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Inaugural Address

R. A. Duff

Towards a Theory of Criminal Law?

After an initial discussion (§I) of what a theory of criminal law might amount to, I sketch (§II) the proper aims of a liberal, republican criminal law, and discuss (§§III–IV) two central features of such a criminal law: that it deals with public wrongs, and provides for those who perpetrate such wrongs to be called to public account. §V explains why a liberal republic should maintain such a system of criminal law, and §VI tackles the issue of criminalization—of how we should determine the proper scope of the criminal law.

I

Towards a Theory of Criminal Law? I should begin by explaining my title, and its concluding question mark. The 'towards' reflects the fact that even a sketch of a full theory of criminal law would be too ambitious an undertaking for one paper. Our concern is with normative theory: an account of what criminal law ought to be or to do. A complete normative theory of criminal law, however, would need to cover not merely the scope, content and structure of the substantive criminal law, and the legislative processes through which crimes are created or defined, but also the activities of those who enforce the criminal law; the criminal process of investigation and trial; and the punishments to which those whom that process convicts become liable.[1] All I can hope to do here is offer some pointers towards some of the central ingredients of such a theory.

The question mark in the title gestures towards the questions that must be asked about the kind of theory of criminal law that we should aim to develop. At least two kinds of critic will argue that the enterprise is doomed. First, radical abolitionists who aspire to abolish not just criminal punishment, but the whole institution of criminal law, will argue that the search for a normative theory of criminal

[1] Compare Braithwaite and Pettit (1990, ch. 2); contrast Moore (1997).

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law is as futile as is the search for a normative theory of slavery: we can ask how a society should organize its affairs, and how it should deal with harmful or disruptive types of conduct (with 'conflicts' or 'troubles' that arise among its members); but a normatively adequate answer will not include a system of criminal law.[2] Second, proponents of 'Critical Legal Studies' will argue that criminal law is riven by fundamental contradictions that undermine any claim to principled rationality, and render impossible the kind of 'rational reconstruction' (see MacCormick 1990) of criminal law that a normative theory must aim to provide.[3] Answers to both these sets of critics should emerge in what follows. Abolitionists remind us that we cannot take criminal law for granted, as a necessary feature of any human society; to answer them we must show why criminal law matters by showing what distinctive ends it can serve, what distinctive values it can embody—and thus showing that, whatever the deficiencies of our existing systems of criminal law, they require reform rather than abolition. The quick answer to 'critical' theorists is that they need to distinguish rational conflict from reason-negating contradiction: if ours is a normatively messy world of rationally irresoluble conflicts between different and often incommensurable values and moral demands; and if the criminal law is one of the institutions through which we try, collectively, to orient ourselves and to sustain our lives in such a world: an adequate normative theory of criminal law must do justice to those conflicts, and to the impossibility of resolving them without remainder. The rationality of a rational reconstruction will then be secured, rather than undermined, by the way in which it portrays the criminal law as a site of conflict.

There are further questions to be asked, although they cannot be pursued here, about the scope of a theory of criminal law. Should we aspire to a universal theory of criminal law as such—one that applies to any system of criminal law, wherever and whenever it exists (see, for example, Moore 1997, ch. 1)? Or should we aspire only to a more local theory that will be apt not for all human societies, but for some more limited 'us' and societies like ours? One reason to be cautious about would-be universal theory concerns the dependence of criminal law theory on political theory. Since crimi-

[2] See, for example, Christie (1977) (on 'conflicts'); Hulsman (1986) (on 'troubles'); Bianchi (1994).

[3] See, notoriously, Kelman (1981); and, less iconoclastically, Norrie (2001).

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nal law is one of the organs of the state, a theory of criminal law must appeal to an account of the proper aims and duties of the state, and explain how this institution can serve those aims or assist in the discharge of those duties; a crucial part of this must be an account of how the state should treat those over whom it claims authority. If we could produce the one true normative political theory, applicable to all societies at all times and in all places, we could hope to produce the one true theory of criminal law, as a theory of what the criminal law should be and do at all times and in all places. If, however, we eschew such grand ambitions, we can start more modestly and more locally: we can ask what kind of criminal law, serving what ends and expressing what values, is appropriate for a more limited 'us', as citizens of a particular kind of polity. It would be a substantial achievement to answer that more modest question, before going on to ask how far we can expand that 'us'.

To ask what kind of criminal law is appropriate for us raises, of course, the immediate question of who 'we' are.[4]

II

To Whom Does the Criminal Law Speak? Normative theorizing about criminal law often starts with the aims of criminal law: what are its proper purposes? But there is a prior question: who is criminal law for? The criminal law aims to govern, to guide, or to control (which verb we use here matters) the conduct of a population. Even if aspects of the law are addressed to courts, rather than to the population whose conduct falls under the law's jurisdiction (see Dan-Cohen 1984; Alldridge 1990), it is implausible to suggest that the law is addressed only to courts or officials: it speaks as well to those with whose conduct its courts and officials deal.[5] Before we ask what its aims should be, we must therefore ask how it should portray, and address, those whom it claims to bind.

Different legal theories imply different answers to this question. Classical positivism, for instance, as purveyed by Austin and Bentham, tells us that the criminal law, like all law, deals with sub-

[4] We should also remember the danger that the 'we' who offer a theory of criminal law might in fact be an atypical subgroup of the 'we' whose law it is supposed to be.

[5] *Pace* Kelsen (1945, p. 63); see Hart (1994, pp. 35–42).

