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MALA PROHIBITA, THE WRONGFULNESS CONSTRAINT, AND THE PROBLEM OF OVERCRIMINALIZATION

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ABSTRACT. The wrongfulness constraint, as a principle of criminalization, is supposed to preclude criminalization in the absence of wrongfulness. Crimes that look especially problematic from the perspective of the wrongfulness constraint are *mala prohibita* offenses. The aim of this Essay is to consider the question whether the wrongfulness constraint can serve as an effective tool to curb overcriminalization by looking at the case of *mala prohibita* offenses. This Essay defends the following propositions. First, because of the availability of an array of tools to defend various *mala prohibita* offenses as satisfying the wrongfulness constraint, it is often not a straightforward matter to demonstrate that committing a *malum prohibitum* offense is not wrongful. Second, as a result, the wrongfulness constraint is of limited use as a way of stemming the tide of overcriminalization. The Essay concludes by suggesting, more broadly, that the problem of overcriminalization is not that too many crimes violate the wrongfulness constraint but that criminal laws, even those that satisfy the wrongfulness constraint, can easily become a source of oppression, and that asking whether crimes violate the wrongfulness constraint may be counterproductive because the question misdirects our attention.

I. INTRODUCTION

Overcriminalization is widely noted to be a problem.[1] One potential solution to the problem, it appears, is the wrongfulness constraint, which is supposed to preclude criminalization in the absence of

[1] *See, e.g.*, R.A. Duff, *The Realm of Criminal Law* (Oxford: Oxford University Press, 2018), pp. 1–2; Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008), pp. 3–54.

wrongfulness.[2] Consider, for example, the reporting requirement for those carrying more than $10,000 in cash when leaving the country.[3] Simply moving one's own money, say in the form of one hundred of one hundred-dollar bills, from one country to another without telling the government is not wrongful in an obvious way. This law is thus suspect from the perspective of the wrongfulness constraint, and crimes like this give the impression that the wrongfulness constraint could serve as a real constraint on the scope of criminal liability.

Such crimes are often referred to as *mala prohibita* offenses, to be distinguished from *mala in se* offenses. The basic idea is that some crimes, like murder, rape, or robbery, are wrongs 'in themselves' ('*in se*'), whereas crimes like the crime of failing to report the amount of currency one is carrying are wrongs because they have been prohibited ('*prohibitum*'). *Mala prohibita* offenses look problematic because it is not clear how their existence can be squared with the wrongfulness constraint. Douglas Husak was one of the first to articulate the problem of *mala prohibita* offenses in a succinct way, and he even floated the idea that most *mala prohibita* offenses 'should be repealed as incompatible with our best theory of criminalization and punishment', while adding that he is 'a bit reluctant to endorse this sweeping and radical conclusion'.[4] The aim of this Essay is to examine *mala prohibita* offenses from the perspective of the wrongfulness constraint and to evaluate the wrongfulness constraint as a device to control the problem of overcriminalization.

This Essay defends the following propositions. First, because of the availability of an array of tools to defend various *mala prohibita*

[2] *See, e.g.*, Duff, *The Realm of Criminal Law*, pp. 55–56; Husak, *Overcriminalization*, p. 66.

[3] 31 USC s. 5316(a) (1986) ('[A] person . . . shall file a report . . . when the person . . . knowingly . . . transports, is about to transport, or has transported monetary instruments of more than $10,000 at one time . . . from a place in the United States to or through a place outside the United States; or . . . to a place in the United States from or through a place outside the United States'.); 31 USC s. 5316(b) (1986) ('A report under this section shall be filed at the time and place the Secretary of the Treasury prescribes'.); 31 USC s. 5322 (2001) ('A person willfully violating this subchapter or a regulation prescribed or order issued under this subchapter . . . shall be fined not more than $250,000, or imprisoned for not more than five years, or both'.); see also *United States v. Bajakajian*, 524 U.S. 321 (1998).

[4] Douglas Husak, '*Malum Prohibitum* and Retributivism', in R.A. Duff and Stuart Green (eds.), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford: Oxford University Press, 2005), pp. 65–90. For other important contributions to the topic around the same time, see Stuart Green, 'Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses', *Emory Law Journal* 46 (1997): pp. 1533–1615; R.A. Duff, 'Crime, Prohibition, and Punishment', *Journal of Applied Philosophy* 19(2) (2002): pp. 97–108. A number of theorists have devoted more attention to the topic since then. *See, e.g.*, Duff, *The Realm of Criminal Law*, pp. 20–21, 58–70, 313–322; Andrew Cornford, 'Preventive Criminalization', *New Criminal Law Review* 18(1) (2015): pp. 1–34; A. P. Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Portland, OR: Hart Publishing, 2011), pp. 24–29; Victor Tadros, 'Wrongness and Criminalization', in Andrei Marmor (ed.), *The Routledge Companion to Philosophy of Law* (New York: Taylor & Francis, 2012), pp. 157–173.

offenses as satisfying the wrongfulness constraint, it is often not a straightforward matter to demonstrate that a violation of a *malum prohibitum* offense is not wrongful. Second, as a result, the wrongfulness constraint is of limited use as a way of stemming the tide of overcriminalization. The Essay concludes by suggesting, more broadly, that the problem of overcriminalization is not that too many crimes violate the wrongfulness constraint but that criminal laws can easily become a source of oppression, and that asking whether crimes violate the wrongfulness constraint may be counterproductive because the question misdirects our attention.

