Retribution in Criminal Theory

DOUGLAS N. HUSAK*

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I. INTRODUCTION

In *Placing Blame*,[1] Michael Moore presents a very ambitious theory of the criminal law—perhaps the most comprehensive and far-reaching examination of the philosophical foundations of the criminal law since Jeremy Bentham.[2] The unifying theme of Moore's theory is the placement of retribution at the heart of criminal theory. The enormous scope of his endeavor makes Moore's theory vulnerable to attack on many fronts—the further out one sticks one's neck, the more easily it is decapitated. In *Placing Blame*, Michael Moore sticks his neck out awfully far.

I will focus on three separate but intimately related dimensions of what I have identified as Moore's central theme. In Part II, I examine his views

* Professor of Philosophy and Law, Rutgers University. Ph.D., J.D. 1976, Ohio State University; B.A. 1970, Denison University.

1. *See* MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW (1997).

2. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1982).

about the data from which a theory of the criminal law is to be constructed. In Part III, I discuss his account of the rationale of punishment. In Part IV, I scrutinize his defense of legal moralism as a theory of legislative aim. I express general misgivings about the extraordinarily central place Moore affords retribution in his account of the criminal law as it exists today. I want to stress at the outset, however, that I regard my commentary as friendly. Like Moore, I am overwhelmingly sympathetic to retributivism. My support for retributivism, however, is more tempered. No contemporary criminal theorist rivals Moore in his unqualified enthusiasm for retribution. My reservations will seem minor and inconsequential to theorists whose opposition to retributivism is more basic and fundamental than mine.

II. THE DATA OF THEORY CONSTRUCTION: WHICH LAWS ARE CRIMINAL?

To begin to theorize about any subject matter, we must have some means to identify what the theory is *about*. We need data. What are the data about which a theory of the criminal law is constructed? In other words, by what criterion do we identify what counts as the criminal law? Clearly, different answers to this question can produce radically different theories of the criminal law.

What I call the *orthodox* answer is that laws are criminal when persons who violate them are subject to punishment. This answer identifies criminal laws by reference to a feature they are alleged to have in common—the remedy or sanction that may be imposed on persons who violate them. I describe this answer as orthodox both because the majority of criminal theorists hold it[3] (inasmuch as they adopt a position at all) and because I believe it to be the most defensible.

The orthodox answer has several advantages. Inter alia, it makes those constitutional protections that pertain to criminal defendants applicable to persons who are subject to punishment. Likewise, it makes those constitutional protections that pertain to persons who are subject to punishment applicable to criminal defendants. This answer, however, also gives rise to many difficult problems.[4] Fortunately, not all of these

3. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 1 (2d ed. 1995); WAYNE R. LAFAVE AND AUSTIN W. SCOTT, JR., 1 SUBSTANTIVE CRIMINAL LAW 12 (1986).

4. This answer, like all answers, encounters descriptive difficulties. Perhaps the greatest difficulty is that punitive damages are sometimes imposed on persons whose civil wrongs are especially egregious. How should those who defend the orthodox answer deal with this difficulty? One response is to say that punitive damages are not punishment, since they are awarded to plaintiffs. Another response is to modify the orthodox answer so that punishment is the only sanction for which persons become

problems must be resolved in order to believe the orthodox answer to be correct. I will mention only two such controversies. First, in order to hold that laws are criminal when they subject violators to punishment, I do not think that one must produce an altogether satisfactory account of the nature of punishment. Perhaps no entirely adequate definition of punishment exists. Theorists who subscribe to the orthodox answer need only believe that one condition that an adequate definition must satisfy is that punishment is restricted to actual or supposed violators of criminal laws.[5] In other words, punishment—*whatever* its elusive nature may be—should be taken to represent a defining feature of the criminal law.

Second, I do not think that one need be able to categorize each borderline sanction on one side of the line or the other—as punishment or not as punishment—to believe the orthodox answer to be correct. We are confident in our ability to identify paradigm cases of punishment, but many modes of treatment deviate from this paradigm and may or may not qualify as instances of punishment. Troublesome cases are increasingly familiar to constitutional scholars and have given rise to more ongoing dispute than any other issue in criminal law recently addressed by the Supreme Court.[6] The Court's decisions about when a sanction amounts to a punishment are confusing at best.[7] Perhaps such confusion is inevitable. If we draw from the concept of punishment employed in ordinary language, I see no reason why we should expect that there must always be a right answer to the question of whether each such mode of treatment is or is not an instance of punishment. The concept of punishment, like most concepts in ordinary language, is vague and allows for borderline cases.[8] Unfortunately, many

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eligible when they are criminally liable. Presumably, a law that allowed only punitive damages would qualify as criminal.

5. This component is a part of H.L.A. Hart's celebrated definition of punishment. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4-5 (1968).

6. *See, e.g.*, Hudson v. U.S., 522 U.S. 93 (1997) (holding that monetary penalties imposed against bank officers were not criminal penalties for double jeopardy purposes); Kansas v. Hendricks, 521 U.S. 346 (1997) (finding that involuntary confinement of sexually violent predator constituted civil commitment for double jeopardy purposes); U.S. v. Ursery, 518 U.S. 267 (1996) (holding that civil forfeiture of property used in production of marijuana was not punishment for double jeopardy purposes).

7. One commentator describes the Court's analysis of this issue as "an incoherent muddle," and "so inconsistent that it borders on the unintelligible." Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1268, 1280 (1998).

8. *See* Douglas N. Husak, *Review: Philosophical Analysis and the Limits of the Substantive Criminal Law*, 18 CRIM. JUST. ETHICS 58 (1999) (reviewing GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW (1998)).

of the uses to which the concept of punishment is put cannot readily accept the conclusion that given sanctions are somewhat like but also somewhat unlike paradigm cases of punishment. Suppose that a person alleges that a statute requiring him to register as a sex offender (for a past sex offense) subjects him to a punishment, such that he is owed a trial.[9] He could only be baffled if he is assured that since the registration requirement is somewhat like but also somewhat unlike punishment, he is owed something that is somewhat like but also somewhat unlike a trial.[10] Typically, legal purposes demand that questions of categorization be given a yes or no answer.[11] Our ordinary language conception of punishment, however, does not always provide yes or no answers. Therefore, answers to the question of whether a given mode of treatment is or is not an instance of punishment may be indeterminate. A theorist can continue to accept the orthodox answer while remaining agnostic about whether given modes of treatment are or are not punitive. If he is forced to provide a yes or no answer, he probably must resort to stipulation.[12]

Despite its difficulties, I tend to believe the orthodox answer is superior to its competitors. This commitment to the orthodox answer is crucial for the shape of the theory that fits the data. An astronomical number of laws, many of recent origin, qualify as criminal if we identify criminal laws as those that subject violators to punishment. Federal law is the main source of this "flood" of new crimes.[13] According to one recent estimate, more than 300,000 federal regulations are punishable by criminal penalties.[14] These statutes are scattered throughout various parts of federal codes; they are enforced by the combined efforts of as many as 200 regulatory agencies.[15] I will mention only two of literally thousands of examples of

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9. *See, e.g.*, Roe v. Farwell, 999 F. Supp. 174 (D. Mass. 1998).

10. Of course, some procedural protections are available to defendants even if they are not subject to criminal punishment. Courts must struggle to identify the procedural protections that are owed to defendants in proceedings that are not fully criminal. *See* Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 792-806 (1998).

11. Perhaps we must develop what could be called "middleground jurisprudence." Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 680-83 (1999).

12. Hence the Supreme Court affords extraordinary deference to legislative indications that a mode of treatment is non-punitive, and requires the "clearest proof" that a sanction involves criminal punishment despite a contrary legislative categorization. *See* U.S. v. Ursery, 518 U.S. 267, 268 (1996).

13. The "flood" of federal crime is described as one of the most noteworthy developments in criminal law in the last 50 years in Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 970-74 (1999).

