

I would do anything for Law (and that's a Problem): Criminalization, Value, and Motives¹

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Criminalization creates a prudential reason to refrain from the criminalized in order to avoid legal punishment. Prudence is not the right reason to refrain from wrongdoing. According to Michael S. Moore these facts should lead us to affirm the corruption thesis according to which criminalizing any wrongful conduct decreases the number of people who refrain from the criminalized wrong for the right reason. This paper argues that Moore is mistaken. These facts do not support the corruption thesis in any way. Rather they support the obscuration thesis according to which criminalizing any wrongful conduct decreases the number of people who are correctly perceived as refraining from the criminalized wrong for the right reason. This is significant since the corruption thesis is Moore's basis for claiming that the value of doing the right thing for the right reason grounds a pro tanto reason against criminalizing wrongful conduct. The paper ends by reflecting over whether, and if so why, it is valuable that those who refrain from wrongdoing for the right reason are also perceived as refraining from wrongdoing for the right reason, such that the obscuration thesis could similarly give rise to a pro tanto reason against criminalizing wrongful conduct.

I. INTRODUCTION

The defining trait of criminal laws is that those who break them become liable to state punishment.² Punishment is characterized by the intentional infliction of something which people are generally assumed to have a prudential reason to avoid,³ e.g. "harsh treatment",⁴ "deprivation",⁵ "harm or suffering",⁶

¹ I am grateful to Andreas Albertsen, Thomas Ferretti, Siba Harb, Søren Flinch Midtgaard, Tim Meijers, Victor Tadros and Danielle Zwarthoed for useful comments. Special thanks to David Vestergaard Axelsen, Amneris Chaparro, and Kasper Lippert-Rasmussen for extensive and very useful written comments.

² Douglas N Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008), 78; A. P. Simester and Andrew Von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford ; Portland, Or: Hart Pub, 2011), 1; Joel Feinberg, *The Moral Limits of the Criminal Law Vol. 1: Harm to Others* (New York; Oxford: Oxford University Press, 1984), 3–4.

³ Note further that unless the vast majority of people in a given society took themselves to have a prudential reason to avoid criminal punishment, the criminal justice system of that society would almost certainly fail to promote its justifying aim effectively. Set aside such defective systems of criminal justice.

⁴ Husak, *Overcriminalization*, 92.

⁵ Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 14.

⁶ Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law*, First paperback edition, Oxford Legal Philosophy (Oxford United Kingdom: Oxford University Press, 2013), 21.

“unwelcome consequences”,⁷ “pain or other consequences normally considered unpleasant.”⁸ It is thus a general fact about criminalization that:

- (1) The criminalization of any conduct, C, creates a generally applicable prudential reason to refrain from C’ing in order to avoid punishment

It is widely affirmed that there is moral value in doing the right thing for the right reason.⁹ Morally obligatory and morally supererogatory conduct¹⁰ has more moral value when it is motivated by certain reasons than when it is motivated by others. Whatever the right reason to do the right thing is, it is not prudence, and it is certainly not fear of punishment.¹¹ While rescuing a drowning child in order to avoid punishment is, of course, better than letting it drown, it is also worse than rescuing the child out of respect for the moral law, because of the intrinsic moral value of the child, or whatever the right reason to rescue drowning children is.¹² Thus, the following claim is fairly uncontroversial:

- (2) Prudence is not the right reason to refrain from wrongdoing.

The aim of this paper is to discuss what, if any, implications (1) and (2) have for the justifiability of criminalizing wrongful conduct. *Prima facie* these facts seem to put the criminalization of wrongful conduct at odds with the moral value of doing the right thing for the right reason. When the state criminalizes some wrong it knowingly and intentionally creates a prudential reason to refrain from the criminalized wrong. Perhaps the state even creates this prudential reason *in order* to give people an additional reason to refrain

⁷ Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 6.

⁸ H. L. A. Hart, “Prolegomenon to the Principles of Punishment,” *Proceedings of the Aristotelian Society* 60 (1960-1959): 4.

⁹ Immanuel Kant, *Critique of Practical Reason* (Mineola, NY: Dover Publications, 2004); Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford; New York: Clarendon Press; Oxford University Press, 1993), 43–44; Friedrich A. von Hayek, *The Road to Serfdom: Text and Documents*, ed. Bruce Caldwell, Definitive ed, The Collected Works of F.A. Hayek, v. 2 (Chicago: University of Chicago Press, 2007), 216; Michael S. Moore, *Placing Blame: A Theory of the Criminal Law*, 1st published in paperback (Oxford; New York: Oxford University Press, 1997), 611; 747-748; S. Matthew Liao, “The Idea of a Duty to Love,” *The Journal of Value Inquiry* 40, no. 1 (August 28, 2007): 18, doi:10.1007/s10790-007-9013-8. Victor Tadros even claims “everyone agrees” that this is so, though this is probably too strong a claim seeing as I struggle to see how a utilitarian could agree that motives are relevant to the value of conduct. (“The Wrong and the Free,” in *Legal, Moral, and Metaphysical Truths.*, ed. Kimberly Kessler Ferzan ([S.I.]: Oxford Univ Press, 2016), 82.

¹⁰ Throughout the paper ‘conduct’ refers to both actions and omissions

¹¹ Kant, *Critique of Practical Reason*; Moore, *Placing Blame*, 611; 747-748; Tadros, “The Wrong and the Free,” 82.

¹² The paper takes no stance on what the right reason (or reasons) to do the right thing is, except that it is not prudence. The idea that there is value in doing the right thing for the right reason is strongly associated with the idea that the right reason is in some sense, moral. Several of the authors I shall discuss refer to the right reason to do the right thing as such (Moore, *Placing Blame*, 747; Tadros, “The Wrong and the Free,” 82.). It is far from uncontroversial that the right reason to do what is morally obligatory is always moral even on the most plausible interpretation of what that means. It seems especially problematic in the case of personal relationships and the duties inherent in those, where the “content of the duty is just to be motivated for the other person’s sake.” (Liao, “The Idea of a Duty to Love,” 18.)

from the criminalized wrong.¹³ However, (2) tells us that it would be better if none of those who refrain from the criminalized wrong are motivated by the prudential reason created by criminalization. According to many, most prominently the great legal scholar Michael S. Moore, (1) and (2) should therefore lead us to affirm:¹⁴

The corruption thesis: The criminalization of any wrongful conduct, V, decreases the number of people who refrain V'ing for the right reason.

This paper argues that this is mistaken. Far from providing a conclusive reason to affirm the corruption thesis (1) and (2) do not even support the corruption thesis. Rather these facts support:

The obscuration thesis: The criminalization of any wrongful conduct, V, decreases the number of people who are correctly perceived as refraining from V'ing for the right reason.

