

# Political Retributivism and Legal Moralism

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## 1. Introduction

There is much that is both right and important in Dan Markel's very stimulating paper in this inaugural volume of the *Virginia Journal of Criminal Law*.<sup>2</sup> I will note just four matters here (without implying that Markel would accept all the glosses I put on them).

First, the justification of systems of criminal law and punishment is a political, not purely a moral, task. Philosophical theorists of criminal law, especially those who count themselves as legal moralists or who offer retributivist accounts of criminal punishment, too often talk as if criminal law should be a direct institutional manifestation of the moral law: its proper task, they think, is to ensure that culpable moral wrongdoers receive the suffering they deserve for their wrongdoing. Political theory and political considerations come in only at a second stage, to constrain the state's pursuit of this moral goal: we recognize, for instance, that such liberal values as liberty and privacy, together with the moral and material costs involved in a system of criminal punishment, set constraints on the extent to which the state should even attempt to criminalize and punish every kind of moral wrongdoing; so many kinds of wrongdoing which we have good reason of basic principle to criminalize should in the end, all things considered, escape the grasp of the criminal law.<sup>3</sup> However, the criminal law is not the moral law, or the law of God (this is one of the crucial differences between liberal democracy and theocracy). For one thing, the moral law is addressed to all moral agents; but the criminal law, as part of the structure of a polity as a political community, is addressed only to members of that polity; it addresses them, and it claims to bind them, not (merely) as moral agents, but as citizens of the polity.<sup>4</sup> Furthermore, as part of the polity's institutional structure, the criminal law's remit extends only over matters that are the polity's proper business—matters that fall within what we can call the civic enterprise of living together as members of a political community.<sup>5</sup> In a liberal polity, the civic enterprise is limited in its scope, since one central liberal concern is to leave its citizens with as extensive a possible sphere of "private" life (a sphere that is not the polity's business) within which they are free to pursue their own goals and to actualize their own values. Just how limited that enterprise is, and what it should include, are central tasks for democratic deliberation,<sup>6</sup> and in particular for deliberation between those whose views lie towards the more libertarian end of the liberal spectrum, who emphasize the importance of a negative species of liberty as non-interference; and those whose views lie closer to the "social

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<sup>1</sup> Thanks are due to the editors of the *Virginia Journal of Criminal Law* for arranging the symposium from which this paper emerged: I wish the journal well. Thanks are also due to Dan Markel for comments on a draft of this paper, which saved me from at least some misunderstandings.

<sup>2</sup> Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 *VIRGINIA J. OF CRIM. LAW* xx (2011). Future bare page references in the text of this article are to this paper.

<sup>3</sup> Michael Moore, who is one of Markel's targets, is perhaps the best contemporary example of this kind of view: see MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF CRIMINAL LAW* chs. 1, 18 (1997); Michael S. Moore, *A Tale of Two Theories*, 28 *CRIM. JUST. ETHICS* 27 (2009).

<sup>4</sup> As Markel notes (n. 46), it also binds temporary residents in or visitors to the polity; they are its guests.

<sup>5</sup> See further R. A. DUFF, *ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW*, chs. 2, 6 (2007); R. A. Duff, *Responsibility, Citizenship and Criminal Law*, *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* (R.A. Duff & Stuart Green eds., 2011). In what follows I will draw extensively on the arguments developed in these works, without tediously repeated self-citations.

<sup>6</sup> See further Alon Harel, *The Triadic Relational Structure of Responsibility*, in *CRIME, PUNISHMENT, AND RESPONSIBILITY* 103 (R. Cruft, M. Kramer and M. Reiff eds., 2011).

welfarist” (p. xx) end of the spectrum, who would allow the state a larger role in promoting certain social goods. Any discussion of the proper scope of the criminal law depends upon, and must appeal to the results of, that deliberative process.

Second, a justificatory account of criminal law and punishment must be set in relational terms. Part of the point here is that, since the criminal law binds us as citizens, any account of its proper aims and scope must be grounded in an account of our relationships to each other as citizens, and to the state as the institutional mechanism through which the polity formally conducts its affairs. But we must also attend to the essentially relational character of criminal responsibility and punishment. The criminal law deals in the attribution of responsibility for what it defines as crimes: it specifies the conditions given which citizens can be properly held criminally responsible in its criminal courts, and the conditions under which they can then be properly held liable to conviction and punishment.<sup>7</sup> Responsibility, however, is relational: I am responsible *for*  $\Phi$  to some person or body who has the standing to call me to account for  $\Phi$ . Responsibility here is a matter of answerability: to say that *A* is responsible for  $\Phi$  to *S* is to say that *A* must be ready to answer to *S* for  $\Phi$ , which is also to say that *S* has the standing or the right to call *A* to answer to her for  $\Phi$ . I am responsible to the editors of this volume, and to the other authors, for my paper: I must answer to them if I fail to produce it on time, or if I produce a bad paper; they have the standing to demand explanations from me, and to criticize me if I cannot provide an exculpatory explanation. But I am not responsible, not answerable, to my grandmother or to my dentist for this paper (though there are other matters for which I am answerable to each of them): if they challenge me about the lateness or the poor quality of my paper, my response will not be to explain myself, let alone to apologize, but to tell them that it is not their business—I do not answer to them for this (unless they are also readers of this journal—but I would then be answerable to them as readers, not as my grandmother or my dentist).<sup>8</sup> So we must now ask: to whom, by whom, are we held responsible under the criminal law? If we should see the criminal trial as a formal process through which alleged offenders are called to answer to charges of public wrongdoing, and then to answer for that wrongdoing if it is proved against them,<sup>9</sup> we have to ask who is thus calling the defendant, and by what right: in whose name and voice does the court speak, and by what right does it claim the authority to judge the defendant? An appropriate answer to this question, for liberal democrats, is that the court speaks and acts for his fellow citizens: but it can legitimately thus speak and act only in relation to matters that are the business of his fellow citizens—of the polity whose court it is.