14. *See* Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 32 (1995).

15. *See id.*

relatively new statutes that qualify as criminal according to the orthodox answer: the Bank Secrecy Act,[16] which proscribes the failure of a financial institution to file a report regarding any bank transaction in excess of $10,000, and the environmental regulations that prohibit acts that disturb mud in a cave on federal land.[17] Of course, such examples could be multiplied.

Among the most noteworthy contentions in *Placing Blame*—which is crucial in setting the stage for much of what follows—is Moore's apparent rejection of the orthodox answer to the question of what makes a law an instance of a criminal law. I confess to some puzzlement about whether Moore really rejects the orthodox answer, as well as about the nature of his objections to it. As I understand him, Moore proposes a relatively simple refutation of the view that criminal laws—the data for theory construction—should be identified by reference to whether violators are subject to punishment.

According to Moore, the orthodox answer is deficient because it identifies the criminal law by reference to a structural feature. "What is wrong with this remedy-based view of the criminal law," he writes, "can be seen by enquiring into the intelligibility of asking, 'What is a punishment?', if one does not already have in mind an answer to the question, 'Why do we punish?'"[18] To be sure, the orthodox answer represents little progress in identifying those laws that are criminal unless we have some means to recognize punishment. But what is punishment? Clearly, punishments cannot simply be identified by the hardships that result to the persons who are made to suffer them. Civil fines, deportation, terminations of benefits, suspensions of licenses, orders to affix bumper stickers to cars, and the like can all result in terrible and unwanted consequences for the persons on whom they are imposed. Thus, we should not conclude that a sanction is a punishment unless it involves what might be called a *punitive intention.* But which intentions are punitive? We cannot decide when a person who imposes a sanction has a punitive intention unless we have some idea of the function that he intends such a sanction to serve. If so, no merely structural feature can suffice to distinguish the criminal law from other areas of law.[19] We can only

16. Pub. L. No. 91-508, 84 Stat. 1114 (codified as amended in scattered sections of 12 U.S.C. and 31 U.S.C.).

17. *See* 16 U.S.C. §§ 4302(1), 4302(5), 4306 (a)(1), 4306(b) (1994).

18. MOORE, *supra* note 1, at 24-25.

19. Moore claims that theorists who believe "that criminal law is marked by the punitive sanction" view the criminal law as "something like a natural kind." *Id.* at 21.

recognize a sanction as a punishment if we know what punishment is for. Contrary to the orthodox answer, a functional and not a structural feature must mark the boundary between punishment and non-punishment.

Exactly how the foregoing argument (if I have understood it correctly) is supposed to refute the orthodox answer is unclear to me. Theorists who identify the criminal law by reference to punishment, and agree that a sanction cannot be a punishment unless those who impose it have a punitive intention, may have very different views about the function that punitive sanctions are designed to serve. They need not agree about this function in order to embrace the orthodox answer. All they need to suppose is that an intention is punitive when it is designed to impose a deprivation or a hardship; the resulting deprivation or hardship cannot simply be a collateral consequence of some other objective that is sought, as when persons become unemployed because of regulations of their occupation or profession. I see no reason why theorists must agree about the exact function of punishment in order to concur that punishment is what separates the criminal law from other areas of the law. That is, they can agree that *whatever* the function or functions of punishment may be, laws are criminal when violators are subjected to them. I have conceded that the orthodox answer gives rise to problems and unresolved controversies. What I admit to be a problem with the orthodox answer, however, is apparently construed by Moore to be a refutation of it.

In any event, Moore does not simply reject the orthodox answer; he replaces it with an alternative view that he believes to be superior to it. Moore holds that the criminal law is a functional kind, the function of which is to realize a principle of retributive justice.[20] This principle, as Moore construes it, requires that all (but only) culpable wrongdoers be punished to the extent of their desert.[21] But despite his unambiguous statement that something "is wrong with this remedy-based view of the criminal law,"[22] I confess to uncertainty about whether Moore's own view is really intended to reject the orthodox answer. To reject this answer, a theorist must believe that some laws that subject violators to punishment

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This claim is puzzling. According to Moore, three kinds of kinds exist: natural, nominal, and functional. *See id.* at 19-20. Kinds are natural when they "not only exist 'naturally' (i.e., without human contrivance) but also have a nature to them that gives the essence of the kinds." *Id.* at 19. No one today—and certainly not Moore—believes that the criminal law exists naturally, without human contrivance. Therefore, no one today believes that the criminal law is what Moore describes as a natural kind. Criminal theorists who believe that the criminal law is marked by the punitive sanction should not be understood to view the criminal law as "something like a natural kind." *Id.* at 21. Whether something is or is not a natural kind cannot admit of degrees.

20. *See id.* at 20.
21. *See id.* at 185.
22. *Id.* at 24.

are *not* criminal laws, and/or that some laws that do not subject violators to punishment *are* criminal laws. I see no clear evidence that Moore thinks that any such laws actually exist; he does not provide examples of laws in either category.

When presented with a possible counterexample to his theory that a law is criminal when it realizes a principle of retributive justice, Moore does not respond in exactly the way that I would anticipate if he really believed that the realization of retributive justice were the defining feature of the criminal law. Moore replies to a challenge to explain how retributive justice could possibly be realized by an ordinance against giving food to a homeless person.[23] His reply, not surprisingly, is that retributive justice is *not* realized by such an ordinance; persons who violate this law are not wrongdoers and do not deserve to be punished.[24] I have no quarrel with this reply. But if Moore really believed that the criminal law is defined by the realization of retributive justice, his reply to this alleged counterexample would be somewhat different. He would not merely say that persons do not deserve punishment for violating this criminal law. He would say that this ordinance is not a criminal law at all. Since he purports to be providing a theory of the criminal law, he need not account for this peculiar ordinance any more than he need account for the laws in contract or tort. Moore's actual reply, however, suggests that he believes that the realization of retributive justice is a characteristic of *just* criminal laws—a far less controversial position—and not a characteristic of criminal laws per se.

Perhaps, then, Moore's view is designed merely to *supplement*, rather than to reject, the orthodox answer. His theory to identify those laws that are criminal might merely supplement rather than reject the orthodox answer in the following way. Perhaps he should be understood to hold that a law is criminal when it realizes a principle of retributive justice, and a law realizes a principle of retributive justice only by subjecting violators to punishment. So laws are criminal when they subject violators to punishment after all—which they do when they realize a principle of retributive justice.

Whether or not this latest suggestion construes Moore correctly—and I am right to suppose that his view should be understood to supplement rather than to reject the orthodox answer to the question of how criminal

23. *See id.* at 185. The example comes from David Dolinko, *Some Thoughts about Retributivism*, 101 ETHICS 537, 557 (1991).

24. *See* MOORE, *supra* note 1, at 185.

laws are identified—I believe it to be problematic. Some of the same problems persist. A law that subjects violators to punishment but does not do so by realizing a principle of retributive justice (such as the peculiar ordinance mentioned above) would not be a criminal law at all. But the problems run deeper. If it is possible to realize retributive justice by some means other than punishment, this theory to identify the criminal law will be deficient. Later, I will contest Moore's arguments that are designed to show that retributive justice can only be realized by punishment.[25]

I dwell on this topic because the criterion by which laws are identified as criminal is absolutely crucial to theory construction. As I have indicated, different sets of data can, and do, produce radically different theories of the criminal law. If Moore is correct, and laws are criminal when they realize a principle of retributive justice, his theory need not be concerned with laws that do not have this function. But if the orthodox answer is correct, and laws are criminal when they subject violators to punishment, it becomes virtually impossible, in my judgment, to defend a relatively simple theory about the aim, function, or purpose of the criminal law. No theory, I fear, can remotely fit the data. The hundreds of thousands of laws that subject violators to punishment are so diverse that they resist any unifying theory.[26] Moore joins a long line of distinguished criminal theorists who have contended that the criminal law is essentially concerned with wrongdoing and blame.[27] Whatever may have been the case historically, however, I am less persuaded that this concern is especially evident in the criminal law as it exists today.[28] I concur with those commentators who claim that we "mythicize" the criminal law when we construe it as a "stickler for individualized moral blameworthiness."[29] Judicial deference to legislative supremacy in the creation of crimes all but ensures that no theory about the function of the criminal law will closely fit

25. *See infra* Part III.

