought normally to be made only if that person has been engaged in a practice of responsibility which provides the person with a proper opportunity to respond to the charge made against them. We condemn someone as part of a communicative practice of responsibility, and practices of responsibility must treat people as autonomous agents who are capable of responding to moral reasons. A person who is condemned in a practice of responsibility such as a criminal trial is asked to recognise that their judgement has been defective. And when such an invitation is made, a person is entitled to provide a range of responses; for example that the terms for condemnation are deficient, for example by not describing something that should be regarded as morally wrong, or that the evidence which is relied on ought not to be relied on. This gives rise to a range of rights that a person has to respond to accusations that are made against her, to scrutinise the evidence against her and so on.

If we are aiming merely at the distribution of benefits and burdens we need not always provide people with these communicative opportunities. As the person's judgement is not an object of investigation it need not be engaged in the same way that is required in practices of responsibility. We see this clearly in the case of taxation. A person is entitled to have an opportunity to influence political decisions regarding taxation through the democratic process. A person is normally entitled to an

²⁰ See A Duff, L Farmer, S E Marshall and V Tadros *The Trial on Trial (3): Toward a Normative Theory of the Criminal Trial* (Oxford: Hart, 2007) and also V Tadros 'Rethinking the Presumption of Innocence' (2007) 1 *Criminal Law and Philosophy* 193

²¹ See, also, R A Duff *Answering for Crime* (Oxford: Hart, 2007) ch.9.

explanation of why a burden should fall on them rather than others. But as long as the scheme is justified, is democratically legitimised, and satisfies the requirement of publicity, enough has been done to respect the autonomy of citizens. The rules may simply be imposed on citizens.

But that would not be sufficient for the criminal process. The criminal process makes personal judgements about defendants, and defendants are entitled to challenge those personal judgements directly on a case by case basis. It is insufficient to give people right to challenge the rules in general that are applied to them. They must be given the opportunity to challenge each application of the rule to them. And that is because the application of the rules involves more than the distribution of benefits and burdens amongst a community: it makes personal declarations about defendants.

In other words, civil procedure is just *insofar* as it is optimally accurate in distributing outcomes justly. Procedures which are accurate in distributing benefits and burdens would be sufficient in civil trials even if those procedures did not provide defendants with a full opportunity to challenge a case made against them. Providing participatory opportunities in civil trials is to be done on a purely instrumental basis: it is done only in order to enhance accuracy. In contrast, accuracy is part of a richer aim that we have in providing protections in criminal trials: the aim to condemn wrongful conduct as part of a practice of responsibility which shows due respect for the defendant (and others) as an autonomous agent.

We can now see why one institution, the criminal law, has both the role of condemning wrongdoers for what they have done and for warranting punishment. The very procedural and substantive protections that must be put in place to make condemnation of wrongdoers just are the very same procedural and substantive protections that are required to give people adequate protection against being punished. Hence, it makes sense to have a single institution which does both the condemning and the punishing.

When to Punish, When to Penalise

The argument so far is that there is a close relationship between crime and punishment. Something is a crime, I have suggested, only if it is punishable. Crimes have a condemnatory function. But civil wrongs may also be condemnatory, though in a different way. The creation of a civil wrong may indicate that the state regards the class of action prohibited as wrongful. What makes crimes distinct is twofold: 1) that it is only crimes that warrant punishment; and 2) that the criminal justice system provides a forum in which individual defendants can be condemned for their conduct.

In the light of what I said earlier, we have four kinds of regulation. There are civil regulations which price, and which create conditional permissions to perform the conduct. There are two kinds of civil prohibition: civil regulations and private wrongs. And there are criminal prohibitions.

My focus is mainly on the different kinds of prohibition. Suppose that we think that there ought to be an obligation on citizens not to *v*. We might make *v*ing criminally wrong, we might make it a regulatory wrong or we might make it a private wrong. Of course, needless to say, more than one route can be taken. So, for example, breach of health and safety causing harm might be a tort; it also involves breach of a regulation and it may be criminalized as well. The conditions of liability may be different in each case. For example, in private law it must be shown that harm has been caused where that is not important in the regulatory scheme. In the criminal law, fault must be proved where that is not true in the regulatory scheme.

My main focus will be on the distinction between criminalization and civil schemes. But within the civil law, I will focus primarily on civil regulations rather than private law. Here's why. It is quite difficult to justify private law over regulatory schemes in that they distribute costs in a way that is heavily luck dependent. Those who are harmed can gain compensation only if they can find a plaintiff who is liable, and that will normally be so only if they can find a plaintiff who is at fault. Those who harm must pay compensation for the harm that they cause even if that harm is well beyond the level that they could reasonably have expected to occur. These problems are a consequence of the role that causation of harm plays in private law, something that regulatory schemes may drop.²² Furthermore, private law seems overly dependent on the willingness and ability of those who are harmed to bring actions against those who harm them, and a consequence of this is that many people who are harmed even by someone who is liable to pay do not receive compensation.

Private law, then, might be thought problematic both in the way that it distributes resources and the extent to which the distribution of resources is governed by the state. If it is justified to retain schemes of private law, this is probably because such schemes might be efficient. Here's why they might be efficient. By imposing costs for harms that a person causes, private law makes it easier to determine the liability that each person has: each person must pay for what they have done. And in this way, individual citizens can easily mimic the decisions that would be achieved through private law without resorting to the courts. When private regulations are breached, then, disputes can be resolved by the parties themselves.

