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ORIGINAL PAPER

Property Offences as Crimes of Injustice

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Abstract The article provides an outline of the basic principles and conditions of criminalisation of interferences with others' property rights in the context of a specific context: a liberal, social democratic state, the legitimacy of which depends primarily on its impartiality between moral doctrines and the fair distribution of liberties and resources. I begin by giving a brief outline of the conditions of political legitimacy, the place of property and the conditions of criminalisation in such a state. With that framework in place, I argue that interferences with others' property rights should be viewed as violations of political duties stemming from institutions of distribution. I then discuss three implications of this view: the bearing of social injustice on the criminal law treatment of acts of distributive injustice; the expansion of criminalisation over the violation of distribution-related duties, which are considered criminally irrelevant under moral conceptions of criminalisation; and, finally, the normative significance of the *modus operandi*.

Keywords Property offences · Social justice and criminal law · Liberal legitimacy and criminal law

Introduction

My aim in this paper is to provide an outline of the conditions of criminalisation of interferences with property rights within a specific political theoretical framework. Namely, a neutral, liberal, social democratic state setting terms of social cooperation, which can be accepted by all reasonable citizens irrespective of their moral beliefs and commitments.

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The crux of my argument is that in such a state: (a) criminalisation and punishment are justified in cases of violation of political duties introduced on the terms of the social contract and only as a last resort on the basis of strong evidence that it is the only way of securing the stability of social cooperation; (b) property rights are instrumental to social cooperation, therefore contingent on and subject to principles of distributive justice; (c) it follows from (a) and (b) that criminalisation of interferences with property rights is warranted only when they constitute violations of distributive principles and only to the extent that criminalisation is necessary on consequentialist grounds.

I will begin by giving a very brief and rough outline of the basic contours of a liberal, social democratic state, explain what counts as a duty within such a state and outline the place of property in such a political context. I will then set out the general conditions of criminalisation. Finally, I will specify the conditions of criminalisation of interferences with property rights. In the course of doing so, I will consider three implications of this view of property offences: the ramifications of social injustice for the criminalisation of interferences with the property of others; the expansion of the scope of criminalisation over distributive injustices other than unwarranted interferences with others' property rights; the normative relevance of the *modus operandi*.

I should note from the outset that my account here is normative and largely revisionist. I attempt to construct the conditions under which interferences with property rights are to be criminalised within a state of a specific orientation and character. This is animated by the second-order assumptions that no complete descriptive theory of all criminal law arrangements is available and that the justification of the criminal law is directly dependent on the foundational terms of the state. Nevertheless, on occasion and where relevant, I will highlight how this normative model speaks to current institutional reality with reference specifically to the criminal law of England and Wales, although I should think that some of these conclusions are true of other jurisdictions. Finally, it should be noted that for reasons of space I will focus mainly on the question of criminalisation rather than the conditions of criminal responsibility, although the model I try to construct is not silent on the latter. Indeed, this paper is part of a longer term project, which aims precisely at setting out the conditions of legitimacy of the criminal law, including conditions of criminal responsibility, in a liberal, social democratic state.

A Rough Outline of a Liberal, Social Democratic State

The theory of the state, which serves as the basis for my construction of a liberal, social democratic model of criminal law generally and the criminalisation of property offences in particular, is couched in the post-metaphysical turn in political theory exemplified mainly but not exclusively by the thought of John Rawls. More specifically, I am referring to the later, purely political reformulation of Rawls's theory of state legitimacy in conditions of reasonable pluralism (Rawls 1993). The core idea is that, in light of value pluralism at this stage of the modern era, the state ought not to be based on controversial metaphysical and moral doctrines in order for it to be legitimate and stable in the long run. It should rather be organised around substantive and procedural principles which are constructed on the basis of the self- and mutual understanding of the modern subject. This can be broken down into three basic theses, which may in fact be seen as three formulations of the same idea from three slightly different perspectives. They are the following:

First, the starting point of political, social democratic liberalism is the status of all citizens as free and equal. This is not a matter of natural right or metaphysical truth but an

historically indexed political ideal regarding people's general attitudes towards each other.[1] Freedom and equality are capacities of the modern subject, capacities which all regard themselves and others as possessing (Rawls 1993).

Secondly, the question of legitimacy and content of the law are *political* and *not moral*. The law's political character implies that the justification of public norms depends not on their substantive content but on whether they cut across the whole range of moral doctrines and, subsequently, on whether they are generally acceptable on the basis of publicity. In other words, the law's rightness is not to be measured against some transcendental 'truth', even if that truth includes liberty and equality, but rather against standards of justifiability to and acceptability by all.

Thirdly, this state model is both procedural and substantive. This means that it does not only promote liberty (and its correlate, equality) as a fundamental value in political communities in the sense that all citizens must be treated equally *by* the law. It does not suffice that liberty and equality inform the allocation of resources and liberties from the detached point of view of the philosopher king. Their attributes of liberty and equality imply that citizens are self-authenticating sources of value, in Rawlsian terms. This necessitates the cooperative and deliberative determination of public norms, which is best served by a democratic system of decision-making with robust public institutions setting the conditions of free, substantive political discourse.

The fourth feature comes both as a result of and in order to make possible the realisation of the state's political, procedural character and citizens' moral capacities. This state model is committed to the fair redistribution of resources for everyone to enjoy a minimum of material welfare enabling them to pursue their conceptions of the good and to participate in a political life of democratic, deliberative co-determination of public norms. There may be disagreements as to what exactly counts as *fair* allocation or how exactly redistribution is to take place—a question depending largely on actual conditions in specific contexts. However, the important point is that the state, which stands for the collective, is under an obligation actively to interfere in the way that wealth is distributed in a normatively specific pattern.

The Basic Features of Property Rights in a Liberal, Social Democratic State

What citizens in a liberal social democratic state ought to do, as well as what they are entitled to, is not to be determined with reference to moral norms, which require a substantive commitment on their part. These normative demands are instead set in relation to the foundations and terms of the original contract. We can accordingly distinguish between two types of such political duties.