Criminal punishment raises further relational questions. To punish someone is, after all, to create a very particular, and problematic, relationship. Punishment does not just happen; it is not imposed by some impersonal mechanism (or mysterious deity): it is ordered by a judge or magistrate, and administered by such people as police, prison and probation officers. They impose burdens of various kinds on offenders, including deprivations of liberty, acting not as private individuals but as officials of the criminal justice system. One important question, of course, is how they should see themselves in relation to those whom they punish: what kind of moral relationship is possible between such officials and those on whom they impose such burdens? But we must also ask in whose name they act, by what right those who require and authorize officials to inflict such punishments do so, and how they are related to those who

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<sup>7</sup> A defendant is criminally responsible if it is proved that he committed an offense, for which he must now answer; he is criminally liable if he cannot offer an exculpatory answer, i.e. a defense, for that commission.

<sup>8</sup> These are of course normative claims, about which there is often disagreement. My grandmother might, for instance, have a more expansive view of the proper scope of grandmaternal interests and concern.

<sup>9</sup> For this conception of the criminal trial, see R. A. DUFF, LINDSAY FARMER, S. E. MARSHALL, AND VICTOR TADROS, *THE TRIAL ON TRIAL (3): TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL* (2007).

are punished. If we are to make normative sense of a system of criminal punishment, we must understand the relationship that it creates between the punisher and the punished, since that determines its meaning and justification. But to understand how such a relationship is morally possible, we must understand the prior relationship on which it depends. In virtue of what kind of relationship can anyone claim the right to punish another? The answer must again refer to what it is to be a citizen, and to the civic relationships that define the polity.

Third, the relational significance of criminal punishment is further highlighted when we attend to punishment's communicative dimension: for both the meaning and the legitimacy of any communicative enterprise (and especially when it involves communication expressed as forcefully as it is in punishment) depend not just on the propositional content of what is said, but on who is saying it, to whom, in what tones. More traditional versions of retributivism, of the kind that Markel rightly criticizes, often begin with the thought, expressed in impersonal and passive terms, that "the guilty deserve to suffer", and go on to portray punishment as the enterprise of inflicting that suffering on them. Among the many problems faced by that form of retributivism (which include explaining the apparently mysterious justificatory connection that it posits between crime and suffering), we should note that vigilantes could, on this view, do the work that punishment is supposed to do. Suppose a vigilante group, dissatisfied with official failure to prosecute a known offender, seizes him and locks him up, in conditions that are materially similar to those he would have suffered in prison, and for a term as long as the prison sentence a court would have imposed; or it extracts from him the amount that a court would have imposed as a fine: it seems that he might have received the punitive suffering he deserves. He might not have been "punished" in the strict sense, given the vigilantes' lack of authority,<sup>10</sup> but they could have achieved the goal that punishment, on this retributive view, is meant to serve: the infliction of a deserved quantum of suffering. Such an implication should worry us, but it is not an implication of a communicative conception of punishment: whatever (if anything) the vigilante group is saying through its infliction of suffering on the offender, it cannot claim to be speaking in the voice of the polity, since it is not authorized to do so: what it inflicts therefore cannot be doing the communicative work that punishment is to do.

Fourth, even if we should in the end strive for a criminal law whose scope is very much narrower than that of our present laws (as well as one that is much less harsh), it is impossible to set very tight constraints in advance on the legitimate scope of a liberal criminal law. It can be legitimate to use the criminal law to promote social welfare in various ways; and we must recognize the possibility of "dumb but not illiberal" (DBNI) laws that still have a legitimate claim on our obedience, and breaches of which are still justly and justifiably punished.

It might now seem that if I agree with so much of what Markel argues, this comment on his paper should be a rather brief one: perhaps I should take a few more pages to explain why he is right on these central points; but for the most part I should let his arguments speak for themselves. However, there are some important issues on which I think he is wrong (issues that also affect the precise meaning and implications of the matters on which we do, at least in broad outline, agree), and some matters that it will be useful to clarify further; it is on these that I'll focus in what follows.

The issues here revolve around legal moralism, and the ways in which the criminal law's definitions of and responses to criminal offenses should be related to an understanding of the moral wrongness of the kinds of conduct that are criminalized. Markel rejects legal moralism, in both its positive and its negative versions: we do not have good reason to criminalize and punish every kind of moral wrong (thus positive legal moralism is wrong), and we can have good reason to criminalize and punish types of conduct that are not already morally wrong

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<sup>10</sup> Traditional definitions of punishment require that punishment be imposed by an authority: see e.g. H. L. A. Hart, *Prolegomenon to the Principle of Punishment*, in HART, PUNISHMENT AND RESPONSIBILITY 1 (1968).

(we will see shortly that a lot hangs on how we read “already”). I will argue that he should accept (as I accept) a version of positive legal moralism, as well as negative legal moralism, and that this is fully consistent with the “liberally constrained social welfarism” that he also favors. Markel suggests (n. 197) that the differences between us may not be significant, and it is true that we might not differ radically in our conclusions about the kinds of criminal law a liberal legal system could include, and (a different issue) about the laws that have a claim on our obedience even if we rightly think them “dumb”: but I will argue that the differences do matter, at least at a theoretical level, since they bear directly on how we are to understand the relationship between criminal law and morality.

To explain these claims (and why they matter), I’ll first discuss (in section 3) the criminal law’s treatment of so-called *mala in se*, and then turn in section 4 to so-called *mala prohibita*, which are thought to be particularly problematic for legal moralists. In relation to *mala in se*, what needs clarifying is the precise way in which the political character of criminal law bears on their criminalization. In relation to *mala prohibita*, I’ll argue that Markel pays inadequate attention to the differences, and to the relationships, between criminal law and other modes of legal regulation, and that this prevents him from recognizing that in this context as well as in that of *mala in se*, moral wrongfulness is a precondition of justified criminalization.<sup>11</sup> Before turning to those tasks, however, we must first get clear about just what legal moralists, either positive or negative, need to claim; this will occupy section 2.

## 2. Legal Moralisms and the “Already Wrong”

Negative legal moralists hold that moral wrongdoing is a necessary condition of criminal punishment and criminalization: we should not criminalize a type of conduct, rendering those who engage in it liable to conviction and punishment, unless it is morally wrong. Such a view says nothing about what counts as a good positive reason to criminalize conduct; it only tell us what we must not criminalize. By contrast, positive legal moralists hold that the wrongness of a type of conduct gives us reason to criminalize it. That reason is not conclusive, since we might have even stronger reasons not to criminalize it; but it brings the conduct within the “in principle” reach of the criminal law, as a kind of conduct that merits criminalization.

