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## NORMATIVE GAPS IN THE CRIMINAL LAW: A REASONS THEORY OF WRONGDOING

Luis Ernesto Chiesa Aponte\*

*In this article it is argued that in two controversial homicide cases—severing conjoined twins and downing a hijacked commercial plane headed toward a heavily populated area—it is permissible to kill innocent human beings without having to establish the existence of a claim of justification such as self-defense or choice of evils. Even though criminal law scholars consider that unjustified conduct is always wrongful, the position defended in the article is that there is a normative gap between an absence of justification and a finding of wrongdoing. This “normative gap defense,” which negates wrongdoing without justifying the conduct, is the best way to deal with the troubling homicide cases described above. The normative gap defense is grounded on what is called a “reasons” theory of wrongdoing. According to this theory, the state cannot legitimately prohibit conduct when, in light of the fact that there are powerful utilitarian reasons in favor of performing the act and commanding deontological reasons against performing it, we are in a state of equipoise in which it is impossible for us to determine which course of action is “the right thing to do” (i.e., justified). Under these circumstances, the conduct should be regarded as non-wrongful even though it is unjustified.*

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## I. INTRODUCTION: THE NORMATIVE GAP THESIS

Can the willful and premeditated killing of an innocent human being ever be considered lawful? That was precisely the question the English Court of Appeal had to answer several years ago in one of the most interesting criminal law cases in recent memory: the conjoined twins case.<sup>1</sup> There, a doctor asked for a court order that would authorize him to perform an operation to separate two conjoined twins. The doctor was aware that the weakest of the twins, Mary, would die as a result of the operation. However, by performing the operation the life of the strongest twin, Jodie, could be saved. If the twins remained conjoined, they both would surely die within the next six months. If the doctor performed the operation and Mary died, would he be guilty of criminal homicide? The Court of Appeal answered “no” and, therefore, authorized the severance of the twins.<sup>2</sup> Is there a principled way to account for this solution?

Now, consider a second case. Suppose that Pat and Jamie, a couple of American terrorists, hijack a commercial plane en route to New York City on Labor Day. The plane is carrying two hundred passengers. The hijackers set a course for the plane that leads it on a collision course with the Empire State Building. Military officials in Washington are immediately alerted of the imminent threat. After much deliberation they decide to shoot down the plane in order to avert the hijacker’s attack. They are aware that by shooting down the plane they will kill the innocent passengers on board. Additionally, the officials know that when the plane crashes it will inevitably kill close to one hundred innocent people occupying the space where the plane is expected to crash. The officials shoot down the plane with a mid-range missile. The Empire State building and the lives of the people inside are spared, but only at the cost of the two hundred souls inside the plane and the one hundred innocent people on the ground where the plane crashed. Is there a principled way of concluding that the military officials should not be punished for shooting down the plane and killing the innocent passengers on board and the innocent people on the ground?

My intuitions tell me that both the doctor in the conjoined twins case and the officials in the hijacked plane hypothetical should not be punished

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1. *Re A (children) (conjoined twins: surgical separation)*, [2005] 4 All ER Ca 961.

2. *Id.* at 1018.

for their killing of innocent human beings. Therefore, if I were a judge in these cases I would conclude that both actors should be acquitted and then struggle to find the rationale for writing the opinion. Generally, if a person is not punished it is because his conduct falls into one of the following categories: (1) it does not satisfy the *paradigm* (i.e.; definition) of an offense; (2) it is justified; or (3) it is excused.<sup>3</sup> In this article, however, I will argue that none of the above mentioned categories can be used to explain coherently why the doctor and the officials should not be punished. Consequently, I will attempt to flesh out a fourth category that can adequately explain why both these actors should escape from punishment.

The core question underlying these cases and every other criminal case is whether punishment and condemnation are justifiable under the circumstances. Recognizing this elementary proposition requires us to focus on the logical nature of punishment. My thesis is that in much the same manner as awarding compensation doesn't make sense if there are no damages, imposing punishment is incoherent in the absence of certain logical prerequisites. Among them is the fact that the defendant engaged in a wrongful act.

Consequently, in this article I will attempt to elucidate both the relationship of wrongdoing to punishment and the very meaning of wrongdoing. In the end, I will try to show two things: (1) that the reason why the doctor and the officials should not be punished is because their conduct is not wrongful, and (2) that none of the three traditional categories can satisfactorily explain why their conduct is not wrongful.

The first section of the article briefly examines why punishment doesn't make sense without wrongdoing. I will try to prove this by posing the question, "what is punishment imposed for?" Following a variation of a Hegelian theory of punishment, I will contend that the logically compelled answer to this query is that punishment is imposed for wrongdoing.

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3. These categories represent the traditional approach to criminal law defenses both in the common law and continental tradition. In Anglo-America see, for example, Paul H. Robinson, *Structure and Function in Criminal Law* 11–14 (1997) [hereinafter Robinson, *Structure*]. In Europe see, e.g., Enrique Bacigalupo, *Lineamientos de la Teoría del Delito* 43 (3rd ed. 1994). There is an additional category that explains why some conduct, even though unjustified and unexcused, can be exempt from punishment. Professor Paul Robinson calls this category "non-exculpatory defenses." 2 Paul H. Robinson, *Criminal Law Defenses* 460 (1984) [hereinafter 2 Robinson, *Defenses*]. Non-exculpatory defenses are not of importance for the purposes of this article.

In addition to this I will show that the connection between culpability and punishment is not one of logical necessity but of justice. Therefore, the primary inquiry should turn to determining whether the doctor's and the official's conduct was or was not wrongful.

The second section analyzes the possible meanings of wrongdoing. The inquiry will follow two stages. In the first stage I will explore the relationship between the elements of an offense, justificatory defenses, and wrongdoing. I will conclude that an unjustified infraction of the elements of an offense points strongly in the direction of wrongdoing without conclusively establishing it. In the second stage I will examine two competing approaches to wrongdoing. The first approach, which I call the negative approach to wrongdoing, holds that wrongful conduct consists of an unjustified infraction of the elements of an offense. This negative approach is defended by most, if not all, of the criminal law scholars both in the common law and the continental tradition. Nonetheless, I will defend a second approach, which I will call the positive approach to wrongdoing. Under this approach, wrongdoing is not exhausted by a showing of an unjustified infraction of the elements of the offense. In several instances, something else needs to be proved in order to conclusively establish wrongdoing. The positive approach holds that there is a normative gap between an absence of justification and a finding of wrongdoing. Ultimately, I will attempt to show the superiority of the positive to the negative approach by demonstrating that the only approach that can coherently establish the non-wrongful nature of the doctor's and the official's conduct is the positive one. In other words, I believe that the correct solution to the conjoined twins case and the hijacked plane hypothetical lies in concluding that both actors conducted themselves in a manner that, although unjustified, is not wrongful.

The third and last section constitutes a search for a principle that can explain the gap between an absence of justification and wrongdoing. The principle can be found if one adheres to what I call a reasons theory of wrongdoing. According to this theory, conduct is wrongful if, and only if, the reasons against performing the conduct exceed the reasons in favor of performing the conduct. On the other hand, conduct is not wrongful, because justified, if the reasons in favor of performing the conduct outweigh the reasons against performing it. Finally, I will propose that conduct is not wrongful, although unjustified, when it is impossible for society to determine whether the reasons in favor of performing the conduct outweigh

the reasons against performing it because there are powerful conflicting reasons both in favor and against doing so.

In the cases that I posited at the beginning of this article, it can be said that both the doctor and the officials have strong utilitarian reasons for engaging in the conduct (saving as many lives as possible). Contrarily, the state has commanding deontological reasons for prohibiting the conduct (respecting the inviolability of innocent human life). Different people in society accept these conflicting reasons for action as moral principles that determine the way that they live their lives. Therefore, it is not possible to determine whether the utilitarian reasons in favor of performing the conduct outweigh the deontological reasons against performing it. According to the reasons theory of wrongdoing, the fact that it is impossible for society to choose between these conflicting reasons for action appears as a sufficient basis for not prohibiting the conduct even though it does not provide a proper foundation for justifying the act.

## II. WHAT IS PUNISHMENT IMPOSED FOR?

Scholars have long debated the issue of what is the proper aim of punishment.<sup>4</sup> However, there is an even more fundamental question that remains under theorized: what is punishment imposed for?<sup>5</sup> In this section I will try to give an answer to that question. The analysis will proceed in two steps. First of all, I will attempt to clarify the difference between asking “what is punishment imposed for?” and “what is the aim of punishment?” Next, I will explain that punishment is imposed for the commission of an offense by elucidating how and why the concept of punishment is necessarily connected to the actual or perceived commission of an offense. I cannot cease to stress the importance of the fact that the connection between wrongdoing and punishment is conceptual. In this sense, punishment would simply not make sense without wrongdoing. This will lead me to argue that the relevant inquiry in both the conjoined twins case and

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4. See, e.g., Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *Law & Contemp. Probs.* 401 (1958).

5. Two Anglo-American scholars have actually paid attention to this query: H.L.A. Hart & George P. Fletcher. See H.L.A. Hart, *Punishment and Responsibility* (1968); George P. Fletcher, *What Is Punishment Imposed For?*, 5 *J. Contemp. Legal Issues* 101 (1994).

the hijacked plane hypothetical is ascertaining whether the doctor and the officials have committed an “offense” that would make the imposition of punishment coherent.

### A. Two Different Questions

Every single theorist, whether he defends a consequentialist or a deontological approach to punishment, expresses his view on the subject of punishment and its aims in the following manner: “Punishment is imposed for \_\_\_\_\_ with the aim of \_\_\_\_\_.” For some reason that I still do not understand, these two questions are often confused. In other words, every writer implicitly *must* take a stand on two *very distinct* questions: (1) What is punishment imposed for? and (2) What is the aim of punishment?