II. WHAT ARE *MALA PROHIBITA* OFFENSES?

Even though the *malum prohibitum-malum in se* distinction seems clear enough, it is not always easy to classify offenses as one or the other. Take the example of the crime of going over the speed limit. Is it a *malum in se* or a *malum prohibitum* offense? The crime appears to be both *malum in se* and *malum prohibitum*. The *malum in se* component has to do with endangering others by driving in an unsafe manner. But, as everyone knows, a sober, competent driver may drive above the speed limit on purpose with due care without imposing any unwarranted risk on others, if the speed limit is set too low or if the surrounding conditions are such that there is no additional risk of harming others by speeding. That would still be an offense because the speed limit means what it says and there is a prohibition on driving over a certain speed. In that situation, speeding is a *malum prohibitum*. Speeding may not be a wrong in itself, though it may be a wrong because it is prohibited. So, rather than classifying offenses as *mala prohibita* or as *mala in se* offenses, it is better to think of offenses as having *mala prohibita* and *mala in se* components.[5] And what is that *malum prohibitum* component about? It seems that the *malum prohibitum* component is about going against a legal directive, even when not following the directive does not seem otherwise morally wrongful. In other words, the wrong of committing a *malum prohibitum* offense is the wrong of disobedience.

[5] *See* Husak, '*Malum Prohibitum* and Retributivism'; Duff, *The Realm of Criminal Law* ('pure and impure'), pp. 313–322; Stuart P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (New York: Oxford University Press, 2006), p. 120 ('*mala in se* and *mala prohibita* qualities'); John Gardner, *Offenses and Defences: Selected Essays in the Philosophy of Criminal Law* (New York: Oxford University Press, 2007), p. 239.

To understand *mala prohibita* offenses, then, we need to examine the idea of disobedience. What is disobedience? If individuals go around in life never killing or raping, do they 'obey' the laws that prohibit such conduct? In a sense, yes, they do because they do not break these laws. On the other hand, they do not 'obey' or 'follow' the law; they merely behave in a way that does not involve committing an act that is prohibited. They may be lazy and never do anything that takes the kind of energy involved in most cases of rapes and murders. Also, especially for these kinds of offenses, many people would behave the same way with or without laws that prohibit them, simply because they are people for whom the thought of doing wrongful acts is not even a live possibility or are people who may refrain from certain acts simply because they are wrong. These individuals seem to 'obey' the law only in a very weak sense.

Obedience to law, in other words, implies that a person does or refrains from doing something for reasons that have to do with the existence of a law.[6] And the same goes for disobedience. People who break the law without realizing it are disobeying the law in the sense that they do what they are told not to do, but the term 'disobeying' implies knowingly going against a directive of which one is aware, or, at most, going against a directive because of a failure to be aware of the existence of applicable directives that one should have been aware of through reasonable investigation. A farmer who produces foie gras by force-feeding his ducks without realizing that foie gras production has been banned in his state, after having made reasonable efforts to ascertain the applicable law, may have broken the law but has not disobeyed the law.

This 'preliminary' discussion takes some controversial positions, as it crashes into two longstanding issues: strict liability and mistake of law.[7] Namely, this conception of disobedience seems to require recognizing a reasonable mistake of law defense when the basis for blaming an offender is disobedience. If there is no legal requirement that one is aware or should have been aware of, then disobedience seems descriptively inaccurate. Therefore, if one acts, without being aware of a legal directive despite having made reasonable efforts to learn it, in ways that go against the directive, there is no disobedi-

[6] Cf. Michael Sevel, 'Obeying the Law', *Legal Theory* 24 (2018): pp. 191–215.

[7] Husak is illuminating on this question as well. Douglas Husak, *Ignorance of Law: A Philosophical Inquiry* (New York: Oxford University Press, 2016).

ence. And to the extent that some strict liability offenses involve situations where a person does something not realizing that what he or she is doing is criminally prohibited despite having made reasonable efforts to learn the law, strict liability offenses are problematic. At the very least, the presence of the reasonable mistake of law in a case means that conviction and punishment in that case cannot be justified on the basis of disobedience.[8] While it may be the case that some strict liability offenses cannot be justified as disobedience offenses, that does not mean they cannot be justified in some other way. I will bracket these issues for now and focus on instances where disobedience (that is, going against a legal directive one is or should be aware of) is present.

This limitation does not beg the question. Despite the common association of certain *mala prohibita* offenses, known as regulatory offenses or 'public welfare offenses',[9] with strict liability crimes, it is a common legislative practice, at least in the context of regulatory offenses, to insert terms like 'knowingly' or 'willfully' in offense definitions to avoid convicting the unaware,[10] and when the legislation fails to do so, courts often, though not always, step in to imply mens rea terms.[11] So, even though defining disobedience as involving knowingly going against a legal directive takes strict liability offenses off the table at the outset, there is much in the world of *mala prohibita* offenses that remains as an object of our scrutiny.

With that discussion about the meaning of disobedience out of the way, let's talk about the ways in which different crimes come with *mala prohibita* and *mala in se* components. Even crimes that are ordinarily considered to be *mala in se* offenses often have *mala prohibita* components. And that there can be culpability associated with

[8] The controversy surrounding ignorance of law defenses implicates two types of concerns: notice and culpability. *Cf.* Husak, *Ignorance of Law*. Notice concerns have to do with whether there has been fair notice of the penal consequences of certain acts that may appear innocent. Culpability concerns have to do with whether people who do not realize that they are committing criminal acts are culpable. The question at issue here is not whether persons who violate a law without realizing it lack fair notice, but whether persons who unknowingly violate a law are culpable for reasons having to do not only with the underlying badness of the conduct, but also with disobedience.

[9] *Morissette v. United States*, 342 U.S. 246 (1952).

[10] *See, e.g.*, 22 USC s. 2778(c) (2014); 50 USC s. 1704(c) (1977); *see also* Richard Lazarus, 'Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law', *Georgetown Law Journal* 83(7) (1995): pp. 2448–2450, 2454, 2468–2471.