This distinction between positive and negative forms of legal moralism matches the more familiar distinction between positive retributivism, according to which the (or a) proper aim of criminal punishment is to impose on culpable wrongdoers the penal burdens they deserve; and negative retributivism, according to which penal desert is simply a necessary condition of just punishment.<sup>12</sup> Positive retributivists tell us that we should punish the guilty, and positive legal moralists that we should criminalize what is morally wrong. Negative retributivists tell us that we should not punish the innocent, and negative legal moralists tell us that we should not criminalize what is not morally wrong.

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<sup>11</sup> Fortunately, my argument does not depend on the possibility of drawing a clear or neat distinction between *mala in se* and *mala prohibita*: Bentham’s comment on this ‘acute distinction .... which being so shrewd, and sounding so pretty, and being in Latin, has no sort of occasion to have any meaning to it’ (JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES (1776), in COLLECTED WORKS OF JEREMY BENTHAM, iii, 63 (J. H. Burns and H. L. A. Hart (eds., 1977)) might have been, like so many of his comments, overstated, but we should not suppose that the distinction can serve anything more than an expository purpose, or that it can serve that purpose more than roughly (see also R. L. Gray, *Eliminating the (Absurd) Distinction between Malum in Se and Malum Prohibitum Crimes*, 73 WASH. U. L. Q. 1369 (1995). *Mala in se*, as we will see, consist in conduct whose (supposed) wrongfulness can be identified independently of the law, and *mala prohibita* in conduct whose wrongfulness cannot be thus independently identified: but nothing in my argument will hang on being able to make this distinction sharp.

<sup>12</sup> On positive and negative retributivism see David Dolinko, *Some Thoughts about Retributivism*, 101 ETHICS 537, 539-43 (1991).

As a matter of logic, positive legal moralism does not entail negative legal moralism: one could, that is, consistently hold that we have good reason to criminalize any and every kind of moral wrongdoing, but also that we could have other reasons for criminalizing conduct that is not morally wrongful.<sup>13</sup> Typically, however, positive legal moralists are also negative legal moralists: they hold that we have good reason to criminalize a type of conduct if, *and only if*, it is morally wrongful. Negative legal moralism is then a more modest thesis, about what we should not do; positive legal moralism adds to that constraining claim a more ambitious claim about what we should do.

To declare my own hand, I certainly accept negative legal moralism, and will explain and defend it in what follows. I also accept a qualified version of positive legal moralism: that we have good reason to criminalize a type of conduct if and because it constitutes a moral wrong *of the appropriate kind*. But that qualification, “of the appropriate kind”, is crucial. The main defect in traditional versions of positive legal moralism, of the kind espoused by Moore,<sup>14</sup> is that they take any and every kind of moral wrongdoing to fall, in principle, within the reach of the criminal law: we have some good reason to criminalize the most intimate and personal kinds of wrong (such as sexual infidelity, the hurtful breach of a friend’s confidence, failing to show a proper respect and concern for one’s parents), even if we also have much stronger countervailing reasons not, in the end, to criminalize such conduct. But if we take seriously the political character and grounding of criminal law, as part of the structure not of our entire lives, but only of those aspects of our lives and activities that fall within the public realm of the civic enterprise, we can see that we have reason to criminalize only those kinds of wrong that fall within that public realm; wrongs committed within the non-public, private realms in which (in liberal societies) we live so much of our lives are in principle not the criminal law’s business. That is why we should say that we have reason to criminalize, not any moral wrong, but any public moral wrong—any moral wrong that falls within the public realm.<sup>15</sup>

When legal moralists, whether positive or negative, say that we should criminalize a type of conduct if, or only if, or if and only if, it is morally wrong, what they must mean is that it must be “already wrong”. The basic point here is a simple logical one. If moral wrongfulness is to constitute either a reason for or a necessary condition of criminalization, then it cannot be something that comes into being only with criminalization, or that criminalization creates. If a given type of conduct becomes wrongful only if and when it is criminalized, our reasons for criminalizing it cannot include its not yet existent wrongfulness, nor can its wrongfulness constitute a necessary condition of its criminalization. If  $p$  is either a reason for or a necessary condition of  $q$ ,  $p$  must be independent of  $q$ , and its existence must be determinable without reference to  $q$ .

This is, as I said, a simple logical point: but it is one that causes some confusion among theorists who do not attend carefully enough to what “already wrong” means here, or to just

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<sup>13</sup> Compare the difference between Feinberg’s version of the Harm Principle, according to which preventing wrongful harm is one but not the only good reason for criminalizing conduct (JOEL FEINBERG, HARM TO OTHERS, 26 (1984)), and Mill’s version, according to which it is the only good reason (JOHN STUART MILL, ON LIBERTY, ch. 1, para. 9 (1859)).

<sup>14</sup> See *supra* text at n. 3, and references in that footnote.

<sup>15</sup> As Markel points out (n. 183), “we lack a good account of what makes a wrong a public wrong as opposed to a private wrong”, and I do not suggest that the idea of a public wrong provides a criterion by which we can distinguish those wrongs that are in principle criminalizable from those that are not; indeed, to call a wrong a public wrong is, on my view, not to offer a premise from which we can reach the conclusion that we have reason to criminalize it so much as to assert that conclusion. As I noted earlier, it is a crucial task for any democratic polity to work out, through public deliberation, what belongs to the civic enterprise and thus to the public realm; in doing so, citizens will also be working out which wrongs should count as public wrongs.