On the one hand, there are duties which stem directly from citizens' capacities of freedom and equality. In this respect they are necessary not in that they are determined by an extra-political normative order but in that they are preconditions of the very possibility of an institutional structure that will actualise the terms of social cooperation.[2] All citizens are under a duty not to interfere with the ability of others to exercise those capacities and therefore others' ability fully to participate in the co-determination of public norms. These

[1] It is not uncontroversial that freedom and equality are neutral, generally acceptable and therefore capable of providing a basis for the construction of a theory of state legitimacy and justice. For this objection and its extensions specifically in relation to crime and punishment see Matravers 2000.

[2] Rawls rather misleadingly refers to such duties as "natural" (Rawls 1971:314).

duties include respect for others' bodily, psychological and sexual integrity as well as their status as citizens.

Duties in the second set are purely institutional in that they stem from the institutional structure based on and serving the foundational terms of the state. This structure is contingent on actual conditions in a given historical moment, an implication of which is that different arrangements may fulfil the terms of social cooperation in different but equally satisfactory ways in different contexts.

Private property is one of these institutions. Unlike Locke-inspired theories of the state, a liberal, social democratic political theory regards private property not as a natural right or an otherwise matter of metaphysical or moral necessity but rather as a contingent institution, which may or may not satisfy the terms of social cooperation depending on actual circumstances. Now, let us assume that in our societies, that is in contemporary, modern societies, *private* property is indeed the best possible arrangement allowing citizens to pursue and achieve their ends. This, however, still does not tell us all there is to know about the normative content and structure of the institution of private property. It simply tells us that such institutions must be in place as will allow citizens to enjoy dominion over parts of the world in a way that will facilitate their flourishing.

Since the central point of private property in a liberal, social democratic state is to allow citizens to pursue their goals and to improve their lives through the use of material goods, it is more likely than not that it will have a structure very similar to what we are already familiar with.[3] Property rights will allow their holder a range of exclusive liberties in relation to the object of the property. Accordingly, others are under corresponding duties with trespassory prohibitions being perhaps chief amongst them. This much does a liberal, social democratic conception of property have in common with its Lockean counterparts.

But these two conceptions of property soon part company. Liberal, social democratic institutions of private property are subject to normative constraints stemming from the redistributive goals of the state. They are therefore still linked to freedom and equality but indirectly so. The most important implication of this is that interferences with private property by the state do not constitute infringements of citizens' moral capacities but rather a reaffirmation of those moral capacities through the reaffirmation and entrenchment of the state's proactively allocative responsibility. In the libertarian model the state is sharply distinguished from its citizens and citizens are, in turn, viewed as a collection of individuals rather than a group with internal normative bonds. One is therefore only under a duty to respect the boundaries of the freedom of others rather than contributing to the realisation of others' freedom. It follows that any interference with one's property, even by way of state-imposed tax, is already unwarranted and unjustifiable. Clearly not so in a social democratic state, in which citizens are held to have agreed to undertake duties with regard not only to their own well-being but also to the well-being of others as an expression of their own freedom and equality. The scope of property rights is therefore conditioned by the necessarily social point of having property rights in the first place. To put it slightly differently, all citizens owe duties of justice to others and the state as part of the terms of social cooperation. How these duties are institutionalised and what limitations it is justifiable to impose to the enjoyment of property rights is again a contingent matter to be determined with regard to actual conditions.[4] However, it will no doubt centrally entail that

[3] For an account of the structure of the legal institution of property independently of distributive schemes see Penner 2000.

[4] All this is not to say that justice extends further than a state's institutional structure. There is a clear-cut divide between the public and the private and citizens are not under public duties, such as the duties of

citizens will be required to part with property, which they have rightfully acquired, in order for inequalities to be redressed through providing equal access to education and training and other opportunities, for essential public services and so forth.

The legitimacy and normative force of duties of justice, as well as all political duties, is subject to the further requirement of *completeness*. The institutional structure must be such as to form as complete as possible a scheme of public norms guaranteeing fair social cooperation. In the face of gross inconsistencies and inequalities, no partial duties can be legitimately imposed. For example, it should not be difficult to imagine, not least because it is not all that far from current reality, a society marked by immense disparities of wealth between those who monopolise production, or the reproduction of money for that matter, and the poorer parts of the population with the former getting away with not contributing sufficiently and fairly towards the welfare of the collective. It is also not difficult to imagine a society, in which some parts of the population are deprived of those basic liberties necessary for one to enjoy full membership in the political community. In such cases, and to the extent that the state can be thought of as a normative entity resulting from the social contract, the terms of this contract are blatantly not met and therefore no burden may be imposed on any of the parties.

Of course, the threshold that a state must cross in order for it to be 'largely' unjust is far from obvious or easy to determine. There will, no doubt, be straightforward cases of states which fail altogether fairly to distribute liberties and resources, for instance by disenfranchising whole groups, even ones relatively small in membership. But there will also be borderline cases of states with robust political and just institutions, which nonetheless fail some citizens, or groups of citizens, in some respects thus making it more difficult to gauge whether there is a collapse of legitimacy of the whole basic structure or not. Be that as it may, it does not detract from the formal point that a state's institutional structure must be largely coherent and complete in order for it to be able to make demands of citizens. I will return to this point a little later when discussing whether redistribution is possible through the criminal law in any way.

Criminalisation in a Liberal, Social Democratic State

As I have already said, a liberal social democratic state remains neutral among controversial conceptions of the good. An extension of neutrality is the requirement of publicity. It is only those arguments that may be accepted by all that are admissible in public discourse and it is only those norms that pass the procedural tests of democratic deliberation that may count as legitimate *public* norms.

