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Public Wrongs and Private Wrongs

Jesse Wall

Consider a scenario where the entirety of the criminal law is abandoned in favour of tortious actions. In this 'privatization' of the criminal law, all of the wrongful conduct that would currently amount to a crime would be redefined and reclassified as various different torts. As a result, public wrongs would become private wrongs, for private individuals to address instead of public officials. The conflation between public and private wrongs cuts across our intuitions about individual responsibility and collective concern. Although jurisdictions may carve out the distinction in subtly different ways, we generally consider some wrongful conduct to raise matters for public officials to address on the behalf of the community, and we consider other wrongful conduct to cause losses that are for private individuals themselves to address. Here, I aim to give some philosophical content to this distinction by identifying what aspect of a criminal wrong is able to generate normative implications for public officials. These normative implications can then help us explain some of our intuitions about individual responsibility and collective concern, and in doing so, help us explain why we would find the privatization of the criminal law to be troubling.

There are three ways in which we can understand criminal wrongs as 'public' wrongs (in the sense that they are wrongs that have normative implications for public officials). First, according to Marshall and Duff, criminal wrongs are public wrongs in the sense that they infringe the values and interests that the community have a shared and mutual concern for.[1] Second, it is Lamond's view,[2] which

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1. SE Marshall & RA Duff, "Criminalization and Sharing Wrongs" (1998) 11:1 Can JL & Jur 7 at 20 [Marshall & Duff, "Criminalization"]:

> A group can in this way '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 (as distinct from contingently coincident) values and interests, and by the shared recognition that its members' goods (and their identity) are bound up with their membership of the community. Wrongs done to individual members of the community are then wrongs against the whole community—injuries to a common or shared, not merely to an individual, good. This, we suggest, provides an appropriate perspective from which we can understand the point and significance of a 'criminal' rather than a 'civil' process.

See further RA Duff & SE Marshall, "Public and Private Wrongs" [Duff & Marshall, "Wrongs"] in James Chalmers, Fiona Leverick & Lindsay Farmer, eds, *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press, 2010) 70 at 71: "A better understanding of the idea of a public wrong is, we suggest, that it is the kind of wrong that properly concerns 'the public'—a wrong that is a matter of public interest in the sense that it properly concerns all members of the polity by virtue simply of their shared membership of the political community."

2. Grant Lamond, "What is a Crime?" (2007) 27:4 Oxford J Legal Stud 609 at 611:

> My main claim about fault-based crimes will be the deceptively simple thesis that they are wrongs that merit punishment by the state, i.e. that the state is responsible for punishing. Simple as this thesis may seem, it involves the complicated task of understanding what sorts of wrongs deserve punishment, rather than some other type of response, and which of these wrongs are properly the matters for the state.

is affirmed by Lee (in all ways but one),[3] that criminal wrongs are public wrongs in the sense that they are the wrongs that public officials, on behalf of the community, are responsible for punishing. Third, an implication of Edwards and Simester's account of criminal wrongs is that we may be able to understand the sense in which they are public wrongs in terms of the procedural advantages of having public officials empowered to address the wrongdoing.[4] In this article, I argue that Marshall and Duff's focus on socially proscribed wrongdoing is analytically inseparable from Lamond's focus on public censure and punishment. Once viewed as inseparable, we can then understand the sense in which criminal wrongs are 'public' wrongs (wrongs that concern public officials). I also argue here that the focus on the advantages of public officials controlling criminal proceedings, although able to account for an important aspect of the concept of a crime, cannot be constructed to contribute to an explanation of why criminal wrongs are 'public wrongs'. Rather, the procedural aspects of the concept of a crime follow from the combined normative features of the first two views.

The purpose of this article is therefore two-fold. The first is to demonstrate the analytical connection between proscribing (or prohibiting) a wrong and censuring (or punishing) a wrong, with analogy to the analytical connection in private law theory between imposing a primary obligation and imposing a reparatory obligation. The second is to demonstrate that the procedural powers of public officials *follow from* the aspects of criminal wrongs that render them public wrongs, with analogy to the way in which the rights and obligations of private individuals in relation to civil wrongs follow from the aspects of civil wrongdoing that render them private wrongs. I conclude by suggesting that criminal wrongs are public wrongs, since we consider the coercive guidance of the conduct of others to be a matter of public responsibility and not a matter of individual discretion.

One may "think there is something decidedly vain—or academic in the pejorative sense—about the task of identifying the defining features" of the criminal law (or "the law of torts").[5] Following Gardner, there are three general and related reasons why delineating the concept of a crime (or the concept of a tort) matters. To start, different areas of law differentiate themselves from others, doctrinally. To designate a wrong as a criminal wrong is to apply a body of

3. Ambrose YK Lee, "Public Wrongs and the Criminal Law" (2015) 9 Criminal Law and Philosophy 155 at 156 [footnotes omitted]: "In particular, I shall argue 'public wrongs' should not be understood merely as wrongs that properly concern the public, but more specifically as those which the state, as the public, ought to punish." *Ibid* at 169, n 53: "Nevertheless, I am not convinced with [Lamond's] criticism of Duff and Marshall, which is grounded in seeing them as arguing that 'public wrongs' should be understood as wrongs *to* the public."

4. James Edwards & Andrew Simester, "What's Public About Crime?" (2017) 37:1 Oxford J Legal Stud 105 at 132 [footnote omitted]: "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."

5. John Gardner, "Torts and Other Wrongs" (2011) 39 Fla St UL Rev 43 at 61 [Gardner, "Other Wrongs"].

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doctrine that is likely to lead to a different process, and a different set of consequences, than if the wrong was designated as belonging to some other branch of law.[6] Second, to explain these doctrinal differences, each area of law develops a "way of accounting for itself", "a rationale", or "a set of connected but partly competing rationales" to explain "its own existence".[7] These rationales have a founding or anchoring influence on the development of doctrine; they inform how the body of doctrine should be applied and understood. Third, where we want to improve, develop, or reform an area of law, we ought to engage with both the surface-level doctrine and the underlying rationales.[8] In short, there may be limits to good criminal law scholarship where there is uncertainty as to *what a crime is* (and where there is indifference to the uncertainty). In addition to these three general reasons, I suggest that there is a particular reason for exploring the concept of criminal wrongs *as public wrongs*. In exploring the idea of public wrongs, I suggest that we can begin to identify a rationale for when it is appropriate for public officials, and the community at large, to take responsibility for some legal wrongs (and not others). This rationale can extend beyond the criminal law, into wider questions of community responsibility as against individual responsibility.[9]