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jects. A sovereign issues commands, backed by threats, to a populace; their role is to hear and obey those commands. Something like this is also implicit in accounts that portray criminal law as a set of prohibitions, or as a technique for controlling behaviour: prohibitions, like commands, imply a distinction between those who prohibit and those who are to obey, whilst behaviour-controlling techniques are applied by would-be controllers to a population whom they would control. In sharp contrast, traditional legal moralism implies that criminal law deals with and addresses us as moral agents: if, for instance, the proper aim of criminal law is to achieve retributive justice by punishing morally culpable wrongdoers (Moore 1997, ch. 1), it is concerned with people as potential or actual moral wrongdoers. (Thus for a legal positivist, the fact that the wrong I commit in Scotland is dealt with by a Scottish court under Scots law, while the wrong that my French friend commits in France is dealt with by a French court under French law, reflects the fact that I have disobeyed the commands of the Scottish sovereign, whereas she has disobeyed those of the French sovereign. On Moore's account, by contrast, such matters of jurisdiction are of only secondary significance: they simply reflect an appropriate, efficient division of moral labour between different states.)

Neither of these views is satisfactory. Classical legal positivism might capture the actual impact of criminal law on many of those who are subject to its coercive attentions: it might be seen and heard by all too many as an alien imposition that demands obedience on pain of sanctions if they disobey. But that is not how the law should address or be heard by members of a liberal democracy of the kind that we aspire to be. Moore's account does take the moral standing of those who are subject to the law seriously: they are addressed not as subjects of an alien sovereign, but as moral beings living under a law—the moral law—that is their law. But Moore does not take the locality of criminal law seriously enough. When a Scottish court tries a Scottish thief, it is not acting as the agent of the moral law, given jurisdiction over this thief, but not over a French thief who is tried in France, as a matter of practical convenience. It is acting as the agent of the local political community whose law it administers; what gives it jurisdiction over the Scottish thief is not his status as a moral wrongdoer who happens to be within its reach, but his status as a member of that political community.

A better answer is that the law should see and address those

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whom it claims to bind as citizens. There is of course an austere sense of 'citizen' in which this answer is an unhelpful truism: the citizens of a state are simply those whom its laws claim to bind. But we can make this answer more helpful by asking what citizenship could amount to in contemporary polities like our own, which aspire to be liberal democracies. An appeal to 'liberal democracy' is not yet much more helpful, given the different meanings that theorists attach both to 'liberal' and to 'democracy', but we can give the idea a slightly more determinate content by appealing to the republican tradition that makes citizenship a central idea(l) for a polity.[6] Citizenship, for a republican, involves equal and mutually respectful participation in the civic enterprise; a key difference between different republican theories, and in particular between liberal and more communitarian species of republicanism, concerns what they build into the civic enterprise—which aspects of citizens' lives and relationships count as part of the *res publica*.

Republican citizens see themselves as belonging to a particular political community, and as connected through the practices and values of that community to their fellow citizens. This is not the only, and might well not be the most important, community to which they belong; it is one among many communities, many forms of life, in which they live, some of which are narrower and more local in their geographical or affective scope (as well as being a citizen, I am a member of a family, of various groups of friends, of a university, perhaps of a village), whilst others are wider and more universal (I am also a philosopher, a moral agent, a human being—though the last two are rather more problematic). The polity is a distinct community, engaged in a distinctive enterprise of living together, structured by a set of values that help to define that enterprise, and by a distinction that any community must draw between what is 'public' and what is 'private': between what is, and what is not, the business of members of the community in virtue simply of their membership. It is a law-governed and law-constituted community: the law (including but not only criminal law) structures and governs significant dimensions of the civic enterprise; but the law, and the citizens' shared respect for the law, also helps to constitute them as a political community.[7]

[6] Two useful examples of contemporary republicanism are Dagger (1997) and Pettit (1999).

[7] On this community-constituting aspect of law, see recently Raz (2009, ch. 4). It is important to remember, however, that in a viable polity much of the civic enterprise is not (directly) governed by the law.

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That law is their law, in two ways that mark this conception out from the other two noted above. It is their law, first, as a common law:[8] not a set of commands imposed on them from the outside, but a law that expresses the values by which they define themselves as a polity; not a law issued by a sovereign demanding their obedience, but a law that speaks in their own collective voice, in terms of values that are their own. Furthermore, although a common law is not by definition a democratic law, republican law of a kind appropriate to a contemporary polity is democratic law: citizens can see themselves (through whatever legislative process they operate) as authors of their law.

Second, it is their law rather than a law for all humanity, or for all moral agents: it binds them, but does not bind the French thief operating in France. The point is not that they do not regard thefts committed in France as wrongs, or think that the moral values expressed in their law have normative authority only over them; they need not be moral relativists. The point is that their law is concerned with the implications for this polity of the values that it expresses, and with the conduct of its citizens in relation to those values: a Frenchman's theft is a wrong, which English citizens can deplore; but it is not the business of English criminal law.

(We should note, although we cannot discuss here, two ways in which this simple picture of republican law as a law for citizens needs to be complicated. First, the law of any civilized polity binds and protects not only its citizens, but temporary residents: that is why some adopt a territorial account of jurisdiction (see Hirst 2003, ch. 3). It is better, however, to understand this aspect of jurisdiction as concerning the treatment of guests: a civilized polity extends to guests the same protections and expectations as its citizens share; but its law is its citizens' law, not everybody's law. Second, I have taken for granted the grounding of jurisdiction in separate nation states, each with its own system of law; but, of course, the world is no longer like that. In particular, we should note the growth of a European criminal law (see Mitsilegas 2009), and of a truly international criminal law (see Cassese 2008).[9] So we must ask whether we

[8] On the idea of a common law in play here, see Postema (1986, chs. 1–2); see also Cotterrell (1995, ch. 11).

[9] Also worth discussing are the claims to 'universal jurisdiction' over certain crimes that some legal systems make: see e.g. Criminal Justice Act 1988 s 134; *R* v. *Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte* [2000] 1 AC 14.

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can still talk of citizenship, or something like it, in these larger contexts: of being citizens of the EU; of being citizens of 'humanity' as a whole.)

What kind of criminal law would citizens of a liberal republic maintain? We cannot make detailed progress on this issue without knowing more about the values by which they define their civic enterprise, but it will be enough for present purposes to note that their civic life, and their understanding of what is a public matter, will be structured by versions of familiar liberal values such as equality, liberty and privacy, and a commitment to equal concern and respect for all citizens by all citizens (see Dworkin 1985, ch. 8; 1989). Those values help to determine both the content and scope of the substantive criminal law, and its procedures and its punishments. The key point for our present purposes, however, is that the criminal law must be one that citizens can, consistently with those values, impose on each other and on themselves: it must treat those whom it addresses, and those on whom it forces its attentions, with the respect and concern due to them as citizens. But what kind of law could that be?