26. This negative conclusion is probably impossible to prove. Perhaps all that can be accomplished is to point out that counterexamples to a simple, coherent, and unifying theory are pervasive. In any event, commentators have come to a similar conclusion about the criminal law of England and Wales. "[T]he sheer variety of conduct that has been designated a criminal wrong defies reduction to any 'essential' minimum. One finds no unifying thread to the subject matter of the multifarious crimes known to England and Wales." A.P. SIMESTER & G.R. SULLIVAN, CRIMINAL LAW: THEORY AND DOCTRINE 3 (2000).

27. In recent history, the most prominent contributions are Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958), and HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

28. "The tendency at the close of the twentieth century is to focus not on the necessity that the guilty atone but on the pragmatic utility of using criminal sanctions to influence social behavior." GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 203 (1998).

29. Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1279 (1998).

existing practice.[30]

Other areas of law, Moore contends, are far more resistant to the kind of unifying theory he defends in the criminal context. Consider his brief remarks about property law. He claims that property law contains a "hodgepodge of doctrines" that lack any distinctive goal or function.[31] To defend this anti-theoretical claim, Moore must have some means to identify those laws that fall within the domain of property law. What are the data of a theory of property law? If, for example, Moore identified property laws by the device he uses to identify criminal laws, property laws would be those that implement principles of justice in acquisition, use, and transfer.[32] By employing such a device, a theorist could "find" property law to be unified and coherent.[33] Moore is able to avoid describing the criminal law as a hodgepodge because he identifies criminal laws (the data for theory construction) by a criterion that guarantees the accuracy of a simple, coherent, and unifying theory. If Moore had used the orthodox answer to identify the criminal law, he might have come to the same anti-theoretical conclusion about criminal law that he reaches about property law.

Return to my example of disturbing mud in a cave.[34] How would Moore respond if this statute were presented as a counterexample to his theory that the criminal law realizes a principle of retributive justice? Three answers are possible. First, he might reply that, appearances notwithstanding, this statute proscribes wrongdoing and realizes a principle of retributive justice.[35] This response seems implausible and does not cohere easily with other positions held by Moore.[36] Second, he might admit that this statute does not realize a principle of retributive justice, but deny that his theory is falsified by a few isolated counterexamples. The problem with this

30. Legislative supremacy in the creation of crimes has been affirmed most recently in Montana v. Egelhoff, 518 U.S. 37, 58 (1996) (Ginsburg, J., concurring in judgment).

31. MOORE, *supra* note 1, at 34.

32. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 280 (1974).

33. Similar strategies are available in tort law. *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS 198-203 (1992); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 32-36 (1995).

34. *See supra* note 17 and accompanying text.

35. A heroic effort in this direction is undertaken by Stuart P. Green, *Why It's A Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997).

36. Moore construes his position to be liberal in outcome. *See infra* Part IV. It is hard to see how a willingness to regard this conduct as wrongful could be compatible with his liberal sympathies.

response is that such counterexamples are neither few nor isolated. Many statutes appear to have virtually no connection to wrongdoing or to a principle of retributive justice.[37] Third, Moore might reply that the whole exercise of responding to possible counterexamples from positive law is quite beside the point. He might insist that his theory is not designed to provide an account of the criminal law as it is, but rather of the criminal law as it ought to be.[38]

The first thing to say about this third response is that there is ample evidence against it in *Placing Blame*.[39] Moore assures us that his "interest . . . is in a theory of criminal law as it exists in the Anglo-American legal culture . . . ."[40] Elsewhere, he adds that his ultimate strategy in defending his version of retributivism is one that "accepts established legal institutions at face value and asks, 'what goals makes [sic] the most sense of these?'"[41] Despite this textual evidence, I believe it is likely that Moore would dismiss these potential counterexamples as largely irrelevant to his project, which is more normative than descriptive. This interpretation explains why he does not even attempt to establish a fit between his theory and the existing criminal law.

I do not think, then, that the criminal law as it exists today is especially concerned with wrongdoing. Nor do I think that the criminal law as it exists today is especially concerned with culpability—the other component of Moore's conception of retributive justice.[42] Many of the statutes that qualify as criminal by the orthodox answer lack a culpability requirement altogether. Most criminal law commentators agree that the Supreme Court has approved of criminal liability without culpability, even when

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37. In case anyone doubts that counterexamples are so pervasive, consider various offenses of drug use and possession. Although such offenses are driving the criminal justice system today, Moore concurs with my view that they cannot be defended morally. *See* MOORE, *supra* note 1, at 778-95. For a sustained attack on the justifiability of drug offenses, see DOUGLAS N. HUSAK, DRUGS AND RIGHTS (1992).

38. Moore's actual view is somewhat more complex. He holds the very "line between descriptive and normative theories" to be "questionable." MOORE, *supra* note 1, at 9. "Descriptive theories," he contends, "are evaluative." *Id.* at 18.

39. Admittedly, evidence also can be found for a contrary interpretation. Moore writes that "the most interesting theory of the criminal law . . . is descriptive of what is known as criminal law's 'general part' and normative about what is known as criminal law's 'special part.'" *Id.* at 9-10.

40. *Id.* at 19.

41. *Id.* at 159.

42. According to Moore, "[c]ulpability itself consists of two properties: intentionality, and absence of excuse." *Id.* at 55. I am not persuaded that this analysis of culpability is adequate; when the criminal law requires culpability, it frequently requires only recklessness rather than intention. Although Moore undoubtedly has described the paradigm of culpability, the most interesting and troublesome question, to my mind, is how far this paradigm may be extended to give rise to deserved punishment for persons whose criminal conduct is not intentional.

punishments are severe.[43] If Moore believed his theory to be an adequate description of the special part of the criminal law, he should try to reconcile his account with the many well-known cases that are widely regarded as counterexamples to it.[44] Although the task is daunting, perhaps he can succeed.[45] But the fact that Moore does not even *try* to establish this fit provides further reason to suspect that either he does not embrace the orthodox answer, or his theory is not designed to be descriptive.

To be sure, the lack of fit between theory and the data the theory are designed to explain is not peculiar to Moore's particular account of the criminal law. As I have indicated, criminal theorists often speak of the criminal law as designed to impose blame for wrongdoing. How can they continue to suppose that their views are faithful to the criminal law as it exists today? One time-honored device to retain some degree of fit between theory and data is to confine the application of the theory to the so-called *core* of the criminal law. As long as one purports to be concerned only with core criminality, the lack of fit between theory and data may escape notice. The data that cannot be explained by the theory are consigned to the periphery of the criminal law, from where counterexamples should not be drawn. The adequacy of this device, of course, cannot be assessed in the absence of a criterion to identify the core of the criminal law.[46] Unless there is some independent means to identify this core, the claim that a theory fits the core is likely to become trivial. To avoid triviality, the core of the criminal law must consist in something other than those laws that the theory happens to fit.

Granted, I do not deny that Moore's view is attractive. In my judgment, the criminal law as reformed along the directions indicated in *Placing Blame* would almost certainly represent a tremendous improvement over what we have today. Notwithstanding this concession, I remain skeptical

43. *See* Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 832-34 (1999).

44. For the most well-known such cases, see, for example, U.S. v. Park, 421 U.S. 658 (1975) (affirming criminal liability of president of food distributor for rodent contamination of certain shipments); U.S. v. Dotterweich, 320 U.S. 277 (1943) (affirming conviction of corporate officer for shipments of misbranded drugs); U.S. v. Balint, 258 U.S. 250 (1922) (finding valid a statute imposing liability without scienter for sale of narcotic drugs).

