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“THE HOMOGENEITY OF THE LEGAL”

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Every bona fide philosopher of law tries [their] hand at least once at the ancient problem of punishing failed attempts. (Feinberg)

Also some philosophers interested in the law but without any corresponding *bona fides*!

Descartes famously discusses demons and dreams in motivating a sceptical perspective. One way to understand him is as emphasizing how often we have false beliefs: almost nightly. I think there’s a serious issue about whether we are normally, in dreams, in a state of belief—whatever variety of *appearances* dreams present, it does not seem to me that we as part of our dreaming form beliefs in response to them. But if we do, then I suppose that we also in dreams *intend*.

That, in your dream, you intend to subdue your attacker by overwhelming them with violence is *as* plausible—that’s a comparative claim—as that, in your dream, you believe you are being attacked. Similarly, I think it’s as plausible that while dreaming you are sometimes in many of the internal mental states involved in making an attempt, or making an effort, or trying. It’s perhaps not *quite* as plausible—and while curious, there’s a lesson in that—that in dreams we actually *do make* attempts; but it’s not completely implausible either.

Descartes’ famous “evil demon” case seems clearer anyway: there’s little doubt that the subject of an evil demon’s misrepresentations could undertake *beliefs* in every sense in which we ourselves actually do. And a victim of the demon, for whom relations between their mental states and the external world are in principle arbitrary, seems still apt to have intentions and to make, in at least one relevant sense, *attempts*. I will for the sake of argument, however, not here stress any differences between dream cases and demon cases: suppose them both to be cases in which our mental states are as they actually are though our normal causal embedding, in our environment, is disrupted.

This essay is not about whether in dreams or demon cases we have beliefs or intentions, or make attempts—much less is it about, say, homicidal sleepwalking (as in the *Parks or Boshears* cases). I draw attention to examples used to motivate traditional scepticism because they help make available a conception of mental phenomena—including the sort involved in action—as in the exhibited way *internal* to the subject and prior to the behavior that outwardly expresses those phenomena. That conception might then combine with abhorrence of the dystopian idea
of a state that directly criminalizes thought—perhaps with opposition even to the coherence of such a thing as a thought crime—to represent one pole of an oscillation that I (from a potentially naïve perspective) think makes legal theorizing about attempts so challenging. Could the immobilized victim of an evil demon, utterly detached from their environment, be a criminal? Shall we roust people out of their deepest slumbers and drag them off to the penitentiary? No: criminality must involve actual harm—the internal, just as such, is insufficient.

The other pole involves the intuitive culpability of subjects whose failure to satisfy the conditions of what are uncontroversially crimes seems to be the product entirely of external circumstances alone—where the relevant conception of externality is as of the complement of the internality figuring in cases like those of dreams and the evil demon above. It’s easy to think that if the gunshot misses, even after you aimed carefully, only because the wind whipped up unpredictably, there is little if any voiding of your culpability, even though there is also in a way nothing—no harm, no foul!—for you to be culpable of. You continue to exhibit a kind of liability, about as much as you would have if the wind had remained calm: and yet your thoughts seem to contribute all of what could be understood as criminal here. So: are there thought crimes after all? On this pole, the essence of criminality is culpability, and that can be equally present in cases where the lack of harm was accidental.

I think one deep philosophical difficulty—there are of course many others—presented to jurisprudence by failed attempts is ultimately a matter of this awkward inconstancy about the appropriateness of various legal treatments of thought. And I would like to propose a way of moving to a more stable position, even in the face of the apparently opposing forces that create the oscillation.

