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CRIMES AS PUBLIC WRONGS

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ABSTRACT
Despite the notion's prominence, scholarship has yet to offer a viable account of the view that crimes constitute public wrongs. Despite numerous attempts, some scholars are now doubting whether a viable account is forthcoming whereas others are reeling back expectations for what the concept itself can offer. This article vindicates crime's public character while asserting the relevance of political theory in doing so. After critiquing prior attempts and clarifying expectations, the article offers a novel account, relying on both key doctrinal features and a deliberative democratic framework through which to interpret their public significance. In doing so, it demonstrates how this framework explains the public nature of censure, and ultimately argues that crimes are public wrongs not because such actions themselves necessarily wrong or harm the public, but instead because they are the type of wrong that the public has a stake in addressing. This gives rise to an understanding of sentencing as public decision-making within which citizens and their representatives decide how best to use public power to manage public interests.

INTRODUCTION

The notion that crimes can be understood as "public" wrongs is neither new nor uncommonly invoked. Its lineage is readily traceable at least back to the eighteenth century, when William Blackstone's *Commentaries on the Laws of England* stated authoritatively that legal wrongs could be divided into private and public categories.[1] In the late twentieth and early twenty-first centuries,

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1. William Blackstone, Commentaries on the Laws of England (1774), https://avalon.law.yale.edu/subject_menus/blackstone.asp#intro. Certainly, this was not always the case. *See, e.g.*, David Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. Rev. 59 (1996); David D. Friedman, *Beyond the Crime/Tort Distinction*, 76 B.U. L. Rev. 111 (1996).

scholars suggested that the idea was "virtually . . . uncontested,"[2] while others have continued to characterize it as "well-established"[3] and "the most influential approach to understanding the nature of crimes."[4] Yet, despite this history and prominence, it is still far from clear what it actually means to say that crimes are public wrongs, the basis on which this can be said, and whether and in what ways the concept is a useful one.

Recent years in particular have witnessed renewed attention to this way of conceptualizing crime, yet the emerging body of scholarship demonstrates neither universal acceptance of the idea nor agreement as to its meaning and value among proponents.[5] Critics have argued that existing accounts render the notion incoherent or trivial, while doubting that a defensible explanation is forthcoming.[6] Even among proponents, it has been argued that the notion either lacks real explanatory power or is "circular and unhelpful."[7] Leading figures have likewise seemingly reeled back their ambitions for the idea over the last two decades.[8]

Yet, understanding crimes as public wrongs should continue to be of great importance. There is growing recognition that criminal theory needs to be grounded in a public framework, and the ambivalence surrounding crime's "publicness" acts as an impediment to a coherent and compelling vision of criminal justice in these terms. This is particularly the case when the relationship between criminal wrongs and the consequent public response to those wrongs is fully appreciated. Recent debate about public wrongs has often focused on what the notion can contribute to discussions about the nature and limits of criminalization, but its significance for theorizing criminal sentencing should not be overlooked.[9]

This article works to vindicate the notion that crimes can meaningfully and usefully be understood as public wrongs. It does so by exploring what a plausible account requires and by outlining a novel account of crime's public nature in a way that avoids the shortcomings of prior

2. Lawrence C. Becker, *Criminal Attempts and the Theory of the Law of Crimes*, 3 PHIL. & PUB. AFFS. 262, 269 (1974).

3. Ambrose Y.K. Lee, *Public Wrongs and the Criminal Law*, 9 CRIM. L. & PHIL. 155, 155 (2015).

4. Grant Lamond, *What Is a Crime?*, 27 OXFORD J. LEGAL STUD. 609, 614 (2007).

5. For the recent growth in scholarship directly on the topic, *see especially* R.A. Duff, *Criminal Law and the Constitution of Civil Order*, 70 U. TORONTO L.J. 4 (2020); R.A. Duff & S.E. Marshall, *Crimes, Public Wrongs, and Civil Order*, 13 CRIM. L. & PHIL. 27 (2019) [hereinafter Duff & Marshall, *Public Wrongs*]; R.A. DUFF, THE REALM OF CRIMINAL LAW (2018) [hereinafter DUFF, REALM]; James Edwards & Andrew Simester, *What's Public About Crime?*, 37 OXFORD J. LEGAL STUD. 105 (2017); Lee, *supra* note 3; R.A. DUFF, ANSWERING FOR CRIME (2007); Lamond, *supra* note 4; S.E. Marshall & R.A. Duff, *Criminalization and Sharing Wrongs*, 11 CAN. J. L. & JURIS. 7 (1998) [hereinafter Marshall & Duff, *Sharing Wrongs*].

6. Edwards & Simester, *supra* note 5.

7. Lee, *supra* note 3, at 170. Despite such conclusions, Lee makes clear at the outset that he has "no intention to argue against this . . . idea."

8. Duff & Marshall, *Public Wrongs*, *supra* note 5; *cf.* Marshall & Duff, *Sharing Wrongs*, *supra* note 5.

9. Because of this, the aspirations of the account outlined here and those of others may differ.

attempts. Ultimately, this article argues that crimes are public wrongs in that, given the way in which they involve a heightened disrespect for public values, they signal a prospective public interest in how those wrongs are addressed. In other words, crimes can be understood as public wrongs not because such actions themselves necessarily wrong or harm the public, but instead because, unlike civil wrongs, they are the type of wrong in which the public has a stake in the response. Such an account gives rise to an understanding of sentencing as public decision-making within which citizens and their representatives decide how best to use public power to manage public interests.

This article argues further that scholars have neglected the significance of democratic ideals for understanding the notion of public wrongs itself. Consequently, in arriving at the above account, this article demonstrates that a deliberative democratic vision of public governance provides important conceptual resources that not only helpfully inform that account of public wrongs but are likely essential to any plausible defense of the public censure thought to be inherent in criminal justice.

To this end, Section I begins by discussing the importance of vindicating the notion that crimes are public wrongs before clarifying what scholars should expect of a viable account. Section II subsequently explores prior accounts of the notion while discussing the shortcomings they present. Section III notes the political deficiencies of accounts of public wrongs and introduces deliberative democracy as a framework that can help construct a viable account. In Section IV, a novel account along these lines is outlined.

I. CRIME AS PUBLIC WRONGS

A. Why Crime as Public Wrongs?

Scholarly attention to the notion of public wrongs is at an all-time high.[10] The body of scholarship on the topic has grown considerably over the last two decades and, given the lack of consensus it demonstrates, will likely continue to do so. Undoubtedly, this growth is partly a testament to the influence of R.A. Duff and Sandra Marshall, whose work has provoked and sustained engagement with the idea throughout this time.[11] Irrespective of their contributions to this trend, however, there are several reasons why this closer scrutiny—and the continued struggle to address disagreement—is worthwhile.

10. *See* works listed in note 5, *supra*.

11. Notably, Marshall & Duff, *Sharing Wrongs*, supra note 5; Duff, Answering for Crime, *supra* note 5; Duff & Marshall, *Public Wrongs*, *supra* note 5. Other key works in this debate have been in direct conversation with these works: Lee, *supra* note 3; Lamond, *supra* note 4; Edwards & Simester, *supra* note 5.

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For one, criminal scholarship has historically neglected conceptualizing crime beyond circular doctrinal understandings as conduct that has been criminalized. Critics have argued accordingly that despite active debates *about* crime, "[t]he issue of what crime *is* is rarely stated, simply assumed."[12] Absent a cohering understanding of the law's diversity of offenses, some might still charge the concept as having no "ontological reality."[13] In light of this, and given the great power wielded by the concept in practice, there is considerable value in developing a philosophical understanding of crime. Exploring crime through the lens of public wrongs is a promising approach to working out such an understanding.[14] This is especially the case given that its uniquely public management is often invoked in discussing crime's distinguishing features.

The notion of crimes being *public* wrongs also takes on particular importance and promise in light of the need to ground criminal theory in political theory. In this respect, scholars have increasingly acknowledged how criminal justice systems are, or ought to be, animated and constrained by public values and commitments, and not freestanding moral views.[15] The interventions of criminal justice, after all—whether punishment, supervision, or other treatments—are exceptionally coercive and targeted exercises of *state* power and must be explained and legitimized as such.[16] This need is arguably still underexplored in criminal theory,[17] and the gap is one that extends to public wrongs scholarship as well.

Accordingly, it would be useful, if not necessary, to vindicate the notion that crimes are indeed "public" wrongs as a means of cohering the *object* of criminal justice with criminal justice's more general public theorizing. For some, this might only mean that crimes are public in the sense of being permissible subjects of state intervention;[18] however, a stronger view would suggest that the public nature of wrongs has logical and normative implications for the way that criminal justice is theorized more broadly. In addition to its importance for criminal theory generally, this view makes the notion of public wrongs particularly relevant in the context of criminal sentencing.

In this respect, it should be noted that any given conception of crime has important logical implications for the way that sentencing is understood

12. Paddy Hillyard & Steve Tombs, *From 'Crime' to Social Harm?*, 48 CRIME, L. & SOC. CHANGE 9, 11 (2007).

13. Louk H.C. Hulsman, *Critical Criminology and the Concept of Crime*, 10 CONTEMPORARY CRISES 63, 71 (1986).

14. Lamond, *supra* note 4.

15. *See, e.g.*, DUFF, ANSWERING FOR CRIME, *supra* note 5; Malcolm Thorburn, *Criminal Law as Public Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW (R.A. Duff & Stuart Green eds., 2011); GEORGE FLETCHER, THE GRAMMAR OF THE CRIMINAL LAW (2007); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293 (2006).

16. FLETCHER, *supra* note 15, at 181.

17. *Id.* at 151–152 (noting an "absence of a developed literature on political and criminal theory" and that criminal theorists write little on political theory, while political theorists write little on criminal theory).

18. *See, e.g.*, Duff & Marshall, *Public Wrongs*, *supra* note 5; Lee, *supra* note 3.

and what kind of decision-making process it entails. Sentencing is, after all, a process for deciding how to respond to crime. If crime is understood as creating an unfair advantage, for instance, sentencing might be conceived of as a process of deciding how best to achieve an equilibrium of burdens and benefits.[19] If crime is understood as an assertion of superiority over the victim, sentencing might be conceived of as a process of deciding how to best humble the offender and reassert the victim's value.[20] If crime is understood as disobedience of a command backed by a threat, then sentencing might simply be a matter of revisiting and simply following through on that promise.[21] The list could go on, and may overlap.