45. I explore the possibility that the Court may be less enthusiastic about strict liability than most commentators believe it to be. *See* Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 860 (1999).

46. For a discussion of the difficulties in identifying the core of the criminal law, see GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 404 (1978).

that Moore's theory lives up to its billing as a theory *of* the criminal law. No commentator can afford to be so cavalier about the lack of fit between his theory of the criminal law and the criminal law as it exists. At some vague point—when the chasm between theory and data becomes too wide—the theory ceases to be about the criminal law at all.[47] Instead, it is a theory about what should *replace* the criminal law. In my judgment, Moore's theory probably crosses this vague threshold.

III. RETRIBUTION AND THE RATIONALE OF PUNISHMENT

The principle of retributive justice that Moore uses to identify the criminal law is realized when culpable wrongdoers are punished to the extent of their desert. According to Moore, consequentialist considerations play no role in the justification of punishment.[48] He writes: "[P]unishment is justified if it is given to those who deserve it. Desert . . . is a sufficient condition of a just punishment, not only a necessary condition."[49] In this Part, I challenge this extraordinary account. I will argue that what culpable wrongdoers deserve may not be punishment. Additionally, I will argue that consequentialist considerations play an indispensable role in the justification of punishment.

Why should we be attracted to a theory that conceptualizes the criminal law as functioning solely to exact retribution? Is it not true that at least part of the purpose of the criminal law is to reduce crime? Moore thinks not. He begins his defense of retributivism by appealing to intuitions.[50] These intuitions, cultivated through various thought experiments long familiar to moral philosophers, are designed to show that the state of affairs in which culpable wrongdoers are punished is intrinsically good (superior to a state of affairs in which they are not punished) even though no utilitarian objective such as crime reduction is achieved.[51] Moore concludes that these thought experiments "reveal us to hold retributive beliefs" about the rationale for punishment and demonstrate that consequentialism plays no

47. For a general discussion of how legal theories must fit the data of theory construction, see RONALD DWORKIN, LAW'S EMPIRE 65-68 (1986).

48. *See* MOORE, *supra* note 1, at 153.

49. *Id.* at 153-54.

50. Moore invokes additional arguments in support of retributivism; he does not rely solely on third-person judgments about what states of affairs are valuable. He also appeals to first-person judgments. He asks us to "imagine the guilt you would feel if you did the kinds of acts that fill the criminal appellate reports of any state." *Id.* at 145. He continues: "[S]uch guilt feelings typically engender the judgement that we deserve punishment." *Id.* at 147-48. If my subsequent arguments are sound, I believe that the feelings of guilt to which Moore refers only show that we deserve to suffer for our crime, not that we deserve to be punished for it.

51. Moore actually presents three thought experiments, but each, as far as I can tell, is designed to establish the same point. *See id.* at 98-100.

role in its justification.[52]

Each of these thought experiments involves persons like Donald Chaney who have committed monstrous crimes but whose punishment is unjustified according to a (pure or mixed) utilitarian theory.[53] No good, beyond the realization of retribution, is promoted by punishment. I share Moore's intuition that the state of affairs in which Chaney does not receive his just deserts is dissatisfying. I also concur with Moore about the crucial point that has divided retributivists from consequentialists: the value of the state of affairs in which Chaney is given his just deserts is not dependent on utilitarian gains such as crime reduction. Still, I will argue that these thought experiments fail to establish what Moore claims and needs: they do not demonstrate the intrinsic value of punishing culpable wrongdoers, or that consequentialism plays no role in the justification of punishment.

In order to clarify what I believe these examples show and do not show, I begin by noting that retributivism, as construed by Moore, is not simply the view that *criminals* deserve to be punished, but the view that a culpable "wrong ought to be punished."[54] That is, retributivism provides as much a reason to create *new* crimes to proscribe culpable wrongdoing as to punish persons who commit crimes that already exist. Consider a case (#1) in which a person has clearly engaged in culpable wrongdoing—even though his conduct happens not to be a crime. Consider the hypothetical case of Smith, who engages in conduct as heinous as that of Chaney. For some reason, however—perhaps due to a legislative oversight—Smith's conduct is not criminal. Thus, the state lacks the lawful authority to seek to attain the value of retribution. Suppose that the outraged siblings of Smith's victim find him and exact a terrible vengeance. They make Smith suffer for his culpable wrongdoing—to the very same extent as would be just if his act were criminal and he were punished in proportion to his desert.[55] Smith has not been *punished*,[56] although he has been made to suffer to the

52. *Id.* at 104.

53. *See* State v. Chaney, 477 P.2d 441, 441-43 (Alaska 1970) (finding punishment of concurrent one-year terms of imprisonment to be too lenient for conviction on two counts of forcible rape and one count of burglary).

54. MOORE, *supra* note 1, at 187.

55. In both of my thought experiments, Smith is made to suffer by human agents for his culpable wrongdoing. Suppose, however, that Smith's suffering (to the appropriate degree) results from a natural disaster such as an earthquake. In this case, Smith is not made to suffer *for* his crime. My own intuitions are somewhat unclear about whether the demands of retribution have been satisfied in this case. To avoid this complication, Smith is made to suffer for his crime in my thought experiments.

56. I assume that the siblings are incapable of imposing punishment. In my view,

same extent as if he had been punished. Are our retributive intuitions satisfied? My own answer is affirmative.[57] If the objective of retributive justice is to give Smith his just deserts, I am inclined to believe that this objective has been achieved. Punishment, I conclude, is not the only possible means by which the demands of retributivism might be obtained. The intrinsic value of giving a person what he deserves can be attained even in a situation in which the state lacks the lawful authority to punish the culpable wrongdoer.

Now consider a case (#2) in which no legislative oversight occurs and Smith's act of culpable wrongdoing is a crime. Again, before the state can arrest him, the siblings of his victim take their vengeance out on Smith. In this case, do our retributive beliefs demand that Smith be punished, notwithstanding the fact that he already has been made to suffer to the appropriate degree for his crime? Again, as in all of these thought experiments, we are assured that no good consequences will be produced by his punishment. Should we continue to insist that punishment is still needed? I think not. If I am correct, our retributive beliefs only require that culpable wrongdoers be given their just deserts by being made to suffer (or to receive a hardship or deprivation). These beliefs do not require that culpable wrongdoers be given their just deserts by being made to suffer by the state through the imposition of punishment. In other words, even when the state has the lawful authority to punish culpable wrongdoers, our retributive beliefs do not really show that *punishment* is deserved.[58]

Let me clarify my position. In case #1, in which Smith's monstrous act happens not to be a crime, I am not simply maintaining that the principle of legality—which precludes punishment for non-criminal conduct—provides a reason against punishment that overrides the reason in favor of punishment.[59] Both cases #1 and #2 are intended to challenge Moore's claim that our intuitions show that *punishment* is what culpable wrongdoers

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vengeance is an alternative means to realize retribution, that is, a device for exacting retribution without punishment. Most definitions of punishment support my assumption. *See* HART, *supra* note 5, at 4-6.

57. For further discussion, see Douglas N. Husak, *"Already Punished Enough,"* 18 PHIL. TOPICS 79 (1990).

58. Retributivists differ about what culpable wrongdoers deserve. *See* R.A. Duff, *Punishment, Communication, and Community, in* PUNISHMENT AND POLITICAL THEORY 48, 50 (Matt Matravers ed., 1999). According to Duff, wrongdoers deserve censure. *See id.* He writes: "Whatever puzzles there might be about the general idea that crimes 'deserve' punishment, puzzles of which some anti-retributivists make quite a meal, there is surely nothing puzzling about the idea that wrongdoing deserves censure." *Id.* Even this claim, however, may go too far. Perhaps wrongdoers only deserve that others hold negative attitudes about them; any expression of these attitudes may require further defense.

