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Criminalizing the State

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CRIMINALIZING THE STATE

François Tanguay-Renaud*

A CHALLENGING THE ORTHODOXY

When domestic criminal law theorists single out the state as a phenomenon in need of analytical examination, they typically single it out as *agent of criminal law*. That is to say, they tend to approach it as the quintessential maker, definer, promulgator, adjudicator, and enforcer of criminal law. Their working assumption is, characteristically, that a sound account of the nature and role of the state has much to teach us about what criminal law and criminal process are, as well as what they should be.[1] Interestingly, theorists rarely ponder the possibility that the state may also be an *agent of crimes*, whose conduct may itself be dealt with according to the criminal process. It is now almost half a century since Hannah Arendt called for scrutiny of this possibility when she claimed that abominable crimes such as those of Adolf Eichmann could only be committed "under a criminal law and by a criminal state" (1963: 240). No doubt, this assertion is provocative. Does it even make sense to think of states as possible criminals? Insofar as it does, can it ever be legitimate to treat them as such? State policies commonly described as atrocious crimes—such "the Final Solution," apartheid, or slavery—surely invite such queries. So do all-too-frequent state-sponsored acts of aggression, terrorism, torture, mass expropriations without just compensation, murder, or rape. Besides, if other socially prominent organizations such as private corporations can be treated as criminals, as they often are, why can't states be? While a number of criminologists did heed Arendt's call and engaged

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[1] Many of Richard Dagger's and Antony Duff's recent writings, inspired by the republican tradition of thinking about the state, are prominent examples. See e.g. Dagger (2011) and Duff (2011).

in related inquiries, albeit through argumentative paths marred by conceptual confusions and theoretical unsophistication,[2] remarkably few contemporary analytical philosophers of domestic criminal law have followed suit.

Admittedly, in the last few years, some such philosophers have started to wrestle seriously with the thought that states, appropriately understood, may be the source of significant wrongdoing. Alice Ristroph (2011a), for example, argues that states are responsible for the criminal justice systems they generate, in the sense that they ought to take responsibility for them and may rightly be held to answer for their consequences, good and bad. Victor Tadros (2009) goes further and contends that a state may be complicit in the crimes of some of its inhabitants when it wrongfully contributes to the unjust creation of social conditions that make such crimes more likely. Still, such theorists' gazes remain resolutely focused on the state *qua* agent of criminal law.[3] Generally, they seek to provide firm foundations for the claim that states must proactively and carefully scrutinize their criminal laws and processes to ensure their legitimacy. At times, they also endeavour to articulate reasons why the state should refrain from holding criminally responsible those whose crimes it bears at least partial responsibility for. Some also strive to build a compelling case for why states ought to take steps to mitigate the harms they occasion through their criminal justice systems and more general policies. The state may be a wrongdoer, they contend, but a criminal wrongdoer? While Ristroph recognizes the importance of evaluating state criminal justice systems and even contemplates the possibility of remedial compensation for harms caused by state penal policies, she generally avoids talk of state blame, prosecution, and punishment (2011a: 118, 124). Insofar as she does consider this latter possibility, she remains deeply sceptical of its suitability.[4] Tadros is more

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[2] Amongst the core problems plaguing these criminological discussions is their tendency to speak of crimes perpetrated by the state in the same breath as distinct forms of individual illegality and misconduct that are only loosely related to the state, yet happen to have some 'political' component or connection. Many also carelessly resort to the label of 'state crime' to refer to conduct that is not in fact illegal. Finally, criminologists generally omit any discussion of what submitting the state to the criminal process might entail. See e.g. Tilly (1985), Ross (2000), Green and Ward (2004).

[3] The same can be said of most others who pursue similar lines of argument, such as Ashworth (2003) and Berger (2012).

liberal in his use of language, to the point of describing some instances of state complicity in individual crimes as cases in which the state "should be regarded as a co-defendant." Yet, he, too, insists that this analogy is no more than a "legal metaphor" (Tadros 2009: 400).

It is only by looking back further in history that one comes to appreciate how deep-rooted the philosophical reluctance to admit the possibility of domestic state criminalization really is. In their own ways, Thomas Hobbes, Immanuel Kant, Hans Kelsen, Joel Feinberg, and Dennis Thompson all argued against it. No doubt, the *prima facie* appeal of many of the claims on which they rest their conclusion at least partly explains why it has come to represent such an unquestioned orthodoxy. But is this orthodoxy really as incontrovertible as most now seem to think? I have always doubted it and, in this article, I pose the question candidly. I proceed by identifying what I take to be the core objections to the criminalization of states—that is to say, objections to the condemnation (censure, blame) and punishment of the state, as a result of a suitably 'criminal' process of public accountability, for the culpable (or blameworthy) perpetration of legal wrongs. I then investigate ways in which these objections can be challenged.

For greater certainty, my focus in this article is not on the proper scope and contours of state crimes, either in general or as a specific category of legal thought. I say little about this issue—about which I reserve further arguments for another day—beyond assuming that certain legal wrongs are best characterized as crimes, and suggesting ways in which some state legal wrongdoing may already be recognized or treated as criminal. My focus here is on the contemporary practice of criminalization—as I have characterized it above in terms of what I take to be its distinctive elements—and on the intelligibility and legitimacy of its applicability to the state. Moreover, it is on the possibility of *domestic* state criminalization that I concentrate, even though, where instructive, I occasionally compare or contrast it with the possibility of international state criminalization. I opt for this focus given the lesser theoretical resistance to the prospect of international state criminalization,[5] and since

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[4] See e.g. Ristroph (2011b: 686), where she speculates that since "the state is not much like a person," it "cannot be regulated according to the same legal models that we use for private individuals."

[5] See especially Luban (2011). Less resistance does not mean none. See e.g. Kant (1997, p. 117) and Koskenniemi (2002).

the core objections to it find close analogues in the wider set of objections to the domestic case.

The first, commonly-encountered, objection to domestic state criminalization is that the state is not a kind of entity that can intelligibly perpetrate criminal, *qua* legal, wrongs. In section B, I argue against this ground of scepticism by building upon an account of the modern state according to which it may be a moral agent proper, capable of both culpable moral and legal wrongdoing. I then move on, in section C, to consider a set of objections to the intelligibility and legitimacy of subjecting states to domestic criminal processes. These objections primarily find their source in the assumption that such subjection would necessarily involve the state prosecuting, judging, and punishing itself. I argue that whether this (questionable) assumption is sound or not, it does not create the kinds of unsolvable quandaries its exponents think it does. I then seek to address the distinct, yet related, objection that, at least in aspiring liberal jurisdictions (domestic or international), treating the state as a criminal objectionably involves extending to it various substantive and procedural guarantees that, given its nature and *raison d'être*, it should not have. Finally, in Section D, I discuss three central objections to punishing the state. First, that organizations like states do not have the phenomenal consciousness required to suffer punishment. Second, that the constant possibility of dispersion of state punishment amongst individual state members stands in the way of its justification. And lastly, that whatever justification there may be for making things harder for the state in response to its culpable wrongdoing, such treatment need not be understood as punishment. While partially conceding the strength of these objections, I strive to loosen their grip in ways that show that justified punishment of the state, meaningfully understood as such, remains a distinct possibility.

I conclude by contrasting supposed alternatives to the criminalization of states, and by asking what my analysis ultimately leaves us with. I contend that it leaves us with enough to keep the possibility of domestic and international state criminalization on the table as a justifiable response to state wrongdoing—even if doing so compels us to revisit some of our usual assumptions about what is required for justified (individual) criminalization. I also suggest that thinking of the state as a possible

criminal or, more broadly, as a possible wrongdoer opens up interesting new vistas for criminal law theory in general.

Given the potential implications of such an inquiry for law and policy-making, my motivations for engaging in it extend beyond the obvious need for philosophical demystification. Indeed, I start with Arendt's intuition that, *qua* complex organizations channelling the energy of large numbers of individuals, modern states and their institutions can sometimes facilitate, enable, and program for serious wrongdoing, in ways that are irreducible—or incompletely reducible—to individual criminality. Some domestic legal systems seem to recognize this possibility to a degree when they allow, at least on the books, for the criminal prosecution of core state organs—such as "government or governmental instrumentalities," "governmental entities," "public bodies," or "public agencies"—over and above the prosecution of their individual members and officials.[6] While constitutional law is not usually analogized to criminal law,[7] state wrongdoing is also regularly condemned under bills of rights and, on occasion, even judicially punished. Thus, under s. 24(1) of the *Canadian Charter of Rights and Freedoms*, punitive damages are sometimes deemed an "appropriate and just remedy" for egregious violations of rights resulting from state action.[8] In international law circles, the criminalization of states, quite apart from that of their individual officials,

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[6] See e.g. *Criminal Code of Canada*, RSC 1985, c. C-46, at ss. 2, 22.1, 22.2; *Indiana Code Ann.*, at s. 35-41-1-22 (Burns 2004); *New York Penal Law*, at s. 10.00(7) (McKinney 2004). For a helpful historical survey of the criminalization of governmental bodies in the United States, alongside an argument for its expansion, see Green (1994). Compare: *Code pénal* (France), at s. 121-2, which explicitly exclude the state from the ambit of the criminal law, and the court cases reaching the same conclusion in the Netherlands (Roel de Lange 2002: s. 7).

[7] There are exceptions. See e.g. Steiker (1996: 2470), who describes constitutional criminal procedure guarantees as "a species of substantive criminal law for cops." See also 18 U.S.C. § 242, which makes it a statutory crime in the United States to deprive a person of her constitutional rights.

[8] See e.g. *Crossman v. The Queen*, (1984) 9 DLR (4^{th}) 588 (Federal Court, Trial Division); *Patenaude v. Roy* (1988), 46 CCLT 173 (Superior Court of Quebec); *Freeman v. West Vancouver (District)* (1991), 24 ACWS (3d) 936 (Supreme Court of British Columbia). More generally, see *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, par. 87, where the Supreme Court of Canada establishes that "[a] superior court may craft any remedy that it considers appropriate and just in the circumstances.".

has also often been contemplated. In fact, "international crimes of states" remained present in all but the final drafts of the International Law Commission's *Articles on State Responsibility*, which explicitly listed wrongs such as aggression, slavery, genocide, apartheid, and "massive pollution of the atmosphere or the seas" as state crimes (Crawford 2001: 352-353).[9] While the category was ultimately dropped, it continues to hover, albeit indirectly, in the background of the *Rome Statute of the International Criminal Court*, which makes it the case that individual crimes against humanity must be perpetrated "pursuant to or in furtherance of a State or organizational policy."[10] Thus, the idea that states may perpetrate criminal wrongs, and may be treated as criminals, already has some currency in the law and amongst lawmakers. My hope is that this project will contribute to future policy deliberations about it.