what it is that the moral wrongfulness must be prior to or independent of. Husak and Moore both display this confusion: Husak when he talks of conduct that “is not wrongful but for its illegality”;<sup>16</sup> Moore in his claim that “only behaviors that are morally wrong independently of the law may be criminalized”.<sup>17</sup> Markel works with this understanding of legal moralism: he takes a negative legal moralist to hold that any conduct that is to be legitimately criminalized must involve “*institutionally independent or pre-institutional* moral wrongdoing” (p. xx; see pp. xx, xx), and supposes that a negative legal moralist cannot sanction criminalizing conduct “that is not in itself morally wrongful” (p. xx). Now as Markel argues, and as we will see in s. 4, negative legal moralism as thus understood is quite implausible: we may have good reason to criminalize a range of types of conduct because they violate a justified or legitimate law, in which case their criminalization-grounding wrongfulness cannot be independent of the law. But the core legal moralist claim is simply that the moral wrongfulness of a kind of conduct is either (for negative legal moralists) a necessary condition of its legitimate criminalization, or (for positive legal moralists) a positive reason to criminalize it; and while that claim does require us to identify the conduct’s moral wrongfulness independently of the criminal law, it does not require us to identify a wholly pre-legal wrongfulness. Self-avowed legal moralists who accept the Husak-Moore understanding are mistaken about what they need to claim, and commit themselves unnecessarily to an implausible reading of “already wrong”.

We need to distinguish three notions here: wrongs that are “pre-institutional” in the sense that the conduct in question can be committed, and can be identified as wrongful, prior to and independently of any institutional context in which it is set; wrongs that are “pre-legal” in the sense that the conduct in question can be committed, and can be identified as wrongful, prior to and independently of any legal provision (in particular any legal regulation that prohibits it); and thirdly wrongs that are “pre-criminal” in the sense that the conduct in question can be committed and can be identified as wrongful prior to and independently of its criminalization. That these are different notions is evident once we remind ourselves that not all institutions are legal institutions, and that not all laws are criminal laws.<sup>18</sup> In particular, we must note that a type of conduct can be legally prohibited without being criminalized: a legislature could for instance impose a legal requirement on landlords to provide certain services for their tenants (thus prohibiting a failure to provide those services); and whilst it could then criminalize the failure to provide those services, it could instead give the tenants the right to sue in civil court for performance or compensation, or mandate the local authority to take away the landlord’s license through an administrative process. I will have more to say about this in s. 4: all that we need note here is that the crucial claim for the negative legal moralist is not that conduct which is to be criminalized must be pre-legally or pre-institutionally morally wrong, but only that it is must involve “pre-criminal” moral wrongfulness—that it must be morally wrongful prior to and independently of the law that defines it as criminal. For that is all that the simple logical point noted above requires: if we insist that moral wrongfulness is a reason for, or a necessary condition of, criminalization, all that we are thereby committed to is that any kind of conduct which is to be criminalized must be morally wrongful prior to and independently of its criminalization.

Victor Tadros has offered a counter-example to negative legal moralism as I have defined it here. Suppose that we are concerned about the harm that is caused by the misuse of knives, and come to believe that an efficient way to reduce such harm would be to bring it about that

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<sup>16</sup> Douglas Husak, *Holistic Retributivism*, 88 CALIF. L. REV. 991, 997 n. 27 (2000); quoted by Markel, p. xx.

<sup>17</sup> Moore, *A Tale of Two Theories*, *supra* n. 3, 32.

<sup>18</sup> I will not rely on the claim about institutions here, since someone might argue that all institutions, properly speaking, are legal institutions. Such an argument would, I think, be misguided; but the important point for present purposes can be made by focusing on the fact that not all laws are criminal laws.

people do not generally carry knives in public. We might also realize that mere exhortations not to carry knives will be ineffective: too many of those who might misuse knives will not be dissuaded; others, who might have been willing to forswear knives, will then see reason to continue to carry them for reasons of self-protection—and will indeed, let us suppose, do no moral wrong in continuing to carry them for that reason. So, for the sake of more effective dissuasion, we might then pass a legal regulation, prohibiting the carrying of knives in public (allowing, no doubt, certain exceptions for those who have good reason to carry a knife). But we will also realize that a mere regulation, even if backed up by some kind of administrative sanction for those found carrying knives, will still be inadequately effective; too many people will still carry knives; and it will then be morally permissible for others to carry knives as a self-defensive precaution. The only way to secure a substantial enough reduction in knife-carrying, we come to see, is to criminalize it: for only the distinctive condemnation provided by a criminal conviction, and the distinctively condemnatory punishments that follow, will be effective in dissuading enough people from carrying knives. Now, Tadros argues, the crucial point is this. Once knife-carrying is criminalized, and once people in general are therefore not carrying knives, individuals lose the self-defensive moral permission to carry one: the threat of a knife attack from someone else is sufficiently reduced, and does not now warrant such a defensive measure. We can therefore say that, once knife-carrying is criminalized, it becomes morally wrongful. But it was not morally wrongful prior to its criminalization: for before it was criminalized, before its prevalence was thus reduced, it was morally permissible to carry a knife as a necessary measure of self-defense. So this, Tadros argues, is a case in which we might be justified in criminalizing a type of conduct as an efficient way of reducing harm, but in which the conduct to be criminalized is not wrongful prior to its criminalization.<sup>19</sup>

I am not persuaded. Let us accept for the sake of argument that it is not generally morally wrong, in advance of any legal prohibition, to carry knives in public. Of course, it is wrong to carry a knife with the intention of using it to attack persons or their property, or to carry it in a way that creates a clear and serious risk of harm; but merely carrying, let us suppose, is not a wrong, even when it is not a self-defensive measure. However, once we collectively decide to prohibit carrying knives, for the sake of public safety, and pass a regulation to that effect, it is then wrong to carry knives, in the sense that we—those on whom the regulation is binding—now ought not to carry knives (the collective plural “we” is important here).<sup>20</sup> Since breach of the regulation is a moral wrong, and is clearly a wrong that belongs in the public realm, we have reason to criminalize it. Of course, we must also recognize and provide for the range of defenses that should enable a defendant to avert criminal liability for the commission of this offense, including self-defense: someone who carries a knife because he reasonably believes this to be a necessary self-defensive measure will therefore be able to offer this as a defense if he is prosecuted. But, first, someone who carries a knife for self-defensive reasons at a time when the regulation is in force but is not effectively enforced is still committing what is at the least a presumptive wrong, which requires justification—and which can therefore properly be defined as a criminal offense, so long as the law also accepts such a justification.<sup>21</sup> Second, if we attend not just to the law’s definition of the offence, but to the ultimate judgment that it authorizes, it does not render liable to conviction and punishment any type of conduct that

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<sup>19</sup> See Victor Tadros, *Wrongness and Criminalization*, in *ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* (Andrei Marmor ed., forthcoming). His example depends, of course, on some large empirical claims.

