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What's Public About Crime?

James Edwards* and Andrew Simester**

Abstract—It is often claimed that the fact that some wrongs are public is a fact that is important to our thinking about permissible criminalization. We argue that it is not. Some say: what gives us reason to criminalize wrongs—when we have such a reason—is the fact that those wrongs are public. Others say: the fact that a wrong is public is a necessary condition of there being reason to criminalize that wrong, or of its permissible criminalization. What we should make of these statements depends on what is meant by a public wrong. If the claim that a wrong is public is simply the *conclusion* of a sound argument that there is reason to criminalize the wrong, or that the wrong is permissibly criminalized, the above statements are true, but trivially so. If the claim that a wrong is public is a *premise* in an argument that there is reason to criminalize the wrong, or that the wrong is permissibly criminalized, the above statements, we argue, are false. We conclude that it would be better, when we think about permissible criminalization, to do without the idea of a public wrong.

Keywords: criminal law; criminalization; political theory; public wrong; responsibility

1. Introduction

Debate has long raged about the proper limits of the criminal law. On first encountering this debate one may be forgiven for thinking that one faces the following dilemma: either one lines up alongside James Fitzjames Stephen, Patrick Devlin and Michael Moore on the side of the legal moralists, or one lines up alongside John Stuart Mill, H.L.A. Hart and Joel Feinberg as a defender of the harm

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principle (and perhaps the offence principle too). To go into battle with the latter is to reveal oneself as a liberal who thinks that the mere prevention of immorality is itself no reason to criminalize, and that such a reason exists only if criminalization will likely prevent harm (or offence). To go into battle with the former is to reveal oneself as a moralist who thinks that the fact it will likely prevent immoralities is sufficient reason to justify creating a crime.

This way of characterising the debate is multiply problematic. For one thing, those on the liberal side need not claim that preventing immorality is itself no reason to criminalize.¹ They need not, in other words, rest their liberalism on an allegedly exhaustive list of criminalization's upsides. They need only claim that whatever those upsides turn out to be, they make a case for criminalization that is defeated by criminalization's downsides whenever criminalization is not likely to prevent harm (or offence).² Similarly, those on the moralist side need not claim that preventing immorality is itself sufficient reason to criminalize.³ They need not, in other words, claim to have identified an upside that always wins the day. They need only claim that preventing immorality is always *a* reason to criminalize, such that one cannot help oneself to the conclusion that where harm (or offence) will not be prevented, there is nothing to say for criminalization. The conflict described above predictably turns out

¹ In *Harmless Wrongdoing* (OUP 1988) 322-323, Feinberg writes that 'the need to prevent evils of any description is at least *some* kind of reason' to criminalise.

² This is the view Feinberg calls 'bold liberalism': *ibid* 324.

³ Michael Moore, for instance, accepts that some wrongdoing is 'immune to criminalization even according to a legal moralist view of the proper reach of criminal legislation'. So he does not believe that immorality is sufficient reason to criminalize. See M Moore, 'A Tale of Two Theories' (2009) 28 *Criminal Justice Ethics* 27, 33.

to be a phony war. One can join with the moralists in claiming that the prevention of immorality is always a reason to criminalize. And one can join with the liberals in claiming that said reason is defeated when criminalization is not likely to prevent harm (or offence). One can, in short, be a liberal and a moralist at the same time. Of course, those who take this compromise position may continue to disagree about the details: they may disagree about whether the prevention of harm (or offence) need *always* accompany the prevention of immorality. Perhaps this is at most a sensible rule of thumb. To reach that point, however, is to have long abandoned the battle lines drawn above: if the mere prevention of immorality were itself no reason to criminalize, the possibility of dispensing with other such reasons—like the prevention of harm (or offence)—would be a non-starter.

The easy caricature with which we began misleads for a further reason. It misleads because it leaves out an influential third line of thought: the thought that it is important to the case for criminalizing ϕ ing that ϕ ing is in some sense a public matter.⁴ It leaves out the thought, as it is now commonly put, that all crimes should be *public wrongs*. This thought is most familiar from the work of Antony Duff and Sandra Marshall. In their hands it becomes a thesis about criminalization's upsides. As Duff puts it, 'we have good reason to criminalise some type of conduct if (and only if) it constitutes a public wrong';⁵ 'what concerns the criminal law is not moral wrongdoing as such, but only public wrongdoing: we have no reason at all to criminalise the betrayal of a friend's confidence, or a philanderer's sexual infidelity,

⁴ As Doug Husak puts it, 'The reason we should not punish a breach of contract or a tort, for example, is not because these behaviors are not wrongful but because these wrongful behaviors are private.' See D Husak, *Overcriminalization* (OUP 2008) 199.

⁵ RA Duff, 'Towards a Modest Legal Moralism' (2014) 8 *Criminal Law and Philosophy* 217.

because these are not public wrongs'.⁶ Duff is thus no part of the liberal-moralist compromise described above. For him, there is reason to criminalize any public wrong, but no reason at all to criminalize other moral wrongs. There is thus no need to invoke the downsides of criminalization to explain why the latter class of wrongs should not be crimes: there is simply no case for their criminalization. Of course, those sympathetic to the thought about public wrongs need not accept this last claim. Instead, they may make a move similar to that made by the liberal: they may argue that whatever reasons for criminalization exist, the downsides of criminalization defeat those reasons unless what is criminalized is a public wrong. Those who take this view *can* endorse the liberal-moralist compromise, while adding something to it. They can claim that there is reason to criminalize ϕ ing if this will likely prevent immorality, but that ϕ ing is permissibly criminalized only if it is true both that criminalizing ϕ ing will likely prevent harm (or offence), and that ϕ ing is a public wrong.

In this paper we evaluate the third line of thought, both in the form that is compatible with, and in the form that is hostile to, the liberal-moralist compromise. Our discussion comes in four parts. Part 2 considers what it is to say that a wrong is public. Part 3 explores what we call the *positive thesis*. According to that thesis, it is the fact that a wrong is public that gives us reason to criminalize that wrong. Part 4 explores what we call the *negative thesis*. According to that thesis, it is a necessary condition of there being reason to criminalize some wrong, or of that wrong's being permissibly criminalized, that the wrong is public. We argue that both theses should be rejected.

⁶ RA Duff, 'Towards a Theory of Criminal Law?' (2010) 84 *Aristotelian Society Supp Vol 1*, 9.

2. What makes a wrong public?

Assume that there is reason to criminalize ϕ ing, or that ϕ ing is permissibly criminalized. It is tempting to think that there must be *something* public about ϕ ing. After all, public officials create criminal laws. And public officials are empowered to bring, or take over, criminal proceedings. This suggests a first possible account of what makes a wrong public: perhaps public wrongs are those wrongs with certain normative implications for public officials. On the widest possible version of this view, ϕ ing is a public wrong if and only if ϕ ing gives public officials some reason for action. This view might be narrowed either by reference to *what* a public wrong gives public officials reason to do, and/or by reference to the *properties* of the reason that it gives them. As to the former, public wrongs might be wrongs that give officials reason to discourage, or regulate, or prohibit, or criminalise or punish ϕ ing. As to the latter, public wrongs might give officials not just any old reason, but a reason that permits or requires them to do one of the aforementioned things.

We need not adjudicate between these possible accounts here, for all suffer from a common problem. If any such account is offered as *definitive* of a public wrong, then to say that ϕ ing is a public wrong is to announce the conclusion of an argument rather than one of its premises. Take the suggestion that public wrongs are wrongs officials have reason to prohibit. Whatever considerations establish that officials have reason to prohibit some wrong, also establish, on this view, that the wrong is public. So the fact a wrong is public cannot be among the considerations that establish that officials have reason to prohibit the wrong. That would be to include one's conclusion among one's premises. The same point can be made about the accounts offered by Grant Lamond and Ambrose Lee. For them, public wrongs are

wrongs public officials ought to punish.⁷ Whatever considerations establish that officials ought to punish people for some wrong, also establish, on this view, that the wrong is public. As Lee acknowledges, the fact a wrong is public cannot then be among the considerations that establish that officials ought to punish its perpetrators.⁸

We can put the general point here as follows: if we accept the above accounts of public wrongfulness, ‘public wrong’ becomes the label we attach to a category of wrongs, only *after* we have worked out that those wrongs have certain normative implications for public officials. Our grounds for thinking that a wrong has these normative implications for officials must thus be independent of the idea of public wrongfulness itself. It follows that the idea of public wrongfulness—so understood—cannot compete with existing accounts of those grounds. It cannot compete, that is, with existing accounts—including those offered by Stephen, Devlin, Moore, Mill, Feinberg and Hart—of the grounds on which certain wrongs are discouraged, or regulated, or prohibited, or criminalised or punished by public officials. It can only tell us that whichever wrongs the best account picks out, are the wrongs we rightly describe as public.

If the idea of a public wrong is to help us make progress with the limits of the

⁷ G Lamond, ‘What is a Crime?’ (2007) 27 OJLS 609; A Lee, ‘Public Wrongs and the Criminal Law’ (2015) 9 Criminal Law and Philosophy 155.