Finally, it bears repeating that my object of inquiry is not the criminalization of state officials in their personal capacity. It is true that some individual crimes are linked to the state in the sense that only individuals occupying certain official roles can perpetrate them—think of corruption offenses, offenses involving the disclosure of information obtained in the course of state employment, or offenses of desertion. However, these crimes remain the crimes of individuals. That is, they are crimes for which individuals are publicly called to account, condemned, and punished in their own name. My focus is on the more controversial possibility of treating *the state itself* as a criminal.

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[9] See also Article 9 of the Nuremberg Charter which, although ultimately dispensed with by the Tribunal, could have served to condemn and punish the German state and relevant state institutions: "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization." *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal*, Aug. 8, 1945, Art. 9, 59 Stat. 1544, 82 UNTS 279.

[10] Rome Statute of the International Criminal Court, July 17, 1998, Art. 7(2)(a), UN Doc. A/CONF.183/9* <www.un.org/icc>, reprinted in 37 ILM 999 (1998). The newly defined individual international crime of aggression also explicitly requires high level individual involvement with "the use of armed force by a State" in ways inconsistent with the Charter of the United Nations. See Resolution RC/Res.6, Review Conference of the Rome Statute, Annex I on the Crime of Aggression <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf>. At the time of writing, only the state of Liechtenstein had ratified the amendments contained in this resolution.

B IS STATE CRIMINAL WRONGDOING INTELLIGIBLE?

For many who are used to considering and referring to the state as a discrete social actor, the suggestion that it cannot intelligibly commit crimes—that is, breaches of legal duties (aka legal wrongs) of a criminal nature—may seem somewhat puzzling. Surely, states are made up of, and act through, human beings who, themselves, can perpetrate crimes. If that is true, why can't a state at least sometimes be understood as a criminal, if only by association with or as an accessory to such crimes?

One oft-encountered suggestion is that, for the decisions and actions of individuals occupying roles in the architecture of the state—that is, officials—to be attributable to the state itself, they must be made, and carried out, for a 'public' purpose. Otherwise, the argument goes, the decisions and actions are only attributable to these individuals personally: they are 'private' and not the doing of the state. This idea is given various interpretations. For some, public action on the part of officials is action taken in furtherance of the interests of society as a whole, rather than in furtherance of the officials' self-interest, or the interests of any particular individual or group. Least controversially public under this description is the provision of certain "public goods" that cannot as effectively be provided to some without being provided to all. Commonly-cited examples include social order, protection, safety, trust, as well as various other basic conditions of societal cooperation. Theorists in the Kantian tradition speak in more definitive terms. They speak of public action as action taken for the creation or sustenance of a "civil condition," in which relevant public goods and private rights are sufficiently secured that citizens can rule themselves, through the legal apparatus of the state, as independent moral equals. The temptation for some of these theorists has been to hold that state *qua* public action, understood in such an abstract unitary way, is inherently morally permissible. The civil condition is elevated to the level of absolute and universal moral aim, such that any action by officials taken in its furtherance can yield no wrongs.[11]

One should not succumb to this temptation. Kant himself recognizes that every existing state is morally imperfect, and may commit

[11] For recent examples of criminal law theorists tempted by, yet stopping short of fully endorsing, this line of argument, see Thorburn (2012: 11-12), as well as Dorfman and Alon Harel (2012: 16).

wrongful excesses and injustices, some of which may be quite extreme. This concession should come as no surprise since the civil condition, just like the broader idea of action in the interests of society as a whole, constitutes no more than a normative ideal for the state, in the purported furtherance of which acts of varying moral quality may be carried out. Some such acts may be sloppily executed, unjust, excessively coercive, oppressive, or otherwise in dereliction of some of the state's duties to its citizens or others. Therefore, irrespective of what one thinks of Kant's actual articulation of the civil condition as a moral benchmark for the state, and of the thought that an ideal state operating in an ideal world could do no wrong, genuine acts of existing states will sometimes "fail the tests of critical morality" in ways that amount to moral wrongdoing (Ripstein 2009: 325-343, 348). The same can no doubt also be said of acts in the "interests of society as a whole" which may, at times, rest on morally wrongful trade-offs, inflictions of harm, and so on. This point about the possibility of state moral wrongdoing is important, since the criminal law is commonly thought to recognize, specify, and sometimes even create, genuine moral wrongs.

Unfortunately, our troubles do not end here, at least at the level of domestic law. Some, like Thomas Hobbes, argue that even if the state can act immorally, it cannot violate the (domestic) law because it itself is the (domestic) law. In other words, a state and its domestic legal system are one and the same entity, such that states cannot intelligibly contravene their domestic law (Hobbes 1996: 150, 215).[12] Therefore, the objection goes, even if engaged in from a genuinely 'public' point of view, any act that violates domestic criminal law cannot intelligibly be an act of the state. In previous work, to which I refer the reader, I have sought to refute this objection (Tanguay-Renaud 2010). In brief, though, it seems clear that there is more to the state than law. For one thing, social rules such as the ones making up legal systems or states' constitutions are all subject to change over time. Thus, when considered diachronically, they must inevitably be understood as a sequence of sets of rules. We think of this sequence of sets as unified only because the ongoing group of human beings to which it belongs accepts it (perhaps along with some relevant external actors) as an efficacious and continuous unit. It is undeniable that

[12] This objection has most recently been associated with the work of Hans Kelsen (2006: 181-207). Kantians are less prone to making this objection since the idea of an entity that creates the law and then departs from it is, in a sense, central to their philosophy. We are self-legislators, Kantians think, but can also violate our own laws.

law plays a central role in constituting the state, but as this argument suggests, so do the social and political recognition as well as engagement of relevant actors. It is this socio-political dimension that accounts, for example, for the fact that we do not think of most violations of a state's constitutional law—both small and more extreme, including many coups and other kinds of substantial unconstitutional reorganizations—as undermining the state's continuity. It also explains why such violations are unnecessary for a state to become distinct from another—as in the case of Canada, whose constitution remains, to this day, continuous with laws of the British Parliament.

Note that what I have just said should not be interpreted to mean that, insofar as states are structured and bounded by rules, these rules are necessarily legal rules. Non-legal socio-political conventions also play a central role in constituting and empowering state action. If the Australian Prime Minister can apologize on behalf of the state of Australia for its treatment of aboriginal people, without any legal rule empowering this action, and if the British Prime Minister can declare war on behalf of the state while, legally, this power is held by the Monarch, it is because of a widespread social recognition of these Prime Ministers' constitutional capacity to do such things. This reasoning may also extend to less obviously 'constitutional' offices. Nick Barber articulates the claim in the following way:

> The legal rules which regulate the police force might hold that an officer who harasses innocent folk steps outside of the area of her office and acts as a private citizen. The community in which the police officer works, in contrast, may regard the harassment as an act of the police: it is the police as an institution who have undertaken this action, through the medium of the particular officer (2010: 113).

For Barber, then, extralegal actions such as police harassment and, presumably, even more serious forms of legal wrongdoing—such as murder or sexual assault—may intelligibly be undertaken on the state's behalf, insofar as the state is understood in both legal *and* socio-political terms. Of course, it is a further question whether courts, *qua* state organs mandated to apply the law, ought to recognize such extralegal dimensions of the state. I will come back in the next section to the normative position of courts vis-à-vis the rest of the state. The point here is solely about the

intelligibility of state domestic legal wrongdoing, quite independently of the appropriateness of its judicial acknowledgment.

I insist on 'state' legal wrongdoing to reflect the context of Barber's discussion. Yet, notice that, in the passage quoted above, Barber singles out an intermediate actor as wrongdoer—namely, the police as an institution. Assertions about governmental and administrative institutions are often made in passing in discussions about state legal responsibility.[13] Yet, they give rise to a number of important questions about what it is that links these institutions to the state, and how they, like the state considered as a whole, may be said to be wrongdoers in their own right. Of course, such institutions, just like the state as a whole, may be treated, by means of moral or legal fictions, *as if* they were state wrongdoers. However, Barber seems to have a deeper and more complex sense of institutional wrongdoing in mind, and I believe he is on to something important.

As Christian List and Philip Pettit (2011) argue, a stringent case can plausibly be made that at least some organized groups—let's call them corporate organizations—are fit to be held responsible and blamed in the same way as individual wrongdoers. Primarily, they are fit to be held responsible and blamed for wrongdoing, including criminal wrongdoing, which they, as agents, planned or programmed. While I cannot get into the minute details of the account here, one of its great strengths is that it rests on the non-mysterious premise that organizations derive all their matter and energy from their individual members. It is through their members that organizations can access evidence and gain the understanding required for making evaluative judgments about the reasons for action (including moral and legal reasons) and normative options that they face *qua* corporate agents. It is also through the intercession of individual members that organizations can ultimately implement their corporate judgments, and act in the world *qua* corporate agents. I say '*qua* corporate agents' because, as List and Pettit emphasize, to count as agents that are independently fit to be held responsible for their own wrongdoing, organizations must also be irreducible to their members in a salient way.

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[13] Hobbes himself speaks of some acts of representative assemblies and other body politics as crimes that may be punished (1996: 150). Malcolm Thorburn, who otherwise resists the idea of state wrongdoing on allegedly Kantian lines, also speaks of the possibility of "crown liability," over and above the tortious and criminal liability that a state official may personally incur (2012: 11, fn 18).

The basic thought is that some organized groups of interacting human beings can be conversable agents. That is, they can be constituted in ways that make it possible to do business with them over time *qua* groups—for example, by entering into treaties or contracts with them, reasonably expecting that these will be honoured. For such group conversability to be possible, the group needs, of course, to be responsive to the attitudes and in-puts of its individual members. Yet, it must also be responsive in a way that ensures a minimum of group consistency, coherence, and sensitivity to reason over time. According to List and Pettit, these features can obtain when the group functions in keeping with an adequate normative framework, or constitution. A constitution is adequate in this sense, when it ensures that reason is "collectivized," such that the organized group's judgments, beliefs, action-directing attitudes, as well as action plans are, on the whole, functionally independent, as opposed to a mere reflection, of the corresponding judgments, attitudes, and plans of the members. Autocratic decision procedures, according to which all decisions are merely those of an individual dictator and no real *group* decisions are taken, are clearly inadequate. In such cases, there is no conversable group agent—only the dictator himself or herself. Simple majoritarianism is also inadequate, since group decisions are then reducible to the decisions of those individuals in the majority. What the constitution must ensure, List and Pettit argue, is the group's relative autonomy, in the sense of enabling it to form judgments, attitudes, and plans that cannot fully be reduced to those of group members and, as a result, are not, on the whole, hostage to their idiosyncracies.[14] A process must also be in place, they hasten to add, to ensure that the group can correct its judgments and attitudes over time, thus enabling it to exhibit the minimal, yet genuine rational consistency that we expect from agents proper.