[11] Susan R. Klein and Ingrid B. Grobey, 'Debunking Claims of Over-Federalization of Criminal Law', *Emory Law Journal* 62(1) (2012): pp. 9–10 ('Moreover, the Court has implied a mens rea in many federal offenses that might otherwise appear to be strict liability offenses'.); *id.*, p. 70–71.

disobedience even with core *mala in se* offenses is most evident in controversial cases where a seemingly reasonable legal line-drawing generates an instance of convicting those who have not committed a pre-legal moral wrong. In the famous case of Judy Norman, a battered woman who killed her husband after suffering from years of abuse was convicted because her killing failed to satisfy the imminence requirement, even though it appears to have been necessary to avoid her own death by her husband at *some* point in the near future.[12] Or imagine a case of mercy killing or assisted suicide, where a person goes beyond assisting a suicide but engages in killing another on purpose, that is not morally wrongful but is nevertheless criminally prohibited. In both cases, those who kill knowing that what they are doing is criminal even though they see themselves as – correctly, let us assume – morally justified in killing would be disobeying the state's directives not to kill on purpose even in such situations.[13]

However, since this Essay is on the question whether *mala prohibita* offenses violate the wrongful constraint, we should focus on offenses where the *malum prohibitum* aspect predominates and the culpability analysis would have more to do with the act of disobeying, or going against a prohibition, than with the inherent wrongfulness of the prohibited conduct, such as harming or risking harm to others. And there are many different types of offenses that can be classified as *mala prohibita* offenses in this way.

First, the state frequently criminalizes certain conduct not because it directly causes harm but because it might lead or contribute to harm less directly, by, say, further acts by the agent of the conduct or others. Various possession offenses – drugs and weapons – may be categorized in this group of offenses.[14] Those who have these items

[12] For a discussion, see Kimberly Ferzan, 'Defending Imminence: From Battered Women to Iraq', *Arizona Law Review* 46 (2004): pp. 213–262; Benjamin Zipursky, 'Self-defense, Domination, and the Social Contract', University of Pittsburgh Law Review 57 (1996): pp. 579–614.

[13] These line-drawings may be deemed reasonable even if they end up convicting (pre-legally) morally innocent people for reasons having to do with, say, the difficulty of policing between justified and unjustified killing.

[14] *See, e.g.*, R.A. Duff, 'Perversions and Subversions of Criminal Law', in R.A. Duff et al. (eds.), *The Boundaries of the Criminal Law* (Oxford: Oxford University Press, 2010), pp. 88–112; R.A. Duff and S.E. Marshall, '"Abstract Endangerment', Two Harm Principles, and Two Routes to Criminalisation", *Bergen Journal of Criminal Law and Criminal Justice* 3(2) (2015): pp. 149–157; Larry Alexander and Kimberly Ferzan, *Reflections on Crime and Culpability: Problems and Puzzles* (New York: Cambridge University Press, 2018), p. 84 n.2; Larry Alexander and Kimberly Ferzan, *Crime and Culpability: A Theory of Criminal Law* (New York: Cambridge University Press, 2009), pp. 309–310; Husak, *Overcriminalization*, p. 38.

in their possession may not be harming or wronging anyone, but there may nevertheless be a prohibition on possession of these items for public safety reasons. In such cases, one may be violating these laws by just possessing such items without harming or unduly risking harm to others.

Second, as noted above, there are offenses that have been called 'regulatory offenses', sometimes called 'public welfare offenses',[15] as opposed to ordinary offenses. Regulatory offenses refer to a type of criminal offense that the government enacts as a way of enforcing its regulation of various aspects of our lives – air quality, food safety, environmental preservation, and so on. In United States federal law, typically, a statute would authorize a federal agency (or authorize the President to authorize an agency) to promulgate regulations to implement the statute and specify that certain violations of the statute or the regulations are crimes.[16] For such offenses, the relationship between doing something prohibited and in fact imposing a harm or risk of harm to others may or may not be clear, but the disobedience can be clear.

Third, the state also criminalizes conduct that in itself may be morally neutral but is easier to detect and is associated with certain types of criminal behavior. Money laundering, defined roughly as engaging in transactions with money that is derived from certain criminal activities, is an example of a crime like this.[17] The isolated act of putting funds into a bank does not seem morally wrongful, but once there is a prohibition on the conduct because the state finds it useful to do so, the activity turns into a crime.

Fourth, closely related, the state imposes certain affirmative duties in order to aid law enforcement. For instance, information-gathering offenses like the requirement that one declare the amount of currency one is carrying abroad over a certain minimum is a way of criminalizing conduct that seems morally neutral in order to

[15] *Morissette*, 342 U.S. 246; *see generally* Darryl Brown, 'Public Welfare Offenses', in Markus Dubber and Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal Law* (New York: Oxford University Press, 2014), pp. 862–883.

[16] *See, e.g.*, 31 USC s. 5322 (2001); 15 USC s. 80b-17 (1975); *see also* Lazarus, 'Meeting the Demands of Integration in the Evolution of Environmental Law', p. 2441 ('[A]t the federal level, Congress has virtually criminalized civil law by making criminal sanctions available for violations of otherwise civil federal regulatory program'.).

[17] 18 USC s. 1957 (2012) (criminalizing engaging in 'a monetary transaction in criminally derived property of a value greater than $10,000 [where the property] is derived from specified unlawful activity').

unveil more clearly morally suspect conduct, like running an illicit business.[18] These types of offense frequently also require reports of signs of suspicious activities by other people.[19]

Now, in the same way that even core *mala in se* offenses have *mala prohibita* components, these *mala prohibita* offenses can have *mala in se* components as well. An example might be an environmental regulatory offense where dumping a certain amount of chemicals is not only going against a legal directive, which provides the *malum prohibitum* component, but also increases the risk of people nearby getting sick, which would be the *malum in se* component. Or, consider a weapons possession case. One might say that having a gun in one's possession is not a moral wrong but a legal wrong because merely having it does not impose a risk of harm on others. However, the matter may be more complicated than that. First, by having a gun, one would be increasing the amount of risk that exists in one's community. Second, by having a gun, one may be encouraging others to obtain one, which can also increase the risk of gun-related violence.[20] It would nevertheless be a stretch to turn every *malum prohibitum* offense into a *malum in se* offense in this way, as the government can set its rules, for prophylactic or other reasons to be further discussed below, so that even harmless acts that do not appreciably increase the risk of injuring other people are prohibited and criminalized.