By way of overview, this article is concerned with addressing three claims about the concept of a criminal wrong. It considers these three views through six sections. It starts (in section one) by highlighting three (prima facie) different aspects of a criminal wrong (conduct, punishment, and process). Section two then explores Marshall and Duff's view that criminal wrongs are the wrongs that merit social prohibition by virtue of the values that the wrongful conduct transgresses. I suggest that this view provides an incomplete concept of a crime. To complete the concept of a crime, I draw upon (in section three) Lamond's view that criminal wrongs are wrongs that attract a punitive response on the basis that they manifest disrespect for an appropriate interest or value. I then argue, (in section four) that the social prohibition of a wrong as a criminal wrong (Marshall and Duff's focus) and the punitive remedial response of the criminal law (Lamond's focus) are analytically inseparable. Which leaves the recent work by Edwards and Simester, from which I infer (in section five) a potential conceptual claim that criminal wrongs are public wrongs in the sense that they are wrongs that public officials are best placed to address. Against this inference, I argue (in section six) that the powers of public officials in criminal law procedures follow from, rather than explain, the concept of a crime being a public wrong. By identifying the analytical ordering of these competing conceptual claims, this article offers a new explanation of the sense in which criminal wrongs are 'public wrongs'.

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6. *Ibid*. "[D]esignating some wrong as a tort is a way of taking quite a significant body of doctrine off the shelf and applying it to that wrong."
7. *Ibid* at 63.
8. *Ibid* at 63-64.
9. See, for instance: Jesse Wall, "No-fault Compensation and Unlocking Tort Law's Reciprocal Normative Embrace" 27:1 NZULR 125.

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1. The different aspects of the concept

There is disagreement as to the "basic features of criminal liability that explain[] its normative status"[10] and, by extension, its doctrinal distinctiveness. The only consensus has been that criminal wrongs are "public wrongs".[11] However, as Edwards and Simester have explained, the label of a "'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."[12] We therefore need to identify the "grounds for thinking that a wrong has these normative implications".[13] In contrast to Edwards and Simester,[14] and Duff and Marshall,[15] we need not burden this conceptual analysis of basic or essential features of "the wrongs we rightly describe as public" (that then have normative implications) with the additional normative task of making "progress with the limits of the criminal law".[16] We are concerned here only with demarcating the concept of a crime: given that there are a set of wrongs that are doctrinally distinct as 'public wrongs', we are concerned here with the aspects or features of this concept that have normative implications for public officials. In doing so, we are isolating the sense in which criminal wrongs are public wrongs (wrongs that have normative implications for officials).

We could view criminal wrongs as transgressions of a set of values that the public are properly concerned with, or as wrongs that attract a punitive response that is within the appropriate domain of public officials, or as wrongs that are public in the sense that public officials are best placed to address the wrongdoing. Part of the difficulty lies in the fact that a properly constructed concept can have more than one basic or essential feature. Hence, in their seminal article, "Criminalization and Sharing Wrongs", Marshall and Duff warn us that:[17]

> [D]ifferent aspects of the concept [of crime] raise different questions. We need to ask what kinds of conduct merit social proscription; a 'criminal' process; punishment—and we cannot suppose in advance either that the answers to these questions will be just the same, or that the considerations relevant to answering each of them will be just the same.

Criminal wrongs may be distinct from private wrongs because they are a different type of wrong, attract a different remedial response, and are addressed through different processes. Unfortunately, this observation does not take the sting out of the disagreement. Whilst the concept of a crime may have a number of aspects to it, if we agree that criminal wrongs are *public* wrongs, then we need to determine which of these aspects or features explain the 'publicness' of criminal wrongs. In

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10. Lamond, *supra* note 2 at 610.
11. William Blackstone, *Commentaries on the Laws of England*, bk 4 (Clarendon Press, 1765-1769) at 5; George P Fletcher, "Domination in Wrongdoing" (1996) 76 BUL Rev 347 at 347.
12. Edwards & Simester, *supra* note 4 at 108.
13. *Ibid.*
14. *Ibid*.
15. Duff & Marshall, "Wrongs", *supra* note 1 at 70.
16. Edwards & Simester, *supra* note 4 at 108.
17. Marshall & Duff, "Criminalization", *supra* note 1 at 17.

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other words, we need to identify which aspect or feature of the concept provides the grounds for thinking that criminal wrongs are public wrongs.

2. The wrongs that merit social prohibition

Let us start with our initial puzzle and consider the consequences of 'privatizing' the criminal law. If we were to abandon the notion of crime and define all crimes as various different torts, two consequences are likely to follow. First, wronged individuals (or victims) would have "to find the resources [themselves] to bring and pursue" tortious actions against those who wronged them.[18] Second, tort law may seek to (as the default remedial response) compensate the wronged individual (victim) rather than punish the individual wrongdoer. Perhaps, over time, pockets of the community may organize themselves to assist and fund the individual victim to bring his or her proceeding,[19] and perhaps over time, the remedial avenues of tort law may become more punitive in their focus. However, for Marshall and Duff, to abandon the notion of crime is to abandon something further than a particular legal process or a particular remedial response.

There is, according to Marshall and Duff, a reason that explains why the community *should* "bring the case 'on behalf of' the individual victim—rather than leaving her to bring it for herself" (and even "*insist* on bringing the case even if she is unwilling to do so").[20] Certain wrongs are 'public wrongs' in the sense that they "properly concern[] all members of the polity by virtue simply of their shared membership of the political community."[21] A group can share a wrong that has been committed against an individual where the members of the group define and identify themselves "as a community united by mutual concern, by genuinely shared (as distinct from contingently coincident) values and interests".[22] Crimes therefore protect values and interests that are shared by the community and help constitute the community through mutual concern for these values and interests. Simply put, a sexual assault, a murder, or a theft infringes a set of values that 'properly concerns all members of the polity' in a way that a breach of a contractual duty, a trust duty, a tortious duty of care, does not. Hence, there are some interests and values that the criminal law is concerned with (as well as a range of interests and values that it is not concerned with, despite these being considered sufficiently valuable to afford legal protection under the civil law). The way in which Marshall and Duff explain this distinction is between interests and values that concern all members of the community by virtue of 'shared' and 'mutual concern' and those interests and values that do not.

