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Public Wrongs and the ‘Criminal Law’s Business’: When Victims Won’t Share

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Amongst the many valuable contributions that Professor Antony Duff has made to criminal law theory is his account of what it means for a wrong to be *public* in character. Given that much of his writing on this topic has been developed over a series of articles with frequent co-author Professor Sandra Marshall, I shall refer to it as the Duff-Marshall account of public wrongs (Marshall and Duff 1998; 2009; Duff and Marshall 2010). In this chapter, I sketch an alternative way of thinking about criminalization, one which attempts to remain true to the important insights that illuminate the Duff-Marshall account, while providing (it is hoped) a more satisfying explanation of cases involving victims who reject the criminal law’s intervention.

According to the Duff-Marshall account, the scope of public wrongs is not limited to those which directly victimize the public collectively (such as terrorist attacks), but also includes wrongs which are directed primarily at individual victims (such as murder, rape, assault, etc.). The puzzle that Duff and Marshall have so fruitfully addressed is how to make sense of the idea that a wrong against an individual victim is also, at the same time, public in character.¹ In brief, their view is that wrongs done to individual victims can be *shared* by a polity, thereby becoming public wrongs:

A group can . . . ‘share’ the wrongs done to its individual members, insofar as it defines and identifies itself as a community united by mutual concern, by genuinely shared . . . values and interests, and by the shared recognition that its members’ goods (and their identity) are

* My thanks to Andrew Ashworth, Kimberley Brownlee and Matthew Kramer for their comments on a previous draft of this chapter.

¹ Duff does not deny that wrongs to individual victims may also properly be pursued by the individual victims as private wrongs (e.g. torts) and that the polity can and should support the victim in so responding (e.g. by providing a civil cause of action, access to courts, enforcing judgments for damages arising from a private cause of action, etc.). Rather, the puzzle Duff and Marshall address is under what conditions it is justifiable for the polity itself to respond *directly* to the wrong, rather than merely responding indirectly by supporting the victim’s direct response. On direct and indirect responses to wrongdoing, see Dempsey 2009a, ch. 9. See also Green 2009 and Marshall and Duff 2009.

bound up with their membership of the community. Wrongs done to individual members of the community are then wrongs against the whole community . . . insofar as the individual goods which are attacked are goods in terms of which the community identifies and understands itself. (Marshall and Duff 1998: 20)

The Duff-Marshall account of public wrongs is a matter of foundational importance to Duff's criminal law theory more generally, since it delineates what he takes to be the proper scope of the 'criminal law's business'. This phrase, borrowed from the Wolfenden Committee Report, is often quoted by Duff when discussing what he takes to be the proper limits of the criminal law. Indeed, it appears in nearly every account Duff offers regarding 'public wrongs' (Duff 2005: 441; 2008: 107; 2010*b*: 138; 2010*c*: 589, 595–7; Duff and Marshall 2010: 71). It remains unclear, however, whether the notion of the 'criminal law's business' does much work in unpacking the Duff-Marshall account of public wrongs, since the logical relationship between what counts as a 'public wrong' and what counts as the 'criminal law's business' is more circular than explanatory: some wrongs are private, not public; private wrongs are not the criminal law's business; wrongs that are not the criminal law's business do not properly concern the criminal law; wrongs that do not properly concern the criminal law are private, not public; and so on . . .²

Duff is frequently concerned to distance his 'public wrongs' approach from what he labels 'legal moralism'. According to Duff, legal moralism endorses 'the claim that moral wrongfulness is a good reason for criminalization' (Duff 2007: 84). The error in legal moralism, according to Duff, is 'that it takes *all* wrongdoing, of any and every kind, to be in principle the business of the criminal law', rather than limiting the scope of criminalization to *public* wrongdoing (Duff and Marshall 2010: 71, emphasis added). Legal moralism's approach to criminalization risks becoming 'radically over-inclusive', warns Duff, 'since it implies that we have good reason to criminalise every kind of moral wrongdoing, even if other considerations often then tip the balance against criminalisation' (Duff 2007: 47–8). In rejecting legal moralism, Duff observes:

We surely have no reason, not even one outweighed by countervailing reasons, to criminalise such undoubted and serious wrongs as the betrayal of a friend's confidence, or the demeaningly contemptuous dismissal of a colleague's ideas. I am of course answerable for such wrongs to those whose business they are – to my friends, or to my colleagues; but . . . such wrongs are, 'in brief and crude terms, not the law's business'. (Duff 2007: 48)

Whilst I am sympathetic to Duff's tendency toward minimalism in criminalization, I worry that his critique of legal moralism moves too quickly and thereby risks obscuring a more plausible third way of delineating the proper scope of criminal law. In what follows, I will highlight some problems with Duff's critique of legal moralism, suggest an alternative method for approaching questions regarding the proper scope of criminalization, and put this method to work in addressing a type of case that has caused the Duff-Marshall account of public wrongs particular

² See Duff 2010*a*.

difficulty: that is, cases in which victims refuse to share their wrongs with the community.

1. Duff's Critique of Legal Moralism

Duff's critique of legal moralism moves too quickly on two fronts. First, it fails to distinguish between having a reason to do something and having a *good* reason to do it. In some sense, of course, every reason is a good reason (for a bad reason is, we might say, no reason at all)—but the sense in which Duff uses the phrase 'good reason' suggests that he means to refer to a particularly weighty or strong first-order reason, or perhaps even a second-order reason.³ If, however, the claim of legal moralism is simply that we have *a* reason to criminalize any wrong—and perhaps that reason is nothing more than a 98lb weakling of a reason which is easily defeated by stronger or weightier reasons against criminalization—then the risk of radical over-inclusiveness that worries Duff seems to fade considerably. Indeed, there is little reason to think that the legal moralism Duff takes as his foil would lead to a substantially broader scope to the criminal law than Duff would be willing to endorse—for the mere fact that there exists a reason (even a good one, whatever that might mean) to criminalize a wrong does not entail that criminalization would be justified all-things-considered (Moore 1997: 68–75, 739–95).