Importantly, the consequences of how we understand crime can also go beyond sentencing's teleological orientation to specify citizens' stake in the issue, their standing in the sentencing process that addresses it, and the resulting citizen-state relationship. Without adequately theorizing the public nature of crime, then, scholars not only risk incoherence but also risk undermining public ideals by importing antagonistic conclusions into how we understand the resulting social response.

Consider, as both an illustration and cautionary tale, Michael Moore's moralist-retributivist perspective. On this view, Moore conceives of crime simply as culpable moral wrongdoing, full stop, and as a consequence of his retributive logic, conceives of sentencing principally as a process through which an individual's moral desert is determined and assigned.[22] As a result, his account does not assign any distinctively public character to criminal offenses, and instead rationalizes the public control over criminal justice by way of institutional and epistemic, rather than political, considerations.[23]

Having the state undertake this role, Moore explains, serves to protect everyday people from the dangers that punishing presents to their virtues. Moreover, in comparison with private persons whose motivations may be corrupted, the state can be more consistent and more accurate in determining what individuals truly deserve.[24] As a result, Moore's conception of crime feeds into a paternalistic vision of sentencing and criminal justice —one whose fundamental features arise not out of a recognition of a shared stake or claim of ownership, but out of the need to withdraw a morally and intellectually challenging decision from ill-equipped citizens.

Certainly, for those working toward theorizing the public nature of criminal law, Moore's characterization of punishment and the role of the state in

19. Herbert Morris, On Guilt and Innocence (1976), at 31–58; George Sher, Desert (1987).

20. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. Rev. 1659, 1684 (1992); *see also* Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 Cornell L. Rev. 239 (2009).

21. *See, e.g.*, James Q. Wilson & Richard J. Herrnstein, Crime and Human Nature: The Definitive Study of the Causes of Crime (1985), at 14.

22. *See, e.g.*, Michael S. Moore, Placing Blame: A Theory of the Criminal Law (2010).

23. Michael Moore, *A Tale of Two Theories*, 28 Crim. Just. Ethics 27, 40 (2009).

24. *Id.* at 42; Moore, *supra* note 22, at 152.

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facilitating justice are ready targets.[25] However, critics should be wary of addressing these things directly without appreciating the role that Moore's conception of crime plays in facilitating those ideas. In light of the above, and insofar as scholars are concerned with developing criminal theory that reflects political ideals, there is good reason to build "from the ground up." An account of public wrongs, as the object of the state's action and as a concept that itself suggests some *public* stake, is an appropriate place to start, if not a clear prerequisite for other theorizing.

B. Public Wrongs Beyond Ownership

In a legal, institutional, and procedural sense, the notion that crimes are public wrongs is straightforward and compelling. The state invests notable resources in maintaining close control over crime at all stages of its management, and both the law and institutions serve to reinforce its control over both process and outcome. The state seeks out crimes through public police forces tasked with crime detection, investigation, and the physical production of the accused. The decision to pursue the crime, both initially and throughout the proceedings, rests with the prosecutors and not the victim.[26] Indeed, the victim's consent is legally neither sufficient nor necessary for prosecution to proceed.[27]

Public prosecutors not only have the power to decide *whether* to lay charges, but also *what* charges ought to be laid, constructing the issue in terms they deem most appropriate. Police and prosecutors often have discretion over whether to divert criminal matters to extrajudicial resolutions, in effect delegating decision-making power and setting the issue on a path toward responses other than judicial outcomes.[28] Beyond that, public prosecutors are themselves able to dispose of cases in ways that they deem appropriate through plea bargaining.[29] Through all of this, as well as through the judicial decision-making that may ultimately result, the state holds a firm grip over criminal wrongs. All of this, of course, sets the stage for unparalleled,

25. *See, e.g.*, R.A. Duff, *Political Retributivism and Legal Moralism*, 1 VA. J. CRIM. L. 179, 180 (2012) (noting Markel's critique and emphasizing Moore's attention in this respect at n.2); Moore, *supra* note 23; DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2007).

26. Matt Matravers, *The Victim, the State, and Civil Society*, *in* HEARING THE VICTIM: ADVERSARIAL JUSTICE, CRIME VICTIMS AND THE STATE 6 (Anthony Bottoms & Julian V. Roberts eds., 2010); Marshall & Duff, *Sharing Wrongs*, *supra* note 5, at 15 ("whether it is brought, and how far it proceeds, is up to the prosecuting authority").

27. Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 719 (2008), at 719. Victims, of course, may play a practical role as key witnesses without whom the case could not proceed.

28. This is the case with a number of restorative justice initiatives. *See, e.g.*, MARK S. UMBREIT & JEAN GREENWOOD, CENTER FOR RESTORATIVE JUSTICE & PEACEMAKING, UNIVERSITY OF MINNESOTA, NATIONAL SURVEY OF VICTIM OFFENDER PROGRAMS IN THE UNITED STATES (1997).

29. In Canada, *see* Department of Justice, *Plea Bargaining in Canada*, http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02_5/p3_3.html ("there is still no formal process by means of which Canadian courts are required to scrutinize the contents of a plea bargain").

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intensive state involvement by way of the custodial or supervisory outcomes characteristic of a criminal sentence.

The unique nature of this relationship is illustrated by contrast with civil wrongs. Torts—crime's extracontractual cousin—are under private control from the moment they arise. No police force is tasked with detecting or investigating torts, nor would they act on any report of one. The state does not endeavor to prosecute tortfeasors and does not impose liability for these wrongs on its own initiative. Unless brought forward by an individual demanding recourse, it is fair to suggest that the state has no concern whatsoever.[30] Consistent with the state's lack of interest, civil parties are also free to address the wrong themselves, independent of state process. In reality, nearly all torts are addressed through extrajudicial means.

Moreover, *how* these wrongs are addressed need not reflect what the courts would have decided had the case been brought to them. The parties' own sense of justice "trumps other arguably applicable norms,"[31] and thus not only are judges generally uninterested in how the parties address the wrong,[32] they generally lack the authority to void a valid settlement even where its substance is contrary to its own views of substantive justice.[33] This is, of course, only even a question when one party makes a request, as the state takes no initiative to determine what the results of tortious wrongdoing end up being.[34] Further, even where courts have awarded their own judgment, parties are free to negotiate an alternative resolution should they deem this to be in their best interests.

In all, then, the public displays extremely different positions in relation to criminal and civil wrongs. The state, while providing access to civil justice, is not invested in seeing to it that civil wrongs get addressed, nor in seeing that they get addressed in any particular way. Where public and private visions of justice conflict, the latter wins out. With crime, however, the opposite is true. The state not only devotes considerable resources to seeing that such wrongs are detected, it maintains clear control over the proceedings and ensures that they are addressed in a way that it sees fit. With these contrasting structures in place, it is fair to conclude that crimes are, legally speaking, firmly under public "ownership."[35]

While this contrast is undoubtedly important to an account of crimes as public wrongs, it should not itself be taken as explanatory. To accept this would involve making the tautological claim that crimes are simply public

30. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 Texas L. Rev. 917 (2010). Marshall & Duff, *Sharing Wrongs*, *supra* note 5, at 15.

31. Carrie Menkel-Meadow et al., Dispute Resolution: Beyond the Adversarial Model (2005), at 391.

32. James M. Fischer, *Enforcement of Settlements: A Survey*, 27 Tort & Ins. L.J. 82, 90 (1992).

33. *See, e.g.*, Robertson v Walwyn Stodgell Cochrane Murray Ltd, [1988] B.C.J. No. 485, paras. 4, 8 (C.A.) ("valid" here meaning according to general contract principles).

34. Judicial approval of settlements is, however, a normal feature in class action lawsuits given their representative nature. *See, e.g.*, Class Proceedings Act, RSO 1992, §29 (Ont., Can.).

35. *See* Nils Christie, *Conflicts as Property*, 17 British J. Criminology 1 (1977).

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because the public controls them. The question for scholars looking to vindicate the notion that crimes are public wrongs is the prior question of *why* the public controls them in this way. To redeem the idea, the answer to this question should not rely, as Moore does, on incidental instrumental rationales, but instead on the normative idea that crimes are somehow public in character.

In this light, the strong legal and institutional position that the state takes with respect to crimes should be taken as indicative of some moral claim over them. The public invests so heavily in this position, and guards it so closely, because it is the public who have some stake in such wrongs. Crimes, in this sense, are not public wrongs because they are owned by the public—they are owned by the public because they are public wrongs. With this in mind, what might such an account look like? What expectations ought theorists have of an account, and by what criteria should an account be judged successful?

C. Expectations for Public Wrongs

In pursuit of the above, developing an account of crimes as public wrongs is a task of normative reconstruction. While a purely normative account of public wrongs might be unconstrained in reimagining what the term could signify, to vindicate the notion that *crimes* are public wrongs it stands to reason that an account should be tied in some recognizable way to descriptive realities of criminal law.[36] This is not to say that theorists must accept and defend every characteristic of current practice,[37] but it is to say that an account of public wrongs needs to reflect, and indeed explain in a normatively convincing way, its central features.

Certainly, the extent to which there needs to be agreement between normative theorizing and descriptive reality is up for debate, requiring choices about which features ought to be considered central. At the same time, there are certain relatively uncontroversial aspects against which an account of public wrongs can be measured. Indeed, while there remain some differences, scholarship—consisting both of positive accounts and the critiques offered against them—has helped make clear certain expectations.[38]

First, any explanation of public wrongs needs to account for the fact that crimes are *wrongs*—that is, that they involve morally wrongful conduct for which offending individuals are responsible. Given a widespread commitment to restricting the criminal law's application, this could be fairly restricted to seriously wrongful conduct.[39] With respect to responsibility,

36. This is not to say that the features of criminal wrongs are not themselves normative, only that certain features have attracted sufficient doctrinal and scholarly acceptance that they can be treated as describing a certain criminal orthodoxy.

37. Indeed, one can say with confidence that the criminal law has not always developed in a coherent manner. *See, e.g.*, Becker, *supra* note 2, at 263.

38. Those who address such "criteria" directly include Lamond, *supra* note 4; Marshall & Duff, *Sharing Wrongs*, *supra* note 5.

39. Lamond, *supra* note 4, at 613–614.

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this is not to say that other contributing factors, including societal responsibility for crime, can be ignored, it is only to say that this wrongdoing involves sufficient personal responsibility as to warrant the individualized focus central to criminal liability and intervention.