Once causation of harm is dropped as a marker of the scope of liability, it will be much more difficult to know what a person who has breached a regulation ought to pay. Hence, distribution of resources must be achieved through some bureaucratic enterprise which will be expensive to administer. In other words, we may be willing to tolerate tying liability to causation, even though causation is morally arbitrary, because it allows disputes to be resolved without recourse to bureaucracy.

Furthermore, insurance might do the same kind of job as the regulatory scheme in a reducing the influence of luck even if we retain private law. It might reduce the effects of luck in a way that is more efficient than a regulatory scheme. And it might do so in a way which protects autonomy more effectively in that people can choose whether or not to insure. However, whether such a scheme is just is to be determined by standards set by regulatory schemes. We should think of regulatory schemes as being morally primary, in a sense, then. They distribute resources more fairly, and we should depart from fairness only if the bureaucratic costs of fairness turn out to be too high or the restrictions on autonomy turn out to be too great. Regulation is, then, the main moral alternative to criminal law. Private law is a default institution.

Regulatory schemes have the advantage that they distribute costs more fairly amongst those that harm and those that are harmed. How do they compare with criminalization schemes? Here are some of the factors that might seem important in judging the advantages of the criminal and the civil law. Firstly, using the civil route allows penalties to be imposed on individuals without it being shown beyond reasonable doubt that the person breached the prohibition, or was at fault for doing so for the reasons noted above. That means that it is possible to distribute the costs of

²² In the context of tort, which is the most obvious but not the only context that this applies, see C Schroeder 'Causation, Compensation, and Moral Responsibility' in D G Owen *Philosophical Foundations of Tort Law* (Oxford: OUP, 1995).

breach more widely between those that have wrongly breached the regulations (and, of course, some of those who haven't) without any extra cost to victims.

Any benefits of the criminal law, in contrast, are to be had only by imposing great burdens on a smaller number of individuals. This partly because of the greater protections required by the criminal law, any burdens that the criminal law imposes are concentrated on a small number of individuals; even a small proportion of those who have wrongly breached the regulations. That means that if a significant deterrent benefit is to be had, some small group must be made to suffer quite intensely. One reason against criminalization, then, is that it tends to distribute burdens narrowly, intensifying the burden suffered by each person.

A second reason against criminalization is that in criminalizing we increase the range of exceptions where a person becomes liable to suffer as a means to the good of others, reducing the scope of a person's status to be treated as an end. By restricting the scope of the criminal law, we also restrict the circumstances in which we may be harmed as a means to benefit others; and I have suggested that we have good reason to provide special protection to ourselves against being treated in that way.

I have already alluded to a first reason in favour of criminalization: that the criminal law creates a warrant to condemn particular individuals. This might be thought especially important where particular victims are concerned who have a special interest in the individual being condemned for what they have done, and where the fault is of a very serious nature. It might be thought insufficient in that case that the class of conduct is treated by the state as wrong. In other cases, the demand may be less strong. The state has reason to create a forum in which those that breach the relevant regulation can be condemned, but that reason may not be decisive. It may be outweighed by reasons of the kind just alluded to about the concentration and nature of the burden that the criminal law imposes.

A further reason in favour of criminalization is the impact it has on security. The different schemes will tend to enhance the security of citizens in different ways, and consequently to different degrees. The punishment scheme is *aimed* at security: wrongdoers are made to suffer in order to deter them from future wrongdoing and to deter other people from wrongdoing. Civil schemes aren't aimed at security in this way. Compensation is backward looking rather than forward looking. Rather than aiming at prevention of future wrongs the compensation scheme provides security from wrongdoing by providing compensation when a person has been wronged. It acts as a kind of insurance against being wronged, ameliorating the harm that is suffered by the victims of wrongdoing.

It should be noted, however, that whilst civil schemes do not aim at deterring future wrongdoers, they may have the incidental benefit that wrongdoers are in fact deterred by the prospects of paying compensation for the harms they might cause. As long as damages and fines are not imposed in order to make people suffer (in which case we would have a punishment scheme), the fact that people are deterred from behaving in a costly way by such schemes is to be welcomed as a beneficial side-effect. So, for example, requiring those who breach contracts to pay compensation in fact enhances the security of contractors by deterring breach, even though that is not (or at least ought not to be) the justification for requiring compensation to be paid.

Given these differences between the schemes, how are we to choose whether to compensate or whether to punish? With respect to many harms which a person causes intentionally or risks causing, compensation ought to be provided whether or not there is good reason to punish the person who causes the harm. So the real

question for us is whether there is good reason to punish people in addition to requiring them to pay compensation. If the person can fully compensate the person harmed, it might seem that compensation is sufficient and that punishment is unwarranted. The person harmed will be compensated by the person who harms. The person who harms will be worse off as a consequence of harming, if, as is often the case, he does not benefit to an even greater degree by causing the harm. But he was in a good position to avoid being worse off. However, things are not so simple.