Myriad examples can be given in favor of this contention. Hegel, for example, believed that punishment *is imposed for* an action that objectively contradicts the Right *with the aim of* reasserting the Right over the wrong implicated by such an action.<sup>6</sup> For Kant punishment *is imposed for* a criminal action *with the aim of* doing justice.<sup>7</sup> A famous nineteenth-century German criminal law scholar, Anselm von Feuerbach, believed that punishment *is imposed for* an act manifesting disobedience to societal norms *with the aim of* making citizens comply with the norms out of fear of being punished if they do not.<sup>8</sup> For the famous turn-of-the-century Italian scholar Enrico Ferri, punishment *is imposed for* an act demonstrating the moral inferiority of a person’s character *with the aim of* rehabilitating the offender.<sup>9</sup> The same can be said of Anglo-American scholars. Duff, for example, believes that punishment *is imposed for* conduct that has wronged members of a moral community *with the aim of* establishing a dialogue between the wrongdoer and the community.<sup>10</sup> For Fletcher punishment *is imposed for* a wrongful and culpable act *with the aim of* expressing solidarity with the victim.<sup>11</sup>

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6. G.W.F. Hegel, *Philosophy of Right* 69 (T.M. Knox trans., 1942).

7. Immanuel Kant, *The Metaphysics of Morals* 141 (Mary Gregor trans., 1991).

8. Santiago Mir Puig, *Derecho Penal: Parte General* 91 (7th ed. 2004).

9. Alejandro Alagia, Alejandro Slokar, & Eugenio Raúl Zaffaroni, *Derecho Penal: Parte General* 57 (2nd ed. 2002).

10. R.A. Duff, *Penal Communications: Recent Works in the Philosophy of Punishment*, 20 *Crime & Just.* 1 (M. Tonry ed., 1996).

11. George P. Fletcher, *Basic Concepts of Criminal Law* 37–38 (1998).

The linguistic difference between asking “what is punishment imposed for?” and “what is the aim of punishment?” is readily apparent in the Spanish language. It plays on the subtle difference between the Spanish prepositions “por” and “para.” Usually, the preposition “por” is used to signify a past state of affairs while the preposition “para” is used to signify an aim that has yet to be achieved.<sup>12</sup> An example illustrates this point. If a child who has just been scolded by his mother were to ask her, “¿por qué me regañas?” (what am I being scolded for?) she could answer, “por haberme gritado” (for yelling at me). On the other hand, if the child were to ask her, “¿para qué me regañas?” (why are you scolding me?) she could answer, “para que no lo vuelvas a hacer” (so that you don’t do it again).

However inconspicuous it might seem, the interplay between the prepositions “por” and “para” ultimately determine the meaning of the child’s two questions and, therefore, the form the mother will give to her answers. For, in Spanish, “por” is usually used when one wishes to inquire about the causation of events while “para” is usually used when one wishes to inquire about the motivation of the actor. When the child asks, “¿por qué me regañas?” (what are you scolding me for?) he seeks a causal explanation that links his mother’s action (scolding) to an event that triggered it (yelling at his mom). Contrarily, when the child asks, “¿para qué me regañas?” (why are you scolding me?) he seeks not a causal explanation of the event but rather a motivation explaining his mother’s reaction. “Por” inquires about the event that caused the scolding while “para” inquires about the aim the mother had in scolding him. One can now see why it is different saying that “la pena se impone *por*” (punishment is imposed *for*) than saying “la pena se impone *para*” (punishment is imposed *to*). While the latter question seeks a causal explanation that points towards the event that triggered the imposition of punishment, the former query is driven by a desire to discover the aim that motivates the imposition of punishment. The first question should be answered by ascertaining that “la pena se impone por la violación antijurídica de una norma” (punishment is imposed *for* the wrongful violation of a norm). The second question, on

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12. See, for example, the different uses of the word “por” and “para” in a Spanish dictionary. “Por” can be used to inquire into the causation of events while “para” can be used to inquire into the aims or purposes of our actions. These differing functions of both prepositions are not interchangeable. 2 Real Academia Española, *Diccionario de la Lengua Española* 1674, 1803–04 (22 ed. 2001).

the other hand, should be answered by ascertaining that “la pena se impone para disuadir a futuros ofensores” (punishment is imposed *to* deter future offenders—or any other legitimate aim of punishment). In sum, “por,” in this context, is backwards looking while “para” is forwards looking. The same thing should hold in English. The phrase “punishment is imposed *for*” looks towards an event in the past while the phrase “punishment is imposed *to*” looks towards a goal that is to be achieved in the future.

As can clearly be seen through both examples of scholarly opinion on the subject of punishment and through an inquest into the differences between the Spanish propositions of “por” and “para,” the inquiry inevitably turns to the search for an answer to two distinct questions that should not be confused: what is punishment imposed for? (“*¿por qué se impone la pena?*”), and what are the purposes of punishment? (“*¿para qué se impone la pena?*”). What I find more interesting, however, is the fact that while many of these writers substantially diverge on their views concerning the aims of punishment,<sup>13</sup> all of them agree on their views regarding the event that triggers the imposition of punishment: punishment is imposed for the commission of an act that represents an untoward state of affairs. In other words, punishment is imposed for the commission of an *offense*. This is altogether clear in H.L.A. Hart’s conception of punishment since he stresses that one of the constitutive features of punishment is that it must be triggered by “an offense against legal rules.”<sup>14</sup>

This apparent consensus regarding the answer to the question of “what is punishment imposed for?” reveals a deep conceptual connection between the offense and the punishment.<sup>15</sup> This connection highlights the

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13. Hegel, Duff, and Fletcher are retributivists albeit for different reasons (Hegel focused on the abstract “reassertion of the Right” while Duff stresses a “communicative” account of retribution and Fletcher views it as a way of reestablishing equality between victim and offender). Contrarily, Feuerbach and Ferri are consequentialists (Feuerbach believed that general deterrence is the aim of punishment while Ferri believed that special deterrence was the aim of punishment).

14. Hart, *supra* note 5, at 4–5.

15. Fletcher, *supra* note 11, at 35. This definitional or conceptual connection between punishment and the past commission of an offense is also apparent in the works of Leo Zaibert. See, for example, Leo Zaibert, *Punishments, Institutions and Justifications*, 30 *Stud L. Pol. & Soc’y* 51, 53 (2003) (stating that “[p]unishment, *by definition*, is an act carried out in response to something else . . . .” (emphasis added)).

centrality of the concept of “wrongdoing” in explaining the true nature of punishment in so far as it entails inflicting pain upon a person *for* having committed an offense and not just *for the sake* of social protection.<sup>16</sup> This logical or conceptual connection between *offense* and *punishment* reveals that imposing punishment without the commission of an offense would be akin to the state’s production of random and arbitrary violence.

Ultimately, every time an actor is threatened with the imposition of punishment the threshold inquiry must be to ascertain whether or not the actor committed a wrongful act “for which” punishment is to be imposed. Consequently, the relevant inquiry in both the conjoined twins case and the hijacked plane hypothetical is to determine whether the doctor’s and the officials’ conduct constitutes an “offense” that triggers the imposition of punishment.

## B. About the Meaning of “Offense”

I would like to briefly explain what an offense is in this context and elucidate how and why the concept of punishment is necessarily connected to the commission of an offense.

When someone commits an offense he is either implicitly or explicitly calling into question the efficacy of a norm,<sup>17</sup> because the communicative aspect of his act demonstrates that the offender is unwilling or unable to abide by the rules that a given society deems to be necessary in order for its citizens to organize their lives in an adequate manner. In turn, this calling into question of the efficacy of the norm has the effect of frustrating the expectation of law-abiding citizens that such norms will be observed.<sup>18</sup> Punishment represents the reaction to this frustrated expectation.<sup>19</sup> Consequently, the act of punishment serves to reestablish the efficacy of the norm after it has been called into question by the commission of an offense. In this manner, the expectation that law-abiding citizens have

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16. Fletcher, *supra* note 11. Of course, this should not be read to mean that punishment cannot serve the purpose of social protection. See, e.g., Francisco Muñoz Conde & Mercedes García Arán, *Derecho Penal: Parte General* 50–51 (6th ed. 2004).

17. Günther Jakobs, *Imputation in the Criminal Law and the Conditions for Norm Validity*, 7 *Buff. Crim. L. Rev.* 491, 495 (2004).

18. *Id.* at 496.

19. Muñoz Conde & García Arán, *supra* note 16, at 35.

regarding the observance of norms is reinforced by the imposition of punishment upon those who shattered that expectation with the commission of an offense.

Notice that an actor violates the norm even if he is excused. Therefore, his conduct calls into question the efficacy of such a norm and could, in principle, trigger the imposition of punishment in order to reassert the efficacy of the infringed norm. Suppose, for example, that Allan, a deranged lunatic, kills Bill believing him to be the devil. Allan's conduct clearly violates the norm against homicide. That is why the language found in modern formulations of the insanity defense presupposes the violation of the norm when it requires the actor not to be aware of the "*wrongfulness* of his act."<sup>20</sup> In other words, in order to establish a valid claim of insanity the actor must concede that his conduct was wrongful (i.e., violated the norm). Therefore, societal expectations that norms will be followed are still disturbed by Bill's conduct. Punishment can be coherently imposed for his norm violation in an attempt to reinforce the societal expectations that were shattered by Bill's wrongful conduct. Therefore, if we decide not to punish Bill based on the excuse of insanity we are somehow asserting that, even though punishing him for his norm violation would be perfectly coherent, we believe that it would be unjust to do so. Consequently, under my theory, it seems clear that the connection between punishment and wrongdoing is one of logical necessity and not of justice.<sup>21</sup> That is why punishing insane Bill would be coherent even if it would be utterly unjust to do so. It would be coherent to punish Bill for

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20. See, for example, the Model Penal Code's the formulation of the insanity defense. Model Penal Code §4.01 (Proposed Official Draft 1962) (actor not responsible if he lacks capacity to appreciate the *criminality or wrongfulness* of his act). An actor who alleges the excuse of mistake of law also implicitly admits that his conduct violated the norm (i.e., is "wrongful"). His defense rests on his admittedly mistaken perception that the norm was not violated. It is more difficult to see why someone who establishes a claim of duress or excusable necessity (i.e., "personal necessity") implicitly admits the violation of the norm. Maybe the fact that an actor may exert self-defense against someone acting under duress or excusable necessity indirectly supposes that the norm was violated since self-defense can only be exerted against a "wrongful" aggression. I'm grateful to Professor George P. Fletcher for pointing this out.

21. Fletcher, however, could be read in a way that could lend support to a different proposition. Namely, that punishment is imposed for a culpable and wrongful norm violation and not merely for a wrongful one. In his words: "[p]unishment is imposed, therefore, for wrongdoing as reduced by the extent to which culpability is diminished." Fletcher, *supra*

his wrongdoing in the sense that doing so would not appear to be an act of random brutality.