The overall contention, then, is that, by jointly committing and adhering to such a constitution, an organization's members can generate a single, relatively autonomous corporate agent which, when faced with normatively significant choices, is capable of making irreducible judgments about what is good and bad, right and wrong. This corporate

[14] They envisage a number of ways in which such propositional irreducibility can be ensured, including various premise aggregation decision procedures and more complex "distributed premise-based procedures" amongst subgroups (List and Pettit 2011: chs 2-3).

agent, which in an important sense has a mind of its own, may then make decisions and plan for action in an irreducible way, and may do so in ways that exhibit the types of *mens rea* attitudes that are deemed so central to modern criminal culpability—namely, intention, recklessness, negligence, and the like. Moreover, it may control for the performance of such action by arranging things so that some individuals are directed, or empowered, to perform relevant tasks, while others are identified as possible back-ups. As List and Pettit argue, a corporate agent that arranges for criminal wrongdoing in this way is fit to be held responsible and blamed as the "source of the deed," or the "planner" at its origin (2011: ch. 7). Of course, the individuals who give life to such an agent have to answer for what they do in making corporate agency possible. They remain agents, and possible wrongdoers, in their own right. However, the entity they maintain also has to answer as a whole for what it does at the corporate level, while making use of the resources provided by its various members.

As complex organizations that deal with their members and with other states across time and political regimes, modern states are prime candidates for long-lasting irreducible corporate agency. Their constitutions typically include goals and principles of governance, institute multilayered decision-making procedures, and impose the kinds of balances and checks necessary to foster relative organizational autonomy and sufficient rational consistency over time. Common examples of relevant decisional constraints include: the separation of powers between the executive, the legislative, and the judiciary, bicameral legislatures, federal divisions of powers, judicial review of administrative and legislative action, *stare decisis*, elections, conventions of ministerial and cabinet responsibility, impeachment procedures, and the like. No doubt, states depend on their individual members to make decisions and act, but by committing and adhering to their state's constitutional framework to a reasonable extent, such individuals can also bring about irreducible state agency.

An objection might here be raised that states really act through their executives or other governmental organs and that, insofar as these organs are constituted in ways that meet the conditions of irreducible agency, *they* are the potential wrongdoers on which we ought to concentrate our attention. Such a move would, no doubt, explain Barber's focus on the police as an institution. It would also resonate with the explicit mention of governments, governmental agencies, public and administrative bodies, and municipalities as potential criminal wrongdoers

in domestic criminal codes. However, this move would unacceptably disregard the very real possibility of culpable moral and legal wrongdoing by the overall group agent contemplated by most national constitutions and usually internationally recognized as such—that is, the state as a whole. At the domestic level, consider the case of a state's parliament or congress enacting harmful laws that egregiously violate some individuals' constitutional rights, which are then enforced by the executive, garner the acquiescence of a large part of the population and are judicially upheld, at least in lower courts. At the international level, think of the declaration and waging of an unjust and illegal war by a state which, as whole, endorses this course of action. A significant point in respect of such scenarios is that even when some or all of a state's relevant subparts are not responsible agents due to constitutive deficiencies, even when their wrongs are excused because of, say, understandable epistemic limitations, or even when their distinctive behaviour does not amount to a given wrong, the state as a whole may still be fit to be held responsible and blamed for that wrong *qua* corporate agent.[15]

Of course, recognizing that corporate agents may nest within one another is important, just as it is important to recognize that individual agents necessarily nest within corporate agents. Moreover, it is important to appreciate that nested corporate agents may be wrongdoers in their own right. However, such recognition should not obscure the fact that the state as a whole may also be constituted as a responsible agent capable of wrongdoing—an agent with its own constitution, goals, commitments, attitudes, and plans, which its executive and other subsidiary organs need not share. To be sure, subsidiary corporate state organs may, like individual members, partake in the formation of their state's irreducible beliefs, action-directing attitudes, and plans. For example, in both British-style parliamentarianism and U.S.-style separation of powers, the executive generally has a central role to play in the development and adoption of state policies, even if balances and checks often force it to modulate its interventions and, at times, may frustrate them altogether. Like individual state members, subsidiary corporate state organs may also play a role in the implementation of state policies. This role will often be

[15] List and Pettit (2011: 165-167) emphasize the related possibility of shortfalls of *individual* responsibility as a key reason for holding corporate agents responsible for given harms and wrongs. This argument can easily be extended to include the possibility of shortfalls in the responsibility of relevant subsidiary corporate agents.

central to the life of the state, even if it is only that of an intermediary as opposed to that of an ultimate implementer, and even when it is performed reluctantly. It may be performed reluctantly, I insist, or sometimes outright resisted, since states and their subsidiary organs may differ in their judgments, commitments, and goals. As a result, they may also differ in their wrongdoing, insofar as they perpetrate any.

Still, one may ask, if states and their subsidiary agents, both corporate and individual, are best understood as distinct entities from an agency standpoint, how can we know whether the latter's actions implicate the state? Would it not be easier to assume that the the complex agential web that I have just begun to uncover amounts to a single agent? For example, could we not speak of the politico-legal organization of a (territorially-demarcated) society's governance or, for short, of "the government"? It would certainly be easier to think of 'state action' in such an undifferentiated way.[16] Sometimes, courts may even be justified—on consequential, expressive, or fairness-based grounds—in fictionally treating the actions of subsidiary agents as if they had been performed on behalf of the state, when, in fact, they were not. Fictions of identification and vicarious responsibility are no stranger to the law. By definition, though, fictions are not reality, and their indiscriminate use may lead to the unjustified obliteration of important agential distinctions.[17]

Fortunately, there is no need to resort to fiction in such a wholesale fashion. The actions of subsidiary agents implicate the state when the state either arranges for them, or fails to take sufficient measures to prevent them when it has a duty to do so. When such state behaviour amounts to criminal wrongdoing, even if only accessorial in nature, it can then intelligibly be singled out as such. To determine which actions the state arranges, one must scrutinize its decisions and plans. These are, by and large, contained in the rules through which the state intentionally directs subsidiary agents to act in specific ways, as well as in those in which it authorizes, perhaps recklessly or negligently, actions beyond the scope of what it intends. Scrutiny of such rules, as well as of the actual responses of

[16] I have sometimes done it myself (Tanguay-Renaud 2009: 34).

[17] Compare: Veitch (2008: ch. 2), who argues that the state, understood in such an all-encompassing way, facilitates the "dispersal" of responsibility by obscuring the responsibility of distinct subsidiary agents for their actions.

the subsidiary agents they empower, can also provide important evidence of state inaction, where such action is required.

Here, a few clarifications are warranted. First, when I loosely speak of rules, I speak of legal rules, but also, as I have done throughout, of relevant non-legal conventions, customs, policies, and practices. Of course, I also recognize that more particular commands and rulings may form part of the means through which states arrange for action. However, given the sheer size and range of actions of modern states and the associated need for generalizations, such particular means will tend to be secondary. Notice, secondly, that this approach to identifying state action also applies to the actions of other corporate agents. Thus, it also allows us to single out the actions of corporate state organs, which, as we have seen, may differ in their moral and legal quality from those of the state. Thirdly, actions that implicate the state need not be those of "state officials," if by this expression one means to exclude "private" companies and ordinary individuals. Indeed, a state may well empower the latter to act for it, even if only temporarily and contractually. It may also fail to supervise them as it should.

Finally, I am not denying that it will sometimes be debatable whether given individual actions implicate the state in one of the ways identified above. Neither am I denying that states and their subsidiary corporate organs may fail to meet the conditions of irreducible agency, either because of constitutional deficiencies or of their members' lack of commitment. In such cases, legal fictions of state criminality might still be invoked. The question then becomes whether such fictions are justified and, in some scenarios, it might just be that they are. Consider, for example, situations in which fictions of state criminality would express valuable denunciation of harmful structural deficiencies, spur meaningful organizational reforms, provide optimal deterrence against future official misconduct, yet have virtually no unjust side-effects. No doubt, similar lines of argument could also be developed in relation to the state's subsidiary corporate organs (see e.g. Cane 2002: 264-270). That being said, fictional criminalization remains at best a non-standard case of the practice which, at its core, is directed at wrongdoing agents. Accordingly, I will persist with my focus on the real agency paradigm when investigating the possibility of state criminalization, and leave the discussion of states (or subsidiary corporate state organs) that do not meet its conditions on a reasonably consistent basis for another occasion.

I am now in a position to sharpen some of my comments from the beginning of the section about where the state stands in relation to its purpose(s). The fact that state action boils down to corporate action makes clear that states can, *qua* states, perpetrate wrongs, including legal wrongs, even when they are not pursuing the public interest or, more broadly, when they are not acting legitimately. Once constituted as irreducible agents, states may, just like other corporate and individual agents, act in all sorts of ways and with all sorts of motivations that are wrongful. Indeed, there may be despotic, even tyrannical, states. Some might insist that a state that fails to pursue the interests or well-being of its individual members fails to meet a key moral standard of legitimacy that unavoidably applies to it given its nature and role in society. At a more conceptual level, some may also contend that a state must at least claim, however hypocritically, to be acting in the interests of its individual members if it is to count as a state. Notice, though, that even if these contentions are accurate, which they may well be, neither entails that a state must genuinely purport to act in furtherance of anyone's interest to act and do wrong, even criminal wrong, as a state.

Notice further that my account allows for different relationships between the state and its population. In some cases, states will be constituted in ways that make possible, encourage, and sometimes even require, the active participation of a large part of their population in their corporate life. In so-called liberal democratic states, for example, citizens will be able to vote, join political parties, run for elected office, make representations seeking to influence their state's decisions and plans, and so forth. In some other cases, though, the bulk of the population may be confined to passive subservience to a state whose corporate energy is almost exclusively derived from a ruling elite.[18] Now, while a state need not contain a broad popular base of active members, every state still requires a minimum of recognition and acquiescence from the bulk of its population if its constitutional structure is not to disintegrate into, or fail to rise from, anarchy. In fact, many theorists plausibly affirm that it is a mark of the modern state that it claims supreme authority—or sovereignty—to regulate people's lives within its territory. For a state to exist, the argument often continues, this claim must be sufficiently successful *de*

[18] John Rawls makes a related distinction when he contrasts "states, as traditionally conceived" and "liberal democratic peoples (and decent peoples)" (1999: 23-30).

facto (Barber 2010: 19-25; Philpott 2010; Green 1990: 25-28, 65-66, 78-83). One prominent articulation of this traditional position is that of Max Weber (1991: 78), who argues, more specifically, that it is a mark of the state that it successfully claims a monopoly on the legitimate use of physical force within a territory. Traces of this understanding can also be found in the works of Hobbes (1996: 207, 215) and Kant (1996: 104-110), for whom acts of domestic punishment are inherently acts of sovereign authority and are, therefore, the prerogative of the state. Such ways of thinking lie at the root of a series of further objections to state criminalization that I now seek to address.