Consider some harmful action v . Here is what I think is required for full compensation. A person is fully compensated for being a victim of harm if they are as well off as they would have been had they not been harmed. One way to develop this idea further is in relation to a person's preferences. Here are two formulations. The first is that a person is fully compensated if that the person would, *ex ante*, be indifferent between the option to suffer v and receive r and the option not to suffer v . Another formulation is that a person is fully compensated for being harmed if the person harmed would have accepted a payment of r in return for a permission to make him suffer v .

Formulations of this kind are inadequate. There are two main reasons why this is so. The first has to do with what is being compensated: wrongs rather than harms. If we provide a person with compensation for being harmed, it is insufficient to provide that person only with the amount of compensation that would have made them indifferent between suffering and not suffering v if they had had the choice. One reason for this is that chosen suffering is more tolerable than non-chosen suffering, and victims of harm don't choose to be harmed and receive the compensation. But the point is stronger than this. Once the person chooses to be harmed, that person is no longer wronged, and it is being wronged for which a person demands compensation.

We can see this clearly in the case of rape. A person can't choose to be raped and to receive compensation, for if a person chooses to allow another person to have intercourse with them, they are not raped. There is a very significant difference between what a person would demand in payment for sex and what will fully compensate a person for being raped.

Perhaps nothing will fully compensate a person for being raped. But we should not think that this is true of all wrongs. To avoid the problem that it is wrongs rather than harms that we are compensating the proper calculation of full compensation must consider whether the person would prefer a world in which they involuntarily suffer harm and receive compensation to one which they would not be harmed. This yields the following: a person is fully compensated for being the victim of v if they are provided with resources, r , such that they would be indifferent between a world in which they will involuntarily suffer v and receive r and an otherwise identical world in which they will not suffer v .

But now we face a second problem. This way of seeing compensation focuses on the preferences of the person concerned, and that may be the wrong way to understand compensation. What we are interested in is how well of a person *is*, and that may not track their preferences; an idea that should be familiar from criticisms of utilitarianism. To take an extreme case, a person may enjoy seeing animals suffer. And they may prefer a world in which they are harmed but animals suffer than a world where they are not harmed. But we should not regard the suffering of animals as providing them with compensation for being wronged.

This idea is not only significant with respect to what we ought to see as compensation, however. It is also important with respect to what a person ought to be compensated *for*. For example, a person may prefer being wronged and receiving

money to not being wronged. But this may be because they lack self-respect. Whether compensation is regarded as a full and sufficient response to wrongdoing is dependent on whether providing compensation is consistent with self-respect. Lack of self-respect may be endemic in a community, and in that case compensation ought not to be regarded as full with respect to some kind of wrongdoing even if all people in that community would be indifferent between the world in which they are wronged and compensated and the world in which they are not wronged.

We now have the components of an idea of full compensation. A person is fully compensated if they have good grounds for being indifferent between the world in which they are wronged and compensated and the world in which they are not wronged. That idea is still incomplete in a number of respects. For example, it does not tackle a range of questions about the effects of being wronged, for example concerning cases where the person wronged fails to ameliorate their wrong, or who is very sensitive to being wronged, or who also benefits from being wronged (after all, what doesn't kill you makes you stronger). But it will suffice for our purposes.

With these things in mind, let's outline a regulatory scheme that aims at compensation, ignoring for the moment the possibility of punishment. Compensation is to be provided through a detection and enforcement scheme. The more resources available to such a scheme, the more people will be detected and forced to pay compensation. However, there will be diminishing returns in making the scheme more and more effective. Those that cause harm are made to pay not only a fair proportion of the compensation required given harm caused by violations of the regulations, but also 1) compensation for a fair proportion of the shortfall in detection and enforcement such that those people harmed in a similar way are compensated; and 2) sufficient compensation for the costs of the scheme itself.

There will be an efficient point at which the costs of making the scheme more effective are too high, and wrongdoers will prefer a less effective scheme that requires them to pay a proportion of the compensation that ought to fall on those people who are not detected and forced to pay. To see this, suppose that all of those people wronged ought to be fully compensated, and that the burden of compensation ought to fall entirely on wrongdoers. Given that baseline, an optimal scheme from the perspective of wrongdoers will be one in which any increase in the efficiency of the scheme in detection and enforcement will cost more than the extra payment of compensation required to compensate those who are harmed by wrongdoers who are not detected, or who are not forced to pay compensation. Let's call this additional cost to each person who causes harm and who is detected and forced to pay r_2 . Each person who harms and who is detected and who is forced to pay compensation must, therefore, pay $r + r_2$.

If a regulatory scheme provides full compensation to victims of wrongdoing, they have no grounds for arguing for a punishment scheme to supplement the regulatory scheme. Hence, where it is just to develop a regulatory scheme like the one above, there are no grounds for criminalization of the conduct. Regulation is preferable to criminalization.

However, things will often not be as straightforward as this. For one thing, as I have already noted, a scheme like this may turn out to be unfair. This scheme requires wrongdoers to pay the whole of the costs that are incurred by violations of the regulation that they have breached. But this may turn out to be very expensive in some circumstances. Justice may require that those breaching a regulation are not made to bear the full expected costs of breach of that regulation. There are different

ways in which $r + r_2$ might be distributed more widely than those who breach the particular regulation.