<sup>20</sup> Why is it now morally wrong to carry a knife? Either because the prohibition does serve this aspect of the common good in a way that does not impose unreasonable burdens, and we should obey it for that reason; or because, even if it is a “dumb” regulation, it is not illiberal, and can claim our obedience as a matter of our civic duty to respect the democratic process that produced it. See further *infra* s. 4.

<sup>21</sup> On presumptive wrongs and defenses, see DUFF, *ANSWERING FOR CRIME*, *supra* n. 5, ch. 9.

was not wrongful prior to its criminalization: for what makes a defendant liable to conviction and punishment is not just that he carried a knife in public, but that he did so even though this was not a necessary or reasonable defensive measure. That—carrying a knife in public when this is not a necessary or reasonable defensive measure—is the type of conduct that we have now criminalized: even if that conduct was not wrongful prior to or independently of the law altogether, as I accepted for the sake of argument above, it does become wrongful once the regulation prohibiting carrying knives is enacted; it is therefore pre-criminally wrong, which is all that the legal moralist needs to assert.

The enactment of a criminal law defining knife-carrying as an offense does play a causal role in the historical process given which a particular token of the type of conduct “carrying a knife in public” becomes a token of the type of conduct “carrying a knife in public although it is not a necessary or reasonable defensive measure”, and thus becomes criminal: for, we are supposing, the enactment of that law brings about a change in people’s behavior, a reduction in how many people carry knives; it thus brings about a relevant change in the circumstances under which this particular token of knife-carrying is done—a change given which carrying a knife is no longer a necessary or reasonable defensive measure. But what we have decided to criminalize is not a particular act of knife-carrying, but the type of conduct “carrying a knife in public although it is not a necessary or reasonable defensive measure”. What matters for a legal moralist is not whether the wrongness of a particular criminal act depends, historically or contingently, on the enactment of a criminal law, but whether the wrongness of the type of conduct to be criminalized is logically prior to and independent of the law that criminalizes it; and that condition is satisfied in this case.

So much, then, by way of clarification of just what positive and negative legal moralists must claim about the need for conduct to be “already wrong” if it is to be criminalized. I turn now to the ways in which that wrongfulness bears on decisions about criminalization, and to the different kinds of wrongfulness displayed by *mala in se* and by *mala prohibita*.

### 3. *Mala in Se: Moral and Political Wrongs*

Consider the most familiar and obvious kinds of *malum in se*: murder, rape, other kinds of attack on persons or property.<sup>22</sup> Why should they be criminalized; why must they figure in any plausible criminal code?

Markel and I agree that an answer to this question must refer to the political character of the criminal law, and must thus be grounded in a political account of the polity, the state, and their proper roles. We agree that, although we should of course want to prevent such wrongs, and although criminalization can play an important preventive role, such instrumental factors do not play a foundational role in justifying criminalization. We also agree that an adequate answer to the question cannot simply appeal to the moral wrongfulness of such actions, since we agree (as against traditional positive legal moralists) that moral wrongness by itself does not constitute a reason for criminalization. We seem to differ, however, about the role that the political dimension plays in the argument, and about how we should understand the criminal wrongfulness of the conduct that is criminalized—the wrongfulness for which the defendant is convicted and punished.

Markel argues that imposing punishment on the offender “instantiates a regime of equal liberty under the law”; that it “is an act through which we diminish and deny the plausibility of the claim of superiority *implicit* in an offender’s action against the polity (and his victim when he has one)”; that it “instantiates the polity’s commitment to a kind of democratic self-defense against low-level rebellions or usurpations of decision-making authority”; and that it

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<sup>22</sup> We can ignore here the question of whether property crimes are pure *mala in se*, if property and the rights of property owners are defined by the (non-criminal) law.



“affirms and communicates to A his moral accountability for choosing to do actions that are unlawful and that he could have otherwise avoided” (p. xx). This suggests, in line with his insistence that what we need is a “political” rather than “comprehensive” retributivism, that the wrong for which the offender is to be convicted and punished must include a distinctively political wrong, to do with the offender’s failure to respect the democratic decision-making authority that underpins the criminal law, and the regime of equal liberty to which the polity should be committed; we should punish him because not to do so, or to see no good reason to do so, would be to betray that commitment. This focus on the political character of criminal wrongs is in tune with his argument that political retributivism is preferable to comprehensive retributivism because its core values—“ensuring accountability for unlawful choices, equal liberty under the law, and commitment to protecting the channels of democratic decision-making in the impartial administration of the law”—are political values about which we can hope to find a Rawlsian “overlapping consensus” (p. xx).

Suppose that a criminal court judge who has read and been persuaded by this account is now faced by a defendant who has just been convicted of rape: what does she say to him, in explaining the sentence that she is about to pass? The passages that I quoted from Markel in the previous paragraph might suggest that she should not talk to him of the (pre-legal) moral wrongfulness of what he has done, as an attack on the victim’s sexual integrity and dignity, or of the specific and substantive wrong he has done to the victim: she should instead talk of his avoidable choice to break the law; or of his failure to respect the law, the democratic process, and the regime of equal liberty that it protects; or of his rebellion against or usurpation of the democratic decision-making authority—wrongs that he has committed not merely against his individual victim, but against the whole polity.