This can be summarily restated in the following fashion:

- (1) The commission of an offense calls into question the efficacy of a norm.
- (2) This calling into question of the efficacy of the norm frustrates the expectations that law-abiding citizens have that such norms will be observed.
- (3) Punishment reasserts the efficacy of the norm infringed by reinforcing the expectations that law-abiding citizens have regarding the observance of norms.
- (4) When an actor is excused society chooses, out of compassion for the actor, not to punish the offender even though punishing him would be coherent (though unjust) because his conduct called into question the efficacy of the norm by violating it.

The relationship between punishment, offense, and norms now becomes apparent. By violating the norm the offender calls into question its efficacy and it is by virtue of punishing the offender for his violation that the efficacy of the norm is reestablished. In other words, punishment is the reaction to an act of *wrongdoing* (i.e., violation of a norm) that has the effect of reasserting the efficacy of the norm that was infringed by the wrongful act. This position is compatible with the core views held by desert theorists since in order to deserve punishment one must have committed a wrongful act. However, contrary to the views shared by most desert theorists, I believe that punishing an excused offender is perfectly coherent even though it might be blatantly unjust.

It is now clear that what needs to be ascertained in assessing whether the doctor and the officials should be punished for their conduct is whether their conduct constitutes an offense. In a deeper sense what needs to be assessed is whether their conduct was wrongful (i.e., violated a norm)

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note 5, at 109. If his view were that punishment is imposed both for a wrongful and culpable act I would have to disagree. As I have attempted to show, conceptually speaking, punishment is imposed *for* wrongdoing and nothing more. The relationship between culpability and punishment is not a matter of conceptual necessity but of justice. However, I find it unclear from his writings whether he actually supports this view or the one I defend in this Article. See Fletcher, *supra* note 5, at 105 (stating that punishment “is imposed for the act of wrongdoing”).

and, therefore, whether it should be interpreted as a calling into question of the efficacy of the norm. This necessarily requires an elucidation of the concept of wrongdoing because, as I have tried to show, an understanding of the meaning of punishment can only be achieved by an understanding of the meaning of crime (i.e., of offense, wrongdoing, or norm violation). Nozick summed this up in a simple yet illuminating formula that adequately explains the relationship between wrongdoing and punishment.<sup>22</sup> According to his formula, punishment is the product of the amount of wrongdoing times the degree of responsibility (on a scale of 0 to 1). Algebraically stated, Nozick's formula looks like this:  $P = W \times R$ .<sup>23</sup> Notice the centrality of the concept of wrongdoing in this formula. Punishment is imposed *for* wrongdoing. Without wrongdoing it would not even make sense to talk about the "responsibility" of the actor since one would be left asking oneself "responsibility for what?" This helps to explain why, in absence of wrongful conduct, punishment would become an arbitrary decision. Culpability only determines the amount of punishment to be imposed. The less culpability the offender exhibited while performing the wrongful act the less punishment he deserves.

In sum, determining whether or not the doctor's and the officials' conduct was wrongful is of the utmost importance because punishing them would only be coherent if it is in reaction to the wrongful violation of a norm whose efficacy is thus called into question.

### III. THE MEANING OF WRONGDOING— THE RELATIONSHIP BETWEEN THE PARADIGM<sup>24</sup> OF AN OFFENSE, JUSTIFICATION DEFENSES, AND WRONGDOING

I have tried to show that punishment can only be imposed for wrongdoing. That is, no punishment can be coherently imposed when there is no wrongdoing *no matter what theory of punishment one espouses*. Therefore,

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22. Robert Nozick, *Philosophical Explanations* 363 (1981); see also Fletcher, *supra* note 5, at 109.

23. Where P equals "punishment", W equals "wrongdoing" and R equals "responsibility".

24. The term "paradigm" is used as a translation for the German "tatbestand" and the Spanish "tipo." Roughly speaking, the "paradigm" of an offense is equivalent to the "definition

I now turn to the fundamental inquiry of whether or not the doctor's and the officials' action was wrongful. In assessing whether the doctor's (had he performed the operation without asking for judicial authorization) and the military officials' actions were wrongful, one must necessarily evaluate two distinct aspects of their conduct: (1) did it satisfy the paradigm of the offense of homicide? and (2) was it justified under any conventionally recognized justificatory claim such as self-defense, necessity, or public duty?

### A. The Paradigm and Wrongdoing

Killing someone intentionally is the normal or paradigmatic case of a punishable murder. Likewise, damaging the property of another is a paradigmatic or typical case of punishable criminal mischief. For every instance of what we regard to be traditional crimes there are hypothetical cases that portray what we take to be the usual or paradigmatic cases of punishable commission of such offenses. The above-mentioned examples represent such hypothetical cases. Namely, in normal or paradigmatic cases, those who intentionally kill someone are liable for murder and those that damage the property of another are liable for criminal mischief. Of course, someone who intentionally kills another can escape liability for murder by proving that the killing took place in self-defense. Similarly, someone who damages the property of another might avoid liability by establishing that his act was necessary in order to avoid a greater evil or harm or by proving that he was insane at the time he performed the wrongful action. These hypothetical cases, therefore, represent watered down descriptions of the crime. They represent only the inculpatory facet of the offense without regard to possible claims of justification or excuse. However, these examples constitute a useful tool with which to explain to someone the essence or core of the punishable crime of murder or criminal mischief.

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(or elements) of an offense.” However, “paradigm” should be preferred over “definition” because it illuminates the fact that conduct infringing the elements of an offense is a normal or paradigmatic case of wrongful conduct. Of course, one may prove that this instance of “normally” wrongful conduct is, exceptionally, not wrongful. See Albin Eser, *Justification and Excuse: A Key Issue in the Concept of Crime*, in 1 *Justification and Excuse: Comparative Perspectives* 17, 37 (George P. Fletcher & Albin Eser eds., 1987).

Most people refer to this core aspect of the crime as the “elements of the offense.”<sup>25</sup> Fletcher has suggested that we use the term “Definition” (of the offense).<sup>26</sup> In Spanish, we use the word “tipo” as a means of implying that the violation of the elements of the offense represents the typical case of a punishable crime.<sup>27</sup> This is why I propose that we use the term “paradigm” to capture the typical or normal case of punishable offenses. The paradigm of the offense describes the standard or paradigmatical instances of punishable crimes.

Of course, since the paradigm of the offense represents a watered down version of the offense, its mere infraction does not necessarily entail that the conduct is wrongful or punishable. In cases of justification, for example, conduct infringing the paradigm of the offense is considered non-wrongful. By the same token, in cases of excuse, conduct infringing the paradigm of the offense is considered wrongful but not blameworthy and, therefore, not punishable.

Now we can examine whether the doctor’s and the officials’ conduct satisfied the paradigm of homicide. There should be little doubt that they both intentionally killed human beings. The doctor in the conjoined twins case was aware that the death of Mary was a natural consequence of performing the operation. By the same token, the military officials were aware that the death of the passengers on the hijacked airplane and of the innocent people on the ground was a necessary result of shooting down the plane. This is all that is necessary to establish the paradigm of the offense of murder in both cases.<sup>28</sup> Furthermore, both the doctor and the officials satisfy the paradigm of murder by virtue of affirmative acts and not by mere omissions. This distinction turns out to be crucial since, as some scholars have noted, it is usually easier to justify letting a person die because of an omission than killing a person through a voluntary act.<sup>29</sup> Both the conjoined twins case and the hijacked plane hypothetical, however, represent troubling instances of killing and not of letting die.

25. See, e.g., Robinson, *supra* note 3, at 22.

26. Fletcher, *Rethinking Criminal Law* 554 (2000); Fletcher, *supra* note 11, at 102.

27. See, e.g., Mir Puig, *supra* note 8, at 222–23.

28. The awareness that the result is a natural consequence of the action to be performed suffices to establish the mental element required for the crime of murder. Model Penal Code §§ 2.02(2)(b), 210.2(1)(a) (Proposed Official Draft 1962).

29. Fletcher, *supra* note 11, at 67–68.

However, as I previously stated, actions infringing the paradigm merely represent normal or typical instances of punishable crimes. They may, nonetheless, turn out not to be wrongful (and therefore, not punishable) if one of the exculpatory dimensions of the crime, a justification defense, is established.<sup>30</sup>

This can be better understood by an example. Suppose that Nice Guy broke the door of his Ford pickup. Did Nice Guy's action infringe the *paradigm* of an offense? According to the Model Penal Code (MPC), the paradigm of the only offense that he might have committed, criminal mischief, is composed of the following elements: (1) causing damage, (2) to the property of another.<sup>31</sup> From the MPC's description of the offense of criminal mischief it follows that Nice Guy did not satisfy the *paradigm* of the crime since it requires that the property damaged be owned by a person other than the person who damages it. Since the statutory law provides no prohibitions against the performance of conduct such as Nice Guy's, he does not need to give reasons that explain why he should not be punished and, therefore, his conduct is irrelevant for the criminal law from the very outset. Now, suppose that Nice Guy intentionally breaks the door of a car owned by somebody else. In this case Nice Guy infringed the paradigm of the offense of criminal mischief.<sup>32</sup> That is, Nice Guy's conduct is *normally* or *typically* wrongful and, consequently, punishable. However, this does not necessarily mean that Nice Guy's conduct was wrongful since, according to the MPC, his conduct might not be wrongful if he establishes a valid claim of justification such as choice of evils (necessity).<sup>33</sup> For example, if Nice Guy broke the door in order to save a suffocating child that was left alone inside the car, we would say that even though he satisfied the elements of the paradigm of criminal mischief, he did not act wrongfully because his action is justified by virtue of the choice-of-evils defense. Consequently, we can conclude that the fact that Nice Guy infringed the paradigm of the offense of criminal mischief merely makes his action relevant for the criminal law in a way that actions not satisfying the elements of the offense (such as in the first example) are not.

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30. Of course, actions infringing the paradigm might not be punishable because, even though wrongful, they are excused.

31. Model Penal Code § 220.3(1)(a) (Proposed Official Draft 1962).

32. *Id.*

33. Model Penal Code §§ 3.01–3.02 (Proposed Official Draft 1962).

In sum, the fact that both the doctor and the officials satisfied the elements of the paradigm of homicide merely makes their action relevant for the criminal law. The action becomes relevant because it points in the direction of wrongdoing. However, in order to establish that their conduct was wrongful one must not only prove that it constitutes a normal or paradigmatic case of wrongdoing but also that it was wrongful all factors are considered.