For example it may be just to spread the costs more widely, between those who breach different regulations. One way is that the costs might be spread between those who breach different regulations. Breaching some regulations may cause unexpectedly high levels of harm where breaching others may cause unexpectedly low levels of harm. In that case it may be just to spread the costs from those breaching the former set of regulations to those breaching the latter set of regulations. Even if a person can be made liable to pay the expected costs of breaching a regulation, unexpected costs may fairly be distributed between those breaching regulations.

Secondly, it may be that those that haven't breached the regulations ought to bear some of the costs. These costs may fall particularly on those harmed. There are two reasons why this might be the case. First, some costs may fall on those harmed as a matter of justice. If those harmed had better opportunities to avoid being harmed, they may be expected to bear some of the costs of being harmed, even if others wrong them. However, it may also be that victims of some kinds of wrong bear a cost no matter what is done to compensate them. As I hinted earlier in discussing rape, it may be that there are wrongs which are not fully compensable. It may be impossible to put victims of some wrongs in a position where they would have good grounds for being indifferent between the world in which they are wronged and compensated and the world which they are not wronged. Victims of those wrongs must bear these costs of the wrongs. And where the victim suffers loss of life, it may be that any compensation to the victim, which in this case will be paid to his family, is regarded as trivial.

Finally, it may be that justice requires some of the costs of compensation to be provided through general taxation. Although wrongdoers behave in a way that is expected to be costly, we ought sometimes to share those burdens with them. Whilst we can expect people to bear a greater share for compensating others for being harmed if they had an adequate opportunity to avoid harming them, we cannot expect them to bear the full costs of their decisions.

Consider the parallel in self-defence.²³ Suppose that the only way of preventing the attacker from harming you is to kill him; but the harm he will otherwise cause is quite minor. In that case, you must bear the harm. If the force required in self-defence is grossly disproportionate to that which you will otherwise suffer you must bear that harm. This suggests that one's grounds for complaining about being harmed are weakened if one had the opportunity to avoid being harmed, but that they are not extinguished altogether. The fact that a person had an adequate opportunity to avoid incurring some cost is a reason for that person to bear a greater proportion of the cost. But those who had no opportunity to avoid paying the cost must nevertheless bear some of the burden of it.

Now, if deterrence is permitted and is successful, the costs of compensation are significantly diminished. As there are less breaches of the wrong, there is also less cost to be distributed. As the just distribution of costs of the compensation scheme may fall not only on those who breach the regulations but also on those who don't, all parties will prefer these costs to be lower. However, wrongdoers who are apprehended and punished will suffer an additional burden: they not only suffer through punishment, they are made to suffer as a means to reduce costs to be distributed. This burden can be ameliorated at least to some degree by requiring others to do more to

²³ For further discussion of this issue, see V Tadros 'The Moral Foundations of Self-Defence', forthcoming.

share the costs of compensating victims. But, as with serious wrongs, it may be impossible to place wrongdoers in a position that they will prefer to be punished than to have to pay their fair share of compensation.

We can now see how to investigate whether a particular public wrong ought to be regulated by the civil law or criminalized. First, take wrongs that cannot be compensated. In that case, victims of the wrong will inevitably bear substantial costs of being the victim of the wrong, and it will often be very difficult or costly to avoid being the victim of a wrong. If we fail to deter those wrongs, victims will have strong grounds to complain that not enough has been done for them to secure them against being victims. If we punish wrongdoers rather than regulating them, and deterrence is effective, we will reduce the number of victims, and that is a significant gain.

Wrongdoers may then complain that they suffer the greater burden of being harmed as a means. That harm will be ameliorated to some degree in that the total amount of compensation required to be paid will be lower. It may be ameliorated further by others taking on greater burdens of compensation, say through general taxation. Often, with respect to these wrongs, enough will have been done to avoid people being made to suffer as a means to prevent the suffering of others. The complaints of wrongdoers if we punish for perpetrating the wrong will be less powerful than the complaints of victims if we don't.

Whether we ought to criminalize some conduct, then, depends on the comparative strength of two claims. On the one hand, there are the costs that we would otherwise impose on those who are held liable, on victims of the conduct regulated, or on taxpayers, if we don't criminalize the conduct. On the other hand, there is the liability to be treated as a means that we will impose on offenders if we criminalize the conduct. The civil law alone tends to create greater costs that are distributed more widely, and those costs are more difficult to avoid. If conduct is criminalized, overall costs may diminish. However, the price paid for this is that criminal offenders are treated as a means. Though being treated in that way is relatively easy for people to avoid, given the protections of the criminal law, those people convicted of offences have some grounds to object to criminalization. The decision whether to criminalize must be taken in the light of these competing concerns: do we increase costs and make them difficult to avoid by refusing to criminalize, or do we decrease costs at the expense of making some people, albeit those who had a good opportunity to avoid this, suffer as a means?

Criminal Justice and Human Rights

When a state provides inadequate protections against criminal convictions it may violate the human rights of defendants. When a state fails to criminalize some conduct that it ought to criminalize it may violate the human rights of victims. Whilst civil law may impact on the human rights of citizens in various ways, the criminal law is often thought particularly vulnerable to human rights challenges. The question is why. The answer, I think, is to do not only with the degree of suffering that criminal law imposes (deprivation of liberty, resources or the imposition of obligations to work), it is also to do with the fact that suffering is intended as a means to the good of others. We are careful to protect people against criminal convictions because in that way we protect people's status as an end. When a state fails to provide adequate protections against criminal conviction, it fails to protect the scope of our status as an ends. States have a special interest in ensuring that status is adequately protected by their fellow states. Or so I will suggest.