The next two sections highlight two features of the kind of criminal law that republican citizens could, consistently with a mutual recognition of their shared citizenship, impose on each other and on themselves.

III

Public Wrongs. The first feature of a republican criminal law is its distinctive focus on wrongdoing. It is of course arguable that a focus on wrongdoing is a defining feature of criminal law as such—though that is not yet to say that its focus is on moral wrongdoing: the criminal law does not simply attach penalties to specified types of conduct, but condemns those kinds of conduct and censures those who engage in them.[10] What is suggested here, however, goes beyond this definitional point in two ways. First, the criminal law is focused on moral wrongdoing: if we ask what could justify subjecting someone to a criminal trial and punishment, a central part of the

[10] Compare Feinberg (1970) on the distinction between punishments and penalties; see also Hart (1968).

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answer must be that what she is tried and punished for constitutes a moral wrong. Second, such wrongdoing is not just a necessary condition of criminalization, but its focus. The claim is not, for instance, that we may criminalize conduct that causes or threatens harm to others, in order to prevent such harm, but only on condition that the conduct is morally wrongful.[11] It is that we should criminalize morally wrongful conduct because it is wrong; wrongfulness is the object, not merely a condition, of criminalization (see further Duff 2007, ch. 4).

This might sound like a familiar species of legal moralism: the proper aim of the criminal law is to condemn and punish moral wrongdoing (see e.g. Moore 1997). There is, however, a crucial difference. The truth in legal moralism is that the criminal law is properly concerned with moral wrongdoing; the error in traditional types of legal moralism is the claim that the criminal law is in principle properly concerned with all moral wrongs: no moral wrongdoing is in principle beyond its reach.[12] This does not commit legal moralists to arguing that every kind of moral wrongdoing must be criminalized: although we have reason to criminalize all moral wrongdoing, there are other and stronger reasons not in the end to criminalize many kinds of wrong—reasons having to do, for instance, with the way in which criminalization and attempts to enforce the law would seriously impinge on citizens' liberty and privacy.[13] But it does commit them to arguing that the immorality of any type of conduct always gives us some reason to criminalize it, and it is that claim that liberals rightly find implausible. One who betrays a friend's confidence, or is unfaithful to his life's partner, commits what might be quite a serious wrong; but however serious

[11] This is a natural way of reading various versions of the Harm Principle: see, for example, Feinberg (1984).

[12] Thus Moore again: the function of criminal law is to punish 'all and only those who are morally culpable in the doing of some morally wrongful act' (1997, pp. 33–5). Devlin's notorious argument (1965) that there was no realm of 'private morality and immorality' that was in principle not the criminal law's business might seem to put him in the same camp. But Devlin was no legal moralist: what we have reason to criminalize is not conduct that is wrongful, but conduct that is strongly felt to be seriously wrongful by members of the society; what gives us reason to criminalize it is not its (perceived) wrongfulness as such, but the harm that it might, if not criminalized, cause to the stability and cohesion of the society.

[13] Thus both Moore and Devlin end up accepting many of the constraints that liberals would place on the scope of the criminal law—but not for the reasons that liberals typically give for such constraints.

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it is, we should surely say, not that although we have reason to criminalize it (it deserves the criminal law's condemnation and punishment) we have stronger reasons not to do so, but that we have no good reason, even in principle, to criminalize it—because it belongs to a realm of private moral wrongdoing that is 'in brief and crude terms, not the law's business' (Wolfenden 1957, para. 61).

Liberal republicans do not face this objection, because theirs is a distinctive type of legal moralism. They will draw (as liberals generally draw) a firm distinction between the 'private' and the 'public', and will insist that what concerns the criminal law is not moral wrongdoing as such, but only public wrongdoing: we have no reason at all to criminalize the betrayal of a friend's confidence, or a philanderer's sexual infidelity, because these are not public wrongs. Now the idea that criminal law is properly concerned with public wrongs is an old one, but its meaning is far from clear. On some accounts, what makes a wrong public is that it has some harmful impact on 'the public', as distinct from any identifiable individual (Blackstone 1765–9, Book IV, ch. 1, p. 5); but that leads us to a search for the public harm, and distracts us from the wrong done to the individual victim—which should be the criminal law's focus. We should instead (although this does less to help us determine the proper scope of the criminal law) understand a 'public' wrong as one that is the business of the public—of all members of the polity in virtue simply of their membership as citizens; a private wrong, by contrast, is the business only of a smaller group to whom it belongs. Both the philanderer's adultery and the attack that a violent husband perpetrates on his wife might be private wrongs in the sense that they occur 'in private', and have no material impact on anyone other than those most closely involved; but the latter is, whilst the former is not, a public wrong in the sense that it properly concerns all members of the polity. We should, collectively, act against the violent husband, and define his conduct as criminal; but whereas there are people with the standing to call the philanderer to account (the wronged partner, family members, friends), his wrongdoing does not concern his fellow citizens simply in virtue of their membership of the polity.

But what justifies such claims about what is or is not a public wrong? The 'publicness' of a wrong cannot now constitute the grounds for criminalizing it (as it could on Blackstone's reading), since to call a wrong 'public' is to express the conclusion, rather

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than a premiss, of an argument to the effect that it is our business; what then can provide the premisses?

We will return to this question, which is the question of criminalization, in §VI, but must first attend to another central feature of a republican criminal law; this will also enable us to see why a republican polity should maintain a system of criminal law, a system of regulation that focuses in this way on wrongdoing, at all.