But I am afraid the resolution may require a revision to our conception of the state’s relation to crime and punishment: indeed—depending on one’s conception of punishment (by contrast to penalty or perhaps just state-imposed cost)—it may require eliminativism about punishment as such. The general idea to be explored is that of locating the opposing philosophical inclinations—the inclination to see the unsuccessful attempted murderer as equally culpable, on one hand, and the inclination to see mere thoughts as beyond the legal pale—in fundamentally different normative frameworks, frameworks that cannot ultimately be merged or combined so much as simply accommodated as the differently-grounded normative frameworks they are. The law, and its way with criminal behavior, must be understood as grounded in the only kind of normativity it could in principle enjoy: punishment, if it is, distinctively, an intrinsically ethical phenomenon, will find no basis in that sort of normativity. That ground will instead produce a deep homogeneity in the nature of law: the basic justification for all legal arrangements is the same and does not directly involve ethical relations. A system that divides the law into categories, with the criminal law, specifically, understood as at least in part a codification of independently existing moral facts sees the law instead as heterogeneous.
Feinberg usefully confronted our ancient puzzle about attempts: should there be a difference in the penalties imposed on (i) completed crimes and (ii) unsuccessful attempts to produce the same result? Using the familiar method of hypothetical contrast, he considers two would-be murderers, A1 and A2, only one of whom, A1, achieves their end. “A2 will be guilty only of attempted murder and typically subject to a term of five years or less. His unfortunate counterpart A1, on the other hand, could be convicted of first-degree murder, and in most states he would be condemned either to life imprisonment or the death penalty” (Feinberg 1995).

Representing the view of many, Feinberg sees A1 and A2, in the familiar cases, as “equally blameworthy morally,” because “blameworthiness is normally compounded out of such factors as beliefs, emotions, motives, objectives, and intentions.” Accordingly, the difference in the penalties “seems to be more arbitrary than rational, the difference in the fates of A1 and A2 being determined not by their deserts but by luck” (Feinberg 1995). I think Feinberg’s engagement with the issue is interesting and reasonable; and I won’t here focus on its disadvantages. Rather I want to offer an alternative—it is indeed part of this alternative perspective that proposals such as Feinberg’s are not, quite, wrong. The elimination of the causal condition on completed crimes, for example, which Feinberg would favor as a way of improving the law by making it less arbitrary, could eventually, from the point of the view of the alternative perspective I will offer, still be countenanced. But the ground of the reform would no longer be, as it is for Feinberg, that the law must not differentiate, in the application of criminal penalties, between equally blameworthy subjects. Instead, if that reform were appropriately instituted, it would be because the general justification for a state’s authority with respect to its citizens is best served by so defining the category marked out for penalization.

Any polity will jointly face such questions as what sort of taxation scheme shall we have? Shall we have a draft—requiring military service of all citizens? and so on. On one way of facing those questions, they are set in the context of an abstract issue about a state’s authority: on what basis can a group impose conditions on the behaviors of its members? One very general sort of answer is in part, in effect, economic: we (collectively) benefit if we (severally) are subject to such conditions.

There are familiar examples—e.g., “tragedy of the commons” cases and prisoner’s dilemmas—in which if the members of a group each acts, individually, rationally or in some other sense well, then the end result will be sub-optimal, even from the point of view of those same members. A general start at a justification for the state and its authority has to do with its role in securing results that are closer to optimal, collectively, even when that requires interfering or threatening to interfere with a citizen’s free pursuit of their own good as they conceive it. And that broad form of justification for the very existence of a state can then extend to the particular decisions of a state established with that end. Which taxation scheme best serves the common good? If we forego a draft, will we find ourselves in a “tragic” situation, akin to that we might encounter with an unregulated commons, in which we suffer more, ultimately, than
we would have had we tolerated some restrictions on our freedom to realize an advantageous payoff?

One lesson to be drawn from Rawls is that the adequacy of this answer depends on an implicit qualification: the particular form in which conditions are imposed, in order to achieve the collective benefit, has to be *fair*. Distinguish here the question of the metaphysics of law—which we might think of as linked with the metaphysics of a state (or at least of a governing institution)—from the question of its justification. An adequate account, if only to a first refinement, will involve a net increase in some sort of *value* (a better relation between benefits and harms—and a finished theory will have to explain those) for the members of a group, and the *fairness* of the distribution of the investment required to achieve that increase, perhaps together with additional elements—some form of *consent*, for example—in its justification of the normative authority of an institution of governance with respect to that group.

