



Responses to *Wrongs and Crimes*

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Abstract

This is a response to the four essays on *Wrongs and Crimes*.

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I could hardly hope for a better group of people to respond to my work in *Wrongs and Crimes* than these four outstanding philosophers. I have already learned a great deal from their work, and the care that they have taken in responding to my arguments is something that I am both grateful for and a bit nervous about.

Dana Nelkin and Derk Pereboom both engage with my account of punishment, and the role of responsibility and duty in that account; Doug Husak is focused on general principles of criminalization that I attack, and my resulting account of criminalization; and Tom Dougherty explores my views about the nature of consent. I won't aim to respond to all of their arguments, and my responses do not do justice to the rich set of issues they address.

1 Response to Nelkin

Like many (but by no means all!) who rely on the relationship between desert and punishment, Nelkin hopes to rescue desert-based alternatives to punishment from the charge of barbarism. Her thoughtful work on desert is at an early stage, but there is at least some promise in the idea that there are more humane versions of desert. But I continue both to be sceptical about the view that the burdens of punishment can be deserved, and that it plays a very important role in the justification of punishment. Even if Nelkin's views about responsibility and punishment are not barbaric, desert is at best a fifth wheel in the justification of punishment.

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1.1 Nelkin's Two Doubts About the Duty View

I begin with some of Nelkin's objections to the Duty View. That view, that I defended in *The Ends of Harm*, and further in *Wrongs and Crimes*, relies on the idea that harming wrongdoers for the sake of general deterrence can be justified by appealing to the duties that wrongdoers incur as a result of their wrongdoing (or the duties that they would incur were they able to perform the relevant actions). This justification of punishment responds to the challenge that punishment for the sake of deterrence wrongly uses wrongdoers for the sake of others. I accept that punishment for the sake of deterrence uses wrongdoers for the sake of others, but aim to show that this is permitted because it is often not wrong to use a person for some end that she is required to serve, and wrongdoers (as well as perhaps some non-wrongdoers) incur the relevant duties. The most important duties as far as criminal justice is concerned are protective; because wrongdoers have duties to protect others, they may be used for the sake of protection.

The scope of this justification of punishment depends on the qualities of the duties that wrongdoers incur: their content and their stringency. If wrongdoers lack protective duties, general deterrence will not be justified at all. If wrongdoers only have duties to protect the direct victims of wrongdoing, the Duty View justifies general deterrence only where harming them protects those victims. I argued that wrongdoers incur a broader range of duties than that. I did this by starting with less controversial cases, where protective duties are clearly owed to victims, and then I considered a range arguments that justify departures from those less controversial cases.

There are two aspects to Nelkin's engaging essay: first, she offers some reasons to doubt some of the arguments for departing from the less controversial cases. Although this is not completely clear from her essay, it is natural to read her as concluding that the Duty View cannot provide a justification of punishment that is plausibly broad in its aims, and thus plausibly broad in scope in the real world.

Second, she sketches an alternative desert-based view that she finds more plausible than standard retributive views. She implies that this view is also more plausible than the Duty View because it has the requisite scope. On this alternative view, it is permissible to punish wrongdoers only where some important goal—such as deterring crime—will be achieved, but it is permissible to punish wrongdoers to achieve that goal because they deserve it. An implicit assumption of her overall view is that desert is sufficient to meet the objection to harmfully using others to secure some goal even where those others lack duties to secure those goals.

1.2 The Scope of the Duty View

One argument that I offered for the view that wrongdoers have duties to third parties relies on chains of duties. Consider:

Transfer: Drucilla has seriously assaulted Vera. Xavier threatens to seriously assault Yolanda. If Vera harms Drucilla, which she can do at little cost

to herself, Xavier will be deterred from seriously assaulting Yolanda. There is no other benefit that Drucilla can provide to Vera.

I argued that it is permissible for third parties to harm Drucilla to deter Xavier from harming Yolanda. Drucilla owes a duty to respond to her wronging Vera. One duty that she has is to help Vera carry out her duties. And Vera has a duty to protect Yolanda.

Nelkin does not dispute the conclusion. But she suggests an alternative explanation. She suggests that third parties are permitted to harm Drucilla because this would benefit Vera. In response, it is hard to see how it is necessarily a benefit to Vera that Drucilla is punished. Suppose that a third party will punish Drucilla. Vera may not know about Drucilla being punished, and may want her not to be. In that case, it is hard to see how Vera is better off as a result of Drucilla's punishment. But this hardly undermines the justification of punishing Drucilla for Yolanda's sake. It is also worth noting that Vera seems required to punish Drucilla for Yolanda's sake, and Nelkin's alternative argument for the justification of punishment by third parties would not explain this.

Furthermore, Nelkin does not show that there is no chain of obligation that can explain the permissibility of punishing Drucilla. Even if Nelkin's alternative explanation were successful, this would not show that the argument offered does not explain the permissibility of punishing Drucilla. It would only show that there is an alternative justification for doing so. Given that I supported the general idea that there are chains of obligations that can generate duties on people to benefit people who they have not wronged, Nelkin must do more to undermine the argument in support of the broader scope of the Duty View than to show alternative possible explanations of the case I offered.

Finally, Nelkin's alternative argument might also be thought to be a version of the Duty View—it is permissible to punish Drucilla because doing so benefits Vera, and Drucilla owes such a benefit to Vera. I have doubts about this argument; I don't think that wrongdoers owe it to their victims to benefit them by allowing victims to take pleasure in the suffering of wrongdoers, or anything like that. But, if Nelkin's alternative argument is successful, it helps to establish rather than undermine the Duty View, for it helps to show that the Duty View has a plausibly broad scope.

A further question about the duties that wrongdoers incur is the extent to which those duties are sensitive to the duties of victims, or their preferences. One case that I explored to consider this question is:

Preferred Child: Amina seriously assaults Idris. Idris has three children, Apple, Bear, and Cupcake. Amina can rescue either Apple or (Bear and Cupcake) at some high cost to herself. Amina can do nothing else to benefit Idris. As Apple is Idris's preferred child, Idris would rather see Apple rescued than (Bear and Cupcake).

I suggested that Idris's preferences are not decisive, and that Amina ought to rescue Bear and Cupcake, because Idris has a duty to rescue Bear and Cupcake rather than Apple.

Again, Nelkin appears to accept the conclusion that Amina ought to rescue Bear and Cupcake. But she thinks that this does not establish that chains of duties explain the scope of the duties of wrongdoers. She offers an alternative explanation for why Amina ought to do this: she has a direct duty to rescue the greater number.

If this alternative explanation is right, the Duty View need not rely on chains of duties to establish that it has a plausibly wide scope. To see this, note that Amina would not have a duty to rescue Bear and Cupcake had she not wronged Idris. Thus, if she does have a duty to rescue Bear and Cupcake, this is explained by two things: the fact that she now has a more stringent duty of protection of some kind because of her wrongdoing; and the fact that this more stringent duty is independent of the preferences of the person who is wronged. If this duty does not arise as a result of a chain of duties from Amina to Idris to Bear and Cupcake, it arises in some other way. It might arise, for example, because people who act wrongly directly incur general duties to protect others, rather than merely duties to those they have wronged, as I argue in *Wrongs and Crimes*.¹ But however it arises, it is enough to show that the Duty View does not have implications for criminal justice that are implausibly narrow because victims of wrongdoing might prefer suboptimal modes of protection.

