

## Criminal Law and the Constitution of Civil Order (Draft)

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*Some believe ... that one who offends against mankind deserves universal condemnation and to have all mankind as his enemy, that an evil act committed at Constantinople, for instance, can be punished in Paris. As if judges were the upholders of human sensibilities, rather than of the contracts which bind men together.*<sup>1</sup>

*These acts have in fact been forbidden and subjected to punishment not only because they are dangerous to society, and so ought to be prevented, but also for the sake of gratifying the feeling of hatred—call it revenge, resentment, or what you will—which the contemplation of such conduct excites in healthily constituted minds. ... It will follow that criminal law is in the nature of a persecution of the grosser forms of vice, and an emphatic assertion of the principle that the feeling of hatred and the desire of vengeance above-mentioned are important elements of human nature which ought in such cases to be satisfied in a regular public and legal manner.*<sup>2</sup>

### 1. Introduction

Beccaria's claim that the task of judges, and thus of the (criminal) law that they apply, is to uphold not 'human sensibilities', but 'the contracts which bind men together', stands in sharp contrast to Stephen's emphatic legal moralism. For Stephen, the criminal law is an essentially moralised enterprise: it is concerned with certain kinds of moral wrong—with manifestations of 'the grosser forms of vice'. For Beccaria, the criminal law has no such moral concern: it rather serves to sustain the social contract. Recent philosophers who espouse what they call a 'public law' conception of criminal law also reject the kind of moralised conception of criminal law that Beccaria rejects, and that can be found in (some) contemporary versions of legal moralism—although they do not share Beccaria's under-developed brand of contractualism: they insist that criminal law's proper purpose is not to uphold the moral law, or to punish moral wrongdoers, but to sustain a certain kind of political structure, a set of political institutions and arrangements. My aim in this paper is to show that we should indeed understand and theorise criminal law as a type of 'public law'—as against the view of criminal law favoured by legal moralists such as Michael Moore; but that its distinctive role, as a species of public law, is precisely to take formal note of, and provide an appropriate response to, certain kinds of moral wrong—those kinds of wrong that properly count as 'public' wrongs. Some advocates of a 'public law' conception of criminal law think that it rules out any species of 'legal moralism'; I will argue that they are wrong in this—that we should espouse a 'public legal moralism', which I will sketch in the paper.

To that end, I begin in s. 2 by looking more closely at the contrast between the moralist view that Moore exemplifies, and the 'public law' conception that we can draw from Beccaria; central to this contrast (though this is not something to which Moore attends) are their contrasting views

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<sup>1</sup> C Beccaria, *On Crimes and Punishments* (trans. R Davies et al; Cambridge University Press, 1995), ch. 29, 74.

<sup>2</sup> J F Stephen, *Liberty, Equality, Fraternity* (2nd edn; Elder and Co., 1874), 162.

of the criminal law's ambit and jurisdiction. I then turn in s. 3 to recent versions of the 'public law' conception, in particular those developed by Malcolm Thorburn and Vincent Chiao, and connect such accounts to the classical idea that criminal law serves to sustain 'civil peace' or 'civil order'. In s. 4 I will say a little more (though still sketchily) about the idea of civil order, and then (in s. 5) about the conception of criminal law that I will be connecting to civil order; and I will argue (in s. 6) that a public law conception of criminal law as sustaining civil order still leaves plausible room for a refined version of legal moralism—for a claim that criminal law is properly concerned with, and should be theorized as an appropriate institutional response to, certain kinds of wrongdoing. In s. 7, I will show how the relationships between wrongs (of the kinds that we have reason to criminalize) and civil order, and between criminal law and civil order, can be internal rather than contingent: wrongs can be constitutively rather than causally or contingently violative of civil order, and the criminal law partly constitutes the civil order that it serves to sustain. Finally, s. 8 takes brief note of three objections to this account.

## 2. *Two Conceptions of Ambit and Jurisdiction*

We can begin our examination of the kind of legal moralism that 'public law' theorists reject by looking not at Moore, but at what Nils Jareborg calls the 'radical conception of crime' (which he contrasts with, and favours over, the 'primitive conception' and the 'collectivist conception'): for this makes explicit the implications for the criminal law's ambit and jurisdiction on which I want to focus. 'What is wrong with a crime', according to the radical conception, 'is solely what makes it worthy of criminalization, i.e., an invasion of or a threat to a value or interest worthy of protection by criminal law'.<sup>3</sup> An implication of this conception, Jareborg thinks, is that domestic systems of criminal law should have an in principle unlimited or universal jurisdiction—

Under the radical conception [of crime] there is, in principle, reason to take jurisdiction over all acts that invade or threaten interests or values that are protected by criminal law.

For example, a murder should be the concern of any country, irrespective of the place of commission or the citizenship of the offender and the victim.<sup>4</sup>

Petter Asp develops and refines this suggestion by distinguishing, as Jareborg did not (explicitly) distinguish, ambit from jurisdiction.<sup>5</sup>

The question of ambit in this context is, roughly, the question of whether a type of conduct falls under, is defined as criminal by, the law of a particular polity: does theft committed on the streets of Krakow fall within the scope of—is it defined as criminal by—Scots criminal law? The question of jurisdiction is, roughly, the question of whether the courts of a particular polity have the standing to try someone for an alleged crime: could someone alleged to have committed theft in Krakow be brought to trial for that alleged crime in a Scottish court?<sup>6</sup> Now it might seem that ambit and jurisdiction must go together. Surely it would be pointless for a national legislature to define a type of conduct as criminal, but not to give that nation's courts jurisdiction to try those

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<sup>3</sup> N Jareborg, 'Crime Ideologies' (in Jareborg, *Scraps of Penal Theory*; Justus Förlag, 2002, 72), 79.