The failure of the corruption thesis undermines Moore's claim that the value of motives is among the values lending moral weight to a presumption of liberty, the standing case against criminalization that must be overcome in order to justify criminalization.¹⁵ The value of motives cannot lend weight to a presumption of liberty unless this value is in conflict with the criminalization of wrongful conduct and the corruption thesis is necessary to explain why there is such a conflict. The obscuration thesis is of interest because it draws attention to a hitherto overlooked but ubiquitous consequence of the criminalization of wrongful conduct, and because it provides a compelling explanation of why the corruption thesis *seems* plausible in light of (1) and (2), even though it is not supported in any way by these facts. What is far more interesting, however, is that if it is more valuable to refrain from wrongful conduct for the right reason if one is also perceived as refraining from wrongful conduct for the right reason then the obscuration thesis also lends weight to a presumption of liberty. I argue that this is plausibly the case, and that the obscuration thesis is, in fact, the best explanation of why some wrongful failures to perform certain actions should not be criminalized. Thus, (1) and (2) does cause the criminalization of wrongful conduct to interact with the value of motives in a problematic way after all. Moore turns out to be right that the criminalization of (some) wrongful conduct causes choices to refrain from that wrong to lose some of their value in virtue of creating a prudential reason

¹³ Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 6.

¹⁴ Michael S. Moore (*Placing Blame*, 747–48; “A Tale of Two Theories,” *Criminal Justice Ethics* 28, no. 1 (May 2009): 32, doi:10.1080/07311290902831284; “Liberty’s Constraints on What Should Be Made Criminal,” in *Criminalization: The Political Morality of the Criminal Law*, ed. R. A Duff et al., Criminalization Series 4 (New York, NY: Oxford University, 2014), 187–188; 202.),

¹⁵ Moore, *Placing Blame*, 747–48; Moore, “A Tale of Two Theories,” 32; Moore, “Liberty’s Constraints on What Should Be Made Criminal,” 187–188; 202; George, *Making Men Moral*, 43–44; Hayek, *The Road to Serfdom*, 216ff.

to refrain from the criminalized conduct. However, the problem is not that the creation of a prudential reason corrupts motives, but that it obscures them.

The paper proceeds as follows. Section II provides a typology of the different ways in which the criminalization of wrongful conduct can affect people's motives for refraining from that conduct. Section III argues the corruption thesis is not supported by (1) and (2). Section IV argues that (1) and (2) instead supports the obscuration thesis. Section V argues that it is valuable that those who refrain from wrongdoing for the right reason are also perceived as refraining from wrongdoing for the right reason, and that the obscuration thesis can therefore give rise to a pro tanto reason against criminalizing wrongful conduct.

II. NINE WAYS TO REACT TO CRIMINALIZATION

Imagine a scenario in which the wrong, V, is not criminalized and one in which V is criminalized. Any given person can either refrain from V'ing for the right reason, refrain from V'ing for the wrong reason, or V. She might do the same thing in both scenarios, but this need not be the case. Since it is not possible to do what is wrong for the right reason, she cannot v for the right reason.¹⁶ Thus, it is possible to assign everyone to one of nine different groups with respect to any given wrong. These groups are as follows. The Saints who refrain from V'ing for the right reason regardless of whether V is criminalized; the Corrupted who refrain from V'ing for the right reason if V is not criminalized, and refrain from V'ing for the wrong reason if V is criminalized; the Fallen who refrain from V'ing for the right reason if V is not criminalized, and V if V'ing is criminalized; the Redeemed who refrain from V'ing for the wrong reason if V is not criminalized, and refrain from V'ing for the right reason if V is criminalized; the Prudent who refrain from V'ing for the wrong reason regardless of whether V is criminalized; the Anarchists who refrain from V'ing for the wrong reason if V is not criminalized, and V if V'ing is criminalized; the Repentant who V if V is not criminalized, and refrain from V'ing for the right reason if V is criminalized; the Scoundrels who V if V is not criminalized, and refrain from V'ing for the wrong reason if V is criminalized; and the Unrepentant who V regardless of whether V is criminalized. People can belong to different groups depending on the wrong in question, but for each wrong everyone belongs one and only one of these groups.

Table 1: Overview of the nine groups

¹⁶ As Moore also notes (Moore, *Placing Blame*, 747.) It could be objected that it is possible to do the wrong thing for the right reason if one makes a mistake of fact. However, those who V due to a mistake of fact are neither V'ing for the right reason nor for the wrong reason, rather the mistake of fact disrupts the connection between motives and action, such that these agents perform another action than the one they are motivated – rightly or wrongly – to perform.

		If V is criminalized		
		Refrains from V'ing for the right reason	Refrains from V'ing for the wrong reason	V's
If V is not criminalized	Refrains from V'ing for the right reason	Saints	Corrupted	Fallen
	Refrains from V'ing for the wrong reason	Redeemed	Prudent	Anarchists
	V's	Repentant	Scoundrels	Unrepentant

The greater the number of Corrupted and Fallen the more criminalizing V decreases the number of people who refrain from V'ing for the right reason, since the members of these groups refrain from V'ing for the right reason if, and only if, V is not criminalized. The greater the number of Redeemed and Repentant the more criminalizing V increases the number of people who refrain from V'ing for the right reason, since the members of these groups who refrain from V'ing for the right reason if, and only if, V is criminalized. The Saints always refrain from V'ing for the right reason. The Prudent, Anarchists, Scoundrels, and Unrepentant never refrain from V'ing the right reason.¹⁷ The sizes of these five groups are therefore irrelevant to the corruption thesis.¹⁸

The corruption thesis is true if, and only if, the criminalization of any wrongful conduct will cause a net decrease in the number of people who refrain from the criminalized wrong for the right reason. This is so if, and only if, the Corrupted and Fallen outnumber the Redeemed and Repentant in the case of all moral wrongs. The facts (1) and (2) supports the corruption thesis if, and only if, the criminalization of any wrongful conduct causes a *brute* decrease in the number of people who refrain from the criminalized wrong for the right reason *because* of (1) and (2), that is, some people who would otherwise have refrained from V'ing for

¹⁷ This includes both those who refrain from V'ing for the wrong reason, and those who V.

¹⁸ It might be that the wrongness or rightness of motives is not an either/or question, but a matter of degree, such that motives can be more or less right. If this is correct, then the members of the Saints, Prudent, Scoundrels, and Anarchists might be relevant to the correctness of the corruption thesis since criminalization might make the members of those groups refrain from V'ing for better or worse reasons even though they always/never refrain from V'ing for the right reason. Nothing hinges on this question. This is so since the reason (1) and (2) fail to support the corruption thesis, should also lead us to conclude that these facts fail to give us any reason to expect that anyone will refrain from V'ing for a worse reason if V is criminalized.

the right reason will refrain from V'ing from for the wrong reason (or V) if V is criminalized *because* the criminalization of V creates a prudential reason to refrain from V'ing. This is so if, and only if, (1) and (2) jointly explain why there are some Corrupted and Fallen.

III. THE CORRUPTION THESIS

Moore's statement of the corruption thesis can be found in the following passage:

Autonomous action in this [Kant's] sense is doing right actions for right reasons. Such autonomous decision – in the sense of acting out of a concern for morality and not merely out of prudence – is an important moral desideratum, and state coercion always renders such decision-making less likely.¹⁹

His justification can be found a few paragraphs earlier:

[L]egal coercion always diminishes the possibility of attaining morality's highest value [doing the right thing for the right reason], because the law's coercive sanctions induce many to act for those merely prudential reasons (fear of punishment) that have no moral worth.²⁰

These quotes indicate that Moore is not only claiming that (1) and (2) *support* the corruption thesis, but that these facts are sufficient to *justify* it. In virtue of these facts the criminalization of any wrong, V, will make more refrain from V'ing out of prudence, which means that less will refrain from V'ing for the right reason. Whatever the problems of the former claim, the latter is surely more problematic. Even if we take Moore's claims at face value all they show is that we should expect there to be some Corrupted when wrongful conduct is criminalized in virtue of (1) and (2), but since the corruption thesis only holds if there are more Corrupted (and Fallen)²¹ than Redeemed and Repentant this is far from enough to justify the corruption thesis. Victor Tadros has already (successfully) taken this line of attack.²²

This section shall argue that *the prudential reason created by the criminalization of V cannot make some who would otherwise have refrained from V'ing for the right reason refrain from V'ing only out of*

¹⁹ Moore, Placing Blame, 747–48.