In sum, the points made in this Part are: (1) crimes have *mala in se* and *mala prohibita* components; (2) the *malum prohibitum* component criminalizes disobedience of state directives; (3) crimes can be classified as more or less *malum in se* or *malum prohibitum* depending on which component predominates, and there are several different types of *mala prohibita* offenses; (4) ignorance of law could exculpate a person from a charge of disobedience, which would accordingly exculpate him or her from a charge of a *malum prohibitum* offense (or the *malum prohibitum* component of an offense), and this in turn implies that certain strict liability offenses cannot be justified as disobedience offenses; (5) taking strict liability offenses off the

[18] 31 USC. s. 5316(a); see n.4 above.

[19] *See generally* Sandra Guerra Thompson, ''The White-Collar Police Force: 'Duty to Report' Statutes in Criminal Law Theory'', *William & Mary Bill of Rights Journal* 11(3) (2009): pp. 3–65; Sungyong Kang, ''In Defense of the 'Duty to Report' Crimes'', *UMKC Law Review* 86 (2017): pp. 361–403; Gerard E. Lynch, 'The Lawyer as Informer', *Duke Law* Review 1986 (1986): pp. 520–521.

[20] Alexander and Ferzan, *Reflections on Crime and Culpability: Problems and Puzzles*, pp. 17–60.

table and allowing mistake of law defenses does not lead to the general position that *mala prohibita* offenses, such as regulatory offenses, are unjustifiable, and many such offenses are not strict liability offenses and make knowledge of law an element to be proven by the state.

III. *MALUM PROHIBITUM* AND THE WRONG OF DISOBEDIENCE

There remains the issue of whether *mala prohibita* offenses are wrongful, and I have been arguing that this issue turns on the question whether disobedience of the state is a wrong. There is a voluminous philosophical literature on the question whether there is a duty to obey the law, and much of this literature is critical of the idea that there is such a duty.[21] However, that debate is not (at least directly) helpful for our purposes, as the obligation to obey that is generally said not to exist is 'a general obligation applying to all the law's subjects and to all the laws on all the occasions to which they apply'.[22] In short, a proof against the existence of a general duty to obey the law is of such limited applicability that it cannot help us answer the questions *when* a duty to obey exists and *when* a violation of such a duty is wrongful.

So, when is disobedience, if ever, wrongful? We can start with one of the more familiar examples of criminalization of disobedience, the crime of contempt. For instance, a United States federal court can punish a person for '[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command'.[23] Provisions like these criminalize disobedience and convict people for their failures to obey commands by legal authorities in certain situations; the fact that one does not do what one is told to do is precisely at the heart of this type of criminality. Is disobedience wrongful in such contexts? Here is one possible reason why it might be: the legal system needs to employ coercive devices to ensure compliance with the law because otherwise the rule of law could not become reality. The problem with this rationale, however, is that the fact that the legal system needs the ability to punish people for disobedience in order

[21] *See, e.g.*, John Simmons, *Moral Principles and Political Obligations* (Princeton, New Jersey: Princeton University Press, 1979).

[22] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (New York: Oxford University Press, 1979), p. 234.

[23] 18 USC s. 401 (2002).

to administer justice is insufficient to show that those who disobey the law in these contexts behave wrongfully.

At the same time, the observation that the legal system crucially depends on the cooperation of those who are subject to it in order to function as a legal system can serve as the basis for a moral obligation on the part of the citizens. That is, a failure to obey government officials in certain situations interferes with the government's ability to carry out the functions of a state. Disobedience is wrongful in these instances because persons have a moral duty not to interfere with the workings of a legal system, and those who violate such duties by disobeying authoritative directives in these specified conditions behave wrongfully. (This statement will have to be qualified in various ways below.)

This argument can be thought of as an instantiation of the following proposition from John Rawls:

> From the standpoint of justice as fairness, a fundamental natural duty is the duty of justice. This duty requires us to support and to comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves. Thus if the basic structure of society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do his part in the existing scheme.[24]

For our purposes, such a natural duty to support just institutions would have to be rooted in the value of the state, which is the source of the criminal laws and the institutions that support the laws. A typical definition of a state is that it is a set of political institutions organized to govern a particular territory that successfully lays claim to the monopoly of legitimate violence within the territory.[25] The state does a number of things, including protecting the physical safety of those within its territory from attacks from one another and from people outside the territory, operating a system of dispute resolution spanning from police force to administrative agencies to the judicial branch, solving coordination problems by establishing and enforcing conventions, such as rules of the road, and so on. So, given that the state exists, and given that it does these things, what sorts of obligation follow? The answer is that it is morally wrongful to interfere with institutions of the state that make it possible for individuals to live normal lives as we understand normalcy today.

[24] John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), p. 115.

[25] Leslie Green, *The Authority of the State* (New York: Oxford University Press, 1988); George Klosko, *Political Obligations* (New York: Oxford University Press, 2005).

To bring these considerations to the idea of *mala prohibita* offenses, given all the goods that the state promotes, we may start, at least as a preliminary matter, thinking of the criminal justice system as an effective tool for the promotion of these goods. It is the state's job to determine how to use these tools to promote the general welfare, and the citizens have a duty to support the state's use of such tools.[26]

We may defend the argument that disobedience is wrongful in a different way. Consider the following two examples:

(1) A person does not pay Social Security and Medicare taxes for his housekeeper even though he knows that he is required to do so under the law.
(2) A driver does not update his car inspection when it is required for him to do so even though he knows about the requirement because the car seems 'fine' to him and he does not see why the inspection is necessary.