The principles of neutrality and publicity directly govern criminalisation as well. I will only provide a sketch of the conditions of criminalisation generally here for reasons of economy of space.[5]

Footnote 4 continued
justice, in their private spheres. For instance, one may be obliged to pay taxes, which will then be redirected to welfare policies but one is not under a duty of philanthropy. It should be emphasised that redressing inequalities of the type that philanthropy tries to tackle is a central political task of the state. The argument that for a society to be just, duties of justice ought to reach further than the basic structure is, of course, forcefully advanced by Gerry Cohen. For its most comprehensive formulation see Cohen 2008.

[5] For a more detailed account see Melissaris 2011, 2012.

(1) It is only public wrongs that may be criminalised, because it is only the public domain that is the business of the state. This much is accepted by most liberal criminal law theorists but the crucial question is what counts as 'public' and what does not. It is often the case that takes on the criminal law, which insist on viewing criminalisation as a non-consequentialist moral matter, i.e. as the moral disapprobation of moral wrongs, run into difficulties when they must distinguish between the public and the private and, consequently, when they are called accurately to set the boundaries of the criminal law. They often find themselves having to subject a priori moral reasons for holding others responsible to consequentialist and epistemic constraints.

The state model animating my analysis here draws a non-moral line between public and private. This is possible by acknowledging people's dual status as citizens, on the one hand, and as moral agents on the other. Public wrongfulness can only be conceptualised with reference to citizens' identity as citizens, the terms of the social contract and the duties that they generate for citizens. These duties are undertaken *by* citizens *as* citizens and *towards* other citizens. Importantly, they are owed to others both severally and collectively. Political duties are promises to act in certain ways or to abstain from acting in some ways addressed to each citizen separately and to the political community as a whole. This follows directly from the character of the state as embodying the citizens' collective political commitments and not as a normative entity separated from the citizen body and merely mediating between individuals.

(2) So we now know that the proper business of the law generally is the specification of political rights and duties, the violation of which constitutes a public wrong. The task of the criminal law is to respond to such public wrongs. But this still does not tell us everything there is to know as to exactly *which* public wrongs fall under the ambit of the criminal law. The point from neutrality is still relevant. What differentiates between criminalisable and non-criminalisable wrongs can, quite obviously, not be a moral difference between various acts.[6] Neither does the reason for criminalising coincide with the reasons of an act's wrongfulness. So what may justify criminalisation?[7]

The answer is to be found in the very point of the institutional structure and its enforcement. Institutions either entrench political duties which flow directly from the terms of the social contract or they introduce contingent political duties, which facilitate social cooperation. In a liberal, social democratic state with a just and largely complete basic structure, citizens would generally be autonomously motivated to abide by the state's law. This is the very point of the social contract. Assurance that the terms of social cooperation, and the long-term stability of social order, will be maintained should be possible without the need for coercion –though not without the need for law. Nevertheless, and for various reasons, one cannot expect this fully to be the case. There will no doubt be some who will be insufficiently so motivated. To the extent that this motivational deficit is not due to the incompleteness of the basic structure, then it is justified to take accountability-seeking measures in order to maintain stability and assurance.

Punishment as a response is only one of the many possible ways of enforcing public duties. Its employment and normative boundaries are therefore determined by the

[6] This is not uncontested amongst republican thinkers. For instance, in his prolegomena to a general theory of criminal law, Antony Duff seeks *prima facie* strong moral reasons to differentiate between criminalisable and non-criminalisable public wrongs (Duff 2010b).

[7] By 'criminalisation' I simply mean a distinct way of dealing with a public wrong. This may be by punishing the wrongdoer, in the standard and current understanding of what punishment entails, but not necessarily so.

pragmatic circumstances which necessitate it, i.e. there must be a direct, and as accurate as possible a, correlation between punishment and the aims of assurance and stability. Because punishment, in its standard understanding, deprives a citizen of liberties and facilities that she would otherwise be free to enjoy, it potentially outweighs other considerations in one's reasoning as to how to live in cooperation with others. This means that its threat assumes that citizens do not have the capacity to be autonomously motivated to honour their political duties. It is for this reason that it should be reserved as last and temporary resort when there is strong proof that all other measures which allow citizens to reason freely and act on reasons from the terms of the social contract are ineffective.

The Criminalisation of Distributive Injustice

General Principles

We can now bring all of the above points together in order to sketch the conditions of criminalisation of unwarranted interferences with property rights.

As I have already said, liberal, social democratic property rights have a structure already familiar to us. Part of their point is to allow citizens to pursue their ideas of happiness through the unimpeded enjoyment of material and other goods including not only already acquired goods and resources but also the opportunity to acquire such property. Now, all this requires certain exclusionary prohibitions against other parties. The boundaries of these prohibitions will of course depend on the form of the held property right. For instance, full-blown ownership will entail prohibitions of a greater extent than, say, a tenancy agreement. Nevertheless, the important point is that others are under a political duty not to overstep these boundaries. Consequently, failure to observe property-related duties is potentially criminalisable to the extent that all other ways of ensuring self-motivated compliance are not likely to increase citizens' assurance and safeguard the stability of the political order.

Crucially, these property rights and the corresponding duties are not independent from the rest of the political structure. They may facilitate the pursuit of conceptions of the good on the part of citizens but they do so within a framework of distributive fairness, which redresses contingent large-scale inequalities in resources and opportunities. Property rights and related duties are not regarded as unqualified natural rights of an inherent moral value. Not only are they introduced in order to institutionalise and entrench distributive fairness but they are also subject to limitations from distributive fairness.