On this interpretation Markel’s account would be formally analogous to the “benefits and burdens” justification of criminal punishment that was popular for a time.<sup>23</sup> On that account, the criminal law is part of a cooperative practice that bring all its members a range of benefits (including those of safety from attack), and requires them all to shoulder a fair share of the burdens that must be borne if those benefits are to be achieved, including the burden of self-restraint involved in obeying the law and in refraining from the conduct it defines as criminal. One who commits a crime thereby refuses to shoulder his share of the burden of law-abiding self-restraint, whilst still benefitting from the self-restraining law-abidance of others; he takes unfair advantage of them, and gains an unfair profit (freedom from self-restraint) for himself; his punishment is justified as imposing a burden which wipes out that unfair advantage. One of several serious objections to that account is that it commits the courts to punishing rapists not for the specific, concrete wrong that they do to their victims, but for the unfair advantage that they take at the expense of their self-restraining, law-abiding fellow citizens—which is to distract the court’s, and the law’s attention away from its proper object, the substantive wrong involved in rape.<sup>24</sup> Similarly, an objection to Markel’s focus on the political wrongfulness of the rapist’s action invites the objection that what the criminal law should define as a criminal, public wrong, what the court should condemn and punish the convicted rapist for committing, is not that kind of political wrong, but the specific, concrete moral wrong that he perpetrated on his victim—a wrong that can be identified and understood independently of law generally and of the criminal law in particular.

Markel might now object that this is to abandon the political conception of criminal law and punishment that he and I agree is essential; that it is to fall back into a legal moralism and

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<sup>23</sup> See famously Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973); for perhaps the most plausible attempt to defend this view, see Richard Dagger, *Playing Fair with Punishment*, 103 ETHICS 103: 473; *Punishment as Fair Play*, 14 RES PUBLICA 259 (2008)

<sup>24</sup> See R. A. DUFF, TRIALS AND PUNISHMENTS, ch. 8 (1986).

a comprehensive retributivism that fails to take seriously the political character of criminal law and punishment and the political grounding that such an institution therefore needs. And, he might add, although a criminal wrong must have the kind of political dimension sketched above, it can still also include the pre-legal moral dimension on which I have focused here.<sup>25</sup> I think, however, that in the case of such *mala in se* as rape, the notions of political obligation and citizenship do not play the kind of role that Markel assigns them in grounding, and so in helping us to understand, the criminal law's authority. Their role is not, as Markel portrays it, to help to define the content of the wrongs that are to be criminalized, and for which people are to be convicted and punished; it is rather to explain why those wrongs are the polity's business.

Markel talks as if, once we recognize the political character of criminal law, we must find a political (rather than a simply moral) wrong for which the defendant is to be convicted and punished—a “claim of superiority *implicit* in an offender's action against the polity”; a “low-level rebellion[] or usurpation[] of decision-making authority”; or a choice “to do actions that are unlawful”. There certainly are such wrongs, and at least some of them are criminalizable: we might think of wrongs whose wrongfulness consists essentially in disobedience to a law that is enacted through a suitable democratic process (we will discuss these further in s. 4); or of wrongs that consist in an attack on the polity's institutions (including perverting the course of justice and other kinds of corruption of public institutions); or of wrongs that are breaches of the obligations that we owe particularly to our fellow citizens (tax evasion, for instance). But the wrong for which the rapist is properly convicted and punished is not in that way a civic or political wrong. The wrongful character of rape as a crime is precisely the same as the wrongful character of rape as a pre-legal moral wrong—it is just the same wrong. It is criminalizable not because, in the context of the criminal law, it acquires a new, political or civic wrongfulness, but because it is a wrong that we collectively see as our business: it is a wrong against which we should be ready to protect each other, as a matter of solidarity with each other as members of the polity; a wrong that constitutes a serious attack on its victim, in violation of the values by which we take ourselves to be collectively bound. It is, indeed, a kind of wrong that undermines or denies the basic conditions of civic life: but that is not what makes it wrong, or what we should condemn and punish; it is what makes the pre-legal moral wrong something to which we must collectively attend and respond.<sup>26</sup>

There is, of course, much more to be said about the character of criminal *mala in se*, and in particular about the criminal law's role, and authority, when the pre-legal wrong is either unclear or controversial. All that I hope to have done here is to suggest that, whilst we must indeed give a political account of the proper role and scope of the criminal law, that does not mean that we must give a political account of the wrongfulness of the kinds of conduct that we have good reason to criminalize. The criminal law's primary role, at least in this context, is not to make wrong what was not already wrong, or to take note of political as distinct from simply moral wrongs, or to issue proscriptions that citizens are to obey; it is to mark out that range of pre-existing (pre-criminal) wrongs that the polity will treat as public wrongs, and for which citizens will therefore be called to account, convicted and punished by the polity's criminal courts.

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<sup>25</sup> Indeed, he has emphasized that point in private correspondence.

<sup>26</sup> A possible source of confusion here lies in the common idea that the criminal law prohibits such conduct as rape, and that the rapist disobeys that prohibition. We should rather say that the substantive criminal law is not a set of prohibitions that we are to obey; it rather specifies and defines those (pre-existing) wrongs for which we will be summoned to answer in a criminal court. See further R. A. Duff, *Relational Reasons and the Criminal Law*, OXFORD STUDIES IN PHILOSOPHY OF LAW, II (Brian Leiter, Leslie Green, eds., 2012), where some necessary qualifications to this general claim are also noted.

It is time now to turn to *mala prohibita*, and to show how the legal moralist can provide a plausible account of how and why they are properly criminalized.

#### 4. *Mala Prohibita: The Two Stages of Criminalization*

When we turn from (so-called) *mala in se* to (so-called) *mala prohibita*, do we turn to a context in which the criminal law is no longer dealing with pre-existing wrongs, but is now creating wrongs? Traditional definitions of the concept of *mala prohibita* suggest that we do: if *mala prohibita* consist in conduct that “is not wrongful prior to or independent of the law that defined it as criminal”,<sup>27</sup> then if the conduct is *malum* at all that is only because it has been criminalized. In that case, however, legal moralists are in serious trouble, since on their view conduct can be legitimately criminalized only if it is already, pre-criminally, wrongful: they must either abandon that view; argue that it holds only for *mala in se*, and remain silent about the justification for *mala prohibita* (which form the substantial bulk of modern criminal law); or take the heroic step of arguing that no criminal *mala prohibita* can be justified—that we should abolish them all.