IV

Calling to Account. The criminal law does not create wrongs: it does not make wrong what was not already wrong by criminalizing it. Rather, it declares certain kinds of pre-existing wrong to be public wrongs—wrongs that concern the whole polity.[14] Mere declarations of public wrongfulness, however, will be empty if nothing is then done about such wrongs when they are committed: a university's ringing announcement that it regarded plagiarism as a serious wrong would be undermined if it then simply ignored flagrant acts of plagiarism by its members. The second central feature of the criminal law to be noted here is, therefore, the provision that it makes for a formal response to the commission of what it has defined as a public wrong.

Philosophers who write about criminal law have tended to focus on substantive criminal law (the definitions of offences and the criteria of criminal liability), and on the punishments that those who commit crimes may incur. But the process that connects crime to punishment is also important to a normative understanding of criminal law; indeed, the formal and public aspects of that process are central to the criminal law's purpose. That process includes police investigations of crimes, the treatment (including questioning, arrest, detention, searching, and the like) of suspected offenders, as well as an increasing variety of possible disposals which divert actual or suspected offenders from the criminal courts.[15] But we should

[14] This point is evident in the case of so-called *mala in se*—crimes whose wrongfulness is independent of any legal regulation. It is more complex in the case of so-called *mala prohibita*, whose wrongfulness depends on there being a breach of a legal regulation: even then, however, what justifies criminalizing the breach of a legal regulation must be that that breach is morally wrong. See further Duff (2007, chs. 4.4, 7.3).

[15] On such provisions, see Ashworth and Redmayne (2005); Sanders and Young (2006); Kleinig (2008).

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focus here on the criminal trial, as the formal culmination of the criminal process.

It might be tempting to see the criminal trial in purely instrumental terms, as a method of establishing who is to be subjected to the punishments (or other kinds of coercive measure) that give the trial its point; but this does not do justice to important aspects of criminal trials, or their role in a democratic system of law. We should rather see the criminal trial as a formal process through which an alleged wrongdoer is called to answer to his fellow citizens, by the court that speaks in their name. He is called, initially, to answer to the charge of wrongdoing—either by pleading 'Guilty', thus admitting his culpable commission of the wrong; or by pleading 'Not Guilty', thus challenging the prosecution to prove his guilt. If the prosecution does prove that he committed the offence, he must then answer for that commission: either by offering a defence—a justification or excuse which shows that he should not be condemned for committing the offence—or by submitting himself to the court's formal condemnation and to the sentence it imposes. The criminal trial is thus a formal analogue of the informal moral processes through which we call each other to account for wrongs that we have committed: it addresses the defendant not simply as someone who is the subject of a formal inquiry, but as a citizen who is to participate in the process, and who is expected to answer to his fellows for his alleged violation of the values that define their polity.[16]

So the criminal law does not merely declare certain kinds of wrong to be public wrongs; it also provides for a formal response to the actual or alleged commission of such wrongs, by a process that calls the alleged wrongdoers to account. The authority that it claims over the citizens is not the authority to require them to refrain from the kinds of conduct that it defines as criminal: those kinds of conduct are wrongful independently of the criminal law; we do not need the criminal law to give us good reason not to engage in them. Its authority is, rather, the authority to require the citizens to answer for their (alleged) conduct in the public forum of the criminal court, and to submit themselves to the judgement of their fellows.

This account of the criminal trial as a process of calling to account shows the importance of key aspects of the criminal law and

[16] For further explanation and defence of this conception of the criminal trial, see Duff et al. (2007). It should be clear that this is an account of what trials should be, not of what they actually are in our existing courts.

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the criminal process. I'll note just two here.

First, a defendant summoned to trial might argue, not that he should be acquitted, after pleading 'Not Guilty' to the charge, but that he should not even be tried, and should therefore not be expected to enter a plea: he might argue that there is a 'bar to trial'.[17] Such bars are of various kinds. Some concern the defendant's condition: if he is so disordered that he cannot understand the trial, he is 'unfit to plead' and cannot be tried—not because the trial might produce an inaccurate verdict, but because he cannot answer for his conduct and therefore cannot properly be called to answer. Others concern the court's jurisdiction: he might claim that the (alleged) offence was committed outside the temporal or geographical limits of the court's jurisdiction, or that he has immunity as a diplomat—and that he therefore need not answer in this court for this alleged offence. Others concern some prior official misconduct towards the defendant: if, for instance, the defendant is available for trial only because he was kidnapped abroad by state officials and brought into the country unlawfully, or if the trial depends on evidence extracted from him by torture, he might argue that such wrongdoing deprives the court of the standing to call him to account.[18] In such cases, the defendant is not denying (or admitting) that he committed the offence, or offering a defence that should secure an acquittal; he is denying that he should be called to answer for this alleged offence in this court. To enter a plea, either of 'Guilty' or of 'Not Guilty', would be to recognize the court's authority to call him to answer, its right thus to call him to account: but that authority and that right might be denied. One task for a theory of criminal law is to investigate the conditions (legal, political and moral) on which that authority and that right depend.[19]

Second, criminal law theorists disagree about the significance of the distinction between offences and defences, as well as about how to draw it.[20] For instance, if I intentionally injure another person, I

[17] On bars to trial generally, see Robinson (1984, vol. I, pp. 55–7, 102–14, 179–87; vol. II, pp. 460–543).

[18] Compare *R* v. *Horseferry Road Magistrates' Court, ex p. Bennett* (1994) 98 Cr App Rep 114; *A and Others* v. *Secretary of State for the Home Department* [2005] UKHL 71.

[19] Compare the ways in which, in our informal moral dealings, I might deny that someone has the standing or the right to blame me for an alleged moral wrong: see Cohen (2006); Tadros (2009); Duff (2010).

[20] For defences of the distinction's significance, see Fletcher (1978, chs. 7, 9–10); Gardner (2004); Tadros (2005, ch. 4); Duff (2007, ch. 9.3–4); for sceptical critiques, see Williams (1982); Greenawalt (1984).