²⁰ *Ibid.*, 747.

²¹ A group which Moore completely and unproblematically ignores. As long as he can show that the Corrupted alone outnumber the Redeemed and Repentant he need not argue that there are any Fallen. Henceforth, I shall ignore the Fallen too. This is partly because Moore ignores them, but also partly because it is unclear how (1) and (2) can explain why anyone who would otherwise have refrained from V'ing, for the right reason can respond to the criminalization of V by starting to V even though they take the threat of punishment for V'ing as a prudential reason to refrain from V'ing, which operates directly on their reasoning as nothing but a prudential reason to refrain from V'ing.

²² Tadros, "The Wrong and the Free," 82–83.

prudence by operating directly on their reasoning in its capacity as a prudential reason. Therefore, (1) and (2) do not explain why any of those on whose reasoning the prudential reason created by the criminalization of V operates directly in its capacity as a prudential reason are among the Corrupted.²³ (1) and (2) neither give us a *prima facie* reason to believe the corruption thesis, nor a *pro tanto* reason in its favor, nor do these facts explain why the criminalization of wrongful conduct ever decreases the number of people who refrain from the criminalized wrong for the right reason, if, indeed, that is ever the case. (1) and (2) fail to do all of those things because they give us no reason to believe that there are any Corrupted, and, should there be any Corrupted, they contribute nothing interesting to the explanation of why that is. In short, the facts that criminalization creates a prudential reason to refrain from the criminalized conduct, and that this is not the right reason to refrain from wrongdoing, are simply no reason to believe that criminalizing V causes anyone who would otherwise have refrained from V'ing for the right reason to either refrain from V'ing for the wrong reason or to start V'ing.

The facts (1) and (2) straightforwardly explain why the criminalization of V makes *more* people refrain from V'ing for the wrong reason because the prudential reason created by criminalization operates directly on their reasoning in its capacity as a prudential reason. A person who does not refrain from V'ing must think that the balance of reasons favors V'ing. As (1) tells us the criminalization of V creates a generally applicable prudential reason to refrain from V'ing in order to avoid punishment. Some of the people who previously thought that the balance of reasons favored V'ing might consider this new prudential reason sufficiently weighty to tip the scales, such that they now consider themselves to have more reason to refrain from V'ing. Accordingly the criminalization of V makes those people refrain from V'ing out of prudence. As (2) tells us, this is the wrong reason to refrain from wrongdoing. It is an empirical question whether this explanation is correct, but those who are deterred from V'ing by the threat of legal punishment presumably reasons in this

²³ This leaves it open that (1) and (2) might explain how some are Corrupted because the prudential reason does something else than operate directly on their reasoning in its capacity as a prudential reason, e.g. because the presence, or creation, of a prudential reason not to V makes some refrain from V'ing out of prudence because they take it as an insult, or consider it a reason to believe that V'ing not morally wrong. I set aside this possibility as it can be of no help to the corruption thesis for several reasons. First, the natural reading of Moore is that (1) and (2) support the corruption thesis because the prudential reason created by criminalization operates on the reasoning of the Corrupted directly in its capacity of a prudential reason (Cf. Victor Tadros' reconstruction of Moore's argument "The Wrong and the Free," 82.). If Moore had some more exotic process in mind one would have expected him to make it explicit. Second, the prudential reason created by criminalization will only operate in those exotic ways on the reasoning of those who hold equally exotic beliefs, e.g. that the fact that the state created a prudential reason to refrain from V'ing is a reason to believe that V'ing is not morally wrong. It is unlikely that any significant number of people hold such beliefs, and those who do might be too irrational to realize the value of doing the right thing for the right reason anyway. Even setting that aside, (1) and (2) would only explain why there are some Corrupted the same way the fact that it is Thursday would explain why Jack wears his trousers on his head, if we assume that Jack believes that he must wear his trousers on his head on Thursdays. This is a rather uninteresting sense of explanation (at least for present purposes), in which any facts can explain any human action as long as the agent holds sufficiently strange beliefs.

way. Thus, Moore is probably right to claim that the criminalization of V makes more refrain from V'ing for the wrong reason because "the law's coercive sanctions induce many to act for those prudential reasons [...] that have no moral worth."²⁴ The problem, from the point of view of the corruption thesis, is that those whom the criminalization of V causes to refrain from V'ing for the wrong reason in this way are the Scoundrels who would not otherwise have refrained from V'ing for the right reason. Rather they would have V'd if V'ing had not been criminalized. Since the Scoundrels would not have refrained from V'ing for the right reason either way they are irrelevant to the corruption thesis. In explaining why there are Scoundrels, (1) and (2) support the claim that criminalizing V makes more refrain from V'ing for the wrong in a way that does nothing to support the corruption thesis. In order to support the corruption thesis (1) and (2) must explain why there are some Corrupted, but this cannot be done in the straightforward manner in which (1) and (2) explained why there are Scoundrels.

In order for (1) and (2) to explain why there are some Corrupted, these facts must explain how the criminalization of V can make some of those who would otherwise have refrained from V'ing for the right reason refrain from V'ing for the wrong reason because the prudential reason created by criminalization operates on their reasoning directly in its capacity as a prudential reason. It cannot be because the creation of a prudential reason tips the balance of reasons of the Corrupted like it tips the balance of reasons of the Scoundrels. For, unlike the Scoundrels, the Corrupted were already sufficiently motivated to refrain from V'ing independently of the criminalization of V. The prudential reason created by criminalization is only an additional reason to do what the Corrupted were already sufficiently motivated to do. Of course those who were already sufficiently motivated to refrain from V'ing for the right reason might recognize that *if* they were not, *then* the prudential reason would also be sufficient to motivate them to refrain from V'ing. However, it seems implausible to hold that persons who consider the right reason to refrain from V'ing motivationally sufficient are no longer refraining from V'ing for the right reason, if they merely recognize that they also have a prudential reason to refrain from V'ing which would have been sufficient to motivate them to refrain from V'ing, even if they had not considered the right reason sufficient to motivate them to refrain from V'ing. Kant, otherwise so strict about what counts as a rightful motive, did not think so.²⁵ Moreover as Tadros points out one can recognize the motivational force of both moral and prudential reasons, which even "seems to be the normal case: people typically refrain from murdering both because it is wrong and because

²⁴ Moore, *Placing Blame*, 747. Note how the first part of the sentence corresponds to (1) and the second to (2).

²⁵ As he writes: "All that ethics teaches is that if the incentive which juridical lawgiving connects with that duty, namely external constraint, were absent the idea of duty by itself would be sufficient as an incentive." (Immanuel Kant, *The Metaphysics of Morals*, Cambridge Texts in the History of Philosophy (Cambridge ; New York: Cambridge University Press, 1996), 21.)

they will be punished for it.”²⁶ What matters is whether people still consider the right reason sufficient to motivate them to refrain from *V*’ing, whether they *also* recognize the force of the prudential reason created by criminalization is beside the point.