In order to make progress we need to know something further about the philosophical foundations of human rights. Human rights are rights that create international duties. These are duties that states have an obligation to fulfil, an obligation that is not defeated by state sovereignty. The idea is that states have an obligation to ensure that citizens of other states are protected against human rights abuses even if this involves eroding the power of sovereign states to decide issues for themselves.

This gives rise to two questions. First, what kinds of moral value can ground a human rights abuse? Without being able to defend this idea fully here, my tentative view is that the foundation of human rights is in the failure to recognise the equal status of human beings as morally autonomous. This, I note, is a *moral* view about human rights and it may be contrasted with pragmatic accounts, based on rationalising what is currently on the list, or lists, of human rights, or political accounts, such as John Rawls',²⁴ based on principles that could be accepted from different philosophical standpoints, though in a moment we will see that it is restricted by institutional concerns.

The plausibility of a moral view of human rights is to show ways in which human rights obligations are distinct from the obligations of justice. If a human rights abuse is simply an injustice, the developing language of human rights has made little progress.²⁵ Human rights, I suggest, are both morally and institutionally distinctive.

Here is how they are morally distinctive. Human rights, on my view, are special because they are grounded in two things. The first is a special feature of human beings: the status that they have in the light of their moral autonomy. The moral autonomy of human beings gives rise to special obligations of respect. The second is equality: the fact that each person is morally autonomous gives rise to an obligation to treat each as an equal. Violations of human rights can thus occur either when insufficient respect is shown to the person, taken individually, or when one person or group is treated as having greater moral status than another person or group.

There may be ways in which an individual can be denied what they are owed by a state. Perhaps they are given fewer resources than equality demands, or perhaps their liberty is restricted too greatly in pursuit of a good aim. But these interferences should not normally be regarded as a violation of human rights, unjust though they are. For human beings may be treated in these ways without the state implying that they lack the moral status of autonomous agents. These may be simply mistakes about the obligations that arise in consequence of the moral status of citizens rather than a denial of their moral status as such.

Thus we distinguish between injustice and human rights abuses. In perpetrating an injustice, a state fails to do what the equal status of its citizens as morally autonomous requires of it. It fails to understand the implications of equal status. In perpetrating a human rights abuse the state fails to recognise that its citizens have that status at all. This distinction, between respecting the fact that citizens have equal moral status and understanding the implications of equal moral status, is by no means sharp, of course. The greater the injustice perpetrated, the more we will think that the state has failed to recognise that its citizens have the status of morally

²⁴ See J Rawls *The Law of Peoples* (Cambridge, Mass. Harvard UP, 1999). For a good critique of the political conception, see A Buchanan 'Taking the Human out of Human Rights' in *Rawls's Law of Peoples: A Realistic Utopia?* (Oxford: Blackwell, 2006).

²⁵ For an attack on the idea that human rights have a special moral foundation, to which what I say here might be seen as a response, see J Raz 'Human Rights Without Foundations' in S Besson and J Tasioulas *The Philosophy of International Law* (Oxford: OUP, forthcoming)

autonomous agents, rather than failing to understand the implications of that status. But a lack of sharpness is not fatal to a distinction.

How does this moral idea relate to the international dimension of human rights? Why is human status something that we have special reason to protect internationally? The first thing to note is that some grave injustices might be sufficient to motivate state action, even if those injustices are not human rights abuses. For example, mass torture of animals for fun is not a human rights abuse, but it might justify interfering with the sovereignty of the torturing state. So our question should be why interfering with human rights is generally sufficient rather than necessary to interfere with state sovereignty. The answer is that we have good reason to provide people with assurance that they have equal status as morally autonomous when this is denied, both because it is intrinsically important that this is recognised by them and by others, and also because of the grave harms that we know can come about when this is not recognised.

This moral conception of human rights might be thought to ignore the important institutional dimension that human rights have. When a state treats its citizens in this way, it becomes a proper subject of criticism from other states; hence the international dimension of human rights. But that is only possible if it can be institutionalised at the international level. Perhaps, then, we also ought to say that a person has a human right to something only if the relevant violation is *internationally justiciable*. On this view, something may be very morally bad, it may be a serious violation of a fundamental moral duty, grounded in the moral status of the victim, but it will not count as a human rights violation unless it is internationally justiciable.

But if that is true, it is a limit on, or a specification of, what can be regarded as a human rights violation rather than a positive foundation for human rights. Basic lack of respect for moral autonomy provides the category of things that are in principle apt candidates for human rights violations, a category that is further circumscribed by issues of justiciability.²⁶

This institutional dimension of human rights is not best outlined in a Benthamite way, which would suggest that a moral right exists only if it *has* been institutionalised. It should not even be understood, in the way that Joseph Raz understands it,²⁷ that a human right exists only if it should be institutionalised now. Raz's idea is that we should constrain the scope of human rights according to whether the international 'community' would tend to do a sufficiently good job of enforcing those rights without further distorting unequal political power between states. This seems to me an important thought about the pragmatics of what human rights we should include on human rights documents. But it is insufficiently aspirational. It implies that the moral duties that the international community has to prevent the gravest forms of injustice are dependent on their tendency, rather than their capacity, to carry out those moral duties. The more corrupt the powerful countries tend to be, the less human rights others have!