That provides a basis on which to reconsider the legal status of attempts. We could think of state-imposed penalties on crime—though perhaps the word “crime” will no longer quite fit—in something like the way we think of the state’s role in torts, or property, or contracts. The state should not (in fact I think, metaphysically, cannot) “moralize” the activities of its citizenry. We can come together to constrain and regulate certain conditions, to impose costs on some behaviors, and to provide benefits for others, fairly, given appropriate circumstances.

The guiding principle behind all that is just the general justification for the existence of the state and its authority in the first place: there is plausibly a justification for a fair regulation and cost/benefit scheme, imposed by a group, on its members’ behaviors, in pursuit of collective ends. But if “punishment” is distinguished from “penalty” in terms of the former’s carrying some sort of *condemnation* (again Feinberg, among others), such a scheme would not involve punishment. We punish criminals but only penalize the owners of cars that have sat too long at a meter. If a tree growing in your yard falls over and damages your neighbor’s roof, you have to make them whole—that’s how we’ve arranged things legally. We don’t care about how the falling over of the tree was completely accidental (you watered it carefully and pruned it, and yet a high wind…). We do seem currently to moralize crime and punishment; but the law operates comfortably also with categories that are not conceived morally.

My suggestion is that we reconceive crime so that it too is something for the state to regulate and to penalize but not to punish. The value of, for example, the deterrent effect of the criminalization of the behavior—whether we continue to use “crime” or rather “violation” for it, in the new system—being sufficient to offset the disvalue of the imposition of those penalties will then be especially significant, though it will continue to be paramount too that the distribution of penalties be “fair,” but where that fairness is now not itself an ethical category—the law providing for the homeowner’s liability for damage by their trees is not “unfair” no matter how much it legally embeds a kind of luck.

Using some shortcuts, I can perhaps quickly just telegraph some of the features of the position toward which I aim. I think of Hart, and of positivists generally (e.g., John Austin and O.W.
Holmes), as usefully separating two normative systems—a system of law and a system of morality. That distinction gives legal authority a kind of independence, contrasting with a position on which the law should be seen rather as our best attempt to institutionalize and reassert an underlying structure of moral relations. And while the positivist point of view can accordingly more readily tolerate the elimination of mens rea as an element of crimes, as for example proposed by Lady Wootton in her Crime and the Criminal Law, that position is certainly not entailed by positivism: on the contrary, there is good reason to think a well-founded legal system will have an interest in conditions that are defined partly in terms of subjects’ internal mental states.

Now, Rawls offered a theory of political justice, an account of what could constitute the justice exhibited specifically by a political system. He proposed that if a political system were governed by principles that we could be understood reasonably to favor from behind a “veil of ignorance,” that would show them to be principles preferred from an unselfish perspective: they could thus be seen as, at least in that way, fair. Any differential effects they might then end up having would be authorized as merely differential, not unfair, because those effects would be arising fortuitously within the system governed by those principles.

Finally, though I do not offer quite what Posner calls “an economic theory of criminal law,” there are also points of contact with such a view: some of his approach looks more like an analog of act-consequentialism in normative ethics than like the rule-consequentialism that I think of as the appropriate analog for the sort of position proposed here. Is a collection of rules and laws fair, and does having them have the right relation to the collective ends sought? Whether a given behavior can be seen itself to have economic advantages, even if it were widespread, does not entail that a rule restricting it or even imposing huge penalties on it would not (also) be advantageous. The view toward which I aim is thus, I guess, Positivist (in its conception of legality and in its separation of legal and ethical normativity), Rawlsian (in its conception of the justification of political and legal authority), and in a family with economically-minded views of criminal law.