## B. Justification and Wrongdoing

The fact that their conduct satisfied the paradigm of the offense of homicide entails that their conduct is considered to be typically or normally wrongful. They, however, may deny that their conduct falls within the scope of the typical instances of wrongful behavior signified by the paradigm. That is, they may assert that their conduct is not wrongful by trying to establish a claim of justification. Justifications are conventionally recognized permissions to infringe the paradigm of the offense. The permission is based on the assumption that under a certain set of circumstances, infringing the paradigm is, all things considered, the right thing to do.<sup>34</sup> According to the common law, recent statutory enactments such as those following the MPC, and comparative criminal law, these justificatory claims invariably turn out to be three: (1) self-defense or defense of others (necessary defense), (2) public or law enforcement duty, and (3) necessity (choice of evils).<sup>35</sup>

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34. Some scholars, such as Mitchell Berman, believe that this description of justificatory defenses is wrong. According to this strand in criminal law theory, for something to be justified it need not be the “right thing to do” under the circumstances. It may suffice for the conduct to be “permissible” under the circumstances. See generally Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 *Duke L.J.* 1 (2003). Notwithstanding its several appeals, I disagree with that position. My disagreement flows from the fact that both in ordinary and philosophical parlance, to be “justified” in doing something usually entails something more than being “permitted” to do it. Therefore, when we claim to be “justified” in doing something we usually mean that doing so is not merely a permissible course of action but the “right” one.

35. In Anglo-American criminal law and the MPC see generally Robinson, *supra* note 3, ch. 4. In continental criminal law see, generally, Enrique Bacigalupo, *Derecho Penal Parte General* §§ 49–52 (2d ed. 1999).

I stated before that conduct infringing the paradigm of the offense is conduct that should be regarded as *prima facie* wrongful. A claim of justification, however, serves to negate the *prima facie* wrongfulness of the act by establishing that the conduct was, all things being considered, the right thing to do under the circumstances.<sup>36</sup> If John kills Alan because it was necessary in order to ward off Alan's unjustified aggression, we may say that John's killing of Alan in self-defense, even though *prima facie* wrongful because it satisfied the paradigm of the offense of homicide, is not wrongful because, all things being considered, it was the right thing to do. By the same token, Nice Guy's breaking the window of a car in order to save a suffocating child inside would be *prima facie* wrongful because it satisfied the paradigm of the offense of criminal mischief but would nonetheless be justified under a theory of necessity because, all things considered, his action was the right thing to do under the circumstances. The same would hold for an actor that is justified under any other conventional justificatory claim such as public duty.

In sum, establishing a conventionally recognized justificatory claim defeats the *prima facie* judgment of wrongfulness implicit in an infraction of the paradigm of the offense because the existence of justificatory circumstances makes the conduct, all things being considered, the right thing to do under the circumstances.

Consequently, both the doctor and the officials may attempt to avoid punishment by showing that their conduct falls within the scope of a conventionally recognized justificatory claim that negates the wrongfulness of their action. Therefore, it is now necessary to analyze whether their conduct can be justified under existing theories of necessary defense, necessity, or public or law enforcement duties.

The opinions in the conjoined twins case lend some support to the notion that the doctor was acting in defense of Jodie. However, as I shall attempt to prove, the possibility of justifying the doctor's conduct by virtue of necessary defense should be rejected from the outset. The reason for this is that necessary defense is only valid if one is repelling a *wrongful aggression*,<sup>37</sup> and such an attack is missing both in the conjoined twins case and in the

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36. See, e.g., Fletcher, *supra* note 26, at 792 (stating that "a justification speaks to the *rightness* of the act").

37. See, generally, Joshua Dressler, *Understanding Criminal Law* § 18.02(b)(1) (3d ed. 2001); Fletcher, *supra* note 26, at 760.

hijacked plane hypothetical. Even though the fact that Mary is not a wrongful attacker seems intuitively obvious, some scholars' work seems to lend support to the opposite assertion. Judith Jarvis Thompson, for example, has attempted to describe fetuses as unnatural intruders invading the sanctity of the mother's body.<sup>38</sup> If one accepts Thompson's position, it would only take a small step to conclude that a conjoined twin such as Mary could be portrayed as an "unnatural intruder" invading the body of her sister Jodie.

This appears to be the metaphor that drives the parts of the opinions in the conjoined twins case that suggest that such a description of the situation is plausible. Characterizing these cases in such terms, despite being, to quote a scholar's take on the subject, a "tempting metaphor,"<sup>39</sup> should ultimately be rejected. The reason for this lies in the moral quality of the acts that may trigger a response in necessary defense. It seems obvious to me that the aggression triggering a justified defensive response should, at least, be reflective of human agency. Attacks lacking human agency are simply not of the same moral quality as acts that reflect human agency. As one scholar has noted,<sup>40</sup> this is the lesson to be learned from Holmes's oft-cited assertion that "even a dog distinguishes between being stumbled over and being kicked."<sup>41</sup>

This difference should be taken into account when examining the law of necessary defense. The relevance of the elementary distinction between attacks that are the product of human agency (intentionally hitting a person) and those that are not (being tripped and falling on top of a person) is one of the keys to understanding what constitutes a "wrongful attack" for the purposes of necessary defense. Because of their different moral quality, only attacks reflecting human agency should be considered "wrongful" in this context. This assertion finds much support in continental criminal law doctrine.<sup>42</sup> As the leading Spanish commentator in the law of necessary defense once stated in order to demonstrate why instances

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38. Judith Jarvis Thompson, *A Defense of Abortion*, 1 J. Phil. & Pub. Aff. 47 (1971).

39. Fletcher, *supra* note 26, at 863.

40. *Id.*

41. Oliver Wendel Holmes, *The Common Law* 3 (2004).

42. In Germany, see Claus Roxin, *Derecho Penal: Parte General* 612 (Diego-Manuel Luzón Peña, Miguel Díaz y García Conlledo, & Javier de Vicente Remesal trans., 1997). In Spain see Mir Puig, *supra* note 8, at 431. In Latin America see Alagia, Slokar, & Zaffaroni, *supra* note 9, at 618.

lacking human agency are not wrongful attacks that may trigger a justified defensive reaction,

The addressees of legal norms are persons capable of intelligence and will-formation. Therefore, legal norms may prohibit—or declare to be wrongful—a person's voluntary acts but they can not prohibit natural events or causal processes that are not the product of human will (such as the production of harmful results produced by a person who is unconscious or an epileptic)<sup>43</sup>

Ultimately, even if one concedes that Mary is attacking Jodie (and whether this is ultimately true is also dubious), it seems clear that such an attack should not trigger a justified response in necessary defense because the absence of human agency precludes the possibility of finding that there is a wrongful attack. Summarily stated, if there is no act there can be no wrongful attack.

The situation regarding the hijacked plane hypothetical is more complicated. While the officials could obviously claim that the hijackers are wrongful attackers, they most certainly cannot claim the same thing about the passengers inside the plane or about the people on the ground that will die as a result of the plane going down. They (people inside the plane and people on the ground) are innocent non-harmful bystanders. It seems fairly clear from this that there is no possibility of justifying either the doctor's or the officials' conduct under a theory of necessary defense.

One may try to justify the officials' conduct under a theory of public duty or law enforcement authority. Ultimately, however, this claim is equally implausible. It is settled law that the use of deadly force pursuant to law enforcement authority or a public duty is limited to a small number of instances. Namely, deadly force can never be justified under a theory of law enforcement authority or public duty if it presents a substantial risk of injury to innocent non-harmful third parties. This is made explicit in the Model Penal Code.<sup>44</sup> Since by shooting down the plane the officials create a substantial risk of death both for the passengers inside the plane and the people on the ground, their conduct cannot be justified under a law enforcement authority or public duty exemption.

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43. Diego-Manuel Luzón Peña, *Aspectos Esenciales de la Legítima Defensa* 127 (2d ed. 2002).

44. See Model Penal Code § 3.07(5)(a)(i), (2)(b)(3) (Proposed Official Draft 1962); Dressler, *supra* note 37, § 21.05 (B), (C).

Courts and scholars have attempted to resolve these fact situations using the justificatory necessity defense. This seems to be the position of the drafters of the MPC as well.<sup>45</sup> Notwithstanding its several appeals, this solution finally turns out to be untenable from a deontological point of view because it ends up justifying by virtue of necessity the killing of an innocent human being in order to save another human being. This solution finds no support under the common law that, for good reason, does not recognize a defense of justifiable necessity in cases of intentional homicide.<sup>46</sup> In *Regina v. Dudley and Stephens*, for example, the Queen's Bench rejected the possibility of justifying homicide by virtue of the necessity defense because, among other things, they believed that it was impossible to measure the "comparative value of [human] lives . . ."<sup>47</sup> The great Benjamin Cardozo was even more explicit on this point when he stated that "[w]here two or more are overtaken by a common disaster, there is no right on the part of one to save the lives of some by the killing of another. *There is no rule of human jettison.*" Cardozo then urges us to ask, "[w]ho shall choose in such an hour between the victims and the saved?"<sup>48</sup> He was evidently suggesting that nobody could legitimately choose between them. Underlying his claim is the sound Kantian principle that no human being can be used as a means to an end.<sup>49</sup> This position dovetails with religious teachings. In one famous passage of the Talmud, for example, a young man is advised, "be killed and do not kill; do you think that your blood is redder than his? Perhaps his is redder than yours."<sup>50</sup> In a similar vein, one could ask if Jodie's blood is redder than Mary's or if the blood of the innocent passengers and people on the ground is redder than the blood of the people in the Empire State Building.

This is not to say that taking risks that endanger human life can never be justified. It appears to be settled law that it is not wrongful to take a

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45. Model Penal Code § 3.07, cmt. c, at 131 (Official Draft and Revised Comments 1980).

46. 4 William Blackstone, Commentaries on the Laws of England 30 (1979), *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884), *U.S. v. Holmes*, 26 F. Cas. 360 (Pa. 1842). See also Perkins & Boyce, *supra* note 8, at 1055–59; George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. Cal. L. Rev. 1269, 1278–79 (1974).

47. 14 Q.B.D. 273, 287.