In this regard, it is worth noting the shift in phrasing that Duff occasionally makes when arguing his case against legal moralism. Oftentimes, he subtly moves from making claims about what we do or do not have reason to criminalize to making claims about what we should 'say' we have reason or not to criminalize (Duff and Marshall 2010: 73, 75–6). Tellingly, Duff has even framed the argument in terms of what members of a *legislature* should think about their reasons for criminalizing something (Duff 2007: 47). This shift is noteworthy because it suggests that there may be a tension in Duff's work between what is intended to be illuminating for fellow philosophers and what is intended to be chilling for prospective legislators (and, presumably, other criminal justice actors). My concern here is that the latter project may negatively impact the former, for whilst it may be appropriate to limit the range of considerations legislators take into account with rules of thumb regarding the proper scope of their deliberations when legislating, we should not allow those rules of thumb to obscure a full philosophical account of the reasons that actually do bear on the justifiability of their conduct.⁴ Put another way, it is possible that both of the following may be the case: (1) it is true we have good reason to criminalize any and all wrongdoing *and* (2) legislators should not bear that truth in mind when acting qua legislators.⁵ Professor Duff's

³ On the distinction between first- and second-order reasons and the variety of second-order reasons, see Raz 1990: 39–40 and postscript; Raz 1979: 18, 21–3.

⁴ On rules of thumb, see Schauer 1991: 104–11.

⁵ Compare Gardner 2007: 211.

equivocation between what we actually *do* have reason to criminalize and what we (or legislators) should *think* we have reason to criminalize obscures this possibility.

A second way in which Professor Duff's critique of legal moralism moves too quickly is in its failure to distinguish one's having a *reason* to ϕ and ϕ -ing being one's *business*—for one may have a *reason* to ϕ without ϕ -ing being one's *business*.⁶ For example, you may encounter a particularly glum-looking stranger walking down the street. If he would be cheered by your warm smile, then normally you will have a reason to smile at him.⁷ (Of course, the fact that you have a reason to smile at the stranger is not yet to say that you *should* smile at him all-things-considered. He may be glum and creepy as well, such that any reasons you have to smile at him are defeated by the reasons you have to refrain from smiling at creepy strangers.⁸) Absent unusual circumstances, however, your ability to cheer him gives you at least a reason to do so.⁹ Yet, the mere fact that you have a *reason* to smile at him does not make it your *business* to do so. If you are his friend or family member, then cheering him may fall within the ambit of your business—but absent your standing in a special role vis-à-vis the glum man, cheering him is simply none of your business.¹⁰

How then can we make progress in identifying the things that fall within the ambit of our business? Continuing with the example of cheering someone, we can provide at least a partial explanation of why bringing cheer is properly thought to be the business of friends and family rather than random strangers by reference to the fact that friends and family are typically in a particularly good position to realize the value of cheering one another, whilst strangers are not. This idea of 'being in a particularly good position to realize a value' can be at least partially cashed out in terms of epistemic and efficiency considerations.¹¹ First, in virtue of our roles and relationships within the social forms of friendship and family, we typically stand

⁶ Conversely ϕ -ing may be one's business without one having any reason to ϕ . See n. 10.

⁷ To elaborate, your reason to smile is grounded in the fact that you can realize the value of bringing cheer to the glum stranger. This account is consistent with what I have previously referred to as the normal correspondence thesis: that, in the normal course of things, the fact that one's doing a particular action can realize value provides a reason for one to perform that action (Dempsey 2009a: 58, 86–90). See also Gardner and Macklem 2002. Neither Gardner and Macklem 2002 nor Dempsey 2009a makes the distinction I draw here between one having a reason to ϕ and ϕ -ing being one's business.

⁸ Just as the ability to realize value through an action generates a reason to perform that action, so too does the ability to realize disvalue through an action generate a reason to refrain from performing that action. If smiling at a creepy stranger would generate disvalue by, for example, jeopardizing your safety, that disvalue generates a reason *not* to smile.

⁹ On the matter of unusual circumstances disrupting the normal correspondence between reason and value, see Dempsey 2009a: 86–91.

¹⁰ Conversely, there are times when doing something is your business, but you have no reason to do it. For example, it is the business of parents to try to cheer their glum teens, but as many a frustrated parent has experienced, sometimes trying to cheer a glum teen is destined to fail or even backfire, making the teen not only glum but angry as well. In that case, trying to cheer the teen is still the parent's business, but she has no reason to try. For an illuminating discussion of the relationship between reasons to try and reasons to succeed, see Gardner 2004.

¹¹ Gardner has cashed out the idea of being 'particularly well-placed' in terms of his 'efficiency principle', which is principally concerned with 'the efficient use of rational energy' (Gardner 2007: 278).

in a position of epistemic privilege vis-à-vis our friends and family, which explains (in part) why certain matters properly fall within the ambit of our business as friends and family. Friends and family, that is, are more likely to know and understand what has caused the person to become glum, what is most likely to bring him cheer, when attempts to cheer him are likely to backfire, and so forth. Second, in virtue of the fact that friends and family typically have more frequent interactions with one another than strangers do, the ability to realize the value of cheering a friend or family member typically has relatively few transaction costs. These low costs ground further considerations of efficiency that explain (in part) why cheering someone is properly considered to be the business of friends and family rather than strangers.¹²

If this distinction between having a reason to ϕ and ϕ -ing being one's business is plausible, then it opens up space to consider a third way to approach the question of what kinds of wrongs fall within the ambit of the 'criminal law's business'. I will develop this alternate account in section 3 below. First, however, I will examine some methodological points of departure that illustrate how Professor Duff's approach to these questions differs from my own.