The institutional dimension is thus better thought of in more ideal terms: something is a human right only if it is *capable* of being institutionalised. Whether something is capable of being institutionalised depends not on what we have institutionalised, nor indeed on the capabilities of the institutions that we have. It depends on institutions as we can realistically imagine them. A person can have their human rights violated even though there are no institutions which can scrutinise their

²⁶ See, also, A Buchanan *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: OUP, 2004) 118-121.

²⁷ See his 'Human Rights Without Foundations'.

violation, and even though the social and political conditions are not now present in which their scrutiny can be just.

Whilst the institutional and political arrangements may not now be present to ensure that protecting human rights is now feasible without enhancing the position of rich and powerful states against poor and weak states, that should not lead us to deny that there are violations of those human rights. It should lead us to deny that we should institutionalise them now. What we should rather do is work towards the political conditions under which they can be institutionalised. In the meantime, recognising that there are human rights abuses which are currently non-justiciable is important for two reasons.

Firstly, it creates pressure on states to create international conditions under which those rights could become justiciable, so that those states can fulfil their human rights duties. This view allows us to take seriously the idea that we should have regard to the way in which powerful states may use human rights practice to foster their own political power and influence in the international sphere. But it does so without denying that those states are failing in their obligations to protect the human rights of others. Violations of human rights thus create pressure to create institutions, and to create the international conditions under which their protection is feasible without bolstering the power of rich states over poor states.

Secondly, this conception of human rights importantly allows non-governmental organisations to criticise states for their human rights abuses. We thus take seriously the important role that human rights have had in providing a language in which people, rather than states, can expose states that fail adequately to respect their citizens as human beings.

This is also a reason to prefer 'top-down' approaches that find foundation in general theory rather than 'bottom up' approaches, which attempt to draw general conclusions from extant human rights that are actually enforced.²⁸ A bottom up approach would attempt to generalise about the moral foundations of human rights by reflection on the rights that are commonly recognised. But which rights are commonly recognised may turn not only on the best moral conception of human rights but also on questions of justiciability. The bottom up approach will lack the intuitively appealing structure that there are actions or inactions that are candidates for human rights violations that (may or may not) lack the status of human rights violations because they are non-justiciable in principle, as well as human rights violations that are not *currently* justiciable, but which may be justiciable in a more ideal world. This structure gives rise to two ways in which we might resist the idea that some action is a violation of human rights. It may not be a candidate because it is the wrong kind of action, or because it is not serious enough. Or it may not be a human rights violation because it is not justiciable in principle. But there are human rights violations that are not justiciable *now* because the institutions for making them justiciable, or the social and political circumstances in which this would be worth doing, are not yet available.

The basic moral idea of human rights that I have outlined gives rise to a range of different ways in which human rights can be violated. Perhaps the central way in which inadequate respect for the person as an autonomous agent is shown is by acting (or omitting) in a way that deprives the person of the ability to live a minimally decent life, for the whole or for a significant portion of the life. Of course, not every violation

²⁸ For the distinction between top down and bottom up approaches, see J Griffin *On Human Rights* (Oxford: OUP, 2008). Griffin prefers a bottom up approach.

of a human right of this kind *in fact* has this effect.²⁹ Nelson Mandela's human rights were violated, but one could hardly claim that in consequence he failed to live a life of value, or a minimally decent life. But human rights violations make a very substantial erosion of one's ability to live a decent life, or at least to make a significant proportion of one's life decent, very difficult to avoid. Many of the tortured, the maimed and the wrongfully imprisoned, as well as the homeless and the starving, will fail to live minimally decent lives, or at least a significant portion of their lives will likely not be minimally decent.

The kind of human rights violation just outlined is often taken to be the sole kind of human right. However, if equal respect for morally autonomous agents is at the foundation of human rights, not all human rights violations need be of the kind just outlined. A person's human rights may be violated if they are marked out as having less status as a human being. For example, if some section of the society is discriminated against, such that preference for jobs or resources is diverted away from them and towards the preferred section, the section discriminated against may have their human rights violated. Simple unequal treatment might be thought an injustice that does not violate human rights.³⁰ But human rights are violated if a group is discriminated against because they are considered as having less status, as being less than human, or a less significant kind of human. Even if those people have enough to live a decent life, they have their human rights violated.

A further way in which the state may fail in its human rights obligations, one which also has significance for criminal justice, has to do with the communicative role of the state. The state may fail to condemn that which it has an obligation to condemn, or it may condemn in circumstances where it is not entitled to do so. The state may fail victims of crime by failing to provide a forum to condemn those that have harmed them. And it may fail defendants by condemning them where it lacks the epistemic or procedural resources to do so, for example where the presumption of innocence has been interfered with.³¹

A final way in which human rights may be violated, which will be important for my discussion here, is by treating a person merely as a means for the good of others. That may violate human rights even if this does not have the tendency to undermine the person's ability to live a valuable life. For example, suppose that many people in a state find it funny to see fellow citizens suffer. Some citizens are selected at random and given painful electric shocks for the pleasure of others. That would violate the human rights of those shocked even though they are neither treated as though they have unequal status (in that everyone is deemed by the scheme to have the same status) nor are they deprived of the conditions necessary for a valuable life. A central way in which failures of criminal justice give rise to human rights violations is that they fail to give citizens adequate protections against being treated as a means. This should be seen, I think, as a denial of the status of citizens as ends in themselves rather than a failure to understand what equal status requires.