Consistent with the line explored here, it might be that by penalizing completed crimes more than we do unsuccessful attempts to commit those crimes, we better deter all those crimes, resulting in a better circumstance for all of us. Now, could such differential penalization be fair? I think that’s a good question: it’s a question that arises for most any condition with respect to which the state imposes a cost. Are our current systems of parking restrictions fair? Only sometimes. Likely not if, for example, overtime parking in one part of town, with a higher percentage of people of one race, is fined $100 and in other parts of town only $10. But our system of parking fines can be fair even if, systematically, it permits people who were as “blameworthy” or “condemnable” for their failure to move their vehicle to be differentially fined—there’s just the randomness of meter enforcement efforts, to begin with. And even if the ideal would be full enforcement, some people will be overtime for reasons that morally justify the violations while others are not (contrast the scofflaw with the subject whose overtime parking is the product of an emergency medical condition).
Similarly, perhaps, with the question of whether to punish attempts as we do completed crimes: the fundamental question is whether doing so, fairly, best serves all things considered our collective interests. Whether it might allow equally ethically bad people to be differentially punished—except they would now be being only penalized—is not crucial. The crucial question is not easy to answer, it is an empirical question (not a purely a priori or theoretical one), and we will accordingly want state-imposed conditions on law-making, laws governing how, in practice, that crucial question is to be, in practice, resolved (the analog of writing an English grammar book in good—by the book’s own lights—English!).

The original philosophical concern—that the internally-alike are normatively-alike—is nevertheless preserved, not dismissed. It is maintained in a pure form in one normative sphere (ethics) even while it is explicitly and self-consciously given up in another normative sphere (the law). The internally alike are indeed equally blameworthy.

And the other originally competing philosophical consideration—no thought crimes!—is now better understood and accommodated. How could criminalization of thoughts, independently of any behavioral manifestation, be seen as an attempt to have an effect on phenomena that are collectively costly? Isn’t it the actus reus, in the end, that produces the costs (the deaths, the injuries, etc.)? Yes; but if by criminalizing some thoughts we can reduce some of those costly manifested external behaviors, then there is one kind of ground for doing so. (Admittedly, at the moment the evidentiary challenges are probably prohibitive, so there will anyway be significant practical limitations on this theoretical proposal.) Our abhorrence of the category of the thought crime may express an implicit suspicion that no deterrence effect can offset the risks of harm (of future collective costs) of any system criminalizing them. (Ironically, I find in that suspicion an exquisite incipient appreciation of the intrinsic value of rational judgment itself.)

But the questions have now been given appropriate conceptual shape, in any case. Whether attempted murder should be a violation at all, and whether it should be penalized to the same degree as a completed murder, these are empirical questions and a matter of degree, unlike questions in the ethical domain, which are a priori. The normative phenomena of ethics are, well, categorical (again, here I merely assert). What’s ethically wrong with some murders is not a matter for convention, not a political issue. By contrast, how we, collectively, should treat someone that murders is a political question. One plausible way of answering it appeals directly to the more general ground for creating an institution with authority to mete out treatments in the first place.

Here are four issues for which this sort of approach might have interesting consequences: (i) The difference between “racist” policies and policies that have “racist effect.” The former is an ethical issue—involving the thoughts of the policymakers; the latter is an issue about political fairness. Could any of the confusion about these matters be resolved by this new framework? People who resist penalization of behaviors with racist effect, independently of any implicit actual racism, have perhaps not fully appreciated the ground of state-imposed penalties. They continue to over-moralize state interventions. It may well be that non-racists can behave in
ways that have racist effects: maybe they are in no way ethically to blame. But we can penalize those behaviors anyway—there can be strict liability. Strict liability is not inherently unfair. When is it? When there is an implicit moral element: there is no strict liability for ethical failure. But if we eliminate morality as an element of legal categories then there is no longer in principle any limitation on which sorts of behavior might expose us to strict liability.