Let me pause here to make a brief detour and show the relevance of this point to current institutional arrangements. The development of property offences at least over the last two centuries has marked a shift from property rights *simpliciter*, and especially property as physical possession to a reconceptualisation of property as a bundle of rights with various manifestations. George Fletcher has famously recorded this transformation in the law of larceny in terms of the transition between two ideal types of manifest and subjective liability as these emerge from doctrinal changes (Fletcher 1978).[8]

Fletcher's thesis is based on the doctrinal shift of focus in the felony of larceny from physical, sensibly identifiable misappropriation of tangible property to the psychological attitude of the defendant in relation to others' property. This, however, is in turn based on

[8] The historical accuracy of Fletcher's argument is not uncontested. See Weinreb 1980 and Fletcher's response in Fletcher 1980.

too sharp a distinction between conceptions of wrong and conceptions of responsibility, which disregards the way in which one's responsibility will, at least to an extent, depend on the ways in which one can wrong others. For example, the weaker the requirement of bringing about sensibly identifiable changes in the physical world for an act to be wrongful, the more pronounced the subjective aspect of responsibility will be. Therefore, in order to grasp these types of liability fully we need a more complete picture of wrongfulness in relation to prevalent conceptions of values, rights and duties which become entrenched in the law and are underpinned by political and socio-economic changes. In the context of property offences and every other institution-related wrong this need for multi-level analysis is particularly strong precisely because of their institutional, contingent character. The relation between manifest and subjective criminality can only be made sense of in tandem with an understanding of the gradual transformation of conceptions of property and the political framework, in which they take place.

Lindsay Farmer (2010) very convincingly makes this connection and argues that the, gradual and protracted, metamorphosis of theft goes hand in hand, both historically and conceptually, with the rise and expansion of exchange relations over space and individuals and the new processes of circulation and distribution of wealth.[9] The current criminal law of England and Wales also offers us an abundance of glimpses into this correlation, of which I will only mention a few. First, the Theft Act 1968 marked the transition from an understanding of theft in terms of the outright removal to the assumption of any of the rights of the owner in an enormous variety of ways and circumstances. This marks a shift from the understanding of theft in terms of the harm done to the owner by depriving her of tangible property to emphasising D's interference with the owner's private domain of control over goods, both tangible and intangible, which is circumscribed by the relevant rules of acquisition and allocation of property.[10]

The same Act expanded the scope of theft over a range of proprietary rights and interests much wider than fully-fledged ownership. This has led to results which ring rather counterintuitively if one thinks of theft in terms of possession connected to the owner's immediate well-being, but which become more sensible when one thinks of property offences as distribution-related. *Turner No 2*[11] is perhaps the most interesting such case. D was found guilty of stealing his own car, when he removed it from the garage at which he had left it for repairs without paying the bill. The judgment is generally considered clumsy because the court did not consider in any detail whether the property was held as liens by the garage owner. Nevertheless, it still reveals an intuition on the part of the court which largely coheres with the orientation of the law on property offences, that there is a public wrong involved in failing to honour contractual agreements, which ought to be met with disapprobation by the criminal law.

Finally, the reform of the law of fraud with the Fraud Act 2006[12] may plausibly be seen as shifting focus from specific transactions with identifiable parties entering into a transaction and the harmful misuse of trust of one party by the other, to the expression of

[9] In L. Farmer (2010). The metamorphosis of theft: property and criminalization. Unpublished paper presented at Queen's University Criminalization conference 2010.

[10] This is of course not the only way of explaining the doctrinal transformation of theft. As I said, I only want tentatively to highlight the explanatory potential of the account of property offences offered here for current law.

[11] [1971] 1 WLR 901.

[12] In English law one commits fraud among other ways by dishonestly and knowingly misrepresenting the truth intending to make a gain or cause a loss.

disregard for the truthfulness requirement for the rational and intentional circulation of goods as well as the potential undermining of large-scale transactions and the conditions of their possibility.[13]

Social Injustice and Criminal Responsibility for Crimes of Injustice

There is a view with considerable intuitive appeal: the state ought not to hold criminally responsible for wrongdoing those who are on the receiving end of social injustice insofar as the state is responsible for this injustice. This intuition is particularly strong when the wrongdoing consists in the misappropriation of the property of others and therefore the link between motivation and act is stronger. If D is impoverished because of the state's failure fairly to allocate resources, is the same state justified in holding him responsible and indeed punish him for stealing or misusing property belonging to others? If property offences are part of a scheme that punishes for citizens' failure to live up to their duties of justice, does it follow that the link between the *prima facie* wrong committed by D and a social injustice of which D is a victim has a bearing on the criminal law's treatment of D?

The intuition needs to be systematised. Social injustice may have a bearing on crimes of injustice in a variety of ways: (1) it may mean that D's very duties are obliterated, because they are conditional on social justice; (2) D may not be fully responsible for breaching a distribution-related offence because D was, somehow, driven to it by social injustice; (3) the state may not have the standing to hold D responsible for distribution-related offences, which D committed driven by need, because of the wrong it does to D itself by treating D unjustly; (4) finally, the social injustice may have a bearing on the appropriateness of criminalisation and punishment as responses to distribution-related offences. I will suggest that (1) holds in cases of extreme injustice and (4) holds in cases of partial injustice. I find (2) plausible –although empirically next to unprovable– but I will also suggest that it does not show social injustice itself to be a special reason for justifying the wrong or otherwise directly affecting D's responsibility but rather a circumstance the consequences of which potentially are pertinent to D's criminal responsibility. Finally, I will argue that (3) is never the case.

(1) A fundamental distinction should be drawn between extreme and partial injustices. The former are cases of basic structural injustice, in which groups of citizens are denied the resources or liberties to which they are entitled by virtue of their status as participants in the political community and which are necessary for them to be able to make the best of that status. Partial injustice is done when a fair scheme of distribution of resources and liberties is largely in place but there are imperfections, which mean that some citizens are distributively short-changed. Imagine, for example, a professional group, the members of which are not granted adequate or sufficient employment law protection or sufficient social insurance rights, while at the same time they are equal participants in democratic politics and they enjoy the protection of the law in all other respects.

In a word, in the face of extreme injustice the criminal law enjoys no legitimacy and its role is altogether cancelled out.[14] In a socially just state such as the one that frames my

[13] To say that the criminal regulation of property relations seems to be focusing on circulation and distribution of property is not to say that the terms of distribution are determined by principles of fairness and social justice. If anything, one could plausibly argue that what the criminal law further entrenches and protects is the capitalist, and far from social democratic, mode of distribution. This is sadly corroborated by practices in the criminal justice system.