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have committed an offence of wounding (see Offences Against the Person Act 1861, s 20), but I might still avoid conviction by offering a defence (a justification or excuse): by arguing, for instance, that I injured him in self-defence, as the only way to ward off his attack on me; or that I acted under exculpatory duress—under an unavoidable threat of death to myself. Whether a factor that bears on the verdict counts as an element of the offence, or as a matter of defence, makes a difference to the allocation of burdens of proof: the prosecution must prove all the elements of the offence; but once the commission of the offence is proved, the onus falls on the defendant to offer evidence of the existence of a defence—evidence that would suffice, if not rebutted, to create a reasonable doubt about his guilt. If we understand the criminal trial as a process through which a citizen is called to answer a charge of public wrongdoing, we can see why this distinction matters, why it is proper to lay the burden on the defendant in this way, and how we should decide which factors should count as elements of the offence and which as matters of defence.

According to the presumption of innocence,[21] the prosecution must prove the defendant's guilt beyond reasonable doubt: we should not require a citizen to prove her own innocence if she is to avoid conviction and punishment. But does this mean that the prosecution should have to prove, *ab initio*, not just that the defendant intentionally injured another person, but that she did so without justification or excuse? Or could we hold that, once it is proved that she intentionally injured another, it is reasonable to require her to answer for that deed—to require her, that is, to offer evidence that it was justified or excusable if she is to avoid the condemnation and punishment that conviction brings? She should not, we might say, have to answer for conduct that is legally innocent: no probative burden should be laid on her unless and until the prosecution has proved that she did something non-innocent. But intentionally injuring another person is not legally innocent: it is a presumptive wrong, in the sense that it is an action that we normally have conclusive moral reason not to do, and that is something for which we can reasonably demand that she answer in a criminal court. She might have an exculpatory answer to offer—that she acted in self-

[21] The 'golden thread' that runs 'throughout the web of the English Criminal Law': *Woolmington* v. *DPP* [1935] AC 462, p. 481 (Viscount Sankey).

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defence or under duress, for instance; but given her proved commission of a presumptive public wrong, it is fair to lay on her the onus of offering that answer and adducing evidence to support it. Offences should, therefore, be so defined that they pick out presumptive wrongs for which their agents should have to answer in court, and every element of the presumptive wrong should be an element of the offence: that is why *mens rea* (the intention, recklessness or negligence that guilt requires) is properly part of the offence, since one who causes harm through non-culpable accident or mistake has not committed a presumptive wrong. But factors that justify or excuse the commission of a presumptive wrong should be defences: a citizen who commits such an action should answer for it to her fellows, even if her answer exculpates her.[22]

V

Why Criminal Law? I have suggested that two key features of a liberal republican criminal law are, first, its focus on public wrongs, and, second, its provision of a procedure through which citizens are called to account by and to their fellows for their alleged commissions of such wrongs. But why should a polity create or maintain such a system of criminal law?

According to traditional versions of legal moralism, it seems that the polity should create a system of criminal law as the agent of the moral law, in order to ensure that wrongdoers are condemned and punished as they deserve; but that is not, we have seen, a plausible account of the aims of a liberal polity, or of the proper scope of its criminal law. Accounts that make the harm principle (in one of its versions) central suggest a different picture. A central task for a polity is to protect its members from various kinds of harm. Some such harms are caused (or could be prevented) by human action, and could be averted by proscribing or prescribing the relevant kinds of action. The criminal law is at least sometimes an efficient way of do-

[22] There will of course be plenty of room for argument about whether a particular factor should be counted as an offence element or as a matter of defence, and the same kind of factor might be classified differently in different cases. It seems plausible to say, for instance, that lack of consent is an element of the offence of rape, since if sexual intercourse is fully consensual no presumptive wrong is committed (*pace* Dempsey and Herring 2007); but that consent should count as a defence if voluntary euthanasia was legalized, since the intentional killing of a human being is a presumptive wrong that requires justification.

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ing this, since its proscriptions and prescriptions are backed by the prudential sanction of punishment as well as by the moral sanction of condemnation; and it is a means of harm prevention that we can justly use so long as we use it only against conduct that deserves such condemnation because it is wrongful.[23] However, it is not clear whether or when the criminal law is a more efficient method of harm prevention than other modes of legal regulation would be.[24] More significantly, the reasons that we have to criminalize such core wrongs as murder, rape and other attacks on the person do not depend on the contingency of whether criminalization will efficiently prevent them. Those reasons have to do, rather, with what it is for a polity to take its defining values seriously, and for its members to take each other seriously as participants in the shared way of life who are bound and protected by those values.

There are of course many ways in which a polity can express its defining values, and its members can express their shared commitment to those values. But since an important aspect of those values will be that, in their light, certain kinds of conduct count as wrongs, one way to express the values will be to take public notice of such wrongs—to declare, formally, that they are public wrongs that merit condemnation. We can thus see the beginnings of criminal law in such a declaration: a polity's criminal law identifies and defines the wrongs that must be recognized as public wrongs. This by itself takes us no further than a merely declaratory law, but we have already seen that a polity that takes its values seriously cannot just ignore violations of those values. Not only must it take such steps as it reasonably can to avert such violations: steps that might include, for instance, education, public exhortation, and various kinds of 'situational crime prevention'.[25] It must also respond to violations that still occur: for consistently to ignore violations would be to betray those values, and would fail to do justice both to the victims and to the perpetrators of such violations. We owe it to our fellow citizens to recognize and respond not just to the harms that they suffer (by

[23] Compare Feinberg's classic development of the harm principle (Feinberg 1984).

[24] To which a consistent consequentialist would reply that we should use criminal law only if and when it is an efficient method of preventing the relevant kinds of harm. This issue arises very clearly in the context of health and safety regulation: see e.g. Braithwaite (2002).

[25] Though there are various interesting ethical questions about what kinds of preventive measure it could be appropriate for the citizens of a liberal polity to take against each other: see von Hirsch et al. (2000).

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providing help, sympathy, support), but also to wrongs that they suffer. We also owe it to them, as fellow members of a normative community, to respond to the wrongs that they commit: simply to ignore a fellow member's wrongdoing is to imply that neither he nor his actions matter.