2. Justifying Criminalization: On Starting Points

It is relatively uncontroversial to observe that criminalization calls for justification. When legislators create criminal prohibitions, when police and prosecutors arrest suspects and pursue charges against them, when juries or judges convict defendants, when judges impose sentences upon the convicted, and when jailors and their ilk effect punishment in executing those sentences—each of these criminal justice officials stands in need of justification for their conduct.¹³ In order to make progress on the question of whether such actions are justified, it is necessary to consider the reasons these officials have for engaging in these acts. What kinds of reasons, we may ask, can do the normative work required to justify the conduct of criminal justice officials?

That, in any event, is how I tend to go about contemplating such matters—and in section 3 below I will use this approach to begin developing an account of what falls within the ambit of the criminal law's business. First, however, it is worth

¹² Indeed, the extremely low transaction costs borne by the stranger walking toward the glum man on the street might support the claim that smiling at him is the stranger's business, such that we might justifiably criticize the stranger who fails to offer a warm smile by remarking, 'Why didn't you just smile? What would it have cost you?'

¹³ I will use the label 'criminal justice officials' to refer to those typically so-named (such as police, prosecutors, judges, and jailors/probation officers)—as well as to refer to actors within the criminal justice system who play an official role within the system, albeit on a more temporary basis (for example, jurors)—and finally to those who do not act within the criminal justice system itself, but instead posit the laws that structure and guide the system (for example, legislators). My claim above is that all of these actors stand in need of justification for their contributions to the overall project of criminalization.

noting that Professor Duff offers a somewhat different way of approaching such questions. As he explains:

A justification of criminalisation will need to begin by specifying some value(s) that can be claimed to be public, as part of the polity's self-definition; show how the conduct in question violates that value or threatens the goods that it protects; and argue that the violation or threat is such as to require or demand a public condemnation. (Duff 2007: 143)

My approach to thinking about the justification of criminalization differs from Duff's in several respects. One minor distinction that should not distract us long is that Duff approaches the justification of criminalization as if it were an inquiry into the conditions under which criminalization is 'required' or 'demanded', while I approach the issue as an inquiry into the conditions under which criminalization is justified (in the sense of being permissible¹⁴) and, if so, to what extent criminalization constitutes an effective use of state power (Dempsey 2009*a*, ch. 8). Given the tremendous costs of the criminal justice system (both economic and moral) and the historic and ongoing *injustices* perpetrated in the name of the criminal justice system, it seems to me that it is quite difficult enough to identify the conditions under which criminalization is permissible and effective, much less 'required' or 'demanded' all-things-considered.

More importantly, my approach differs from Duff's insofar as I frame my account of the justification of criminalization in terms of the reasons that apply to actors operating within distinct roles within the criminal justice system, rather than framing it in terms of the values that are violated or threatened by defendants through their criminal conduct. My focus on the reasons that apply to the conduct of criminal justice officials, however, is not unrelated to questions of value; for on my account, the fact that a criminal justice official *can* realize a value by ϕ -ing normally generates a reason for her to ϕ .¹⁵ So, for example, the fact that a police officer can realize a value by arresting an offender, or a prosecutor can realize a value by prosecuting him, generates reason for them to do so (Dempsey 2009*a*, chs 4–5; 2009*b*).

On a related point, while Duff focuses on values that are violated or threatened by the criminal conduct of *offenders*, I focus on values that can be realized by the conduct of *criminal justice actors*. Oftentimes, of course, these values are two sides of the same coin: the values violated or threatened by offenders' conduct (for example, the value of public safety or bodily integrity) will often be the same values that can be realized by the criminal justice official's conduct (for example, insofar as an arrest or prosecution enhances or maintains public safety or protects individuals' bodily integrity). Sometimes, however, the values that are violated or threatened by offenders' conduct will not be realized by criminal justice officials' actions. The value of a victim's sense of self-determination may be violated or threatened in a violent assault, for example, yet this value may very well not be realized through the

¹⁴ The notion of permissibility I wish to invoke is that of 'weak permissibility'. On the distinction between weak permissibility and strong permissibility, see Kramer 2004: 280–3.

¹⁵ In other words, on my account 'reasons for action track value' (Raz 2001: 1). For elaboration, see Dempsey 2009*a*, chs 5, 9. My account is broadly consistent with Gardner and Macklem 2002 and with the general correspondence between reason and value that underpins Raz's early work (Raz 1990: 24–5).

conduct of criminal justice officials if, say, they pursue charges against her wishes (Dempsey 2009a, ch. 9). Under such circumstances, whilst the violation or threat to the value of the victim's sense of self-determination can explain (in part) why an offender's conduct was wrongful, that value does not generate a reason in favour of prosecuting the offender (for, *ex hypothesi*, the prosecution does not realize that value). Finally, some values that can be realized through criminal justice officials' actions (and thus *are* relevant to justifying criminalization on my account) are not values that are violated or threatened by the offender's conduct. For example, it makes little sense to think of the value of retribution as being violated or threatened by an offender's conduct, yet if we grant that retribution is a genuine value, then surely the value of retribution can be relevant to justifying the conduct of at least some criminal justice officials (such as jailors); for insofar as the value of retribution generates a reason for action weighing in favour of their conduct (for example, the jailor's locking of the prison gate), that value is relevant to justifying their conduct.