So (1) and (2) cannot explain why there are some Corrupted, the same way they explain why there are some Scoundrels. But perhaps (1) and (2) can support the corruption thesis in the following way. The criminalization of *V* might stifle reflection on the wrongness of *V* and why one should refrain from *V*’ing in virtue of (1) and (2). After all someone who considers a prudential reason to refrain from *V*’ing motivationally sufficient has no practical incentive to reflect on whether there is *another* (right) reason to refrain from *V*’ing, since they consider themselves to have sufficient reason to refrain from *V*’ing anyway. By removing the practical incentive to reflect on whether there are other reasons to refrain from *V*’ing the creation of a prudential reason to refrain from *V*’ing might prevent some who would otherwise have refrained from *V*’ing for the right reason from ever discovering the existence of the right reason to refrain from *V*’ing.²⁷ Call this the *dulling effect*. While initially promising, (1) and (2) cannot explain why there are any Corrupted by means of the dulling effect. As part of his attack on the corruption thesis, Victor Tadros argues that “criminalization surely sometimes improves people’s ability to act for moral [i.e. the right] reasons”,²⁸ because criminalization communicates “public abhorrence” which may make some people “recognize that the relevant conduct is wrong.”²⁹ Tadros advances this argument in support of the claim that the Redeemed and Repentant sometimes outnumber the Corrupted. However, Tadros’ point also directly undermines the potential of (1) and (2) to explain why there are some Corrupted by means of the dulling effect. Even if the creation of a prudential reason not to *V* stifles reflection on whether there are other reasons to refrain from *V*’ing, the criminalization of *V* simultaneously makes less reflection necessary to discover the right reason to refrain from *V*’ing since it communicates public abhorrence, which facilitates the realization that *V*’ing is morally wrong. Furthermore, the state can directly counter the dulling effect by supplementing criminalization with other initiatives designed to promote recognition that *V*’ing is wrong and of why that is,³⁰ such as public campaigns and compulsory education (in general or as part of the punishment of those who *V*).³¹ The public campaigns against drunk driving during the 1980’s had great success in making people recognize that drunk

²⁶ Tadros, “The Wrong and the Free,” 83.

²⁷ This is one way to understand Moore’s remark that making charitable giving legally obligatory through redistributive taxation corrupts motives because then “the virtue of benevolent giving has become the necessity of paying one’s taxes.” (Moore, “Liberty’s Constraints on What Should Be Made Criminal,” 188.)

²⁸ Tadros, “The Wrong and the Free,” 83.

²⁹ *Ibid.*

³⁰ Cf. Corey Lang Brettschneider, *When the State Speaks, What Should It Say?: How Democracies Can Protect Expression and Promote Equality* (Princeton, N.J: Princeton University Press, 2012).

³¹ It is worth noting that the state will often have reason to implement these measures anyway, since they are also likely to help reduce the incidence of *V*’ing.

driving is wrong, a success it might not have had if it had not been accompanied by the expansion of legislation against drunk driving.³² Thus, there is even more reason to think that criminalizing V will make more, rather than less, people refrain from V'ing for the right reason than Tadros lets on. And, what is more important for the purposes of this paper, even less reason to think that (1) and (2) supports the corruption thesis due to the dulling effect.

A third way in which the proponent of the corruption thesis might attempt to argue that (1) and (2) explains why there are Corrupted is as follows. If there is no strong prudential reason to refrain from V'ing, then one can effectively signal virtue by refraining from V'ing. The creation of a strong prudential reason to refrain from V'ing undermines this expressive potential.³³ This might make it less attractive to refrain from V'ing for the right reason, and cause some who would otherwise have refrained from V'ing for the right reason to refrain from V'ing only out of prudence. It has been theorized that introducing monetary payment (which, like the threat of punishment, is a prudential incentive) for blood donations might reduce the number of blood donors for this exact reason.³⁴ This attempt to argue that (1) and (2) support the corruption thesis fails for two reasons. First, there is little expressive potential in refraining from many, perhaps most, wrongs for reasons unrelated to criminalization. This is so since there is ample prudential reason to refrain from those wrongs even in the absence of a threat of punishment, and/or because those wrongs are so serious that refraining from them signals little more than that one is not a moral monster. Accordingly there is little hope of finding support for the corruption thesis across a significant range of wrongs using this line of argument. Second, and more importantly, the desire to be seen as virtuous is no more the right reason to refrain from wrongdoing than prudence.³⁵ While (1) and (2) *does* explain why the criminalization of V makes these people refrain from V'ing out of prudence rather than in order to signal virtue, neither is the right reason to refrain from wrongdoing, and (1) and (2) cannot explain why there are any Corrupted using line of argument.

I shall end my discussion here. I have found no reason to believe that the corruption thesis is supported by (1) and (2). These facts give us no reason to believe that there any Corrupted. The prudential reason

³² Harold G. Grasmick, Robert J. Bursik, and Bruce J. Arneklev, "REDUCTION IN DRUNK DRIVING AS A RESPONSE TO INCREASED THREATS OF SHAME, EMBARRASSMENT, AND LEGAL SANCTIONS*," *Criminology* 31, no. 1 (February 1993): 61, doi:10.1111/j.1745-9125.1993.tb01121.x.

³³ Empirical support for this claim can be found in Roland Bénabou and Jean Tirole, "Incentives and Prosocial Behavior," *American Economic Review* 96, no. 5 (November 2006): 1652–78, doi:10.1257/aer.96.5.1652.

³⁴ Richard M. Titmuss and Ann Oakley, *The Gift Relationship: From Human Blood to Social Policy*, Orig. ed. with new chapters (New York, NY: The New Press, 1997). See also Carl Mellström and Magnus Johannesson, "Crowding Out in Blood Donation: Was Titmuss Right?," *Journal of the European Economic Association* 6, no. 4 (June 2008): 845–63, doi:10.1162/JEEA.2008.6.4.845.

³⁵ Tadros would agree, as he writes "We have good reason to celebrate those who sacrifice themselves for the sake of others, for example, but not (or not so much) if this was done only for personal glory." ("The Wrong and the Free," 82.).

created by the criminalization of V is merely a further reason to do what those who were going to refrain from V'ing for the right reason were already sufficiently motivated to do. It is therefore unclear how this prudential reason can make those who would otherwise have refrained from V'ing for the right reason refrain from V'ing only out of prudence by operating directly on their reasoning in its capacity as a prudential reason. Thus, (1) and (2) fail to provide a reason to think that criminalization will make anyone who would have refrained from V'ing for the right reason refrain from V'ing out of prudence instead. This does not necessarily mean that this never happens, but when it does (1) and (2) does nothing to explain why.

IV. THE OBSCURATION THESIS

The previous section argued that (1) and (2) did not support the corruption thesis. This section shall argue that (1) and (2) do support the obscuration thesis, that is, that the facts that criminalization creates a generally applicable prudential reason to refrain from the criminalized conduct and that this is not the right reason to refrain from wrongdoing support the proposition that the criminalization of any wrongful conduct, V, decreases the number of people who are correctly perceived as refraining from V'ing for the right reason.