(ii) Separation of church and state: I hope the approach here provides for a more robust separation between how citizens of a state might evaluate moral issues and how its legal domain is constituted. The question of whether to “express condemnation” can hardly abstract from the question of whether the behavior is immoral. Shall abortion be criminalized? Euthanasia? Shall we distinguish, in the criminal law, between killing and letting die? If we eliminate the moral aspect of crimes, or (if this is not the same thing) eliminate crimes as a distinctive variety of violation (one partly constituted by its essentially presenting an ethical polarity), those questions can be taken up in abstraction from the issues over which people with different attitudes toward the ethics of abortion disagree. The separation of ethics and state implicit in the conception investigated here effectively supports a separation of church and state.

(iii) The current view may be a kind of “abolitionism” about punishment. If what it is to be punishment is in part to be a morally condemmatory intervention, then I would abolish it. And there is also some sympathy, here, with abolitionist approaches that are motivated rather by the actual conditions normally imposed—by prison conditions and by the processes involved in the imposition of the death penalty. It is plausible that those conditions cannot represent a politically fair system for achieving our collective ends. Indeed, I speculate that some of the unfairness now being suffered is precisely the product of a misunderstanding of the appropriate grounds for the imposition of penalties on the violations we currently characterize as crimes: when the basis for the intervention is explicitly ethical and correspondingly punitive, then political justice, understood as the kind of fairness Rawls described, is liable to recede—our practice recapitulating our conceptual emphasis. So while the current approach would countenance strict liability for what are now characterized as crimes, it would not necessarily (nor, I think, could it plausibly) countenance the same range of penalties for those violations as are now imposed as punishments.

(iv) The perspective investigated tends to eliminate some distinctions between criminal wrongs, if they are seen as somehow public (as if it is the state that is wronged) on one hand and “private” violations (such as tort, contract, or property violations), for some of which injured parties must themselves initiate any legal proceeding seeking redress, on the other. If there is a breach of contract, one might think, there is a legal issue that does not involve the state in the same way as does a murder. At one level of analysis, we simply needn’t resist that thought: the state is not a party to the legal issue in the breach of contract case. But it is in a good sense not a party to the issue in the case of murder either: the country itself is not murdered! In both cases one citizen was harmed by another. IRS enforcement actions are different: there it is the United States itself that was treated illegitimately. But the categories just seem to cut across each other: the public/private distinction, with criminal matters on the side of the public and
with private matters (and the associated demand that individuals initiate the proceeding) on the other, is awkward. In one good sense all legal matters are public: they involve the state’s authority. And if there is a residual public/private distinction to be made, it’s unclear that we shouldn’t anyway give the state standing to initiate proceedings in private matters: if that residual distinction is made in terms of who, intuitively, is a party (whether the harm was inflicted, most directly, on an individual), I would say that we already do.

All violations involve, on the line proposed here, acting in ways prohibited by what the state has expressed, fairly, as in its interest: it’s in our collective interest that citizens pay taxes, that contracts not be breached, that there be property rights, and, in the same vein, that there be no assault or murder or rape. I think our civil procedures may be set up, currently, to reflect a problematic distinction and could, at least in principle, be changed.

It will develop the position here further to remember that we, collectively, may also simply prefer certain social arrangements over others (and we can allow the preferences here to be rationally arbitrary—like tastes). Accordingly, the state may be justified in setting itself up accordingly—so that the harm of having such unwanted arrangements instituted is avoided. Of course, this is an area in which the risk of unfairness is high: we may for example each prefer an arrangement in which we are disproportionately favored—we may prefer more rather than less, even after we already have more, and we, some of us, are even so gross as to prefer that the more we get be disproportional, specifically. But the unfairness of such an arrangement is written into the contents of such preferences—pursuing any such arrangement is explicitly at odds with the impersonal general political basis of legal authority (such preferences get no purchase in the original position).

But it is worth noting that, although the approach investigated here puts harms and benefits at the metaphysical basis of political and then legal authority, and thereby into our understanding of an adequate system of law, including the criminal law, still, if we collectively find repugnant a system that for example does not criminalize some “harmless” behaviors (cases, even should they be undiscovered, of the mutilation of a corpse might be examples), then whether or not the behavior itself is harmless, the failure to criminalize it would still involve a collective harm—our repugnance constitutes it. And so, consistent with the line of approach taken, the state would have grounds to criminalize such behavior.