Second, this account of wrongdoing should offer a compelling explanation of the targeted blame and censure that is central to criminal conviction. It ought to support the fact that, in holding an individual criminally liable, the criminal process expresses a message that the offending individual ought to have behaved differently. Ideally, it should do so in a way that supports the idea that this censure is itself public in nature—that is, it is the public, *as a public*, that expresses this message.[40]

As will be seen, the wrongful nature of the conduct also needs to be explained in a way that does not distort the reasons for that censure.[41] Where the criminal law censures murder, for instance, the offending individual is condemned for the very reasons that murder is wrong, not, for example, for breaking a rule per se. While this concern is easily avoided in accounts that conceptualize crime simply as moral wrongdoing, the endeavor to explain crime as public introduces a dimension on which some accounts have stumbled.

Taking censure as a key feature needing to be explained, however, is not to suggest that a successful account must explain that *punishment* is the appropriate response. While some take consequent punishment as an essential feature of crime that an account of public wrongs needs to explain,[42] others have accepted that this is unnecessary.[43] While it is certainly true that the availability of punishment is both largely unique to criminal justice[44] and a frequently employed tool therein, there are several good reasons to avoid conceptualizing punishment as an *essential* feature of criminal justice.

For one, it seems entirely flawed to conceptualize a problem in reference to a supposed solution or substantive response, rather than vice versa. To do so on the basis of such a contested and problematic response as punishment is even more inexplicable. Moreover, even in a purely descriptive account of criminal practice, punishment is not seen as a necessary or desirable response to all criminal convictions. Responses to crime can and do involve a variety of potential interventions that serve criminal justice—a fact that should increasingly be considered by criminal theory in light of interests to theorize a way toward less punishment.[45] Accordingly, an

40. *See, e.g.*, Marshall & Duff, *Sharing Wrongs*, *supra* note 5, at 13.

41. On this critique of some accounts, *see* Marshall & Duff, *Sharing Wrongs*, *supra* note 5, at 9; Duff & Marshall, *Public Wrongs*, *supra* note 5, at 39; Edwards & Simester, *supra* note 5, at 115–117; Duff, Realm, *supra* note 5, at 216–217.

42. Lamond, *supra* note 4, at 613–614. Ambrose Lee also makes punishment central to the notion of public wrongs. Lee, *supra* note 3.

43. Marshall & Duff, *Sharing Wrongs*, *supra* note 5, at 15–16.

44. Punitive damages are an exception.

45. *See, e.g.*, Husak, *supra* note 25.

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account of public wrongs needs to be able to explain with equally compelling force those instances of wrongs for which punishment is properly *not* employed as well.[46]

This is not to say that we should entirely ignore the way in which crime is responded to in assessing the validity of an account of crime itself. As was explained previously, a viable account of crime as public wrongs should offer an explanation as to why it is appropriate that the state, rather than other actors, is responsible for initiating and pursuing the response to criminal actions.[47] So too must it explain the state's keen interest in holding on to that role. More specifically, it would also be seen as a weakness if an account could not explain the way in which criminal justice regularly involves uniquely targeted and intimate forms of public intervention—that is, a sort of response that can be contrasted with more diffuse public policy interventions as well as less involved civil sanctions.[48] These facts go some way toward fulfilling the need to explain crime as meaningfully public.

Implicit in an account of public wrongs is also the necessity to distinguish these from private wrongs. This is necessary for any account of crime. As Douglas Husak writes, "[t]he desire to preserve *some* line between the criminal and civil law is so entrenched that this divide might be taken as a datum for which all theories . . . must account."[49] It is also the case specifically for an account of crime as public wrongs, though with the added task of differentiating crime from civil wrongs on the basis of its publicness. In this respect, Richard Dagger describes crimes as "'public' in the twofold sense that they both require the attention of the law and are different from the private wrongs . . . to which the law also must attend."[50] Since both private and public wrongs are public in the sense of being legitimate targets of state coercion, this distinction between criminal and civil wrongs needs to be explained on the basis of some additional or further public character. Otherwise, it would be no more appropriate to call crime "public" than it would be to do the same for torts.

II. EXISTING ACCOUNTS OF THE PUBLIC NATURE OF CRIME

While attempted explanations of the public nature of criminal wrongs have come from some of the most prominent criminal scholars and have emerged with increased frequency and depth, the literature to date has nonetheless failed to produce a viable account of crimes as public wrongs.

46. Depending on one's views, this may or may not be a large majority of them.

47. Lamond, *supra* note 4, at 613–614.

48. *See also* DUFF, REALM, *supra* note 5, at 223–224 (discussing the need to account for the expectation for "something more" beyond a formal verdict, and recognizing the potential diversity of what that "something more" is).

49. HUSAK, *supra* note 25, at 137.

50. Richard Dagger, *Republicanism and the Foundations of Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW (R.A. Duff & Stuart Green eds., 2011).

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Each of these previous attempts, despite their contributions, has in some way failed to deliver on one or more of the core needs highlighted above. A survey of extant accounts—grouped here around the harms-the-public thesis, the wrongs-the-public thesis, and the demands-public-punishment thesis[51]—illustrates this and lays further groundwork for this article's alternative.

A. Harming the Public

Early accounts of public wrongs have relied on harm-based rationales in explaining crime's distinctive public nature. While crimes are not inherently more damaging than their civil counterparts[52]—contrast, for instance, negligent gas works resulting in the total destruction of a home with a minor act of vandalism on that same home—some scholars have posited that the public nature of crime stems from the fact that, unlike civil wrongs, they harm the public *as a community*. Accordingly, Blackstone's *Commentaries* held that crimes strike at the very core of society, being the sort of wrongs whose effects society could not survive if permitted to continue.[53] Crimes like treason and murder, he argued, harm society by undermining peace and order and depriving the whole of a member.[54]

Yet, select examples aside, it is difficult to see how a great deal of crimes—even paradigmatic offenses like common assaults—harm the community as such. Moreover, even if being harmed *as a public* is the criterion, then it is unclear why negligent acts damaging public property, for example, are torts and not crimes. On the other hand, if certain *harms*, like deaths, are thought particularly fatal to the polity, it remains unclear why those same harms caused by mere torts are not universally public and criminal.

To redeem the harm-based view, others have instead linked public harm to crime's unique doctrinal feature: mens rea. Unlike civil wrongs, this

51. The articulation of two of these can be traced to Lamond, *supra* note 4, at 614ff., although his categorization and the one provided here are not perfectly aligned; I would place Dan Markel's account as set out in Dan Markel, *What Might Retributive Justice Be? An Argument for the Confrontational Conception of Retributivism*, *in* RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY (Mark D. White ed., 2011) in both of the first two categories. The third captures Lamond's own approach, which aligns with the subsequent writing of Ambrose Lee, *supra* note 3. *See also* Edwards & Simester, *supra* note 5, at 108.

52. *See, e.g.*, Marshall & Duff, *Sharing Wrongs*, *supra* note 5, at 7–8; HUSAK, *supra* note 25, at 137.

53. BLACKSTONE, *supra* note 1, bk. 4 at 5. Blackstone presents a difficult account to articulate, both because of the apparent diversity of rationales he blends together and because he does not go into depth on any of them. In his writings, one could argue that Blackstone distinguishes crime as a public wrong on any or all of the following bases: (i) that crime is a violation of public rights and duties, (ii) that crime is a violation of a "public law" that commands or prohibits acts to all, as opposed to regulating a subset of actors, (iii) that crime involves wrongs that are particularly fatal to society, (iv) that crime involves additional harms to the public considered as a public, varying according to each crime, and (v) that crimes are those acts that set problematic examples and necessitate deterrence. A similar argument has been offered much more recently by Richard Dagger and seems susceptible to the same critiques that follow. Dagger, *supra* note 50.

54. BLACKSTONE, *supra* note 1.

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typically entails a heightened fault element such as intention or particular knowledge, and is indeed so central that it marks "true crimes" and is presumed to be the case at common law.[55] Appealing to this distinction, Lawrence Becker, among others,[56] argues that the *way* in which crimes are committed, along with the dispositions or traits that such a mode reveals, causes additional, "community-wide" harm through community reaction.[57] Where wrongs are committed intentionally or with grave negligence, community members lose assurance that others will act in socially cooperative ways and create "social volatility" by abandoning their own "socially stable" behavior.[58]

However, this version of the harm thesis fails as well. For one, the empirical claim that crimes do in fact produce (sufficient) volatility is entirely implausible with respect to some (uncontroversial) offenses—for instance, bribery or tax fraud.[59] Second, by tying their criminal and public nature to these secondary effects, such accounts fall susceptible to the charge that they distort, ignore, or even denigrate the real reason that many acts are criminalized—the wrong done to the individual victim.[60]

B. Wronging the Public

The failure of early harm-based explanations facilitated a later wave of accounts in which the public nature of crime was expressed in terms of how they *wrong*, rather than harm, the public. On one account, Dan Markel has argued that criminal acts are situations in which the state uniquely needs to reassert its authority.[61] In choosing to break democratically enacted laws,[62] Markel suggests, those offending reject the authority of the polity and usurp its decision-making structure, thereby offending "against" the public.[63] While the more explicit engagement with political or civic dimensions is laudable, this account too fails on several grounds.

For one, the claim that, by murdering or stealing, individuals reject the state authority or democratic process is implausible. While wholesale

55. In Canada, *see* R v. Sault Ste Marie, [1978] 3 S.C.R. 1299 (Can.), R v. ADH, [2013] 2 S.C.R. 269 (Can.). In the United Kingdom, *see* B v. DPP [2000] 2 AC 428, Sweet v. Parsley [1970] AC 132.

56. *See also* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974), at 65–71; GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW (1998), at 35–36.

57. Becker, *supra* note 2, at 273ff.

58. *Id.*

59. Lamond, *supra* note 4, at 616. *See* Becker, *supra* note 2, at 275 (acknowledging this reliance).

60. *See supra* note 41 and accompanying texts.

61. Markel, *supra* note 20; Markel, *supra* note 51. Malcolm Thorburn adopts a similar view of crime: *see* Malcolm Thorburn, *Punishment and Public Authority*, *in* CRIMINAL LAW AND THE AUTHORITY OF THE STATE (Antje du Bois-Pedain, Magnus Ulvang & Petter Asp eds., 2017).