59. *See infra* Part IV for a brief discussion of legality.

deserve. As an alternative, I propose that what culpable wrongdoers deserve is *suffering* (or deprivation or hardship). This crucial difference is blurred in the thought experiments that Moore provides.[60] We are invited to suppose that a culpable wrongdoer like Chaney is not made to suffer for his crime unless he is punished, and our intuitions recoil at this prospect. The point of my thought experiments is to separate punishment from suffering by describing cases in which suffering is inflicted but punishment is not. When suffering is inflicted but punishment is not, the retributive beliefs I share with Moore are satisfied and no longer demand that punishment be imposed.

In evaluating the thought experiments presented by Moore, we tend to imagine that a culpable wrongdoer like Chaney is not made to suffer for his crime unless he is punished because we believe that no one other than the state has the authority to make Smith suffer so horribly. I do not challenge this belief.[61] I should not be misunderstood to condone the behavior of the vengeful siblings. My claim is that devices other than state punishment can satisfy the demands of retributive justice. If we deny the authority to exact retribution by victims (as we should) and confer a monopoly of punishment on the state (as we should) our reasons should not stem from the supposition that only state punishment can possibly satisfy the demands of retributive justice. Our reasons to prefer state punishment to private vengeance cannot be derived solely from a principle of retributive justice.

Another way to make my point is to invoke the relationship of "fit" that retributivists might use to explain the connection between crime and punishment.[62] Just as there is something fitting or appropriate about reacting with disapproval at the sight of cruelty, we are encouraged to suppose that there is something fitting or appropriate about imposing punishment on criminals. My point is that the fit we intuit does not really obtain between crime and punishment, but rather between crime (as culpable wrongdoing) and suffering (or deprivation or hardship). We sometimes claim to intuit a fit between crime and punishment when we mistakenly suppose that the appropriate degree of suffering (or deprivation or hardship) can only be produced *by* punishment.

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60. *See supra* notes 50-53 and accompanying text.

61. Thus I do not question whether the imposition of retributive punishment is a legitimate function of the liberal state. *See* Jeffrie G. Murphy, *The State's Interest in Retribution*, 5 J. CONTEMP. LEGAL ISSUES 283, 284-85 (1994).

62. No one should underestimate the difficulties that arise in providing an account of this relationship of "fittingness." The relationship cannot be solely descriptive, but must imply some kind of rational endorsement.

I adopt one final route to my conclusion. Let us stipulate that culpable wrongdoers have negative desert. Just as I believe that the state of affairs in which persons with negative desert are made to suffer is intrinsically good, I believe that the state of affairs in which persons with positive desert are made to prosper is intrinsically good. Perhaps there is an asymmetry between negative and positive desert, so that the intrinsic value of depriving persons with negative desert is greater than the intrinsic value of rewarding persons with positive desert. Still, there is some intrinsic value, however slight, in rewarding persons with positive desert. This intrinsic value is achieved when persons with positive desert are rewarded. We would be unlikely to think, however, that only the state could possibly achieve this intrinsic good by conferring rewards on persons with positive desert. Similarly, we should not think that only the state could possibly achieve the intrinsic good of imposing deprivations on persons with negative desert.

If I am correct that our retributive beliefs do not justify punishment, but only the infliction of suffering, what *else* is required to justify punishment? Unlike Moore, I do not believe that the institution of punishment can be justified solely as a means to achieve the intrinsic value of giving culpable wrongdoers what they deserve.[63] Instead, I believe that the justification of the institution of punishment must incorporate consequentialist elements. Moore has told only part of the story—admittedly, a very important part. To complete the account, however, one must also show that the benefits of state punishment exceed its costs.[64] Moore describes one of these benefits in impressive detail: punishment is a means to give culpable wrongdoers their just deserts. But what of its costs? I will briefly mention three of these costs that I collectively refer to as the *drawbacks* of punishment.[65]

The first such cost is the astronomical expense of our system of criminal justice. Like most philosophers, Moore pays relatively little attention to considerations of economics. But institutions that are designed to give persons what they deserve are unbelievably expensive.[66] They cost

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63. *See supra* notes 20-21 and accompanying text.

64. Moreover, a comprehensive account must show that no alternative to punishment can do better. In particular, one must prepare a cost/benefit analysis of private vengeance. One of the reasons typically given to prefer punishment to private vengeance is that the former is thought to be more likely to realize the principle of retributive justice. Unfortunately, however, evidence for this claim is thin. The massive injustice of the drug war has led me to suspect that the state does not do an adequate job in realizing retributive justice. *See* Douglas N. Husak, *Desert, Proportionality, and the Seriousness of Drug Offences*, *in* FUNDAMENTALS OF SENTENCING THEORY 187 (Andrew Ashworth & Martin Wasik eds., 1998). In any event, we lack reliable data on the relative efficacy of private vengeance as a means to realize retributive justice.

65. *See* Douglas N. Husak, *Why Punish the Deserving?*, 26 NOÛS 447, 458 (1992).

66. These economic costs are described in ELLIOTT CURRIE, CRIME AND PUNISHMENT IN AMERICA 37-39 (1998).

taxpayers enormous sums of money that might be used to achieve many other benefits that taxpayers should want: education, transportation, funding for the arts, welfare, and the like. Second, an institution of punishment is susceptible to grave error. Despite the best of intentions, punishment is bound to be imposed unjustly, at least occasionally.[67] The third cost of creating an institution of punishment is the inevitability that authority will be abused. Although I make no effort to estimate the extent to which authority is abused, I am confident that the price paid by society is enormous. In combination, these three drawbacks of punishment are extraordinarily costly.

Retributivists like Moore seemingly suppose that their task is complete when they show that the punishment of culpable wrongdoers is intrinsically good; that more value is produced in the world when criminals receive their just deserts, even though no increase in utility is produced. I can appreciate why retributivists tend to dwell on this crucial point, in light of the refusal of consequentialists to concede it. But this demonstration does not suffice to justify the institution of punishment—even for retributivists. They must show not only that giving culpable wrongdoers what they deserve is intrinsically valuable, but also that it is *sufficiently* valuable to offset the drawbacks that inevitably result when an institution of punishment is created.[68] The intrinsic goodness of realizing a principle of retributive justice would justify punishment in a possible world (such as a divine realm) in which none of the foregoing drawbacks obtained. Unfortunately, that possible world is not our world. In our world, we must sympathize with citizens who balk when asked to fund an institution that has the sole objective of realizing retributive justice. Citizens might reasonably prefer to use their precious tax dollars for any number of other worthy purposes.[69] My point is that the value of realizing retributive justice, by itself, is insufficient to justify the creation of an institution of

67. *See* Donald A. Dripps, *Miscarriages of Justice and the Constitution*, 2 BUFF. CRIM. L. REV. 635, 637 (1999).

68. The difficulty of offsetting the drawbacks of punishment arises not only for retributivists who (like Moore) defend punishment as a device to attain retributive justice, but also for retributivists who argue that punishment is justified by its expressive or communicative function. Even if punishment serves an important expressive or communicative function, why suppose that the performance of these functions is sufficiently important to justify the creation of an institution of punishment?