48. Benjamin Cardozo, *Law and Literature* 113 (1930) (emphasis added).

49. Kant, *supra* note 7, at 60; Fletcher, *supra* note 46, at 1279.

50. Talmud, *Pesahim* 25 (b).

risk that endangers human life if the risk is outweighed by forceful considerations. Let's say, for example, that someone drives at dangerously high speeds in order to take a dying person to the hospital. Taking such risks is permissible under both Anglo-American<sup>51</sup> and continental criminal law.<sup>52</sup> The reason for this lies in the fact that the absolute prohibition against the taking of human life only applies if it is done "intentionally." When the possibility of the death of an innocent human being is merely "probable," in contrast to "inevitable," there is consensus, even among religious scholars, that the absolute prohibition against killing innocent life is simply inapplicable.<sup>53</sup> Philosophers and religious commentators use the theory of "double effect" to justify such a solution.<sup>54</sup> According to this theory, the driver would be justified in taking such a risk because his intention was to save the dying passenger by rushing him to the hospital and not to kill or to put innocent lives at risk. The killing or putting at risk of innocent lives would be described under the double effect theory as an unintended consequence of his action. Under the MPC this solution is even more obvious since one need not resort to the theory of necessity to justify the conduct of the person driving the car in order to save someone who is dying because the action would simply not satisfy the minimum culpability requirements of the offense of homicide. This follows from the fact that the driver's conduct should not be characterized as reckless or negligent since the risk taken was reasonable under the circumstances.<sup>55</sup>

In sum, the taking of innocent human life cannot be justified in cases of intentional killing. However, taking risks that endanger the lives of human beings might be justified as long as there are good reasons for doing so and the occurrence of death is not certain.

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51. See Model Penal Code § 2.02 (2)(c) cmt. 3, at 237 (Official Draft and Revised Comments 1980).

52. Muñoz Conde & García Arán, *supra* note 16., at 294–95.

53. See Kent Greenawalt, *Natural Law and Political Choice: The General Justification Defense—Criteria for Political Action and the Duty to Obey the Law*, 36 *Cath. U. L. Rev.* 1, 12–13 (1986) (citing authorities).

54. See, e.g., Michael Walzer, *Just and Unjust Wars* 152–59 (3d ed. 2000).

55. I would like to clarify that some scholars argue that, if the actor's purpose was to save lives and not to kill, the doctrine of double effect can also be used to justify engaging in conduct that inevitably will produce the death of another person. I believe, however, that engaging in conduct that is practically certain to cause the death of an innocent human being can never be justified.

The basic principle that prohibits the intentional taking of human life underlies the general theory of necessity elaborated by continental criminal law doctrine as well. Therefore, most, if not all, continental criminal law scholars believe that a purposeful or knowing homicide can never be justified by virtue of necessity.<sup>56</sup> Their position is summed up by Andenaes, a famous Norwegian scholar, in the following manner: “[e]ven though many lives could be saved by the sacrifice of one, this would hardly be justifiable. It would conflict with the general attitude toward the inviolability of human life to interfere in this way with the course of events.”<sup>57</sup> In other words, the doctor in the conjoined twins case cannot relinquish the life of Mary as a means to save the life of Jodie and validly claim to be justified.<sup>58</sup> By the same token, the military officials cannot sacrifice the lives of the passengers in order to save the lives of the occupants of the Empire State Building and claim to be justified.<sup>59</sup>

Therefore, it turns out that the doctor’s and the officials’ conduct infringes the paradigm of the offense of murder without satisfying the conventionally accepted criteria of justification. However, as I will try to demonstrate later, there is a way of recognizing the non-wrongful nature of their actions without having to justify their conduct.

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56. See, e.g., Alagia, Slokar, & Zaffaroni, *supra* note 9, at 631 (stating that it is impossible to weigh the value of competing human lives).

57. Johannes Andenaes, *The General Part of the Criminal Law of Norway* 169 (Thomas Ogle trans., 1965).

58. Several scholars have questioned this basic tenet of the common law. See, e.g., Wayne R. LaFare, *Substantive Criminal Law* § 10.1 (d)(2) (2d ed. 2003). Professor Joshua Dressler seems to flirt with this solution as well. Dressler, *supra* note 27, §22.04. The drafters of the Model Penal Code broke, as well, from this tradition when they stated that it would be possible to grant a necessity defense to actors who kill innocent human beings in order to save a larger amount of lives. See Model Penal Code § 3.02, cmt. 3, at 14–15 (Official Draft and Revised Comments 1980). This position strikes me as clearly objectionable from deontological grounds. I cannot accept the view that human lives can be used as a means to achieve an end (even if the end is to save human lives). For this reason the common law viewpoint is preferable to the MPC’s. Furthermore, the MPC solution has never gained acceptance in the civil law tradition. It seems clear to continental criminal law scholars that the death of a non-harmful person can never be justified under a theory of necessity. See, e.g., Hans-Heinrich Jescheck & Thomas Weigend, *Tratado de Derecho Penal: Parte General* 387 (Miguel Olmedo Cardenete trans., 2d ed. 2002).

59. Of course, the officials could validly claim self-defense against the hijackers. Self-defense, however, is unavailable as a defense to the killing of the passengers since they were innocent third parties who did not unlawfully attack the occupants of the building.

Contrary to common scholarly opinion,<sup>60</sup> even though it is clear that a claim of justification negates wrongdoing, it is not at all clear whether an absence of justification necessarily implicates wrongfulness. I have asked many people about the proper solution to these hypotheticals. Most, if not all, conclude that both the doctor's and the military officials' conduct should not be considered wrongful.<sup>61</sup> This common intuition, which I most certainly share, flies in the face of the traditional theory of wrongdoing as an unjustified infraction of the paradigm of the offense. If it is true, as I argue, that punishment is imposed for wrongdoing, and if our intuitions regarding the non-wrongful nature of the doctor's and the officials' conduct are sound, it follows that wrongdoing is not conclusively established by proving that there was an unjustified infraction of the paradigm because, as I have attempted to prove, both the doctor and the officials unjustifiably infringed the paradigm of the offense of homicide.

While it is true that the existence of justification negates wrongdoing, the contrary is not true. An absence of justification does not categorically entail wrongdoing. The connection between justification and wrongdoing is more complicated. The absence of justification strongly suggests the existence of wrongdoing without definitely establishing it. In other words, the existence of wrongdoing is presumed by a showing of an unjustified infraction of the paradigm of the offense. Nonetheless, this presumption may be rebutted. The defense that serves to rebut this presumption of wrongdoing is what I have come to call the "normative gap" defense.

In the next section I will try to explain how it is conceptually possible to describe an action as a non-wrongful infraction of the paradigm even though it is not justified. In other words, I will show how it is possible for a normative gap to exist between an absence of justification and a finding of wrongdoing. Afterwards, in the last section, I will explain how this normative gap works and, therefore, how an actor may attempt to negate

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60. For examples of scholars who hold this common opinion in the United States see Fletcher, *supra* note 11, at 80–81. In Spain, see Mir Puig, *supra* note 8, at 164; and in Latin America, see Alagia, Slokar, & Zaffaroni, *supra* note 9, at 590.

61. For example, Professor Fletcher, an avowed kantian and retributivist, has expressed to me that he considers that, even though not justified, both the doctor and the officials are acting in a non-wrongful manner.

the wrongfulness of an action infringing the paradigm without establishing a valid claim of justification.

### C. The Normative Gap and Positive and Negative Approaches to Wrongdoing

The relationship between an absence of justification and wrongdoing is similar to the relationship between enacted law and law in principle. The distinction between enacted law and law in principle is more easily expressed in other languages. In Spanish, for example, the query has to do with the connection between *ley* (enacted or positive law) and *derecho* (law in principle).<sup>62</sup> The positive law (*ley*) is composed of the law enacted in the manner established by a legal system's rule of recognition.<sup>63</sup> In the American legal system, for example, the positive law consists of the conventionally recognized legal materials, namely, the Constitution, statutes, and case law.<sup>64</sup> Law in principle (*derecho*), on the contrary, is composed of the basic principles that are immanent in the legal order. These basic principles could be found in the specific rules of the positive law but do not necessarily need to be. *Derecho* transcends the positive law. This explains why, on occasions, there is a gap between the enacted law and the law in principle. This is precisely the gist of Dworkin's criticism of Hart's concept of law. Hart thought that this gap was filled by morality (or politics) while Dworkin thinks that *derecho*, in the form of his principles, fills this gap.<sup>65</sup> Furthermore, the law in principle is more basic and fundamental than the enacted law. As one scholar has noted, what is taught in most criminal law courses is *derecho* and not *ley*.<sup>66</sup> That is why in Spain they study "*derecho*

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62. As Professor Fletcher has noted, even though *ley* and *derecho* are easily translatable into many languages, the translation to English is quite difficult. For example, the Germans have the terms *gesetz* and *Recht* and the French have the terms *loi* and *Droit*. See George P. Fletcher, *Basic Concepts of Legal Thought* 35 (1996).

63. I am employing the concept "rule of recognition" in the sense given to it by Hart. See H.L.A. Hart, *The Concept of Law* 94 (2d ed. 1994).

64. Certain other legal rules in the American legal system form part of the positive law. Administrative regulations are good examples of these rules.

65. Dworkin readily accepts the difference between positive law and law in principle. See, e.g., Ronald Dworkin, *Law's Empire* 217 (1986).

66. Fletcher, *supra* note 62, at 209.

penal” and not “*ley* penal” and in Germany they study “*Strafrecht*” and not “*Straf gesetz*.” Thus, in the United States we study the basic principles of criminal law and not merely the laws relating to the field. That is, we study law in principle and not merely enacted law.

The same is true for the relationship between an unjustified infringement of the paradigm and wrongdoing. An unjustified infringement of the paradigm is equivalent to *ley* and wrongdoing is equivalent to *derecho*. In other words, satisfying the elements of the offense unjustifiably only establishes wrongdoing according to the positive law (this includes the conventional rules of justification). However, wrongdoing in principle is not conclusively established by demonstrating this. There is a gap between an unjustified infraction of the paradigm and wrongdoing in much the same manner that there is a gap between *ley* and *derecho*. Just as the positive law merely points in the direction of the law in principle, an unjustified commission of the elements of the offense merely points in the direction of wrongdoing.