62. Markel specifies this as a necessary condition of the plausibility of his account, suggesting that this entails "reasonable laws fairly passed . . . that are generally respectful of persons' rights and liberties" rather than laws that "reinforce tyranny or oppression." Markel, *supra* note 20, at 264.

63. *Id.* at 262–263.

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rejection might exist in exceptional cases,[64] individuals offend despite recognizing this authority—thinking they would escape consequences, thinking that the act would be worth the cost, or not thinking about authority at all. Second, even if one accepts the notion that the offending individual is usurping the polity's decision-making structure, this account is vulnerable to critique of distortion: what makes murder a crime is the wrongfulness of intentional killing, not the challenge to the political order per se.[65] Lastly, tying criminality to the act of defying authority per se would necessarily complicate, if not erode, the notion that different crimes warrant different responses. Conceiving all crime as rebellion would suggest that all responses to that rebellion would, at least in terms of qualitative response, be the same.

An alternative and more prominent account of public wrongs has been offered by Antony Duff, at times writing with Sandra Marshall.[66] Duff links the public nature of public wrongs to the idea that such a wrong "violates or threatens," in whole or part, a given polity's "civil order"—its constitutive values and norms of conduct that regulate social relations.[67] "Public," in this respect, refers to a particular "normative space."[68] By virtue of falling within it, wrongs are seen to properly *concern* the public—that is, to be considered the public's business.[69] Criminal wrongs can therefore be considered public in the sense that they satisfy the necessary normative condition for state concern and intervention. Wrongs that are not the public's business are therefore private, and outside the ambit of criminal practice.

While Marshall and Duff have been right to reject critiques that this point is "trivial,"[70] it crucially falls short of explaining crime's *distinctively* public character and why the state is responsible for the process and outcome. When "public" is interpreted as "a legitimate target of public intervention," this account offers no more of an explanation of *crimes* as public wrongs than of *torts* as public wrongs. This "publicness" of public wrongs does no work to differentiate crimes from mere torts,[71] and something more would be required to explain crime's unique "public wrong" label.

64. The "Sovereign Citizens" movement might be such a case. *See, e.g.*, Charles E. Loeser, *From Paper Terrorists to Cop Killers: The Sovereign Citizen Threat*, 93 N.C. L. Rev. 1106 (2015).

65. *See* Lamond, *supra* note 4, at 619.

66. Duff, Realm, *supra* note 5; Duff & Marshall, *Public Wrongs*, *supra* note 5; *see also* Duff, Answering for Crime, *supra* note 5, at 140ff. Earlier versions, since departed from, date back much earlier. *See* Marshall & Duff, *Sharing Wrongs*, *supra* note 5; Duff & Marshall, *Public Wrongs*, *supra* note 5, at 28 (reflecting on this initial account). *See also* Husak, *supra* note 25.

67. Duff, Realm, *supra* note 5, at 183, 153–159; Duff & Marshall, *Public Wrongs*, *supra* note 5, at 28–35. These threats or violations can occur in a variety of ways, some of which approach Becker's harm-based account, but need not be more than wrongs that are inconsistent with civil order values. *See* Duff, Realm, *supra* note 5, at 218–219.

68. Duff, Realm, *supra* note 5, at 184.

69. *Id.*

70. Duff & Marshall, *Public Wrongs*, *supra* note 5, at 30–31, responding to Edwards & Simester, *supra* note 5, at 132–133.

71. Lee, *supra* note 3, at 159; *see also* Patrick Tomlin, *Duffing Up the Criminal Law?*, 14 Crim. L. & Phil. 319 (2020).

Indeed, Marshall and Duff acknowledge that there is no intrinsic connection between their sense of publicness and *criminal* justice, noting that something being a public wrong, qua public wrong, does not itself necessitate criminalization instead of tortification.[72] On Duff's account, whether any given "public wrong" should be considered criminal requires us to subsequently ask whether, in light of the nature of criminalization, it is desirable that it be so.[73] However, what *common, public-related characteristic* makes us answer this question in the affirmative for the body of (properly considered) crimes is precisely what an account of crimes as public wrongs ought to offer. This, however, does not follow from Duff's account, which consequently falls short of the potential for the notion of crimes as public wrongs.[74]

C. Demanding Public Punishment

Differentiating crime from torts, both Grant Lamond and Ambrose Lee have argued that crimes are public wrongs in that, beyond the threshold of concerning the state, they *ought to be punished by the state*.[75] While Lee omits a detailed rationale, Lamond points to mens rea as a distinguishing feature of crime. However, instead of suggesting, like Becker, that it causes additional harm, he notes that it "manifests a disrespect for the interest or value that has been violated"[76] and thus, through a retributive lens, uniquely deserves punishment.[77] Capturing Lee's position as well,[78] Lamond writes that crimes "are public wrongs not because they are wrongs to the public, but because they are wrongs that the public is responsible for punishing. There is a public interest in crimes not because the public's interests are necessarily affected, but because the public is the appropriate body to bring proceedings and punish them."[79]

These accounts too, however, are subject to a variety of important critiques. First, Lamond's account can be criticized on methodological grounds for conceiving crime out of a predetermined response, and both

72. Duff & Marshall, *Public Wrongs*, *supra* note 5, at 30. *See also* DUFF, REALM, *supra* note 5, at 380ff.

73. On what Duff sees as the essential features of this, *see* DUFF, REALM, *supra* note 5, at 292–297.

74. Duff may argue that a plurality of considerations, rather than a single consideration, answers this. While this might be the case, critiques remain that (i) at some level of abstraction, a shared characteristic should be identifiable, and (ii) if any decisive consideration is not a distinctively *public* reason for answering the question in the affirmative, Duff's account fails to distinguish tort from crime on public grounds. I explore this critique further below in discussing Grant Lamond's account.

75. Lamond, *supra* note 4; Lee, *supra* note 3.

76. Lamond *supra* note 4, at 621–622. Lamond also goes on to demonstrate how negligence can demonstrate the same disrespect and that its criminality should be limited to such cases. *See id.* at 623ff.

77. He also requires that the value of criminalization outweigh its costs, and that only those of sufficient gravity be criminalized. *Id.* at 626–627.

78. Lee, *supra* note 3, at 168–169.

79. Lamond, *supra* note 4, at 629, *see also* 625.

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Lamond and Lee can be critiqued for tying their account to punishment specifically. This not only puts the proverbial cart before the horse—or, in Maslow's language, sees nails because one's tool is a hammer[80]—it untenably hinges on the appropriateness of punishment for all crime.[81] Second, Lee himself admits that this understanding of public wrongs is "circular and unhelpful."[82] The question "What are public wrongs?" collapses into the question "What should be criminalized?" and the term becomes a mere "placeholder" for that which should be punished by the state.[83] Grounds for punishment account for the crime-tort distinction, rather than any particularly public characteristic of crime itself.[84] Accordingly, publicness does not explain *why* the state handles crime, but is instead a label assigned *because* the state handles crime—offering scholars no more than the descriptive procedural account noted at the outset. It is this logic that leads James Edwards and Andrew Simester to deride the "publicness" in these accounts as "the conclusion of an argument rather than one of its premises."[85]

Faced with the "dilemma"[86] of choosing between a notion of public wrongs encompassing both crime and tort, or one without explanatory potential, Lee, Edwards, and Simester suggest that theorists leave behind the notion of public wrongs to pursue more fruitful lines of thinking.[87] However, with respect, abandoning this notion would be premature. While the predicament outlined by Lee is challenging, the remainder of this article suggests that this is a false dilemma. By revisiting the notion of public wrongs from the perspective of deliberative democratic theory, the notion can in fact be vindicated in a way that advances criminal theory.

III. PUBLIC WRONGS AND DEMOCRACY: SKETCHING A NOVEL ACCOUNT

A. The Relevance of Political Theory to Conceptualizing Crime

If crimes are to be understood as public wrongs, both in the sense that they are of legitimate concern to the state—a sense that civil wrongs, too, share—and in the sense that they are especially or additionally public so as to distinguish them as uniquely public wrongs, it is perhaps obvious to say that political theory would be significant to the construction of such an account. What exactly that significance *is*, however, is less evident. This ambiguity has

80. Abraham Harold Maslow, The Psychology of Science (1966), at 13.
81. *See* Hulsman, *supra* note 13.
82. Lee, *supra* note 3, at 169, 170.
83. *Id.* at 169. Or, on Duff's account, that which more generally ought to be responded to in the distinctively criminal way.
84. *Id.* at 170.
85. Edwards & Simester, *supra* note 5, at 108.
86. Lee, *supra* note 3.
87. *Id.*; Edwards & Simester, *supra* note 5, at 132–133.

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not been helped by existing scholarship that, while not ignoring the relevance of political theory, has often given it too limited or superficial a role in developing an account of public wrongs.

On one view, political theory can be seen simply as a providing a framework delineating what acts might legitimately be criminalized. On this view, political theory says little or nothing about the concept of public wrongs itself, only what behaviors could fall under that category. Consequently, some scholars have even been willing to proceed without specifying any particular framework.[88] Though rarely mentioned, *democratic* commitments have often been given a similarly ineffectual role. Marshall and Duff, for instance, point to democratic deliberation simply as the means by which polities would determine the civic norms that they expect their members to adhere to.[89] Similarly, Lee's brief reference to democracy is only to suppose that liberal democratic decision-making would draw a line between public and private spheres, and thus what would or would not be susceptible to being criminalized.[90]

Within such accounts, democracy is reduced to a placeholder for what substantive decisions citizens and their representatives would make, and what theorists, rightfully, do not want to preempt by drawing firm conclusions one way or another. However, democracy itself can and ought to be more influential in developing the very idea of a public wrong. In this respect, Markel's view goes further by incorporating democratic commitments into his concept of public wrongs itself. While doing so in a way that ultimately fails, he recognizes that what offending individuals are offending against is not freestanding moral dicta, but democratic decisions. This much is right and, with a richer view of democracy, can be incorporated into a viable account of crime as public wrongs.

The following works toward the view that democratic ideals can play a more significant role in shaping a conception of crime as public wrongs. As will be shown, these ideals do so by providing an understanding of the prohibitions that offending individuals disrespect and also by favoring certain interpretations of that disrespect's significance. The richer account of democracy invoked for these purposes will specifically be one of *deliberative* democracy—a perspective whose significance for understanding crime has yet to be fully realized despite its prominence in political theory.[91]

88. Lamond, *supra* note 4, at 626–627; Lee, *supra* note 3.

89. Duff & Marshall, *Public Wrongs*, *supra* note 5, at 35; DUFF, REALM, *supra* note 5. On this, *see also* Albert W. Dzur & Rekha Mirchandani, *Punishment and Democracy: The Role of Public Deliberation*, 9 PUNISHMENT & SOC'Y 151 (2007) (Dzur and Mirchandani are not concerned with the notion of public wrongs per se, and instead are focused on an argument for public deliberation at the policy level for making decisions in criminal justice).