69. To decide which worthy purposes should be given priority, we need nothing less than a comprehensive theory of the state, complete with weights attached to each of its several functions. Despite the enormous breadth of Moore's project, he does not defend a comprehensive theory of the state.

punishment with the formidable drawbacks I have described.[70] Something else needs to be said on behalf of punishment.[71]

The difficulty I have mentioned is not resolved if we hold, with Moore, that society has not only the right, but also the duty, to realize retributive justice by imposing deserved punishment.[72] The same problem I have posed resurfaces. The burden is to show not only that the imposition of punishment is a duty, but also that it is a duty of sufficient weight or stringency to justify an institution with the drawbacks I have recounted. Unless we have some views about the stringency of this duty—about the extent of the value of realizing retributive justice—we will be unable to assess any number of recent questions that have arisen in criminal justice. Consider, for example, proposals to repeal statutes of limitations for rape prosecutions. DNA evidence now enables us to reliably identify perpetrators of rape years after the crime was committed. Should we prosecute persons we now know to have committed rape decades ago? Retributivists might be expected to provide competing answers to this question depending upon the relative importance they assign to the principle of retributive justice. Theorists who believe that the realization of retributive justice is of crucial significance are likely to think that statutes of limitations should give way in the face of new evidence about the identity of rapists. But theorists who assign less weight to the realization of retributive justice may disagree. Even if the attainment of retributive justice that results from the punishment of culpable wrongdoers is a duty, the relative stringency of this duty must still be assessed.

What is needed to answer the problem I have posed is some additional value that punishment can be expected to attain—a value which, when added to the value of realizing retributive justice, will justify the institution of punishment. This value, I submit, is crime reduction—a good clearly worthy of precious tax resources. Thus, I contend that crime reduction plays an essential role in the justification of criminal law and punishment. Exactly where and how crime reduction enters into an adequate justification of criminal law and punishment is complicated and contentious, so this discussion must be postponed for another time.[73] But

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70. I am unaware of an argument that should persuade persons who do not share my intuitions and believe that the intrinsic value of realizing retributive justice is sufficiently great to offset the foregoing drawbacks. However, I am equally unaware of an argument that should persuade persons who do not share my intuitions that the attainment of just deserts (apart from consequences) has any intrinsic value.

71. These drawbacks of punishment have many philosophical implications for retributivism. For example, they undermine claims that retributive justice differs fundamentally from distributive justice in that the latter, but not the former, is holistic. *See* Douglas Husak, *Holistic Retributivism*, 88 CAL. L. REV. 991 (2000).

72. *See* MOORE, *supra* note 1, at 91.

73. For some intriguing thoughts about the role of crime reduction in a basically

we would not, I repeat, be tempted to create an institution of criminal justice with the drawbacks I have described unless we were satisfied that so doing would tend to reduce the incidence of the conduct we had categorized as criminal. The benefits of crime reduction, when added to the intrinsic goodness of achieving retributive justice (hopefully) offset the drawbacks of punishment. Contrary to pure retributivists like Moore, a theory of criminal law and punishment must find some justificatory role for crime reduction.[74]

IV. LIBERAL LEGAL MORALISM

Many commentators allege that the criminal law sweeps far too widely, and that we suffer from a crisis in overcriminalization.[75] As a result, legal philosophers have searched for a set of principles to limit the reach of the criminal sanction. But we cannot begin to decide whether we suffer from overcriminalization unless we address the more basic inquiry of what the criminal law is for. Without a theory of criminalization, we cannot respond to the charge that we might actually underutilize the criminal sanction.[76] Our society is plagued by a variety of ills. Economists warn that workers do not save enough for retirement. Nutritionists point out that people eat too many calories. Educators complain that students do not read enough. How should we decide which of these ills, if any, calls for a criminal penalty? Allegations about overcriminalization or undercriminalization can only be assessed relative to a theory about the proper scope and reach of the criminal law—what Moore calls a theory of legislative aim.[77] On Moore's account, as we have seen, the criminal law functions to realize a principle of retributive justice.[78] Retributive justice is realized when the

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retributive theory of punishment, see generally ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993).

74. Moore occasionally invokes the legacy of Kant in his retributive defense of legal moralism. *See* MOORE, *supra* note 1, at 747. Kant, however, should (probably) be interpreted to believe that punishment is justifiable in order to "hinder hindrances to freedom." Thomas E. Hill, Jr., *Kant on Wrongdoing, Desert, and Punishment*, 18 LAW & PHIL. 407, 429 (1999). Thus Kant might well agree with my position, and depart from that of Moore, in assigning a crucial role to deterrence in the justification of punishment.

75. This allegation can be traced to Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967). *See also supra* note 27 and accompanying text.

76. *See* Green, *supra* note 35, at 1546.

77. *See* MOORE, *supra* note 1, at 639.

78. *See id.* at 23-30.

state adopts the theory of legislative aim that Moore calls *legal moralism.*[79] *Placing Blame* probably contains the finest defense ever given to legal moralism.

What exactly *is* legal moralism? Clearly, different formulations are available. Part of the difficulty in answering this question, I believe, is in deciding whether the term is used generally, to identify a group of theories that share crucial characteristics, or specifically, to name a single theory. I would have thought that different legal moralists could divide over the details of their particular views without relinquishing the mantle of legal moralism. Lord Devlin, for example, is probably the most well-known legal moralist of the twentieth century.[80] But Devlin, as Moore is well aware, shares only a handful of the theses that Moore attributes to legal moralists.[81] By contrast, Joel Feinberg characterizes legal moralism "in the usual narrow sense" as the view that "[i]t can be morally legitimate to prohibit conduct on the ground that it is inherently immoral, even though it causes neither harm nor offense to the actor or to others."[82]

Moore's own characterization of legal moralism is unlike those of Devlin or Feinberg. According to Moore, a legislator who subscribed to legal moralism,

> [W]ould believe that in some sense there are right answers to moral questions . . . and that such right answers do not depend on what most people . . . happen to think about these matters. Further, a theorist of this type would believe that every legislator has the right and the duty to legislate his view of what the correct moral order is, into law.[83]

This account of legal moralism contains at least two distinct claims, each of which can be held without the other. First, it includes a metaethical thesis about the status of morality. Second, it contains a political thesis about how legislators should legislate. I will resist the temptation to discuss the metaethical realism of Moore's legal moralism.[84] In what follows, I will critically evaluate that component of legal moralism that offers guidance to legislators.

I will begin with three quick reservations. First, I find it curious that Moore chooses to characterize legal moralism as a theory of legislative

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79. *See id.* at 662.

80. *See, e.g.*, PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965).

81. Moore properly critiques Devlin's conception of morality as too sociological. *See* MOORE, *supra* note 1, at 129. For a more favorable view of Devlin, see Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality*, 40 WM. & MARY L. REV. 927, 928 (1999).

82. 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING xix-xx (1988) [hereinafter FEINBERG, HARMLESS WRONGDOING].

83. MOORE, *supra* note 1, at 645.

84. For some forceful criticisms, see JEREMY WALDRON, LAW AND DISAGREEMENT 164-87 (1999).

aim. Legal moralism, I submit, should be identified by the content of the criminal law, not by the motivations of those who enact it. Suppose that a legislator is bribed to ratify a criminal code that happens to prohibit all and only instances of culpable wrongdoing. The aim of this legislator is to increase his own wealth, not to punish immorality. Would we not describe this code as giving effect to legal moralism? In any event, I doubt that Moore really means that a legislator who subscribes to legal moralism has "the duty to legislate *his view* of what the correct moral order is, into law."[85] Suppose that, like Devlin, this legislator has a deficient conception of how the content of morality should be ascertained. If so, his duty cannot be to enact *that* view of morality into law.[86]

Second, I suspect that legal moralism has a difficult time explaining the significance of the principle of legality—and reconciling Moore's position on legality with his other theoretical commitments. When Moore is somewhat careless, he claims that the criminal law should realize the following principle of retributive justice: "Moral responsibility ('desert') . . . is not only necessary for justified punishment, it is also sufficient."[87] But Moore does not really mean that the desert of the culpable wrongdoer suffices for deserved punishment.[88] If the state has neglected to criminalize an instance of immoral conduct, the principle of legality gives rise to a countervailing reason *not* to punish it. According to Moore, the weight to be given to the principle of legality will nearly always override the weight to be given to the competing principle that immorality should be punished.[89] But why these competing principles should (nearly always) be balanced in this way is not altogether clear. Presumably, the importance of legality derives mostly from the need to give adequate *notice* to potential defendants. Consider, however, a case in which a person engages in immoral conduct that he believes to be criminal. He

85. MOORE, *supra* note 1, at 645 (emphasis added).

86. Moore's own moral views clearly differ from those of the majority of Americans generally and of legislators in particular. Although he rejects the justifiability of drug offenses, recent polls indicate that a majority of persons in our society (as well as legislators) believe that "smoking marijuana is always morally wrong and should not be legally tolerated." David M. Wilber, *Reefer: Madness or Medicine? Taking Sides on the Medical Use of Marijuana*, 10 PUB. PERSP. 10, 14 (1999).