⁸ Lee, *ibid*, 170. It is true that if (i) public wrongs are wrongs that ought to be punished by state officials, it does not follow that (ii) there is reason to criminalize those wrongs. To make claim (i) is thus not to simply announce a conclusion *about criminalization*. But it is to announce a conclusion *about punishment*: whatever the best theory of punishment tells us are the wrongs that public officials ought to punish are, by that very token, public wrongs. True, one then needs an argument for the move from (i) to (ii). But the concept of a public wrong cannot help one make it.

criminal law, it must be understood differently. It must be understood in a way that allows public wrongfulness to figure as a premise in arguments about what there is reason to criminalize, or about what is permissibly criminalized. One possibility would be to start with what is *private*. It might be argued that there is a private sphere into which we have a right that others—including the state—not intrude. It might then be argued that certain wrongs falls within that sphere. Such wrongs we might dub private. The rest we might dub public. On this view, the category of public wrongs is purely residual—it is made up of the wrongs that are left over once criminalizing others is deemed an infringement of the right to a private life.

If this is what is meant by a public wrong, both the positive and the negative thesis are false. First, the fact that ϕ ing is a public wrong cannot plausibly give us reason to criminalize it. That ϕ ing does not fall within the private sphere hardly shows that there is anything that counts in favour of its criminalisation. Second, the fact that ϕ ing is a public wrong cannot plausibly be a necessary condition of there being reason to criminalize it. That criminalization intrudes into the private sphere does not show there is nothing that counts in its favour. It is partly because law-makers often *do* have weighty reasons to so intrude that the right to a private life is so important. Finally, it cannot plausibly be permissible to criminalize only public wrongs. The right to a private life is not absolute: intrusion into the private sphere can sometimes be justified, and there is no reason to think that criminalization is never a justified intrusion.⁹ One might deny this by claiming that the private sphere just is made up of activities that the law in general, or the criminal law in particular, may not prohibit. But that claim only succeeds in converting the idea of a public wrong back into a

⁹ Obvious counterexamples are domestic violence and marital rape.

conclusion: public wrongs are now simply those wrongs that the (criminal) law may prohibit. So understood, the idea of a public wrong again cannot help us establish which wrongs may be prohibited.

To avoid these problems another understanding of a public wrong is needed. Consider the following possibility. Instead of treating the word public as a reference to public officials, or as a reference to a residually public sphere, we might treat the word public as a reference to *members* of the public. One way to develop this thought is to say that public wrongs are wrongs done *to* those members. This need not be to deny that the wrongs in question have individual victims; it need only be to claim that what makes them *public* wrongs is the fact that the general public are (also) victims of such wrongs.

This understanding of a public wrong leads to unattractive conclusions. If we endorse the positive thesis, we must then claim that it is the fact that each murder or rape wrongs the public at large that gives us reason to criminalize those wrongs. The fact that murders or rapes are (also) wrongs done to individual victims drops out of the case for criminalization. Duff and Marshall write that ‘it is appropriate to object’ to accounts of this kind, that the conduct of a murderer or rapist ‘should be criminalized because of, and he should be punished for, the wrong he does to the individual victim’.¹⁰ We agree.¹¹

¹⁰ SE Marshall and RA Duff, ‘Criminalization and Sharing Wrongs’ (1998) 11 Canadian Journal of Law and Jurisprudence 7, 12.

¹¹ Such accounts fare no better with the negative thesis. Their defenders must tell us when a wrong is done to the general public. One option is to point to the generation of widespread fear or the creation of social volatility (see R Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 65-71; L Becker,

This understanding might, however, be developed in a subtler way. Rather than casting members of the public in the role of victims, we might think of them as having an *interest* in public wrongs, in virtue of their participation in a political community the character of which they help to define. On this alternative approach, public wrongs are not wrongs *done to* members of the public, but wrongs that are *of concern* to them as participants in the political community—as citizens.¹² Duff and Marshall’s later writings make clear that theirs is such an account.¹³ The key idea, on this account, is that members of the public are members of a political community, and are thus ‘engaged in a distinctive enterprise of living together, structured by a set of values that help to define that enterprise’.¹⁴ Not everything its members do is the business of that community. This includes some wrongs they commit. If I refuse to buy a round of drinks this may be the business of my friends, ‘but it is private in the context of the polity—it is not the business of my fellow citizens simply in virtue of

‘Criminal Attempts and the Theory of the Law of Crimes’ (1974) 3 *Philosophy & Public Affairs* 262). When plugged into the negative thesis, this implies that those who are able to successfully conceal their wrongdoing thereby cancel the reasons to criminalize it, or render its criminalization impermissible. Another option is to point to public perception: perhaps what makes members of the public victims of a wrong is the fact they perceive it as an attack on them all. This option is persuasively critiqued by Lamond (n 7) at 617.

¹² We return below to the conception of citizenship utilized by Duff and Marshall. In the meantime, we follow them in using citizenship to refer to membership of a political community.

¹³ Duff and Marshall, ‘Public and Private Wrongs’ in J Chalmers, F Leverick and L Farmer (eds) *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh 2010) 71ff.; Duff, ‘Responsibility, Citizenship and Criminal Law’ in RA Duff and SP Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 128.

¹⁴ Duff (n 6) 5.

our mutual citizenship'. What counts as the polity's business 'depends on an account of the defining aims and values of such a polity',¹⁵ and these can be changed over time. Wrongdoing is the polity's business when it 'violates the polity's defining values'.¹⁶ That a wrong satisfies this criterion makes the members of that polity answerable to one another for its commission. In Duff's words, when we commit such wrongs we are 'responsible as citizens to our fellow citizens: we must answer to them for wrongs that are their business'.¹⁷ We must also call our fellow members to answer for committing such wrongs.¹⁸ Public wrongs, for Duff and Marshall, are wrongs of this kind. What generates this conclusion is not that members of the public are wronged. Rather, it is that the wrongs fall within the scope of their polity, because they violate the values that help to define what that polity is.

Duff and Marshall often write that public wrongs are the public's business.¹⁹ Without more, this does not take us very far. To claim that ϕ ing is the public's business might simply be to claim that its criminalization does not intrude into an independently-defined private sphere, a claim compatible with the residual interpretation dismissed above. Sometimes Duff even writes as if public wrongfulness is a conclusion not a premise: 'the public character of crime' he writes, is 'an implication, rather than a ground, of its criminalisable character'.²⁰ This may tempt us to think that Duff is saying nothing about what gives us reason to criminalize. It may

¹⁵ Duff, *Answering for Crime* (Hart 2007) 142.

¹⁶ Duff (n 13) 139.

¹⁷ Duff (n 15) 142.

¹⁸ Duff (n 13) 140.

¹⁹ See e.g. Duff (n 6) 9; Duff and Marshall (n 13) 76.

²⁰ Duff (n 15) 142; see also Duff (n 6) 9-10.

tempt us to think that all he is saying is that once we know there is reason to criminalize ϕ ing we know ϕ ing is a public wrong. This temptation should be resisted. For Duff and Marshall, to say that ϕ ing is a public wrong is not just to say that there is reason to criminalize ϕ ing. Neither is it just to say that ϕ ing is the business of members of a political community. It is also to say that ϕ ing ‘violates’ a value by which that community defines itself,²¹ and to say that in virtue of this violation community members have duties to answer to one another for ϕ ing. So understood, the idea of public wrongfulness is clearly capable of figuring as a premise in arguments about criminalization. Nor will the conclusions of those arguments be uncontroversial. If the negative thesis is true, then on this interpretation of a public wrong, there is no reason to criminalize wrongs that do not violate the community’s defining values, or it is impermissible to criminalize those wrongs. True, it may still be permissible to regulate these wrongs using other parts of the law.²² But even if criminalization would prevent much additional harm (or offence), there is no reason to use the criminal law, or it is impermissible to do so. These are conclusions many reject. It is thus worth exploring whether they can be defended.

3. The Positive Thesis

According to *the positive thesis*, it is the fact a wrong is public that gives us reason to

²¹ ‘As public wrongs, potential crimes must violate a value on which the civic enterprise depends’: Duff (n 13) 139.

²² Some argue that Duff is not entitled to this conclusion, objecting that if a wrong is not the business of the political community—if it is not public—there can be no reason for *any* form of legal regulation: see e.g. Lee (n 7). If this is right, Duff’s conclusions are even more contentious than the text here allows.

criminalize that wrong. Why think that this is true of public wrongs in Duff and Marshall's sense? Duff's answer lies in the following passage:

if another's wrongdoing is my business, I respond properly by calling her to answer for it; that is how I take both her and her wrongful conduct seriously. And that is what the criminal law does in relation to public wrongdoing: it calls alleged perpetrators of such wrongs to account, and holds them formally answerable for their commissions of such wrongs through the criminal trial.²³

If this is right, we can argue as follows:

- (1) Members of the polity have duties to answer to one another for public wrongs, and to call one another to answer for those wrongs;
- (2) If a public wrong is made a criminal offence, its perpetrators will be called to answer for their wrongdoing in a criminal court, and some will answer for those wrongs;
- (3) That a wrong is public provides reason to criminalize that wrong.