So whilst I am persuaded by the view that the duties of wrongdoers are shaped by the duties of those they have wronged, this is not necessary to establish that the Duty View has a plausibly broad scope. As far as I can see, Nelkin's arguments, were they successful, would give the Duty View a somewhat different scope from the way that I would develop it, but they do not show it to be unsuccessful or implausibly narrow in the justification of punishment that it provides. We are yet to see the need, then, for an alternative retributivist explanation of punishment.

1.3 Nelkin's Desert and the Fifth Wheel

Let us now stand back from this more detailed discussion about the scope of the duties that wrongdoers have to protect others, and consider the more general merits of the Duty View and Nelkin's desert-based alternative.

On Nelkin's desert-based view, desert is one necessary condition of punishing wrongdoers. But it is insufficient on its own, and on its own it provides no reason in favour of punishment. Rather, desert in conjunction with the fact that protection by the state requires punishment of some justifies punishment.

Here is a version of this view: given that the state must punish someone to achieve protection of its citizens, it ought to punish wrongdoers because they deserve it. On one way of understanding this view, it is not very plausible. It might be thought to imply that we first establish that there is a duty to punish *someone* for the sake of protection, and wrongdoing plays a role only in establishing who should be punished. This view implies that the state is permitted to punish wrongdoers only to the degree that it would be permitted to punish non-wrongdoers were no wrongdoers available to be punished. Surely, the fact that a person has acted wrongly makes a

¹ See V Tadros *Wrongs and Crimes* (Oxford: Oxford University Press, 2016), 65–66.

difference to whether punishment is permitted at all, and to its magnitude, and not merely to selecting who will be punished, given that punishing some person is permitted independently of wrongdoing.

So a better version of the view that Nelkin sketches is that wrongdoers lose their rights not to be punished for the sake of protection by acting wrongly, and they do so because they deserve punishment. Desert, on this view, plays the role that duties play on the Duty View—it establishes that a person is liable to be punished for the sake of protection.

But we can now see a challenge to this view. Suppose that wrongdoers have duties of protection to secure some protective end. I take it that Nelkin agrees that, subject to certain conditions of enforceability, it is then not wrong to use them for the sake of that end. In these cases, the Duty View explains the permissibility of punishment. But, Nelkin suggests, this view may be too narrow. I have raised some doubts about whether this is so, but suppose that she is right. Can desert then fill the gap? I doubt it.

The challenge is to show that it is permissible to harm a person for the sake of some goal because she deserves to be harmed, where her wrongdoing is insufficient to ground a duty on her to secure that goal in virtue of the relevant costs. This is hard to believe. Consider:

Baddy on the Bridge: Baddy has committed some wrongs in the past. He is now standing on a bridge. A trolley is headed under the bridge towards five people who will be killed if nothing is done. He can jump from the bridge in front of the trolley to save the five, but if he does so he will be harmed to degree n . He has no inclination to do this. Alice is on the bridge with Baddy. She can throw him off to save the five and he will be harmed to degree n .

If Baddy has a duty to save the five even though he will be harmed to degree n , and he refuses to do so, and that duty is enforceable, Alice is permitted to throw him off the bridge. Nelkin and I, I think, agree about this.

But now suppose that he is not required to do this. Does it follow that Alice is not permitted to throw Baddy off? Nelkin seems to think not because, even if Baddy lacks a duty to save the five at cost n , he may deserve to suffer cost n , and this may justify Alice in throwing Baddy off.

One concern about this view is that it is hard to see how there could be sufficient grounds for Baddy to deserve to suffer cost n , and yet insufficient grounds for Baddy to have a duty to suffer cost n for the sake of saving the five. Why shouldn't any considerations in favour of desert be sufficient for Baddy to have the relevant duty?

And, if these considerations are insufficient for Baddy to have the relevant duty, why are they sufficient to justify using Baddy for the sake of saving the five? The fact that Baddy deserves to suffer, Nelkin agrees, is insufficient to justify making him suffer for no reason at all. Desert must be appended to some goal to have normative force. But how can desert justify using a person to pursue a goal where the person would be permitted to reject that goal herself?

Thus, Nelkin faces a dilemma. Either her desert-based view is designed to have no more scope than the Duty View, in which case desert is simply a fifth wheel in the justification of punishment, or it is designed to have broader scope than the Duty

View, in which case she owes an explanation for why desert is sufficient to justify using a person for the sake of some goal in the absence of the person used having a duty to serve that goal. The prospects for providing the latter explanation seem bleak, so I think that, even if Nelkin is right that wrongdoers deserve harm by acting wrongly, this has no important role to play in helping to justify punishment where punishment is inflicted in order to achieve some further goal, such as deterrence.

This does not show that retributivism, in general, is a fifth wheel. It does not show that it is wrong to punish wrongdoers for reasons of desert where this is not done in order to achieve some further goal, such as deterrence, that the person is used to serve. But as both Nelkin and I are sceptics about this, we need not consider it here.

2 Response to Pereboom

Broadly speaking, Pereboom and I are fellow travellers with respect to punishment. We also share scepticism about the idea that criminals deserve to suffer the kinds of harms or losses of rights that criminal punishment involves.

2.1 Senses of Responsibility

Before considering where our disagreements lie, and making progress with them, let me first note a difference between our understandings of responsibility. Pereboom thinks that there are different senses of responsibility that are pegged to different implications that our conduct might have when certain agential facts obtain. He distinguishes the basic desert sense of responsibility from a forward-looking sense of responsibility.

I don't think that these are different senses of responsibility. I do not deny that there are different senses of responsibility—for example, there are different senses involved in the claim that I am responsible for looking after my children, and the claim that I am responsible for failing to do so. But when it comes to attributing actions or outcomes to agents, I think that there is just one sense of responsibility.

Disagreement about desert is not best understood as a disagreement about whether a person is responsible, in some sense, but rather as a disagreement about the implications of being responsible—whether, for example, it is an implication of a person being responsible for wrongdoing that she deserves to suffer.

I also have a question about how to understand the contrast that Pereboom draws between backward-looking and forward-looking notions of responsibility. I don't really understand this contrast. If a person acts wrongly, there is a 'backward-looking' question about whether she was responsible for doing so, or is responsible for the result—backward-looking in the sense that whether she fulfilled certain agential conditions, that are now in the past, determines whether she is responsible.

There is then a question about the implications of the person fulfilling those agential conditions, and those might include questions about the past (for example, whether the person could have been harmed to prevent her from acting) as well as

the future (for example, whether it is apt to respond to the person's conduct in certain ways, including by blaming her or by imposing legal duties on her).

But then it is hard to see what a pure forward-looking account of responsibility is. We might have the view that there are purely instrumental reasons to treat those who exercise their agency differently from those who do not—for example, because this would create good incentives for others. But this is just the view that responsibility can make a difference to what we should do in practice, even if it does not matter morally as such.

Thus, rather than distinguishing between backward- and forward-looking senses of responsibility, we should rather consider (a) whether we are responsible; (b) whether responsibility matters (morally, or evaluatively) as such if we are, and if so how; and (c) whether responsibility matters in practice to what we should do even if (or when) it does not matter as such.

In *Wrongs and Crimes*, I argue that we are responsible for what we do; that responsibility for wrongdoing matters as such to the duties that people have, and that these duties make a difference as such to how others should treat them. This, of course, leaves open the possibility that responsibility might matter in practice, even if it does not matter as such, and any plausible view accepts this. I think that all of this is just clarificatory, and does not point to any substantive disagreement between Pereboom and me.