In these two examples, we may make the case that disobedience is wrongful by seeing that disobedience can be an act of free-riding. Rawls's statement is well-known in this regard as well:

> The main idea is that when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission. We are not to gain from the cooperative labors of others without doing our fair share.[27]

In the case of the taxes, the person not paying taxes that he knows he owes behaves wrongfully because the person is going against a scheme that is devised to raise public revenue by distributing the tax burden across a population according to a formula determined by the state. And, given that it is not obvious or intuitive whether a particular tax applies to one's situation or not, there is a difference between those who are aware that a particular tax rule applies and those who do not know. As to car inspections, we may say that the driver is free-riding because the car inspection scheme is about reducing the overall risk of harm from having unsafe cars on the road and once everyone complies with the law, individuals in the community can bike, ride, or walk around more freely without fear

[26] *Cf.* Duff, *The Realm of Criminal Law*, p. 333.
[27] Rawls, *A Theory of Justice*, p. 112.

of being hit by a defective car. An individual who opts out of the system of car inspections, then, benefits from the safety level of the road achieved by others' compliance without paying his or her fair share.[28]

How do these two considerations – fairness and support for just institutions – relate to disobedience? Perhaps the offenses discussed do not in fact criminalize disobedience but criminalize something we might call *undermining*. The two wrongs are different. For one thing, the victim of disobedience appears to be the state whereas the victims of undermining seem to be fellow citizens who depend on well-functioning state institutions. Even offenses that appear to be pure disobedience offenses like contempt may, by harming the state, ultimately victimize those who benefit from having a legal system. What all this means is that disobedience might not be the best way of describing the nature of the wrong involved, as every instance of disobedience can be redescribed as an instance of wronging your fellow citizens who depend on you to do your part.

So, then, does it matter whether we talk in terms of disobeying or undermining? Perhaps not. One may frequently undermine cooperative ventures by disobeying and one may obey in order to avoid undermining. The ideas overlap in application considerably. At the same time, it is a mistake to deemphasize the disobedience aspect of *mala prohibita* offenses by characterizing relevant transgressions as undermining as opposed to disobeying for the following reasons. Establishing and operating social schemes typically require governmental institutions. When such institutions get to work, they advance their goals often by issuing binding directives. Therefore, it is by obeying such directives one does one's fair share or supports just institutions, and that aspect should not be obscured in our analyses.

But is it still not the case then that the wrong of disobedience derives from the wrongs of free-riding and undermining of just institutions? Put that way, it seems that the wrong of undermining is more fundamental than the wrong of disobedience. This is a fair point, but we should remember that the state with authority to set

[28] It is possible that the car is safe to drive and the individual has put in enough effort to assure himself of that on his own, without getting the car inspected by a mechanic authorized by the state to issue a certificate of safety. Is that not sufficient for doing one's fair share? It may not be, since one's 'fair share' may consist of not only making sure that the car is safe to drive but also to reassure other people that the car is safe to drive by displaying a proof of inspection. *Cf.* Duff, *The Realm of Criminal Law*, pp. 328–332.

directives, as mentioned above, can get things wrong. That is, law is fallible. The laws and the way they are enforced by the state may be unjust, stupid, do more harm than good, and so on. Yet the law demands obedience. The problem with characterizing *mala prohibita* offenses as being about the wrong of undermining as opposed to the wrong of disobeying is that it takes the spotlight off the distinctive problem of *mala prohibita* offenses. Given the fact that the phenomenon that is to be morally analyzed is the state making commands and expecting to be obeyed, we should not frame the debate in such a way that the most morally problematic aspects that are undoubtedly present drop out.

Now, the question is, no matter what you call it, whether a combination of these two grounds – fairness and support of just institutions – can justify *mala prohibita* offenses. Take inchoate offenses, various possession offenses to control the amount of risk out in the world, for instance. It seems that the overall risk of harm from weapons in a community can be brought down considerably if a state prohibits weapons possession, meaning that once everyone gives up his or her weapon, individuals in the community can move about more freely without fear of being gunned down. However, when an individual opts out of the system and comes into possession of a gun, that person would be having at his or her disposal an instrument of harm that others in the community do not hold, since he or she would be the only one with the gun. But in such a case, the person enjoys a baseline level of safety thanks to the restraints others in the community have shown and an enhanced level of safety due to his weapons possession, which makes the person a free-rider on other people's efforts.[29] Regulatory offenses (such as environmental crimes) and offenses designed to aid law enforcement, such as currency reporting crimes and anti-money laundering crimes, too, can be justified on the grounds that such offenses criminalize free-riding on others' efforts to control societal problems. And all of these offenses can also be justified as involving violations of the duty to support just institutions.

Of course, it is not as easy as that. Laws may be misguided, overbroad, poorly written, or any combination of those. It is implausible to posit an obligation to obey that attaches to *all* laws at

[29] For a similar argument, *see* Tadros, 'Wrongness and Criminalization', pp. 168–169.

all times in a just state, and a case-by-case evaluation is called for. However, in those case-by-case evaluations, those who set out to defend a *malum prohibitum* offense have a number of ways to do so.

IV. *MALUM PROHIBITUM* AND THE WRONGFULNESS CONSTRAINT

The arguments presented in the previous section discuss in general terms how one might go about showing that *mala prohibita* offenses satisfy the wrongfulness constraint. The question is what follows from the conclusion that a given crime definition satisfies the wrongfulness constraint. It appears that a person who is prosecuted, convicted, and punished for committing a crime that satisfies the wrongfulness constraint is in no position to object to such treatment. After all, he or she has engaged in morally wrongful conduct.[30]

This intuition has been articulated in terms of *liability* or *forfeiture*. That is, those who commit such wrongs become 'liable to punishment' or 'have forfeited' their right not to be punished.[31] This Essay is not about liability or forfeiture. The point here is more limited. That, is, once it is established that a person has committed a wrong, he or she now faces an uphill battle when objecting to being convicted and punished, as the person starts from the position of a wrongdoer. A criminal law's satisfaction of the wrongfulness constraint, in other words, appears to give the state the high ground when it seeks to prosecute using that law. Is that impression warranted? Does or should the state earn the high ground simply by keeping its criminal laws consistent with the wrongfulness constraint?