The previous section argued that while (1) and (2) give us no reason to believe there are any Corrupted, these facts give us a reason to believe there are some Scoundrels. The argument that (1) and (2) supports the obscuration thesis takes its starting point in this observation. The greater the number of Scoundrels with respect to V, the more criminalization increases the number of those who refrain from V'ing for the wrong reason. This is so since Scoundrels refrain from V'ing for the wrong reason if, and only if, V'ing is criminalized (whereas they V if V'ing is not criminalized). *Ceteris paribus* the more criminalizing V increases the number of those who refrain from V'ing for the wrong reason, the more it decreases the probability that any given person who refrain from V'ing does so for the right reason. In giving us a reason to believe there are Scoundrels, (1) and (2) thus *support* the claim that criminalizing V will decrease the probability that any given person who refrains from V'ing does so for the right reason.³⁶

³⁶ Note that (1) and (2) *support*, but do not *justify* the claim that criminalizing V will have this effect. Whether criminalizing V will actually decrease the probability that any given person who refrains from V'ing does so for the right reason is an empirical question which cannot be fully answered from the proverbial armchair. It may be that there are so many Redeemed and Repentant that the criminalization of V increases, rather than decreases, the probability that any given person who refrains from V'ing does so for the right reason. My claim is merely that (1) and (2) support the claim that the criminalization of V decreases this probability, because these facts give us a reason to believe that criminalization increases the number of those who refrain from V'ing for the wrong reason, without giving us any reason to believe criminalization will cause a comparable increase in the number of those who refrain from V'ing for the right reason. This might or might not be the case, but if it is the case then it is in virtue of other facts than (1) and (2).

In addition to supporting the claim that the criminalization of V decreases the probability that any given person who refrains from V'ing does so for the right reason, criminalization also increases the difficulty of identifying those who refrain from V'ing for the right reason in virtue of (1) and (2). Those who refrain from V'ing for the right reason can (normally) be fairly easily distinguished from those who V, since the difference is one of externally observable conduct. Distinguishing those who refrain from V'ing for the right reason from those who refrain from V'ing for the wrong reason is likely to be more difficult. Because it makes the Scoundrels refrain from V'ing for the wrong reason, rather than V, criminalizing V makes it harder to distinguish those who refrain from V'ing for the right reason from the Scoundrels.³⁷ However, there is a much more important way which the creation of a prudential reason to refrain from V'ing also increases the difficulty of identifying those who refrain from V'ing for the right reason. Suppose there was no reason to refrain from V'ing other than the right one. In that case one could identify those who refrain from V'ing for the right reason simply by identifying those who refrain from V'ing. Under such circumstances it is easy to see how criminalizing V would greatly increase the difficulty of identifying those who refrain from V'ing for the right reason simply by creating a wrong reason to refrain from V'ing where there was none before. Most of the time, however, there will be other prudential reasons to refrain from wrongdoing than the desire to avoid punishment, and the prudential reason created by criminalization will merely be one among several potential prudential reasons to refrain from V'ing. However, the prudential reason created by criminalization is special in three ways, each of which increases its impact on the difficulty of identifying those who refrain from V'ing for the right reason.

First, the prudential reason created by criminalization applies to virtually everyone. The entire system of criminal justice is built on the assumption that punishment is something virtually everyone desire to avoid. Other prudential reasons will rarely, if ever, apply as generally. While it is possible to imagine many potential consequences of V'ing that *most* would probably desire to avoid, e.g. being informally sanctioned,³⁸ and which could thus be a source of a prudential reason to refrain from V'ing, few desires will be as universal as the desire to avoid punishment, which, by definition, is something to be avoided. Nor is it as certain that those who V will suffer those potential consequences as it is that they will face punishment if V'ing is criminalized. This is both because there might be some social contexts in which V'ing is not informally sanctioned, perhaps even some where it is approved of, and because the chances of V'ing undetected by

³⁷ It is, of course, equally true that in making the Anarchists V, rather than refrain from V'ing for the wrong reason, the criminalization of V makes it easier to tell the Anarchists apart from those who refrain from V'ing for the right reason. However, whereas (1) and (2) is a reason to believe there are Scoundrels they are actually a reason *against* believing there are Anarchists.

³⁸ Here to be understood as sanctions which are *extralegal*, but not *illegal*, e.g. being fired, excluded from one's social circle, or acquiring a bad reputation.

those private persons, or groups, who would informally sanction V'ing is typically much better than V'ing undetected by a state committed to identifying and punishing criminals.

Second, the creation, and presence, of the prudential reason created by criminalization is publicly announced,³⁹ whereas the presence of other prudential reasons are not. When V is criminalized everyone knows that virtually everyone, including herself, has a prudential reason to refrain from V'ing. Since there is no similar public announcement of the presence of other prudential reasons to refrain from V'ing, people might not know that these prudential reasons apply to them, and it will both be uncertain to others whether any given person *has* any given prudential reason to refrain from V'ing, and, if so, whether this person *knows* she has it.

Third, the prudential reason created by criminalization is often extraordinarily forceful. Any informal sanctions which even came close to being as harmful and stigmatizing as the more severe forms of criminal punishment,⁴⁰ would themselves be criminal to inflict on others. While there are many potential prudential reasons to refrain from most wrongs even in the absence of criminalization, it will toften be unclear to others what, if any, prudential reasons a given person considers herself to have to refrain from V'ing and how strong she considers those reasons to be. By contrast, the prudential reason created by criminalization *applies to virtually everyone, is generally known to apply to virtually everyone, and is likely to be extraordinary powerful*. When V is criminalized prudence will therefore always be, and be known to be, a possible explanation of why any given person refrains from V'ing, whereas this will rarely be the case in the absence of criminalization. This causes the criminalization of V to increase the difficulty of identifying those who refrain from V'ing for the right reason,⁴¹ and to decrease people's inclination to believe that any given person who refrains from V'ing does so for the right reason.

³⁹ And otherwise justified laws will be public (Lon L. Fuller, *The Morality of Law* (New Haven, Connecticut: Yale University Press, 1964), 49–51; Moore, *Placing Blame*, 660.)

⁴⁰ For instance Feinberg points out that punishment brand the convicted with "society's most powerful stigma and undermine his life projects, in career or family, disastrously." (Feinberg, *Harm to Others*, 3.) See also Husak, *Overcriminalization*, 57; 77-103; Simester and Von Hirsch, *Crimes, Harms, and Wrongs*, 3–16; Jonathan Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law*, Law and Philosophy Library, v. 19 (Dordrecht ; Boston: Kluwer Academic Publishers, 1994), 1–6.

⁴¹ This is based on assumption that judgments concerning whether a given person who refrains from V'ing does so for the right reason are largely based on whether other (likely) motives could explain why that person refrained from V'ing. This raises the problem that the criminalization of V might not increase the difficulty of identifying those who refrain from V'ing for the right reason, if information about who V'd before V was criminalized is available. Suppose Albert refrains from V'ing and Betty must form a belief about his motive. If Betty knows that Albert also refrained from V'ing before V was criminalized, an action which could not have been motivated by fear of punishment, then Betty can rule out this explanation of why Albert refrains from V'ing after criminalization also, and criminalization has not increased the difficulty of discerning whether Albert refrains from V'ing for the right reason. However, such information is only available to people who knew each other prior to the criminalization of V. The criminalization of V would still make it

If the criminalization of V decreases the probability that any given person who refrains from V'ing does so for the right reason, makes it harder to distinguish those who refrain from V'ing for the right reason from those who refrain from V'ing for the wrong reason, and decreases people's inclination to believe that any given person who refrain from V'ing does so for the right reason, then the criminalization of V will decrease the number of people who are correctly perceived as refraining from V'ing for the right reason. In virtue of (1) and (2) there is reason to expect the criminalization of V to do all of those things. (1) and (2) thus support the obscuration thesis.