(3) follows from (1) and (2) only if one accepts two propositions. First, one must accept that the duties mentioned in (1) can be discharged in the manner described in (2): one must accept, that is, that the criminal courts operate on the polity's behalf. If they do, calling public wrongdoers to answer in a criminal court constitutes members of the polity's calling each other to answer for those wrongs; and answering for public wrongdoing in a criminal court constitutes answering for such wrongdoing to one's fellow members. Second, one must accept that law-makers ought to act on the polity's behalf: one must accept that if making some law will result in the discharge of

²³ Duff (n 6) 16; see also Duff and Marshall (n 13) 72.

members' duties, law-makers have reason to do just that.

We can accept these claims for present purposes. We may still have our doubts about (1). These doubts stem from the distinction between what we value and what is of value. Our donating to charity may be of value, but we may not value donating. We may value our misery, even though our misery is not of value. Duff thinks that if one of the polity's defining values is autonomy, this gives its members duties to answer to one another for autonomy-based wrongs. He also thinks that if autonomy is of value, but is not one of the polity's defining values, its members—at least *qua* members—have no such duties.²⁴ Why, though, should the fact that X is one of the polity's values—defining or otherwise—be of such normative significance? It is true that when we value X we typically, perhaps necessarily, take X to be *of value*. But this cannot itself be enough to generate reasons for action. Suppose that Jane thinks that cutting the red wire will defuse a bomb and save lives. Jane takes cutting the red wire to be of value. But if cutting the red wire will instead cause the bomb to

²⁴ Couldn't Duff say that if an *ideal* political community would value autonomy, this is enough to generate duties to answer for autonomy-based wrongs? He could not. Duff insists that it is for the actual members of the political community to determine the nature of their civic enterprise, and to thereby determine which wrongs count as public in their community. As he puts it, 'a crucial task for those engaged in the civic enterprise is to work out, through a robust public deliberation, the nature of that enterprise, and what belongs to it.... Once they have determined the scope and content of the civic enterprise, they can identify a class of public wrongs: wrongs which impinge on or fall within that enterprise, which they therefore have reason to criminalize as wrongs whose perpetrators can in principle be called to account through the criminal courts.' See RA Duff, 'Relational Reasons and the Criminal Law' in L Green and B Leiter (eds) *Oxford Studies in Philosophy of Law: Vol 2* (OUP 2013) 201.

explode, Jane has no reason at all to cut it.²⁵ Duff would no doubt reply that this misses his point. An autonomy-based wrong is a public wrong only if it *both* violates the polity's defining values and is *actually a wrong*.²⁶ And it is only actually a wrong if autonomy is of value. Alas, this only creates another puzzle: if the fact X is of value is insufficient to give members of a community reasons for action qua members, and if the fact X is valued is also insufficient to them such reasons, why think that the combination of these facts is sufficient?

One possible answer derives from the thought that some communities are themselves of value. Think of families, neighbourhoods, sports teams, or universities. As members of these communities we have certain obligations to fellow members in virtue of our membership. The fact that members have these obligations is part of what makes such communities of value. Can we make the same claims about political communities? One might argue that we can. One might argue that a political community is itself *of value* when its members self-identify as members of the community, and take the success of their lives to consist partly in that ongoing

²⁵ The example is drawn from David Enoch, *Taking Morality Seriously* (OUP 2011) 22-3.

²⁶ Duff is sometimes misunderstood on this point. Michael Moore takes Duff to be claiming that the fact that X violates one of the polity's defining values *suffices* to make X a public wrong: 'No self-respecting retributivist should find there to be any justice achieved by prohibiting and then punishing behaviours that are only conventionally regarded as wrong, even when those conventional moral beliefs are so deeply held that they are (and are conventionally regarded as being) essential to the society's moral sense of itself.' See M Moore, 'Liberty's Constraints on What Should be Made Criminal' in RA Duff et al (eds), *Criminalization: The Political Morality of the Criminal Law* (OUP 2014) 199. This gets Duff wrong. A candidate public wrong must satisfy two tests: first, it must be shown to be a wrong; second, it must be shown to violate one of the polity's defining values, thus making it *public*. For clarification, see Duff (n 13) 139.

membership. As Duff and Marshall put it, the members of such a community find ‘their identities and their goods within their relationships to others; in particular, in the context of discussions of the criminal law, in their relationships with each other as members of a political community’.²⁷ They ‘see themselves as belonging to a particular political community, and as connected through the practices and values of that community to their fellow citizens’.²⁸

Imagine Bill is one of these people. Bill self-identifies as a Canadian citizen. He takes his citizenship to connect him to other Canadians, who together form a community that is, *inter alia*, a just community in which to live;²⁹ Bill takes his life to go better because of this connection. Assume other Canadian citizens are like Bill. Can we conclude that the Canadian political community is itself of value? That depends. The connection between Bill and his fellow Canadians may be no more than apparent. The Canadian political community may in fact be unjust. If it is, the fact that Bill and other Canadians take its being just to make their lives go better does nothing to make that community of value. It simply shows that their lives are going less well than they think. Now whether a polity is just, of course, depends on many things. But in a non-ideal world one thing it depends on is what the community does in response to injustice. Political communities that value justice—it might be argued—are political communities in which, *inter alia*, the members are duty-bound to call one another to answer for injustices they perpetrate. For Bill and his fellow

²⁷ Marshall and Duff (n 10) 21.

²⁸ Duff (n 6) 5.

²⁹ By justice here, we mean to refer to one moral value among others. For the merits of this usage, see J Tasioulas, ‘Hart on Justice and Morality’ in L Duarte d’Almeida, J Edwards and A Dolcetti (eds) *Reading HLA Hart’s The Concept of Law* (Hart 2013).

Canadians, the existence of such duties helps make their conception of the community—and of themselves—a reality. In Duff and Marshall’s words, it helps the community to ‘remain true to itself’, thereby contributing to the success of the lives of Bill and his fellow members.³⁰ Just as with families, neighbourhoods, sports teams and universities, such duties help make the political community a community of value.

Here, then, is a possible answer to the foregoing puzzle: if X’s being valuable and X’s being valued are individually insufficient to give us reason to do anything, why should the conjunction give us reasons—let alone duties—to answer for X-based wrongs? According to the account sketched here, our having these duties is partly constitutive of a valuable type of political community, a community that lives up to the conception its members have of the community and of themselves. Such a community could not exist if its members did not have these duties. If this is right, members’ duties to answer—and call one another to answer—for public wrongs are *associative* duties. They are duties members of a community have, in virtue of their membership, and which help make that community a community of value. Duff seems to endorse this defence of (1). In his view:

The criminal law gives institutional form to a particular subset of what we might call secondary associative obligations: associative because they are obligations we owe to our fellow citizens in virtue of our shared membership of the polity; secondary because they concern our civic responses to breaches of the primary obligations that the criminal law presupposes—to commissions of the kinds of wrong with which the criminal law is concerned. As citizens,

³⁰ Duff and Marshall (n 13) 83.

we have a special duty to attend to public wrongs committed within the polity: a duty to respond to such wrongs by calling the wrongdoer to public account, which we owe to both victim and wrongdoer; a duty to answer to our fellows for our own commissions of such wrongs, and to answer to any accusations of such wrongdoing that are reasonably brought against us.³¹

If this defence succeeds, we should accept (3): we should accept that the fact a wrong is public in Duff and Marshall's sense generates a reason to criminalize that wrong.

A. *Distortion*

One way to test Duff and Marshall's account is to ask whether it gives us a plausible account of the reasons to criminalize wrongs that almost everyone agrees should be criminalized—wrongs such as murder, robbery or rape. Duff and Marshall accuse other writers of defending accounts that fail this test. This includes some accounts mentioned above—those that characterize members of the public as *victims* of public wrongs, on the ground that such wrongs tend to cause social volatility or take unfair advantage of the law-abiding.³² According to Duff and Marshall,

such accounts do seem to subordinate the individual victim (a concern for their good, or the wrong done to them) to some supposedly larger social good. The offender's conduct is counted as criminal, and he is to be punished, for the sake of that larger good: to which it is appropriate to object that his

³¹ Duff (n 13) 140.

³² See n 11.

conduct should be criminalized because of, and he should be punished for, the wrong he does to the individual victim.³³

These rival accounts ‘distort’ the reasons there are to criminalize familiar *mala in se*, by picking out the wrong feature—social volatility or the taking of unfair advantage—as the feature that gives us reason to criminalize murder or rape.³⁴ There is reason to criminalize such act-types, Duff and Marshall claim, not because of these further features, but because they are wrongs: ‘if we are to give the victims their due, the criminal law’s attention must be on the wrongs that they have suffered’.³⁵ Call this *the distortion objection*.