90. Lee, *supra* note 3, at 159.

91. Its use in addressing other issues in criminal theory has demonstrated some potential in this respect: *see, e.g.*, Jeffrey Kennedy, *The Citizen Victim: Reconciling the Public and Private in Criminal Sentencing*, 13 CRIM. L. & PHIL. 83 (2019) [hereinafter Kennedy, *Citizen Victim*]; Jeffrey Kennedy, *Justice as Justifiability: Mandatory Minimum Sentences, Section 12, and Deliberative*

In contrast with aggregative conceptions of democracy that find legitimacy simply in the aggregated preferences of a majority, a deliberative view suggests that the legitimacy of public decisions is derived from processes of public reasoning—that is, processes in which citizens and their representatives provide one another with persuasive reasons as to why a particular decision is the right one.[92] Such processes are thus ultimately oriented toward *justifying* decisions to those subject to them, including, for present purposes, decisions to prohibit conduct, as well as decisions about how to respond to those prohibitions. In doing so, those subject to decisions are respected as equals and authors of the laws that govern them.[93] The reasons provided in service of this end are public reasons, not simply in the sense that they are given publicly, but because the form and content of those reasons are such that others can understand, engage with, and ultimately be reasonably expected to accept them.[94] The latter aspect, on the account imagined here at least, requires reference to shared, rather than controversial, values, principles, and considerations.[95] These added normative expectations of democracy, it will be seen, are instrumental in constructing an account of public wrongs, and one with a compelling explanation of the public features of criminal justice.

Deliberative democracy is itself a family of views, and it is worth briefly noting that the version in mind here might be a stricter account than others, characterized by greater emphasis on the substantive constraints of deliberative processes rather than more laissez-faire views of later scholarship.[96] This is not to accept that a full roster of public reasons can be philosophized in advance, however, and the significance of this commitment

Democracy, 53 U.B.C. L. Rev. 351 (2020) [hereinafter Kennedy, *Justifiability*]. For other explorations of the various points of connection between deliberative democracy and criminal justice, *see* Dzur & Mirchandani, *supra* note 89; Pablo de Greiff, *Deliberative Democracy and Punishment*, 5 Buffalo Crim. L. Rev. 373 (2002); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 Va. L. Rev. 311 (2003); Duff, Realm, *supra* note 5 (Duff references "public deliberation" throughout his account as the means by which its substance would be filled out, though without attending to implications of deliberative democracy in a detailed way). *See also* Roberto Gargarella, Punishment, *Deliberative Democracy & the Jury*, 9 Crim. L. & Phil. 709 (2015) (discussing possible and implicit connection to deliberative democracy specifically in Dzur's monograph).

92. Amy Gutmann & Dennis Thompson, Why Deliberative Democracy? (2004), at 3–4; Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* The Good Polity: Normative Analysis of the State (Alan Hamlin & Philip Pettit eds., 1989); John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765 (1997).

93. *See, e.g.*, Simone Chambers, *Theories of Political Justification*, 5 Phil. Compass 893, 895 (2010).

94. *Id.*

95. Rawls, *supra* note 92; Joshua Cohen, *Truth and Public Reason*, *in* Philosophy, Politics, Democracy 348–386 (2009). *See also* Stephen Macedo, *Why Public Reason? Citizens' Reasons and the Constitution of the Public Sphere* (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1664085.

96. Andre Bächtiger et al., *Deliberative Democracy: An Introduction*, *in* The Oxford Handbook of Deliberative Democracy 1 (Andre Bächtiger, John S. Dryzek, Jane Mansbridge & Mark Warren eds., 2018). In this respect, it is in many ways closer to "first-generation" deliberative theory, in a Rawlsian tradition.

plays a largely formal role in the present account.[97] While there is considerable debate in this respect, it is worth noting that an emphasis on the use of shared reasons as a basis for decisions in this context is one that is well justified by the uniquely high stakes of criminal sentencing, the risks posed by a less discriminating approach, and the collective nature of criminal law expression.

Most fundamentally, this is due to the fact that criminal liability is the gateway to the most significant and prolonged interventions into citizens' lives. As a consequence, it is here that we would show the greatest disregard for others' political autonomy by criminalizing and sentencing them either without justification or on the basis of sectarian rationales that they could reasonably reject. Practically, this would also cause issues regarding the perceived legitimacy of such interventions. Being coerced in this way would undoubtedly be antagonistic in any area,[98] but even more so in the targeted, individualizing context of criminal justice. Hinged on reasons that the offending individual might reasonably reject, a system of criminal justice would risk isolating the individual and delegitimizing public intervention in the same instance when it attempts to assert the legitimacy of public norms and indeed bring the offending individual back into that normative community.[99] To the extent that decision-making will not always result in full agreement on the outcome, opening deliberations up to private reasons risks decisions being justified by them, in whole or in part.

But even where full agreement is achieved, a reliance on shared public reasons—rather than allowing various private reasons to "converge" on that decision[100]—is necessary. Importantly, it is by doing so that criminal justice can best live up to its communicative aspiration of prohibiting and censuring *as a public*.[101] Insofar as criminal scholars expect to denounce criminal behavior on account of the reason(s) why it is criminal, a common, public rationale is necessary, and a strong conception of public reason provides this.[102] With disparate reasons, even where consensus on a decision was reached, the state would have to express either no rationale, a rationale

97. *See* Jonathan Quong, *The Scope of Public Reason*, 52 POLITICAL STUD. 233, 244–245 (2004). One concern about a more ambitious version of public reason is that the points of agreement would, in practice, be too limited or "incomplete," inhibiting our ability to arrive at decisions. To the extent that much of criminal theory is concerned with limiting the reach of criminal law, this "incompleteness" may be an attractive feature of this political framework.

98. Kent Greenawalt, *On Public Reason*, 69 CHI.-KENT L. REV. 669, 670 (1994).

99. For a related argument, *see* Candace McCoy, Wolf Heydebrand & Rekha Mirchandani, *The Problem with Problem-Solving Justice: Coercion vs. Democratic Deliberation*, 3 RESTORATIVE JUSTICE 159, 178 (2015).

100. Even among those who accept the need to arrive at decisions that are justifiable to all, debate exists about whether it is necessary for deliberations to do so on the basis of *shared* reasons, rather than separate, and potentially private, reasons that converge on a particular decision. *See* Kevin Vallier, *Convergence and Consensus in Public Reason*, 25 PUB. AFFS. Q. 261 (2011).

101. *See, e.g.*, DUFF, REALM, *supra* note 5.

102. CHARLES LARMORE, THE MORALS OF MODERNITY (1996), at 368; Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, *in* PHILOSOPHY, POLITICS, DEMOCRACY (2009), at 163.

adopted by only a segment of the community, or each rationale that was relied on. Lost in these options, then, is the ability to speak to the offending individual *as a public*.[103] For similar reasons of fragmentation, any educative aspirations of criminal justice communication would likewise be practically undermined.

B. The Significance of Mens Rea

As it stands, the literature leaves scholars without a viable explanation of how crimes can be meaningfully understood as public wrongs. Accounts to date have failed for a variety of overlapping reasons. For one, some scholars make their explanations contingent on the truth of certain empirical claims that cannot be accepted, such as asserting particular society-wide impacts or perceptions of crime. Some, in an attempt to give the public some stake in crime, distort the nature of wrongdoing in a way that displaces the moral reasons central to that wrongdoing. Some, taking more conservative positions, fail to distinguish crimes from tort's baseline public character. To address this, some turn to explanations that fail to give publicness any significant explanatory power in differentiating crime and tort.

Despite these failings, the literature does provide future scholarship with useful observations and demonstrates certain strengths that should be taken up. Among these strengths is the identification of doctrinal features useful in distinguishing crime and tort,[104] the making of public frameworks central to explaining what offenders are disregarding and how the response should be understood,[105] and the reliance where possible on relatively uncontroversial claims for public well-being.[106] Although these aspects were worked into accounts unsuccessfully, their value is nonetheless noteworthy and forms a useful starting point for a more plausible account that avoids the above shortcomings.

The significance of mens rea is central in this respect. While both crime and tort are public in a basic sense, vindication of the notion that crimes are public wrongs requires an explanation of its public character in a way that distinguishes it beyond this common, basic sense. In other words, crime must be shown to be especially or uniquely public. Some distinction between crime and tort is thus not only a necessary component of the account sought here, but its likely starting point.

As different accounts have suggested, the distinction between criminal and merely tortious wrongs might best be captured by reference to the

103. Insofar as the intersubjective nature of deliberative dialogue is transformative, a convergence view of deliberation would, in the other direction, sacrifice the benefits of requiring the offending individual to account for their behavior in terms of values shared by the community that is calling them to account. *See, e.g.*, Cohen, *supra* note 92, at 23–26.

104. *See especially* Becker, *supra* note 2; Lamond, *supra* note 4.

105. As does Markel, *supra* note 20; Markel, *supra* note 51; Marshall & Duff, *Sharing Wrongs*, *supra* note 5.

106. *See* Becker, *supra* note 2; Nozick, *supra* note 56; Fletcher, *supra* note 56.

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way in which those wrongs are committed. The differential fault element exemplified by mens rea requirements for crimes has strong explanatory power in both descriptive and normative senses. As noted above, this requirement is central to criminal doctrine, especially to views of what constitutes "true" crime, and, despite derogations, represents the "major thrust"[107] of criminality. It is typically presumed to be the case by courts,[108] and common law crimes nearly always required this—deviations being out of deference to Parliament.[109] Furthermore, the fact that something is done intentionally, knowingly, or even with particular inadvertence is intuitively significant, and has been a fact from which scholars have repeatedly drawn moral and practical conclusions.