2.2 Manipulation and the Duties of Wrongdoers

In *Wrongs and Crimes*, I offered a set of general objections to Pereboom's manipulation argument as it applies to desert, and as it applies to a range of other implications that fulfilling a set of compatibilist conditions of responsibility are thought to have.

Pereboom thinks that I have misunderstood him here, by treating his argument as having more general application than he intends. There is no misunderstanding, though. I acknowledge that Pereboom is only focused on basic desert.² My main aim was not to show that the manipulation argument fails for basic desert (though I offered some reasons to think that it does), but rather to assess the strength of this argument for a wider range of implications that responsibility is thought to have, with a special focus on the duties that wrongdoers incur as a result of their wrongdoing. This assessment of the argument is, I think, more important than the focus on basic desert, which, for a range of reasons, is less significant in the justification of social institutions, such as the criminal law, that rely on the significance of responsibility.

My general objection to the manipulation argument, if it is right, has force when considering a wide range of implications that responsibility has been thought to have, from deserved suffering, to blame, to duties of wrongdoers, and to punitive institutions. Pereboom and I are also in agreement, though, that, even if the manipulation argument fails to show that we do not deserve to suffer as a result of our

² *Wrongs and Crimes*, 67.

responsibility for wrongdoing, there are other reasons to reject the view that we do so deserve. Of course, not everyone is persuaded, as Nelkin's essay shows.

As we are in agreement about this, though, let us explore the implications of the manipulation argument for the duties of wrongdoers. Pereboom is sympathetic to the view that such duties make a difference to the permissibility of using people for the sake of general deterrence, so any dispute between us about the magnitude of punishment that such duties warrant depends on the stringency of those duties.

I should say, here, that I am generally in agreement with Pereboom that, once we fully bring to light the causal history of wrongdoing, and fully grasp the fact that wrongdoing is fully causally determined (if it is), we tend to find the duties of wrongdoers less stringent than our pre-theoretical intuitions tell us.³

Nevertheless, assessing the manipulation argument makes a difference to just how revisionist our view should be. Compare:

Manipulated Wrongdoer on the Bridge: Dorabella is on a bridge with Fiordiligi. A trolley is heading on a track under the bridge towards five people who will be killed if Dorabella does nothing. Dorabella can save the five only by throwing Fiordiligi from the bridge onto the tracks. Fiordiligi's body will stop the trolley, saving the five, but Fiordiligi will be killed. Fiordiligi started the trolley. Evil scientists manipulated Fiordiligi's brain to ensure that she acts wrongly. However, Fiordiligi fulfils all plausible compatibilist conditions of responsibility—her effective first-order desire to kill the five conforms to her second-order desires; her process of deliberation from which the decision results is reason-responsive, in that it would have resulted in her refraining from posing this threat were her reasons different; her reasoning is consistent with her character, because she is egoistic; but she sometimes regulates her behaviour by moral reasons; she is not constrained to act as she does and she does not act out of an irresistible desire.

Non-Manipulated Wrongdoer on the Bridge: As *Manipulated Wrongdoer on the Bridge*, except there are no evil scientists. Fiordiligi's brain is affected in an identical way, but rather by a naturally occurring force field.

What does intuition tell us about the costs Fiordiligi would be required to bear in order to prevent the five from being killed, were she able to do so only by bearing these costs in *Manipulated Wrongdoer on the Bridge*? Pereboom has the intuition that she would not be required to kill herself to save the five. My intuition is less clear. But Pereboom and I agree that she would be required to bear greater costs than she would have had to bear had she involuntarily started the trolley as a result of some muscle spasm. So we agree that fulfilling compatibilist conditions of responsibility makes a difference to the costs that she is required to bear, and to that extent we are both compatibilists about the duties that arise from fulfilling such conditions in a deterministic world.

³ See, further, V Tadros *To Do, To Die, To Reason Why* (Oxford: Oxford University Press, forthcoming) for an exploration in the context of self-defence and war.

We are compatibilists in the sense that backward-looking considerations about the exercise of certain agential capacities in a deterministic world make a difference, as such, to a person's duties. This is also an important conclusion with respect to the debate between compatibilists and non-compatibilists about the aptness of blame. Pereboom thinks that we cannot deserve to be blamed in a deterministic world. As we all now know, there are many conceptions of blame. One conception is that blame involves forcefully making demands of others—for example, demands to revise their conduct and to execute duties acquired as a result of acting wrongly. And it is plausible that those demands are apt where people have the relevant duties, and have acquired them through culpable agency. Thus, Pereboom should concede that blame is apt in a deterministic world, on one conception of blame. Does that imply that blame is deserved? That depends on a conception of desert, but on one conception desert is just one kind of aptness, and so blame is deserved on one conception of blame and desert.⁴

Now consider whether our intuitions about *Manipulated Wrongdoer on the Bridge* are reliable. It might be argued that Fiordiligi is required to bear greater costs than our initial intuitions tell us. I offered some reasons to think this. For example, our intuitions in manipulation cases may be distorted by the fact that we do not clarify the background causal story about the responsibility of the manipulators. We may tend to treat Fiordiligi's responsibility as less significant because we contrast it with the responsibility of the manipulators. As the causal history of their manipulative conduct is not brightly illuminated, we tend to assess them in the light of our folk-psychological understanding of responsible choice, an understanding that Pereboom and I agree is distorting.

For this reason, if manipulation does not make a difference to the costs that a person is required to bear as such, we should assess the costs that manipulated agents are required to bear by considering cases not involving manipulation, but where the causal story that leads to the person acting wrongly is illuminated as brightly as possible. *Non-Manipulated Wrongdoer on the Bridge* is a case like this. But when assessing that case, we tend to think that Fiordiligi is required to bear significant costs to avert threats to the five. This is a kind of hard-line response to the implications of *Manipulated Wrongdoer on the Bridge* for the stringency of the duties of wrongdoers.

Now we should consider whether the hard-line response is the only response to the implications of *Manipulated Wrongdoer on the Bridge*. It is also tempting to think that the fact that Fiordiligi has been manipulated makes a difference to the stringency of her duties. Indeed, Pereboom is inclined to agree with my tentative view that manipulation makes such a difference, at least in cases where the manipulators are not themselves disposed to respond to the wrongdoing in the appropriate way.

I should pause here to consider Pereboom's views about this. Suppose that X manipulates Y to act wrongly. When does the stringency of Y's duty depend on facts

⁴ See, further, D Nelkin 'Accountability and Desert' (2016) 20 *Journal of Ethics* 173; *Wrongs and Crimes*, 82–84.

about X, and why? Pereboom thinks that the stringency of Y's duty depends on X's dispositions. But I can't see why. I suspect that this is what Pereboom has in mind. Suppose that X and Y are each able to prevent the harm that results from Y's wrongdoing, or to compensate others for that harm. Then X has a more stringent duty to do this than Y because X has manipulated Y into acting wrongly.

But even if this is so, it does not establish that X's dispositions make a difference to Y's duties. Suppose that X has these duties (or would have them were he able to do the relevant things), and is disposed to fulfil these duties. These facts cannot themselves make a difference to what Y is required to do. X's dispositions do not matter; rather, what matters is what X actually will do, or can be made to do. For example, if X has a more stringent duty than Y, and X will do what he is required to do if Y does not act, Y is not required to act. Y may leave it up to X as X has the more stringent duty. If X will not do what he is required to do voluntarily, Y might be permitted to force X to do it to avoid his having to bear the costs. And if Y bears the cost, he might be permitted to extract compensation from X. But none of this has anything to do with X's dispositions.