The distortion objection can be turned against Duff and Marshall’s own view. We already saw that for them, there is reason to criminalize public wrongs because citizens thereby discharge duties to call one another to answer. And we saw that those duties exist because their existence helps constitute a valuable type of community. Yet this appeal to community seems to be precisely the appeal to a ‘larger social good’ for which Duff and Marshall criticize rival accounts. On their view, there is reason to criminalize public wrongs, and thereby call offenders to answer, precisely ‘for the sake of that larger good’—precisely so that citizens are members of a community that lives up to their conception of the community and of themselves. Were criminalization of some wrong not to contribute to this larger good, there would, on Duff and Marshall’s view, be no reason to criminalize.

³³ Marshall and Duff (n 10) 12.

³⁴ Duff and Marshall (n 13) 71.

³⁵ Ibid.

Duff and Marshall might reply that there is an important difference between their account and the rival accounts mentioned above. If we accept the latter, the concerns of the criminal law are concerns about social volatility caused, or unfair advantage taken, rather than concerns about wrongs done to victims of murder or rape. If we accept Duff and Marshall's account, our reasons to criminalize are reasons to call wrongdoers to answer *for their wrongdoing*. So the concerns of the criminal law really are concerns with wrongs done, and the distortion objection, it appears, is inapplicable.

Notice, however, that our concern may be misdirected not only because of *what* we are concerned about, but also because of *why* we are concerned about it. Bernard Williams brings this out in discussion of what he calls 'moral self-indulgence'.³⁶ According to Williams:

a person may act from generosity or loyalty, and act in a counter-utilitarian way, and not attract the charge of moral self-indulgence, but that charge will be attracted if the suspicion is that his act is motivated by a concern for his own generosity or loyalty, the enhancement or preservation of his own self-image as a generous or loyal person.³⁷

Williams's point is this: we can imagine a person whose actions are outwardly identical to those of a generous or loyal person—who donates large amounts of money to the local hospital despite his limited means, or who consistently comes to

³⁶ B Williams, *Moral Luck* (CUP 1981) ch 3.

³⁷ Ibid 45. By putting the matter in terms of 'self-image', Williams does not mean to suggest that his concern is with persons who seek to confirm their self-image for personal, psychological satisfaction. His is a more general worry about seeking to mould reality *in order to constitute* one's self-image.

the aid of his friends when they need him. Such a person may be motivated by the fact that the hospital needs money to perform lung transplants. But he may, instead, be motivated by the perceived effect of the donation on his own character. He may be motivated, in other words, by a desire to become, or remain, a generous or loyal person—replacing, in Williams’ words, ‘a thought about what is needed’ with ‘a thought which focuses disproportionately on the expression of his own disposition’. Such behaviour ‘involves a misdirection not just of attention, though that is true too, but genuinely of concern’: for Williams, such misdirections are themselves distortions.³⁸

Are Duff and Marshall guilty of similarly misdirected concern? We think they are. Take the following passage:

the reasons that we have to criminalize such core wrongs as murder, rape and other attacks on the person do not depend on the contingency of whether criminalization will efficiently prevent them. Those reasons have to do, rather, with what it is for a polity to take its defining values seriously.³⁹

By taking those values seriously, the members help their community live up to the conception they have of it and of themselves—their community thereby becomes a community that is liberal, humane, caring or just, and citizens thereby become members of such a community. As we saw with Bill and his fellow Canadians, their lives go better as a result. The worry is that this story involves just the kind of misdirection that exercises Williams. For on this story the criminal law’s concern with

³⁸ Ibid 47.

³⁹ Duff (n 6) 15. See also Duff (n 15) 88; Duff (n 24) 195.

murder or rape is not, ultimately, a concern with the damage done to the lives of victims or even of wrongdoers.⁴⁰ It is rather a self-absorbed concern, a concern of citizens with their own character and values *qua* community members. That the criminal law is concerned with wrongs like murder or rape, on this view, is derivative of—because dependent on—this more basic communitarian concern.

This seems to us to get things backwards. To take Duff and Marshall's own injunction seriously, and give 'victims their due', the criminal law's basic concern must be with the wrongs themselves: with the damage wrongs like murder or rape do to victims' lives, as well as to the lives of wrongdoers.⁴¹ Of course, we may disagree about how the basic concern is best addressed. Perhaps we should seek to prevent murders and rapes themselves, or perhaps we should seek only to prevent the wrongs of failing to answer, or suffer punishment, for committing them.⁴² Either way, the

⁴⁰ Duff and Marshall would accept, of course, that (part of) what makes murder and rape *wrong* is the damage we mention in the text. But this is not what makes them *public* wrongs. And the positive thesis we are considering states that it is the fact a wrong is public which gives us reason to criminalize that wrong.

⁴¹ As John Gardner observes, those who commit such wrongs have reasons for regret, and lives are blighted by the existence of such reasons: 'Wrongs and Faults' in AP Simester (ed), *Appraising Strict Liability* (2005).

⁴² A retributivist like Michael Moore would take the last view: M Moore, *Placing Blame* (OUP 1997). For Moore, the sole function of criminal law is to achieve retributive justice—to prevent the wrongs that would occur if those deserving of punishment were not punished. Our disagreement with Duff cuts across the disagreement between those, like Moore, who think that the sole function of criminal law is to prevent such secondary wrongs, and those, ourselves included, who think that preventing primary wrongs—like murder and rape—is also a legitimate function of criminal law. For both ourselves and

case for criminalizing murder and rape rests upon the fact that criminalization can ameliorate the damage those wrongs do to people's lives, not the fact that criminalizing them helps Bill and his fellow citizens to 'remain true' to themselves.⁴³

By contrast, the case made by Duff and Marshall for criminalization is of this latter kind. For them, citizens have duties to answer—and call one another to answer—for public wrongs, because a community in which these duties exist is a community that lives up to its defining values. There is reason to criminalize public wrongs precisely because criminalization will result in discharge of these duties, making citizens members of the type of community of which they aspire to be a part. It follows that the reason to criminalize murder and rape is, for Duff and Marshall, ultimately a concern of citizens with what Williams calls 'the enhancement or

Moore, the criminal law's basic concern is with wrongs and the damage they do to people's lives. For Duff and Marshall, the basic concern is with the character of the political community.

⁴³ Cf. Duff and Marshall (n 13) 83. It might be objected that we should distinguish two questions here. First, why is it appropriate for wrongdoers to be called to answer for wrongs? Second, why is there reason for public officials to call them? The damage to people's lives we mention in the text might help answer the first question. The self-image of the community might help answer the second. (Thanks to an anonymous referee for pressing this possibility.) We do not think these two questions can be so easily separated. Whether it is 'appropriate' to respond to a wrong by calling the perpetrator to answer *depends on who is doing the calling*. As Duff puts it (n 24, at 203), 'we do not answer into a void: we answer to some person or some body, and can be expected to answer only to one who has the standing to demand it of us.' One cannot, in other words, *first* determine that calling to answer is appropriate, and *then* decide who is the appropriate caller. Rather, calling to answer is not appropriate unless (i) an appropriate caller exists, and (ii) the appropriate caller is doing the calling. In the case of criminal law, those who call suspected wrongdoers to answer are public officials. The only question, then, is whether and why *these officials* have reason to call suspects to answer for wrongs.

preservation of [their] own self-image'⁴⁴—with their being members of the liberal, humane, caring or just community of which they self-identify as members. And this, of course, is the very concern that Williams denigrated as self-indulgence: as replacing a thought about what is needed—to prevent wrongdoing that damages people's lives—with a thought that focuses unduly on citizens' conception of their community and of themselves. In short, if other views distort the truth by failing to fix 'the criminal law's attention' on victims and 'the wrongs that they have suffered',⁴⁵ it is hard to see why the same is not true of Duff and Marshall's account. And if we should reject distortive accounts of the reasons to criminalize wrongs, we should also reject the positive thesis when Duff and Marshall's account of a public wrong is plugged into it.⁴⁶

B. *Citizens and recusants*

It might be said in rejoinder that our discussion overlooks the following fact: wrongdoers and victims are citizens too. This misses our point. Our claim is not that Duff and Marshall fail to take into account the interests of certain people. It is not, in

⁴⁴ Williams (n 36) 45.

⁴⁵ Duff and Marshall (n 13) 71.

⁴⁶ A different interpretation of Duff and Marshall's account would take them to be concerned not with how community members *conceive* of the community, but the way in which the community *presents* itself. The reason to criminalize murder or theft or rape, on this view, is that the community's claim to value life, or private property, or sexual autonomy, would be false if these wrongs were not criminalized. This view seems to us to fare no better against the distortion objection. We are to criminalize for the reason that, if we do not, our claims about ourselves will be false. So our concern when we criminalize is to mould reality in order to *reflect* our self-image. This seems to us a no less self-indulgent reason to criminalize than the one we consider in the text.

other words, that they ignore the interests of wrongdoers and victims, and take account only of the interests of third parties like Bill. It is rather that Duff and Marshall only take into account interests shared by wrongdoers, victims and third parties alike: the interest all three have, as citizens, in the character of the community of which they are members.