Another key distinction between my starting point and Professor Duff's is that while he limits the universe of values that can be relevant to justifying criminalization to those 'that can be claimed to be public, as part of the polity's self-definition', I would impose no such limitation. As I understand it, this limitation precludes consideration of wholly individualistic values (ones that no one claims to be public and that play no role in the polity's self-definition) from doing any normative work when it comes to justifying criminalization. On my account, in contrast, such individualistic values can, at least in principle, generate reasons that are relevant to justifying the actions of criminal justice officials. Consider a prosecution for domestic violence involving closeted same-sex romantic partners in which the victim requests dismissal in hopes of avoiding the 'outing' that would occur if the details of the relationship were divulged at trial. The value to the victim of remaining in the closet is hardly a value that is 'claimed to be public', nor is it in any way 'part of the polity's self-definition'—yet, it seems plausible to suppose that such individualist values can nonetheless ground reasons in favour of the prosecutor dismissing the case at the victim's request.¹⁶

3. The Institutional Bureaucracy Account

In this section, I offer a different approach to thinking about the justification of criminalization, which I will refer to as the institutional-bureaucracy account. Inspired by Duff's approach, I will attempt to tether this account closely to the question of what is properly within the ambit of 'the criminal law's business.' In

¹⁶ Framing the example in terms of prosecution rather than the legislative decision to enact a prohibition against same-sex domestic violence does not switch the focus *from* criminalization *to* prosecution, for on the Duff-Marshall account of public wrongs, the two are inextricably related. As they have noted, 'the process of prosecution is crucial to the idea of crime' and '[o]ne who commits a public wrong is properly called to public account for it and the criminal trial constitutes (in ideal theory, if all too obviously not in actual practice) such a public calling to account' (Duff and Marshall 2010: 72). See also n. 33 below.

doing so, I hope to provide a plausible alternative to both the Duff-Marshall account (according to which the criminal law's business is limited to public wrongdoing); and the legal moralist account (according to which the criminal law's business includes any and all wrongdoing).

According to the institutional-bureaucracy account, the best way to approach the task of explaining the universe of reasons that apply to any given actor operating within an institutional bureaucracy (such as the criminal justice system) is to begin by identifying the kinds of actions she can perform given her role within the bureaucracy, whom she represents when acting in that role, and the kinds of values she can realize in performing those actions in that role. Once this array of axiological reasons is in view, we can entertain debates as to whether doing one's duty generates additional first-order reasons that are not already accounted for in virtue of the value of doing so (Herman 1981, Baron 1984) and further consider the impact that duties may have insofar as they generate exclusionary or self-reflexive second-order reasons that bear normative force on a person's rational horizons (Raz 1990: 39–40, 178–99). Proceeding in this way, the institutional-bureaucracy account aims to consider all of the reasons that apply to each actor, and to evaluate her justification in light of these reasons (i.e. 'all-things-considered'): if she acts for an undefeated reason, all-things-considered, then her conduct is justified.¹⁷

Applying this methodology to evaluating the justification of actions by criminal justice officials, it is important to recognize at the outset that criminal justice officials—in virtue of their distinct roles within criminal justice systems—can perform actions that are unique to those roles. Legislators can create criminal prohibitions, while others cannot;¹⁸ police can arrest, while others cannot;¹⁹ prosecutors can prosecute, while others cannot, and so forth.²⁰ In some ways, then, the fact that criminal justice officials operate within the institutional bureaucracies of criminal justice systems expands the universe of reasons that apply to them (and are thus, we are assuming at present, are relevant to justifying their conduct). The fact that criminal justice officials can perform actions with respect to which non-officials are impotent—and the fact that those actions can realize value and/or disvalue—means that officials can have reasons for action that non-officials do not.²¹ Prosecutors, for example, can have reasons to pursue (or discontinue) prosecutions, while non-prosecutors can have no such reasons because non-prose-

¹⁷ This aspect of the account borrows from John Gardner's work on justification and reasons (Gardner 1996). I will not here attend to the distinction Gardner draws between what is justifiable and what is justified. For further discussion, see Dempsey 2009a: ch. 5. More generally, the institutional-bureaucracy account is influenced by themes developed in Gardner's work on criminalization, especially Gardner 1998; 2007: 276–83. I will not explore the differences in our accounts here.

¹⁸ Judges can, although less commonly do, create criminal prohibitions as well. (For example, *R v. R* [1992] 1 AC 599 created a prohibition against marital rape previously unknown to English law).

¹⁹ The obvious exception here being the historic and mostly discontinued process of citizen's arrest.
²⁰ Again, the exception being the largely discontinued practice of private prosecutions. In the UK, the Crown Prosecution Service must approve the private prosecution and can take over or discontinue the prosecution, thus raising serious doubts as to the sense, if any, in which these are genuinely private prosecutions.

²¹ Compare Gardner 2007: 202.

cutors are simply not institutionally situated either to pursue or discontinue prosecutions (Dempsey 2009*a*: ch. 3).

The next step is to identify whom the criminal justice official represents when she acts in her particular role.²² By acting qua legislator, police officer, prosecutor, judge, jury or jailor, individuals act not only on their own behalf, but also as representatives of distinct groups. Most obviously, criminal justice officials act as representatives of the polity or sovereign in whose name they act (e.g. ‘the People’, ‘Regina’) (Duff 2005: 459–60); (Dempsey 2009*a*: 48–50). Moreover, insofar as their actions are performed in a context which meets a certain threshold of political legitimacy, the criminal justice officials can be understood to be acting as representatives of their communities.²³ Importantly, however, in acting qua criminal justice officials, these people do not directly represent victims (Dempsey 2009*a*: ch. 9; Harel 2008). We shall return to that last point below.

Identifying the group whom an institutional actor represents while acting within a particular bureaucratic role is relevant to the third step in our analysis: identifying the kinds of values she can realize in performing those actions in that role. Consider the different kinds of values that people can realize when responding to wrongdoing and the way that these values are sensitive to the fact of whom the people represent when acting: Alex pushes Blair—Blair tells Alex off (‘You violent jerk!’) and then walks away—Blair walks past Chris, who smiles encouragingly as Blair passes—Alex then lunges for Blair again—Chris restrains Alex and calls Alex to account (‘What the heck are you doing?!’). In this hypothetical, Blair and Chris realize different sorts of values in responding to Alex’s wrongdoing. Blair realizes values of standing-up for oneself and self-preservation, whilst Chris (at first) realizes the value of supportive fellow-feeling toward Blair and (later) realizes the value of calling a wrongdoer to account and protecting another human being from harm.²⁴ As Chris is not Alex’s victim, Chris cannot realize the same kinds of values that Blair can realize in responding to Alex’s wrongdoing. Likewise, as Blair *is* Alex’s victim, Blair cannot realize the same kinds of values that Chris can realize in responding to Alex’s wrongdoing. Rather, each person, in virtue of their role as victim or bystander, has distinct capacities to realize distinct values.