[14] For a similar argument and responses to objections see Gargarella 2011.

analysis here, distributive fairness cannot be gauged in isolated contexts, as is the case in libertarian thought which only shows regard to the conditions of acquisition of property. In order for a state to qualify as distributively just, its institutional structure must be complete for it to come at least sufficiently close to eradicating inequalities and allocating equal opportunities for all to develop and live a fulfilled life. Should the institutional structure not achieve this, then property rights and duties, as well as all other rights and duties, are left unjustified. This follows from the interdependence of citizens *qua* citizens and the contractual nature of their rights and obligations. The terms of this contract cannot be partially enforced. Gross distributive inequalities undermine the justifiability of the institutional structure and the rights and duties that it may generate. It clearly follows that in such conditions the state is not justified in criminalising interferences with property even though criminalisation may emerge as the best possible means of guaranteeing assurance and stability. The liberal, social democratic state's concern is not the stability of *any* kind of social order but the stability of a *just* order. If the state falls short of the requirements concerning the justice of the basic structure and the public justifiability of rights and duties, then it can make no demands of citizens. It follows that gross distributive injustices may not legitimately be redressed at the adjudicative level, which presupposes an already legitimate normative framework. If a state which purports to be neutral, liberal and social democratic has failed properly and completely to institutionalise its character and orientation with publicly identifiable, democratically enacted norms, then adjudication comes too late and lacks legitimation.[15]

It follows *a maiore ad minus* that redistribution through the criminal law is not legitimately possible either. Say that there are gross wealth disparities and inequalities in the allocation of liberties. And say that a segment of the worse off part of the population interferes with others' property. One may be tempted to view the distributive inequality as justification for these offences. But this already presupposes a robust normative substratum, which may allow for exceptions and qualifications but nevertheless legitimately governs social cooperation. In the face of the breakdown of the institutional structure, this is not the case and solutions can only be sought in the political rather than the legal realm, because the criminal law cannot itself explore the conditions of its legitimacy. A judge in a theft case cannot ask whether the state is just enough for the defendant before the court to be held as owing any political duties to others. The proper forum for such discourses is the political one.

(2) The point so far has been straightforward, albeit not uncontroversial. Cases of partial injustice, however, where the basic structure is largely just but there are isolated instances of distributive injustice, present us with greater difficulty. The overlap between legitimacy and justice comes to an end here. Although the state may be treating some citizens unjustly, it remains largely legitimate to the extent that constitutional essentials and primary goods are fairly distributed. In cases of partial injustice D has a political entitlement on the basis of the foundations of the social democratic state –and the state is under a corresponding duty to redress the injustice– but this entitlement has not been institutionalised in law.

It is tempting to believe that in such cases the defendant's responsibility is somehow conditioned by the social injustice for a variety of reasons: because the need in which D finds himself makes him lose control of his actions; because he is acting in self-defence;

[15] All this is not to say that there will be no juridical state of sorts and that social coexistence will regress into the state of nature. But this will not be a legitimate state capable of being just to everyone and of being accepted by everyone.

because he finds himself in a state of necessity and so on and so forth. I find this intuition analytically inaccurate and empirically unprovable. Firstly, and most importantly, the question is not philosophical but empirical. There is no reason from principle not to accept that social injustice may be a condition qualifying one's responsibility. But this means that it is not social injustice itself that qualifies D's responsibility but its repercussions for D's cognitive or motivational disposition. In other words, social injustice may be what causes D to be provoked and what D defends himself or others against and so on. It is not, however, *itself* a reason justifying D's wrongs. Secondly, a sufficiently direct and strong factual correlation between social injustice on the one hand and changes in the disposition of D or D's acts will be extremely hard, if not impossible, to prove.[16] Thirdly, when injustice is such that it is proven not to leave any options available to D but to act in violation of some putative political duty (e.g. when D's financial situation due to a social injustice is such that he commits a wrong out of necessity), it will more often than not be the case that the social injustice is extreme and therefore that no such duties are in place.[17]

(3) There have recently been some very strong attempts at expressing and defending the intuition that in such cases of partial injustice, the state *loses its standing* to hold unjustly impoverished defendants responsible for the violations of their duties as citizens, duties which are not extinguished. Victor Tadros has argued that when a state, which purports to be socially just, fails to treat some people fairly and this injustice 'causes' the latter to commit crimes, then the state loses its standing to hold them responsible because of the hypocrisy in holding others accountable when it itself is guilty of wrongdoing and when it is indirectly complicit in the crime. (Tadros 2009). Antony Duff pursues the same intuition but his conclusion is more modest than Tadros's. He argues that, in the face of social and political injustice –and in other cases in which it itself has done wrong in a way connected to D's wrongdoing– the state loses its standing to hold D accountable if it refuses to or does not provide the appropriate setting to answer for its own wrongdoing. In that case, "*rather than being included, as an equal participant, in the rights and benefits of citizenship, [D] has been systematically excluded from significant aspects of them: those who would call him to account as a fellow citizen have notably failed to treat him as a fellow citizen in their dealings with him outside the criminal law*" (Duff 2010a: 138).[18]

I am not convinced that the link between social injustice and criminal responsibility has the normative import and ramifications that Tadros ascribes to it for the standing to hold the wrongdoer accountable. The reason is formal and has to do with the structure of duties, responsibility and standing. In particular, I would argue that if A owes a duty to B and violates it, then B never loses the standing to hold A accountable even if B has violated a duty that she owed to A (and of course A's standing is similarly not extinguished because of his wrongdoing either). There may, however, be good reasons why the standing *ought not to be exercised or ought not to be exercised in a specific, especially a forceful, manner.*

Let me explain this by referring first to one-to-one relations between agents, which though substantively different from those between citizens and the state they are similar to the latter in their formal structure. Say that A owes a duty to B and fails to honour that duty thus wronging B. Imagine further that B is no angel either and has also been inconsistent in fulfilling her own obligations towards A. As Duff correctly argues, it is perfectly coherent for one to own up to one's failings and expect others to do the same (Duff 2010a).