These facts are, however, not sufficient to justify the obscuration thesis. While (1) and (2) give us a reason to believe there are some Scoundrels, and no reason to believe there are any Repentant and Redeemed, the Repentant and Redeemed might nevertheless outnumber the Scoundrels. If this is the case then the criminalization of V will not decrease the probability that any given person who refrains from V'ing do so for the right reason. It seems unlikely, however, that this would be the case across a wide range of cases. The best explanation of why we should expect there to be some Repentant and Redeemed is that criminalization communicates public abhorrence at V'ing and this helps some realize that V'ing is wrongful which enables them to refrain from V'ing for the right reason.⁴² There is good reason to think that most who refrain from V'ing if V'ing is criminalized, but who would not have refrained from V'ing if V'ing had not been criminalized will be Scoundrels. We can hardly expect a significant number of those who would have V'd if V was not criminalized to be very responsive to the state's communication of public abhorrence. After all, unlike the prudential reason created by criminalization, the moral reason to refrain from V'ing existed before V was criminalized.⁴³ This is not to say that criminalization will not make more people refrain from V'ing for the right reason, but only that the fact that criminalization creates a prudential reason to refrain from the criminalized conduct should lead us to expect that it will increase the number of those who refrain from V'ing out of prudence even more,⁴⁴ such that the probability that any given person who refrains from V'ing does so for the right reason decreases, though the absolute number of those who refrain from V'ing for the right reason increases.

harder for strangers to discern whether Albert refrains from V'ing for the right reason, and after the criminal prohibition has been in force long enough, nobody would have that sort of information.

⁴² Tadros, "The Wrong and the Free," 83.

⁴³ Provided V is *mala in se*.

⁴⁴ It is possible for the criminalization of V *both* to increase the number of those who refrain from V'ing for the right reason and those who refrain from V'ing for the wrong reason by reducing the number of those who V. Since the purpose of criminalization is often to reduce the incidence of the criminalized conduct, we should probably expect this to be the normal case.

Generally we should expect criminalization to decrease the number of people who are correctly perceived as refraining from V'ing for the right reason when the two following scope conditions are met:

- (A) Criminalizing V reduces the incidence of V'ing
- (B) Criminalizing V reduces the proportion of those who refrain from V who do so for the right reason.

The first limit on the scope of the obscuration thesis should not bother us too much. Ineffective criminal laws are typically problematic,⁴⁵ and we are mainly interested in whether the obscuration thesis holds for otherwise justified criminal laws. One strength of the obscuration thesis compared to the corruption thesis is that when criminalization obscures motives, it does so in virtue of the law achieving its intended effect, namely making those who are not sensitive to moral reasons behave morally by creating prudential reasons to do so. The fact that the criminalization of V makes the Scoundrels refrain from V'ing out of fear of the law is a success for the law, because it means that criminalization has caused even non-virtuous people to refrain from V'ing. This is not true of the corruption thesis. It is hardly the intended effect of criminalizing V that those who would otherwise have refrained from V'ing for the right reason now do so only out of prudence.

The second limitation on the scope of the obscuration thesis is a less restrictive version of a one of the scope conditions of the validity of the corruption thesis. Whereas the corruption thesis is correct only if the criminalization of V causes an *absolute* decrease in the number of people who refrain from V'ing for the right reason, the obscuration is correct only if it causes a decrease in the proportion of those who refrain from V'ing who do so for the right reason. Unlike the corruption thesis, the obscuration thesis is thus compatible with the criminalization of V sometimes causing an increase in the number of people who refrain from V'ing for the right reason. There is little reason to think that (B) fails to hold for a significant number of criminal laws. If criminal prohibitions were generally effective at making people refrain from the criminalized conduct for the right reason, then most of those whom the criminalization of V causes to refrain from V'ing are convinced to refrain from V'ing because the mere communication of public abhorrence at V'ing makes them realize why they ought not to V. However, if the prudential reason created by criminalization plays only a minor role in reducing the incidence of the criminalized conduct, it becomes a bit unclear why the criminal law should not just be abolished in favor of a system of mere moral appeals that people refrain from wrongdoing, which are not backed up by any threats of punishment. After all, such a system would ex

⁴⁵ Husak, *Overcriminalization*, 145–53.

hypothesi be nearly as effective as reducing the incidence of wrongdoing as the criminal law and significantly less intrusive and expensive.⁴⁶

Crucially the number of Scoundrels is relevant to the obscuration thesis but not the corruption thesis. For the fact that criminalization makes the Scoundrels, who would otherwise have V'd, refrain from V'ing out of prudence makes the criminalization of V decrease the probability that any given person who refrains from V'ing does so for the right reason, which, in conjunction with the difficulty of discerning people's motives for refraining from V'ing, makes it less likely that those who refrain from V'ing for the right reason are correctly perceived as refraining from V'ing for the right reason. Conversely Scoundrels are irrelevant to the corruption thesis, for while the criminalization of V will make them refrain from V'ing for morally worthless prudential reasons, the alternative is not that they refrain from V'ing for the right reason, but that they V.

V. SHOULD WE CARE WHETHER THE OBSCURATION THESIS SUCCEEDS?

So far it has been argued that (1) and (2) does not support the corruption thesis, but supports the obscuration thesis. Since it is widely acknowledged that it is more valuable to do the right thing if one does so for the right reason,⁴⁷ it is clear why there would be something regrettable about decreasing the number of people who refrain from wrongdoing for the right reason. It is therefore obvious why we should care about whether the corruption thesis succeeds. It is less clear that it is valuable that those who refrain from wrongdoing for the right reason are also *perceived* as refraining from wrongdoing for the right reason. It is thus less clear that it matters whether the obscuration thesis succeeds. This section argues that it is generally valuable that those who refrain from wrongdoing for the right reason are also perceived as refraining from wrongdoing for the right reason. Accordingly the obscuration thesis gives rise to a general *pro tanto reason* against criminalizing wrongful conduct, and is, it shall be argued, in fact, the best explanation of why some wrongful failures to perform certain actions ought not be criminalized.

⁴⁶ Of course, if the punishment of wrongdoers rather than the prevention of wrongdoing is the *point* of criminalization, then there would still be a reason for criminal prohibitions to create these reasons as an inevitable side-effect of punishing wrongdoers. (cf. Moore, *Placing Blame*.)

⁴⁷ Kant, *Critique of Practical Reason*; George, *Making Men Moral*, 43–44; Hayek, *The Road to Serfdom*, 216; Moore, *Placing Blame*, 611; 747-748; Liao, "The Idea of a Duty to Love," 18; Tadros, "The Wrong and the Free," 82.

