



BOOK REVIEW

A Discussion of Victor Tadros, *Wrongs and Crimes*. (Oxford: Oxford University Press, 2016), pp. 368, \$115.00

I. INTRODUCTION

In *Wrongs and Crimes*, Victor Tadros' main concern is to displace the concept of harm from its central role as an organizing concept of the criminal law, and replace it instead with the concept of wrongdoing.

The book is divided into four sections. In Part A ('Punishing Wrongs'), Tadros addresses foundational issues having to do with the nature of wrongdoing, the justification of punishment, and the conditions for criminal responsibility. Part B ('Criminalization in Principle'), takes aim at attempts to provide necessary and sufficient conditions for an act's being a crime. Part C ('Wrongs, Harms, and Consent') is concerned with the notions of harm and consent, and addresses in detail the question of how and why consent is rendered invalid because of coercion and error. Finally, Part D ('Further Reaches of the Criminal Law') discusses crimes which don't seem to involve harm at all: cases of offense, attempts, and possessory offences.

A. *Punishing Wrongs*

The first part of the book is the most abstract. Tadros defends what he calls the '*Respecting Value*' view of moral wrongdoing:

An act is wrong because the values that provide decisive reasons against acting explain why the act is not a valuable expression of autonomous agency. Where this is so, respecting the value that provides a decisive reason against performing the action makes it inappropriate to value the action as an expression of autonomous agency (43).

In the remainder of this section, Tadros refines his distinctive and well-known justification of punishment, the so-called ‘duty’ view, developed most fully in *The Ends of Harm* (Tadros 2011). On this view, punishment is justified in order to protect society from (certain kinds of) wrongdoing. Any such view must answer two questions: (1) why do wrongdoers, just in virtue of their wrongdoing, have some kind of special liability to being harmed in the service of the end of protecting society? (2) what justifies harming wrongdoers for this end without their consent?

Tadros’ answer to (1) is that wrongdoers, by virtue of their wrongdoing, owe special duties to their victims, and these in turn entail duties to society more generally. His response to (2) is that the prohibition on using others without their consent is subject to an exception: it is not wrong to use others in the service of duties they already have.

In the last chapter of this section, Tadros defends compatibilism about responsibility against Derek Pereboom’s powerful four-case ‘manipulation’ argument (Pereboom 2014).

B. Criminalization in Principle

One way to mark the bounds of criminality is by way of principles which capture necessary and sufficient conditions for the criminalization of an act. Tadros does not think that such a project can be made to work. He divides ‘criminal law principles’ into two kinds: those which lay out the features of acts which should render them immune from criminalization (‘restrictive’) and those which point to features of acts which make it the case that they *should* be criminalized (‘justificatory’). The Harm Principle is a restrictive principle. Some retributivists endorse the principle that all wrongful acts should be criminalized; this is a justificatory principle.

The problem with both sorts of principles, according to Tadros, is that they admit of exceptions which cannot be accommodated without risking triviality. Consider a recreational drug, the Happy Pill, whose possession does not violate any restrictive principles. Suppose the US threatens to cut off subsidies for essential medicines to some poor country unless that country criminalizes possession of

the Happy Pill. Tadros thinks that the country is then required to criminalize the possession of the Happy Pill.

Restrictive principles thus require *ceteris paribus* clauses. Might they be formulated in slightly weaker terms, e.g. 'It is always *pro tanto* wrong to criminalize conduct which is not wrongful?' This might be made to work if we had a 'general theory' of *pro tanto* wrongdoing which might be able to decide such cases. In the absence of such a theory, Tadros thinks, we should abandon this strategy.

So too with justificatory principles. Some retributivists (Moore and Michael 2010) think that the state has a duty to criminalize wrongdoing. However, they also agree that some wrongdoings are so trivial that any punishment would be disproportionate; *these* wrongs should not be criminalized. So the duty to criminalize wrongdoings also has exceptions. But, Tadros thinks, there is no way to weaken a justificatory principle in order to make room for exceptions. In particular, he thinks that we should not characterize it in terms a *pro tanto* duty to punish wrongdoing.

Tadros' challenge seems to have the following form. Any moral principle purporting to circumscribe the bounds of criminality will admit of exceptions. If we try to rewrite the principle to accommodate the exception we are likely to fail (because it will always be possible to generate counter-examples), or we will come up with a principle which lacks explanatory value; as he puts it, such principles will either 'fail or fail to illuminate' (92).

If this is the best way to read Tadros' challenge, it is certainly well taken. However, it then seems to have little internal connection to the philosophy of the criminal law. The claim that there are no true explanatory moral principles which circumscribe the bounds of the criminal law simply follows from the claim that there are no true explanatory moral principles as such. There is a rich philosophical literature on this question (Dancy 2017; Ridge et al. 2016). While its application to the criminal law is novel, I would have welcomed more direct engagement with it.