[16] For an account of such a connection see Delgado 1985.

[17] For ways in which social injustice and blameworthiness can be linked see Green 2011.

[18] Note that, as I have already argued, Duff's point holds in cases of extreme injustice.

So, insofar as B is prepared to be held to account for her wrong to A, then B maintains the standing to hold A to account for his wrongdoing too.

But how about cases in which B does not own up to her failure and implicitly or explicitly denies that she is subject to the same standards as A thus maintaining that they have different moral status? It is cases such as these that Tadros has in mind, when he talks of hypocrisy. However, I find it difficult to see why the fact alone that B raises that claim is of any consequence other than that it raises questions concerning the standards applicable to the relations between A and B. The crucial question then is whether the claim can be backed, which largely depends on the nature of the standards of wrongdoing and accountability. If these standards are agent-neutral, and therefore independent of the parties' attitudes, then B's claim will be either right or wrong. If it is right, then she owed no duty to and has not wronged A to start with. If she cannot back her claim, then she is just as accountable as A. But their wrongs are still separate and they generate distinct relations, which are not cancelled out by the parallel wrongs. Now, if the validity of the standards governing A's and B's relations depend on their acceptance by the parties (like the conventional rules of a game, for example, or indeed legal rules as understood here), then B's reasonable refusal to accept them means that those standards are not omni-laterallly binding. In that case, there are again no duties and no wrongs to start with rather than the parties not having the standing to hold each other accountable.

The above is the case whether B's obligations, or their violation, are directly related to A's or not. Say B steals A's watch from a drawer without A realising. Some days later A punches B in a separate incident of unprovoked violence. In an alternative scenario imagine that A punches B in retaliation for the theft. In either case, I see no obstacle stemming from the structure of duties and wrongs to both of them calling each other to answer for the wrongs they have respectively committed.

Now imagine that A punches B to stop her stealing his watch. In that case B's wrong is such that it ostensibly justifies A punching her in self defence. B's wrongful actions directed at A arguably give reasons to A to act in a way that would otherwise be wrongful. Nevertheless, B still has the *prima facie* standing to hold A to account for his punching her. Should the conditions of self-defence hold, however, she will not conclusively have the standing to take any accountability-seeking measures against A. Crucially, this will be so because A will not be responsible any longer for the act of punching *as a wrong*.[19]

These last cases of parallel wrongs resemble to a degree cases of complicity. The main difference here is that in the latter the wrong is directed against a third party. It is possible for both A and B to owe C a duty, which they do not owe to each other –therefore no relational reasons apply to them. They then go on to violate that duty with A acting as the principal and B providing sufficiently substantial assistance with sufficient knowledge of A's plans. A and B have no standing to hold each other responsible not because they lose such standing due to their complicit action but simply because they did no wrong to each other and never had the standing to hold each other responsible to start with. Now, alternatively, imagine that A and B owe it to each other too to not violate the duty (although on this occasion the person directly wronged was C). The answer is, I think, the same although to some it may seem more counterintuitive. A and B can still meaningfully and for good reason blame each other for their participation in the wrong. Why is it morally unimaginable for either of them to have a *lucidum intervallum* of conscience and says to

[19] Antony Duff (2009) draws a sharper distinction between accountability and liability. I am not relying on this here, not least because I'm not sure that it reflects a substantive distinction and not simply a procedural distinction between two steps in the process of holding another accountable.

the other "you have done me wrong and I have done you wrong in doing this to C and we should both explain ourselves to him and to each other"?

Of course, and on the assumption that the wrongdoing does not offer a conclusive indefeasible reason to exercise the standing to hold the other accountable,[20] there may be other good reasons not to exercise that right. In some cases it may simply be bad form to do so. Or, perhaps, it is better for A and B to try to reach an understanding and begin afresh in trying to rebuild their moral relationship. But these are new, different reasons for which taking accountability-seeking measures should be waived and do not follow from the parallel wrongdoing, and the parties' hypocrisy or complicity. Now, if it is deemed appropriate to act on that standing, how one ought to hold the other responsible is again a matter of appropriateness. It may, for instance, be sufficient for A and B to own up to their wrongs and apologise rather than seeking any more forceful measures.

All of the above is, I think, true of relations between moral agents but also of relations between the state and citizens as well as citizens between them. These relations are of course more complex but their complexity does not affect the basic principles. All parties in a liberal, social democratic state must honour their duties to each other on the assumption that all the parties have undertaken political duties, which depend on the necessary conditions that I outlined earlier being fulfilled. Should these conditions not be met, there are no legitimate political duties. So, in a complete and fair state, citizens owe political duties to each other and to the collective, as represented by the state. And, in turn, the state owes it to each citizen to distribute resources and liberties in a just manner. When any of the parties violates these duties, the others have the standing to hold that party accountable. Therefore, just as the state maintains the right to hold citizens responsible for wrongdoing, so are citizens entitled to call the state to answer for the injustices committed against them. The state is, in fact, under a positive obligation to provide the right institutional structure making it possible for citizens to demand that injustices be redressed.

(4) So far, my argument largely echoes Duff's. But, as he too notes, the intuition remains that something is amiss here, that those on the receiving end of injustice ought to be treated differently by the criminal law because of the social injustice of which they are victims. This intuition, I have already suggested, does not have to do with the justifiability of those citizens' wrongful actions nor with the state's or other citizens' standing to hold them responsible. It has rather to do, first, with the appropriateness of exercising that standing and, secondly, with the appropriateness of the criminal law as the best accountability-seeking measure. As is the case in relations between individuals, we must first ask whether to exercise the standing to hold the other accountable is the most appropriate thing to do in the circumstances. But if it is, this may be pursued in more appropriate ways than the criminal law. The criminal law in a liberal, social democratic state is the appropriate accountability-seeking measure to the extent that its activation maintains assurance and long-term stability. Therefore, punishing the unjustly poor for committing acts of injustice out of need will be permissible only to the extent that it serves those goals and only as a last resort when all other such measures have failed.

