

Wrongfulness and Prohibitions

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Abstract This paper responds to Antje du-Bois Pedain’s discussion of the wrongfulness constraint on the criminal law. Du-Bois Pedain argues that the constraint is best interpreted as stating that ϕ ing is legitimately criminalised only if ϕ ing is wrongful for other-regarding reasons. We take issue with du-Bois Pedain’s arguments. In our view, it is neither a necessary nor sufficient condition of legitimate criminalisation that ϕ ing is wrongful in du-Bois Pedain’s sense. Rather, it is a necessary (albeit insufficient) condition of legitimate criminalisation that ϕ ing is what we call bare wrongful—that is, that the reasons in favour of ϕ ing are defeated by the reasons against. Though du-Bois Pedain is critical of this view, we argue that her criticisms do not convince.

Keywords Criminal law · Criminalisation · Harm principle · Wrongfulness

What is it for conduct to be “wrongful”? Unsurprisingly there are different views. Some writers hold that conduct is wrongful whenever it is in breach of a duty.¹ For them, it is a further question whether the breach of duty is justified or excused; that question, while of relevance to the actor’s culpability, does not determine whether her actions were wrongful in the first place. On another view, wrongfulness comes later in the story. One must first determine whether a breach of duty lacks justification; only if it does is one entitled to conclude that anything wrongful has occurred.²

¹ e.g. Gardner (2005: 55).

² Berman (2004: 7 n. 11) and Norrie (2000: 153), disagreeing with Gardner (2007) on this point.

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