A. Does the obscuration thesis give rise to a general pro tanto reason against criminalizing wrongful conduct?

To see why it is generally valuable that rightly motivated rightly actions are also *perceived* as rightly motivated, consider the following two cases:

Angels. The Angels all extremely virtuous. Each Angel discharges her duties conscientiously, no Angel ever wrongs another, nor does any Angel even wish to “gain unless they can do so in ways that further the interests of the rest.”⁴⁸ The Angels all behave in this manner, because they recognize the intrinsic moral worth and dignity of each other (which is the right reason to do the right thing). Moreover every Angel knows that this is what motivates every other Angel.

Holy Fools. The conduct and motives of the Holy Fools are just as virtuous as that of the Angels. However, each Holy Fool wrongly believes that the virtuous behavior of every other Holy Fool is solely motivated by prudential considerations.

The Angels seems to realize something valuable that the Holy Fools do not. It is not that the Angels are more virtuous than the Holy Fools. If anything the Holy Fools are even more admirable than the Angels, since they behave virtuously even though they (wrongly) believe that their companions will not reciprocate. Unlike the Angels, however, there can be no civic friendship based on *mutual* virtue among the Holy Fools.⁴⁹ Even though each Holy Fool is virtuous, the belief of each that she is the only virtuous Holy Fool precludes a common sense of “trust and the feeling that ‘he would never wrong me’”⁵⁰ from arising among them. It also seems to me that this prevents the Holy Fools from realizing the value of fraternity amongst themselves, insofar as realizing this value does not only require that none of the Holy Fools would wish to become better off, unless they can do so in a way that benefit everyone, but also that the Holy Fools recognize that the other Holy Fools share this attitude. There is value in bonds based on mutually recognized virtue(s), which is promoted by rightly motivated rightful actions, but only if these actions are also *perceived* as rightly motivated. If criminalization decreases the number of people who are correctly perceived as refraining from V'ing for the right reason, it conflicts with this value. Such a conflict is a *pro tanto* reason against criminalization. Thus, the obscuration thesis gives rise to a general *pro tanto* reason against criminalizing wrongful conduct.

⁴⁸ John Rawls, *A Theory of Justice*, Original ed (Cambridge, Mass: Belknap Press, 2005), 105.

⁴⁹ Of the kind that Aristotle considered superior, Aristotle, *The Nicomachean Ethics*, ed. W. D. Ross and Lesley Brown (Oxford ; New York: Oxford University Press, 2009), 144–48.

⁵⁰ *Ibid.*, 147.

B. Does the obscuration thesis explain why some wrongful conduct ought not to be criminalized?

This is not to say that such a *pro tanto* reason against criminalizing wrongful conduct is of any significant weight in the case of most wrongs. Whatever value there is in those who rescue others from drowning children for the right reason being correctly perceived as virtuously motivated is dwarfed by the value of people being rescued from drowning. Thus, the question of whether we should care whether the obscuration thesis is true has not been settled. Initially, we might note that even if the *pro tanto* reason against criminalizing wrongful conduct based on the obscuration thesis was never of much weight on its own, it could still make a practical difference as a necessary part of a set of reasons that are jointly sufficient to outweigh the reasons in favor of criminalization. What is more interesting, however, is that in the case of some types of wrongs the *pro tanto* reason against criminalization based on the obscuration thesis is weighty indeed. Indeed, the fact that criminalizing V decreases the number of those who are correctly perceived as refraining from V'ing for the right reason turns out to be the best explanation of why certain wrongs ought not to be criminalized.

Some types of conduct derives much of their value from *being correctly perceived as performed for the right reason*. Consider the act of bringing flowers for one's spouse. Suppose Albert brings his wife, Betty, flowers. Receiving flowers from one's romantic partner is typically valuable as an expression of affection (or some related positive attitude). The value of Albert bringing Betty flowers seems to not only depend on Albert *actually* being motivated by affection, but also on Betty *believing* that Albert brings her flowers out of affection. If Betty does not believe this, but instead believes that Albert brings her flowers because his employer threatened to fire him if he did not, then the gesture will lose much of its value. *Crucially something of value seems to be lost even if Betty is mistaken.*⁵¹ Because the value of bringing one's spouse flowers depend on it being correctly perceived as rightly motivated, the obscuration thesis is sufficient to explain why it should not be made legally obligatory to bring one's spouse flowers at least once a month.⁵² While there is no reason to expect that such a law would cause those who would otherwise have brought their spouses flowers out of affection to do so only out of prudence, it will make everyone bring flowers for their

⁵¹ Some would perhaps want to say that though Betty cannot realize this value unless she believes that Albert brought her the flowers out of affection, they do have value none the less. I do not think this is very plausible. It is not that I deny that some things are like that. The autonomy of persons who do not value their autonomy is still plausibly valuable. But (in this case) receiving flowers is valuable because it is an expression of affection. When Betty does not believe that Albert brings her flowers out of affection then it is not the case that Betty fails to realize the value of this expression of affection, rather the gesture does not succeed at expressing affection in the first place.

⁵² Though the obscuration thesis is not necessary, there are many good reasons not to compel people to bring their spouses flowers.

spouses regardless of whether they feel any affection. This makes the gesture ineffective as a vehicle for expressing affection. Since this was the whole point of the practice, the value of bringing one's spouse flowers is undermined.

The example of flowers illustrates how the obscuration thesis explains why making conduct legally obligatory undermines the very possibility of using the conduct as a vehicle to express some positive attitude,⁵³ like love, friendship, gratitude, because it will give everyone a prudential reason to engage in the conduct regardless of their attitudes.⁵⁴ While failing to bring one's spouse flowers every once in a while is not wrongful,⁵⁵ failure to express a positive attitude can be morally wrongful. For instance, failing to express gratitude when gratitude is due is (at least sometimes) wrongful. It seems to me that this is the best way to make sense of the following remark by Robert P. George:

[G]overnments have conclusive reasons not to attempt to enforce certain obligations whose meaningfulness depends on the parties fulfilling their obligations freely [... since this] would have the effect of robbing these important practices of their meaning and value in social life⁵⁶

Prima facie the claim is problematic because it relies on a false opposition between fulfilling obligations freely and enforcing those obligations. If I am forced to X but would have X'd regardless of whether I was forced, and I know this, then it is unclear in what sense I do not X freely. Denying this has the implication that nobody freely chooses not to murder, which seems rather absurd.⁵⁷ However, George's remarks can be, charitably if a bit creatively, reinterpreted as pointing out that the obscuration thesis gives rise to a conclusive reason not to attempt to enforce obligations to express a positive attitude, since the creation of a prudential reason to do this undermines the value of such expressions. The examples George provides – obligations to express gratitude and to acknowledge achievements⁵⁸ – fits with such a reading. Expressions of gratitude and acknowledging achievements are prime examples of conduct which has no value if it is not correctly perceived as rightly motivated by gratitude and regard for achievements. George's remarks are thus best made sense of in light of the obscuration thesis.

⁵³ This is supported by Bénabou and Tirole, "Incentives and Prosocial Behavior."

⁵⁴ This is not always problematic. The desire to express some attitude is sometimes clearly the wrong reason to engage in conduct, e.g. donating blood in order to express altruism (Ibid.). Other times many different actions can serve to express some attitude, and undermining the possibility of using one particular action to express this attitude is no big deal. Similarly failure to express one's positive attitude towards someone will often not be wrongful.