C HOW CAN THE STATE BE CRIMINALIZED?

The criminal process is often theorized as a process through which criminal wrongdoers are called to account for their deeds (see e.g. Duff et al. 2007). Insofar as this view is correct, does it not pose a steep challenge for the possibility of criminalizing the state? That is, if the state is the kind of supreme, or sovereign, regulative authority that, at least in principle, may have the last word on everything within a territory, or at least successfully presents itself as such, who is to call *it* to account? This challenge is not conceptual insofar as the state, just like individuals, can intelligibly call itself to account and hold itself responsible for its wrongdoing. The real problem, I take it, is the problem of justice, or lack of appearance of justice, that may be associated with the state being judge in its own case.

Not everyone sees self-referential calling to account as problematic. According to Kant, for example, the sovereign state, which he otherwise presents as supreme legislator on behalf of the people, may sometimes depart from domestic law and then act as judge in its own case (1996: 95; Ripstein 2009: 330). In fact, Kant argues, the state is the only entity that has standing to judge and remedy its domestic illegalities, speaking, in so doing, in the name of the people and the law. The usual objection to this provocative suggestion is that such a self-referential process is likely to be rife with conflicts of interests and, therefore, to be irremediably biased (or at least appear to be). One response is that, despite being subject to pressures of their own including from wrongdoing states themselves, some international bodies may be sufficiently well-designed and insulated to be able to call states (or at least many of them) to account—by prosecuting and judging them—justly, and with appearance

of justice. This line of argument certainly has merit, but note that the idea of organizational independence on which it rests may also be advanced to a significant degree in the context of domestic adjudication.

At the level of prosecution, independence can be meaningfully ensured by allowing "private prosecutions" led by victims of state wrongdoing and their counsel, possibly with the support of amicus curiae. In federal states, where not all prosecutorial state units are inappropriately implicated in wrongdoing, some relatively independent prosecutors may also be involved. At the adjudicative level, independence may be fostered through guarantees of tenure and remuneration for the judiciary, discerning methods of judicial appointment, stringent oaths of office, and other strict conditions of service imposed on judges. That is, constitutions often envisage bodies—namely, courts—that occupy a special, insulated position in the state's architecture, in part to provide independent checks on state action (including state action involving lower courts). Consequently, we generally do not see any intractable problem in having the judiciary sit in judgment of the legal validity of state action in constitutional and administrative law contexts. The question then becomes: why would courts sitting in judgment of state criminal wrongdoing be any different?

According to one school of thought, constitutional and administrative law are primarily concerned with questions of legal validity, such that judges, who undertake to uphold the law in their oaths of office, can engage with related questions without overstepping the bounds of their jurisdiction. Yet, as I argued, the state is a socio-legal creature that can very well perpetrate legal wrongs while acting in legally invalid ways. Thus, judgments of state legal wrongdoing may require judges to recognize extralegal state action and, so the argument goes, to venture out of their jurisdiction inappropriately. In my view, such a line of reasoning endorses an exceedingly myopic understanding of the role of courts. As a general rule, judicial oaths of office do not demand mere fidelity to law. They require judges to apply the law *and* do justice.[19]

[19] Consider the following examples of judicial oaths, which all more or less convey the same idea. In the United Kingdom: "I, [NAME], do swear by Almighty God that I will well and truly serve our Sovereign Lady Queen Elizabeth the Second in the office of [TITLE], and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will. So help me God." See online: <www.judiciary.gov.uk/about_judiciary/judges_and_the_constitution/index.htm>. The judicial oath for the High Court of Australia uses virtually the same words: High Court of

Appreciation of this dual character of the judicial role is important. Despite the common popular assumption that justice and law go hand-in-hand, and that it is always possible for judges to do justice according to law, nothing could be further from the truth. There is nothing in law or in its application that is necessarily just.[20] Thus, in many jurisdictions, judges have found ways to address state legal wrongdoing perpetrated through legally invalid action, in the name of justice. Consider, for example, the numerous judicial doctrines developed to compel states and subsidiary state agents to make good on all sorts of legitimate expectations that their legally invalid actions create amongst those who reasonably rely on them.[21] Think also of the numerous cases in which courts depart sharply

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Australia Act 1979 (Commonwealth of Australia). In Finland: "I, [NAME], do promise and swear by God and His Holy Gospels that to the best of my understanding and conscience I wish to and shall in all judgments render justice to poor and rich alike and render judgment in accordance with the laws and lawful rules of God and country: I shall never, under any pretext, pervert the law nor promote injustice because of kinship, relationship, friendship, envy, hatred or fear, or for the sake of gifts or presents or other reasons, nor shall I find an innocent person guilty or a guilty person innocent. Furthermore, I shall not, before pronouncing a judgment or thereafter, reveal to the parties or to anyone else anything about the deliberations that the Court has held behind closed doors. All of this I wish to and shall fulfil faithfully, honestly and as an earnest judge, without deceit and intrigue, so help me God, in body and mind." For this translation of the Code of Judicial Procedure (4/1734) (Finland) s 7, see online: <www.finlex.fi/en/laki/kaannokset/1734/ en1734 0004.pdf>. In the United States, federal judges must take the following oath: "I, [NAME], do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [TITLE] under the Constitution and laws of the United States. So help me God." 28 USC 453. Of course, I am not claiming here that oaths of office are the only source of judges' duties to uphold the law and do justice.

[20] Although I cannot present a fully-articulated defense of this view here, I refer the reader to Green (2010).

[21] One good illustration is the "*de facto* doctrine" invoked by the Supreme Court of Canada to recognize and give limited effect to the "justified expectations of those who have relied upon [...] actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials." *Re Manitoba Language Rights* [1985] 1 S.C.R. 721, par. 79-80. Think also of the cases of officially-induced mistake of law, in which a criminal defendant has reasonably based her conduct on a view of the law, implanted by a governmental official, that turns out to be erroneous. In such cases, many legal systems recognize a defense of "officially-induced error" or are prepared to stay the prosecution on grounds of abuse of process. On this issue see Ashworth (2003: 302-322). Consider finally the various doctrines of substantive legitimate expectation and issue-estoppel that

from their legally-circumscribed jurisdiction to affirm the continuity of states in the face of revolutions (see e.g. Mahmud 1994; Barber 2000), or to give effect to previously non-legal constitutional conventions.[22] I am not denying that, as primary law-applying institutions, courts play a central role in upholding the ideal of rule of law, according to which both states and individuals ought to be held accountable for their illegalities. Notice, however, that in the case of state criminal wrongdoing, such accountability may demand from judges that they recognize some of the state's extralegal, or legally invalid, instantiations. My point is that, given their relatively insulated posture, domestic courts may be able, and well-placed, to hold the state to account for extralegal criminal wrongdoing. This may be so even if, as some argue, such paradoxical enforcement of the rule of law through recognition of extralegality pushes judges to act at the edge of, if not cross, the usual parameters of their role within the architecture of the state.

Now, the inherent bias (or possibility of bias) objection to state criminalization is usually not only aimed at the calling and holding to account parts of the criminal process. It typically also targets the way in which types of behaviour are legally specified as crimes. Indeed, if states are supreme authorities, or sovereigns, within their territory, or at least successfully present themselves as such, may they not simply legislate themselves out of domestic criminal jeopardy? This objection, of Hobbesian lineage, does not directly apply to subsidiary state organs that are sufficiently removed from the legislative process. However, it certainly poses an important challenge for the possibility of criminalizing the state as a whole. Moreover, insofar as the state seeks to immunize its subsidiary organs from the criminal process, the objection may also indirectly apply to them. Here, one should perhaps not entirely disregard the possibility of enlightened states choosing to bind themselves anticipatorily through criminal legislation, and to subject themselves resolutely to the consequences. After all, much of existing international law—perhaps outside its debated core of *jus cogens*—is based on such a model of voluntary state submission. Many contemporary theoretical defences of criminal punishment also rest on the idea of the criminal

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are currently being developed and extended in many jurisdictions in the administrative law context.

[22] See e.g. *R. v. Secretary of State for Transport ex parte Factortame (No 2)*, [1991] 1 A.C. 603 (House of Lords).

(ideally) assenting to, if not willing, his own punishment.[23] Still, states may not be so upstanding, and be tempted to manipulate legislation in their favour. Even then, I do not think the objection is fatal.

While they are typically not conceived as comprising criminal prohibitions, state constitutions often enshrine legal duties whose breach by the state may be judicially condemned and, in some jurisdictions, punitively sanctioned. In other words, constitutions may intelligibly entrench state crimes. One could think along such lines of common bills of rights prohibitions on torture and other cruel and unusual treatment of individuals, of duties not to deprive people of their life, integrity, or liberty without a constitutionally recognized justification, or of duties not to strip individuals of their property without appropriate compensation. The fact that we typically do not think of state violations of such constitutional duties as criminal, just as we do not tend to think of state violations of international human rights treaties as international state crimes, probably largely has to do with the remedies, not obviously punitive, that are typically available for them. Here, I am referring to common remedies such as legal invalidity, non-punitive compensatory damages, apologies, and the like. Still, states may conceivably be called to account and condemned judicially for such legal wrongdoing and, in many jurisdictions, they are. Insofar as state punishment is a constitutionally available remedy and is ever legitimate, we may then be able to think in terms of constitutional crimes of state. Since constitutions are generally much more difficult to amend than criminal statutes or precedents, entrenchment of state crimes in them may then assure that states cannot modify them at whim. Similar entrenchment could possibly also happen at the level of international law, by devising processes that make it difficult for states to retreat from prior treaty commitments or customs acknowledged to establish international crimes of state.