Indeed, this line of thought suggests a second possible objection to Duff and Marshall. For their view, we claim, *does* fail to take proper account of the interests of some people, a failure that leads to further distortion. Recall the argument with which we began section 3:

- (1) Members of the polity have duties to answer to one another for public wrongs, and to call one another to answer for those wrongs;
- (2) If a public wrong is made a criminal offence, its perpetrators will be called to answer for their wrongdoing in a criminal court, and some will answer for those wrongs;
- (3) That a wrong is public gives us reason to criminalize that wrong.

We explained above that (1) is true, for Duff and Marshall, because members' having these duties is partly constitutive of a valuable type of political community—a community that lives up to the conception the members have of the community and of themselves. For citizens to have such duties is for them to have reason to call one another to account for public wrongs. And because criminalizing public wrongs will have this result, there is reason to criminalize them. As we pointed out, this argument goes through if both law-making and law-applying institutions ought to act on behalf of citizens. And this is indeed Duff's view. '[A]s citizens of the polity', he writes, 'the law and the whole apparatus of the state' are to 'act in our name on our behalf', as

‘the formal institutional manifestations and instruments of our shared political lives—of the civic enterprise in which we are collectively engaged’;⁴⁷ ‘we can best understand the authority and claims of criminal law in a liberal polity by understanding it as a law for citizens: a law to which citizens subject each other and themselves’.⁴⁸

Ultimately, then, the reason to criminalize murder, robbery or rape is the fact that this contributes to the success of the lives of citizens, on whose behalf the institutions that create and apply criminal laws should act. What we do not yet know is who counts as a citizen. According to Duff, citizens ‘see themselves as belonging to a particular political community, and as connected through the practices and values of that community to their fellow citizens’.⁴⁹ Citizens, in short, are people like Bill. But if this is so it is unrealistic to think that in any liberal democracy everyone within the state’s jurisdiction will be a citizen. What we have in mind here is not that some people will dissent from particular legal norms on account of their views about particular values. We have in mind people who, whatever values they endorse, simply do not think of themselves as members of the political community *at all*, and for whom correspondence between the defining values of such a community and the values they endorse would be at most a happy coincidence. For want of a better word we will call these people *recusants*. As Massimo Renzo notes, there is no reason to doubt the existence of such people. Recusants

can certainly accept that their identity is embedded within certain roles that

⁴⁷ Duff (n 15) 49-50.

⁴⁸ Duff (n 13) 148.

⁴⁹ Duff (n 6) 5.

they occupy *qua* members of different social groups. What they deny is only their membership in one of these groups: the political community. They do not see themselves as Italian citizens or Spanish citizens, but can still see themselves as brothers or sisters, as sons or parents, as Catholics or Muslims, as environmental activists, football fans, academics and so on. All these memberships and relationships do shape their identity and allow them to make sense of who they are, even when they reject their membership in the state in which they live.⁵⁰

What are Duff and Marshall to say about murders, rapes or robberies committed by, and against, recusants? One possibility is that these are not public wrongs *at all*. This is the conclusion Duff reaches about theft committed in other jurisdictions, at least when committed by and against their citizens. Such wrongs are not public wrongs, because ‘as citizens wearing our civic uniforms, our interest is normally limited to what belongs to or impinges on the civic enterprise of our polity’.⁵¹ Could the same be said of instances of recusant-on-recusant violence *within* the jurisdiction? Surely not. That would lead to the conclusion that there is no reason to criminalize such wrongs. A more plausible answer is that these *are* public wrongs, because the defining values of the polity are violated by murders, robberies and rapes that take place within the jurisdiction. Yet this only creates a further problem. We have seen that the reason to criminalize public wrongs, for Duff and Marshall, is ultimately that it contributes to the success of the lives of citizens. Yet this implies that the reasons to

⁵⁰ M Renzo, ‘Associative Responsibilities and Political Obligation’ (2012) 62 *The Philosophical Quarterly* 106, 117.

⁵¹ Duff (n 24) 203.

criminalize recusant-on-recusant wrongdoing—and to try, convict and punish them in criminal courts—have nothing to do with the interests of either the perpetrators or the victims of such wrongs. The case for subjecting the wrongs recusants commit or suffer to the criminal law, on this view, is given by the fact that this sustains in existence a community of which they are not members. In short, it has nothing to do with *them*.

We take for granted that this implausible conclusion is to be rejected. But we fail to see how Duff and Marshall's account can avoid its embrace. It is no answer, it seems to us, to say that recusants are properly thought of as guests for whom citizens act as hosts. While this might be a plausible way to think about those 'temporarily in a country as visitors, as refugees, or as workers',⁵² many recusants will have lived in the jurisdiction for their entire lives. Are they really to be thought of as guests merely because they take the attitude aptly described by Renzo? And if they are, what are we to make of the fact that they are *involuntary* guests—guests who did not choose their destination, and who may suffer greatly if they leave (if they can leave at all)? We can grant that *voluntary* guests sometimes have duties to ϕ , in virtue of the fact that ϕ ing helps preserve something valued by their hosts. Burdensome though they may be for guests, the existence of such duties can be defended in part on the grounds that they choose to visit and the duration of their visit is limited. Such grounds are unavailable in the case of many recusants, whose presence in the jurisdiction is neither voluntary nor temporary. It follows that, absent some further argument, the fact that answering to citizens would preserve the character of the community in which those citizens wish to live, does not *itself* give such recusants a permanent duty to answer to

⁵² Ibid 207.

citizens; neither does it give citizens a permanent right to call them.⁵³ On Duff's view, it appears to follow that recusants are not answerable in the criminal courts. Yet this is surely the wrong answer. It cannot be impermissible to call murderers and rapists to answer in the criminal courts merely because they are recusants. So we should not think of them as involuntary guests.

If not guests, what then? One option would be to treat recusants as citizens. To do so would require the following revision. Duff writes that citizens 'see themselves ... as connected through the practices and values of that community to their fellow citizens'. If recusants are citizens, that claim must be dropped. It might be said instead that citizens *ought* to see themselves in the way Duff describes. This alternative claim suggests that recusance is itself a defective self-image. But this is too strong. A recusant may live by any moral value one cares to name, including any value that a political community ought to value. She simply does not see herself as part of such a community. It is hard to see why this is a defective view of oneself.

There is a further problem with revising Duff and Marshall's conception of citizenship to include recusants. Recall that for Duff and Marshall, the reason to criminalize public wrongs is the fact that doing so takes the community's defining values seriously. We asked earlier why that fact should be thought to be a reason to criminalize. Duff and Marshall answered that citizens self-identify as members of a community with certain values, such that taking those values seriously is part of their

⁵³ Of course, recusants still have a moral obligation not to commit wrongs. But if this *itself* made recusants answerable in a criminal court, there would be reason to criminalize any moral wrong. Duff's view would then collapse into the immodest legal moralism he is trying to resist.

good.⁵⁴ On the revised conception of citizenship, this answer is unavailable. It is no part of that revised conception that citizens self-identify as part of any community. One might say that there is reason to criminalize violations of the community's defining values because this will result in citizens' coming to see themselves the way they *should*. On this view, the reason to criminalize wrongs would be to change how people think of themselves—to get them to stop thinking as recusants, and to start thinking of themselves as part of a political community. Such a reply would only exacerbate the distortion we identified above. What then counts in favour of criminalizing murder and rape is not making the self-conception of citizens a reality, but getting people to conceive of themselves as community members even when they would rather not. It is far from clear that this is a legitimate state function. Even if it is, its fulfilment is surely not what makes the case for criminalizing murder or rape.

We are left with no satisfactory answer to the question we posed to Duff and Marshall: why should the fact that a wrong is public in their sense give us reason to criminalize that wrong? Absent such an answer, we conclude that the positive thesis should be rejected.

4. The Negative Thesis

Let us turn, then, to the negative thesis. Two versions of that thesis can be distinguished. According to the first version, it is a necessary condition of there being a reason to criminalize some wrong that the wrong has the property of being public. As we saw in section 1, this is Duff's view. According to the second version, it is a necessary condition of the permissible criminalization of some wrong that the wrong

⁵⁴ Marshall and Duff (n 10) 21.

has the property of being public. This version has the apparent attraction of enabling one to remain neutral about the nature of reasons:⁵⁵ whatever the truth about reasons to criminalize, those reasons are defeated when ϕ ing is not a public wrong. Doug Husak appears to defend this second version of the negative thesis. According to Husak, one constraint on permissible criminalization requires that the state have a legitimate interest in punishing ϕ ing.⁵⁶ In his view, ‘we should determine whether the state has a legitimate interest in resorting to the penal sanction by asking whether given wrongs are done not only to individual victims but also to the shared values and interests of communities’.⁵⁷ Following Duff, Husak calls these public wrongs.⁵⁸

What argument can be given for either version of the negative thesis? Here is one possibility. To criminalize ϕ ing is, *inter alia*, to confer on public officials the power to bring, or take over, legal proceedings of a particular kind. Such proceedings hold those suspected of ϕ ing responsible for having ϕ ed, by calling them to answer for ϕ ing in a criminal court. It might be argued that there is reason to confer such powers—or that they are permissibly conferred—only if those who ϕ are responsible to public officials for having ϕ ed: only if those officials have the right to call suspected ϕ ers to answer, and only if suspected ϕ ers have a duty to answer when

⁵⁵ If, for instance, one endorses what John Gardner calls agent-neutrality, the first version of the negative thesis is undoubtedly false. (See J Gardner, *Offences and Defences* (OUP 2007) 58-66.) Whether the attraction is more than ‘apparent’ is a topic for another day.