At any rate, suppose that the manipulators will not bear any costs in *Manipulated Wrongdoer on the Bridge*, and cannot be made to do so. I think that Pereboom then thinks that Fiordiligi's duty is just as stringent as it would be had she not been manipulated. I offered an argument against this view, and, as far as I can see, Pereboom has not met it. The argument is roughly that if Fiordiligi is required to bear the costs, then she will be a victim of wrongdoing.⁵ If this consideration is powerful, or even if it has some intuitive force, we have reason to doubt the idea that the costs that Fiordiligi must bear in *Non-Manipulated Wrongdoer on the Bridge* are no greater than the costs that she must bear in *Manipulated Wrongdoer on the Bridge*. If standard criminal cases are like *Non-Manipulated Wrongdoer on the Bridge*, we then have some support for the view that the magnitude of punishment that may be inflicted on wrongdoers is greater than Pereboom supposes.

For my own part, I suspect that if the only way to prevent many people from being raped and murdered were to imprison rapists and murderers for a significant period, this would be permitted, even though they would not deserve such treatment. Their wrongdoing gives them stringent duties to prevent wrongdoing of a similar kind, and punishing them to prevent such wrongdoing would not wrongly use them.

I am tempted to think that Pereboom's views about mild punishment are premised on the empirical contention that longer sentences are just not needed to ensure that the rate of very serious crimes does not increase substantially. A just society has many other tools for reducing the rate of seriously harmful wrongdoing, and harsh sentences only seem necessary where other kinds of criminogenic injustices are perpetrated. I tend to think that the empirical contention is probably right. But that provides a different argument in favour of milder punishment than the one Pereboom offers. His view seems to be that deterrent punishment involving long sentences for

⁵ Complications arise here, because if Y is not required to save the five, the five will also be victims of the manipulator's wrongdoing. I consider this in some detail in V Tadros 'Permissibility in a World of Wrongdoing' (2016) 44 *Philosophy and Public Affairs* 101.

rapists and murderers would be wrong *even if* doing so were needed to protect many people from being raped and murdered. I doubt this.

3 Response to Husak

Husak has done a great deal to highlight the practical considerations that are relevant to considering the scope of the criminal law, and I am grateful to him for that. He ties his discussion of criminalization to the problem of punishment, and especially overpunishment in the US. As we will see, I have concerns about how he understands this relationship, but I am a fellow traveller in appreciating the significance of this relationship.

3.1 Principles and Effects

Husak's concern that I am uninterested in the empirical effects of criminalization is unfounded. My whole project is to show that there are stringent limits to punishment. Indeed, one of the central disagreements between Husak and me is that Husak thinks that the harm that wrongdoers suffer is a reason to punish them, whereas I think it is a reason not to punish them, and at least in this respect my views favour a criminal law with a more limited scope, and with less punitive implications than Husak's.

The view of criminalization that I recommend is constrained by proportionality. Very roughly, I argue that there are two main downsides to criminalizing conduct—those who have acted wrongly will be harmed, and criminalization is harmful and costly to others. Both downsides must be justified by the good that criminalization achieves; when they are not, criminalization is disproportionate.⁶ Mass incarceration in the US is wrong because it does an enormous amount of harm for no good whatsoever, when compared with civilized systems of punishment that are on offer. And if (as Husak thinks) expanding the criminal law leads to mass incarceration, expanding the criminal law will not be warranted.

But we hardly need philosophers to tell us that mass incarceration in the US is unjust. Philosophical theories of the criminal law should help us to answer difficult questions about the scope of the criminal law, and whether the US system is just is not one of them. Everyone can sign up for principles like: 'don't incarcerate a vast proportion of the population in a patently racist way on the basis of preposterous offences, inflicting clearly disproportionate punishments, where that clearly does much more harm than good, at vast expense, for base political motives in conditions of grave economic and social injustice that drives up crime where there are tons of ways to address the problem of crime that are much better in all respects.'

Because criminalization is subject to the kind of proportionality constraints outlined above, the decision whether to criminalize depends on its effects, and it thus

⁶ *Wrongs and Crimes*, Ch. 9.

depends on the answers to empirical questions. I don't attempt to answer these questions. There is no way that a book like mine (or by any other philosopher writing about criminalization in general) could adequately address them. All we can do is provide the framework that shows when answers to empirical questions have moral significance and why.

This is also why I constrain my enquiry about some of the issues that I explore in *Wrongs and Crimes*. For example, Husak thinks that it is objectionable that my more expansive views about when deception undermines the validity of consent to sex would expand the criminal law resulting in many people being imprisoned. But I don't advocate (or object to) expanding the criminal law in this way. I only examine the facts that make deceptive sex more or less gravely wrong, which determines when people are liable to punishment if punishing them would have good effects. As I point out, this is only part of an overall exploration of what should be criminalized.⁷

I don't advocate principled restrictions on the scope of the criminal law of the kind that are familiar in the literature, such as various versions of the Harm Principle and the Wrongness Principle that I discuss. Does this imply that my theory would do less to reduce incarceration rates than Husak's were it implemented accurately? On the contrary! The relationship between criminalization and punishment is much more complex than Husak thinks.

If we are concerned with the effects of the law, we should be wary of basic principles of criminalization that are insensitive to these effects. If some principle of criminalization rules out such laws *irrespective of their effects*, they also rule out criminalization even when criminalization would significantly decrease the prison population. And, if a principle counterbalances reasons to criminalize where doing so would have good effects, it is a counterweight to attempts to reduce the prison population. So, if anything, such principles show a lack of attention to the problem of incarceration. The principled limits under consideration, including those that Husak endorses, are insensitive to the ways in which undercriminalization can increase both the crime rate and the incarceration rate. Thus, accurately implementing these principles would be both criminogenic and carcerogetic in some social circumstances.

Perhaps Husak thinks that it could not possibly be true that criminalizing conduct decreases the incarceration rate, so those who endorse restrictive principles are on safe ground with respect to the problem of incarceration. Not so. This idea holds only if criminalization does not affect criminal behaviour—then increasing the scope of the criminal law would increase the number of people eligible to be punished, and if officials apply the law, more people will be incarcerated. But criminalization can sometimes reduce the incarceration rate by reducing the number of people who violate the remaining laws that are in force.

To illustrate this point consider, this principle that Husak endorses:

⁷ See, generally, Ch. 9, and for the limits of my exploration of sexual wrongdoing, see *Wrongs and Crimes*, 223.

Wrongness Constraint 1: It is wrong to criminalize conduct that is not wrongful.

I pointed out various ways in which this principle is vague and offered some clarificatory suggestions,⁸ but for now concentrate on the general idea of the principle. As it is focused on the content of the criminal law and not on its effects, it is insensitive to good effects that criminalization might have, including reducing the incarceration rate. It holds that it is wrong to criminalize non-wrongful conduct *even if doing so would reduce the incarceration rate*. For that reason, those who are concerned with the incarceration rate should be suspicious of this principle, for in principle at least it sets back their ambition to reduce the incarceration rate by placing a restriction on how this might be done.