When we evaluate whether human rights are violated by a state, we must have regard both for the burdens that it imposes, but also for the extent to which it treats citizens as a means. One way in which a state may violate a person's human rights is

²⁹ Many accounts of human rights violations make this error. See, for example, D Bilchitz *Poverty and Fundamental Rights* (Oxford: OUP, 2007); D Miller *National Responsibility and Global Justice* (Oxford: OUP, 2007) 178-185.

³⁰ See Griffin *On Human Rights* 39-44.

³¹ For more on the presumption of innocence and human rights, see V Tadros 'Rethinking the Presumption of Innocence'.

by imposing much greater burdens on them than justice requires. This might occur through an unjust distribution of resources. So-called social and economic rights are an example of this. A state may violate the human rights of its citizens by failing to provide them with adequate housing or food. These rights are grounded in the moral autonomy of human beings in that the realisation of human goals requires material resources. Similarly, a state may fail in its human rights obligations by failing to ensure that its citizens are sufficiently secure, for example by failing to resource an adequate police force, or by punishing offenders too lightly.³²

This might be given as a reason for courts (either national or international) to be given the power to scrutinise both civil and criminal schemes with respect to human rights. Distributive schemes may violate the human rights of some citizens by failing to give them the resources or security that they ought to have. For example, a state may violate the human rights of its citizens by requiring those who breach its regulations to bear the full costs of breach. That will be so, for example, if the person is left destitute by the costs that he or she is expected to bear.

But the state can also ensure that it meets its human rights obligations by providing resources through other mechanisms, for example through the welfare state. The welfare state may help to ensure that each person has sufficient resources, and, of course, some of those resources may be used to enhance security. Whether human rights are violated by a distributive scheme will, then, be dependent on a whole set of institutional arrangements. And, for this reason, it will often be difficult to determine whether the human rights of those subject to the scheme are violated or not. All will depend on how resources are distributed elsewhere.

For this reason, there is a limit to the power that ought to be given to courts to scrutinise criminal and civil schemes with respect to the distribution of resources. They will often be poorly placed to determine whether human rights are in fact violated because they will find it difficult to evaluate the full range of economic policies that might render any particular distributive scheme just or unjust. There may be very clear cases where human rights are violated, so it may be that some limited power can be given to the courts to scrutinise civil schemes in human rights terms. But in most cases the competence of the courts to evaluate whether a state is adhering to its human rights obligations will be limited.

Now turn to the criminal case. There it will be much easier to scrutinise whether the state has failed adequately to respect the moral autonomy of its citizens or others. Why might this be so? In the criminal case we are concerned not only with the distribution of burdens, but also with the protections that we give the status of people. The ambitions of the criminal law to prevent harm must be tempered by the requirement that we should not, without great cause, treat a person as a means to the good of others. The scope of our status as ends must be preserved and exceptions must be severely limited. A state that fails to provide adequate protections against punishment thus fails to recognise the status of its citizens rather than failing to appreciate the implications of the status that citizens have.

Where the state provides inadequate protections to citizens against being treated as a means, it may violate the human rights of its citizens. This is not because it makes those people suffer more; civil schemes may also impose great burdens on citizens. It is because it is too willing to allow some of its citizens to be used for the good of others. If I am right that general deterrence provides a good justification of

³² For a discussion of the positive right to security, see S Fredman 'The Positive Right to Security' in B J Gould and L Lazarus *Security and Human Rights* (Oxford: Hart, 2007).

punishment, the constraint on using citizens as a means is not without exception. But a state can violate human rights by normalizing what ought to be exceptional.

It is for this reason, over and above the fact that they are intended to deceive, that we object to show-trials in Stalinist Russia, for example. Even if the policy was effective in promoting other positive goals of the state, some people were made to suffer as a means to promote those goals, and those people were not given adequate protections, such as the rule of law or a fair trial, against being treated in that way.

The view that I outlined will help us to understand the different ways in which human rights may be violated by the state in the realm of criminal justice. How might the state fail to protect the interest that people have in not being treated as a means, and thus fail to respect the scope of their status as ends? One way is by eroding people's ability to avoid being treated thus. A state can provide inadequate protection by making criminal convictions and the punishments that follow a matter of chance. There are different ways in which this might occur. It might occur by state reducing the evidential and other procedural requirements for criminal convictions. But it might also occur as a consequence of the style of criminalization.

One obvious set of examples of this latter possibility are offences of strict liability. If the defendant can be convicted of a criminal offence on the basis of causing the relevant outcome alone, he loses some measure of control over whether he will be punished. That loss of control may not be complete, however. For example, if the strict liability offence is dependent on performing a prior intentional action, the defendant can avoid punishment by avoiding the performance of that action. For example, suppose that the offence of causing death by driving was one of strict liability. Conviction may be unavoidable once one drives, in that one does not have complete control over whether one's driving will cause death. But one can control whether one drives. Avoiding the risk of punishment, in this case, is very costly for most people, in that they must give up driving to avoid that risk.