⁵⁶ This is part of what Husak calls the substantial state interest constraint. See Husak (n 4) 132.

⁵⁷ *Ibid*, 136-7.

⁵⁸ *Ibid*, 135. In this section, when we refer to public wrongs, it is the Duff/Marshall/Husak account that we have in mind.

called.⁵⁹ Let us call this *the public responsibility principle*, and call those who have such a duty *publicly responsible*. Husak and Duff claim that suspected offenders are publicly responsible only if offending is a public wrong.⁶⁰ If they are right, and the argument sketched in this paragraph goes through, one version of the negative thesis should be accepted.

A. One red herring: the argument from authority

We do not here challenge the public responsibility principle itself. Our question is this: can one be publicly responsible in respect of act-types that are not public wrongs? John Gardner claims that one can. In Gardner's view:

one way in which A can become responsible to B in respect of A's offending is by B's having authority over A in respect of A's offending. If that authority is legitimate, then it makes A's having offended into B's business in the sense required for B to have the right (or at least the right to require) that A explain A's having offended.⁶¹

⁵⁹ To be clear, this is not a claim about *legal* rights and duties. The claim is that unless officials have a moral right to call suspected offenders to answer, and suspected offenders have a moral duty to answer when called—unless, that is, there is a relationship of moral answerability—it is not permissible to criminalize offending, or there is no reason to do so.

⁶⁰ Husak (n 4) 136-7; Duff (n 13) 131-4.

⁶¹ J Gardner, 'Relations of Responsibility' in R Cruft, M Kramer and M Reiff (eds) *Crime, Punishment and Responsibility* (OUP 2011) 93.

If B has authority over A in respect of A's ϕ ing only if ϕ ing is a public wrong, this is no challenge at all.⁶² But Gardner claims that this is not so:

the law of anywhere regarding traffic lights anywhere has legitimate authority over me to the extent that my treating it as having legitimate authority over me helps to prevent traffic accidents (and other bad consequences such as gridlock and road rage) anywhere. And the same, *mutatis mutandis*, is true of the law relating to insider trading, narcotics, theft, gambling, homicide, kidnapping, etc. Irrespective of whether I have any relationship with the legal system in question I am bound by its laws because and to the extent that treating them as binding on me will help me to avoid doing bad things, be they universally bad things (such as killing people) or locally bad things (such as driving on the left in a country where everyone else drives on the right).⁶³

If Gardner is right, being publicly responsible for ϕ ing does not depend on ϕ ing's being a public wrong. It does not depend, that is, on whether ϕ ing violates the defining values of the polity. If we better conform to reasons that apply to us already by treating laws relating to traffic, insider trading, narcotics, theft, gambling, homicide or kidnapping as authoritative, those laws *are* authoritative for us, and we are answerable to public officials for violating them. Husak's and Duff's argument for the negative thesis fails.

⁶² For the purposes of this discussion, A has authority over B if and only if A has the normative power to change B's rights, duties, powers, or permissions by issuing directives addressed to B. By authority we thus mean what Gardner calls legitimate authority.

⁶³ Ibid 95. Gardner here invokes Raz's service conception of authority. See J Raz, *The Morality of Freedom* (OUP 1986) chs 2-4.

Gardner's argument depends on the following claim: A is answerable to B for ϕ ing whenever A's ϕ ing breaches a directive of B's that is within the scope of B's authority over A. Is this correct? Consider the following case:

Accident: A is out walking when she comes across a car accident. C, the driver of one vehicle, has a serious leg injury. B, a doctor, who has also come across the accident, begins to treat the driver of the other vehicle. While doing so, B issues directives telling A how C should be treated. If A treats B's directives as authoritative, A is likely to stop C from losing a leg. If A does otherwise, C's leg will be lost.

In *Accident*, it seems clear that—on the conception of authority endorsed by Gardner—B has authority to direct A to treat C in certain ways. B's directives are within the scope of that authority. Now imagine that A fails to do as directed. No doubt, A is answerable to C. Had A done as directed, C would not have lost her leg. So if C demands answers, A has a duty to give them. But if B were to track A down the following week and demand an answer for A's disobedience, it does not seem that A would need to answer *to her*. It would be enough (would it not?) for A to say: I gave C my reasons.⁶⁴

These claims can be defended in the following way. In *Accident*, B has authority over A because C's interest in saving her leg gives A reason (indeed a duty) to take steps to save it, and because A is more likely to conform to that reason (and do her duty) by treating B's directives as authoritative. This is why A is duty-bound to do

⁶⁴ Our discussion here is influenced by that in D Enoch, 'Authority and Reason-Giving' (2014) 89 *Philosophy and Phenomenological Research* 296, 323-8.

as B directs. Now if A breaches her duty, the reasons that add up to give A that duty do not simply disappear. Were this so, we could escape our duties simply by failing to conform to them. The better view is that the reasons A is given by C's interest in her leg continue to exert normative force. As Gardner himself has argued, though A cannot now conform to them fully, those reasons now count in favour of A's doing the next best thing.⁶⁵ One thing this plausibly requires is that A explain why she did as she did—that she offer answers for her breach of duty. But if there is anyone to whom such answers are owed, it is surely C, whose interests gave A—and continue to give A—the very reasons that are now reasons for A to answer. If this is correct, it explains why it would be enough for A to reply to B that she gave C her reasons. It would be enough because it is C's interests that explain why A must answer at all.⁶⁶

If this is right, Gardner is wrong to suggest that A is answerable to B for ϕ ing whenever A's ϕ ing breaches a directive of B's that is within the scope of B's authority. In *Accident*, A is answerable to C, whose interests give A the reasons that ground B's authority over A. If A answers to C, she need not answer to B. It follows that the public responsibility principle is not automatically engaged whenever A violates laws—like the traffic laws mentioned by Gardner—that are authoritative for A. True, our argument implies that A *is* answerable to her fellow road-users, whose

⁶⁵ J Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice' (2011) 30 *Law and Philosophy* 1, 29-31.

⁶⁶ One might say in reply that if B has authority over A, A owes B a duty of obedience, and that if A violates a duty owed to B, it follows that A owes B answers for the violation. As Raz points out, there is nothing in the service conception that entitles one to this conclusion. Once A violates her duty to obey B, '[o]ne needs a separate argument' for the existence of any further duty owed by A. See J Raz, 'On Respect, Authority, and Neutrality: A Response' (2010) 120 *Ethics* 279 at 300.

interests give A the reasons—to drive safely—that ground whatever authority the law has over A. It does not follow, however, that A is answerable to public officials.

B. *Officials as surrogates*

If Gardner's view is to be rejected, when is one publicly responsible? Let us start by considering a case in which it would be wrong for A to ϕ . We can leave open whether ϕ ing is wrong independently of the law, or whether it is wrong partly because of the law. Suppose that there is some class of individuals who benefit from A's not ϕ ing, and whose interests help to make it the case that A has a duty not to ϕ . These people, we might say, are the *beneficiaries* of A's duty. Gardner mentions 'insider trading, narcotics, theft, gambling, homicide, kidnapping' and road traffic offences. The beneficiaries of the latter are A's fellow road users; in the case of insider trading, they are other participants in the relevant financial system; in the case of narcotics, those harmed by their availability; and so on. In each of these cases, if A breaches her duty not to ϕ , then as in *Accident*, A is answerable to those beneficiaries. Why? Because the reasons that gave A her duty—reasons given by the interests of the beneficiaries—continue to call out for next-best compliance, and because answering to the beneficiaries is part of what such compliance requires.

None of this shows that A is publicly responsible. To show that, we must show that A is answerable *to public officials*. As we saw in section 3, on Duff's analysis A is answerable because her fellow citizens, whom public officials represent, themselves have an interest in A's wrongdoing. But that move is not required here. Notice that in all the cases Gardner mentions, and many others, beneficiaries tend to be poorly placed to get the answers owed. In some cases, they lack the expertise required to reliably detect violations. In others, they can be easily intimidated, or

manipulated by A. Even where this is not so, leaving things to beneficiaries is a recipe for wasteful duplication of effort, as various members of that class try to obtain the answers owed. And even if duplication can somehow be avoided, the effort required may come at a significant cost: getting answers from wrongdoers often requires a significant investment of time and energy, lessening one's ability to pursue one's own projects and goals. The fact that beneficiaries have their own lives to lead also generates a further problem: in cases where no-one is harmed, beneficiaries are unlikely to be inclined to bring proceedings, even if A's conduct creates great risks. This is to say nothing of the danger, especially where harm is caused, of leaving victims with the task of holding A responsible. There is a standing risk that what starts as a quest for answers will result in little more than confrontation; that some will seek revenge whether or not answers are forthcoming; and that those on the receiving end will retaliate accordingly.⁶⁷

When we say that beneficiaries are poorly placed to get the answers they are owed, it is costs of all these kinds that we have in mind. Where beneficiaries are so placed, public officials are often better placed to get answers on their behalf. Of course, this is not always so. Such officials may be incompetent or corrupt. But where these evils are avoided, putting officials in control of proceedings can help to solve problems of duplicated effort, unreliable detection, intimidation and manipulation. And by charging such officials with getting the answers owed, we achieve a valuable division of labour: while officials are busy getting answers, the rest of us are freed up to get on with the rest of our lives, and conform to our other responsibilities.⁶⁸ What's

⁶⁷ Compare Gardner (n 55) 213ff, discussing what he calls the criminal law's displacement function.