Fortunately for legal moralism, however, things are not quite that bad. Its salvation, and its ability to justify at least some *mala prohibita*,<sup>28</sup> lie in recalling the points made in s. 1 of this paper about what “already wrong” means in this context, and in being similarly careful in defining *mala prohibita*. Conduct that is to be criminalized must be already, pre-criminally, wrongful: that was the argument in s. 1. A *malum prohibitum* should now be defined, not as an offense consisting in conduct that was not pre-criminally wrong (as traditional definitions imply), but as an offense consisting in conduct that was not pre-legally wrong—that was not wrongful prior to or independently of its legal proscription. Once we remind ourselves that the criminal law is not the only kind of law, and that legal proscriptions need not be criminal proscriptions, we will see that this leaves logical space for a category of *mala prohibita*—of offenses consisting in conduct that is pre-criminally, but not pre-legally, wrongful. Thus the legal moralist can agree (who could deny?) that liberal democracies can “create new moral obligations by virtue of legislation” (p. xx); they can, by legislation, make conduct morally wrong that was not already morally wrong—and can be justified in doing so. What matters for the legal moralist, however, is that they cannot do so by *criminal* legislation; and this, as I will now show, legal moralists can still maintain.

The key to understanding this issue is to recognize that we are dealing here with a two-stage process of legislation: the first stage is that of (pre-criminal) legal regulation; the second stage is that of criminalization. What makes the conduct that constitutes a *malum prohibitum* wrongful (when it is wrongful) is that it involves the violation of an authoritative regulation: that wrongfulness is not pre-legal, since it presupposes a legal regulation that is breached; but it is pre-criminal, and can thus justify criminalization. Two examples will illustrate and give flesh to this abstract possibility.

First, a legislature can create a new moral obligation to refrain from conduct that was not even possible, and so could not have been wrongful, prior to the regulation that prohibits it. It is an offense to drive through (to fail to stop at) a red traffic light at a road junction: but it was impossible to do that prior to the legislation that created this system of traffic lights and the rules that go with them. Once that system is in place, it becomes both possible and (normally)

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<sup>27</sup> Douglas Husak, *Malum Prohibitum and Retributivism*, in *DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW*, 65, 66 (R. A. Duff and Stuart P. Green (eds), 2005).

<sup>28</sup> And we should expect no more than this: given the over-enthusiasm with which governments tend to create criminal offenses, especially *mala prohibita* (in its first ten years, the recent Labour government in Britain created some 3,000 new criminal offenses, most of them *mala prohibita*), we should not expect a normative theory of criminal law to justify more than some of them.

wrongful to drive through a red light.<sup>29</sup> The first stage of this process of criminalization lies in legislative deliberation about how best to regulate and coordinate this dangerous activity of driving, and in the decision that one way to do this is to create a system of signs controlling movement through road junctions—signs that will be mandatory rather than merely advisory or exhortatory, and that will tell drivers when they may (or must) or must not drive across the junction. The upshot of this is a system of traffic lights, and of regulations that explain their meaning: drivers are prohibited from driving across the junction when the lights are red. Note that the criminal law has not yet entered the picture: we are dealing thus far only with traffic regulations. However (and here we move into the second stage), the legislature must also of course think about how to enforce these regulations, and how to deal with breaches of them. The legal moralist's claim is now that, if we are to justify criminalizing breaches, rather than either ignoring them or finding some other kind of legal response, we must show that they are morally wrong: that wrongness will not be pre-legal, since the conduct is possible only post-legally (only once the regulations are in place), but must be pre-criminal. Once we understand this structure of deliberation, however, it is easy enough to see how the conduct can become wrongful. If the lights are sensibly located and ordered, obedience to them serves the ends of road safety, and one who drives through a red light will normally be creating an unwarranted risk of harm, given especially that he must know that others will be coordinating their driving by reference to the lights, and that he will not normally be able to see clearly whether another car is coming. But our reasons for obeying the lights go beyond that. First, we should know that we cannot always trust our own judgments of what is safe or unsafe in this context: it is all too easy to persuade myself, when I am in a hurry, that some dangerous maneuver is safe, or that I can safely exceed the speed limit; we will generally do better to obey the regulations. Second, obedience to the regulations serves a valuable assurance function: it displays to other road users my commitment to respecting the rules of this practice, and to driving safely.<sup>30</sup> If we can argue along these kinds of line that drivers ought (normally) to obey traffic signs, we can also then argue that failure to obey them is wrongful. Such a wrong is certainly a public wrong: whatever uncertainties we may find in trying to draw a distinction between the public and the private realms, driving is clearly a matter of public interest and concern, since it bears on the safety of citizens generally; wrongs committed in driving are therefore public wrongs, and we have reason to criminalize them—to declare formally that these are wrongs for which perpetrators will be held to public account, convicted and punished.<sup>31</sup>

For a second example, we can use one of Markel's own—eating on the subway. Suppose that, as members of a democratic legislature, we are exercised by the problem of litter on the subway (which not only adds to the unpleasantness of subway travel, but poses risks to health

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<sup>29</sup> Only normally, because there will be the cases beloved of theorists, in which I am driving along a deserted road, with clear sight lines all round, and no other vehicles in view, and come to a red light; it would surely, they say, be stupid rather than admirably law-abiding to sit waiting for the light to change. Perhaps it would (and we might indeed hope that no one would waste time prosecuting me for driving through the red light); but that does not undermine the claim to be argued in the text, that we ought normally to obey the red light, even if it seems to us that it would be quite safe to drive through it.

<sup>30</sup> I have previously appealed in this kind of context to the idea of civic arrogance, as displayed by someone who sets himself above the rules (R. A. Duff, *Crime, Prohibition and Punishment*, 19 JOURNAL OF APPLIED PHILOSOPHY 97 (2002). Markel (p. xx) makes a brave effort to salvage this idea as a plausible ground for criminalization; but although I think it can still do some work in some limited contexts, I also think that the idea of (re)assuring our fellow citizens of our reliability can often do more work.