Since the wrong is against both the victim and the community, it follows that public officials should bring the case on their behalf.[23] As a community, we "owe it to the victim to take seriously the wrong she has suffered", and "we also owe it

18. *Ibid* at 18.
19. *Ibid*.
20. *Ibid* at 20.
21. Duff & Marshall, "Wrongs", *supra* note 1 at 71.
22. Marshall & Duff, "Criminalization", *supra* note 1 at 20.
23. *Ibid* at 21.

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to the wrongdoer […] to respond […] to her wrongdoing" in order to censure the wrong.[24] Public officials discharge the community's responsibility "to take her wrong as also [a public] wrong" and the criminal law aims to address and remedy the wrong "in terms of the wrongdoer's relationship to the community as well as to the individual victim."[25]

By their own admission, Marshall and Duff's account of crimes as shared wrongs explains only one aspect of the concept of crime. Their aim is "to identify a central feature of certain kinds of wrongdoing which gives a community reason to count them as 'public' rather than merely as 'private' wrongs".[26] Although Marshall and Duff only give an account of the *wrongs* that merit social proscription as *criminal wrongs*, it is still an incomplete account of this aspect of the concept of a crime. This is because there are two distinct components to something being a 'wrong', and their account only addresses one of these components. As Birks explains, "A wrong is always a breach of duty according to the normative system which is in question."[27] Moreover, according to Birks, "It is not possible for a person to be in breach of duty, and *a fortiori* not possible for him to have committed a wrong, except by his own acts or omissions."[28] A 'wrong' requires *an act or omission* that is in *breach of a duty.* Or, put more generally, a wrong requires conduct that is inconsistent with some norm or value. According to the Marshall and Duff account, conduct that is *somehow inconsistent* with shared interests and values represents wrongs that properly concern all members of the polity and are therefore proscribed as criminal wrongs. The implication is that potentially any conduct (that is inconsistent with a community's shared interests and values) could amount to a criminal wrong.

The problem here is that there are a range of wrongs—that are wrongs by virtue of being *inconsistent* with the interests and values that the criminal law is concerned with—that are nonetheless private rather than public wrongs. The interests and values that the civil law is concerned with overlap with those that the criminal law is concerned with. For example, both the civil and criminal law protect a person's interest in having the exclusive use and control of their property. Both branches of the law also protect a person's interest in determining who (if anyone at all) may interact with their body and under what circumstances. Many of these "traditional crimes against the person and property" each "have a civil law analogue."[29] As Lamond explains, "The same interest underwrites both the civil claim and the criminal wrong."[30] As we shall now turn to discuss in the next section, since there is an overlap between the values and interests that the criminal law and civil law protect, we need to distinguish the types of conduct that each branch of law is concerned with in order to properly differentiate criminal wrongs from civil wrongs.

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24. *Ibid* at 16.
25. *Ibid* at 20.
26. *Ibid* at 8.
27. Peter Birks, "The Concept of a Civil Wrong" in David G Owen, ed, *The Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 31 at 37.
28. *Ibid* at 41.
29. Lamond, *supra* note 2 at 630.
30. *Ibid*.

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3. The wrongs that merit state punishment

For Lamond, conceptualising crimes as wrongs that are both committed against the individual and shared with the community "faces a number of difficulties."[31] The theory is unable to account for situations where a criminal wrong is individualized towards the victim, and the community cannot, or does not, "perceive the attack on the victim as an attack against the community as a whole."[32] The theory also overstates the relationship between the values that the criminal law protects and how a community understands itself. Lamond disagrees with the suggestion that "the values attacked by crime are *constitutive of* the community's identity".[33] Rather, he suggests that the values that the criminal law protects may merely be *distinctive to* a particular community.[34] As we shall see, values and interests are nonetheless relevant to the concept of crime that Lamond constructs. However, there is a higher ordering, or degree of weight and importance, that the community assigns to the values and interests. The criminal law concerns "the things which that community values highly" rather than "the values in terms of which members of the community identify themselves with each other."[35]

Given that public officials, rather than individual victims, bring criminal proceedings, Lamond's starting point in constructing his concept of a crime is to highlight how the aim or purpose of these proceedings is to impose punishment. It is through the criminal law's punitive remedial response that we can understand criminal wrongs as public wrongs, "not as wrongs *to* the public but as wrongs that the community is *responsible* for punishing".[36] If we accept that the community, rather than the individual, is the "appropriate body to bring proceedings and impose punishment", then our concept of crime rests on our response to two questions: "which wrongs merit punishment, and which merit state punishment."[37] To answer the first question: since punishment "is the deliberate imposition of a burdensome liability on an individual for some blameworthy conduct in order to censure that conduct", punishment "presupposes blameworthy conduct."[38] For Lamond, the blameworthy conduct that attracts a punitive response is conduct "that manifests a *disrespect* for the interest or value that has been violated"[39] by demonstrating an unwillingness to be guided by the appropriate interest or value.[40] In answering the second question, Lamond suggests that (in principle) "any serious violation of a value that the state is responsible for supporting is a candidate for criminal punishment."[41] Criminal wrongs are

31. *Ibid* at 617.
32. *Ibid*.
33. *Ibid*.
34. *Ibid* at 618.
35. *Ibid* [footnote omitted].
36. *Ibid* at 621.
37. *Ibid*.
38. *Ibid*.
39. *Ibid*.
40. *Ibid* at 622: "What marks out the failure to be guided as particularly reprehensible, and thus eligible for punishment, is an *unwillingness* to be guided by the value in the appropriate way."
41. *Ibid* at 626.

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therefore 'public' wrongs in the sense that public officials have the responsibility to punish "blameworthy wrongs that manifest a disrespect"[42] for the "things which that community values highly".[43]

Lamond is careful to explain how this concept of criminal wrongs also captures strict liability offences. Whilst criminal wrongs concern conduct that violates a set of values, strict liability is concerned with conduct that "increases the risk of such violation without being seriously blameworthy".[44] These schemes of strict liability are "a means of promoting and protecting private and public interests in ways that civil and criminal law… are unable to deliver".[45] It follows that strict liability offences represent 'public wrongs' in the sense that strict liability offences "demonstrate[] a disrespect" for "schemes of conduct that have the effect of co-ordinating risk reduction or the promotion of certain goods",[46] and moreover, represent 'public wrongs' in the sense that "conduct which demonstrates a disrespect for such schemes can itself merit punishment".[47] As Brudner explains, "the rationality specific to regulatory sanctions is not the intrinsic rationality of desert but the instrumental rationality of means and ends".[48] The regulatory or strict liability scheme is instrumentally valuable, and non-compliance with the scheme ought to be met with sanction on the basis that the non-compliance manifests a disrespect for something that is (instrumentally) valuable. Criminal wrongs, whether they are 'true' crimes or regulatory offences, are therefore public wrongs in the sense that they merit state punishment.