So then what ought the scholar make of these ways of acting? Without being caught up in semantics, it is perhaps unrealistic to suggest that they should be understood as demonstrating outright "rejection," as Markel's work does. Such a view depends too heavily on a subjective fault element, seemingly makes no room for instances of objective fault, and implies a certain decisiveness or finality that may not always be present in criminal offenses. Lamond is closer in noting that this disposition in criminal offenses manifests a certain "disrespect"[110] in the sense that criminal actors are failing to have due regard or show adequate consideration. Certainly, tortious conduct exemplifies disrespect insofar as actors fail to be guided by certain values in practice, and so criminal fault should be taken, distinctively, as manifesting a *heightened* disrespect.

Certainly, this heightened disrespect is most evident in the subjective fault requirement characteristic of true crimes. The scholar might, especially on account of the present focus on *normative* reconstruction, suggest then that only offenses with subjective fault can properly be considered public wrongs and thereby warrant the criminal response—or, put differently, that crimes *should* all involve subjective fault. However, an account of public wrongs based on heightened disrespect might also make room for the view that at least some offenses with objective standards of fault could signal heightened disrespect.[111] This might include, as is the case in some jurisdictions, an insistence that, to be criminal, offenses of objective fault must go beyond *mere* negligence and constitute an especially marked departure from the civil standard.[112] A distinction between civil and penal negligence would, therefore, uphold the distinction, and offenses

107. Becker, *supra* note 2, at 275 n.18.

108. *See* citations *supra* note 55.

109. Lamond, *supra* note 4, at 612. Lamond also notes that these crimes are the standard case from the nonlegal, sociological perspective as well.

110. Lamond, *supra* note 4, at 621.

111. The present article does not take a position on this issue, only recognizing that the account might accommodate both subjective and (some) objective fault.

112. *See, e.g.*, R v. Beatty [2008] 1 S.C.R. 49 (Can.) (Canada distinguishes civil from penal negligence, holding that fundamental principles of criminal justice require this higher standard for criminal censure to be justifiable).

of "gross" negligence might similarly be maintained under this view.[113] Indeed, the fact that objective fault is typically treated in this way where genuinely criminal and not just regulatory responses are at stake only bolsters the notion that criminal wrongs are distinguishable on this basis.[114]

Taking direction from this notion of heightened disrespect, it is nonetheless important to unpack the view further: clarifying what is being disrespected and how this gives crime its public nature. While accepting the mens rea premise as central to an account of public wrongs, different conclusions can be drawn about these fault requirements' meaning and significance. Importantly, any such conclusions should be informed by a public framework that contextualizes this disrespect. Interpreting this doctrinal feature within a deliberative democratic framework not only infuses doctrine with public significance but does so in a way that addresses the shortcomings of prior accounts and better fulfills aspirations. A key contribution in this respect can be seen in regard to the issue of interpreting *what* offending individuals are manifesting heightened disrespect *for*. From this fact, both a need for public censure and an ongoing public stake in how such wrongs are addressed can be seen as logical conclusions.

C. Disrespect for Public Reasons and the Public Nature of Criminal Censure

If criminal fault is taken as signaling heightened disrespect, it remains to clarify what it signals disrespect *for* as a necessary step in appreciating the nature and public significance of that disrespect. On one hand, if criminal law is to be adequately theorized in public terms, the significance of political decision-making cannot be ignored in this endeavor. As Markel rightly argues, offending individuals should not be seen as acting in breach of some supposedly universal moral truth but rather in breach of legislated prohibitions: products of political choice. In a democracy, these prohibitions—and that which the offending individual is acting in spite of—should properly be seen as democratic decisions.

On the other hand, Markel is vulnerable to critiques that to understand crime as disrespect for democratic decision-making is inaccurate and distortive. Lamond is quite right in arguing that offenders are not condemned for rule-breaking per se, but because of the interests or values that underpin such decisions. Yet, to understand crime solely as disrespecting moral values per se is to ignore the normative significance of public theory and the impacts of the political process.[115] Accordingly, without adequately

113. *See* R v. Bateman [1925] 19 Cr. App. R 8 and R v. Adomako [1994] 3 WLR 288 (again suggesting a relevant distinction between civil and penal standards of negligence).

114. None of this is to say that regulatory offenses, imagined separately from the stigmatic censure of criminal law, could not be a distinct body of norms.

115. Lamond offers a thin explanation in this respect, only noting that the disrespected values should be public in some sense.

grounding these values in political theory, the legitimacy with which offending individuals are condemned risks being eroded.

What is needed, then, is a view that displays the strengths of both approaches—one that accounts for the public and political nature of prohibitions while at the same time remaining sufficiently linked to the values that support the normative nature of criminal condemnation. A deliberative democratic framework meets both of these needs by illustrating that what is being disrespected by the offending individual is neither a mere political decision nor a freestanding value per se, but a directive that has been publicly justified to that individual—that is, one that has been supported and legitimized by good, public reasons that they themselves could be reasonably expected to accept.

Accordingly, while offending can be understood in political context, the persuasive normative reasons that work to justify the prohibition serve as the very basis on which offending individuals are condemned. A prohibition against intentional killing, for instance, is a political decision in contravention of which the murderer is acting. However, condemnation results not from ignoring the public decision itself, but for disrespecting the public reasons (and the values that animate them) that justified that decision in the first place—in this case, presumably, the value of autonomy and human life. The reasons integral to the political legitimacy of that prohibition are thus the same that give condemnation its normative bite.

It should be clear on this view that criminal prohibitions should not, consequently, be understood as commands backed by threats. Publicly justified prohibitions do not address citizens with "*Do this, or else!*" but rather "*Do this because . . . .*"[116] Consequently, the reasons provided to citizens with criminal legislation are not, at least not primarily, those "prudential reasons" of avoiding pain,[117] but rather reasons derived from a shared political framework based on respect for mutual self-determination.[118] Accordingly, this view goes a long way toward addressing Hegel's concerns that threat-based conceptions treat "a man like a dog instead of with the freedom and respect due to him as a man,"[119] as each prohibition has been demonstrated as something that we have (our own) good reasons to forgo.[120]

Stepping back, it should also be apparent that this deliberative understanding of prohibition—public reasons justifying why citizens ought to refrain from particular conduct—explains censure itself as an intrinsic or natural reaction to criminal offending. Censure, in the sense that it can

116. This understanding seems to connect with, and add depth to, Duff's ideas around the "declaratory" nature of prohibition. *See* DUFF, REALM, *supra* note 5, at 208.

117. *See, e.g.*, R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001), at 86ff.

118. A full account of the sort of authority that criminal law commands over citizens might follow, but is beyond the present scope.

119. G.W.F. HEGEL, HEGEL'S PHILOSOPHY OF RIGHT (1942), at 246.

120. While a full account of this is beyond the scope of this article, it is worth noting that this fact may erode—insofar as there are good moral reasons being invoked to support all such prohibitions—the distinction between so-called *mala in se* and *mala prohibitum* wrongs.

be understood as expressing that the offending individual ought to have acted differently, can be seen as the expressive *reassertion* of those public reasons justifying prohibition. Where the polity deliberates and justifies its prohibitions with good reasons, and the offending individual acts against those reasons with particular disrespect, it is a logical consequence that the polity disappointedly reasserts those reasons upon finding out.[121] Censure, therefore, can be seen as a natural continuation of the persuasive burden that the state carries in relation to its citizens in a deliberative democracy.

In addition to offering a compelling foundation for censure that avoids the distortive effects that have concerned scholars, this account has two further features worth making explicit. For one, the nature of *public* reasons ensures the legitimacy of that censure in the eyes of the censured. The offending individual is not just given reasons for why he ought not to have acted in the way he did, but persuasive reasons that he himself could reasonably be expected to accept, and is respected as an autonomous citizen accordingly. A deliberative approach to prohibition therefore not only secures legitimacy from a normative perspective, but, if properly actualized, would likely bolster perceptions in practice.

Second, this view also gives substance to the notion that those who offend are not only subject to censure, but *public* censure. Such a view is, for instance, central to Antony Duff's recent statement of the nature of criminal law,[122] and is not just to claim that the state is the one censuring, but that it is the public—the normative community—with whose voice they speak. A deliberative framework takes this claim beyond the symbolic. Interpreted in the way suggested above, the language of public reason is that of shared reasons—in other words, reasons that the full breadth of the public could reasonably be expected to accept. By forgoing justifications that could reasonably be rejected by some, a deliberative view best realizes the claim that public decisions, and the actions that give rise to them, are collective in nature.[123] When reasserting these (public) reasons following

121. This consequence is supported in part by the fact that crime involves *heightened* disrespect for these reasons. Surely, insofar as would be required for their own legitimacy—as, recall, they too are public in a basic sense—tortious standards of care ought to be supported by public reasons as well. In failing to conduct themselves in line with these standards of care, tortfeasors might demonstrate some disrespect for these reasons. Nonetheless, the degree to which this disrespect warrants condemnation is clearly much less, and is sufficiently addressed by the implied disapproval of civil liability. Importantly, it should be added that the sense of censure and expression invoked here is a literal one. The logical consequence is a communicative one, through the use of language, and not to be distorted into a symbolic justification for retributive punishment. Censure here, therefore, should not be understood as "deserved"—with the risks of importing other moral logics into the analysis—but simply "warranted" or "necessitated."

122. Duff, Realm, *supra* note 5, at 109ff. *See also* Sandra G. Mason, *The Concept of Criminal Law*, 14 Crim. L. & Phil. 447 (2020).

123. Cohen, *supra* note 102, at 163. Albeit seemingly noncommittal to this lens, Marshall and Duff approach this idea by discussing the notion of overlapping consensus, but do not take the idea to this conclusion. *See* Duff & Marshall, *Public Wrongs*, *supra* note 5. *See also* Duff, Realm, *supra* note 5, at 180 (suggesting that Duff's doubts about realizing this may be part of the reason).

offense, then, the normative perspectives being expressed are those shared by the public.[124] It is in this way that censure can properly be understood as public censure.

In highlighting the value of a specifically deliberative vision of democracy, it is also worth noting that an aggregative view of democracy would offer a much more precarious account of criminal justice. Under an aggregative view, a criminal prohibition might represent no more than the bare fact that the majority of citizens preferred that this act not be done. The reassertion of reasons, in such a case, does not follow naturally from the fact of prohibition, and the polity may in fact be reduced to appealing, as Markel did, to the democratic nature of the regime in condemning particular acts.[125] The citizen is thus reprimanded on the basis that he ought to have acted differently because a majority of his fellow citizens thought so. This deprives censure of its moral voice. Reasons that incidentally underpin citizens' preferences may not be those acceptable to others, and therefore risk the legitimacy of condemnation even if reasserted.[126] In any case, the absence of public reason as a coalescing constraint, substituted here for a variety of disparate rationales or preferences, deprives condemnation of its collective, public character. Where, for instance, the normative content of censure is adopted by a simple majority of the public, it cannot be said that that censure represents the voice of the public as a whole.