The positive account of how to mark the bounds of criminality is developed in a chapter on 'The Core Case of Criminalization'. Tadros thinks that the most important aim of the criminal law is preventive. However, the prevention of wrongdoing for its own sake is

not an aim of the criminal law.¹ Rather, in the ‘core cases’ of criminalization (e.g. murder and rape), what the law seeks to prevent is the occurrence of the *facts* that make these acts wrong. These may include the fact that the act causes harm, but facts which make an act an instance of harmless wrongdoing may also be among those whose occurrence the law seeks to prevent.

That an act would involve serious wrongdoing enters into the justification of criminalization in another way as well. According to the *Respecting Value* view of wrongdoing, potential wrongdoers do not have an autonomy-interest in being able to act wrongfully. Thus their autonomy is not threatened when the criminal law restricts their freedom to act wrongfully.

Finally, criminalization must meet constraints of proportionality – both in the sense that punishment is appropriately related to the stringency of the duties owed by wrongdoers to their victims, and that the harms of punishment are outweighed by the benefits of criminalization. Tadros rejects the retributivist idea that the suffering of wrongdoers inflicted through punishment is good in itself, but in other ways his account makes room for retributivist insights, for instance that wrongdoers, by virtue of their wrongdoing, ‘forfeit’ their right not to be harmed.

C. Wrongs, Harms, and Consent

It should be a crime to have sex with an unconscious person even if that person is not harmed as a result. It is natural to think that the wrong in question involves the violation of *consent*. Tadros thinks that ‘consent-sensitive’ duties are at the heart of the criminal law. In this section of the book, he explores the value of consent, explains how threats and errors undermine consent, considers how to assess the gravity of sexual wrongdoing, and tries to explain when consenting to harm renders it permissible to inflict it.

The focus is largely on sexual consent. In discussing coercion and consent, Tadros considers a range of standard examples involving threats, offers and blackmail. He takes aim at ‘permissible baseline

¹ Subject to the qualification that the state sometimes has a duty to potential *wrongdoers* to prevent them from wrongdoing. Tadros also thinks that the criminal law has communicative aims which are complementary to its preventive aims.

views' which explain the wrong of making a sexual threat or offer in terms of the wrong of carrying out the threat, or refusing the promised benefit, if the sexual proposal is not accepted. His discussion points towards three different ideas in connection with sexual wrongdoing. The first is that the underlying wrong is that of exploitation. The second suggestion connects sexual wrongdoing with the value of sexual integrity. The third involves the value of being owed consent-sensitive duties, i.e. the value of being in control of whether others are free to do what the duty prohibits.

While his discussion of these issues is suggestive, they seemed to me to be insufficiently developed. What is the connection between sexual integrity and sexual autonomy? Does the wrong of exploitation account only for sexual offers, or does it extend to threats as well? How does exploitation undermine consent? A more systematic discussion of these questions would have been helpful.

Tadros' discussion of error and consent is much richer. Suppose Y consents to sex with X because she is in error about some material fact (where a fact is material if it played a role in the decision to consent or would have played a role if the consentor had been made aware of it). Suppose X knows the fact, but chooses not to correct Y's error. Is Y's consent thereby invalid?

To take one example (*'Racist Sex'*): Yolanda, who is anti-Semitic, believes that Xavier has no Jewish heritage. She consents to sex with him. She would not have consented to sex with him had she known that he was a Jewish mother. Has Xavier wronged Yolanda? A powerful argument from sexual autonomy suggests that he has: consent is valuable because it safeguards one's ability to control whom one has sex with. This safeguard is undermined by error, just as it is by threats.

Tadros thinks that the argument rules out too much. Given any pair of potential sexual partners, there is likely to be some fact about one of them which, if known by the other, would lead them to deny sexual consent. Strict standards of sexual disclosure would thus undermine our legitimate interests in having sexual opportunities.

He gives the example of a sexist society in which rape victims are ostracized. The fact that someone has been raped is in this society material to many potential partners. To require rape victims to disclose this fact is to condemn them to a life without sexual rela-

tionships, the opportunity to marry, and so forth. In this society, it would not be wrong for a rape victim to hide this detail about their sexual history; this would not undermine the consent of sexual partners even if they regarded the fact as material.

While this is an interesting case, I think it points in a direction which Tadros does not take up. It is not news that an exercise of rights may result in distributive injustice, at least if we conceive of such injustice as involving ‘patterns’. At a first pass this applies just as much to the exercise of autonomy in the realm of deciding where to spend one’s money as it does to decisions about whom to have sex with. Indeed, Tadros motivates the discussion of the rape victim by introducing a case involving property rights.