It is worth pausing to note how different the institutional-bureaucracy account is from the Duff-Marshall account of public wrongs. On the Duff-Marshall account, communities *share* the wrongs done to individual victims, such that the ‘wrongs

²² This is where my account starts to differ from Gardner’s and takes on (what some may call) a more ‘agent-relative’ flavour. Whilst I endorse Gardner’s articulation of the agent-neutralist view that ‘wrongdoing by anyone is fundamentally everyone’s concern,’ I do not believe (as he seems to) that this fact entails that ‘[w]e all have one and the *same* reason . . . to avoid the commission of any wrong.’ Insofar as people are differently positioned to realize that value, people will have different reasons vis-à-vis that value. Moreover, insofar as some people cannot realize that value, they will have no reason to do so. I take this view to be more consistent with Gardner’s work regarding the relationship between reason and value, especially Gardner 2004.

²³ See Dempsey 2009*a*: 49–52, discussing Duff *et al.* 2007: 138. We can take this thought further by distinguishing the sense in which legislators represent the electorate, or jurors represent the defendant’s peers, whilst police and prosecutor more clearly represent the polity or sovereign.

²⁴ For further discussion, see Dempsey 2009*a*, ch. 9.

done to individual members of the community are then wrongs against the whole community' (Marshall and Duff 1998: 20). The institutional-bureaucracy account strongly resists this move, preferring instead to identify the distinct values that each individual can realize in responding to wrongdoing in his or her own capacity—as a victim or a bystander. On my account, communities are best understood as bystanders, capable of engaging in coordinated action, who happen to be well-positioned to realize distinct values in responding to wrongdoing against one of their number.²⁵ Victims and their communities are able to realize *distinct* values in responding to wrongdoing: victims have their own values to realize, and communities have their own values to realize. Put in terms of reasons for action: victims have their reasons, and communities have their own. If we think of wrongs as being shared as the Duff-Marshall account claims, we obscure this distinction between the reasons that apply to individual victims and the reasons that apply to their communities—thereby obscuring some of the reasons that may justify a community's response to wrongdoing.

4. The Criminal Law's Business

Let us return now to the question set out in the first paragraph of section 2 above: 'what kinds of reasons, if any, can do the normative work required to justify the conduct of criminal justice officials?' According to the framework elaborated so far—which I have referred to as the institutional-bureaucracy account—any adequate response to that question must attend to the particular roles that officials hold within the institutional bureaucracy, the actions that those roles make possible in virtue of the bureaucratic division of labour within the institutions, the identity of those represented by those official (e.g. the People, Regina, etc.), and the kinds of values that officials can realize through performing actions in those roles. In light of the fact that each step in the process of criminalization involves distinct actions taken by officials in distinct roles, who are capable of realizing distinct values (and disvalues), it makes little sense to ask generally about 'the justification of criminalization'—for, while the phrase may serve as a helpful short-hand when vague generalities are called for, it does little to illuminate the various considerations that might go into answering the question, as it covers over far too many salient distinctions.²⁶

Notably, unlike the Duff-Marshall account, the institutional-bureaucracy account does not give any particular priority to parsing out which kinds of wrongdoing are the proper targets of criminalization. Rather, it is principally concerned with questions regarding the justification of criminalization that arise in virtue of the fact that

²⁵ My account is therefore more consistent with the de facto model of community sketched (without much savour) in Dworkin 1986: 209, as opposed to the rich sense of community that informs Duff's work (Duff 2001: 42–6).

²⁶ Compare Marshall and Duff 2009: 233.

the criminal justice system—as a legal system—is an institutional bureaucracy. It takes seriously the insight that ‘law is a system of reasons recognized and enforced by law-applying *institutions*’ (Raz 1980: 212, emphasis added). With this understanding in view, the account attempts to identify how the institutional framework of the criminal justice system affects the reasons that are relevant to its own justification.

As such, of course, the institutional-bureaucracy account provides nothing near to a complete account of how to evaluate the justification of criminalization. To further flesh out such an account, we would need to answer the question on which the institutional-bureaucracy account is silent: which values are properly realized by criminal justice officials? Put another way, what is properly within the ambit of the ‘criminal law’s business’? Such a question directs our attention away from matters in the philosophy of criminal *law* and more toward questions that arise in the realm of *political* philosophy, such as the proper relationship between the individual and community, how political institutions should be organized, what roles should be created within the bureaucracies of these institutions, what powers should be granted to those operating within those roles, and so forth.

The institutional-bureaucracy account does not provide fully fleshed-out answers to these questions—nor does it suppose that the answers will be identical for each type of legal or political system. It does, however, suggest a way forward in thinking about how to address these questions—one which mirrors the discussion above regarding the difference between ‘having a reason to ϕ ’ and ‘ ϕ -ing being one’s business’. To review, the explanation of how the realization of particular values becomes someone’s ‘business’ depends (in part) on whether the person typically stands in a particularly good position to realize those values (and to avoid the realization of disvalue). The two considerations we discussed above in considering whether someone does stand in such a position vis-à-vis a particular value were epistemic privilege and efficiency.²⁷

Applying these considerations when delineating the scope of ‘the criminal law’s business’, we may begin by asking what kinds of values criminal justice officials are particularly well-positioned to realize. John Gardner has identified one such value in his discussion of the displacement function of the criminal justice system (Gardner 1998): by taking the power to respond to wrongdoing out of the hands of individual citizens (acting in their private capacities) and placing it in the hands of a State-run institutional bureaucracy (where legal officials act in their public capacity), criminal justice officials can realize the value of punishing wrongdoers, without inviting the likely disvalue that would arise if victims and their family or friends were left to take matters into their own hands. Thus, insofar as criminal justice officials are particularly well-positioned to realize the value of retribution without realizing the disvalue of revenge, this consideration supports the argument

²⁷ I don’t mean to suggest these considerations are a closed list, but they do strike me as two key considerations in getting this analysis off the ground.

that punishment for certain kinds of wrongs properly falls within the ambit of 'the criminal law's business'.