It is impossible to answer this question in general terms. Because of space constraints, the analysis here is brief and suggestive only; more thorough analyses would have to be conducted elsewhere. We can begin by taking a quick look at crimes that meet two criteria: usage and controversy. That is, the crimes to focus on when asking about the effectiveness of the wrongful constraint as a device to control overcriminalization are those crimes that are (1) actually

[30] One important basis for objection is that the wrongful conduct is none of the state's business when the conduct, while wrong, is private, such as a betrayal of one's friends. *See, e.g.*, Duff, *The Realm of Criminal Law*, pp. 277–334. This Essay sets that complication aside and focuses on wrongs considered to be public, at least in the sense that the state has a legitimate interest in regulating the conduct. *Cf. id.*, pp. 75–79, 146–148.

[31] Tadros, *Wrongs and Crimes* (New York: Oxford University Press, 2016), pp. 167–172; Christopher Heath Wellman, 'The Rights Forfeiture Theory of Punishment', *Ethics* 122(2) (2012): pp. 371–393.

used by prosecutors[32] and (2) are frequently targets of criticism due to their overbreadth.[33]

Take, for instance, the following two crimes. It is a crime for a person to 'devise[] or intend[] to devise a[] scheme . . . to defraud' and 'for the purpose of executing such scheme', either 'place[] in any post office . . . any matter . . . to be sent or delivered by the Postal Service'[34] or 'transmit[] by means of wire, radio, or television communication . . . any writings, signs, signals, pictures, or sounds'.[35] This is the crime of mail and wire fraud, which makes it a crime for anyone to send anything by almost any means for the purpose of promoting a scheme to defraud. It is also unlawful 'to use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchanges] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors',[36] and any person 'who willfully violates' this provision can be criminally prosecuted.[37] This is the crime of securities fraud, which criminalizes, inter alia, engaging in certain prohibited acts in relation to the sale of stocks and bonds.

Do these crimes all fail the wrongfulness constraint? One reaction to these examples might be that they easily satisfy the wrongfulness constraint because they all involve fraud of some kind, but that would be too quick. First, fraud generally implies deception, and the question of wrongness of deception remains philosophically controversial.[38] Second, the term 'fraud' has been understood in many different ways in the legal setting. As Stuart Green has once summarized, the term can encompass 'not just stealing by deceit, but

[32] Klein and Grobey, 'Debunking Claims of Over-federalization of Criminal Law', pp. 20–32.

[33] William J. Stuntz, 'The Pathological Politics of Criminal Law', *Michigan Law Review* 100(3) (2001): pp. 517–518 (criticizing the breadth of federal law criminalizing mail and wire fraud and misrepresentations); Julie R. O'Sullivan, 'The Federal Criminal Code Is a Disgrace: Obstruction Statutes as Case Study', *Journal of Criminal Law & Criminology* 96(2) (2006): pp. 654, 660–665 (criticizing the redundancy of federal law on false statements and securities fraud and the vagueness of mail and wire fraud statutes).

[34] 18 USC s. 1341 (2008).

[35] 18 USC s. 1343 (2008).

[36] 15 USC s. 78j(b) (2010).

[37] 15 USC s. 78ff (2002).

[38] The literature is extensive. For recent, illuminating discussions; *see*, for example, Aditi Bagchi, 'Lying and Cheating, or Self-Help and Civil Disobedience?', *Brooklyn Law Review* 85 (2020): pp. 363–367; Courtney M. Cox, 'Legitimizing Lies', 90 *George Washington Law Review* (forthcoming 2022).

also deceptive and non-deceptive breaches of trust, conflicts of interest, non-disclosure of materials facts, exploitation, taking unfair advantage, non-performance of contractual obligations, and misuse of corporate assets'.[39] Such slipperiness of the term makes it hazardous to draw any easy, general conclusions about the moral wrongfulness of 'fraud' in the criminal context.

At the same time, it is *surely not difficult* to imagine how one might go about constructing an argument that many of these offenses do satisfy the wrongfulness constraint. For instance, it is true that mail and wire fraud crimes are notoriously broad and vague,[40] but so long as there is a showing of 'a scheme to defraud' that is within the scope of the term ordinarily understood, it would not be challenging to demonstrate that conduct prosecuted under the mail or wire fraud law satisfies the wrongfulness constraint. As to the crime of securities fraud, the definition given above indicates a mix of different types of wrongfulness, 'manipulative or deceptive' bringing the *malum in se* aspect and 'rules and regulations' suggesting the *malum prohibitum* aspect. That is, while terms like manipulative or deceptive appeal to ordinary moral concepts, the terms 'rule and regulations' refer to various rules that people are expected to follow to ensure a healthy securities market that benefits every market participant. For a market participant to not follow such rules would undermine the communal setup and would amount to free-riding on the efforts of others that have made creations of a safe marketplace possible.[41]

It is also a crime, 'in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government', for a person to 'knowingly and willfully . . . make[] any materially false,

[39] Green, *Lying, Cheating, and Stealing*, p. 151; *see also* Samuel W. Buell, *Capital Offenses: Business Crime and Punishment in America's Corporate Age* (New York: W. W. Norton & Company, 2016), pp. 32–74 ('[A]n effort to deceive someone in a market becomes fraud only if the norms of the particular market make that behavior wrong'.).

[40] *See, e.g.*, Jed S. Rakoff, 'The Federal Mail Fraud Statute (Part I)', *Duquesne Law Review* 18(4) (1980): pp. 771–822; *but see* Klein and Grobey, 'Debunking Claims of Over-federalization of Criminal Law', p. 10 ('Vague and sweeping federal offenses, such as obstruction of justice and mail fraud, have . . . been trimmed significantly by the Court's narrow statutory interpretation to apply to clear instances of what we would all recognize as criminal misbehavior'.).