87. MOORE, *supra* note 1, at 91.

88. Moore later protests that claims about sufficiency should seldom be taken literally. *See id.* at 173.

89. On very unusual occasions, Moore holds that the unfairness of punishing persons who have not violated an existing criminal law is outweighed by the enormity of the wrong that would go unpunished. *See id.* at 187. His example of this phenomenon involves Nazi war criminals. *See id.*

subsequently discovers, much to his surprise and relief, that his conduct was not proscribed by an existing criminal statute after all. In such a case, one might think that the weight to be given to the principle of legality might be insufficient to override the value of realizing retributive justice. If the principle of retributive justice does not emerge as more weighty in this kind of case, one wonders how much weight it has generally. Moore's central thesis, of course, is that the duty to realize retributive justice is quite stringent—sufficiently weighty to justify the creation of a criminal justice system with its institution of punishment, despite the enormous drawbacks I have described.[90] I would think that such a stringent duty would outweigh the principle of legality in more kinds of cases than Moore seems prepared to allow.

Finally, I take brief issue with Moore's account of "the correct moral order" that legal moralists believe should be enforced by the criminal law.[91] According to Moore, the correct moral order to be enforced proscribes culpable wrongdoing.[92] The exclusive focus of the criminal law on culpable wrong*doing*, according to Moore, gives rise to the familiar act requirement in criminal liability.[93] Here I will make only two brief rejoinders to Moore's position, since I have addressed these matters elsewhere.[94] First, I see no reason why punishment cannot be deserved despite the fact that the defendant has failed to perform an act. Immorality, not a wrongful doing, is required for deserved punishment, and persons can engage in immorality without acting at all. Omissions provide the clearest (but not the only) examples, as Moore concedes—even while continuing to defend the act requirement.[95] Moreover, even if Moore is correct that deserved punishment requires culpable wrongdoing, the act requirement still would not follow. Many doings—things that people do—are not actions. People snore; people die; people bleed. Some of these non-active doings can be intentional. People grow beards. People make firm plans to assassinate politicians. Is not the latter example an immoral

90. *See supra* Part III.

91. MOORE, *supra* note 1, at 645. A criminal code that enforced the "correct moral order" would be fascinating to attempt to draft. Consider, for example, the familiar statutory distinction between petty and grand larceny. Would such a distinction, which presumably is largely conventional, survive in a code that reflected the "correct moral order"?

92. *See id.* at 36.

93. *See id.* at 45.

94. *See* Douglas Husak, *Does Criminal Liability Require an Act?*, *in* PHILOSOPHY AND THE CRIMINAL LAW: PRINCIPLE AND CRITIQUE 60 (Antony Duff ed., 1998); Douglas N. Husak, *The Relevance of the Concept of Action to the Criminal Law*, 6 CRIM. L.F. 327 (1995) (reviewing MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW (1993)).

95. *See* MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 34 (1993).

doing, even though it is not an action? No principled basis is available to the legal moralist to place such doings beyond the reach of the criminal sanction.

I mention these three reservations briefly in order to address the more basic issue. Why should we embrace legal moralism? In my opinion, the most attractive aspect of legal moralism is its ability to ensure that the criminal law is just, so that punishment is deserved. If all crimes are culpable wrongdoings, punishment (when imposed in the absence of excuse) can be deserved. Whatever the elusive details of a theory of desert, I see absolutely no prospects that punishment can be deserved unless the conduct for which it is imposed is wrongful. This is a powerful advantage of legal moralism that any theory of criminalization must try to preserve. Fortunately, as I will argue, the chief rival of legal moralism, when properly understood, retains this advantage.

A complete defense of legal moralism should contain two parts: first, a critique of alternatives; next, a positive argument in its favor. Moore lists three such alternatives: unrestricted utilitarianism, restricted utilitarianism, and paternalism.[96] The most well-known alternative to legal moralism, however—and the view I am inclined to support—is that criminal legislation should be used only to proscribe harm.[97] I will describe this alternative, which does not correspond to any of the three alternatives listed by Moore, as a *harm theory* of the criminal law. According to a harm theory, the criminal law should be used only to proscribe states of affairs that qualify as harms.

Moore attacks a harm theory on two fronts. First, he proposes three

96. *See* MOORE, *supra* note 1, at 642-45.

97. The familiarity of this alternative, of course, is due to John Stuart Mill. *See* JOHN STUART MILL, ON LIBERTY (Alburey Castell ed., 1947). A defensible harm theory, however, would diverge from (my understanding of) Mill's view in at least four respects. First, Mill himself was not especially concerned with the moral limits of the criminal law, or with the limits of law at all, but rather with the limits of power that a society could exert by any means. Second, Mill believed that harm must be caused to others. I do not believe that his arguments against all cases of paternalism are sound. Third, Mill assumed that only human beings could qualify as others. I see no good reason to follow him in this assumption. Finally, Mill located his harm theory in a "utilitarianism of a wider sort." *Id.* But harm theorists need not be utilitarians of any kind.

The best extended explication and defense of a harm theory is provided in a four-volume treatise by Joel Feinberg. *See* JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS (1984) [hereinafter FEINBERG, HARM TO OTHERS]; JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS (1985); JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF (1986); FEINBERG, HARMLESS WRONGDOING, *supra* note 82.

counterexamples—cases in which the legal moralist will criminalize, but the harm theorist will not: cruelty to animals, desecration of corpses, and destruction of species.[98] Second, he alleges that a harm theory suffers from a central defect common to all restricted theories: their exclusionary nature.[99] What, Moore asks, could possibly justify a decision not to extend the reach of the criminal sanction to those instances of culpable wrongdoing that do not cause harm? Why should the moral reasons that count elsewhere be deemed irrelevant when harm is not involved?[100] In what follows, I will try to respond briefly to both of these objections to a harm theory.

I will begin with a very quick response to the three alleged counterexamples to a harm theory. In the first place, a harm theorist may well refuse to be placed on the defensive here; Moore's own theory may be just as vulnerable to counterexamples as that of his competitor. If all culpable wrongdoing is eligible for proscription, legal moralism threatens to obliterate the criminal-civil law distinction.[101] Breaches of contract, no less than acts of theft, would seemingly qualify for criminal punishment. But I will not take the offensive here;[102] some response, I concede, is needed to Moore's alleged counterexamples. His first and third cases do not raise insuperable difficulties. Cruelty to animals can be proscribed on either of two grounds. First, a harm theory need not suppose that harm must befall human beings to call for criminal penalties. Arguably, non-human animals have rights too.[103] Acts that destroy species might be proscribed under similar rationales. The second alleged counterexample—desecration of corpses—may prove more difficult. I will not canvass the various responses that are available here.[104] As a last resort, a harm theorist may concede that criminal penalties are not warranted in this case; statutes that protect corpses, when human sensibilities are unaffected, may be more

98. *See* MOORE, *supra* note 1, at 646-47.

99. *See id.* at 659.

100. This kind of question plagues all liberals who believe that the just state should somehow remain neutral on matters of morality. Harm theorists, however, need not embrace neutralist liberalism.