Following Lamond, we can now begin to differentiate criminal wrongs and civil wrongs not only with reference to the interests and values that the branches of law are concerned with, but to the conduct that is inconsistent with those interests and values. One way to promote a value is to prohibit conduct that is antithetic to that value. To prohibit conduct is to socially proscribe it as wrongful conduct in the sense that it is *the wrong thing to do*. In comparison, another way of promoting a value is to govern the interactions that endanger it. To govern an interaction is to impose obligations on the participants to that interaction. Where an interest or value is considered sufficiently important to attract legal protection, obligations are imposed on others to avoid intentional conduct that infringes the interest, to avoid careless conduct that infringes the interest, or avoid infringing the interest *per se*.[49] Hence, obligations to perform promises, obligations to avoid damage to property, avoid harm to persons, or avoid invasions of privacy (and so on) protect a set of rights (to contractual performance, to exclusive possession of property, to bodily integrity, privacy, and so on). The same norm or value can dictate that conduct is wrongful because it is prohibited or because it breaches an obligation.

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42. *Ibid* at 629.
43. *Ibid* at 618.
44. *Ibid* at 630.
45. *Ibid*.
46. *Ibid*.
47. *Ibid*.
48. Alan Brudner, *Punishment and Freedom*: *A Liberal Theory of Penal Justice* (Oxford University Press, 2009) 176.
49. Birks, *supra* note 27 at 42.

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There are two subtle but important implications to this contrast between prohibiting wrongs and protecting rights (and imposing obligations). The first implication is that even private wrongs (the breach of an obligation) are public wrongs in one narrow sense: the legal *rights* (and obligations) are *conferred* (and imposed), and in conferring a right, "public authority (the authority of the court) is put at the disposal of the wronged person."[50] In this way, "[t]he wronged person […] is given a right not only against the wrongdoer but also […] a right to conscript the court (and its officers)".[51] To recognize a private law right is to recognize that a set of interests and values is sufficiently important to attract the protection of the law, that is, protection with the assistance of *public officials*. Criminal wrongs, in comparison, are public wrongs in a much broader sense: to recognize a criminal wrong as a public wrong is to recognize that public officials have a responsibility to prohibit and censure the wrongful conduct. Given that there are a range of 'wrongs' that can be committed against a person, a subset of those wrongs are private law wrongs, since the wrongful conduct infringes a legally conferred right. Another subset are criminal wrongs, since (following Lamond's account) the wrongful conduct is an affront to a particular set of values. The first implication here is that under either subset—the conferral of the right or the prohibition of a wrong—public officials are conscripted into the process, in at least one minimal way.

The second implication from the contrast between prohibiting wrongs and protecting rights concerns a "distinction between doing the wrong thing and doing something wrongful", a distinction that "is of pervasive importance in most developed legal systems."[52] It follows from this distinction that conduct that amounts to a breach of an obligation does not necessarily amount to blameworthy conduct. To breach an obligation is 'to act wrongfully': it is to act against a set of reasons (that have "doubly special *categorical* and *mandatory* force")[53] and infringe an interest that is considered sufficiently important (to generate the set of reasons). For instance, there are sets of reasons to perform a contractual undertaking, provide a product or service with sufficient care and skill, and refrain from disclosing confidential information. There may also be good reasons—that the private law is not interested in—for why a person breached a contractual obligation, duty of care, or duty of confidentiality. In breaching these obligations or duties a person has acted wrongfully; they have transgressed an obligation and committed a legal wrong. In comparison, to do what is *prohibited* is to do "the wrong thing".[54] In order for a person to do "the wrong thing" they must act unjustifiably. This means to act contrary to reasons, all things considered. Hence, the criminal law seeks to undertake a more *all things considered* assessment of a

50. John Gardner, "What is Tort Law For? Part 2. The Place of Distributive Justice" in John Oberdiek, ed, *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 335 at 340 [Gardner, "Distributive Justice"].
51. *Ibid* at 340.
52. John Gardner, "Wrongs and Faults" in AP Simester, ed, *Appraising Strict Liability* (Oxford University Press, 2005) 51 at 55.
53. *Ibid* at 57.
54. *Ibid*.

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person's state of mind and any applicable justifying or excusing circumstances. At its core,[55] to be 'unwilling to be guided by a value', to act in a way that is an affront to a value, or to conduct yourself in a way that manifests a disrespect for a value, may require conduct that is accompanied by a certain state of mind in the absence of justifying or excusing circumstances. Moreover, to act contrary to reasons, *all things considered*, precludes the possibility that there were good reasons for a person's wrongful conduct (by virtue of the all things considered assessment).

It follows from this second implication that it is possible to do something wrongful (breach an obligation) without doing the wrong thing (act unjustifiably). There are, nonetheless, normative consequences that follow from a breach of an obligation. To respect that "every person has a right to be secure from harm to persons or possessions" is to accept "that an obligation of reparation is incumbent on a person responsible for an infringement" of these rights, "regardless of his being morally at fault or blameworthy in the matter."[56] Norms of corrective justice therefore impose an obligation to repair the losses that follow from the breach of the primary obligation.[57] The reasons to perform the primary obligation continue to apply to the obligation-bearer and the secondary obligation to repair represents the "best still-available" way of conforming to such reasons.[58] In comparison, where the conduct is blameworthy, norms of retributive justice require the imposition of burdensome liability on the wrongdoer that is proportionate to their wrongdoing. This contrast indicates that the "existence of an obligation of reparation is not necessarily conditional upon fault or blameworthiness",[59] whereas the "imposition of a burdensome liability […] presupposes blameworthy conduct."[60] This distinction between wrongful conduct (breaching an obligation) and blameworthy conduct (doing the wrong thing) triggers fundamentally distinct remedial responses, one is corrective and the other is punitive.

Allow me to recap. I concluded the previous section with a problem: the interests and values that private law is concerned with overlap with those that the criminal law is concerned with. In response to this problem, I sought to draw a distinction between promoting an interest and value by prohibiting conduct that

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55. And at the periphery, to be 'unwilling to be guided by a value' may extend to offences that demonstrate a disrespect—through conduct alone—for scheme of co-ordination that promote certain goods. See Lamond, *supra* note 2 at 630.