[41] *Cf.* Bagchi, 'Lying and Cheating, or Self-Help and Civil Disobedience?', p. 10 ('Lying to strangers about the product you are selling impairs a particular social institution, the market.').

fictitious, or fraudulent statement or representation'.[42] This is the crime of false statements, which criminalizes lying to a federal government official conducting an investigation.[43] This, too, may appear to be an easy case because it involves deception, but, again, the moral ins and outs of deception might depend on the context,[44] and it does seem that there is a case to be made for distinguishing between simple lying to federal agents and lying to federal agents in order to avoid one's own criminal liability.[45] Nevertheless, as a general matter, lying to a government official conducting official business constitutes interference with government functions and thus implicates the duty to support just institutions and accordingly seems at least prima facie wrong. The wrongfulness constraint by itself then does not seem capable of robustly precluding the crime of false statements.

Other crimes heavily prosecuted by the federal government are drug and immigration offenses.[46] It is a crime for a person to 'knowingly or intentionally . . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance'.[47] And it is a crime for an alien to 'enter[] or attempt[] to enter the United States at any time or place other than as designated by immigration officers'[48] and a crime for an alien 'who has been denied admission, excluded, deported, or removed' to 'enter[], attempt[] to enter, or is at any time found in the United

[42] 18 USC s. 1001 (2006).

[43] Lisa Kern Griffin, 'Criminal Lying, Prosecutorial Power, and Social Meaning', *California Law Review* 97(6) (2009): pp. 1515–1570.

[44] *See* Bagchi, 'Lying and Cheating, or Self-Help and Civil Disobedience?', p. 363–367; Cox, 'Legitimizing Lies'.

[45] Green, *Lying, Cheating, and Stealing*, p. 170; Griffin, 'Criminal Lying, Prosecutorial Power, and Social Meaning', p. 1557–1567.

[46] Klein and Grobey, 'Debunking Claims of Over-federalization of Criminal Law', p. 6 (describing the 'astronomical rise in the number of prosecutions for drug and immigration offenses, which now dwarf all other offense categories'.).

[47] 21 USC s. 841 (2018).

[48] 8 USC s. 1325 (1996).

States'.[49] These crimes are also frequently criticized as instances of overcriminalization,[50] and, while they may not be as easy to characterize as satisfying the wrongfulness constraint, there is a roadmap for the task. States have territorial boundaries and legitimately have rules about who may cross them, and governments routinely and correctly regulate substances that endanger the public. Even if the ways in which a state enforces its drug and immigration laws may be unjustifiable in a number of ways, it is difficult to deny the basic proposition that these are areas that are appropriately regulated by the government, and there will be times when those who knowingly go against state directives in these areas of regulation would be behaving wrongfully precisely for disobeying such directives. Again, the claim is not that there is no overcriminalization in the drug or immigration law context; obviously these laws can bring about tremendous harms to people for no good reason. The claim rather is that the government appropriately controls national borders and regulates hazardous substances, and one's disobedience of measures to facilitate such government functions is, generally speaking, wrongful. In other words, successfully carrying out the argument that these laws violate the wrongfulness constraint involves having to overcome such plausible statements about the proper scope of the government's power and the appropriate attitude to hold towards exercises of such powers.

For another example, take the crime of money laundering. It is a federal crime to engage in 'a monetary transaction in criminally derived property of a value greater than $10,000 [where the property] is derived from specified unlawful activity'.[51] The term 'specified unlawful activity' covers a variety of offenses such as drug

[49] 8 USC s. 1326 (1996).

[50] On immigration, *see generally* Jennifer M. Chacón, 'Overcriminalizing Immigration', *Journal of Criminal Law and Criminology* 102(3) (2012): p. 614 ('[O]ur immigration policy provides a paradigmatic example of overcriminalization'.); Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power', *American University Law Review* 56(2) (2006): p. 382 ('[V]iolations of immigration law are now criminal when they were previously civil, or carry greater criminal consequences than ever before'.); David Alan Sklansky, 'Crime, Immigration, and Ad Hoc Instrumentalism', *New Criminal Law Review* 15(2) (2012): p. 160 (describing how overcriminalization and 'the frequently deplored tendency of criminal law to expand into areas for which its heavy-handed machinery seems ill-suited' contribute to the blurring of lines between criminal law and immigration policies). On drugs, *see* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2012), pp. 59–96; Douglas Husak, *Legalize This!: The Case for Decriminalizing Drugs* (London: Verso, 2002), pp. 44–48.

[51] 18 USC s. 1957 (2012).

offenses, bribery, and human trafficking.[52] People who engage in these sorts of transactions tend not to be sympathetic figures. For instance, a person who uses his public office for personal gain by demanding payments from those eager to curry favor and funneling money into his personal accounts is corrupt and is in violation of his fiduciary obligations. At the same time, we need to dig deeper to see exactly what the wrong of his conduct is, as criminal law is not engaged in the project of giving general assessments of people's moral characters.[53]

So, what exactly is money laundering? Money laundering, as conduct, accomplishes two things. First, the possibility of money laundering makes the prospect of committing crimes more attractive to potential perpetrators, and, in that sense, it encourages criminal activities.[54] Second, money laundering, by giving criminals a way to conceal proceeds from criminal activities, makes it easier for them to avoid detection by law enforcement authorities. The first wrong, then, belongs to the family of wrongs having to do with complicity; the second wrong is a form of obstruction of justice.

Money laundering, then, need not be thought of as implicating an exotic wrong at all. It is analogous to the common law crime of receiving or concealing stolen property.[55] The closest offense in the Model Penal Code is 'aiding consummation of crime', which is defined as 'purposely aid[ing] another to accomplish an unlawful object of a crime, as by safeguarding the proceeds thereof or converting the proceeds into negotiable funds'.[56] Money laundering is also analogous to various obstruction of justice offenses. The Model Penal Code also lists as an offense 'hindering apprehension or prosecution', which provides in part that '[a] person commits an offense if, with purpose to hinder the apprehension, prosecution, conviction or punishment of another for crime, he . . . conceals or destroys evidence of the crime . . . .'[57]

[52] 18 USC s. 1956(c)(7) (2016).