But it *is* news to think that the distribution of sexual opportunities and sexual pleasure is a matter of social justice. We are not accustomed to thinking of these as being part of the currency of social justice, but the case of the rape victim points us towards the need to take it seriously.² Whether one may permissibly lie to another in order to mitigate the effects of an unjust sexual world might then follow from a more general theory about our entitlements to deceive – or act in ways which are otherwise wrongful – when we are victims of injustice.

Tadros’ discussion of error and consent is full of insights and examples, but I wish that he had addressed the argument from sexual autonomy more directly. *Prima facie* there does seem to be a serious tension between the value of sexual autonomy on the one hand and the permissibility of deceptively induced sex on the other, at least if one tries to account for sexual autonomy through the device of ‘valid consent’.³ Unfortunately, this tension is left unexplored.

D. Further Reaches of the Criminal Law

In the final section of his book, Tadros discusses three different instances of ‘harmless wrongdoing’: offensive conduct which is

² Unfortunately, the issue has been raised most recently by members of the “Incel” or “involuntary celibates” movement, whose other moral and political commitments are dubious to say the least, and whose members include people like Elliot Rodger, who killed five people in 2014 after writing a manifesto in which he said that he would punish “all females” for the “crime” of depriving him of sex. See Amia Srinivasan’s very interesting discussion of the movement and some of the philosophical issues it raises (Srinivasan 2018).

³ Jed Rubenfeld has argued that these cases show that we should give up on sexual autonomy as the central organizing concept in discussions of sexual deception (Rubenfeld 2012).

nevertheless wrongful; inchoate offenses such as attempts; and possessory offences. He argues that the fact that conduct is offensive does not by itself provide a reason to criminalize it, though the facts which make it offensive may do so; that the wrongfulness of inchoate wrongs such as attempts can be explained by virtue of the intentions with which they are made, even when no harm results; and that it may be permissible to punish possession of firearms for the sake of general deterrence, even if those who possess them do not act wrongly.

I cannot discuss these arguments in a short review. As with the rest of the book, they are dense and thought-provoking. However, I was not always convinced: for instance, I thought that the characterization and criticisms of Thomas Scanlon's views on the relationship between intentions and the impermissibility of attempts were off the mark.

II. CONCLUSION

Wrongs and Crimes is chock-full of challenging arguments and interesting examples, and this review has only been able to give a flavor of them. It is hard to provide an overall assessment of the book, for though it is concerned with a single theme – the connection between wrongs and crimes – there is no 'master argument' to unify the discussions of the various topics it covers (though there is considerable unity within each of the sections I have described). These sections are more-or-less independent, though there are a few cases in which arguments in one section depend upon arguments made in earlier sections.

Rather, *Wrongs and Crimes* is best seen, I think, as unified by a general sensibility and orientation, which involves replacing the concept of harm with the concept of wrongdoing as an organizing concept in some areas of the criminal law. Even if one disagrees with the details of any particular treatment, one leaves on the whole with a deeper appreciation of the connection between wrongs and crimes in each of these areas: the justification of punishment, the moral limits of the criminal law, and the characterization of various crimes. This alone makes the book worth reading.

BOOK REVIEW

REFERENCES

- Dancy, Jonathan. 2017. "Moral Particularism." In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Winter 2017. Metaphysics Research Lab, Stanford University. <https://plato.stanford.edu/archives/win2017/entries/moral-particularism/>.
- Moore, Michael S. 2010. *Placing Blame: A Theory of the Criminal Law*. 1st published in paperback. Oxford; New York: Oxford University Press.
- Pereboom, Derk. 2014. *Free Will, Agency, and Meaning in Life*. Oxford; New York: Oxford University Press.
- Ridge, Michael, and Sean McKeever. 2016. "Moral Particularism and Moral Generalism." In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Winter 2016. Metaphysics Research Lab, Stanford University. <https://plato.stanford.edu/archives/win2016/entries/moral-particularism-generalism/>.
- Rubinfeld, Jed. 2012. "The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy." *Yale LJ* 122: 1372.
- Srinivasan, Amia. 2018. "Does Anyone Have the Right to Sex?" *London Review of Books*, March 22, 2018.
- Tadros, Victor. 2011. *The Ends of Harm: The Moral Foundations of Criminal Law*. Oxford University Press. <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199554423.001.0001/acprof-9780199554423>.

Arudra Burra

*Department of Humanities and Social Sciences
Indian Institute of Technology-Delhi,
Delhi, India
E-mail: burra@hss.iitd.ac.in*

Publisher's Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.