56. DN MacCormick, "The Obligation of Reparation" (1977-1978) 78 Proceedings of the Aristotelian Society 175 at 183.

57. John Gardner, "What is Tort Law For? Part 1. The Place of Corrective Justice" (2011) 30:1 Law & Phil 1 at 9 [Gardner, "Corrective Justice"]: "Norms of corrective justice […] are to be understood on the 'arithmetic' model of addition and subtraction. Only two potential holders are in play at a time. One of them has gained certain goods or ills from, or lost certain goods or ills to, the other. The question is whether and how the transaction is to be reversed, undone, counteracted."

58. *Ibid* at 33-34: "The normal reason why one has an obligation to pay for the losses that one wrongfully occasioned […] is that this constitutes the best still-available conformity with, or satisfaction of, the reasons why one had that obligation."

59. MacCormick, *supra* note 56 at 176: "[T]o say that there is an obligation of reparation is to imply that it *would* be blameworthy [conduct] if [the obligation was] subsequently […] refused or neglected".

60. Lamond, *supra* note 2 at 621.

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is antithetical to that value, and promoting a value by governing the interactions that endanger it. By considering two implications of this contrast, we can begin to see the relationship between wrong and remedy. To forecast this relationship (that will be developed further below): in private law, public officials may confer a private law right and, in doing so, impose an obligation of reparation encumbered upon anyone who infringes the right, whilst in the criminal law, public officials may prohibit conduct and, in doing so, censure or punish anyone who performs the wrongful conduct. As I will now turn to explain, in both cases, I view the wrong and the remedy as analytically inseparable.

4. Prohibition and Punishment

Consider three manoeuvres in Lamond's response to Marshall and Duff. The first is that Lamond constructs a criminal wrong in terms of both conduct and values. A criminal wrong is a particular form of conduct: conduct that represents an "unwillingness to be guided by [a] value in the appropriate way."[61] In comparison, Marshall and Duff's account focuses on the values that are transgressed, and is muted as to the forms of conduct that are criminally wrongful. Second, Lamond posits a different criterion for identifying the values and interests that the criminal law is concerned with. The relevant interests and values are not those shared by the community, but are "the things which that community values highly".[62] Third, Lamond explains the publicness of criminal wrongs in terms of the remedial response of the criminal law. According to Lamond's account, public officials are responsible "because of the condemnatory force of conviction in the name of the community".[63]

The key point that I wish to highlight in this section is that the third manoeuvre follows from the first. By conceptualising criminal wrongs as the *conduct that manifests a disrespect for* the things that the community values highly, Lamond is placing blameworthy conduct—and the criminal law's punitive response to blameworthy conduct—at the heart of the concept of a crime. Hence, the analytical ordering of Lamond differs from Marshall and Duff. For Marshall and Duff, the question of why the criminal law typically seeks to punish wrongdoing is analytically separable from identifying the wrongs that the criminal law proscribes as wrongful.[64] This is because (for Marshall and Duff) the censure that is required from the community does not necessitate a punitive response and can

61. *Ibid* at 622 [emphasis omitted].
62. *Ibid* at 618.
63. *Ibid* at 629.
64. Marshall & Duff, "Criminalization", *supra* note 1 at 17:

> The final, but separable, implication of criminalization is thus that crimes are punished: to ask what kinds of conduct should be criminalized is to ask, in part, what kinds of conduct should attract punishment rather than merely formal censure or liability to pay compensation (though any answer to that question must also depend on our understanding of the rationale of punishment).
>
> Now it might be tempting to take the question of punishment as the central (if not the only) question about criminalization […] But our discussion of the different aspects of the concept of crime should have shown that this would be a mistake.

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take on other remedial forms.[65] The censure can take a range of forms, beyond punishment, presumably because conduct that the criminal law is concerned with is conduct that is inconsistent with a set of shared values (rather than conduct that is blameworthy). For Lamond, there is a connection between a criminal wrong and the criminal law's punitive response; a criminal wrong represents blameworthy conduct and a punitive response presupposes blameworthy conduct.

The same problem of the analytical ordering between the wrong and the remedy arises in private law theory. According to Birks, "It is essential to the understanding of the nature of civil wrongs to dispel the illusion that compensation and such wrongs are intrinsically connected."[66] Akin to Marshall and Duff, Birks contends that the nature of the wrong is analytically separable from the remedial response of the law. Awards for exemplary, restitutionary, and nominal damages all "show that the notion of a wrong is detachable in principle from the compensable harm suffered" and that "[t]here would be nothing incoherent in a system making the policy choice to increase the penal and deterrent functions of the law of civil wrongs by using multiple measures of damages".[67] This mirrors Marshall and Duff's contention that there are also multiple measures for the appropriate censuring response to a criminal wrong and that the **"**punishments imposed by our existing legal systems cannot […] be justified purely on the grounds that this is the only way to ensure that censure is effectively communicated."[68]

We need to be careful not to overstate the diversity of remedial measures. Compensation (which is what Birks focuses on) is one application of the norm of corrective justice. As Gardner explains, different branches of private law "have different things to correct and different ways of correcting them."[69] Contract law is concerned with a promisee's performance interest, "[e]quity is more interested in chasing the defendant's gain", whilst "[t]he common law of torts […] is more interested in remedying the plaintiff's loss".[70] What unifies these remedial responses is the imposition of an obligation of reparation: an obligation to repair the losses that follow from the breach of a primary obligation. Restitution is a way of correcting the wrong where the wrong is a form of unjust enrichment. Nominal damages reflect that in some circumstance there is no way of correcting the wrongful loss, but a civil wrong was nonetheless committed. In all these instances, the remedial measure is corrective, which aims "to put one or both of the parties […] into the same position that they would have been in had the wrong […] not been committed."[71] How the law performs this reparation depends on what requires reparation.

The same can be said of punitive remedial measures. Burdensome liability may be one means of *censuring* wrongful conduct, and there may be other means. Different branches of the criminal law are concerned with different wrongs, and

65. *Ibid* at 16.
66. Birks, *supra* note 27 at 36.
67. *Ibid*.
68. Marshall & Duff, "Criminalization", *supra* note 1 at 16.
69. Gardner, "Other Wrongs", *supra* note 5 at 60.
70. *Ibid* at 56.
71. *Ibid* at 59.