Could this be a problem in practice as well as in principle? It not only can; it probably is. Consider gun control. Suppose that I am right that possessing a gun is in itself permissible, even once possession is criminalized. Further facts are needed to make possession wrong, such as the risks of use by others. I nevertheless argue for criminal laws that prohibit permissible possession if doing so is needed to protect people from harm.⁹

Husak thinks it an objection to this that such offences would increase the incarceration rate. But, at least in the UK context, and many other jurisdictions, the opposite is almost certainly true. Decriminalization would dramatically increase the incarceration rate. Why? Because it would result in much more gun possession, and many more guns would then circulate in society. This would increase the crime rate in relation to guns—and those crimes satisfy the *Wrongness Constraint 1*. A significant proportion of those who commit such crimes would be incarcerated, some for a very long time.

For example, because there are so many guns around, and they are very valuable, stealing guns is prevalent in the US. The FBI estimates that 1.2 million guns were stolen between 2012 and 2015. A gun is stolen around every two minutes. Because gun theft is strongly linked to increased rates of violence, there is a powerful incentive on law enforcement agencies to arrest and prosecute those who do this, leading to a significant increase in the prison population. Furthermore, many crimes are committed with guns, especially those that are stolen, increasing the serious crime rate and the incarceration rate still further. And, in order to tackle these problems, regulations are created to ensure that those who possess guns do so securely, which leads to punishment of those who violate those regulations.

It is no accident that the US homicide rate is dramatically higher than that in comparably wealthy countries; many US homicides are committed with guns. And that is to say nothing of the very large number of non-fatal injuries inflicted with guns, and the robberies, rapes, and so on where guns are used. This results in more incarceration. And it is not very plausible that the relevant conduct should be decriminalized. So lax prohibitions on firearms are at least one cause of the dramatic

⁸ *Wrongs and Crimes*, 93–96.

⁹ See *Wrongs and Crimes*, Ch. 17.

difference in incarceration rates between the US and more civilized countries. For all these reasons, it is almost certain that relaxing the criminal law with respect to gun possession would significantly increase the prison population in the UK. No one sensible recommends this.

Perhaps decriminalization would increase the prison rate in the US, because many people would violate the criminal law, as Husak thinks. It is hard to know whether this is true. At least in some cases, predictions of widespread violations of the law have turned out to be false. The ban on smoking in public indoor spaces in the UK is the most dramatic example I know of where the law dramatically altered behaviour, even though widespread violation was expected by almost everyone, so that the law needs almost no enforcement by law enforcement agencies.

If criminalization *in the US* would lead to a substantial increase in the prison population without any very dramatic effect on the number of people who are harmed or injured by firearms, my theory of the criminal law implies that this would be unjustified *in the US*. But this would not be because possession of firearms is not wrong, but rather because criminalization would be carcerogetic. And my theory of criminal law is not a theory *for the US*. It provides a framework for thinking about the scope of the criminal law in general, where empirical considerations about obedience to the law and cultural attachment to certain forms of conduct, such as gun possession, vary widely.

In this way, my views about criminalization are also more ‘real world’ than Husak’s. Husak’s views are defended in a more ‘real world’ seeming way—he doesn’t use as many unrealistic hypothetical examples as I do (shame on him). But the actual principles that he defends make his theory of criminalization less sensitive to the harm that it causes than mine.

3.2 Absolute and Non-absolute Principles

In *Wrongs and Crimes*, I offer some *reductio ad absurdum* arguments against certain content-focused principles. These principles absurdly imply that criminalizing conduct with certain content is wrong even where doing so prevents a great deal of harm. Consider:

US Threat: Possession of a certain recreational drug, Happy Pill, does not violate any plausible content-focused restrictive principle. For example, it is not wrongful, not harmful, and does not interfere with anyone else’s sovereignty. A poor country is deciding whether to criminalize possession of this drug. US subsidies, that are necessary for the provision of essential medicines to a very large number of people who will otherwise suffer severely, will not be provided if possession of Happy Pill is not criminalized, and the prohibition is not adequately enforced.

Husak seems to agree that criminalization of non-wrongful, non-harmful conduct is warranted in cases like this. He responds that we should nevertheless endorse principles such as *Wrongness Constraint 1*, but non-absolute versions.

But Husak's response is not a response to my arguments. I consider two different kinds of content-focused principles: absolute versions and *pro tanto* versions. Examples of the latter that I considered are:

Wrongness Constraint (Pro Tanto All Possible Worlds): In all possible worlds, it is *pro tanto* wrong to criminalize any conduct that is not wrongful.

Wrongness Constraint (Pro Tanto Current Western Democracies): In all current Western democracies, it is *pro tanto* wrong to criminalize any conduct that is not wrongful.

My examples are offered against absolute principles, but Husak responds to them by suggesting that they do not attack *pro tanto* principles. I never said otherwise; indeed, I noted that they may not be counterexamples to such principles.¹⁰

As I suggested, I am not sure whether the latter principles are true because I do not have a theory that distinguishes between conduct that is *pro tanto* wrong, and conduct that is not *pro tanto* wrong but has downsides. As far as I am aware, no one else has such a theory, and so we have no adequate way of telling whether criminalizing non-wrongful conduct is always *pro tanto* wrong, or even whether it is *pro tanto* wrong in cases like *US Threat*.

My argument was that we don't need to know whether the relevant *pro tanto* principles are true for this reason. Everyone accepts that criminalization has weighty downsides. It is costly, it results in punishment, with all of its familiar downsides, it results in the innocent being convicted and punished for crimes, and so on. I suspect that the downsides of criminalization almost always involve rights infringements in the real world, and that all acts of criminalization are thus *pro tanto* wrong. That is because all criminalization results in some innocent people being punished, and their rights being infringed. Thus, *Wrongness Constraint (Pro Tanto Current Western Democracies)* is true, even if *Wrongness Constraint (Pro Tanto All Possible Worlds)* is not. It is true because that principle is a smaller part of this plausible principle:

All Content (Pro Tanto All Nearby Possible Worlds): In this world and all nearby possible worlds, it is *pro tanto* wrong to criminalize anything.

I think this principle is probably true. But, as we all agree that criminalization almost always has downsides that infringe the rights of others, we need not determine whether it is true. That depends on the resolution of disputes about what downsides ground *pro tanto* wrongs, and I am tempted to think that nothing substantive turns on that.

3.3 The Ubiquity of Examples

I noted earlier that, although my way of defending my views is less 'real world' than Husak's, my views make criminalization more sensitive to real-world effects of

¹⁰ *Wrongs and Crimes*, 100–101.

criminalization. Is it then a problem that the way that I defend my views is not very ‘real world’? We should distinguish whether this is the best philosophical method from whether this is the best method for persuading policy makers.

Books like *Wrongs and Crimes*, or indeed Husak’s *Overcriminalization*, are not written in the way that would best influence policy makers were they to read them, and they do not do much to encourage policy makers to read them. As far as I can see, Husak’s book has not resulted in dramatic alterations to criminal justice policy in the US. It is perfectly sensible for criminal justice scholars to try to influence policy, and very occasionally I have tried to do this (without much success). But I would not dream of trying to do it *by writing philosophy books*. *Wrongs and Crimes* is written for scholars, not for policy makers, and I make no apology for that. I have been fortunate that more people read my work than I ever imagined would do so, despite (perhaps in some cases even because of) the examples.

Still, more philosophical objections to using such examples continue to arise, and Husak is right that there is a divide in moral, political, and legal philosophy between those committed to the use of examples and those who object, at least at a superficial level. Critics of such examples, though, have done such a poor job of arguing against their use that it is hard to know what to make of the criticisms. What could possibly be wrong with exploring some putative moral, political, or legal principle, or a premise in an argument, by considering its implications? And cases are designed to see what the implications of principles and premises are.