What this points to, I think, is that the question of whether sufficient protection is given to people against being treated as a means must be evaluated in terms of the costs that they must bear if they are to retain control over being treated in that way. In the case of the hypothetical offence of causing death by driving, insufficient protection is given against being treated as a means, in that a person is expected to bear great costs to avoid being subject to the risk of being treated thus.

This suggests a second way in which the state may fail to provide inadequate protection to people against being treated as a means. The scope, precision and complexity of the criminal law will all have an impact on the costs of avoiding criminal liability. A complex and sometimes vague criminal law, such as the law of England and Wales, makes the costs of protecting oneself against being punished very high. And this is particularly so when the criminal law departs very substantially from reasonable expectations about its scope. Where these things are true, and given that mistake of law is no defence,³³ avoiding criminal liability requires one to investigate what the criminal law is which is difficult enough for most scholars let alone most lay people.

A third way in which the state can fail to protect people against punishment is by making the scope of the law too broad. Suppose that a broad offence is created which protects others from harm to some modest degree. When that offence is committed the person who commits it is treated as a means. It may be that the person

³³ Abandoning that principle may be warranted for other reasons as well. See D Husak and A von Hirsch 'Culpability and Mistake of Law' in S Shute, J Gardner and J Horder *Action and Value in Criminal Law* (Oxford: OUP, 1993).

could avoid liability at no cost. And yet, if the benefits of punishing the person are too small, punishment will not be justified. An exception to our status as ends exists only if the treatment as a means is easily avoidable *and* if the end pursued is great.

Why might this be so? Why is opportunity to avoid harm insufficient? The answer is that we must respect both our autonomy and our fallibility. By making suffering choice sensitive we respect our autonomy. By restricting the importance of choice, we respect our fallibility. It may be unjust to breach a particular regulation, and that may render compliance with that regulation cost free for citizens. But we nevertheless have good reason to restrict the extent of liability for those that breach the regulations. Choice matters, but it is not all that matters.

These last two ideas suggest some reasons in favour of supplementing the right to a fair trial, which is protected by the European Convention of Human Rights, with a right to a fair criminal law. By focusing on criminal procedure in isolation from a focus on the substantive criminal law, the ECHR fails to recognise the different ways in which the human rights of its citizens can be violated by the state through the criminal justice system. Given the rapid and problematic expansion of the criminal law that we are currently seeing, recognising that there is a human right to a fair criminal law is of fundamental importance.

In the light of that, we may now move from the moral to the institutional question. Although there may be difficulties in determining whether adequate protections have been given to people against being used as a means, it seems to me that courts are better placed to evaluate that issue than they are to determine whether resources are distributed fairly. This is in part because interference with the status of one person for the sake of others needs very strong justifications. But it is also because the harm done to the person on whom that burden is imposed will not normally be compensated for in other ways. The suffering may be ameliorated by providing offenders with opportunities to rehabilitate themselves. But this should not be seen as a way of ensuring that punishment is a benefit to offenders. The loss of status that is suffered through punishment provides an explanation why we should feel sorry for those who are punished even those whose lives, through punishment, get back on track.

Is that sufficient to establish that a right to a fair criminal law is justiciable? There may be a fundamental interest in a fair criminal law, grounded in moral status, but that may not ground a human right, for it may be that any purported human right of that kind would not adequately capable of protection by courts, even ideally imagined. Perhaps that might be thought true because any putative human right of that kind would need to attach to the criminal law as a whole rather than to individual pieces of legislation, and the criminal law as a whole is not capable of being scrutinised by courts. It may be neither capable of being scrutinised by courts as we currently have them, or even courts as we could ideally imagine them.

My own view is that this objection is overstated. Courts *can* establish that the boundaries of the criminal law are drawn too widely in many cases by looking at individual pieces of legislation. They may be incapable of identifying *all* instances in which the right is violated, for the reasons stated in the previous paragraph, but that fact ought not to call into doubt their competence in determining violations in general.

But even if I am right in what I have just said there is a more pragmatic question about whether a fair criminal law is *best* protected through the courts, or whether it is best left to parliaments alone to determine the scope of the criminal law. Recent trends in the expansion of the criminal law through legislation should make us increasingly concerned whether the pragmatic question is best answered by

maintaining the status quo. But philosophical work can only draw tentative conclusions in answering question.

Conclusion

The distinction between civil and criminal law is complex, both descriptively and normatively. In order to distinguish descriptively between civil and criminal law, we need to outline a theory of punishment and to distinguish it from penalties. This is an underdeveloped area in criminal law theory. I hope to have made a modest contribution to that enterprise here, focusing on the way in which punishment makes people suffer: as a means to the good of others.

In the light of this distinction between criminal and civil liability we are in a better position to outline the principles that will be relevant in determining whether to criminalize. We criminalize when the burdens imposed through the civil law alone would be too great and too unavoidable. But when we do so we do so at a cost: a cost to the scope of our status not to be treated as a means. States interfere with human rights when they encroach on our status too readily or too unavoidably. They may do so by giving inadequate protections against criminal conviction, either by eroding evidential and procedural rights, or through an expansive criminal law. Protection of our human rights, our right to be treated as an end rather than as a means, requires the right to a fair trial, but it also requires the right to a fair criminal law.