[53] *Cf.* Husak, '*Malum Prohibitum* and Retributivism', p. 67 (arguing that, granting that a person commits a first wrong by, say, accepting a bribe, 'it is hard to see why persons who deposit or withdraw [criminally derived] funds from banks commit a *second* wrong').

[54] *Cf.* Peter Alldridge, *What Went Wrong with Money Laundering Law?* (London: Macmillan Publishers Ltd., 2016).

[55] 3 Wayne LaFave, *Substantive Criminal Law* s. 20.2 (St. Paul, MN: Thomson Reuters, 2019).

[56] MPC s. 242.4.

[57] MPC s. 242.3(3).

Now, merely analogizing the crime of money laundering to other offenses does not answer the question what is wrong with money laundering. Perhaps we can think of money laundering as implicating the duty to support just institutions as discussed above, given that enforcing its criminal laws through apprehension is a legitimate government function. That seems easy enough, but may be *too* easy, as the implication of recognizing such an obligation and then criminalizing violations of such obligations is far-reaching. Say a person stabs another person and throws him in his car trunk where he bleeds to death. The killer buries the body in the woods that night, and the next morning he cleans the blood from his car. Or a person scores a big heist and then 'lies low' and avoids major purchases in order to avoid detection. Or a person simply goes about one's ordinary and normal routine on a day-to-day basis after committing a crime.

Are they all acting in ways that frustrate the government's efforts to enforce its laws through apprehension and behaving wrongfully for that reason? Possibly yes, though, this issue is not easy to resolve. Alice Ristroph, for instance, has suggested that individuals have a right to resist punishment, at least in the form of 'legal resistance' as opposed to 'violent resistance',[58] whereas Sandra Marshall and R.A. Duff have argued in favor of 'a civic responsibility' for a person who has committed a crime to 'admit her crimes and to submit herself to the judgment of her peers through the criminal process'.[59] It is beyond the scope of this Essay to resolve this debate. The point here can be more limited. Once we accept the idea that the government has a legitimate interest in enforcing its criminal laws and posit a duty to support just institutions, it is at least arguable that there is a duty for a person who has committed an offense to turn himself in, and the wrongfulness constraint offers at best a wavering bulwark against the force of such reasoning. Indeed, it is a federal crime to 'move[] or travel[] in interstate or foreign commerce with intent . . . to avoid prosecution . . . for crime', and it is not a foregone con-

[58] Alice Ristroph, 'Regulation or Resistance?: A Counter-Narrative of Constitutional Criminal Procedure', *Boston University Law Review* 1555 (2015): pp. 1593, 1596.

[59] R. A. Duff and S. E. Marshall, 'Civic Punishment', in A. W. Dzur, I. Loader, and R. Sparks (eds.), *Democratic Theory and Mass Incarceration* (Oxford: Oxford University Press, 2016), pp. 33–59. To be clear, Duff and Marshall's views are nuanced in ways that we cannot get into here, and they are certainly not in favor of a 'legal duty' to assist the state that could lead to punishment for failure to turn oneself in.

clusion that the wrongfulness constraint could invalidate such a crime.[60]

So, to bring us back to the question: Does or should the state earn the high ground by keeping its criminal laws consistent with the wrongfulness constraint? These examples show that we have good reasons to doubt that such is the case. It seems clear that there needs to be a limiting principle of some kind, even after the wrongfulness constraint has been satisfied. What is unclear is what the source of such limiting principles ought to be. The important point for the purposes of this Essay, though, is that while the wrongfulness constraint may be satisfied for many of these offenses, the offenses can still be quite troubling as instances of overcriminalization.

V. CONCLUSION

This Essay has argued that (1) *mala prohibita* offenses criminalize disobedience; (2) disobedience is often wrongful; (3) *mala prohibita* offenses can often easily satisfy the wrongfulness constraint. What does this imply about the wrongfulness constraint? It appears that we should not expect much from the wrongfulness constraint as a way of limiting the scope of criminal laws, at least the ones that are in existence and are regularly enforced today. It is of course possible that things could have been much worse without the wrongfulness constraint already working in the background. That is, perhaps criminal laws we have today could have been much broader but are at the current level of breadth due to the lawmakers' awareness of and some consideration of the wrongfulness constraint. Why criminal laws are the way they are today is not the topic of this Essay. The question this Essay has asked is the more limited one of whether the wrongfulness constraint can do much to curb overcriminalization as we understand the phenomenon today. This Essay's answer to that question is probably not, as it is not difficult to identify, in many prevalent and controversially broad *mala prohibita* offenses, an argumentative strategy to build a plausible case for what is morally wrongful about violating them.

[60] 18 USC 1073 (1996); see United States v. Bando, 244 F.2d 833, 843 (2d Cir. 1957) ("'The words 'toavoid prosecution' mean 'to avoid being prosecuted.' The statute does not say 'to avoid a pendingprosecution.' . . . . It is sufficient if the fleeing felon is 'subject to prosecution.'").

Does that mean *mala prohibita* offenses are easily justified? That does not follow, as the primary problem of *mala prohibita* offenses may not be that they violate the wrongfulness constraint but that such offenses can pervade our lives and restrict our ability to cultivate a liberal political culture where individuals can pursue lives free of government oppression. Some of the examples mentioned above, such as those having to do various regulatory offenses, drug and immigration laws, or obstruction of justice offenses, may easily be sources of such oppression. In short, the wrongfulness constraint is of limited use as a way of restricting the scope of criminal law today. And in order to make progress on the problem of overcriminalization, we may need to pour our efforts elsewhere, as the wrongfulness constraint may not be the most productive locus of attention.[61]

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[61] *Cf.* Husak, *Overcriminalization*, pp. 55–177 (distinguishing between 'internal' and 'external' constraints).