Consider some proposed moral or political principle p . Can’t we show that p is plausible by showing that it has plausible implications, or show that it is implausible by showing that it has implausible implications? To show these things, we must establish what the principle implies. And this inevitably leads us to examples. Furthermore, it almost inevitably leads us to examples that are unrealistic and stripped of many facts that we find in real life, at least if we do the testing well. Why? Because real-world examples are complicated, and involve lots of facts that might be morally significant, and so we don’t know whether p has implications in real life without considering the range of other principles that might bear on the real life case. So just focusing on the real world makes us unable to test p by testing its implications. Fortunately, though, we are imaginative enough to construct and assess hypothetical cases (and if you aren’t, find a job to which you’re better suited).

Indeed, it is hard to believe that good arguments could be found against the use of pared down cases, given that almost everyone uses tons of pared down hypothetical examples in his or her work. Husak himself uses plenty of examples when he tests controversial questions, and not all of them are realistic. For example, in testing the relationship between *malum prohibitum* and *malum in se*, Husak explores the difference between two defendants who have sex with those who are below the age of consent, but one has sex with a person whom he knows to be too immature to consent where the other has sex with a person who is sufficiently mature to consent. He concludes, plausibly, that it is manifestly unjust to punish them equally.¹¹ He considers whether promising could underpin *malum prohibitum* offences by examining

¹¹ D Husak *Overcriminalization*, 112.

those who violate such offences and who have made no such promises.¹² He considers whether the principle against free riding could do so by considering those who launder money but who would be willing to allow others to do the same.¹³ And he asks what principles would constrain the scope of the criminal law were legislators persuaded to enact outrageous offences, such as consuming doughnuts, and he uses this case to show that constitutional limits on criminalization would not prevent criminalization in this case.¹⁴

Of course, examples can be used well or badly. Some are extremely compelling for everyone, where others divide opinion. Our intuitions about some are more trustworthy than our intuitions about others. And some are better suited to test certain principles than others, because they are better at excluding distracting considerations. I am sure that I have used them badly many times. But the number that I use, and the fact that they are not realistic, is not something for which I apologize.

4 Response to Dougherty

Dougherty's excellent essay is concerned with some admittedly underdeveloped arguments in *Wrongs and Crimes* about the nature of consent, a topic that Dougherty's own work has been especially important in exploring. Here, I offer some further defence of the view that I outlined. Like Dougherty, I still think that the jury is out on the nature of consent, and I am not confident in my view.

Here is a standard set of circumstances, and a sequence of events, where valid consent is given on any plausible view. The circumstances are: Yoshi owes Xena a consent-sensitive duty not to *v*. That is, Yoshi has a duty not to *v* unless Xena consents to Yoshi *ving*. Xena's consent is thus needed to make it permissible for Yoshi to *v*.¹⁵ And there are no special considerations that make consent invalid, such as lack of capacity, coercion, error, and so on. This sequence then occurs:

- (1) Xena wants to release Yoshi from his duty not to *v*.
- (2) Xena forms the intention to release Yoshi from that duty.
- (3) Xena attempts to execute that intention by trying to communicate her intention to Yoshi.
- (4) As a result of that attempt, evidence of Xena's desire, intention, and attempt is available to Yoshi and others.
- (5) Yoshi thus forms the belief that Xena has the desire and intention to release Yoshi from his duty, and has attempted to do so by communicating that intention to Yoshi.
- (6) Yoshi concludes that Xena has released him from his duty not to *v*.

¹² *Overcriminalization*, 115.

¹³ *Overcriminalization*, 117.

¹⁴ *Overcriminalization*, 122, 124.

¹⁵ Of course, *ving* may be wrong on other grounds. I leave this complication aside for the moment.

Some event in this sequence is sufficient with the preceding events for Xena to have consented to Yoshi v-ing. But how far must Xena have gone? To decide, we might either consider intuitions about the cases, or we might consider the function, role, or value of consent and see what that implies for when consent is given.

In *Wrongs and Crimes*, I tentatively defended *Attempt*: the view that consent is complete at (3). On that view, (4), (5), and (6) are not required for consent, and I defended that view on the basis of both intuitions about cases and the role and value of consent. Dougherty previously defended *Uptake*: where something like (5) or (6) is required for consent.¹⁶ As we can see from the distinction between (5) and (6), different views about what uptake amounts to might be considered. For reasons of space, I will focus on *Attempt* and *Uptake*, leaving the more purely mental-state views to one side.

One standard way to test different views is to consider cases where some of these events occur and then things go awry. Suppose, for example, that some events in the sequence occur, but the remaining events do not. We might then ask: if Yoshi vs does he v without valid consent? If so, the remaining events are unnecessary for valid consent. For example, suppose that Xena forms the intention to release Yoshi from his duty not to v, but does not attempt to communicate this to Yoshi. If Yoshi vs, does he v without valid consent? If so, the attempt to communicate is unnecessary for valid consent. Those who believe that this is unnecessary might think either that consent just is the intention to release Yoshi from the duty, or that there is some other way of executing the intention—for example, by the mental act of declaring to oneself that ‘it’s ok that Yoshi vs.’¹⁷

To execute this test to compare *Attempt* and *Uptake*, I considered cases where Xena attempts to communicate with Yoshi that Yoshi is released from a consent-sensitive duty, but the communication fails because Xena is unclear—for example, where Xena mumbles. The question is whether Xena successfully consents, and I thought that she does. As evidence, I suggested that Yoshi would be warranted in being uncertain whether Xena consented, which suggests that there is some fact independent of uptake that constitutes Xena’s consent, of which Yoshi is uncertain. Dougherty suggests that those initially sympathetic to *Uptake* will be unpersuaded. They will be willing to grant only that the recipient is uncertain whether the mumbler is attempting to consent, and not whether she consented.

Another way to test what is necessary for consent is to consider when in the sequence consent is given, where the sequence is complete. For example, suppose that (3) occurs on Tuesday but (4) occurs on Wednesday. Does consent occur on Tuesday or Wednesday? If it occurs on Tuesday, it seems natural to conclude that (4) is not necessary for consent, for consent has already occurred on Tuesday. I had thought that *Attempt* passes this test, whereas *Uptake* does not. For example, suppose that on Tuesday Xena writes to Yoshi indicating that Yoshi is permitted to use

¹⁶ See T Dougherty ‘Yes Means Yes: Consent as Communication’ (2015) 43 *Philosophy and Public Affairs*, 224.

¹⁷ Kim Ferzan suggests something like this in ‘Consent, Culpability and the Law of Rape’ (2016) 13 *Ohio State Journal of Criminal Law*, 397.

Xena's car on Thursday. Yoshi receives the email on Wednesday. When did Y consent? It seems that this occurs on Tuesday, and Dougherty agrees.

I had implicitly assumed that if consent is given on Tuesday, facts on Wednesday could not be part of what consent is. Dougherty rightly notes another possible view: some of the remaining steps in the sequence are necessary for consent, but in virtue of their occurring, consent is given on Tuesday. On this view, whether consent is given on Tuesday does not depend simply on what happens on Tuesday. It depends on whether some further events occur, such as (4), (5), or (6).