While the traditional opinion among scholars has been that the absence of justification implies wrongdoing, this need not necessarily be the case. For the sake of brevity I will call the former thesis the negative approach to wrongdoing and the latter, my thesis, the positive approach to wrongdoing. As one can see, the answer to the question of whether the doctor’s and the officials’ conduct was wrongful depends on which approach one adopts. For those in favor of the negative approach to wrongdoing, there is no other option than saying that their conduct was wrongful. On the contrary, to those in favor of the positive approach to wrongdoing, the possibility of a normative gap between an unjustified infringement of the paradigm and wrongdoing opens up the likelihood of negating the wrongfulness of their actions.

Now, just in the same way as the gap between *ley* and *derecho* is grounded in principles, the normative gap between an absence of justification and wrongdoing must be grounded in principles. Various principles may account for this normative gap. During the next sections, I will try to identify a principle that might explain the gap. What ultimately is at stake is the meaning of wrongdoing. For the advocates of the negative theory, the meaning of wrongdoing is exhausted by the unjustified infraction of the paradigm. For a defender of the positive approach, like me, wrongdoing is composed of something transcending the conventional rules.

## IV. THE REASONS THEORY OF WRONGDOING

In this section I will develop a theory of wrongdoing that can successfully account for the normative gap between an absence of justification and wrongdoing in much the same way as Dworkin's theory of integrity or of principles accounts for the gap between *ley* and *derecho*. I will call this theory the reasons theory of wrongdoing. I will illustrate how the reasons theory of wrongdoing adequately accounts for this normative gap in three steps. First, I will provide a definition of wrongdoing according to the theory. Second, I will explain how my reasons theory accounts for the fact that justificatory claims negate wrongdoing. Third, I will explicate how my reasons theory provides a vehicle for negating wrongdoing without justifying the conduct.

### A. Defining Wrongdoing According to the Reasons Theory

#### 1. The Need for a Political Theory of Wrongdoing

Fletcher once stated, "criminal law is a species of political and moral philosophy." Surprisingly, many commentators have focused almost entirely on the moral component of wrongdoing<sup>67</sup> while ignoring its political aspect.<sup>68</sup> Moral philosophy may provide an answer to the question regarding whether a particular person deserves to be punished, but it alone cannot provide an answer to the question about whether the state, as a whole, is legitimized to punish offenders for their morally wrongful conduct. An inquiry into the realm of political philosophy is necessary to answer such a question. Furthermore, even if we conclude that the state has a legitimate right to punish, we are still left with the additional task of ascertaining the political limitations of the state's right to punish. Once again, a sound political theory is needed in order to establish these boundaries.

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67. The most prominent exception to this trend is the work of Douglas Husak. One can clearly see how much of his work aims at working out a *political* conception of wrongdoing that serves as a limit to legitimate state intervention with individual liberties. See, e.g., Douglas Husak, *The Criminal Law As Last Resort*, 24 *Oxford J. Legal Stud.* 207 (2004); Douglas Husak, *Legalize This! The Case for Decriminalizing Drugs* (2002).

68. The work of moral philosophers such as John Gardner illustrates the point. His work is primarily, if not entirely, concerned with providing a moral justification for the criminal law without paying attention to the political implications of his theory. For a good example of this see John Gardner, *Wrongs and Faults*, in *Appraising Strict Liability* 51 (A.P. Simester ed., 2005).

The principle of legality, for example, represents one of the procedural limits of the state's right to punish. The principle of *nullum crimen nullum poena sine lege* limits the state not only because of moral considerations but because of political considerations as well. Political considerations such as, but not limited to, respect for democracy, the doctrine of separation of powers, and a strong commitment to the rule of law lie at the core of the principles underlying the exigency of respect to legality.<sup>69</sup>

In the next section I aim to flesh out a political conception of wrongdoing that will serve as a substantive limit to the state's power to punish. Additionally, the particular conception of wrongdoing I will defend provides a cogent conceptual apparatus that can account in a principled manner for the normative gap between a finding of unjustified conduct and a determination of wrongdoing.

## 2. The Political Theory of Wrongdoing, Legal Goods, and the Harm Principle

In a liberal and democratic state, the prohibition of conduct must be based on sufficient and sound reasons. This is precisely why commentators are becoming increasingly preoccupied with the problem of "overcriminalization."<sup>70</sup> Overcriminalization is regarded as problematic because it calls into question the legitimacy of the state's power to prohibit conduct. Both scholars and the public at large are alarmed when seemingly innocuous conduct is prohibited by legislatures without the existence of sound reasons that warrant such action.<sup>71</sup>

The state can never legitimately prohibit people from eating apples, for example, unless there is a sound reason for doing so. Say that a recent plague has infected the world's apples. In this case, the legislature could legitimately prohibit eating apples if it is for the purpose of saving people's lives. They cannot prohibit it just because they want to or because they think that eating apples is inherently evil. A sound reason for punishing such conduct could be established, for example, if the state could prove,

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69. Roxin, *supra* note 42, at 144–45.

70. See, e.g., Stuart P. Green, *Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 *Emory L.J.* 1533 (1997), and Douglas N. Husak, *Reasonable Risk Creation and Overinclusive Legislation*, 1 *Buff. Crim. L. Rev.* 599 (1998).

71. See, e.g., Douglas N. Husak, *Crimes Outside the Core*, 39 *Tulsa L. Rev.* 755 (2004).

in accordance with Mill's harm principle, that this is necessary in order to prevent harm to others.

Since the state needs sufficient sound reasons to legitimately prohibit conduct, it would make sense that the definition of what constitutes prohibited wrongful conduct should be constructed accordingly. Consequently, I will define wrongful conduct as conduct for which there are sufficient sound reasons for prohibiting it.

This definition finds support in comparative criminal law. Many continental criminal law theorists, for example, believe that conduct can only be wrongful if it threatens what they call a "legal good"<sup>72</sup> (*bien jurídico* in Spanish and *rechtsgut* in German).<sup>73</sup> The concept of legal goods has a rich intellectual history that can be traced back to the works of some of the most influential criminal law scholars of the eighteenth and nineteenth centuries.<sup>74</sup> The concept was developed as a way of addressing the pressing concern of limiting the state's power to prohibit conduct. This concern was echoed by the famous Italian scholar, Francesco Carrara, as early as 1859:

If divine justice were the sole purpose to be achieved through punishment, the State would be led to censure conduct even where there is no palpable harm. This would lead to the State's usurpation of divine power and to a tyrannization of human thought in the name of vice and sin.<sup>75</sup>

Currently, however, continental scholars find themselves divided with regards to what is the appropriate meaning and function of the concept of legal goods.<sup>76</sup> For some, a legal good is merely an abbreviation of the legislative purpose underlying the creation of an offense. When defined in

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72. For a discussion of the meaning and scope of the concept of a "legal good" in English see Bernd Shünemann, *The System of Criminal Wrongs: The Concept of Legal Goods and Victim-based Jurisprudence As a Bridge between the General and Special Parts of the Criminal Code*, 7 *Buff. Crim. L. Rev.* 551 (2004).

73. See, e.g., I Juan J. Bustos Ramírez & Hernán Hormazábal Malarée, *Lecciones de Derecho Penal* 27–44 (1997).

74. The emergence of the concept of legal good has been traced back to the German scholar Birnbaum. However, it was not until the works of von Liszt that the concept actually acquired a substantive content that was meant to limit the lawmaking power of the legislature to define criminal conduct. See Mir Puig, *supra* note 8, at 129; Shünemann, *supra* note 72, at 552 and accompanying footnotes.

75. Francesco Carrara, *I Programa de Derecho Criminal* 18 (1996).

76. See generally Shünemann, *supra* note 72, at 552.

this manner the function of the concept is to aid in the interpretation of the particular offenses by looking at the legislative purpose behind them. I will call this position the formalist approach to legal goods. The other approach to legal goods defines them as those things that a person needs for his self-realization and the development of his personality in society.<sup>77</sup> For them, following the original understanding of the concept, its function is to limit the legislature's authority to define crimes. I will call this position the substantive approach to legal goods.

For the followers of the formalist approach, a legal good is constituted by whatever interest the state sought to protect by prohibiting the conduct. As such, this conception of legal goods strikes me as entirely vacuous since it does not serve the purpose of limiting the law-making authority of the legislature with regards to defining crimes. Furthermore, as Shünemann has convincingly argued, when defined in this manner, the concept can't even aid in the interpretation of the criminal law (as some German scholars contend it can) because "it runs the risk of becoming circular by placing the purpose of the law before its interpretation, even though the purpose depends on the results of that interpretation."<sup>78</sup> Consequently, both because of its incapacity to limit the state's power to define crimes and because of its circularity, the formalist approach to legal goods should be discarded.

On the other hand, the substantive approach to legal goods is a powerful tool with which to limit the legislative authority to create offenses. Under this approach, if the state cannot ascertain a legitimate legal good that is protected by prohibiting the conduct, there is no wrongfulness and, therefore, no punishment can be imposed for an infraction of such an offense.<sup>79</sup> Their approach leads them to include life, property, and liberty as paradigmatic examples of legal goods while, on the other hand, the public enforcement of moral values would not constitute a legal good because this would impede the self-realization of many persons that do not share the same values as the people that are trying to enforce them.<sup>80</sup> Thus, under this theory, the criminalization of conduct such as incest,

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77. Francisco Muñoz Conde, *Teoría General del Delito* 236 (3d ed. 2003). See also Mir Puig, *supra* note 8, at 128–30.

78. Shünemann, *supra* note 72, at 253.

79. See, e.g., Mir Puig, *supra* note 8, at 128–30.

80. See *id.*

bestiality, and consensual sexual acts between homosexuals would be illegitimate if one could not find a legal good protected by such criminalization other than the enforcement of moral values.

The continental theory of legal goods in its substantive version dovetails with John Stuart Mill's use of the harm principle as a means to limit the power of the state to prohibit conduct. According to the aforementioned principle, the state can legitimately prohibit conduct only if it causes harm to others.<sup>81</sup> Mill's thesis was later echoed and further developed by H.L.A. Hart. Hart concluded that it is illegitimate for the state to prohibit conduct merely because it is considered immoral since doing so would contradict the basic value of individual liberty. He defended this view by stating that the distress caused to people when others conduct themselves in what they consider to be an immoral fashion cannot constitute a punishable harm since this would be "tantamount to punishing them simply because others object to what they do; and the only liberty that could coexist with this extension of the utilitarian principle [harm principle] is liberty to do those things to which no one seriously objects. Such liberty plainly is quite nugatory."<sup>82</sup> In other words, according to Hart, the criminalization of acts because of their immorality is illegitimate because it assigns only trifling importance to the fundamental right of individual liberty (i.e., autonomy).