Going back to domestic courts and accountability for a moment, a further objection may be that, as insulated from the rest of the state as it may be, the judiciary (up to its highest echelon) may itself be involved in state legal wrongdoing. Consider again the case of a state's parliament or

[23] For example, Jacob Adler (1992) argues that the "conscientious paradigm" of the criminal who seeks and undertakes her own punishment is the central paradigm of justified punishment. For the more nuanced claim that the criminal should (ideally) be a participant in his or her own punishment, see Duff (1986: chs. 4, 9-10).

congress that enacts harmful laws that egregiously violate some individuals' basic constitutional rights, which are then enforced by the executive and, this time, emphatically upheld by the court of final appeal.[24] Insofar as arguments grounded in hypocrisy and complicity then defeat the judiciary's standing to turn around and call the state to account for such wrongdoing, would unaccountability have to prevail? Again, an argument may be made that appropriately constituted and sufficiently independent international bodies could be well placed, and have the required standing, to call the state to account. Still, no state has ever been internationally tried for crimes and, as I hinted in the first section, the drive to create suitable organizational and legal frameworks for so doing seems to have lost much of its momentum.[25] Admittedly, some United Nations and more regional bodies have been set up to document and call states to account for significant human rights violations. At times, they even blame states for their wrongdoing and call for redress. Yet, many of these interventions go unheeded and, perhaps excepting some infrequent and rather unpredictable Security Council responses, fall well short of the punitive quality that is thought to be so central to the criminal process.

What about the population of wrongdoing states—that is, those in whose names and behalf states typically claim to act—or, at least, that part of the population actually victimized by a state's wrongdoing? Could such individuals not seek to call the state to account, condemn it and, possibly, punish it? The suggestion is challenging. Whereas legitimate and successful calls for accountability and condemnations may conceivably be made in "the court of public opinion," criminal law theorists generally stand firm against the idea of people taking the law into their own hands to punish wrongdoers.[26] Yet, this possibility should perhaps not be rejected

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[24] Beyond obvious examples emanating from corrupt states like Nazi Germany and Apartheid South Africa, numerous less widespread, yet no less holistic state excesses easily come to mind—say, those committed in response to alleged "national security" threats. See e.g. the oft-criticized case of *Korematsu v. United States*, 323 U.S. 214 (1944), upholding the internment of innocent Japanese Americans during World War II.

[25] The International Court of Justice did consider many relevant issues in the recent *Bosnia v. Serbia* case, in which Bosnia accused Serbia of violating its obligations under the Convention against Genocide. Yet, the case was "civil," and primarily concerned with the question of compensatory damages. *Case Concerning the Application of the Convention for the Prevention and Punishment of Genocide* (*Bosnia & Herzegovina v. Serbia & Montenegro*), 2007 I.C.J. General List No. 91 (Judgment of February 26).

[26] There are sophisticated exceptions, such Husak (1990).

too quickly. For example, Article 20 of the German Basic Law (*Grundgesetz*) provides that all Germans may resist those seeking to abolish Germany's constitutional order, if no other remedy is available. In its Preamble, the United Nations Declaration of Human Rights also recognizes that popular rebellion can be a remedy of last resort against tyranny and oppression. Could such recognitions be interpreted as pointing to at least some legal latitude for individuals to punish the state, in the sense of intentionally inflicting hard treatment on it for legal wrongdoing?[27]

Some may try to resist this suggestion by arguing that punishment is, by definition, a purported exercise of authority. I have always been sceptical of this conceptual claim. Ordinary individuals regularly punish their friends, colleagues, and partners for actual or supposed wrongdoing, in ways capable of inflicting significant suffering on them. Yet, even if, somehow, it is true that an act must be an exercise of purported authority to count as punishment, nothing conceptually precludes individuals from claiming, however timidly, the authority to punish their wrongdoing state. Therefore, if insuperable problem there is with ordinary individuals punishing the state, it is not conceptual in nature. A related, yet stronger, argument is that legitimate criminal punishment must be an act of sovereign authority. That is, if, as Weber contended, states successfully claim a monopoly on the legitimate use of force within a territory, there may simply be no accommodation possible for punishments by ordinary individuals. I have argued elsewhere that this interpretation of Weber's position is too strong, and that a state could not possibly claim to monopolize all legitimate uses of force including, for example, all individual instances of defensive force (Tanguay-Renaud 2012: 39-40). What a state is more likely to claim, as part of its claim to supreme authority, is a monopoly on the authoritative determination of the permissibility of uses of force. Such a claim is far less problematic for the possibility of individual punishment of the state. It makes it conceivable that a state may permit ordinary individuals to resort to force or other

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[27] Such interpretation is suggested by theorists, like Tony Honoré, who argue that forceful resistance or rebellion against the state is only permissible "when a wrong has been committed" (1988: 38). The right to rebel, Honoré goes on to say, is "the ultimate sanction for the violation of other rights" (41). John Locke also speaks about permissible individual uses of force in resistance against "unjust and unlawful force" by the government (1988: 402).

means of punishment against it in sanction of its criminal wrongdoing—consider, again, the German context where, on some interpretations, the state may sometimes be constitutionally compelled to permit it.

Moreover, states' claims to authority may not always be legitimate. Joseph Raz famously frames the issue as follows: a purported authority's directives are normally justified, and ground a duty to obey, when, by complying with them, their addressees are more likely to conform to the reasons that otherwise apply to them than if they were to follow their own lights (2006: 1014).[28] Accordingly, when a state does not permit individuals to punish it, yet these individuals have undefeated reasons to do so, it may then be that they should not treat it as an authority and should not obey it, at least in this specific respect. This point may also be articulated in narrower, less perfectionist terms if we assume, *arguendo*, that individuals sometimes have a duty of justice to punish culpable wrongdoers—say, to deter further wrongdoing or for reasons of desert. If leaving the administration of punishment to the state makes it more likely that it will be meted out as it should, then individuals must normally defer to it (see further Quong 2011: ch.4). However, when a wrongdoing state bars individuals from punishing it as they should, the legitimacy of its authority is compromised. In such a case, it is at least arguable that individuals ought not to defer to its directives, at least in this respect.

The point is important and can easily be extended to other key aspects of the state's purportedly authoritative administration of the criminal process, including public calls to account, adjudication of guilt or innocence, and condemnation. Still, let me retain my focus on the more contentious issue of punishment with a view to clarifying the argument further. Again, according to the line of argument under consideration (see also Tadros 2010; Wellman 2009), individuals normally have an obligation to defer to an institution's determinations about whether, how, and how much to punish if that institution is likely to do it more justly and more effectively—or, if we follow Raz, in better accordance with applicable reasons—than if they were to do it themselves. In fact, if it is possible to create such an institution in not too costly a way, and if it is likely to generate a reasonable degree of compliance, then individuals may

[28] For Raz, this condition works in tandem with another one—less central here—according to which, to be legitimate and generate a duty to obey, authority must also be exercised in a way that does not excessively curtail its addressees' personal autonomy (or independence).

well have a duty to create one. It does not matter that this institution is imperfectly just or impartial. Only a greater likelihood of justice and effectiveness—or, following Raz, of compliance with reasons—matters. This reasoning helps us see why it is that punishment of the state by individuals must remain a last resort, as well as what this proviso may entail. Yet, it also shows that the claim that individual punishment is always illegitimate is much too strong. When a state, including its courts, engages in egregious legal wrongdoing, the question may be asked whether it, or international institutions, are more likely to provide fair and effective criminal accountability than if individuals were to "take the law in their own hands." Insofar as the answer is no, it is arguable that the possibility of legitimate popular punishment of the state should not be ruled out *ipso facto*.[29] I say "arguable," since I have not yet examined what, if anything, makes it appropriate to punish the state, and what kinds of state punishments may be permissible.

Before I say anything about this, though, let me briefly address one more prominent objection to popular forms of punishment. For some, justice requires that the same entity that sets criminal prohibitions be the one to determine whether they have been breached and how they should be sanctioned, as well as the one to execute the said sanctions (see especially Harel 2008; Harel 2011). Put differently, the claim is that justice demands that all opportunities for inappropriate and erroneous second-guessing by third parties be ruled out of the criminal process. Here, one may counter that, since the state cannot but act through individuals, the possibility of second-guessing can hardly be ruled out. But let us assume that it can, at least in principle. At first glance, this objection seems to stand in the way of popular punishment of the state. But does it really? I do not think so. First, in cases in which states perpetrate egregious criminal wrongs and fail to hold themselves to account, there may be *no other way* for justice to be effected than through popular means (assuming, for the sake of argument, the absence of suitable international response). Such situations differ significantly from cases, at which this objection is otherwise aimed, in which states *decide* to outsource the

[29] A similar reasoning may be invoked to defend the legitimacy of state punishment by non-state, or sub-state, corporate agents. I bracket here the further question of when individuals should defer to these other agents, although, once again, the service conception of authority on which my argument rests is likely to hold an important part of the answer.

execution of their punishment of individual criminals to other ordinary individuals. That is, ordinary individuals faced with state wrongdoing may be the only ones in a position to do anything about it or, at least, the only ones able to hold the state to account and punish it with any semblance of independence. Indeed, whereas the executive might, for example, be punished by means of a fine authorized by the legislature, which the courts then direct to be paid at least in part to aggrieved parties,[30] or while the federal government may punish a provincial one, the state as a whole generally controls domestic institutional means of criminal punishment.

Now, even if, *arguendo*, it is true that justice absolutely requires that the source of criminal prohibitions also administer the sanctions for their violation, the objection does not necessarily bite against popular state punishments. To see why, let us revert to our discussion of authority. Some theorists describe the kinds of situations in which the purported authority of the state is illegitimate and rejected by its addressees as "states of nature," in which "political authority is absent" (Ristroph 2009: 614-615). Such states of nature are sometimes said to be all-encompassing, or specific to given purported exercises of state authority and given individuals. A better way of characterizing some such circumstances, though, is not as situations in which "political authority is absent," but as situations in which deficiencies in the state's authority correspond, however temporarily and specifically, to ordinary individuals asserting that authority. In other words, in some situations in which states are unwilling to hold themselves to account for egregious legal wrongdoing, and all better institutional processes have been exhausted, individuals may claim the authority to bring about such accountability themselves. In the case of state constitutional wrongdoing, it may then be possible to conceive of this purported popular authority as the very source, or constituent authority, that framed the state's legal duties in the first place. Of course, such argument might be most obviously available in states whose constitutions at least nominally stem from the "the people." However, since all states' existence rests on a minimum of social recognition and acquiescence, it might sometimes be extendable further. In this way, the objection could be circumvented in relation to constitutional wrongdoing. Given current state-based modes of development of international law, the same kind of argument is unlikely to

[30] This suggestion is made in dissent in the Australian High Court case of *Cain v. Doyle*, 72 Commonwealth Law Reports 409 (1946) at 433-434.

be available for international crimes of state (that find no reflection in states' constitutions). That said, with oft-discussed candidates for such crimes like genocide and slavery, I very much doubt that those otherwise advocating the objection would insist on extending it to them (at least when no better institutional response is available). Once again, the problem may be more with the objection itself than with our difficulty in meeting it on its own terms.