What form should that response take? A familiar feature of liberalism is its emphasis on individual responsibility, and an important aspect of individual responsibility is responsibility for one's own actions. That responsibility is in part prospective—a matter of being left free to determine one's own actions. But it is also retrospective —a matter of being held responsible for what one has done. Retrospective responsibility is responsibility as answerability: to be held retrospectively responsible is to be called to answer for my actions, by those who have the standing to do so—to be called on to explain my actions, and if necessary to justify or excuse them, or accept censure for them. That is how we properly treat each other in extralegal moral contexts: if another's wrongdoing is my business, I respond properly by calling her to answer for it; that is how I take both her and her wrongful conduct seriously. And that is what the criminal law does in relation to public wrongdoing: it calls alleged perpetrators of such wrongs to account, and holds them formally answerable for their commissions of such wrongs through the criminal trial. To respond in this way to public wrongs is to do justice to both victims and perpetrators. We show that we take the victim's wrong seriously in part by seeking to bring its perpetrator to book: the common complaint by victims of crime that the perpetrators have been allowed to get away with it has real force when the failure to bring the perpetrator to book reflects a failure to take the crime seriously enough, and especially when the failure to pursue and prosecute the perpetrator reflects discrimination against the group to which the victim belongs. We also thus treat the perpetrator as a fellow member of the polity: as someone who is entitled to the respect and concern that is due to all citizens, and thus also as someone who must answer for his public wrongdoing.[26] The criminal trial also serves to identify those who are eligible for punishment—we cannot discuss the place of punishment in a liberal republic here

[26] This focus on individual responsibility is a target for 'critical' theorists (e.g. Norrie 2001) who object that it involves a distorting abstraction of individuals from the social contexts which generated their crimes. The answer is that such abstraction is an important aspect of the limited ambitions of a liberal criminal law.

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(see Duff 2001); but its primary function is to call alleged wrongdoers to account in way that recognizes them and their alleged victims as members of the polity.

This is of course only the start of a justification of criminal law, and I do not suggest that its proper functions are exhausted by the identification of public wrongs and the provision of a procedure through which alleged perpetrators of such wrongs can be called to account.[27] But I do suggest that these linked purposes are central to an understanding of the criminal law as a distinctive legal institution, and central to the role that it can play in a liberal republic.

VI

Criminalization. Amongst the issues that such an account of criminal law must still tackle, one stands out: criminalization. It is often said that we (in particular we in the UK and in the US) face a crisis of overcriminalization: the criminal law is far too wide, covering kinds of conduct that should not be criminal; far too many people are subject to unwarranted conviction and punishment. Of course much more needs to be said about the standards by which our existing criminal law *over*criminalizes, and about the forms that such overcriminalization takes;[28] but a normative theory of criminal law must say something about its proper scope—if not directly about what kinds of conduct should or should not be criminalized, at least about the considerations that should bear on questions of criminalization, and about the procedures through which such questions should be settled. Furthermore, although there might be a temptation, in response to the perceived crisis of overcriminalization, to focus on limiting principles that could restrain governmental inclinations to overextend the criminal law, a normative theory of criminal law must also aim to identify the positive reasons that we have to criminalize conduct—reasons flowing from the goals that a system of criminal law should pursue: not merely because we some-

[27] In particular, preventive considerations are not irrelevant to criminalization. Minimally, if we realize that criminalizing a certain kind of wrongdoing would increase its frequency, we have reason not to do so.

[28] For a very useful start on this, see Husak (2007, ch. 1). One indicative statistic is that between 1997 and 2007 over 1500 new imprisonable criminal offences were created by the UK parliament.

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times have good reason to criminalize conduct that has not hitherto been criminal, but because we need to get clear about why rape, tax evasion and driving when uninsured are properly criminal, as well as about why sexual infidelity, blasphemy[29] and rudeness are not.

What guidance can the conception of criminal law sketched in the previous sections offer on criminalization? It offers a starting point in the idea of a public wrong—a wrong that is the business of all members of the polity, whose perpetrator should, therefore, have to answer to his fellow citizens. But this is, in two respects, a very limited starting point. First, the idea of a public wrong has yet to be adequately explained, and seems to provide a formal rather than a substantive criterion: it tells us nothing about what kinds of wrong should count as 'public' in this sense. Second, even if we have at least *some* reason to criminalize any public wrong, since the criminal law provides a formal procedure through which the polity can address such wrongs and call their perpetrators to account, it is at best a weak reason: there are other ways of responding to public wrongs than by criminalization; we must ask more carefully when and why criminalization is an, or the, appropriate response.

Among those other ways are the following. We could make no provision for any formal response, although citizens might of course respond informally for themselves: minor kinds of rudeness or incivility, for instance, are public wrongs, in that they are breaches of the good manners that make our social interactions with fellow citizens tolerably pleasant, and they may warrant an informal reproof; but they are too trivial to warrant the force of the criminal law.[30] Or we could follow the advice of advocates of 'restorative justice', and provide for a process of mediation between the parties directly affected, rather than mobilizing the force of the criminal law: some neighbourly disputes, for instance, though they involve wrongs that should count as public, are surely better dealt with in this way.[31] Or we could make it a matter of civil rather than of criminal law, providing the facilities and procedures through which the victim can

[29] Blasphemy was decriminalized in England (Criminal Justice and Immigration Act 2008, s 79), but Ireland has introduced an extended offence of blasphemy, protecting all religions (Defamation Act 2009, s 36).

[30] Hence the '*de minimis*' constraint that is explicit in the American Model Penal Code (§2.12).

[31] For introductions to the restorative justice literature, see Braithwaite (1999); Johnstone and Van Ness (2006).

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pursue the wrongdoer for compensation or restitution: breach of contract and libel could surely both be plausibly counted as public wrongs, but are matters of civil, not criminal, law—and it is not obvious that they should be made criminal. Or we could make it a matter of non-criminal, administrative regulation: it could be subject to penalty (to dissuade people from committing it), but without the condemnation that criminalization involves, and so also without the expensively oppressive apparatus of criminal trials and punishments.[32] If we are to get clear about the proper scope of the criminal law, we must therefore ask not just which wrongs should count as public wrongs, but when and why we should prefer criminalization to such other possible ways of responding (or not responding) to such wrongs.