The rationale underlying the substantive theory of legal goods and both Mill's and Hart's theory of harm as a substantive limit to the legislature's power to prohibit conduct is precisely the same one underlying my reasons theory of wrongdoing. Conduct that does not threaten a legal good or that does not "cause harm to others" is conduct for which the state does not have sufficient and sound reasons for prohibiting it.

Up to this point, I have tried to show through comparative criminal law doctrines and through the philosophical ideas of Mill and Hart that it is *illegitimate* for the state to declare conduct to be wrongful if it does not have, just as my reasons theory holds, sufficient reasons for doing so. I will now attempt to show that not only would it be illegitimate for the state to do such a thing, but that it might also be unconstitutional.

The constitutionalization of the substantive criminal law is not new in civil law countries. German commentators unanimously agree that the

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81. John Stuart Mill, *On Liberty* 10–11 (1978).

82. H.L.A. Hart, *Law, Liberty and Morality* 47 (1963).

principle that there can be no punishment without mens rea (i.e., culpability) is constitutionally required.<sup>83</sup> Likewise, the Spanish Constitutional Court recognized the constitutional stature of the aforementioned principle when they declared that the state was required to punish the offender on the basis of the culpability with which he committed the offense.<sup>84</sup> In a similar vein, both the Italian Constitutional Court and the Canadian Supreme Court recognized rather recently that the defense of *mistake of law* is constitutionally required under the fault principle.

This trend towards the constitutionalization of the substantive criminal law has culminated in the *explicit* recognition of several of its basic principles in the constitutional text of several civil law countries. This is how the continental doctrine of legal goods, in its substantive version, found its way to the text of the Argentinean Constitution. The first paragraph of article 19 of the Constitution of Argentina expressly states that private acts that “do not harm third parties are beyond State authority and can only be adjudged by God.”<sup>85</sup> Argentinean scholars believe that the effect of this paragraph is to constitutionalize the substantive version of the legal goods theory.<sup>86</sup>

Regrettably, the constitutionalization of substantive criminal law has not fared so well in the courts of this country. The Supreme Court’s approach to the constitutionalization of some of the basic principles of substantive criminal law has been haphazard to say the least. Usually, when the Supreme Court finally gets itself to constitutionalize some aspect of the criminal law it ends up either reversing the initial judgment or delivering an ulterior decision that seems to be incompatible with previous ones. Consequently, most of the attempts to constitutionalize basic criminal law principles in this country have failed. This was the case with the Supreme Court’s shortlived incursion into constitutionalizing the act requirement (i.e., no liability without *actus reus*) in the *Robinson* and *Powell* decisions.<sup>87</sup> The Supreme Court’s inability to grapple with the basic doctrines of the criminal law becomes even more apparent when one examines their chaotic pronouncements with regards to the different burdens of persuasion that should attach to the establishment of the various elements

83. See, e.g., Roxin, *supra* note 42, at 100.

84. STC, July 4, 1991 (B.O.E., no. 19910729, p. 150).

85. Const. Arg. Art. 19.

86. See generally Alagia, Slokar, & Zaffaroni, *supra* note 9, at 126–28.

87. *Robinson v. California*, 370 U.S. 660 (1962); *Powell v. Texas*, 392 U.S. 514 (1968).

of a crime. Their burden-of-persuasion jurisprudence from *Mullaney*<sup>88</sup> to *Apprendi*<sup>89</sup> and, most recently, in *Blakely*<sup>90</sup> and *Booker*,<sup>91</sup> reveals that the Court seems to be at a loss with regards to how to make principled distinctions between elements of an offense and defenses (*Mullaney* and *Patterson*) and between elements of the crime and sentencing factors (*McMillan*,<sup>92</sup> *Apprendi*, *Blakely*, and *Booker*).

However, despite the fact that the Supreme Court has sometimes appeared to be confused with regards to how to properly and coherently interpret basic criminal law doctrines, it is nonetheless true that during the last few years the Court seems more willing to entertain the idea of constitutionalizing fundamental criminal law principles. More specifically, the Court's recent decisions constitutionalizing several aspects of the criminal law such as the requirements of culpability and proportionality in death penalty cases<sup>93</sup> (*Atkins*<sup>94</sup> and *Coker*<sup>95</sup>) and the substantive meaning of an "offense" and its procedural implications (*Apprendi*, *Ring*,<sup>96</sup> *Blakely*, and *Booker*) reflect that the time may be ripe for a new wave of Supreme Court jurisprudence in the previously neglected area of substantive criminal law. As one scholar recently noted, these decisions suggest that "the constitutional irrelevance for American criminal law might finally be overcome."<sup>97</sup>

The crowning achievement of this recent trend is the Supreme Court's constitutionalization of a reasons theory of wrongdoing based on something akin to Mill's "harm principle" in its historic decision of *Lawrence v. Texas*.<sup>98</sup> In *Lawrence*, the Court determined that state statutes prohibiting consensual homosexual relationships violated a person's basic interest in liberty and autonomy as guaranteed by the due process clause of the Fifth

88. *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

89. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

90. *Blakely v. Washington*, 542 U.S. 296 (2004).

91. *United State v. Booker*, 543 U.S. 220 (2005).

92. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

93. See generally Daniel Suleiman, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 Col. L. Rev. 426 (2004).

94. *Atkins v. Virginia*, 536 U.S. 304 (2002).

95. *Coker v. Georgia*, 433 U.S. 584 (1977).

96. *Ring v. Arizona*, 536 U.S. 584 (2002).

97. Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 *Hastings L.J.* 509, 514 (2004).

98. *Lawrence v. Texas*, 539 U.S. 558 (2003).

and Fourteenth Amendments of the Constitution.<sup>99</sup> In surprising language that entirely coincides with the substantive theory of legal goods and with Mill's harm principle as a limit to state power, the majority opinion, citing portions of Justice Stevens's dissent in *Bowers*, stated that "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a *sufficient reason* for upholding a law prohibiting the practice."<sup>100</sup> The aforesaid language parallels H.L.A. Hart's previously cited claim with regards to how the public enforcement of moral values runs counter to the recognition of liberty and autonomy as fundamental values. Additionally, notice the express recognition by the court that, in order for conduct to be prohibited the state must have *sufficient reasons* for doing so. This reflects that the Court might be working, implicitly, with a reasons theory of wrongdoing and punishment.

Moreover, the claim that the Court intended to constitutionalize Mill's harm principle is further reinforced by the majority's strong reliance on its previous decision of *Planned Parenthood v. Casey*.<sup>101</sup> In *Casey*, the Court reaffirmed that a woman's decision to have an abortion before the time of viability of the fetus was constitutionally protected by the right to liberty and autonomy secured by the due process clauses of the Constitution and that states could not prohibit the realization of such abortions. The following language in *Casey* lends strong support to my claim that something akin to Mill's harm principle can be derived from the right to liberty and autonomy secured by the due process clause: "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. *Our obligation is to define the liberty of all, not to mandate our own moral code.*"<sup>102</sup> The Court explicitly relied on the above-cited language when deciding *Lawrence*.

Finally, the Court in *Lawrence* expressly acknowledged, once again, that the fact that the majority of the people believe certain conduct to be immoral is not sufficient reason for a state to prohibit the conduct. Dismissing the relevance of the perceived immorality of the conduct at issue in *Lawrence*, the Court asserted that even though some people's condemnation of alleged immoral behavior reflects "convictions accepted

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99. *Id.* at 578.

100. *Id.* at 577.

101. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

102. *Id.* at 850.

as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.”<sup>103</sup> The Court answered that question, as we all know, with a forceful “no.” This is precisely the gist of *Lawrence*’s holding: the state is constitutionally prohibited from using the criminal law as a method for enforcing morality.

The holdings in *Lawrence* and *Casey* reveal that, slowly but surely, the Supreme Court is gravitating towards a theory of crime and punishment that presupposes that for a conduct to be wrongful and, therefore, punishable, there must be sufficient and sound reasons for prohibiting it. Additionally, in the spirit of Mill’s harm principle and the substantive version of legal goods as a way of limiting state power, the Supreme Court has stated that the enforcement of morality does not constitute a “sufficient reason” for prohibiting conduct.<sup>104</sup> In sum, these recent decisions of the Supreme Court lend constitutional support to my reasons theory defining wrongful conduct as “conduct for which the State has sufficient sound reasons for prohibiting it.”<sup>105</sup>

My definition of wrongful conduct also finds support in the constitutional practice of many state courts of invalidating, under their local due

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103. 539 U.S. at 571.

104. *Id.* at 560.

105. I admit that there are other plausible ways of interpreting the aforementioned cases. Someone might point out, for example, that these Supreme Court cases do not necessarily mean that the constitution compels the adoption of a reasons theory of wrongdoing. It could be argued that they mean nothing more than that the right to privacy extends to certain fundamental decisions such as having an abortion or deciding whether to engage in certain consensual sexual acts. Additionally, someone may point out that there appear to be countless “victimless crimes” in the books and that courts don’t appear to be willing to strike them down as unconstitutional anytime soon.

Regarding the first objection, I can only say that my interpretation of the above cited case law is at least as plausible as any alternative version. However, my analysis has the advantage of grouping what can be thought of as a collection of haphazard decisions into a coherent set of judgments that lend support to the reasons theory of wrongdoing. With regard to the second objection, I believe that only time will tell whether victimless crimes are in fact deemed unconstitutional under a reasons theory of wrongdoing. My impression is that as time goes by the courts will find more and more victimless crimes to be unconstitutional.

process clause, any legislation that bears no substantial relationship to injury to the public.<sup>106</sup> For example, a state court used this doctrine to invalidate an ordinance that prohibited catching frogs in a particular lake for no reason whatsoever.<sup>107</sup> Decisions such as this one illuminate the substance of wrongdoing. The mere fact that the legislature prohibits the conduct is not sufficient for a court finding of wrongdoing. The legislation must, additionally, provide sufficient reasons for prohibiting the conduct.