101. A comprehensive theory of the criminal law must provide some account of the boundary between the civil and criminal law. The fact that this topic is not systematically discussed in an 849-page treatise is perhaps the most striking oversight in *Placing Blame*.

102. Admittedly, the criminal-civil law distinction is difficult to preserve on *any* theory of criminalization. A harm theorist must show, for example, that breaches of contract are not criminal harms—a very difficult undertaking. I am inclined to believe, although I will not argue, that legal moralists have a more difficult time than harm theorists in making sense of the boundary between the criminal and civil law.

103. The movement to re-conceptualize non-human animals as something other than property has gathered steam. *See, e.g.*, GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW (1995).

104. For a discussion see FEINBERG: HARM TO OTHERS, *supra* note 97, at 79-95.

a taboo than a defensible prohibition. I doubt that any legal philosopher would be persuaded to abandon a harm theory because he is steadfast in his conviction that corpses must be protected by the power of the criminal sanction.

The theoretical difficulty Moore brings against a harm theory may prove more formidable. Why should moral reasons become irrelevant as a basis for criminal legislation unless harm is caused?[105] What could justify this exclusion? Admittedly, the most familiar answer is totally unpersuasive. Legal philosophers have sometimes supposed that a harm theory can provide a viable alternative to the view that the law should be concerned with matters of morality.[106] If conduct should be proscribed because it is harmful, why worry about morality at all? It is easy to see why theorists are attracted to the pretense that messy and intractable moral disputes can be avoided if harm is the organizing principle of the criminal law. For two reasons, however, this familiar basis for subscribing to a harm theory is confused. The first reason focuses on the nature of the conduct a harm theory would proscribe; the second on the state of affairs that must be caused to count as a harm.

First, a harm theorist should not punish harmful conduct unless it is (also) wrongful. Conduct that causes harm, but is not wrongful, should not be proscribed by a harm theory. Second, a state of affairs cannot be identified as a harm (in the relevant sense) without reference to morality. Conduct produces harm to others when it infringes their rights.[107] Therefore, conduct that does not infringe anyone's rights, however unwanted or undesirable it may be, simply does not cause harm in the sense that renders it eligible for proscription. For each of these reasons, a harm theorist, no less than a legal moralist, requires a conception of morality to get his theory of criminalization off the ground. He does not *exclude* the moral reasons that Moore cites as material to his theory of criminalization; he *supplements* them. These reasons are necessary, but not sufficient for criminalization. Unless a harm theorist is prepared to doubly condemn conduct on moral grounds—both as immoral and as an infringement of rights—his theory will not allow that conduct to be punished. Therefore, his theory preserves the advantage of legal moralism

105. For simplicity, I will assume that a harm theorist requires an agent to cause harm before he will allow criminal liability. I am not persuaded, however, that the relationship between agent and harm need be causal. *See* DOUGLAS N. HUSAK, PHILOSOPHY OF CRIMINAL LAW 156-73 (1987).

106. *See id.* at 231-36.

107. *See* FEINBERG: HARM TO OTHERS, *supra* note 97, at 34.

I described above. It too can ensure that punishments should be imposed only on persons who deserve them.

Once we appreciate that both legal moralism and a harm theory require an account of morality to justify the use of the criminal sanction, the distinction between the two kinds of theories becomes thin. Neither theorist can afford to embrace moral skepticism. As we have seen, the essential difference between the two kinds of theorists is that a legal moralist believes that immorality can suffice for criminality. According to a harm theorist, however, something else is required—a *victim* whose rights have been violated.[108] What is the best reason to believe that immorality should be insufficient for criminality, and that harm should be required as well? Different answers have been given; none is uncontroversial.[109] The response I am inclined to favor again mentions what I have called the drawbacks of punishment.[110] Citizens need a very good reason to authorize the criminal sanction to be imposed, since our institution of punishment is extraordinarily costly, and prone to error and abuse. It is relatively easy to understand why rational citizens would be willing to endorse criminal sanctions that prevent violations of rights. All persons have a self-interested reason to protect rights; each of us has rights that conceivably could be infringed. By punishing harms, we have a reasonable expectation that infringements of our rights will be reduced. But why should rational citizens attach a comparable priority to the proscription of immoral conduct that is harmless and cannot possibly victimize them? I have suggested that the mere assurance that the world would contain more good if immorality were punished does not provide a satisfactory answer to this question. The cost of attaining this good may be too great. We lack a self-interested reason to proscribe immorality that is harmless; we have such a reason when immorality is harmful.

A legal moralist such as Moore may actually accept the foregoing basis I have sketched in favor of restricting the scope of the criminal law to the proscription of harm. Any theorist will find several grounds on which to limit the reach of the criminal sanction; Moore is no exception.[111] When such limiting grounds are added to his theory, the distinction between legal moralism and a harm theory, already thin, becomes thinner still. Moore concedes, as he must, that the costs of enforcement might be too great to

108. Or, a victim whose rights have been threatened. All sensible theories of criminalization will proscribe risks of harms as well as actual harms.

109. See, for example, the intriguing defense of the harm principle provided in JOSEPH RAZ, THE MORALITY OF FREEDOM 412-20 (1986).

110. *See supra* Part III.

111. These grounds include (inter alia) fair notice, convenience, and epistemic modesty. *See* MOORE, *supra* note 1, at 661-65.

justify criminalization.[112] I interpret him to mean that these costs might be too great in proportion to their benefits. If I am correct, the costs of punishment will exceed the benefits *whenever* the state is tempted to proscribe immorality that is harmless. The *only* benefit of punishing harmless wrongdoing is that so doing makes "the world . . . a morally better place."[113] But there are many ways to improve the world; exacting retributive justice on harmless wrongdoers is very low on any sensible list of priorities.

Moore's particular version of legal moralism moves that theory even closer to a harm theory. Despite the fact that his legal moralism provides a reason to criminalize *all* instances of wrongful behavior,[114] Moore somehow emerges as a liberal: a "legal moralist liberal."[115] Moore earns this peculiar label because his morality is so tolerant. When Moore's robust principles of tolerance that limit the reach of the criminal sanction are added to legal moralism, and a requirement of wrongfulness is understood to be a crucial component of a harm theory, the difference between the two kinds of theories nearly vanishes.[116]

I do not pretend, however, that a harm theory fits the criminal law as it presently exists. As I have indicated, the criminal laws of today are too varied to be amenable to a simple, unifying theory. One strategy, however, is available to a theorist who insists that virtually all criminal laws proscribe harms. The plethora of criminal statutes to which I have referred—such as drug offenses and the ban on disturbing mud in a cave—presumably are designed to prevent the *risk* of various kinds of harms. In my judgment, the most interesting and important unanswered questions about criminalization involve the prevention of risk. All theorists concede that only unreasonable risks may be punished. This concession raises at least two questions. First, under what conditions does risky conduct become unreasonable?[117] Second, under what conditions do persons deserve punishment when their act-type creates the unreasonable risk proscribed by a statute, even though their act-token is not especially

112. *See id.* at 663-64.
113. *Id.* at 649.
114. *See id.* at 661.
115. *Id.* at 661.
116. Nonetheless, I retain a slight preference for a harm theory. Certainly the history of morals regulation has been dismal. *See* ALAN HUNT: GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW (1996). The requirement of harm is a sensible way to try to improve the historical record.
117. *See* Douglas N. Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151 (1995).

risky?[118] I submit that these are the two most pressing issues a normative theory of criminalization must confront. Moore, to his credit, elaborates what I take to be the paradigm of culpable wrongdoing.[119] The outstanding problem in criminal law theory is to identify the conditions under which punishment should be extended *beyond* the paradigm of culpable wrongdoing so ably defended in *Placing Blame*.

118. *See* Douglas N. Husak, *Reasonable Risk Creation and Overinclusive Legislation*, 1 BUFF. CRIM. L. REV. 599 (1998).

119. *See* MOORE, *supra* note 1, at 689-98.