Both these questions can of course only be answered in light of a large range of facts pertaining to the situation such as the harm caused, the effect on the general disposition of the body politic to abide by the law and so forth. It is factors such as these that will mark the difference between, say, Jean Valjean on the one hand and at least some of the August 2011 London looters on the other. Still, it seems that *somehow* communicating that

[20] As I have argued, no such reason is admissible in the state and criminal law model, which frames my discussion here.

offenders are responsible for their wrongdoing will always be the appropriate thing to do. The opposite would more likely than not threaten the rule of law as well as citizens' sense of stability. Not only this but, should offenders be absolved of all responsibility, individual citizens would effectively be required to shoulder the burden of distribution. This would amount to the state forsaking its distributive duties, which are its very foundational duties and on the performance of which its character and legitimacy largely depend.

At the same time, holding these citizens *criminally* responsible and punishing them will rarely if ever be the appropriate thing to do. The first priority of the just state will be to address the social injustice that motivated the wrongdoing, while making it clear that the offenders are responsible for that wrongdoing. A just state must first make sure that all citizens will have sufficiently strong incentives to abide by the law autonomously. At the same time, the state is under a duty to the victims of property crime to protect their property and to provide those conditions, in which they will be able to enjoy it and pursue a fulfilling life. A balance must therefore be struck. If it is deemed best to not exercise the standing to hold accountable the unjustly poor who have misappropriated property, then the state is under an obligation to assure the victims and the citizens at large that the foundations of social cooperation are not undermined.[21]

On the Criminalisation of Other Distributive Injustices

Violations of property rights *simpliciter*, i.e. acts of stealing, causing criminal damage and so on, are not the only such interferences that are potentially criminally relevant. Citizens in a liberal, social democratic state are under further distribution-related duties. For instance, they undertake the obligation to make contributions to public finances through taxation, which will then be redirected to public schemes of education, training, creation of employment opportunities, welfare policies and the like. Or they are under a duty to observe employment legislation regarding wages, health and safety in the workplace, non-discrimination and so forth.

In the absence of empirical data it is of course impossible to determine which acts will fall under the ambit of the criminal law. This will depend on the institutional structure that best serves the terms of social cooperation. There is, however, one formal point that must be highlighted. A great part of criminal law theory tends to view most of these distribution-related obligations as non-moral in nature and therefore their violations as 'regulatory' crimes or *mala prohibita*. To the extent that this strand of theory reserves criminalisation for narrowly conceived moral wrongs, i.e. pertaining to moral relations between moral agents, it struggles to justify them, or indeed to explain them.

A liberal, social democratic theory of the criminal law does not face the same difficulty. So-called 'regulatory' offences are of the same order and source as those crimes, which many may regard as of a moral nature and the proper business of the criminal law. They stem from political duties of justice and, to the extent that the pragmatic consequence-related conditions hold, their criminalisation is fully warranted. Indeed, their relative 'seriousness' depends directly on the outcome of the cost-benefit analysis. It is therefore perfectly possible for a health and safety offence to be treated as more grave than, say, shoplifting.[22]

[21] This is again fact-sensitive and subject to the condition of appropriateness. For example, isolated and rare cases of petty theft will not necessitate any such measures.

[22] I have not explained how criminal offences may be hierarchized, because I do so elsewhere. The basic idea is that the seriousness of a crime as well as the severity of the response is determined not by the act's

So, in that sense, all offences are *mala in se* and *mala prohibita* at the same time. The former because they are all based, at least in the final instance, on the foundational terms of the state. The latter because they are not of a pre-political character, i.e. they are not premised in some extra-political moral order. At the same time, however, the distinction between *mala in se* and *mala prohibita* is not cancelled out altogether; it acquires a new meaning. The criminal law cannot create new institutional facts and introduce new reasons for action. This is not any longer because an act must be morally wrongful for it to be punished but because, as I highlighted earlier, in a liberal, social democratic state the criminal law must first allow citizens autonomously to be guided by the law without the need for the strong, coercive disincentives that the criminal law introduces. The criminal law therefore plays the secondary and incidental role of enforcing political duties already otherwise established.

It is worth highlighting another extension of this conception of criminal liability generally and of criminal liability for interferences with the property of others in particular. It potentially extends the scope of criminal liability over acts which are currently held to be legitimate. For instance, much is being made, and justifiably so, of the different ways in which the criminal law treats sharp corporate practices, despite the immensely harmful effect that they may cause, on the one hand and petty property offences on the other (see indicatively Lacey et al. 2010). The problem is that how these different practices will be treated in principle does not depend primarily on the criminal law but rather on the political framework that the latter serves.[23] A state, which relies, implicitly or explicitly, on a conception of private property as a foundational institution and an unconditional right will inescapably not subject private property to any substantive constraints other than those flowing from the basic ways of acquiring and transferring property. Its criminal law will therefore be justified in criminalising petty theft or fraud but not, say, aggressive corporate takeovers. A social democratic state, however, does impose such substantive constraints aiming at fair distribution. And because criminalisation is not morally necessitated but only permitted and serves pragmatic aims, such practices of greed and over-accumulation of wealth are potentially criminalisable.

The Relevance of the *Modus Operandi*

Moral theories of the criminal law tend to view the various ways in which one may interfere with the property of others as independent, moral, interpersonal wrongs. Stuart Green, for instance, in his careful moral account of the wrongfulness of white collar crime, regards crimes such as theft, fraud, bribery and so on as violations of everyday moral norms (Green 2006).

One benefit of this approach is that it can capture distinctions between intuitively different acts. It is one thing to swindle someone and another outright to remove their property.[24] In fact, most legal systems are also organised around these distinctions. For

Footnote 22 continued
inherent moral demerit but by its consequences for citizens' assurance and the stability of social cooperation as well as the deterrent effect of the response. See Melissaris 2012.

[23] Whether the criminal justice system appropriately serves general principles is another matter. What I am interested in here is the possibility of conceptualising as criminal acts which currently cannot be so conceptualised.