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involve different forms of censure. Marshall and Duff recognize this connection between public wrongs and a *censuring* response. "[G]iven the social character and the seriousness of the norms [the wrongdoer] has breached", they argue, "censure should be justified by, and administered through, some more or less formal process".[72] However, Marshall and Duff have a broad and general account of criminal wrongdoing and therefore do not believe that such wrongdoing needs to be censured in a way that is "expressed by punishment."[73] It may be true that conduct that is *inconsistent* with the interests and values that properly concern the polity should be met with censure from the polity (although the conceptual overlap with private law wrongs becomes problematic here). But once we narrow our account of criminal wrongdoing to conduct that is *an affront to* a set of interests and values that the community considers to have particular importance, then the appropriate form of censure becomes punitive (and we can avoid the conceptual overlap with private law wrongs). How the law censures wrongs depends on the wrongs that require censuring. If we are concerned with wrongs that represent blameworthy conduct, then it follows that the censure ought to involve the imposition of burdensome liability.

Note this has only addressed a counter-argument against the explanatory priority of the remedial aspect of public wrongs and private wrongs. The fact that there is a multitude of ways to correct private wrongs or to censure public wrongs does not undermine the unity of the remedial response, nor the correlativity between wrong and remedy. We now need a positive reason to consider the remedial response to be analytically inseparable from the legal wrong.

Recall that, when we considered the different wrongs that the criminal law and private law are concerned with, we have identified a distinction between prohibiting conduct that is antithetical to that value, and promoting a value by governing the interactions that endanger it. Employing some shorthand terminology, another way to explain this distinction is to say that the criminal law prohibits *wrongful conduct* whilst private law doctrines *confer rights* (and impose obligations).[74] Both the prohibition of wrongful conduct and the conferral of rights are premised upon a set of interests and values. When a legislator proscribes a criminal wrong or confers a private law right, or when a court or legislator extends a doctrine or recognizes a new cause of action,[75] the formulation of a criminal wrong or a private law right is broader than a proscription or declaration (with reference or inference to a set of interests and values). As Gardner explains in the context of tort law:[76]

> In deciding whether something should be a tort, then, it is never enough to conclude that it is a wrong calling for repair. It is not even enough to conclude that it should be *recognized by the law* as a wrong calling for repair. The question that must be confronted, in addition, is whether the law should give it *this kind of*

72. Marshall & Duff, "Criminalization", *supra* note 1 at 16.
73. *Ibid*.
74. It is shorthand terminology in the sense that both the criminal law and private law doctrines can be understood in terms of the conferral of rights and imposition of obligations and duties.
75. Gardner, "Distributive Justice", *supra* note 50 at 343-44.
76. *Ibid* at 340-41.

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> *recognition*—the tort-law kind of recognition—complete with its generous terms for power-sharing and cost-sharing as between the aggrieved party and the legal system.

To recognize a tortious obligation is to recognize not only a set of interests and values that prop-up a 'right', and ground the obligation. It is to recognize the right of the rights-holder to claim against the obligation-bearer the losses that follow from the wrong committed, and the right to 'conscript' public officials into the reparative process. The suggestion here is that the conferral of a private law right (and obligation) is analytically inseparable from the recognition of a remedial right. The considerations that go to the construction of the right also go to the imposition of the remedial obligation. This is because the remedial obligation is premised upon the continuation of the reasons the obligation-bearer had to perform his or her primary obligation to the rights-holder.[77] The remedial obligation represents the best available means for the obligation-bearer to conform to these reasons.[78]

The same can be said of the proscription of a criminal wrong (if we adopt the strong formulation of 'conduct'). To proscribe conduct as criminally wrongful is: *to recognize* that such conduct manifests a disrespect for a particular set of interests and values, *to recognize* that such wrongdoing ought to be punished, *and to conscript* a number of public officials into the process. The considerations that explain why the wrong ought to be prohibited also explain why the wrong ought to be punished. The imposition of burdensome liability is premised upon the proscription of the wrong as a blameworthy unwillingness to be guided by an appropriate value. We expect others' conduct to be guided by the interests and values that we consider important (or the interests and values that we have a mutual concern for), and we are prepared to impose burdensome liability on people who are unwilling to have their conduct guided by these interests and values. To 'socially proscribe' something as criminally wrongful is to proscribe not just a norm, or even proscribe certain conduct as being contrary to a norm. It is to also prescribe a remedial response to the conduct that is contrary to a norm.

I suggest that two important conclusions follow from the discussion in this section. First and foremost, the proscription of a legal wrong is analytically inseparable from the recognition of a remedial response that ought to be governed by public officials (in at least one minimal way). Simply put, to prohibit a wrong is to guarantee its censure and to protect a right is to guarantee its repair. The two 'different' aspects of the concept of a crime—prohibition and punishment—represent two views of the same cathedral. Second, when we view the wrongs that merit prohibition as analytically inseparable from the wrongs (following from the above contention) *and* when we construct an understanding of wrongs that isolates the wrongful *conduct* that the criminal law is concerned with, we get the clearest insight into the sense in which criminal wrongs are public wrongs. Criminal wrongs are instances of an agent's unwillingness to be guided by a

77. Gardner, "Corrective Justice", *supra* note 57 at 33-34.
78. *Ibid*.

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particular set of interests and values which merit the imposition of burdensome liability. We (rightly) reserve the task of guiding and coercing conduct for public authorities, rather than leaving it to the resources and discretion of private individuals. It is in this way that we can begin to understand the sense in which criminal wrongs are public wrongs.

5. The right to call wrongdoers to answer

We have so far discussed two of Marshall and Duff's 'aspects of the concept of crime': the wrong and the remedy. With these two aspects isolated, and then rejoined, we can now consider Edwards and Simester's recent response to Marshall and Duff which shifts the focus onto the third aspect of the concept of a crime: the criminal law process.[79] To be clear, Edwards and Simester have their own axe to grind: their inquiry concerns the "ways in which the concept of a public wrong might be of use to those thinking about permissible criminalisation" and the limits of the criminal law.[80] Nonetheless, in this section we consider whether some of their criticism applies to the conceptual analysis provided by Marshall and Duff (leaving aside the further normative criminalisation questions that concern both sets of theorists).[81] This leads us to consider whether the procedural powers of public officials can contribute to the conceptual demarcation of criminal wrongs and whether these procedural powers can explain the sense in which criminal wrongs are public wrongs.