D. The Public Interest in Criminal Wrongdoing: Beyond Censure to Sentencing

Based on the argument so far, it could be argued that crimes are public wrongs in that they are wrongs that warrant public censure; however, this alone provides an unnecessarily weak explanation of crime's public character. Such an account, while perhaps going some way toward explaining the resources deployed in bringing crimes to trial, cannot do so fully.[127] Moreover, the logical response of public censure inadequately explains the subsequent sentencing process that gives rise to unparalleled state involvement in the lives of offenders following sentencing. Why, if the state only needs to reassert the public reasons behind prohibition—a reassertion that can be made verbally by the judge at the point of conviction—do institutions of criminal justice function to carry forward often-intimate public involvement? For this reason, at least, scholars ought to go further in exploring the public significance of the offending individual's heightened disrespect.

The questions of how scholars ought to do so, and specifically what additional significance heightened disrespect ought to be seen as carrying, are

124. Duff does seem to endorse a thinner version of public reason. DUFF, REALM, *supra* note 5, at 110, *see also* 180–181.

125. Markel, *supra* note 20, at 258 n.71.

126. LARMORE, *supra* note 102, at 136–137.

127. Similarly, see above discussion of accounts of public wrongs by Duff, Lamond, and Lee.

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central in this. In giving meaning to this facet of the crime-tort distinction, Lamond interprets disrespect using a retributive rationale—the dominant perspective in public wrongs scholarship.[128] In this logic, the disrespect manifested by criminal offending—unlike tortious wrongdoing—*deserves punishment*, and it is this desert that explains the continued and involved role of the state following conviction as the body that inflicts that punishment.

There are, however, several good reasons against interpreting this disrespect in a retributive way. For one, insofar as retributive theory is not universally accepted as providing society with positive reasons to criminalize,[129] the existing gap within scholarship relating to a nonretributive explanation for public wrongs is very significant. Certainly, the scope of this article does not permit the assessment of the freestanding merits of retributivism; however, such an assessment is unnecessary so long as it is recognized that retributivism is neither the only possible vision of criminal justice nor one that is universally accepted. Given this context, it is to the benefit of both criminal scholarship generally and nonretributivists specifically that an account of public wrongs not reliant on retributive logic is outlined.

A second objection to interpreting the significance of disrespect using a retributive logic might come from the notion of public wrongs itself and has been surveyed above. If disrespect is interpreted in such a way as simply signaling those wrongs that deserve punishment, the account fails to assign crime any distinctive public character. Instead, it leaves crime to be understood as public only insofar as it is a legitimate target of state intervention, like civil wrongs, but distinguished by retributive logic.[130]

A third objection comes from the scope of the explanatory power of a retributive logic. Here it can be noted that a retributive interpretation does not easily account for the public nature of criminal wrongs that might be deemed to warrant further intervention, such as rehabilitative efforts, but not punishment. In such cases, a retributive account struggles to offer a compelling explanation of what is public about these wrongs and why the state takes ownership of them. While not the focus here, a nonretributive account of public wrongs might, in part, offer a better and more coherent explanation of the state's continued public interest and involvement in cases where individuals are found not criminally responsible due to mental disorders.[131] While retributive logic cannot in these cases be

128. Each of Lamond, Markel, Marshall and Duff, and Lee—all of whom largely represent the latest scholarship in the area—either explicitly adopt a retributive rationale in giving crime public meaning or suggest that these questions be considered. Lee seems to be relatively noncommittal in this respect, but still refers to retributive questions and does not exclude the rationale.

129. This, it should be noted, encompasses not only nonretributivists, but also retributivists who see retributivism as playing only a permissive or restrictive role.

130. *See* Section II above.

131. *See, e.g.*, Criminal Code, §672.1ff. (Canada) or Domestic Violence, Crime and Victims Act 2004, §24 (England and Wales).

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used to explain that public interest, parts of a nonretributive account set out in the following may very well.[132]

Lastly, there may be an objection that proceeds from deliberative democracy as a political framework itself, arguing that desert-based rationales fail to respect the demands of public reason. While a full exploration of this argument is not possible here, one might very briefly recall that public deliberation requires reasons that are "public" both in the sense of being shared across competing world views[133] and in the sense of being subjectable to proper empirical scrutiny.[134] In these respects, a desert-based logic is, despite present-day prominence, still controversial.[135] Accordingly, its employment in the face of contemporary society's reasonable pluralism fails to respect those who cannot endorse it.[136] Moreover, desert claims—that is, quasi-empirical claims about what or how much an individual deserves—have been sharply criticized as being "opaque": not only hiding their internal rationales or calculations, but among these, potential biases that undermine democracy's core value of equality.[137] Both of these observations, therefore, may raise questions about the suitability of retributive logic within democratic deliberation.

To the extent, then, that any of these reasons suggest an account of public wrongs not reliant on retributive logic is valuable, an alternative is necessary. To date, however, accounts that offer an alternative interpretation of the significance of heightened mens rea have failed. The particular flaws of these accounts were surveyed above, and it remains to outline a viable alternative.[138]

132. In short, an explanation of these "not criminally responsible" cases would involve noting (1) that such defendants, through their actions, *also* fail to have due regard or show adequate consideration for public values, evincing heightened disrespect, (2) that because of this, they too signal the prospective public interest, to be discussed later in this article, which warrants intimate, intensive public involvement after the fact, and (3) that because of their lack of culpability due to health conditions, there is no value in the moral dialogue component of this account (i.e., the reassertion of public reasons as censure), and thus the stigmatic, expressive dimensions of *criminal* justice do not apply. This explains how the basic structure of *a violation of a defined offense followed by (albeit qualitatively different) intensive public responses* is shared among both "criminal" and "non–criminally responsible" (NCR) offenses. Both might be explained accordingly as "public wrongs" in this sense, with only the former as criminal, though it is also possible to name only crimes as public wrongs and simply recognize that the analytical work done in this account of crimes as public wrongs also explains our rationale for NCR cases. This fact that it does so should lend weight to the account on which this article focuses. *See also infra* note 142.

133. Rawls, *supra* note 92; LARMORE, *supra* note 102.

134. AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996), at 55ff.

135. *See also* David Dolinko, Some Thoughts About Retributivism, 101 ETHICS 537 (1991); Russell L. Christopher, *Deterring Retributivism: The Injustice of 'Just' Punishment*, 96 NW. U. L. REV. 843 (2002). *See also* Benjamin Ewing, *The Political Legitimacy of Retribution: Two Reasons for Skepticism*, 34 LAW & PHIL. 369 (2015).

136. For one argument along these lines, *see* Ewing, *supra* note 135, at 390ff. (suggesting, in brief, that "[f]or a state to criminally punish its citizens partly for reasons of retribution is for it to pursue a highly controversial conception of the good at the expense of citizens' fundamental, universally shared interests in liberty and security").

137. *See* Ristroph, *supra* note 15.

138. *See, e.g.*, Becker, *supra* note 2.

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Beginning with the idea that criminal offending signals a heightened disrespect for public reasons and the values behind them, it is no great step to recognize that offending equally signals an important need to bring the offending individual back within the normative community. Certainly, to a community concerned with seeing its shared public values respected—this being inherent in the fact of holding them, and legitimized by holding them *collectively*[139]—this is necessary. These would, in such cases, be the values that the community has intentionally chosen to realize in collective life, and given that publicly reasoned prohibitions would necessarily have had to outweigh countervailing concerns of personal liberty,[140] the realization of those particular manifestations would be of special importance. Heightened disrespect, not just internalized but demonstrably acted on, signals to the polity that the offending individual is insufficiently governed by the public reasons and values it has set out. Naturally, then, this gives rise to a concern about the actor's future behavior—in repeating the same or similar conduct—and signals a potential need to take steps to ensure that such values are realized going forward.

In other words, criminal acts, established as those acts that demonstrate heightened disrespect for public values, ostensibly signal a *prospective public interest*: due to the fact that public values—the safety or well-being of citizens, for example—are seemingly insecure, the public can be seen to have a *stake* in how that wrong is addressed. The public has reason to believe that, in order to sufficiently safeguard their interest of realizing their values in the way that they have collectively reasoned, public intervention may be required. Crimes, in this sense, are public wrongs not in the sense that such acts themselves harm or wrong the public—and are thus understood as acts "against" the public—but because they are *wrongs in the addressing of which the public has a rightful stake*.

Private wrongs, in contrast, do not signal this public stake, either because they fail to signal the same level of disrespect, or because the intentionality they evince is not directed at public values. As discussed previously, mere torts, despite involving publicly imposed duties, do not signal the same worrying degree of disrespect for public values that criminal levels of fault do. Where torts *are* committed intentionally, there tend to be parallel criminal offenses that capture these acts where they rise above the level of being "mere" torts. Criminal law thus serves to address the public dimension of these wrongs, leaving private law to address private concerns. Moreover, while intentionality may be present in contractual breaches, for example, it manifests against privately determined obligations, rather than publicly reasoned ones. When a breach of contract *does* show disrespect for public

139. Recall that it is this that, as per the political framework espoused here, renders these values legitimately acted on by the public. It is not all values that are open to state support—only shared values.

140. Without suggesting that the content of public reason is fully identifiable from a philosophical perspective, its inclusion of liberty in particular should be a safe assumption.

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values—for instance, where those breaching do so knowing that it will endanger life or cause serious bodily injury, they too may be subject to criminal attention.[141] Criminal wrongs, therefore, uniquely signal a public stake.

Censure, insofar as it is understood as a process of persuading the offending individual that they ought to have acted differently, goes some way toward addressing these concerns. In certain circumstances, this may itself be sufficient and no further action may be required.[142] It may be that, where absolutely no steps to secure the public interest are warranted, it suffices to publicly denounce the conduct in question and leave the offending individual to offer reparation through civil law. At the same time, censure by itself may be insufficient in other cases, and more may be needed. Consequently, upon conviction it remains to be asked what the public stake is specifically, and whether and what intervention may be further required to address it. The process of sentencing, in this view, is therefore properly understood as public decision-making aimed at how state power and resources should be used for this purpose.