In the next couple of sections I will explore how claims of justification negate wrongfulness by providing reasons that outweigh the state's reasons for prohibiting the conduct and how a claim of a "normative gap defense" negates wrongfulness by providing reasons that roughly offset the reasons the state has for prohibiting it.

### **B. Assessing Whether the Doctor's and the Officials' Conduct is Justifiable under a Reasons Theory of Wrongdoing and Justification**

In the first sections of this article I tried to show that both the doctor's action of separating the twins and the officials' act of shooting down the plane could not be justified under a theory of necessity. In those sections my position against justifying their actions was based on the Kantian argument that taking the life of an innocent (non-harmful) human being can never be justified. Now I will try to show that under the reasons theory of wrongdoing and justification one is also obligated to deny them a justificatory defense.

I believe that both wrongdoing and justifications are a matter of reasons. As I previously tried to demonstrate, conduct is wrongful if, and only if, the state has sufficient reasons for prohibiting it. Justificatory claims are related, as well, to reasons. Earlier, I defined a claim of justification as a defense that negates the wrongfulness of the conduct by affirming that it was, all things being considered, the right thing to do. This definition, though accurate, needs to be specified. Conduct is the right thing to do,

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106. The standard of no substantial injury to the public was adopted by the U.S. Supreme Court in *Mugler v. Kansas*, 123 U.S. 623 (1887). However, since *Nebbia v. New York*, the Court has been reluctant to apply this doctrine. 291 U.S. 502, (1934). Nonetheless, the doctrine is very much alive in state constitutional case law. For more information on the subject see LaFave, *supra* note 58, § 3.3(b).

107. *City of Shreveport v. Curry*, 357 So. 2d 1078 (La. 1978).

and therefore justified, if the reasons in favor of performing the conduct outweigh the reasons the state had for prohibiting the conduct.<sup>108</sup> Since other scholars have effectively demonstrated the appeal of defining justificatory claims in this manner, I will not go over this here.<sup>109</sup>

What is of more importance at this point is to show why, under my reasons approach to justifications, both the doctor's and the officials' conduct must be regarded as unjustified. Take the case of the doctor as an example. His reason for performing the conduct is based on utilitarian considerations, namely, saving as many lives as possible. The reason the state had to prohibit the conduct in question is based on the deontological principle that the taking of innocent human life is always morally wrong. Since there are strong reasons both in favor of performing the conduct and against doing so, it is impossible for a pluralistic society to determine which side is right. Therefore, the doctor's conduct cannot be justified because it is not possible to determine whether the utilitarian reasons in favor of performing the conduct outweigh the deontological reasons against performing it. By the same token, if the military officials shot down the plane for the utilitarian reason of saving as many lives as possible and the state prohibited that course of action for the deontological reason of respecting the principle that killing innocent human beings is wrong, it follows that the officials' conduct cannot be justified under my

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108. This theory of justification is based primarily on John Gardner's theory of justifications as reasons. See, for example, John Gardner, *Fletcher on Offences and Defences*, 39 *Tulsa L. Rev.* 817 (2004) [hereinafter Gardner, *Offences*]; John Gardner, *Justifications and Reasons*, in *Harm and Culpability* 103 (A.P. Simester & A.T.H. Smith eds., 1996) [hereinafter Gardner, *Justifications*]; Kenneth Campbell, *Offence and Defence*, in *Criminal Law and Justice: Essays from the W.G. Hart Workshops*, 1986 at 73 (I.H. Dennis ed., 1987). His theory is based on Joseph Raz's theory of norms. See Joseph Raz, *Practical Reason and Norms* (1999). Whether the reasons to be taken into account are "objective" or "subjective," "guiding" or "explanatory" is something better left for a future occasion. Suffice it to say that there is a fair amount of scholarly literature on this subject. See, e.g., Paul H. Robinson, *A Theory of Justification: Societal Harm As a Prerequisite for Criminal Liability*, 23 *UCLA L. Rev.* 266 (1975); George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 *UCLA L. Rev.* 293 (1975).

I want to make clear that Gardner justified an act *only when the reasons in favor of performing it prevail over the reasons against it*. Cases where the reasons in favor merely offset the reasons against are not cases of justified conduct. This can be seen in Gardner, *Justifications*, *supra*, at 107; Gardner, *Offences*, *supra*, at 819. This is also consequent with Raz's discussion of exclusionary permissions. See Raz, *supra*, at 91.

109. See Gardner, *Justifications*, *supra* note 108.

reasons theory of justification. Both of these cases have in common the fact that we are in equipoise because the conflicting reasons in favor of and against the conduct make it impossible for society to determine what is the right thing to do under the circumstances.

### **C. Why the Doctor's and the Officials' Conduct Warrants a Normative Gap Defense under a Reasons Theory of Wrongdoing**

From the outset, my basic claim in this article was that both the conjoined twins case and the hypothetical of the officials shooting down a hijacked commercial plane heading for the Empire State Building proved that a finding of wrongfulness does not necessarily flow from an unjustified infraction of the paradigm of an offense. There is, so to speak, a gap to be bridged between an absence of justification and wrongdoing. This is what I call the normative gap thesis. What remained to be sorted out in the article was the search for a principle that could properly explain the normative gap between the lack of justification and wrongdoing. In other words, I had to find a principled way of explaining why we should regard the doctor's and the officials' conduct non-wrongful without justifying it. I named the defense that would serve to do just this a normative gap defense.

According to my reasons theory of wrongdoing, an actor will be awarded a normative gap defense when it is impossible to determine whether the reasons in favor of performing the action outweigh the reasons the state has for prohibiting the action. In these cases the state has powerful reasons for prohibiting the conduct while the actor has powerful reasons for performing it as well. Ultimately, the impossibility of determining which reasons should prevail negates the inference that the action was wrongful because, by recognizing the existence of commanding reasons both in favor and against performing the action, the state is left *without sufficient reasons for prohibiting the conduct*.

The impossibility of choosing among competing courses of action that are the product of different moral philosophies appears as a sufficient reason not to prohibit the conduct even though it does not provide an appropriate foundation for justifying the act.

The reasons theory of wrongdoing fills the normative gap between wrongfulness and absence of justification and, therefore, adequately solves both the doctor's and the officials' fact situations in the following manner:

- (1) Conduct can only be wrongful if the state has sufficient reasons for prohibiting the conduct.
- (2) In both cases, the state’s reason for prohibiting the conduct was based on the deontological principle that the killing of innocent life is morally wrong.
- (3) In both cases, the actor’s reason for performing the prohibited conduct was based on the utilitarian principle that one should save as many lives as possible.
- (4) We are left in a state of equipoise because there are extremely powerful reasons both in favor of performing the conduct and against performing it.
- (5) The doctor’s and the officials’ conduct are unjustified because it is not possible for society to determine whether their utilitarian reasons for performing the conduct outweigh the state’s deontological reasons for prohibiting the conduct.
- (6) The impossibility of determining which side is right is a sufficient reason for not punishing the conduct. This flows from the fact that punishing the conduct would be tantamount to enforcing a particular moral philosophy on society as a whole through the use of the criminal law (in these cases, a deontological morality). This, in turn, is contrary to the reasons theory of wrongdoing and the Supreme Court’s holdings in *Casey* and *Lawrence*.

**D. Summary of the Reasons Theory of Wrongdoing**

It is finally possible to give a rather complete account of the relationship between wrongdoing and reasons. The following table does just that:

	<i>Non-Wrongful Conduct</i>	<i>Wrongful Conduct</i>
Conduct is not wrongful when the defendant is justified.	Conduct is not wrongful when the defendant has a normative gap defense.	Conduct is wrongful because the state has sufficient reasons for prohibiting it.
Conduct is not wrongful when the reasons in favor of performing the conduct outweigh the reasons against performing it.	Conduct is not wrongful when powerful reasons exist both in favor of performing the conduct and against doing so. Therefore, it is impossible to determine which course of action is the right thing to do.	Conduct is wrongful when the reasons against performing the conduct outweigh the reasons in favor of performing it.

The solution to the conjoined twins case and the hijacked plane hypothetical is now more apparent than before. The proper solution is to acknowledge that both the doctor and the officials should be awarded a normative gap defense that negates the wrongfulness of their acts without justifying their conduct. The reasons theory of wrongdoing provides a vehicle for accomplishing this. Their conduct is not justified because it is not possible for society to determine whether the reasons they had for performing the conduct (abiding by the utilitarian principle of saving as many lives as possible) outweigh the reasons against performing the conduct (abiding by the deontological principle of safeguarding the inviolability of human life). Consequently, if one accepts the thesis underlying this article, their conduct should be described as unjustified but not wrongful. The gap between an absence of justification and wrongdoing is finally bridged.

## V. CONCLUSION

At the start of this article I posited the question of whether it could ever be lawful to kill an innocent human being. The short answer to the question is “yes.” The long answer, however, has required me to delve deep into the nature of punishment and the essence of wrongdoing.

Both the conjoined twins case and the hijacked plane hypothetical demonstrate that it is possible to negate the wrongfulness of an act without having to establish a valid claim of justification. I called this the normative gap thesis. These cases show that an absence of justification does not necessarily entail a finding of wrongfulness. What was not entirely clear was how to account for this normative gap between the lack of justification and wrongdoing.

I developed the reasons theory of wrongdoing as a way to bridge the gap between an unjustified infraction of an offense and wrongdoing. According to this theory, conduct is non-wrongful though unjustified when it is impossible to determine whether the reasons in favor of performing the conduct outweigh the reasons against it. This is precisely what happens in both cases. The doctor and the officials both have strong reasons based on a utilitarian morality in favor of engaging in the conduct (saving as many lives as possible). On the other hand, the state has strong reasons based on a deontological morality for prohibiting the conduct (respecting

the inviolability of innocent human life). It is clear that both of these conflicting reasons for action are accepted as ethical and moral principles to which many people in society aspire and which thus determine the course of their lives. Therefore, in cases such as these, it is impossible for society to determine which side is right. This turns out to be a sufficient reason not to punish the conduct since, according to my reasons theory of wrongdoing, the people may not use the power of the state to enforce a particular moral point of view on society as a whole through operation of the criminal law.

The reasons theory of wrongdoing provides a solution to both cases that conforms to our most basic moral intuitions. Furthermore, and most importantly, the reasons theory of wrongdoing solves both cases in an illuminating manner that sheds light on notoriously obscure concepts such as punishment, wrongdoing, and justification.