In one particularly engaging passage, Edwards and Simester accuse Marshall and Duff of misplacing the criminal law's basic concern. The basic concern of the criminal law "must be with the wrongs themselves", that is, "with the damage wrongs like murder or rape do to victims' lives, as well as to the lives of the wrongdoers."[82] The basic concern could be addressed by preventing the wrongs themselves or by preventing "the wrongs that would occur if those deserving of punishment were not punished."[83] The suggestion is that the basic concern of the criminal law ought to be addressed by prevention or retribution or both. In comparison, Marshall and Duff's basic concern appears to be more like a "moral self-indulgence".[84] The community, by taking "its defining values seriously", help their members "live up to the conception they have of [the community] and of themselves".[85] According to the criticism, the Marshall and Duff view amounts to a misdirected "concern of citizens with their own character and values *qua* community members" rather than "a concern with the damage done to the lives of victims".[86] Edwards and Simester therefore conclude that the fact that a wrong

79. Marshall & Duff, "Criminalization", *supra* note 1 at 17.
80. Edwards & Simester, *supra* note 4 at 132.
81. *Ibid* at 111; Duff & Marshall, "Wrongs", *supra* note 1 at 72.
82. Edwards & Simester, *supra* note 4 at 117.
83. *Ibid* at 117, n 42.
84. *Ibid* at 116, citing Bernard Williams, *Moral Luck: Philosophical Papers 1973-1980* (Cambridge University Press, 1981) ch 3 at 45, 47.
85. Edwards & Simester, *supra* note 4 at 116.
86. *Ibid* at 117.

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is 'public', in the sense that it infringes values that properly concern the public, cannot give us reasons to criminalize a wrong, since it misplaces the basic concern of the criminal law.

Note how this criticism affirms the analysis in the previous section. The type or order of interests and values that concern the polity cannot (in isolation) render a concept of a public wrong (and, further, cannot generate reasons to criminalize a wrong). To proscribe something as criminally wrong is to prohibit and censure (or punish) the wrongful conduct. To the extent that the proscription of criminal wrongs is analytically inseparable from the prohibition and censure of criminal wrongs, Marshall and Duff's narrow focus on the values that the community take as shared and that form the community's mutual concern for one another obfuscates 'the criminal law's most basic concern'. To attend to criminal law's basic concern is (at the very least) to provide a remedial response to the wrong.

Edwards and Simester consider a possible explanation for why a wrong having "the property of being public" is a "necessary condition of there being a reason to criminalise [the] wrong".[87] They suggest that "[i]t might be argued" that we confer procedural powers to public officials "only if those officials have the [moral] right to call suspected [wrongdoers] to answer, and only if suspected [wrongdoers] have a [moral] duty to answer when called."[88] The suggestion here is that there may be a reason to criminalize a wrong, and that reason for criminalisation may be grounded in the publicness of the wrong, where public officials have a moral right to call suspected wrongdoers to answer.[89] However, Edwards and Simester do not accept this explanation of the 'publicness of crimes'. They note that public officials' right to call suspected wrongdoers only arises where beneficiaries (or victims) are "poorly placed to get the answers owed" and "public officials are often better placed to get answers on their behalf."[90] Hence, whether crimes are public in this sense "depends heavily on empirical facts", namely whether there are any procedural advantages of placing public officials in control of the protection of crimes.[91]

This hints at a plausible conceptual claim: criminal wrongs are public wrongs in the sense that public officials are procedurally better placed than private individuals to respond to them. After all, Edwards and Simester are right that "putting officials in control of proceedings can help to solve problems of duplicated effort, unreliable detection, intimidation and manipulation."[92] This observation can account for some important features of the concept of a crime as it can explain the powers that are conferred on public officials in criminal law proceedings. It can explain *the manner in which* criminal wrongs are (procedurally) public wrongs. However, as we will now turn to consider, such important features of the concept of a crime may nonetheless be unable to explain why criminal wrongs have normative implications for public officials.

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87. *Ibid* at 122.
88. *Ibid* [footnote omitted].
89. *Ibid* at 122, n 59.
90. *Ibid* at 125.
91. *Ibid* at 126.
92. *Ibid*.

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6. Process, Prohibition and Punishment

The immediate, and perhaps surface-level, problem with constructing the concept of a crime with primary reference to procedural powers is that the advantages of having public officials in control of the process is a consideration that cannot differentiate the concept. Unless the advantages in having public officials control proceedings arise only in the context of the criminal law and do not arise in a civil law context, a focus on process cannot differentiate criminal wrongs from private wrongs. The problems of duplicated effort, unreliable detection, intimidation, and manipulation are not confined to the context of the criminal law. If these problems are not confined to the criminal law, then public officials (rather than private individuals) are better placed to 'get answers from' wrongdoers in contexts that we would otherwise consider to be civil contexts. To say that crimes are public wrongs in the sense that public officials are best placed procedurally to address the wrong is to apply a criterion that is unable to differentiate a crime from a civil wrong.

This immediate problem is a problem of accurately demarcating the concept in a purely descriptive sense. The immediate, descriptive problem does, nonetheless, signal a deeper problem with the normative implications of the procedural aspects of the concept of a crime. The procedural aspects do not (themselves) represent a normative feature of the criminal law that has implications for public officials. It is more accurate to say that we (the community) are concerned with the procedural barriers that individuals would face if they were to control proceedings. We therefore seek to eliminate these barriers by putting public officials in control. We take this approach because the alleged wrong properly concerns us (the community) and because its character merits state punishment.

Consider, by way of analogy, how we reach the alternative conclusion: that a private law wrong properly concerns the individual. As we know, in a private law context, to respect a right is to recognize a primary obligation not to interfere with the right and to accept that, in the event of interference, a remedial obligation of reparation follows that is based on the continuity of reasons to respect the right.[93] As Weinrib explains, "Right and [obligation]—and therefore plaintiff and defendant—are connected because the content of the right is the object of the [obligation]."[94] When an obligation is breached, and the terms of fair interaction are transgressed, the normative gain of the transgressor (the obligation-bearer who is in breach) is correlative with the normative loss of the transgressed (the rights-holder).[95] The transgressor performing their obligation of reparation "rectifies both the normative gain and the normative loss in a single bipolar operation."[96] This "[c]orrelativity locks the plaintiff and defendant into a reciprocal normative embrace"[97] and "highlights the moral reason for singling out the defendant for liability".[98] This correlatively also explains why individual

93. Gardner, "Corrective Justice", *supra* note 57 at 33-34.
94. Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press, 2012) ch 5 at 123.
95. *Ibid* at 136.
96. *Ibid*.
97. *Ibid* at 142.
98. *Ibid* at 143.