⁶⁸ On dividing moral labour more generally, see S Scheffler, 'Egalitarian Liberalism as Moral

more, the expectation that officials can be relied on to bring proceedings against wrongdoers can help sap the incentive to confront suspects, and remove some of the temptation to seek revenge. Considerations of all these kinds help make the case for an official right to call suspected wrongdoers to answer on behalf of beneficiaries, and for a corresponding duty to answer.⁶⁹ They help make the case, in other words, for public responsibility.

If we are right, the question whether the public responsibility principle is engaged, at least in the type of case described above,⁷⁰ depends heavily on empirical facts. It depends on whether the aforementioned advantages will be achieved by putting control of proceedings in the hands of public officials. *Pace* Gardner, whether wrongdoers are publicly responsible in the case of laws anywhere ‘relating to insider trading, narcotics, theft, gambling, homicide, kidnapping, etc’, depends on the answer

Pluralism’ (2005) 79 *Aristotelian Society Supp* Vol 229-253.

⁶⁹ The law often allocates particular rights, duties, powers or permissions to persons because they are well-placed to act on behalf of another. One example is the criminal defence of best interests necessity. D is permitted to do what would otherwise be an offence in V’s best interests, ‘when it is not practicable to communicate’ with V and no ‘more appropriate person is available and willing to act’: *F v West Berkshire HA* [1990] 2 AC 1, 76. Another example is the Attorney General’s role as representative of the beneficial interest of a charitable trust. Because the beneficiaries are poorly placed to do so themselves, the Attorney-General is empowered to bring proceedings against trustees or against third parties to recover trust property.

⁷⁰ Strictly speaking, our argument is only that public responsibility does not depend on public wrongfulness, such that the former idea cannot be used to defend the negative thesis. We argue that in one mainstream type of case, the wrong does not need to be public in order to engage the public responsibility principle. That leaves open the possibility of other cases which, if legitimately criminalized, would either be exceptions to the public responsibility principle or require that public responsibility be established in some other way. We cannot pursue those possibilities here.

to this question. *Pace* Duff, Marshall and Husak, it does *not* depend on whether violation of those laws is a public wrong. It does not depend, in other words, on whether A has violated one of the defining values of her political community.

It might be objected that our account makes public responsibility too easy to come by.⁷¹ Imagine that Singaporean officials could get answers for wrongs committed in Madagascar by enforcing Singaporean law beyond its borders. Doesn't our account imply that Singaporean officials have the right to call Madagascan wrongdoers to answer for their wrongs? It does not. Many of the reasons why beneficiaries are poorly placed to get answers will also apply to officials when wrongs occur in distant parts of the world. But even when this is not so, there are powerful *systemic* reasons for officials not to intervene like that. As Kit Wellman puts it,

States deliver crucial benefits because they secure peace and order that would be impossible in their absence. Political regimes are essential for this task because peace is in practice possible only when all territorially contiguous

⁷¹ Another worry might be that our disagreement with Duff and Marshall rests on a disagreement about whether we should be consequentialists about morality, since on our view, whether public officials have a right to call suspected wrongdoers to account for a wrong depends on the likely consequences of giving them control over whether suspects are called. Yet as Rawls points out, 'all ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy.' (J Rawls, *A Theory of Justice*, rev edn (Oxford, Oxford University Press, 1999) 26.) What is distinctive of non-consequentialist moral theories is not that they ignore the consequences. It is that they accept constraints on our pursuit of those consequences, which are not themselves justified in consequentialist terms. If empowering officials to call suspected wrongdoers to account would violate some non-consequentialist constraint, officials should not be so empowered.

people follow a common set of rules and appeal to a common authority to adjudicate conflicts under these rules.⁷²

These benefits underpin norms of sovereignty in international law. They would be jeopardized were officials to take it upon themselves to enact and enforce law for other states, whenever they believe that doing so would result in answers being given by those who owe them. Not only would those within each territory lose the ability to determine which rules, and which institutions, would resolve disputes about their rights and duties, but damaging conflict between states would be bound to increase. Such considerations help explain why Singaporean officials lack a right to enforce Singaporean law in Madagascar, even if this would result in Madagascan wrongdoers answering for their wrongs.

We have sketched a rival view of public responsibility to that offered by Duff, Marshall and Husak. We can see one reason to favour the rival view by returning to the distinction, drawn in § 3, between what is valued and what is of value. Some political communities fail to value X even though X is of value. Some of these failures impede beneficiaries who seek answers for X-based wrongs. They threaten to allow X-based wrongdoers to escape responsibility. If Duff, Marshall and Husak are right about public responsibility, there is nothing public officials may do to hold these people responsible. Why? Because, *ex hypothesi*, X is not one of the defining values of the political community, so X-based wrongs are not public wrongs. For Duff, Marshall and Husak it follows that public officials have no right to call X-based wrongdoers to answer. The community's failures thus help shield these wrongdoers from responsibility for their wrongs.

⁷² CH Wellman, *Liberal Rights and Responsibilities* (2014) 63.

The rival view we have sketched has the opposite implication. All else being equal, the more obstacles beneficiaries of X-based duties face in getting answers for themselves, the better suited are public officials to do so on their behalf. Where public officials *are* well-placed to call X-based wrongdoers to answer, those wrongdoers are publicly responsible for their wrongs, so officials have a right to call them. Far from weakening the case for public responsibility, the community's failure to value X thus strengthens that case.

It may help to consider an example. Some claim that distributive equality is of value because it is a requirement of justice. Let's assume they are correct. Now imagine a political community which, over a period of decades, repeatedly passes laws exacerbating distributive inequalities. It is hard to see how distributive equality could be a defining value of this community. And it is easy to see why beneficiaries of egalitarian duties might struggle to get the answers they are owed. In a highly unequal society, those at the top are unlikely to answer readily to those at the bottom. And those at the bottom are unlikely to have the means or the opportunity to effectively call those at the top to answer for wrongdoing. In this community, Duff, Marshall and Husak must hold that community members are *not* publicly responsible for inequality-exacerbating wrongs. The community's failure to value equality thus helps shield those who wrongly exacerbate inequality from responsibility for their wrongs. On the rival view, things are different. The very fact that wrongdoers are likely to escape responsibility if public officials do nothing helps explain why those officials are well-placed to call wrongdoers to answer. This is what gives public officials the right to call them to account. It follows that the community's failure to value equality strengthens, rather than weakens, the case for public responsibility

when egalitarian duties are breached. *Pace* Duff, Marshall and Husak, public officials need not stand by while these wrongdoers escape responsibility for their wrongs.

C. Beyond public responsibility: communities and criminal law

Admittedly, even if we are right about the conditions under which wrongdoers are answerable to public officials, it does not follow that whenever these conditions are satisfied wrongdoers may be called to answer *via the criminal law*. Various other conditions must be met. The question is, of course, what form those additional conditions take. Some argue that criminalization of ϕ ing must be likely to prevent harm (to others). Some argue that ϕ ing must be wrongful, or culpable, or both. Perhaps, then, public officials may use other parts of the law to get answers on behalf of beneficiaries, but may not use criminal law unless they are dealing with a public wrong?

It is unclear why criminal law *in particular* should be subject to this last constraint. One might say that a wrongdoer must be answerable not just to public officials but *to her fellow citizens* before there is reason to criminalize her wrong.⁷³ Why think this is the case? One answer points to the way criminal law addresses those to whom its norms apply. Duff writes that those norms ‘must speak to [the accused] in the voice of his fellow citizens’.⁷⁴ For him,

[The criminal law’s] voice is not (should not be) the voice of a sovereign who demands our obedience as subjects, but our own collective, civic voice; it is a

⁷³ Duff replies to Gardner in this way: see Duff (n 24) 193-4.