More generally, our moralistic tendencies with respect to our laws, however philosophically misconceived (on the line taken here), could still be indirectly relevant, given the conception of legal authority proposed. Even if ethical issues are left out of account in the grounds of legal authority, that does not mean that our differentially moralistic attitudes toward different sorts of behavior can’t themselves be instrumentally relevant in the specific shape of the criminal law: those attitudes might constitute collective preferences the satisfaction of which (if that satisfaction could be achieved fairly) would—indepenedent of the accuracy of the contents of those moral attitudes—be sanctioned.
It may now be worth comparing Act vs Rule Utilitarianism in normative ethics with a distinction between what might be called an economic theory of criminal law—Posner may be an example—and the proposal pursued here. I’m interested in the fact that there is a political justification—it may amount to a kind of qualified “economic” argument—for the having of a government with enforcement authority, and for its having the particular form it has, including its having the legal system it does. But notice that there is no requirement or expectation that the state must decide which behaviors to criminalize or, generally, penalize, in terms of the economic effects specifically of such behaviors. There could in principle be benefits to having restrictions on behaviors that are not themselves costly, and there may be costs to having restrictions on behaviors that are themselves quite costly.

Consider for example the relationship between the use and the possession of drugs. Economic arguments against those behaviors will be affected by the differential harms caused: drug use imposes costs not only on the user but on the rest of us, costs that are not immediately produced by possession (even should it indirectly produce some of those same costs, eventually). But criminalization of drug use might itself have substantial costs: and our ability collectively to contend with the costs of the drug use might be undermined by laws against it.

Ultimately, the economic curves may cross: criminalization of drug use may produce more net costs than those produced by the unchecked use itself, even when the full scope of the latter costs is assessed. Possession, by contrast, while itself not immediately involving all the same costs as use, may be such that its criminalization is economically advantageous. The economic calculus opposing possession might not be as strong as the economic argument in favor of its restriction.

Returning then, finally, to the issue with which we began, about attempts, my hope is that we can confront it now from a new perspective. That issue is so challenging, I think, in part because we are reasonably beset by conflicting pressures: to the extent we conceive the criminal law as some kind of enactment of a moral code, so that, ideally, all and only those who behave badly are punished (and to a degree that is proportional to how badly they behaved), to that extent, in our opposition to moral luck, we find criminalization of attempts irresistible. We will be at least tempted to efface any distinction between attempts and completed crimes and we may want to remove causal conditions on crimes. Feinberg usefully represents this pole of our oscillation.

But to the extent we conceive the criminal law rather as fundamentally regulatory, as a way of enacting a mutually beneficial social arrangement, of organizing ourselves collectively, in large part to prevent conditions that we would want to prevent (and to encourage conditions we would want to obtain), then our attitude toward attempts can be very different. Unsuccessful attempts realize less harm. A world in which no criminal attempt could be successful would be one in which there would be no need, from this point of view, for a punishment: no assaults will have been effected, no deaths caused, none of the relevant problematic conditions (aside from the very existence of the internal state itself) would obtain. Of course that is (rather dramatically and unfortunately!) not our world.
Seeing the issue that way enables a path forward. That our legal system should recapitulate morality is an enchanting ambition. There is something respectable in the thought that the bad should be punished and the good rewarded and that a collective system of law should support that ideal. But I think it is also hopeless. For starters, because the system is, precisely, collective, and because our system must also support a variety of conceptions of what counts as morally good, there will be controversy about what counts as to be punished. On the other hand, even in the face of disagreement about what is to be conceived as bad, some things might easily be seen collectively as to be restricted.