None of this yet addresses, however, the question that so perplexes Duff and Marshall: namely, *which kinds of wrongs* properly fall within the ambit of the 'criminal law's business'? Given the considerations above, one answer that now seems evident is that the 'criminal law's business' includes responding to wrongdoing that is likely to spark widespread revenge and social unrest. Duff and Marshall might be willing to concede (with suitable qualifications) such obvious candidates for criminalization—but what of the more difficult cases—the kinds of wrongs typically considered 'private'? It is worth pausing to reflect on the various types of conduct that have traditionally been deemed by liberal criminal law theorists to fall within this notion of 'private'. The Wolfenden Committee considered one type of such conduct—homosexual sexual activity—in its report that coined the now famous quip as to the scope of 'the criminal law's business', and concluded that this conduct was not properly a matter of concern for the criminal law.²⁸ While the committee's conclusions on this point were correct, their mistake lay in thinking that they were confronting a wrong which was to be assigned to either the private or public sphere. Rather, the reason why homosexual sex does not properly fall within the ambit of the 'criminal law's business' is not that it is a private matter—but that it is not wrong.²⁹

Still, there remains a puzzling category of conduct which is concededly wrong—and sometimes quite seriously so—but still does not properly fall within the ambit of the criminal law's business. One of Professor Duff's favourite examples of this sort of conduct is the betrayal of a friend. He has as yet not fleshed out this example to explain what form the betrayal takes, but we can safely assume that that it is something falling short of assault, theft, or some other conduct that might paradigmatically fall within the ambit of the 'criminal law's business'. Let us assume that the betrayal takes the form of a sexual dalliance with the friend's romantic partner: a clear wrong—and a serious one at that—but not one which Duff (or I) would wish to criminalize. How can we explain why this conduct does not fall within the ambit of the criminal law's business?

For Duff, the answer lies in the fact that this wrong is not the kind that can be shared with the community: 'the individual goods which are attacked are [not] goods in terms of which the community identifies and understands itself.' But is this a plausible explanation? First, it is rather a vague set of considerations—for just what *are* the goods in terms of which a community identifies and understands itself? Moreover, in reflecting on those goods as they relate to the self-identity and self-understanding of a political community such as the US, it seems that the list of relevant goods would prioritize goods such as economic security, entrepreneurialism,

²⁸ Wolfenden Committee 1957. The Wolfenden Committee also considered prostitution, which presents a rather more complicated picture. For some reflections, see Dempsey 2005; 2010.

²⁹ To be more precise, homosexual sex, is not typically wrong all-things-considered. There can, of course, be incidents of homosexual sex (for example, homosexual sexual assault or rape), which would be wrong all-things-considered. My point here is that homosexual sex is no more wrong than heterosexual sex (Dempsey and Herring 2007).

and patriotism—which would suggest a rather odd way of delineating the proper scope of the criminal law.³⁰

Can the institutional-bureaucracy account do a better job of explaining why the wrong of betraying a friend through a sexual dalliance with her romantic partner is, whilst seriously wrongful, not within the ambit of the ‘criminal law’s business’? I think so, based in part on considerations of epistemic privilege, efficiency, and the criminal law’s displacement function. The argument runs as follows: In order to be aware of the fact that the dalliance occurred and to understand enough of the background facts regarding the relevant relationships so as to evaluate whether the dalliance was wrong all-things-considered, one would have to stand in a highly privileged epistemic position vis-à-vis the parties (who, typically, will have attempted to shield their dalliance from common knowledge, keeping it ‘private’ in a descriptive sense (Gavison 1992)). Under normal circumstances, only the parties, the victim, and their close friends and family will stand in this privileged epistemic position, in virtue of the amount of time they spend together, the secrets they share, and so forth. So, considerations of epistemic privilege suggest, preliminarily, that such dalliances are not within the ambit of the ‘criminal law’s business.’

Now, it is of course possible that we could create a criminal justice system in which criminal investigators are placed in people’s homes, attend parties and other social events to catch all the gossip, tap every phone conversation, read every e-mail, require people to disclose their deepest secrets, and so forth. If we had such a system, then criminal justice officials would indeed stand in a sufficiently privileged epistemic position so as to conclude (*prima facie*) that the sexual dalliance falls within the ambit of the criminal law. Yet there are at least two considerations that weigh against an all-things-considered conclusion that this sort of wrong falls within the ‘criminal law’s business’. First, creating such a criminal justice system would be highly inefficient in terms of the resources expended to secure the necessary information relative to the value of calling the wrongdoer to account and securing punishment. Second, if criminal justice officials *did* stand in such an intimate position vis-à-vis these issues, they perhaps might lose the sense of detachment from the wrongdoing which is key to the criminal law’s displacement function. The risk here is that the criminal justice official—through living closely with and sharing the intimate details of people’s lives—might come to have the same revenge-oriented response to wrongdoing that the victim and her close friends and family would have, resulting in the criminal justice official acting as a ‘proxy retaliator’ rather than serving the criminal law’s displacement function.³¹

Admittedly, the institutional-bureaucracy account provides only a partial explanation as to why such wrongs do not fall within the ambit of the ‘criminal law’s business’; certainly many more considerations must be brought to bear in any

³⁰ To be sure people in the US also recognize goods such as physical security, but it seems odd to think of that good as one ‘in terms of which [the US] identifies and understands itself’.