Drawing on Hallie Liberto's work, he suggests that something like this view is plausible in the case of promising. Where Xena sends a message to Yoshi promising Yoshi that Xena will v , and Yoshi receives the message on Wednesday, the success of Xena's promise depends on what happens on Wednesday. But where the relevant fact occurs on Wednesday, the promise occurs on Tuesday. As both promising and consenting are normative powers, there is at least some reason to think that, if Liberto is right, uptake is required for consent, even if consent occurs before uptake, once it is given. Call this version of *Uptake* '*Retrospective*.' On this view, (3) is an attempt to consent, and consent actually occurs only because of some facts that occur later in the process. But, where the later stage in the process occurs, consent is given at (3).

Retrospective at least strikes me as initially surprising. It just doesn't seem true at first sight that whether Xena consents to Yoshi v ing at t depends on facts at t_2 . Consider:

Bike:

Tuesday:

Yoshi: May I use your bike on Friday?

Xena: I'll think about it and drop you an email by the end of the day.

Xena decides that Yoshi can use her bike, and sends an email expressing this on Tuesday evening.

Wednesday:

Yoshi: I didn't have time to read my email. Did you consent to my using your bike on Friday? If not, I'll have to make other plans.

If *Uptake* is true, Xena should reply: 'no,' or 'not yet.' But this seems false. The appropriate reply seems to be 'yes, I sent you an email saying so last night.' But as Dougherty notes, that argument is not decisive; those sympathetic to *Retrospective* will either not share my intuition or they will reject that intuition.

I now offer two more arguments to support *Attempt* over *Retrospective* (as well as other versions of *Uptake*). The first is a further argument from uncertainty, and it counts against all uptake views. Focus on this case of uncertainty, where consent seems normatively significant, but the person's uncertainty cannot be overcome prior to action:

Form: Patient needs one of two operations to treat an urgent medical need: a less beneficial operation from which she will recover quickly (*Operation 1*), or a more beneficial operation from which she will recover slowly (*Operation 2*). Patient has a meeting with Surgeon. She indicates that she would probably

prefer *Operation 1* but is undecided. She goes away to think about it, returns and fills in the consent form. But she does so in a way that leaves it unclear to which operation she has consented. Surgeon assumes that she has consented to *Operation 1*, as this is the operation that she had indicated she would probably prefer. Patient has been put under general anaesthetic, and the assistants have begun preparatory work for the operation, so waking her up before performing the operation will give rise to a significant risk to Patient's life. But Surgeon now realizes that what Patient was attempting to communicate is not completely clear from the form because of Patient's poor handwriting. Surgeon has the form, and quickly tries to decipher the text. Surgeon concludes from Patient's handwriting and their earlier meeting that Patient probably intended her to perform *Operation 1*. That is indeed what Patient intended. Surgeon performs that operation.

It seems that Surgeon permissibly performs *Operation 1*. Indeed, it seems that Surgeon is required to do this, even if Surgeon thinks that *Operation 2* would be more beneficial to Patient overall. And that seems true because Surgeon's evidence warrants the belief that Patient probably decided to have that operation.

How might different views of consent explain this result? Friends of *Attempt* have a straightforward way of understanding the case, with the result that Surgeon permissibly performs *Operation 1*. If *Attempt* is true, Surgeon is trying to discover to which operation Patient consented. She draws the conclusion that Patient has consented to *Operation 1*, which is the correct conclusion. She thus operates on Patient both with her consent and with sufficient evidence of Patient's consent.

If *Uptake* is true, the reason why Surgeon examines the form is to try to discover to which operation Patient tried to consent, knowing that she has not consented. Now, it might be argued that this is just what Surgeon should do on the following grounds: given that Surgeon cannot secure actual consent, she should discover to what Patient tried to consent. But things are much more complex than this. If *Uptake* is true, and Surgeon cannot get sufficient evidence for uptake, Surgeon performs any operation that she performs without consent. Perhaps friends of *Uptake* might resist this conclusion by claiming that Surgeon's degree of credence that Patient attempted to consent is sufficient for uptake. But this move is hard to swallow, as Dougherty agrees. In normal cases of consent to life-changing surgery, a person needs knowledge, or something close to knowledge, to warrant her acting on her evidence.¹⁸ If uptake has a role in consent, a belief that an attempt to consent has been made is insufficient for it. Surgeon thus knows that Patient does not consent if *Uptake* is true.

Now let us assess the implications of lacking consent. Dougherty and I agree that consent involves releasing a person from a consent-sensitive duty. An attempt to consent is an attempt to do this. If *Uptake* is true, Patient has only attempted to release Surgeon from a consent-sensitive duty, but has not done so. Furthermore, Surgeon knows that Patient has not released her from the consent-sensitive duty not to perform *Operation 1*. Thus, Patient's attempt to consent is insufficient to permit

¹⁸ 'Yes Means Yes,' 248.

Surgeon to perform the operation. It is natural to conclude that Surgeon still has this duty. Surgeon should thus perform the operation that she would perform were she not to have the consent of the Patient to perform either operation (if any).

Friends of *Uptake* might claim that Surgeon should nevertheless perform *Operation 1* for this reason: where consent cannot be secured, something less than consent, such as hypothetical consent, will do. As Patient probably attempted to consent to *Operation 1*, she probably would have consented to that operation, and that is the one Surgeon should perform. Thus, Y's actual consent is not needed to explain why X ought to perform *Operation 1*.

The first thing to note about this view is that it gives Surgeon an odd reason to examine the form, at least if she knows in advance that she will not be able to gain a sufficient degree of credence for uptake. Surgeon should not do so because Patient's decision determines what Surgeon's duty is as such, but rather because evidence of her actual decision is also evidence of something else—Patient's underlying attitudes or views about the operation, or how she would have decided under the relevant circumstances. But isn't it weird to consider these things when it is clear that she *has* decided, and Surgeon has significant evidence of this? It is more plausible that Surgeon tries to discover what Patient decided because her decision is important in itself, and not because her decision is evidence of what she would have agreed to hypothetically.

Furthermore, the fact that Patient probably decided to have *Operation 1* is only one piece of evidence that Surgeon might have about what Patient would do under the relevant circumstances. Perhaps Patient kept changing her mind from one day to the next about what is best. If so, her having decided when she signed the form is in no way decisive of what she would have consented to; on a different day, she would have written something else on the form. But it does not seem plausible that, in this case, Surgeon has a reason to go against what she believes to be Patient's actual decision to sign the form.

Also, hypothetical consent is clearly insufficient in some cases where mistakes are made, and *Uptake* has implausible implications in those cases. Hypothetical consent is obviously normally insufficient to make sexual contact permissible. But sexual contact is sometimes permitted where a person is unsure about consent. Deeper kinds of sexual engagement, such as penetrative sex, may well not be permissible on that basis, but some sexual engagement is much more trivial, and evidence that the person is attempting to release one from a consent-sensitive duty may be sufficient to permit such engagement where one is uncertain. Consider:

Kiss: After a long and romantic first date, Xyla and Yasmine are both drunk and Xyla has walked Yasmine home. Xyla says 'may I kiss you.' Yasmine appears to indicate that she wants to be kissed, but Xyla is not completely sure. Xyla could ask her to clarify, but that would kill the romantic atmosphere between them, so Xyla kisses Yasmine. Yasmine was attempting to indicate to Xyla that she wanted to be kissed, and kisses Xyla back.

It seems that Xyla is permitted to kiss Yasmine in the evidence-relative sense, and she does not wrong Yasmine in the fact-relative sense. Of course, she would have been required to stop if Yasmine then indicated that she was attempting to refuse.