⁷⁴ *Ibid* 206.

voice in which we speak to ourselves, as citizens, of the shared values and goals by which our civic enterprise as a polity is constituted.⁷⁵

We have already argued that not everyone to whom criminal law speaks is a citizen (or, indeed, a guest) in Duff's sense. Even leaving that aside, however, why think that the only way criminal law should speak to people is in terms of values they already endorse? There need be nothing disrespectful about trying to get people to explain themselves when they fail to value that which is of value. Assuming we are well-placed to get an explanation, we may show less disrespect by seeking it, than by standing by and doing nothing. By those who acted wrongly we may later be asked: why didn't you say anything at the time?⁷⁶ Duff's point, of course, is that it is a long road from the observation that public officials may seek answers from a wrongdoer, to the conclusion that they may seek those answers via the criminal law. We agree. At the very least, criminal proceedings need to be an effective way of getting the answers owed. Getting answers via criminal law must also come at an acceptable cost in other values. Criminal law is a blunt instrument operated by fallible agents, and it cannot be assumed that we are justified in using it whenever it will get answers wrongdoers owe. None of this shows, however, that criminal wrongs must be those for which we are answerable to our fellow citizens. So we are yet to see why they must be public wrongs.

Consider an alternative argument. Duff claims that the central function of criminal proceedings—perhaps of criminal law as a whole—is to enable citizens to

⁷⁵ Duff (n 15) 50.

⁷⁶ See, relatedly, J Raz, 'Disagreement in Politics' (1998) 43 *American Journal of Jurisprudence* 25, 43.

seek answers they are owed by their fellow citizens.⁷⁷ By seeking—and giving—these answers, citizens take their shared values seriously, thereby (re)constituting their community in valuable ways. That function is not served by calling to account those who do not violate the defining values of that community. So private wrongs have no part to play in criminal law.

In responding to this we need not deny that there is sometimes value in having members of a community seek answers from one another. We can accept, for instance, that when academics are suspected of plagiarism, there is something to be said for the idea that fellow members of the academic community should be the ones to call them to account. In Duff's terms, this is part of what it is to take certain academic values seriously; taking those values seriously helps make the academic community a valuable community of which to be part. In cases like this, community members have reasons to call their fellow members to account for wrongs that attack the very glue binding the community together. In our view, those reasons help explain why public officials are sometimes *poorly* placed to seek answers from wrongdoers. Sometimes, it is important to seek answers *ourselves*, as a means of (re)constituting particular communities of which we are members. The interference of public officials may impede our doing so.

Duff's view is that criminal law stands to political community as anti-plagiarism norms stand to academic communities. Both are part of the glue that holds their respective communities together. But how far does the analogy go? We doubt that it goes sufficiently far: comprehensive, non-voluntary political communities such as the nation state are not like specialist groups that are voluntarily united by their

⁷⁷ Duff (n 24) 195-196.

shared norms and community of spirit. It may be acceptable for a specialist community to set the terms of its own membership, and to discipline or even expel those members who do not ‘fit in’—who undermine that community’s defining values. It may be acceptable for such a community to be motivated in doing so by the fact that someone is ‘not one of us’, and threatens to dissolve the glue that binds ‘us’. The rules of a specialist association may legitimately implement a shared conception of the sodality. But this is legitimate, it seems to us, partly because the rules of specialist associations are themselves subject to the law. There are legal rules—including criminal offences—which are (or should be) designed to protect those who do not ‘fit in’, not only against other individuals but against communities whose shared conception tends to exclude or overlook them. On the communitarian account, the criminal law is *itself* a tool by which a community’s shared conception is to be implemented. Those overlooked or excluded by that conception cannot turn to the law for protection. The task of criminal law is not to protect them but to implement the shared conception. It is true, of course, that doing the latter may, in a sufficiently enlightened community, entail doing the former. But that depends on how lucky we are in the community we have. If we are not so lucky, the communitarian account has it that criminal law may be used to suppress ways of living that are incompatible with ‘our’ values; it may be used in this way *because* of the incompatibility. Under these conditions the communitarian account ceases to capture an ideal and becomes a potential vehicle for the oppression of those who are not ‘one of us’.⁷⁸

⁷⁸ This point holds even if the criminalized conduct is itself wrong. Criminal law may be oppressive because it criminalizes wrongs that are protected by rights, eg to privacy or free expression, or wrongs that are properly tolerated because of their centrality to valuable (if different) ways of life.

One final thought. For those who endorse the communitarian conception, the very existence of a functioning system of criminal law presupposes a community characterised by a set of shared values. In Duff's words, it presupposes a 'moral consensus' that extends beyond the purely procedural to encompass substantive goods.⁷⁹ Duff acknowledges that the moral consensus cannot be 'complete'—that the communities in which we live are often fractious and pluralistic. But in his view, if those fractures

run so deep as to make it impossible (factually or morally) to identify a set of values as 'our' values, values that make a legitimate claim on the allegiance of all members of the polity, then criminal law (as distinct from some uneasy *modus vivendi*, or the mere exercise of coercive power by some over others) is impossible.⁸⁰

Duff offers his version of the communitarian account not as a purely normative theory but as a rational reconstruction of criminal law.⁸¹ Such an account must not depart too radically from the phenomena that provide its subject matter (lest it cease to be reconstructive); and it must offer an account of the goods which are immanent in, and help to justify, that subject matter (lest it cease to be rational in the relevant sense). Though we cannot develop the point in detail here, we doubt that the communitarian conception scores well when measured against either of these criteria.

⁷⁹ Duff (n 24) 185.

⁸⁰ Ibid 185-86.

⁸¹ Duff (n 15) 5ff.

As to the first criterion—and by contrast with relatively small communities, where it may be easier to identify defining values—one might doubt whether the requisite moral consensus exists in such extraordinarily diverse states as California, let alone countries like the United States or, nowadays, the United Kingdom. Yet an account that concluded, say, that U.S. federal (or even state) criminal law does not exist—or, stronger still, is impossible—would conflict radically with what both lawyers and laypersons understand criminal law to be. As to the second criterion, it is true that some legal systems, such as traditional Shari’a, develop organically at a community level, being rooted in regional custom and constituted in part by the interpretations of locally-embedded clerics (*qadi*). Shari’a laws might plausibly be thought of in communitarian terms, as laws that help implement the shared values of the local community. But many western legal systems work differently. True, there may be delegated law-making power for localised regions, and to that extent communities can fashion their own rules. But their doing so is subordinate to jurisdiction at a state or national level. At those broader levels, laws are applied not within but *across* local communities. They set standards for co-operation that, rather than assuming consensus, accommodate *dissensus*. What justifies these laws is not that they help implement a moral consensus but, *inter alia*, that they enable people to live harmoniously in its absence. Neither must this absence be something to regret. Inconsistent ways of life can each be valuable, and tension between them can be constructive. There need be nothing undesirable about living in a ‘morally plural, fractious’ society, even one in which the fractures run deep. Criminal law can help make such societies possible.

It may help to summarise the argument of section 4. We began by accepting that the public responsibility principle identifies a necessary condition, either of

permissible criminalization, or of there being any reason at all to criminalize. Duff, Marshall and Husak think that this condition is only satisfied by public wrongs. Were this correct, it would vindicate one or other version of the negative thesis. We have argued that it is incorrect. Wrongdoers are publicly responsible when public officials are well-placed to get answers from those wrongdoers on behalf of beneficiaries—those whose interests generate the duty the wrongdoer has breached. In such cases, officials have a right to call such wrongdoers to answer for their wrongs.⁸² This right does not depend on whether the wrong is public. Nor is there any reason to think that criminal law in particular should only concern itself with public wrongs. We conclude that the negative thesis should be rejected.

5. Conclusion

We have considered two ways in which the concept of a public wrong might be of use to those thinking about permissible criminalization. According to the positive thesis, it is the fact a wrong is public that provides reason to criminalize that wrong. According to the negative thesis, the fact a wrong is public is a necessary condition of there being reason, or of it being permissible, to criminalize that wrong.

Whether either thesis is true depends on what a public wrong is. We considered several accounts. On some accounts, the label public wrong is simply the label given to whatever there is reason to criminalize (or prohibit, or punish, etc) or whatever is permissibly criminalized (or prohibited, or punished, etc). On these accounts, the claim that something is a public wrong is the *conclusion* of an argument,

⁸² It is, of course, a further question whether that right should be exercised in a given case.

not one of its premises. Such accounts guarantee that both theses are true. But that truth is ultimately trivial.

If the idea of a public wrong is to figure as a premise in arguments about reasons to criminalize, or about permissible criminalization, a different account is required. The search for such an account led us to the work of Duff, Marshall and Husak. For these writers, public wrongs are wrongs that violate the shared, or defining, values of a political community. We argued that this account fails to vindicate either thesis. When it is plugged into the positive thesis, it distorts our reasons to criminalize familiar *mala in se* like murder, robbery and rape. The account might instead be plugged into the negative thesis. It might be argued that wrongs are permissibly criminalized only if the wrongdoers are publicly responsible, and that only those who commit public wrongs are responsible in this way. This argument also fails. Public responsibility does not depend on whether a wrong is public in Duff, Marshall and Husak's sense. We cannot rule out the possibility that some other account of a public wrong avoids our objections. Having considered the leading accounts on offer, we doubt such an account will be forthcoming. In its absence, it would be better, when we think about permissible criminalization, to do without the idea of a public wrong.