⁵⁵ Even though it might be wrongful not to show one's spouse affection, one is hardly obligated to do so through flowers.

⁵⁶ George, *Making Men Moral*, 44.

⁵⁷ Note further that legislation rarely literally forces anybody to do anything. It just (heavily) incentivizes certain conduct. Cf. Joel Feinberg, *The Moral Limits of the Criminal Law Vol. 3: Harm to Self* (Oxford: Oxford Univ. Press, 1986), 189–95.

⁵⁸ George, *Making Men Moral*, 44.

Admittedly most wrongful failures to express a positive attitude will not be seriously wrongful. Criminalizing such failures will tend to be unjustified for reasons unrelated to the obscuration thesis. However, the obscuration thesis might be the best explanation of why wrongful failures to express love ought not to be criminalized. It is plausible that we are sometimes morally obligated to express love. Liao argues children have a right to be loved and that this generates a corresponding duty which is primarily borne by the parents.⁵⁹ He summarizes the current knowledge about children's need for love as follows:

Children who did not receive love but only adequate care became ill more frequently, their learning capacities deteriorated significantly; they became decreasingly interested in their environment; they failed to thrive physically by failing to gain weight or height or both, they suffered insomnia; they were constantly depressed; and they eventually developed severe learning disabilities.⁶⁰

Based on this it seems that it is not only gravely wrong, but also severely harmful for parents to fail to discharge this duty. This duty has been legally enforced in at least one case namely in a 2012 verdict by the Brazilian Supreme Tribunal of Justice which ruled that a father was liable to pay the equivalent of \$87,000 U.S. to his adult daughter for failing to discharge his duty to "show warm affection and concern."⁶¹

The obscuration thesis highlights a significant problem with legally enforcing duties to love one's children. Expressions of love lose some of their value if they are not perceived as motivated by love even if they are actually thus motivated. Creating a prudential reason to express parental love causes parents to have a prudential reason to express love for their children regardless of whether they actually love them. This undermines the significance of expressions of parental love as indications of genuine parental love and threatens the value of the practice which it was supposed to protect. The obscuration thesis thus explains why the value of the expression of parental love would be undermined if such expressions were made legally obligatory. It seems to me that this is the best explanation of why parents' duties to love their children should not be legally enforced. Since it is both wrong and harmful not to love one's children legally enforcing the duty to do so neither conflicts with the wrongness constraint nor the harm principle. Neither is it plausible that duties to love should not be enforced because it is outside of parents' control whether they feel love, for as Liao has argued at length this claim false.⁶² Thus, the example of wrongful failures to love one's children demonstrates the practical relevance of the obscuration thesis.

⁵⁹ S. Matthew Liao, "Moral reasons of Children to Be Loved," *Journal of Political Philosophy* 14, no. 4 (December 2006): 420–40, doi:10.1111/j.1467-9760.2006.00262.x.

⁶⁰ *Ibid.*, 423.

⁶¹ Referenced by Luara Ferracioli, "The State's Duty to Ensure Children Are Loved," *Journal of Ethics and Social Philosophy* 8, no. 2 (September 2014): 1.

⁶² Liao, "The Right of Children to Be Loved," 426–30; Liao, "The Idea of a Duty to Love," 1–9.

The first draft of the Mexican “General Law for Women’s Access to a Life Free of Violence” provides another real life example of the relevance of the obscuration thesis. The draft contained the following definition of psychological violence:

[A]ny act or omission that harms a person’s psychological stability, and which can constitute negligence, abandonment, constant carelessness, jealousy, insults, humiliation, diminishment, marginalization, disaffection, indifference, infidelity, destructive comparisons, rejection, restrictions to self-determination, and threats, that will lead the victim to depression, isolation, diminished self-esteem or even suicide.⁶³

Including disaffection and indifference in a legal definition of psychological violence undermines the connection between *feeling* affection towards and *being* concerned about one’s romantic partner and *displaying* affection and concern because it creates a prudential reason to show affection and concern regardless of whether one feels it. This increases the risk that those whose displays of affection and concern are genuinely motivated by feelings of affection and concern are mistakenly perceived as being prudentially motivated, depriving those displays of most of their value. This is problematic indeed. If lovers can feel the law tonight, they might not be able to feel the love tonight.

VI. CONCLUSION

This paper investigated what we should conclude about the criminalization of wrongful conduct in light of the facts that criminalization creates a prudential reason to refrain from the criminalized conduct and that this is not the right to refrain from wrongdoing. It argued that these facts did not support the claim that criminalizing wrongful conduct caused fewer to refrain from the criminalized conduct for the right reason. Rather they supported the claim that criminalizing wrongful conduct caused fewer to be correctly perceived as refraining from V’ing for the right reason. It was argued that there is some value in that those who refrain from wrongdoing for the right reason are correctly perceived as refraining from wrongdoing for the right reason. Thus, the criminalization of wrongful conduct turned out to interact with motives in a problematic way after all. But this interaction was explained by the obscuration thesis not the corruption thesis. Return to Moore’s remark that

⁶³ Patricia Olamendi Torres *Delitos Contra las Mujeres* (Colonia Polanco; Mexico: Unifem, 2007), Artículo 6.I, p. 17. http://www.inegi.gob.mx/prod_serv/contenidos/espanol/bvinegi/productos/integracion/sociodemografico/mujeres/DEL_CONTRA_MUJ.pdf (accessed 1st of July 2015)). The text is in Spanish. I am extremely grateful to Amneris Chaparro for bringing this example to my attention, as well as providing explaining the context to me and translating key passages (including the quoted one) from Spanish.

legal coercion always diminishes the possibility of attaining morality's highest value [acting for the right reason], because the laws coercive sanctions induce many to act for those merely prudential reasons [fear of punishment] that have no moral worth.⁶⁴

This remark fails as an argument in support of the corruption thesis. What intuitive plausibility it has relies on a failure to distinguish between Scoundrels and Corrupted. For the claim that criminalization causes more to act for merely prudential reasons is intuitive in virtue of the Scoundrels, but an increase in the number of people who refrain from some wrong out of prudence only causes a decrease in the number of people who refrain from that wrong for the right reason if it is brought about by the Corrupted. It does not follow from the fact that criminalization "induce many to act for prudential reasons"⁶⁵ that criminalization makes fewer act for the right reason. Moreover, the claim that that criminalization "diminishes the possibility"⁶⁶ of anyone to act for the right reason (as opposed to making it less likely that any given person will act for the right reason) is awkward, since legal coercion does not deprive people of the control over their motives for complying with the law. When read as an argument in support of the obscuration thesis, on the other hand, Moore's remark is perfectly apt. It does follow from the fact that more people act for prudential reasons that the proportion of those who refrain from the criminalized conduct who do so for the right reason will decrease. There is nothing weird about the claim that the creation of a prudential reason does diminish the possibility of being perceived as acting for the right reason since other people's perception of one's motive is outside of one's control. Thus, Moore is on to something interesting and important, but it is the obscuration thesis not the corruption thesis. Any intuitive pull of the latter is best explained as deriving from its similarities with the latter, and I suspect that Moore (and others who make similar claims)⁶⁷ are simply confusing the two.

⁶⁴ Moore, *Placing Blame*, 747.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Cf. George, *Making Men Moral*, 43–44; Hayek, *The Road to Serfdom*, 216–19.