Considering the appropriate legal status for attempts thus enables us better to see an alternative conceptual framework in which to put the general categories of crime and punishment. Moralization of the category of “punishment,” by for example tying it analytically to the expression of moral condemnation (and to that extent to condemnation itself), can be understood either as (i) a terminological/definitory proposal or as (ii) a substantial claim. If the latter, we should resist it—adequate grounds for punishment do not require that it be linked to immorality; if the former, we can if we want fall in with the definitory stipulation, but then we should operate with a different category and term, that of price or penalty (unless those are different from each other). The state, given its own normative basis, has an interest in identifying some behaviors as subject to fairly-imposed costs. That interest is grounded in just what grounds the existence of a state in the first place.

What could justify the existence of an institution with coercive powers? If—again I have only claimed and not defended this here—that is understood in terms of the costs and benefits to be achieved through the establishment of a government (and of the relation of those costs and benefits to what would be possible without government), incorporating the compelling Rawlsian constraint of fairness, represented in terms of the original position, then we can extend that same idea to the specific form such a government could take, and then even to the specific contents of its legal apparatus. Whether the law should have it that people who murder are treated in one or another way is to be answered in terms of whether the having of such a law prescribing such treatment would serve the purposes to which the state is appropriately directed: the implementation of a fair system of penalties—even, potentially (though also optionally), severe ones involving the restriction of liberty—and rewards for various behaviors, in such a way as to achieve collective benefits and to avoid the predictable costs of, at the limit, having no government at all.

This way of thinking of crime and punishment admittedly has a number of consequences that remain challenging: perhaps most significant will continue to be the elimination of anything like blameworthiness as an essential component of our understanding of crime. Some will find outrageous the idea that we could put someone in jail, restricting their liberty that way, for conduct for which they cannot be blamed. It may be thought unfair to impose that sort of a cost on someone when they’re not, in the relevant sense, guilty. The category of political rights should render people immune to punishments imposed without regard to the ethical character of their behavior, or so many seem to think: if we can’t condemn it, we can’t punish it (at most
we can impose a cost). While strict liability is widespread in the tort law, it is always an uncomfortable fit in the criminal law.

Nevertheless, the proposal investigated is meant to be an alternative to what I think is an ultimately untenable discontinuity in the space of the law’s dominion, between the category of the crime and the category of the violation—or, I think relatedly, between the category of punishments and the category of state-imposed costs (or even more generally the state’s responses). I’m sympathetic with Justice Holmes’s view, in “The Path of the Law” (1897): “nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law” (pp. 459-60).

Our discomfort with the elimination of the discontinuity, made out in terms of a requirement of blameworthiness and restrictions on strict liability, between the categories of tort and crime, for example, can be, again, to some extent accommodated, on the current picture, through a kind of instrumentalism about that requirement. If we, collectively, prefer that some kinds of behavior be marked out as something like intolerable, if only so that those who can be shown to have so conducted themselves can then be characterized as having committed a violation of that sort (where the sort in question is, by definition, a conventional kind: the sort we’ve said we think is wrong), then unless there’s no fair way to enact a system so that our preference can be satisfied, there would be justification for a legal system that explicitly communicates a distinction between the condemnable violations and the others (and so Duff’s emphasis on the “communicative” role of the criminal law can also be accommodated). The philosophical question, I think, is whether that marking of a distinction for the criminal law should be seen as responding to a prior condition—the independent moral wrongness of the relevant behaviors—or as in effect creating a non-moral, legal, distinction in terms of our moral attitudes.

I will close with a more metaphysical claim: Ethical condemnation is a phenomenon that anyway, I think, must be reserved for the ethical and not the legal context. It is perfectly coherent to condemn any victim of an evil demon that “intends” (sets its will, I would say) to harm another so as to harm it. But I think that condemnation can appropriately emerge only from a locus of consciousness in which the evil of such an intention is revealed. And the state is not a locus of consciousness—it is a social institution, whose normative status is not, as with individual people, the product of its own intrinsic character, its own rationality. Even G.W. Bush recognized this when he said, “This group-think of ‘we all sat around and decided’—there’s only one person that can decide...” Though this distinction between individual people and groups of humans is an important motivation for the line I’m adopting, I only presuppose it in this context. Ethics is for people, not polities.