A popular move at this stage is to look for some master principle, or set of principles, that can tell us which kinds of wrong we have good reason to criminalize. The best known of such principles is of course the harm principle—that we have good reason to criminalize conduct that wrongfully causes or threatens to cause harm to others.[33] Other recent candidates include the traditional legal moralist's principle—that we have good reason to criminalize all moral wrongdoing;[34] and the sovereignty principle—that conduct is criminalizable if (and only if?) it violates another's sovereignty.[35] We cannot discuss such would-be master principles here. All I would suggest is that each such principle (or set of principles) faces a familiar difficulty. If we give the principle a tolerably determinate meaning that allows it to do substantive work in identifying kinds of conduct that we do have good reason to criminalize, and in setting real constraints on the scope of the criminal law, it turns out to be radically under-inclusive: there are too many kinds of conduct that we surely have good reason to criminalize, but that cannot be cap-

[32] Compare the German regime of *Ordnungswidrigkeiten*—regulatory infractions that attract a penalty, but do not count as crimes: see Weigend (1988); also Feinberg (1970) on punishments and penalties.

[33] For the fullest recent development of the harm principle, see Feinberg (1984; and 1985 on the added offence principle, allowing the criminalization of offensive but non-harmful conduct). In both Mill's (1859, ch. 1, para. 9) and Feinberg's (1984, p. 26) formulations of the principle, what justifies criminalization is actually not the harmfulness of the conduct criminalized, but the harm-preventive effect of criminalizing it; we need a further constraint to limit criminalization to actually harmful or dangerous conduct.

[34] See e.g. Moore (1997) (see at nn. 12–13 above); also Feinberg (1988).

[35] See Ripstein (2006); see also Dan-Cohen (2002), on the 'dignity principle', and Dubber (2002) on autonomy.

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tured by the principle as thus interpreted. If, on the other hand, we give the principle a broad enough meaning to avoid this problem of under-inclusiveness, it becomes so broad or so vague that it can do no substantive work in guiding or constraining our decisions about criminalization, and becomes (at best) a rhetorical way of expressing the conclusion (based on other grounds) that we have good reason to criminalize a certain type of conduct.[36] Such principles can, when given reasonably determinate meanings, identify some considerations that should bear on decisions about criminalization; but they cannot do the kind of conclusory work that their proponents often claim they can do.

Rather than search (in vain) for a suitably refined master principle, we should recognize something that is hardly surprising: that we have different reasons for criminalizing different types of conduct (just as we can recognize, once we abandon the doomed search for a unitary moral theory, that different kinds of conduct are morally wrong for quite different reasons). The proper task for a theory of criminalization is, rather, to assemble and clarify the different kinds of consideration that should be relevant in different contexts. We can hope that there will be some clear cases on either side—types of conduct that we certainly have good reason to criminalize if we are to maintain a system of criminal law at all, and types of even morally wrongful conduct that a liberal republic has no good reason to criminalize; such cases are useful, since we can ask why it seems so obvious, for instance, that murder, rape, theft and fraud should be criminal, and that sexual infidelity, betrayals of intimate confidences and breach of contract should not be. But we will also have to recognize that there are plenty of unclear cases (and perhaps that some of the apparently clear cases are not so certain); that we cannot settle such uncertainties by mobilizing any neat master principle (or set of principles); and that they can be resolved only by a public deliberation that is sensitive to the claims of different and sometimes conflicting values.[37]

The discussion of the previous sections can, however, give us some pointers to guide that deliberation—pointers that, whilst they do not provide determinate or substantive answers, can help us see

[36] This is notoriously true of the harm principle (see e.g. Harcourt 1999; Stewart 2010). But see also Stanton-Ife (2006); Bird (2007) (on the dignity principle); and Duff (2007, ch. 6).

[37] For a good example of this kind of approach, see Ashworth (2009, chs. 2–3).

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what kind of decision we are making, and what kinds of factor are relevant.

As public wrongs, potential crimes (that is, types of conduct that we have good reason to criminalize) must violate a value on which the civic enterprise depends, and display a lack of the respect and concern that citizens owe to each other as fellow citizens. Perhaps every such wrong is in principle criminalizable, in that its public wrongfulness gives us a relevant reason to criminalize it; but that might not yet be a powerful reason. To show that we have good reason to criminalize it, we would need to justify three further claims.

First, we must argue that it is the wrongfulness of the conduct that is salient, and should be salient in our response to it: what matters is not just, for instance, that any harm that was caused be repaired, but that the wrong be condemned and the wrongdoer be held to account. That is a key difference between a criminal law process and a civil law process: a civil case typically aims to determine who should bear the costs of harm that has been caused, and the fact that it resulted from wrongdoing by one of the parties serves as a reason for assigning the costs (as far as is possible) to that party. In a criminal case, by contrast, the focus is precisely on holding the wrongdoer to account, and condemning him for his wrongdoing. (A civil case is also a way of holding a culpable harm-causer to account, and there is no principled reason why the same wrongdoing should not generate both a criminal and a civil case. The point is, however, that the two kinds of process are focused on different issues.)

Second, we must argue that the wrong is not such as to make negotiation or compromise reasonable. Sometimes there is room for discussion about, for instance, the extent to which the putative victim shares responsibility for what he suffered—a sharing that also reduces the wrongfulness of the putative offender's deed or his culpability as its agent; but the criminal law deals in more categorical judgements than that.[38] That is why 'contributory negligence' is relevant in civil, but not in criminal, cases: that my carelessness, as well as your recklessness, played a role in the accident that I suffered reduces the amount I can claim from you, since it is fair that I should bear some of the cost myself; but that my carelessness played some role in my criminal victimization, for instance by making it possible

[38] Contrast Christie (1977, p. 8), on the need to make room for discussion about such questions as 'How wrong was the thief, how right was the victim?'—which is one reason why he is an abolitionist.