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plaintiffs "decide for themselves what is in their best interests" by "giving them the choice whether to pursue an action or not".[99] The implication here is that individual right-holders and obligation-bearers are singled out in the civil law process *because of* the type of wrong committed and *because of* the remedial response of the law to the wrong committed. The civil law process, an individual plaintiff (themselves) bringing a claim and an obligation-bearer (themselves) performing the duty of reparation, *is the consequence* of the normative character of the primary and remedial obligations imposed by the law.

Hence, we confront once again a question of analytical ordering. For Marshall and Duff, public officials control the criminal law process because we—as the community, represented by public officials—"owe it to the victim to take seriously the wrong she has suffered".[100] The procedural powers of public official *follow from* the publicness of the wrong committed. For Lamond, public officials control the process because they are "the appropriate body to bring proceedings and impose punishment."[101] The procedural powers of public officials *follow from* the remedial response of the criminal law. In private law theory, we encounter the same ordering. An individual right-holder may claim a breach of an obligation owed to them, and the obligation-bearer who is responsible must remedy the losses following from their breach. The civil law process *follows from* the type of wrong committed and the remedial response of the law to the wrong.[102]

To focus on the normative implications of the procedural powers of public officials themselves is to suggest a different analytical ordering: that these powers are not just a consequence of criminal wrongs being public wrongs, but rather explain why criminal wrongs are public wrongs. Consider, for instance, Edwards and Simester's suggestion, that "[w]rongdoers are publicly responsible when public officials are well placed to get answers from those wrongdoers on behalf of beneficiaries […] In such cases, officials have a right to call such wrongdoers to *answer for their wrongs*."[103]

It is this final phrase—"*answer for their wrongs*"—that is revealingly incomplete. There is more than one way to 'answer' for a 'wrong'. As I have sought to demonstrate here, constructing a wrong, and the appropriate response to a wrong, requires some consideration. We could infer that (following Lamond) to *answer for a criminal wrong* is to account for prohibited conduct and face the imposition of burdensome liability. A weaker inference (following Marshall and Duff) is that to *answer for a criminal wrong* is to face some form of censure from the community at large. In either case, the reason why we confer particular investigatory and prosecutorial powers onto public officials is not merely because they are well placed to get answers from wrongdoers, but because it is their responsibility *qua* public officials to hold wrongdoers accountable *in a particular way.*

Leaving aside the fact that the advantages of having public officials control

99. Lamond, *supra* note 2 at 620.
100. Marshall & Duff, "Criminalization", *supra* note 1 at 16.
101. Lamond, *supra* note 2 at 621.
102. *Cf* Gardner, "Other Wrongs", *supra* note 5 at 59: "Once we know that the law of torts involves civil recourse, we naturally want to know what form the recourse takes."
103. Edwards & Simester, *supra* note 4 at 132 [emphasis added] [footnote omitted].

the process are likely to be obtained in both criminal and civil law contexts, the larger problem with explaining public wrongs in terms of procedural powers is that it presupposes that there is something 'public' about the process that public officials control (beyond the fact that it is public officials who control it). Instead, the procedural powers follow from criminal wrongs being public wrongs. That is to say, public officials control the criminal law process because of the normative implications of the essential features of the concept of a crime.

Conclusion

By way of summary, let us return to Marshall and Duff's "different aspects of the concept of crime".[104] Whilst "we cannot suppose in advance […] that the considerations relevant to [explaining] each of them will be just the same",[105] we can nonetheless identify some analytical connections between the considerations. I have argued here that the considerations that explain the wrongs that merit social prohibition are the same considerations that explain the censuring and punitive response of the criminal law. To recognize a private law right is to also recognize a primary obligation, a remedial obligation, and to solicit public officials into the imposition of these obligations. The considerations that underpin the private law right continue to apply to the obligation-bearer to formulate a remedial obligation. In the same way, to prohibit a wrong is to declare conduct as the wrong thing to do and therefore recognize that the appropriate remedial response is for public officials to impose censuring or burdensome liability. The considerations that construct the wrong (the conduct and normative system) are the same considerations that explain the censuring or punitive response to the wrong.

I have also argued here that some of the considerations that explain the criminal law process *follow from* this account of criminal wrongs as public wrongs. It is because the criminal wrong is a public wrong that public officials need to address procedural barriers, such as duplicated effort, unreliable detection, intimidation, and manipulation. The ability of public officials to solve these problems can explain some important features of the criminal law. However, these procedural advantages cannot, by themselves, explain why public officials control the process. They can explain the *manner* in which criminal wrongs are public wrongs, but they cannot explain *why* criminal wrongs are public wrongs.

Finally, to return to our initial puzzle, which raised an intuitive concern with the privatization of the criminal law. Allow me to now give some philosophical content to this intuition. If the criminal law were to be 'privatized', three categories of *moral* wrongs would nonetheless remain.[106] There would be significant

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104. Marshall & Duff, "Criminalization", *supra* note 1 at 17.
105. *Ibid*.
106. *Cf* Duff & Marshal, "Wrongs", *supra* note 1 at 82-83:

> Outside the law, we recognize three kinds or categories of wrong. There are, first, those that are too trivial to be worth pursuing very far […] Second, there are wrongs which it would be reasonable for the wronged party to pursue, but which she might also quite reasonably shrug off as relatively unimportant […] Third, there are wrongs that the victim ought to pursue, that it would be wrong to shrug off or ignore […].

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moral wrongs that the law has no concern for, such as infidelity, offensiveness, or selfishness. There would be moral wrongs that represent a failure to adhere to the terms of fair interaction between individuals that the law would have concern for. Such wrongs may include a breach of a contractual obligation, a breach of a duty of care, a breach of confidentiality or a defamatory statement, and so on. There would also be moral wrongs that represent disrespect for a particular set of important interests and values. These wrongs include theft, murder, and rape (as well as dangerous driving, air pollution, and tax evasion). If the criminal law were to be privatized, and all crimes redefined as various different torts, the community at large would forgo the legal avenue to address the third category of moral wrongs. We consider the privatisation of our response to the third category of (moral) wrongs to be problematic for two related reasons: first, we consider such conduct—that disregards standards rather than merely falling short of them—to be blameworthy conduct that ought to be prohibited and punished, and second, we consider prohibition and punishment—the coercive guidance of the conduct of others—to be a matter of public responsibility and not a matter of private resources and individual discretion. We can therefore begin to understand that it is in this sense that criminal wrongs are 'public wrongs'.

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