³¹ Gardner 1998: 34. These considerations caution against community policing and stand strongly against the mindset of some criminal justice officials that they are fighting with or on behalf of the victims of crime. Compare Dubber 2002.

complete and satisfying explanation of why this is so. One advantage this account has over the Duff-Marshall account of public wrongs, however, is that it directs our attention toward specific values (and disvalues) that can be realized by criminal justice officials depending on how the institutional bureaucracy of the criminal justice system is organized and the range of actions made possible by the roles created in that system. Once these values are in view, we can assess what shape and form the institution should take and what roles are appropriate to it. The institutional-bureaucracy account, while not complete on its own, is nonetheless helpful insofar as it avoids the public/private dichotomy’s tendency to obscure rather than to illuminate the very values upon which it is grounded (Dempsey 2009a: 31–41).

5. When Victims Won’t Share

If the arguments thus far hold, then the institutional-bureaucracy account can do some work in delineating the ambit of the ‘criminal law’s business’ in terms of considerations based on epistemic privilege, efficiency, and the criminal law’s displacement function. But can this account further explain why certain matters are and *remain* the ‘criminal law’s business’ even when they are not likely to cause widespread revenge and unrest—when, for example, the wrong is one that is widely tolerated in society and even the *victim* does not wish it to be pursued by the criminal justice system?

We can make some progress in thinking about such cases if we begin by recognizing that the displacement function is not the *only* value served by the criminal justice system. Indeed, as Professor Duff has long observed, the criminal justice system can serve important values of calling wrongdoers to account, making their wrongdoing salient, and subjecting them to condemnatory punishment (Duff 2007: 87–9). Furthermore, as I have argued at length elsewhere, the criminal justice system provides a context in which States and communities can realize the value of reconstituting their characters in virtuous ways. (Dempsey 2007; 2009a: chs 8–9)³² If we are correct, then these values—and the capacity of criminal justice officials to realize these values—might provide some clue as to why certain kinds of wrongs (such as domestic violence and racist violence) are and remain within the ambit of the ‘criminal law’s business’ even when those wrongs are widely tolerated in society and even when the victims do not wish the wrongs to be pursued by the criminal justice system. These wrongs become and remain the business of the criminal law, we might say, in virtue of the ‘constitutive function’ of the criminal law: the capacity of actions by criminal justice officials to (re)constitute the character of their States and communities in valuable ways (Dempsey 2007; Dempsey 2009a).

³² Communities can, of course, use the criminal justice system to reconstitute their characters in disvaluable ways as well (Dempsey 2009a: 51).

The Duff-Marshall account has a difficult time explaining why wrongs such as domestic violence or racist violence fall within the ambit of the ‘criminal law’s business’ even when the victim won’t share. After all, too often these wrongs are not the kind which violate ‘genuinely shared . . . values and interests’ nor do they offend ‘goods in terms of which the community identifies and understands itself’ (Marshall and Duff 1998: 20). They are instead the kinds of wrongs that many people (both historically and still today) have been content to leave alone, thinking that a criminal justice response is unnecessary or inappropriate. Moreover, oftentimes these wrongs are not, in actuality, shared by the individual victim with her community. Rather, particularly in cases of domestic violence, many victims do not want the criminal justice system to prosecute these wrongs.³³ In such cases, the Duff-Marshall metaphor of ‘sharing wrongs’ loses its appeal—while the spectre of Christie’s account of the criminal justice system as ‘stealing’ the victim’s ‘conflict’ seems more apposite (Christie 1977).

In their most recent work on this topic, Duff and Marshall have attempted to explain why these wrongs can still plausibly be thought of as public—as still being shared by the community despite the victim’s refusal to share (Marshall and Duff 2010). In doing so, they distinguish two kinds of public wrongs: those which are appropriate to criminalize at the level of general offence definition, but the prosecution of which in any individual case may properly be left to the discretion of the individual victim; and those which should be prosecuted even when the victims genuinely want the case to be dismissed.³⁴ Their explanation as to why it is appropriate to go forward is grounded in the claim that these cases involve

wrongs that the victim ought to pursue – that it would be wrong to shrug off or ignore: she might be disinclined to pursue it, but (we might say) that response is now wrong or unreasonable.³⁵

Moreover, they explain, these cases involve wrongs that ‘the polity must condemn if it is to remain true to itself.’ According to the Duff-Marshall account then, prosecuting against the victim’s wishes can be justified in virtue of ‘what the victim owes not to himself, but to others, and on his responsibilities as a citizen’ (Marshall and Duff 2010: 84). In such cases:

³³ It is of course possible that the Duff-Marshall account is best understood as a thesis limited to the question of criminalization through legislative action and simply does not extend well into the realm of prosecutorial decision-making. If that is the case, then the institutional-bureaucracy account is best understood as complementary rather than competitive to the Duff-Marshall account of public wrongs. (Thanks to Andrew Ashworth for raising this point.) However, insofar as Duff and Marshall have attempted to extend their account to answer questions regarding whether prosecutions should be pursued without the victim’s support (Duff 2010*a*; Marshall and Duff 2010), the two accounts can be understood as genuinely competitive alternatives.

³⁴ To be precise, Duff and Marshall distinguish three types of public wrongs, the first category of which includes trivial public wrongs that do not merit a response from the criminal justice system (Marshall and Duff 2010: 83).

³⁵ Marshall and Duff 2010: 83. Writing separately on the same issue, Duff characterizes such wrongs as ones which ‘it would be wrong for the victim to ignore’ (Duff 2010*a*: 23).