I have little doubt that many will still cringe at the possibility of popular state punishment. For one thing, its effectiveness in the face of powerful and potentially repressive state apparatuses may be highly uncertain as well as costly (unless, perhaps, a sufficient number of people actively support it). Moreover, it may be difficult to ensure that popular punishment does not impact the state more than it should, which may be of great importance in light of the critical functions the state otherwise discharges for its population. As a result, it may also be difficult to avoid individual state members, possibly including the very victims of state wrongdoing, being detrimentally impacted in significant respects.

In acknowledgement of such challenges, defenders of state accountability through forceful popular means tend to limit their claims to states' breaches of duty that are "weighty, crucial and severe" (Honoré 1988: 51). In other cases, they insist on more discerning constitutional or international processes such as judicial proceedings. No doubt, if such institutions exist and are disposed to play their role, the move is attractive. A judicialized process such as the criminal process as it is liberally conceived, with all its substantive, procedural, and evidential guarantees, is likely to allow for a much more sensitive handling not only of state punishment, but state criminalization as a whole. The problem is that other theorists resist the extension of these guarantees to corporate agents and, therefore, downright oppose subjecting the state to the criminal process as we know it (Thompson 1985; Dan-Cohen 2011).

This resistance primarily finds its roots in the principle of value individualism, according to which the worth of a corporate agent like the state (and, indeed, of anything else) must ultimately be appreciated in terms of its contribution to human (or, at least, sentient) life and its quality. The principle is appealing, widely accepted, and entails that the good or interests of states are not worth promoting, or defending, for their

own sake.[31] The argument typically proceeds by emphasizing that the protections that the criminal process, in its liberal guises, affords individual accused tend to be established for their own good or interests. As such, they cannot simply be extended to the state. To be more specific, there are those criminal process guarantees, such as guarantees against arbitrary imprisonment, whose application to corporate agents hardly makes sense in the first place. However, the argument entails that corporate agents should also not be afforded guarantees from which they could conceivably benefit. For example, a state should not be granted justification or excusatory defences grounded in the protection of its corporate interests exclusively. Nor should it be afforded guarantees against being retried for the same offence, or protections grounded solely in corporate privacy with regard to searches, seizures, and other investigative techniques.

Yet, the deeper one digs into the list of guarantees typically afforded to criminal accused, the more one stumbles upon examples that are not as intuitively straightforward. For example, should a corporate agent not have the right to present evidence in its own defence, even if it holds a crucial piece of information? Should it really be presumed guilty whenever charged with a criminal offence, or susceptible to being convicted on mere suspicion? Doubt arises here because it is untrue that all criminal process protections are grounded in deontological claims about the inherent moral worth of those in jeopardy. Many guarantees are justified instrumentally, in terms of their consequences—for example, as important to truth-seeking and the sorting of actual criminal wrongdoers from innocents. In fact, many guarantees of which we first tend to think in deontological terms, such as the right to remain silent and not to incriminate oneself, are themselves also often defended (at least in part) as assisting the search for truth (see e.g. Seidmann and Stein 2000). And truth-seeking matters in trials of corporate agents because of the reasons, valuable to individuals, for which we may intelligibly criminalize them—be it to bring about accountability for *actual* corporate wrongdoing, express and communicate blame for it, provide deterrence against it, and so forth. The point, more generally put, is that a case may be made for affording a wide gamut of substantive, procedural, and evidential

[31] The assumption, which I endorse, is that corporate agents do not have whatever functional characteristic it is that makes individual human beings distinctively valuable, such as sentience of the right kind or other distinctively human qualities.

guarantees to corporate accused which rests wholly on their returns for individuals. These guarantees may not be extended wholesale, or as a matter of course, from the individual-based arrangements of ordinary criminal law, but they may still be wide-sweeping, stringent, nuanced, and in many ways similar.

This possibility is comforting since, as I noted, depending on the mode and quantum of punishment, criminalization of the state may sometimes have severe detrimental impacts on its individual members. When committed to articulating and upholding sound individuals-oriented guarantees for state criminalization, judicial bodies may be well placed to provide the discernment and measure that could so easily escape a less expert and resourced "popular court." Of course, like any consequentialist rules, the guarantees in question may be defeated when the balance of consequences weighs in favour of accountability, condemnation, and punishment irrespective of whether they are followed. Such reasoning helps explain why it may be that, in some cases, less measured popular punishment is still justified. To fully understand why and how that might be the case, though, we must, at last, turn to scrutinizing the justifiability of punishing the state per se.

D CAN PUNISHING THE STATE BE JUSTIFIED?

According to prominent versions of retributivism, the general justifying purpose of punishment is the infliction of the kind and degree of suffering that wrongdoers deserve. This way of thinking about justified punishment is not easily transferable to state punishment, since claims that states can themselves suffer—that is, suffer in ways that are irreducible to the suffering of their individual members—are generally metaphysically suspect.[32] If List and Pettit are right about corporate agency, then given some plausible functional claims about states—i.e., they have adequate decision-making mechanisms, their decisions can have reasonable coherence over time, etc.—there seems to be no principled difficulty in ascribing genuine cognitive and action-directing attitudes to them. However, this argument does not amount to an argument that the state also has the consciousness required to experience phenomenal states such as

[32] Still, related claims pervade the literature and are too often left unexamined. For example, Tracy Isaacs writes in passing that "If a state warrants punishment for its delinquent behavior, then the state should suffer, not the individual citizens" (2011: 16).

suffering. One could perhaps try to extend the analysis and claim that phenomenal consciousness is also best explained functionally, but I find it difficult to imagine how such a claim could be persuasively articulated. In other words, there seems to be something more to irreducible sentience than mere questions of organizational structure and function—something that the state does not have. If I am right about this assumption, then state punishment may not be justifiable on such a retributivist ground.

Then again, punishment is not conceptually welded to the infliction of suffering. At bottom, punishment simply consists in the intentional infliction of an inconvenient or burdensome deprivation, or setback in interests, in response to wrongdoing (or, at least, what is claimed to constitute wrongdoing). Suffering is merely one form that such inconvenience may take. Thus, expelling a state from an international organization—membership in which, let us suppose, benefits it in ways that are not easily substitutable—amounts to punishing it, insofar as this expulsion is intentionally carried out in response to wrongdoing. Although not usually conceived in such terms, the judicial nullification of a wrongful piece of legislation—along with, say, more legitimate regulations later adopted under it—may also be understood as state punishment. Such measures may be so understood insofar as they are intended to burden or set back the state in response to its initial wrongdoing. If this understanding is correct, then it may be possible to justify punishing the state in different retributivist terms. For example, in the latter case, it might be argued that since the state sought to expand its normative position in a wrongful way, inconvenient measures aimed at rolling back such expansion are justifiable. In other words, the proper "eye for an eye" response to the state's wrongful expansion of its legal rights may be to frustrate such rights, and setback its designs correspondingly. *That*, some may think, is what the state deserves in a case like this.

For others, though, theoretical manoeuvres of this sort may threaten to stretch the ideas of retributive punishment and desert beyond recognition. If that is so, it is perhaps best simply to avoid conducting the inquiry in such terms. After all, not only is the infliction of suffering unnecessary for punishment, but the concept is also altogether detachable from the idea of desert. Undeserved punishments are still punishments, just as much as non-suffered punishments are still punishments. This realization matters a great deal at the justificatory stage, since, as I remarked in the last section, the good and interests of corporate agents like the state are not valuable for their own sake. For this reason, the idea of

giving such agents what they deserve tends not to be given more than marginal importance in discussions of the justifiability of their punishment. Instead, the focus of such discussions tends to be on consequence-based grounds of justification that can more easily be related to the impact, or value, of corporate punishment for individuals. Oft-mentioned grounds include deterrence, reform, and incapacitation—or, more generally, the suggestion that threatening to punish and actually punishing the state may sometimes be justified as a means of preventing future state wrongdoing. It is on this general suggestion that I want to focus.

To be able to assess this suggestion, one first needs to get a firmer grasp on how *the state* can be punished. Indeed, the incidence of state wrongdoing might be reduced through vicarious punishment (possibly involving the suffering) of a state's population, a particular segment of it, or specific individual officials, when these are in a position to influence state decision-making. However, what I am interested in here is state punishment per se as a component of state criminalization, as opposed to hard treatment of third parties for the wrongs of the state. While instances of vicarious criminal liability and punishment can be found in the criminal law of many jurisdictions, they certainly do not represent the core case of criminal treatment. What is more, I believe that genuine state punishment is possible.[33] It consists in punishment that targets what is irreducibly the state's own—namely, its irreducible beliefs, judgments, action-directing attitudes, plans, and possibly also to some extent its constitution.[34] The question then becomes whether responses to state wrongdoing aimed at such irreducible aspects, can ever be justified on the grounds that they make it harder for the targeted state to engage in further wrongdoing and, possibly, can also dissuade others from doing so.

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[33] Compare: Feinberg (1968: 677), who argues that "Collective liability…differs from (other) vicarious liability only in that it involves organized groups and their members."

[34] Some, like Richard Vernon (2011: 304-306), prefer to speak of punishing the state "in its political aspect," a label which, in my view, is at once too narrow and too broad. It is too narrow because a state's beliefs, judgments, and plans which, under some plausible description, are not inherently "political" may be at the root of its wrongdoing. It is too broad because much political action within the apparatus of the state may be reducible to individuals' actions.

This formulation of the question in terms of targeted responses that deliberately make it harder for the state to program for certain actions allows one to imagine a wide array of means of state punishment. Domestically, one could think along such lines of monitored court judgments enjoining the state to discontinue and reform some of its attitudes, plans, and policies—including those evidenced in relevant statutes and regulations—and perhaps also those problematic aspects of its constitution that it is in a reasonable position to modify.[35] One could also conceive in such terms of punitive damages—paid, for example, to the victims of state wrongdoing or to outsiders—that would deplete the resources of the state and its ability to program for action. At the non-institutional level, one could also understand as state punishment individual acts of civil disobedience against a state's laws or policies, carried out in response to, and with the aim of deterring further, state wrongdoing. Here, refusal to pay taxes, defiance of conscription orders, public exposure or leaks of state secrets, and internet-based denial-of-service attacks (DoS) against state agencies may all be cases in point, when carried out with the relevant intention. Yet another possibility may be forceful popular rebellion, aimed at compelling a change in specific state attitudes and programs, restructuring the state in more depth, or straight out inflicting the "death penalty" upon it and reconstituting it wholesale or dismantling it permanently (i.e., a revolution). While some of the same means may be available to international punishers, conquest and reconstruction—as in the case of Germany and Japan after World War II—as well as more minor restrictions on sovereignty, such as enforced no-fly zones, international inspections regimes, well-tailored trade and aid embargos, and exclusions from international organizations, are also imaginable.