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for you to attack me, does not reduce your culpability or mitigate your wrong (an important point in the context of rape).[39]

Third, we must argue that this is not a kind of wrong that should be left for the victim to pursue, or to decide not to pursue, for herself. A civil case belongs to the alleged victim: it is listed as '*P v D*' —plaintiff versus defendant; though the polity provides the formal institution through which it can be pursued, and the means to enforce the outcome, it is for the plaintiff to decide whether and how to pursue the case; and if she wins her case it is for her to decide whether to have the judgement enforced. A criminal case, by contrast, belongs to the polity: it is titled '*Regina v D*' in the still overly monarchical English criminal process, and '*People v D*', or '*Commonwealth v D*', in more self-consciously republican American systems; whether the case is pursued depends not on the victim, but on the prosecutor, who may continue the case even if the victim wants it dropped; a conviction results not in an award of damages that the victim can choose to enforce or not, but a punishment that is imposed independently of the victim's will.

The contrast between a criminal and a civil process is, of course, neither as sharp nor as fixed as this presentation might imply. Communities, as well as individuals, can bring civil cases (a local authority can bring a civil case against a polluter); prosecutors can attend to the victim's wishes in deciding whether to pursue a case, either for practical reasons to do with the difficulty of securing a conviction, or out of (perhaps misguided) respect for the victim's wishes; criminal courts can make compensation orders on convicted offenders. We can also imagine systems that blur the contrast yet further. We could, for example, define a category of wrongs that we will collectively condemn, and for which we will hold the wrongdoer to account, but only if the victim agrees, or brings the case himself; this might deal with the problem raised in different ways by our current procedures for libel and for 'wrongful deaths' caused by medical negligence, which force victims to sue for monetary compensation that distorts the character of that for which they seek redress. But even if we should blur the criminal–civil boundary in this or other ways, we should also see the need for a traditional criminal law procedure that involves the polity as a whole calling wrongdoers to account.

[39] Provocation might seem to provide a counterexample: my attack on you is less culpable if you provoked me, because you were partly to blame for what happened. But that is one reason why provocation is rightly controversial as even a partial defence.

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These suggestions still give no substantive guidance about what kinds of conduct should be criminal, but here are three kinds of wrong that we surely have good reason to criminalize.

First, there are victimizing wrongs which constitute such serious violations of the polity's values, or of one of its members, that to fail to condemn them and to call their perpetrators to account would be to betray those values (compare Jareborg 2005). Obvious examples here are serious attacks on the person—murder, rape, other kinds of physical assault, perhaps also harassment; but this category could also include, for instance, the kinds of racist abuse that deny their victims' full membership of the polity.[40] Some of these wrongs directly implicate citizenship: they involve treating the victim in ways that we should not treat a fellow citizen, in ways that deny their fellow membership of the polity. Others do not thus directly implicate citizenship: what is wrong with murder, rape and other kinds of attack on the person is not that this is not how we should treat fellow citizens, but that this is not how we should treat another human being. But both kinds of wrong are criminalizable because we owe it to each other to take appropriate notice of such attacks on or by our fellows—and appropriate notice includes condemning the wrong and calling its perpetrator to account. These are also kinds of wrong which, we may say, it would be wrong for the victim to ignore: he owes it to himself, as a matter of self-respect,[41] or to his fellows, out of respect for their shared values, to pursue the wrongdoer, or to assist in his prosecution (which is why prosecutions in such cases should not depend on the victim's consent).[42] Wrongs of this kind constitute perhaps the core of the criminal law.

Second, there are wrongs whose only victims are the polity, or its members collectively: wrongs that are public in the sense being used here, as wrongs that concern the public, just because they are public in the other sense of having an impact on the public rather than on any identifiable individual victim. Some of these will be wrongs of endangerment: examples include a range of driving offences, various

[40] See e.g. Public Order Act 1986, Part 3; Protection from Harassment Act 1997; Racial and Religious Hatred Act 2006.

[41] Compare Murphy's discussions of the role and importance of resentment: Murphy (1988; 2003, ch. 2).

[42] But there are difficult issues here about what we can properly expect or demand of, or impose on, victims of crime. See Marshall (2004); also, on the particular problems involved in prosecuting domestic violence, Dempsey (2009, ch. 9).

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kinds of pollution, and breaches of health and safety requirements. Others are wrongs (such as tax evasion, perjury, the bribery of officials) that bear on the polity's essential public institutions. There will of course be questions about whether and when criminalization is an appropriate response to such wrongs, especially those that consist in endangerment rather than in attack;[43] but we have good reason to criminalize them when they involve a serious disregard for the duties of care that we owe our fellows, or for the institutions on which the civic enterprise depends.

Third, there are '*mala prohibita*': wrongs that consist in the breach of a legal regulation which imposes a (typically fairly modest) burden on citizens in order to serve some aspect of the common good.[44] Regulations connected with licensing provide the clearest examples of such wrongs. In the purest cases, the conduct required is impossible, and we can therefore have no reason or duty to engage in it, in the absence of the relevant legal regulation: I could not obtain a driving licence, or display a tax disc, independently of the relevant regulations about driving, and could thus commit no wrong by not doing so. Once the regulations are in place, however, and are justified as serving the common good, I have a civic duty to comply with them, and do wrong if I fail to comply; we then have reason to criminalize such wrongs.

I do not suggest that these three types of criminalizable wrong are mutually exclusive or exhaustive—indeed, I am sure that they are not. All I mean to suggest here is that this is how we need to tackle the criminalization issue: to identify types, or paradigms, of criminalizable conduct, understand why we have reason to criminalize them, and then deal with problematic cases by comparing and contrasting them with these paradigms.

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[43] See at nn. 24, 32 above. On the importance of the distinction between attacks and endangerments, see Duff (2007, ch. 7).

[44] See further Duff (2007, chs. 4.4, 7.3).

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