[24] The distinction has for long been blurred in English law. See Shute and Horder 1993; Clarkson 1993; Gardner 1990.

instance, the classification of property offences in most jurisdictions, including England and Wales, is conduct-centred.

The model of criminalisation that frames my discussion here, a model purporting to be neutral between comprehensive moral doctrines, can obviously not rely on such distinctions *to the extent that* they are determined by one controversial conception of morality. The law's role is not substantively to solve such moral disagreements but to establish norms on which all will agree despite the different systems of moral belief to which each subscribes.

The central question then is whether these moral beliefs and the conceptions of wrongfulness anchored in them are controversial. This is not to be assessed by asking whether they are *actually* contested but whether they may *reasonably* be contested. One way of ascertaining their admissibility as political principles is by asking whether they follow from the basic terms of social cooperation necessitated by the original ideal conception of the citizen as a person.

Take the idea of cheating as an example. According to Green, cheating is, as a matter of moral truth,[25] the violation of "a fair and fairly enforced rule" "with the intent to obtain an advantage over a party with whom [one] is in a cooperative, rule-bound relationship" (Green 2006: 57). The problem with this is not that there is nothing wrong with breaking fair rules with a view to gaining an advantage in the state model that I have in mind here; there is. The problem is that Green sees this as morally synonymous to cheating. But this is not *necessarily* the case. It can reasonably and plausibly be argued that one cheats even when one does not break any rules, say when A manages to talk B into believing that he really needs what A tries to sell to him. It is equally reasonable and plausible, albeit unpalatable to many, to argue that even occasional departures from the rules do not count as cheating but as acceptable practice.[26]

A liberal, neutral, social democratic theory of criminal law does not take it upon itself to arbitrate between moral conceptions of cheating. It can only enact public norms through a process of deliberation and reasonable negotiation between groups and individuals holding divergent moral conceptions.[27] It is only on these norms and the duties that they introduce that citizens can be held to have agreed.

Nevertheless, this is not to say that this model of criminalisation is unable to distinguish between different acts. It simply does not differentiate according to controversial metaphysical or moral schemes, but rather with reference to the ways in which citizens can interact *qua* citizens. These ways of interacting are determined by the terms of the social

[25] It is not entirely clear what it is that accounts for the truth value of moral statements according to Green but this does not matter a great deal here. What is important is that he considers certain moral statements as holding true despite one's beliefs about them.

[26] To illustrate with an example: in the 1986 football World Cup, Diego Maradona, as brilliant a football player as he is a controversial character, handled the ball into the England net and, none of the referees having seen the handball and despite the protestations of the English players, the goal was allowed to stand. At first Maradona defiantly and notoriously called this the "Hand of God". Many years later he said that he did not regard the incident as cheating, because in the slums of Buenos Aires, where he first played his football, it was generally accepted that one would try to score a goal in any way possible as long as it went unnoticed. Green would see this as an uncontroversial case of cheating, because he considers cheating to be, as a matter of moral truth, the violation of "a fair and fairly enforced rule" "with the intent to obtain an advantage over a party with whom [one] is in a cooperative, rule-bound relationship". But if Maradona is truthful and right, and it is not unimaginable that he is, about how football is played in the neighbourhoods of Buenos Aires, we already have a different idea of cheating, according to which departure from the rules of the game is not met with criticism.

[27] Quite clearly not what FIFA does.

contract and the institutional structure that materialises them. They may refer either to acts and omissions that this institutional structure explicitly allows or disallows or to presuppositions or entailments of these acts. Let me use theft and fraud as two characteristic examples to explain this.

Property rights are meant to provide normative assurance to citizens that they will be able to pursue their idea of the good life through the use and enjoyment of both material and intangible goods. This, as I have said, entails certain trespassory prohibitions and corresponding duties on the part of others, which cover the ways in which others can actually interfere with property rights. One can outright remove a thing, one may overstep the boundaries of one's license to use the thing (e.g. a leaseholder making alterations to the thing beyond the rental agreement), one can use a thing for one's own enjoyment without the consent of the owner and despite the fact that the thing remains intact and reusable and so forth. Such distinctions will inescapably be drawn institutionally, as the law specifies the ways in which citizens can interact with each other. But it is also necessary for such institutional distinctions to be drawn as a requirement of the rule of law, which is itself grounded in the foundational terms of the state. Citizens must know with relative certainty and in advance what to expect of others and what others will normatively expect of them, what they may or may not do.

Although some institutional requirements will be made explicitly, others will not. Some ways of interacting with others are made possible on the basis of certain presuppositions. For example, the exchange of money and goods and the redistribution of wealth are based on the truthfulness of the parties regarding the circumstances and conditions of transactions. It follows that one is under a duty accurately to represent the truth as one honestly knows it to be. Misrepresentation skews the transactional terms giving unfair advantage to the party making the misrepresentation. It is therefore an indirect violation of the duty of justice borne by all citizens.[28]

It is therefore possible to distinguish between various modes in which a distributive injustice can be done with reference to the structure and entailments of political duties without resorting to controversial moral norms. And for the same reason it is possible to differentiate between public, therefore *prima facie* criminalisable, and private wrongs. This may, indeed, go some way to explaining current arrangements such as, for example, why acts of cheating are not criminalisable when carried out within private associations, but fall within the business of the criminal law when they involve public relations between citizens.

Finally, let me emphasise once again an important point: the fact alone that public distributive duties are established and can be broken down so as to cover various activities and courses of conduct does not mean that they warrant criminalisation without further ado. Once all the possible ways of enabling citizens to be autonomously motivated to uphold their political duties are exhausted, the criminal law can be employed as a last and temporary resort and to the extent that it is proven to the extent possible that it will be effective in reassuring citizens that their normative expectations will not be disappointed and in maintaining the stability of the social order.

[28] Note that which such acts exactly constitute wrongs cannot be determined *in abstracto* but only with regard to actual institutional arrangements.

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