Insofar as the benefits of such responses to state wrongdoing override their costs, they may well be justified. However, for this statement to hold true, all things considered, a number of important provisos and objections must be addressed. The first is related to value individualism. While states' own interests do not stand in the way of invasive responses tailored to obstruct, and sometimes even change and

[35] For example, socio-political aspects of a state's constitution may be easier to modify than deeply entrenched legal aspects, the alteration of which may require formal constitutional amendments. For the suggestion that structural difficulties in altering a state's constitution may sometimes ground state excuses, see Tanguay-Renaud (forthcoming).

monitor, their very judgments, attitudes, and plans, individuals' interests might. Many of the means of punishment outlined above can have significantly detrimental side-effects (DSEs) on a state's individual members, possibly including many who have not contributed in any relevant way to its wrongdoing and may even themselves be its victims. A common response is that, beyond entertaining some limited pleas for reductions in sentences due to hardship, criminal justice systems generally do not pay much heed to the DSEs of individual punishment—even when they are quite significant on the punished individual's family, dependents, and others (French 1984: 189-190). Although accurate, this observation in no way entails that DSEs *should* not be taken into account when appraising the justification of a punishment. Perhaps, in many instances of individual punishment, such DSEs can be offset by the overall value of punishment to the punished and society at large. Even if correct, though, this moral assessment is at best contingent. In many cases where DSEs are important, they may well not be fully neutralized. In fact, this argument entails even less that side-effects have no moral bearing for corporate punishment, which cannot be justified otherwise than in terms of its value for others—namely, individuals—some of whom may be the very same ones on whom DSEs fall.

This thought can be fleshed out by means of examples. State punishment through fines or forceful methods, such as rebellion and, possibly, war, may have momentous DSEs on individuals. Large fines may lead states to levy heavy additional taxes from their populations and to cut back on important services they would otherwise provide them, thus affecting negatively their standard of living. Resort to force on a wide scale may result in many individuals indiscriminately being harmed, and possibly even killed. No one, I take it, would want to argue that such setbacks in individual interests, possibly involving important infringement of individual rights, do not matter morally. Thus, if instances of state punishment that have DSEs on individuals are to be permissible, this permissibility needs to be argued for.

Commonly-defended grounds for at least some moral latitude to let DSEs of state punishment fall on state members are individual-specific. They comprise individuals' participation in, or failure to oppose, the development of wrongful state attitudes and action plans (Pasternak 2011). They also include individuals' voluntary or semi-voluntary acts of identification and association with the state (Pasternak 2012), as well as

their causal contribution, however minimal, to state wrongdoing (Tadros 2012). A major difficulty with such arguments is that they are unlikely to apply to everyone who is negatively impacted by a state's punishment. Some of these individuals may have been unable to participate in, or oppose, the development of wrongful state attitudes and action plans. Others may have deliberately refrained from participating, and done whatever they could in opposition. Some may also have resolutely refused to identify and associate with the state in the first place (even if they are unable to exit it at a reasonable cost to themselves). Others yet may be leading reclusive or marginal lives with no relevant causal influence on state wrongdoing. In fact, even in situations in which, on the basis of such arguments, it would be permissible to let at least some DSEs fall on all affected individuals, means of state punishment may not be sufficiently discriminating to ensure that no one is unacceptably impacted. While forceful rebellion and war may immediately come to mind as incurably indiscriminate means, all other conceivable methods of state punishment with significant DSEs on individuals must also face the objection.

One tempting reply might be that the establishment of institutions of individual punishment is commonly held to be permissible despite the certainty that innocents will be punished, owing to the unavoidable possibility of error. According to this possible reply, criminal conviction and punishment of some innocents—which may have nothing at all to do with criminal wrongdoing—is justified as a DSE of the overwhelmingly beneficial institutional practice of convicting and punishing the guilty. No doubt, the permissibility of letting such DSEs fall on some innocent individuals is at least intuitively plausible. Yet, analogizing criminal punishment of individuals and criminal punishment of states in this respect is unadvisable. Indeed, considerable resources and systematic efforts are generally invested by criminal justice institutions that deal with individual suspects to determine, on an individual basis, whether or not they are liable to conviction and punishment. As a result, the hope and assumption is that, in the vast majority of cases, only those who are liable to conviction and punishment will be subjected to them. However, insofar as states are targeted and punished as corporate agents in their own right, through means—like many of those identified earlier—that are not geared (or not as systematically geared) at identifying and avoiding objectionable effects on individual members, the worry introduced in the last paragraph remains whole.

Is it the case, then, that the only permissible state punishments are those that have no meaningful DSEs on individual members, or whose DSEs are carefully tailored to match each impacted individual's predicament? This conclusion should not be reached too hastily. Indeed, another, less individual-specific, argument worthy of exploration is that, in cases where the state perpetrates wrongdoing in a way that benefits all of its members, such benefit may ground a permission to let at least some DSEs fall uniformly on all of them. Here, I cannot do justice to all the usual objections to this kind of argument. These include the difficulty of assessing the said benefit in relation to all affected individuals. They also include the challenge of demonstrating that past state wrongdoing benefited those who are suffering DSEs of its punishment here and now, as well as those who may continue to suffer them in the future. That being said, at least one underexplored formulation of the argument, focusing on the way in which state wrongdoing is brought about, might be able to dodge these objections to a meaningful extent. I introduce it here briefly, as a caution against dismissing too quickly the possibility of permissible general DSEs of state punishment on individual members.

The argument rests, once again, on Joseph Raz's thesis about the normal justification of authority. There are some decisions that modern states are especially well-placed to make, given their social position and the kinds of resources at their disposal. Here, I have in mind decisions such as how to address intricate societal problems or how to implement complex social programs. Insofar as individual state members are more likely to comply with reasons by deferring to their state on such matters than by following their own lights, then, Raz tells us, the state is normally justified in demanding that they defer to it.[36] It is justified on the ground that it is providing a rational benefit, or in Raz's words a "service," to these individuals. Thus, in my examples, individuals do not have to attempt to solve, by themselves, the kind of social problems or implementation conundrums mentioned. When a state, whose authority is justified in this way, is inexcusably mistaken in its judgment and ends up perpetrating criminal wrongdoing, it may then be unfair to expect it,

[36] As noted in the previous section, Raz also insists that, to be legitimate, an authority must not excessively curtail individuals' personal autonomy, or independence. Recall also that Raz's thesis may be rearticulated in non-perfectionist terms, insofar as individuals have duties to deal with the matters in question, and are likely to deal with them better by deferring to the state's efforts to do so.

perhaps along with those who significantly contributed to its decision-making, to handle the costs of punishment in a self-contained way. In other words, the state's population writ large may be legitimately expected to absorb some of these costs, as recipients of a service which, although more likely to benefit them, backfired in a given instance.

According to this argument, permissible DSEs still ought to be calculated in some proportion to the benefit individually received, which, again, may rule out more harmful and indiscriminate forms of state punishment. However, since states can be normally justified in making certain kinds of decisions across people and time, the argument may helpfully apply to entire state populations, over time. It may even apply to victims of state wrongdoing who otherwise benefit from the state's rational service.[37] The argument also has the advantage of presenting a defined benefit with which to contend. No doubt, the argument has its limitations. It is a piecemeal argument that only applies to certain cases of wrongdoing, by certain states. For example, states whose authority is generally unjustified must be ruled out of its ambit *ab initio*. Yet, its plausibility (more argument would be needed to establish its success) should lead one to refrain from dismissing too rapidly the possibility of permissible state punishments with DSEs on all individual state members.[38] Of course, there will always also remain possible cases of state wrongdoing that are so "clear, weighty, and crucial" that they warrant punishment despite radical DSEs on some individuals. Some *de minimis* DSEs on individuals may also be generally permissible. What I am suggesting here is that the permissibility of state punishment with widespread DSEs can extend beyond these two extremes.

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[37] Here, I am not denying that other victims-related arguments based on other benefits of state wrongdoing or state punishment for them, or on their possible consent to suffering the latter's detrimental side-effects, are also possible. I am only pinpointing an important strength of the argument under consideration.

[38] Anna Stilz (2011) has recently developed an argument of a similar form. According to Stilz, a state's authority is generally justified, and benefits state members across *all* matters, when the state passes the minimal threshold of "reasonably interpreting" its members' "basic right." This generalized threshold is ambiguous—perhaps especially when framed, as Stilz does, as a threshold of "necessary hypothetical authorization," which may only be passed by "democratic legal states." As I have tried to show through the lens of Raz's thesis about the normal justification of authority, a clearer and more discerning version of the argument is available.

Another objection to state punishment as I have been conceiving it so far is that, since states do not have any matter or energy beyond that provided by their individual members, it is really impossible to punish the former without punishing the latter. I have already signalled my reservations about this objection, since I believe punishing the state involves deliberately targeting its irreducible aspects. At times, it may be possible to punish it with virtually no DSEs on individuals and, at others, with only permissible ones. It is likely true, though, that some means of state punishment could be mixed, and involve deliberately targeting individuals alongside irreducible aspects of the state. For example, it is in the nature of many just wars and rebellions that they target soldiers and other state officials, alongside the structure of the state and its irreducible attitudes and action plans. Such intentional hard treatment of individuals likely brings with it its own additional set of moral constraints, with which a full account of the permissibility of these modes of punishment would have to contend.[39] I can only flag this complication in passing, while stressing that some conceivable means of state punishment will not share this feature. Think, for example, of various forms of civil disobedience targeted at specific laws or policies, of monitored injunctions for the state to reform itself in specific ways, or of well-tailored embargoes against repressive policies (such as bans on arms trading).

Changing register slightly, one may wonder why I insist on discussing the kinds of state treatment listed above under the rubric of state punishment. Whereas, conceptually speaking, punishment is a response to what is at least claimed to be wrongdoing, many of the forms of inconvenient treatment discussed may be justified on consequential grounds that have no connection whatsoever with state wrongdoing. For example, the prevention of state-caused harm may sometimes provide a sufficient justification for such treatments, whether or not this harm is wrongfully brought about. I have no qualms about conceding this point. States are not valuable for their own sake, and a variety of considerations may justify individuals in seeking to alter a state's attitudes, plans, and make-up through comparable means. However, that the forms of state treatment discussed be portrayed and understood as punishment *when they are undertaken in response to culpable wrongdoing*—and especially for

[39] For a good starting point on the moral distinction between intentional harm and foreseeable but unintentional harm (aka harm as side-effect), see McMahan (2009).

my purposes, criminal wrongdoing—matters a great deal. In fact, it may even add to their justification.