Here is a natural explanation that is available to friends of *Attempt*. In attempting to communicate to Xyla that she permits her to kiss her, Yasmine consents to be kissed. Xyla thus releases Yasmine from the consent-sensitive duty not to kiss her. Xyla is unsure whether Yasmine has consented, and so is unsure whether she has been released from her duty not to kiss Yasmine, but as the evidence strongly supports the belief that she has, and taking steps to find out would be costly to both Xyla and Yasmine, Xyla is permitted to kiss Yasmine.

There is a question whether this explanation is available to friends of *Uptake*, though. Suppose that Xyla's level of credence is too low for uptake. Friends of *Uptake* must then claim that Yasmine has not released Xyla from the consent-sensitive duty not to kiss her. In attempting to understand what Yasmine has said, Xyla is not trying to discover whether Yasmine has consented. Furthermore, as Xyla cannot secure knowledge of what Yasmine was attempting, Xyla cannot secure uptake. Thus, if Xyla kisses Yasmine, she does so without consent. Furthermore, there seems nothing other than Yasmine's consent that is sufficient to release Xyla from her consent-sensitive duty, so it is hard to explain the intuition that Xyla lacks a duty not to kiss Yasmine.

Friends of *Uptake* may follow Dougherty in responding that the degree of credence needed for uptake depends on the stakes.¹⁹ As kissing is relatively low stakes, something short of common knowledge of the attempt to communicate a permission is needed for uptake, and therefore Yasmine consents. To assess this response, we need an account of the normative facts that affect whether uptake occurs and the wider range of normative facts that determine the permissibility of acting on one's credence that do not affect whether uptake occurs. A natural way of understanding Dougherty's view is that facts about the significance of what the person might be consenting to determine the degree of credence required for uptake. But difficulties of gathering evidence do not. This would explain why Surgeon lacks uptake in *Form* even though she is permitted to perform *Operation 1* with a lower level of credence; the stakes for Patient in having control over which operation is performed is high, which makes something like common knowledge required for uptake. But the costs to Patient of finding out are also very high, which is why Surgeon is permitted to operate without doing this.

But once we have this distinction in hand, the response offered to *Kiss* is also unavailable. The reason that Xyla is permitted to kiss Yasmine is not just that kissing is relatively low stakes; it is also that the romantic atmosphere will be ruined if she asks. Were this not so, Xyla would be required to clarify whether Yasmine wanted to be kissed. Thus, there is insufficient basis for the view that Xyla has uptake.

The intuitive view that consent is independent of uptake can also be supported more theoretically in the light of *Form* and *Kiss*. Suppose that Xena wants to release Yoshi from a consent-sensitive duty that Yoshi owes to Xena not to *v*. Xena is able to give Yoshi credible evidence that she wants Yoshi to be released from this duty, but she is unable give Yoshi knowledge of this. If *Attempt* is true, Xena will then have the power to make her consent effective by making it the

¹⁹ 'Yes Means Yes,' 248.

cause of the evidence that makes it evidence-relative permissible for X to act. If uptake is required, in contrast, Xena will be unable to do this, and so she will have less power to ensure that her intentions to release others from the duties that they owe her can be executed. This is a reason to prefer *Attempt* to *Uptake*.

This idea also helps us to reinforce the autonomy defence of *Attempt* that I offered, and that Dougherty cautiously accepts. *Uptake* makes it more difficult to make our decisions affect another person's duties because others may lack decisive evidence of our intentions.

This leads me to a second argument for *Attempt* over *Uptake*. It concerns Gettier-style cases. In such cases, Xena attempts to execute her intention to release Yoshi from a consent-sensitive duty by attempting to communicate with Yoshi, but the communication fails. However, Yoshi has compelling evidence from an unreliable source that Xena has made this attempt. Yoshi concludes that Xena has consented and acts accordingly. In such cases, there is no uptake, for consent does not play the appropriate role in causing Yoshi to believe that the attempt has been made. But it seems hard to believe that the person has not been released from the relevant duty, and so commits a wrong. Consider:

Letter: Xena writes Yoshi a letter intending to permit Yoshi to use her bike on Thursday. This letter gets lost in the post. However, for a prank, Zelda writes a letter Yoshi, purporting to be Xena claiming that Yoshi is permitted to use the bike. By complete coincidence, this letter is identical to Xena's letter. Yoshi believes that Xena wrote Zelda's letter. On Thursday, Yoshi goes to Xena's house to get the bike, and rides off with it. Xena and Yoshi never discover what has happened and live happily ever after.

On a natural reading of *Uptake*, Yoshi has not been released from her consent-sensitive duty not to use Xena's bike. Xena's attempt to consent is unsuccessful because it does not reach Yoshi. Zelda cannot consent on Xena's behalf. So, no one has successfully permitted Yoshi to use the bike. Therefore, Yoshi wrongs Xena by using the bike. But, although there is something morally defective about Yoshi's use of the bike, it seems that Xena has consented to its use, and Yoshi does not wrong him by using it. To confirm this conclusion, suppose that Xena finds out about the letter being lost and Zelda's prank. Were *Uptake* true, she ought to tell Yoshi about this, for otherwise Yoshi will wrong her. This seems false.

And cases like this might lead us to qualify *Attempt*. In *Wrongs and Crimes*, I argued that an attempt to communicate is required for consent on the following grounds. Consenting involves executing an intention to release another person from a duty. Such an intention is an intention to alter the practical reasoning of the other person. And a person has that intention only if she attempts to affect the practical reasoning of the other person. This, I thought, can only be done by an attempt to communicate.

But there are exceptions to this general idea, even if it is right in the central cases. Or, at least, there are other ways in which a person can be released from a duty that is normally consent sensitive. One person might intend *that* another person's practical reasoning is altered without altering it herself. This can occur where another

person provides evidence of the relevant intention. In such a case, no attempt to communicate is required to release the person from the relevant duty.

To take a simple case, suppose that Zelda will tell Yoshi that Xena doesn't mind if Yoshi uses Xena's bike. Xena is aware that Zelda will do this, and makes no effort to intervene where he could easily do so, simply because he intends that Yoshi will believe that he is permitted to use her bike. This seems sufficient to release Yoshi from her consent-sensitive duty, regardless of why Zelda tells Yoshi. But Xena just sits passively by, and does not attempt to communicate with Yoshi.

There might be disagreement here about whether it is consent that releases Yoshi from the relevant duty. One view is that consent involves the execution of an intention to release a person from a consent-sensitive duty. This requires an intention that the person has evidence that she is released from such a duty. But the person can either act or omit with that intention.

Another view is that consent requires an attempt to communicate, as *Attempt* claims. But Xena's intention that the person has evidence that she is released from the duty can be sufficient to release Yoshi from that duty, and where this is true something other than consent releases the person from a duty that is normally consent sensitive.

Which of these views is true is not very important—it is just a question of conceptual carving. But there is at least room for the view that an attempt is sometimes unnecessary for the intent that one's intentions will be communicated, and is thus unnecessary for either consent or something close to consent.

5 Conclusion

Wrongs and Crimes discusses a very wide range of issues in moral, political, and legal philosophy, and as a result discusses many of them badly. The four excellent philosophers in this symposium have pressed me to do more to clarify and defend some of the ideas in that book more effectively, and I am grateful for that. As readers will see, I have stood my ground on most of the main ideas in the book. I am still not fully confident in most of what I say there, or indeed here, but I continue to think that the main lines of argument are promising enough to be worth pursuing.

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