<sup>31</sup> Suppose a particular traffic regulation, or the siting and ordering of a set of traffic lights, is “dumb”? Then our reasons for obeying the regulation will have to do with the respect that we owe to, and that we owe it to our fellow citizens to show that we have for, the democratic process that produced this regulation I discuss this kind of case shortly, in connection with my second example.

and safety). We also realize that current provisions, which include not only exhortations to be tidy, but also penalties for littering, are inadequately effective, and come to the view that the only way to reduce litter to bearable levels is to ban eating on the subway—because the most significant kind of litter consists in food wrappings and debris, because the ban on littering is not effective, and because a ban on eating will be much easier to enforce. We therefore plan to enact a new regulation banning eating on the subway (this is the first stage in the two-stage process towards criminalization), but then have to decide whether and how to enforce it. At this, second, stage the legal moralist again enters the debate, to argue that it should be made a criminal matter, creating a criminal offense of eating on the subway, only if a breach of this regulation is morally wrong. Let us assume (quite plausibly) that eating on the subway was not morally wrongful prior to this regulation: can the enactment of the regulation now make it morally wrong? Clearly it can, at least and especially if the legislature got it right, and passed a regulation that does serve this aspect of the common good without imposing unreasonable burdens on those whose conduct it constrains: I should obey the regulation because it serves a significant aspect of the common good, and I owe it to my fellow citizens to assist in, or at least not to undermine, the pursuit of that goal. This is true even if I know that I would never myself litter the subway with food debris—if I am always very careful to wrap my rubbish up and take it home: for even if I could be sure that I would not litter (which is the mischief at which the regulation is aimed), I owe it to my fellow citizens and fellow passengers to show my respect for the rule. For I should recognize that a more sophisticated rule, for instance one that prohibited eating on the subway except for people who are always careful not to litter, would be ineffective in dealing with the problem, would be abused, and would also be likely to breed mistrust and resentment. So although the regulation is not really aimed at me, since I do not and would not cause the mischief at which it is aimed, I should still accept the modest burden of obeying it as my modest contribution to this aspect of the common good.

Suppose, however, that the regulation is “dumb”. Perhaps the problem is not as serious as the legislature was (mis)led to believe; perhaps the new regulation will be no, or little, more effective in reducing litter than the existing regulations; perhaps the benefit in litter-reduction is not substantial enough to justify the burden the new regulation imposes on travelers. If the regulation, for any of these reasons, fails efficiently to serve the common good, do I still act wrongly if I break it? Well, to put the point here in the more modest terms on which Markel rightly insists (p. xx), so long as the rule is “not illiberal”, so long as it does not infringe any fundamental right, so long as it marks a good faith if misguided attempt to serve the common good,<sup>32</sup> I still have reason to obey it: for part of what it is to be a citizen of a democracy, and part of what I owe to my fellow citizens, is to respect the democratic legislative process, and therefore to accept and abide by its results even if I believe them to be, or can even clearly see them to be, misguided. That is not to recommend a blind obedience to every regulation that a legislature might pass: democratic citizens are not mindlessly deferential.<sup>33</sup> But it is to say, which is hardly surprising, that legitimate democratic governments have a proper claim on the allegiance and obedience of their citizens, even when they get it wrong.<sup>34</sup>

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<sup>32</sup> Matters become trickier if the rule is not just dumb, but corrupt (suppose it was passed in order to produce revenue for the local authority, through the fines imposed for breaches); we cannot discuss this here.

<sup>33</sup> Compare W. A. Edmundson, *The Virtue of Law-Abidance*, 6 PHILOSOPHER'S IMPRINT 1 (2006), on the kind of respectful but not overly deferential attitude that a good citizen will have towards the law: law-abidance does not always require obedience to the law.

<sup>34</sup> Although this reminds us, as Markel does, of the way in which any normative account of criminal law and punishment must depend on an account of political obligation. I wouldn't offer quite the same account as he does (pp. xx-xx): I think it more useful to explain political obligation as a form of associative obligation (see RONALD M. DWORKIN, *LAW'S EMPIRE*, ch 6 (1986); John Horton, *In Defense of Associative Political*

The upshot of this discussion is that liberal democracies and their legislatures can pursue “social welfarist” goals, and can use the criminal law in that pursuit; but this “guidepost” for criminalization still does “require some form of moral wrongdoing as a prerequisite” (p. xx) —as a prerequisite not for legal regulation or proscription, but for criminalization. In pursuit of social welfare legislatures might see (and might indeed have) good reason to create various kinds of regulatory system, concerning for some obvious instances such practices as driving, manufacture, financial dealings, and trade, to protect citizens against the various harms that such practices involve; and to create systems of taxation to produce resources to pay for the various social and welfare services that the polity should provide. Such systems will impose burdens on citizens—financial burdens in the case of taxation, liberty-constraining burdens in the case of regulatory regimes: the polity will be justified in demanding that citizens accept these burdens, and obey the regulations, if the burdens can be shown to be a fair contribution to the social goods that these systems produce. If the regulations and requirements are fully justified, as imposing fair burdens (determined by a suitably democratic procedure) for the sake of some aspect of the common good that the polity should pursue, that gives the citizens good reason to obey them: indeed, they now do wrong in breaking them, and such wrongs can be properly marked by criminalizing them. Even if the regulations and requirements are not thus fully justified, they may be legitimate, for instance when they are created through a properly democratic process in a good faith attempt to serve the common good; the citizens then still have reason, although a different reason, to obey them. All of this is fully consistent with the legal moralist’s claim that we can properly criminalize conduct only if it is already, pre-criminally wrongful. It also, we should note, sits readily with the positive legal moralist’s claim that we have a positive reason to criminalize breaches of such regulations, in order to take suitable formal notice of the wrongs that such breaches commit.

##### *5. Concluding Remark*

Nothing in this paper is intended (or expected) to undermine the main thrust of Markel’s paper: his arguments mark a significant advance towards a better understanding of the proper role of criminal law and punishment in a democratic polity. But I have suggested that he goes wrong in his treatment of legal moralism, and in his account of the roles that moral wrongs play, or do not play, in decisions about the scope of the criminal law. Given a better account of legal moralism (which I have tried to provide), we can see more clearly why the criminal law is properly focused on conduct that is already, pre-criminally, wrongful, as an appropriate way of marking and responding to that wrongfulness.

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*Obligations*, 54 *Political Studies* 427 (2006) and 55 *Political Studies* 19 (2007). But he rightly reminds us how important it is to be able to offer some justifying account of political obligation.