[the victim] owes it to his fellow citizens . . . to pursue the wrongdoer: not, or not necessarily, for the kinds of consequentialist reason to which some would appeal (the need to convict the offender before he re-offends against others, for instance); but because *not to pursue the wrongdoer would be to betray the defining values of the polity to which we all belong*. (Marshall and Duff 2010: 84, emphasis added)

As I suggested above, I believe the Duff-Marshall account of public wrongs has a difficult time explaining this category of cases. Their main difficulty lies in the fact that very often when victims refuse to share their wrongs with their communities, the victims are perfectly justified in their refusal. The domestic violence victim who faces a much greater risk of being seriously injured or killed if she supports a prosecution is not acting unjustifiably when she refuses or withdraws her support. There is nothing 'wrong or unreasonable' about her choice. Moreover, crucially, the justifiability of the continued prosecution is not dependent on the unreasonableness of the victim's choice: she does not have to be wrong for us to be right. For, as noted above, victims have their reasons for pursuing wrongs committed against them and communities have their own distinct reasons for pursuing such wrongs. By conflating these distinct sets of reasons under the cover of 'sharing reasons', the Duff-Marshall account finds itself unable to explain the justifiability of so-called 'victimless prosecutions' without recourse to victim-blaming.

It is worth reflecting on the particular examples that Duff and Marshall consider when discussing the category of cases which are appropriate to prosecute even without victims' support. In addition to murder (a wrong in which the individual victim is no longer in a position to refuse to share), they tend to focus on wrongs such as racist abuse, rape, and domestic violence. These exemplars are interesting because the wrongness of each is (arguably) constituted in part by a particular structural inequality that exists in the society in which they occur (Dempsey 2009a: 182, n. 73). They are, in other words, the kind of wrong that would not and could not be committed but for the fact that the community in which they occur is affected by a particular kind of character flaw, such as being racist or patriarchal in character (Dempsey 2009a: chs 6–7).

Duff's and Marshall's use of these examples is particularly interesting because these wrongs are *not* ones which 'the polity must condemn if it is to remain *true to itself*'—rather, they are wrongs which the polity must condemn if it is to *transform itself* (that is, reconstitute its character) in valuable ways. If the polity were merely seeking to remain true to itself—to its 'genuinely shared . . . values and interests'—it would happily accept the victim's refusal to share such wrongs, agreeing that wrongs of that kind are best dealt with privately or not at all. A racist polity does not condemn racist abuse through the criminal law in order to remain *true* to itself: it does so (*if* it does so) to *transform* itself.³⁶ Similarly, a patriarchal polity does not condemn patriarchal violence in order to remain true to its 'genuinely shared . . . values and interests', for, ex hypothesi, its 'genuinely shared values' include valuing patriarchal social forms and its 'genuinely shared interests' include sustaining and

³⁶ For interesting work on this theme, see Alfieri 1999; 2000; 2003.

perpetuating the structural inequality of patriarchy. Rather, when a patriarchal polity condemns patriarchal violence it reconstitutes itself as less patriarchal. In order to realize this (re)constitutive value, the polity must act on its *own* behalf, for its *own* reasons, and not merely on behalf of the victim (Dempsey 2009a, ch. 9).

To review, my argument regarding victims who refuse to share runs as follows. Some communities (indeed, most communities of which I am aware) suffer (more or less) from what we can think of as character flaws grounded in structural inequalities such as racism and patriarchy. These communities, we might say, are racist or patriarchal in character. Moreover, the character of some kinds of wrongs committed within these communities can be constituted, at least in part, by the tendency these wrongs have to sustain or perpetuate these vicious character traits. As I have argued elsewhere, for example, we can understand the wrong of domestic violence as being partly constituted by its tendency to sustain or perpetuate the structural inequality of patriarchy, thereby reinforcing the community's patriarchal character.³⁷

Criminal justice officials often stand in a particularly good position to act on behalf of their communities so as to condemn the structural inequalities that partially constitute wrongs such as domestic violence, racist violence, rape, gay-bashing, etc.³⁸ Moreover, if their condemnatory response to such structural inequalities is habituated, it has the potential to reconstitute the character of the community as less patriarchal, less racist, less homophobic, and so forth (Dempsey 2009a, chs 8–9). It is (in part) because the criminal justice officials act as representatives of their communities—rather than merely as representatives of the individual victims—that they are particularly well-positioned to realize the value of reconstituting the character of their communities in these valuable ways. They are, in other words, often particularly well-suited to fulfilling the criminal law's constitutive function.³⁹

Insofar as criminal justice officials do fulfil the criminal law's constitutive function, we can begin to explain the justification of criminal law's intervention in cases when Gardner's displacement function does not apply. In other words, criminal law's intervention can be justified even in cases where people are not inclined to retaliate against wrongdoers, indeed even in cases in which the victim refuses to share the wrong done to her. For if the criminal law's response to wrongs

³⁷ Dempsey 2006; 2009a, chs 6–7. To be precise, my claim was that domestic violence *in its strong sense* has this tendency—but this distinction need not distract us here. We can understand something about the character of racist violence along similar lines (namely, that part of what constitutes the wrong of racist violence is its tendency to sustain and perpetuate the racist character of the community in which it occurs).

³⁸ Of course, the fact that they stand in a good position to do so is no guarantee that they *will* do so. My point here is simply to note that these legal official stand in the role of community representatives who are charged with the responsibility of responding to wrongdoing within the community, including wrongs that are partially constituted by structural inequalities.

³⁹ Which is, again, not to say that they typically *do* fulfil this function. Nothing in my account is inconsistent with observing that criminal justice officials too often exacerbate the vicious character traits at issue, making the State and community more patriarchal, racist, and so forth (Dempsey 2009a, 215–21).

can realize the value of (re)constituting the character of the State and/or community in valuable ways, then criminal intervention can be (partly) justified even when no one desires retaliation and even when the victim refuses to share the wrong with her community. Moreover, pace Duff, the victim's refusal to share need not be unreasonable in order for pursuit of these wrongs to remain within the ambit of the criminal law's business. Rather, these wrongs become and remain the criminal law's business simply insofar as criminal justice officials are well-positioned to fulfil the criminal law's constitutive function.

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