The justification of criminalization in both its condemnatory and punitive aspects at least partly rests on its expressive value. Christopher Bennett (2008) powerfully conveys this idea when he describes the practice as a symbolic ritual. That is, public condemnation and inconvenient treatment, understood as punishment, are imbued with social meaning. They constitute what we have come to understand and accept as the appropriate response to unjustified and unexcused criminal wrongdoing. For some, this response is symbolically valuable in that it expresses fitting attitudes of resentment and indignation, and judgments of disapproval and disapprobation, for the criminal's conduct (Feinberg 1970: 98). This point is sometimes sharpened by emphasizing that condemnation and punishment inflict, or are relevantly understood as inflicting, an "expressive defeat" on the wrongdoer, thus reaffirming the equal moral worth of the victim which the wrongdoer had implicitly or explicitly denied (Hampton 1990: 122-130). Of course, some crimes are victimless, and a more general formulation of the point according to which such response "adequately symbolises the effect of what the wrongdoer has done on her [own] standing" (in the relevant normative community) may be more apposite (Bennett 2008: 194). Irrespective of its exact articulation, though, the overall claim is powerful. The symbolism of condemnation and punishment for criminal wrongdoing bears important value for individuals, which in turn contributes to the justification of the practice.

Is this argument, specifically developed with condemnation and punishment of individual criminals in mind, really transferable to criminalization of the state? Some, like Joel Feinberg, seem to doubt it, and insist on characterizing criminalization as a means for the state to *disavow* conduct that is not its own and that it does not condone (1970: 101-102). This insistence flies in the face of the observation, made earlier, that a state may conceivably blame and punish itself for its own criminal wrongdoing. It also ignores the fact that other entities and individuals may be legitimately positioned, both internationally and domestically, to hold states to account criminally. The reluctance exhibited by Feinberg is characteristic of theories of domestic individual criminalization that conceive of the state as sitting above, or as embodying or representing, those whose values ought to determine what counts as criminal wrongdoing, and in whose name criminalization ought to take place. In

these theories, such special standing for the state in relation to the relevant normative community of individuals—be it defined in political or moral terms—plays a large role in explaining why it is an appropriate condemner and punisher. No doubt, this path of inquiry has been fruitful and yielded many important insights in the development of criminal law theory. Still, one may wonder why, if the state is not only a possible condemner and punisher, but also a potential criminal wrongdoer, it should not also be theorized as such. Throughout this article, I have sought to start building a case that it should be.

Thinking of the state as a wrongdoer may even have its rightful place within the kinds of theories discussed. Modern states, I suggested, can be agents proper. As List and Pettit go on to insist, they might even appropriately be described as persons, insofar as "person" is understood in the performative sense of an agent capable of appropriately responding to reasons and performing in the space of obligations. In their own words, "persons, natural or corporate, are distinguished by the fact that they can enter a system of obligations recognized in common with others, and limit their influence on one another to that permitted within the terms of that system" (List and Pettit 2011: 178). Understood in this light, states lose much of their aura of unassailable distinctiveness and superiority. They can be thought of as genuine members of normative communities—moral, political, or legal—along with their individual members and other persons (including other corporate persons). It then becomes possible to treat them as responsible agents that can share the values of relevant communities, understand the expressive meaning of condemnation and punishment, and be expected to respond appropriately. Thus, not only may culpable wrongdoing states be perfectly intelligible targets for condemnatory and punitive expression, they may also have what it takes to make that expression their own, and to take appropriate steps to reform themselves, make amends, and avoid similar wrongdoing in the future.[40] Once again, I am not claiming here that states should be thought of as having equal moral value to individuals, or that they should have equal rights. My claim is simply that they may be engaged appropriately as subjects of criminal law, whose criminalization can be valuable, and justified, because of a

[40] Such a way of thinking about the state may then open up new vistas for so-called communicative theories of criminalization, otherwise defended as modified versions of retributivism. Here, I primarily have in mind the work of Antony Duff (2011).

number of important consequential and symbolic considerations (as well as, perhaps, some more tangential retributive ones).

E CONCLUSION: OF NEW VISTAS, ALTERNATIVES, FICTIONS, AND POLITICS

I ended the last section by suggesting that thinking about states as possible criminal wrongdoers may open up new vistas for criminal law theory. Such vistas are not entirely new. There is a long tradition of thinking about the importance of curtailing state action through the rule of domestic and international law. Furthermore, as I suggested in the introduction, the willingness to conceive of states as genuine moral wrongdoers is also making its way, albeit timorously, into criminal law theory circles. In this article, I have sought to advance these discussions, by inviting reflection about regulation of state wrongdoing through criminal law itself. I mostly focused on the case of domestic state criminalization, as I consider that the international law case is more straightforward, and that most of the major objections it faces also arise in some form or another domestically.[41] To be sure, many questions remain to be addressed, even at the domestic level. For example, what specific kinds of state behaviour ought to be criminalized, and what exactly differentiates state crimes from other forms of legal regulation of state conduct? Given the state's regular resort to coercion as a means of discharging many of its central functions—it is, after all, the quintessential agent of criminal law—what kinds of justifications and excuses should be available to it?[42] Moreover, how do wrongdoing by the state, its discrete corporate organs, as well as its individual officials and ordinary members relate to each other precisely?

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[41] Unsurprisingly, the few recent theoretical discussions of state criminalization focus exclusively on international law. See e.g. Luban (2011) and Lang Jr. (2007).

[42] As John Gardner once suggested, the state can be a wrongdoing agent that perpetrates murders or is complicit in murder, robs or is complicit in robbery, blackmails or is complicit in blackmail. As such, it "too needs to justify its coercive activities in moral terms. Satisfying the harm principle and rule of law are necessary but insufficient conditions of this. The state is also bound, even in its exercises of authority and its uses of coercion, by the general principles of morality that bind us all" (Gardner 2007: 2628). I believe, although I cannot argue here, that given the social role of the modern state, and its typical *de facto* authority and greater resources, such general principles may make even greater demands on it. Consequently, many exculpatory defenses available to it may be narrower than those available to ordinary individuals. See further Tanguay-Renaud (forthcoming).

At the international level more specifically, who may legitimately hold a state to account criminally and punish it? Can other individual states, foreign groups of victims, or their allies ever have the standing to do so, or must the response be institutional and multilateral? Insofar as the most appropriate approach is institutional, what features should the relevant institutions and their processes have? And at both levels, to what extent can the concepts, principles, and doctrines applicable to the criminalization of individuals be appropriately transferred to the case of state criminalization? While I provocatively sought to start building a plausible case for state criminalization here, the topic no doubt remains rich in theoretical ramifications that are yet to be examined.

Even then, I could not conclude without briefly highlighting yet another important set of puzzles. Criminalization is a blunt practice. Assuming, as I do, that there will be times when no other social objectives defeat those of domestic state criminalization, there will still remain a question about alternatives. Indeed, when less draconian options are available to achieve the same legitimate objectives, then criminalization should arguably yield to them. What such alternatives might there be? Despite various suggestions to the contrary, I do not think "civil" liability and compensation, reparations, reconciliation schemes, truth commissions, and public inquiries fulfill the same functions, or at least not completely. While all may shed some light on state wrongdoing, and possibly even lead to state reform, condemnation and punishment paradigmatically fall outside their remit.[43] This point is generally also thought to extend to other, more technical, ways of bringing about structural and attitudinal changes in states, including the judicial invalidation of legally unauthorized state action. In fact, even systematic criminalization (or, similarly, appropriate political castigation) of all individual wrongdoers acting within the architecture of the state does not quite cut it. It does not, because, as I suggested repeatedly, there may often be more to the state than the sum of its individual parts. That is, states may culpably perpetrate wrongs of which no individual is guilty, either because all individuals have some kind of defence, or because the grounds for state criminalization are not the same as for individuals. A similar line of argument holds, I suggested, between the state and its subsidiary corporate

[43] In fact, many argue that condemnation and punishment *should* fall outside their remit, given the types of institutional processes that they are (Duff 2008; Gardner 2005; Van Harten 2003).

organs. Thus, criminalization of the state has the distinctive advantage of standing in the way of shortfalls of criminalization, which could, in turn, deprive individuals of its warranted mix of targeted symbolism and consequences.

Indeed, even when the state does not meet the requirements of irreducible corporate agency, the shortfall argument may still be invoked to ground fictions of state criminality. I hinted at this additional possibility throughout, mentioning that expressive, consequential, and fairness-based considerations may sometimes justify it. While a fuller discussion of this other paradigm of state criminalization will have to await another occasion, it seems important not to ignore it both because of its plausible overlap with, and complement to, the real agency paradigm, and because of its educational potential. With respect to the latter, while in many jurisdictions "the state" or "commonwealth" is a person known to law, in others, the law's imagination is limited to sub-state agents such as the Crown and its individual officials. In fact, even in international law where states are the chief legal subjects, the state is often understood to be primarily identifiable through rules fictionally attributing to it certain acts of others. This fictional orientation remains predominant in international law even if, when taken together, many such rules come very close to recognizing the state as an agent proper (including in its domestic extralegal instantiations) (see further Crawford 2001: Arts 2-11). Thus, allowing the possibility of justified fictions of state criminality presents an opportunity to help lawmakers come to terms both with the existence of the state *qua* person, and the conceivability of its criminalization.[44]

How much politics can really countenance the development of state criminalization properly so called, or even the criminalization of subsidiary corporate state organs such as governments and their agencies, is another question. If scarce contemporary discussions of the issue are any indication, it is unlikely to top national (or international) agendas any time soon. This is not to say that conditions may never be ripe. The idea

[44] List and Pettit present a developmental rationale for fictional state responsibility that goes even further. According to them, it may sometimes be permissible to hold states that are not agents fictionally responsible, to make it clear to their members that, unless they develop routines for keeping their state in check (possibly turning it into an agent proper), they will suffer costs. Indeed, they add, this developmental rationale for ascribing group responsibility fictionally "is all the more powerful if the ascription of guilt is attended by a penal sanction of some kind" (List and Pettit 2011: 168-169).

was certainly advocated forcefully at various points since the World Wars, and it appears in limited or derivative ways in some domestic constitutional frameworks and criminal codes, as well as in international documents like the *Rome Statute*. From time to time, it also resurfaces in public discourse after evidence of state-sanctioned aggressions, assassinations, torture, and other scandalous forms of state complicity in wrongdoing comes to light. Only time will tell if state crimes, explicitly identified as such, ever come to form a normal part of the domestic and international norms of state accountability. Only experience will show if justified criminal, or criminal-like, processes and punishments can steadily emerge and reliably stand up to politics and other social pressures in response to state wrongdoing. While we wait and watch, though, we can make sure we get the theory right.

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