The reason the state has control of criminal wrongs and proceedings in the way they do, then, is not merely instrumental. Rather, it is because, as the body through which the public collectively and legitimately manages its interests, the state has a moral or proprietary claim to the problem.[143] Insofar as the wrongdoing signals the public's interests, the problem is rightfully *its* problem.[144] Accordingly, the state *ought* to ensure that these wrongs are detected and managed in a way that is in line with the public's interest. Generally speaking, this necessitates that those working in a public capacity,

141. *See, e.g.*, Canada's *Criminal Code*, §422.

142. It should be made clear in this respect that while censure and public decision-making follow from the same notion of public wrongs, they are in fact distinct and separable responses that should not be conflated. Stepping back, either of these responses could, in different circumstances, suffice on its own. In addition to the case where censure itself suffices to address any public concern, the distinction between censure and the question of how to manage the public interest is further evidenced in cases where, because of mental illness, those offending are deemed to be "not criminally responsible." In such cases, the condemnation or censure of criminal blame is rightfully thought to be inappropriate and is omitted. Nonetheless, despite the fact that there is no need for censure, there is still evidently a public interest in managing the offending individual, and thus the basic structures set up in this respect apply. Given an understanding of censure as the reassertion of public reasons for abstention from certain behavior, this is readily explicable: either because the cause of the offending was not a disrespect for values but instead mental illness (and thus, with the illness addressed, there is no real need to reassert those reasons), or, because of the mental illness, it makes little sense to engage in moral dialogue (as the interlocutor may not be in a mental position to appreciate those reasons).

143. *Cf.* Christie, *supra* note 35.

144. It is so "insofar" as this is signaled because there can of course be parallel actions against an offending individual, and while these actions may overlap, criminal proceedings are concerned with the public's interests while leaving private interests to civil proceedings. Consider, for instance, the emergence of punitive damages in civil proceedings or compensation orders in criminal proceedings. Also, note that the victim's interests can of course be seen as part of the aggregate public interest as well. *See* Marie Manikis, *Conceptualizing the Victim Within Criminal Justice Processes in Common Law Tradition*, *in* THE OXFORD HANDBOOK OF CRIMINAL PROCESS (Darryl K. Brown, Jenia I. Turner & Bettina Weiber eds., 2018).

rather than private citizens, make legal decisions in pursuit of and in response to these wrongs.[145]

Critics might object that the above account relies on implausible empirical claims and argue that it is inaccurate to say that the public necessarily fears or is all that concerned about offending individuals' future behavior or dispositions. To be sure, it is possible that this is not, or is not always, the case. However, it is important to be clear that the account offered here does not rely on the assertion that the public in fact feels this way. Fundamentally, the argument offered here is normative, not empirical: it is that the nature of crime is such that it gives *good reason* to be concerned about the public's prospective interests. Because of this, it is a natural response, at least for a vigilant state with concern for the values it legislates, to facilitate something akin to the criminal process in order to determine the degree to which such concern is warranted in each case and what to do about it. Insofar as political processes give rise to a vigilant and competent *government*, if not public, this should also be an empirical fact.

Moreover, the point is not that every crime requires a public response beyond the confrontational reassertions of censure, only that the nature of crime is such that it firmly raises the question. Indeed, the open-ended nature of this question adds to the account's defensibility. Certainly, criminal offenses—even those pursued and brought through to conviction—are not always felt by the state to warrant public involvement following conviction. This is why absolute or conditional discharges remain sentencing options. Where it is felt necessary, public involvement can take a variety of forms and have a variety of more specific objectives. Accordingly, unlike other accounts, the notion of crime here does not compel a response, nor compel a particular *kind* of response. Instead, this view of public wrongs and the sort of responsiveness it inspires reflect the reality that, first, public involvement may not be justifiable and, second, the type of response—both qualitatively and quantitatively—varies depending on the person, the details of the offense, and other considerations.

Consistent with this ex ante indeterminacy, and as noted above, this account entails a sentencing process understood in a basic sense as public decision-making aimed at whether and how state power and resources should be used to manage the public interest. It is at this stage that appropriate responses to specific offenses are determined. The account of public wrongs set out here *itself* says little about what those responses should be, though by virtue of adopting its political framework, it does offer some

145. Manikis convincingly demonstrates that victims can further this pursuit of the public good by acting as a motivated check on decisions made by public prosecutors. *See, e.g.*, *id.* Nonetheless, as a general policy, public control is appropriate. The same might be said about delegating criminal justice decision-making to victim-offender mediation: it might be the case that in certain circumstances addressing crime through these "private" processes can effectively address public concerns—for instance, by way of the changes they can spark in offending individuals.

procedural guidance in that respect. Carrying a deliberative account of legitimacy forward, the (discretionary) public decision-making that sentencing involves might also be conceived of as requiring a deliberative process aimed at publicly justifying a sentence.[146]

In this respect, the reasons with which particular responses might be justified will too need to respect the constraints of public reason, and chosen responses must take into account ideals intrinsic to deliberative democracy itself—for instance, a commitment to equality, an understanding of citizens as rational and autonomous beings worthy of respect, and a consequent privileging of dialogue over coercion.[147] The kinds of reasons that can be employed do not themselves necessarily preclude substantive choices,[148] and it should be clear that, oriented toward securing the public's prospective interest in any given case, there exists a variety of possible interventions. It is not necessary, for the foregoing account of public wrongs to be accepted, to enumerate the available options here. While accepting that this is likely to involve any number of treatments, educational and capacity-building programs, or less-than-pleasant confrontations, what these will be will ultimately be determined through public reasoning including not only shared moral claims but also empirical claims substantiating that the strategy being advocated for is likely to achieve its aim vis-à-vis the public's interest.[149]

Earlier, it was made clear that it was neither necessary nor particularly desirable to conceptualize punishment as an *essential* feature of an account of public wrongs;[150] however, this was not to say that punishment could never be a publicly justifiable response.[151] Whether, in what form, and

146. For more on this point, *see* Kennedy, *Citizen Victim*, and Kennedy, *Justifiability*, *supra* note 91. For other perspectives on deliberative sentencing, *see* de Greiff, *supra* note 91; Iontcheva, *supra* note 91. It is notable in this respect that current sentencing practice may be recognizable as such: including, as it typically does, reason-giving obligations, a defined set of "public" rationales for sentencing decisions, and submissions from a plurality of stakeholders (noting differences among jurisdictions, this frequently includes defense, crown, authors of presentence reports, and even victims and community members).

147. Roberto Gargarella has suggested that deliberative democrats ought to reject consequentialist approaches that do not respect citizens as autonomous persons. Roberto Gargarella, *Tough on Punishment: Criminal Justice, Deliberation, and Legal Alienation*, *in* LEGAL REPUBLICANISM 171–172 (Samantha Besson and José Luis Martí eds., 2009).

148. Rawls, *supra* note 92, at 795. If it is right that some rationales—for instance, retributive desert claims—do not satisfy the tests of public reason, this would however be influential in terms of what outcomes would be chosen. *See, e.g.*, Ewing, *supra* note 135 and related discussion of the implications of Ristroph's work on opacity.

149. GUTMANN & THOMPSON, *supra* note 134, at 55–56.

150. *See* discussion above in Section I.C.

151. The notion of punishment is not without varying interpretations, and moreover, is sometimes invoked unhelpfully as a blanket term for coercive interventions generally. For clarity, the term's usage here is in line with Christie's understanding as the "inflict[ion] of pain, intended as pain," which features in a diversity of mainstream theories of punishment. *See* NILS CHRISTIE, LIMITS TO PAIN (1981), at 5. For a helpful discussion of the varying uses of the term, *see* Martin Wright, *Is It Time to Question the Concept of Punishment?*, *in* REPOSITIONING RESTORATIVE JUSTICE 5–7 (Lode Walgrave ed., 2011).

when this might be so would require a separate exploration of both its basic compatibility with a deliberative democratic framework[152] and the conditions in which it would be justifiable. In this and other respects, a focused exposition of a deliberative democratic theory of criminal sentencing is warranted, but beyond the present scope. For the time being, it suffices to note that at the stage of sentencing, deliberations ought to focus on how, in light of the offending individual's conduct and circumstances, the public's interest in realizing their values can best be secured through engagement with those evincing particular disrespect.

IV. CONCLUSION

Despite historical prominence and renewed attention in recent years, scholars have yet to develop a viable account of how crimes can be understood as public wrongs. Recent writings have, accordingly, either expressed doubts that such an account is forthcoming or reeled back expectations for what the idea itself can accomplish. These sentiments are, however, premature. While the shortcomings of various accounts have differed, a common thread throughout past attempts is a relative neglect of the explanatory potential of political theory in establishing crime's public nature. Given the inherent interdependence of such theory and understandings of publicness, a central premise of this article has been that revisiting the public wrongs debate with greater attention to democratic theory can provide renewed hope for this longstanding perspective on crime.

After surveying prior accounts and clarifying both the expectations for an account as well as the role of political theory, this article has worked to vindicate crime's public character by offering a novel account, relying on both key doctrinal features and a deliberative democratic framework through which to interpret their public significance. A background of deliberative democracy was shown to account for crime's unique status as wrongs that elicit public censure and explained censure as a reassertion of the deliberated public reasons that underpinned prohibition. Ultimately the article has argued that crimes are public wrongs in that, by manifesting heightened disrespect for public values, they signal a prospective public interest in how those wrongs are addressed. Put differently, crimes can be understood as public wrongs not because such actions themselves necessarily wrong or harm the public, as many have suggested, but instead because they are the type of wrong that the public has a stake in addressing.

In all, the article demonstrates that conceiving of crimes as public wrongs is indeed defensible. Consequently, it not only contributes to criminal theory's need to better understand its object, but also contributes to its aspirations to ground that object in a political framework. However, the arguments here may be of significance outside a focus on crime per se. While

152. For one answer to this question, *see* de Greiff, *supra* note 91.

engagement with the notion that crimes are public wrongs has largely occurred in relation to criminalization, the account offered here suggests that the notion is equally relevant to sentencing and punishment debates. Not only does the account clarify the nature and role of censure, it also suggests a conception of sentencing as an instance of public management of collective interests. While this line of thinking cannot be taken further here, the article suggests that further work in this respect may be warranted. Further progress in this respect would add benefit not only in terms of exploring implications for existing work that theorizes responses to crime, but also as a means of contributing to greater coherence across the various stages or debates within criminal justice.