<sup>4</sup> 'Crime Ideologies', 85-6.

<sup>5</sup> P Asp, 'Extraterritorial Ambit and Extraterritorial Jurisdiction', in A du Bois-Pedain, M Ulväng, P Asp (eds), *Criminal Law and the Authority of the State* (Hart Publishing, 2017), 33.

<sup>6</sup> On 'ambit' and 'jurisdiction' (or 'venue', as it is sometimes called), see M Hirst, *Jurisdiction and the Ambit of the Criminal Law* (Oxford University Press, 2003), ch. 1; and on the more theoretical issues see L Farmer, 'Territorial Jurisdiction and Criminalization' (2013) 63 *University of Toronto Law Journal* 225.

accused of committing that crime; and surely a court can claim jurisdiction over an alleged crime only if it constitutes a crime under the law of the polity whose court this is—which is why claims to ‘universal jurisdiction’ are made only when the extraterritorial conduct over which jurisdiction is claimed has been brought within the ambit of the relevant domestic criminal law.<sup>7</sup> However, as Asp points out, ambit and jurisdiction can, in principle, be separated: in particular, he argues, we can believe that a type of conduct should fall within the ambit of a system of domestic criminal law even when it is committed in another country by and against citizens of that country, without believing that it should fall within the jurisdiction of that system’s courts. As far as ambit goes, ‘the default position must be that offences should be applicable worldwide’: for if ‘it is seriously wrong to kill, does it really matter whether the perpetrator is Swedish or British, whether the victim is Swedish or British, or whether the offence is committed in Sweden or in the UK?’<sup>8</sup> As for jurisdiction, however, there are both principled and practical reasons for the jurisdiction of a polity’s courts to be limited—for the most part—to crimes committed within the territory of that polity.<sup>9</sup> The practical reasons are obvious: the Scottish police are ill-placed to investigate a theft in Krakow, the Scottish courts are ill-placed to try the alleged thief (even if he is available); it makes far more practical sense—especially for crimes that are not dramatically serious—to leave criminal jurisdiction to the courts of the polity in whose territory the crime was committed. The principled reason has to do with respect for national sovereignty: states should, generally, have the power to make and apply their own criminal laws, as they should have the power to deal with other internal matters, free from interference by other states.<sup>10</sup>

We might have doubts about some particular aspects of Asp’s argument. For instance, if the considerations that he cites give us reason to limit the jurisdiction of a nation’s criminal courts, don’t they give us the same kind of reason to limit the ambit of its criminal law? The practical reasons are clearly powerful, but—since there could in principle be cases in which a Polish theft could more practicably be tried in a Scottish court (victim and thief both happen to turn up in Glasgow, and the thief is ready to admit his guilt)—they might be taken to favour a quite general doctrine of ‘*aut dedere aut judicare*’,<sup>11</sup> rather than a strict limit on jurisdiction: this would allow

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<sup>7</sup> See e.g., Criminal Justice Act 1988, s. 134 (‘A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties’); also §§ 6-7 of the German *Strafgesetzbuch*. See generally L Reydams, *Universal Jurisdiction* (Oxford University Press, 2004), especially 11-16 on the historic debate about whether states can legitimately claim universal jurisdiction without an explicit mandate under international law or international conventions.

<sup>8</sup> Asp, ‘Extraterritorial Ambit’, 40.

<sup>9</sup> But only ‘for the most part’: the ‘Territoriality Principle’ is subject to a number of exceptions or qualifications. See generally Hirst, *Jurisdiction and the Ambit of the Criminal Law*; see also A Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford University Press, 2010). Worth particular note here are the principles of ‘nationality’ and of ‘passive personality’, according to which crimes committed anywhere in the world by, or against, a polity’s citizens fall within the ambit of its criminal law and the jurisdiction of its courts: see e.g. German *Strafgesetzbuch*, § 7.1-2; French *Code Pénal*, art. 113.6-7; USC 18 § 2.332.

<sup>10</sup> Asp, ‘Extraterritorial Ambit’, 42-5.

<sup>11</sup> On ‘*aut dedere aut judicare*’ (either extradite or prosecute), a principle that figures in a number of international conventions, see M C Bassiouni and E M Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Nijhoff, 1995).

that in the vast majority of cases ‘*dedere*’ will be the appropriate course—the alleged offender is returned to the state in whose territory the crime was allegedly committed; but it would allow too that in some cases ‘*judicare*’ might be appropriate—the alleged offender can be efficiently tried in another state’s courts. As for the principled reason, it would clearly be a violation of national sovereignty for the Scottish police to enter Poland without permission from the Polish authorities in order to arrest the alleged Polish thief to take him to Scotland for trial; but would it be such an obvious violation to arrest and try him if he happened to come to Scotland, if his guilt could be conclusively proved in a Scottish court—and perhaps especially if the Polish authorities had neither sought to put him on trial in Poland nor sought his extradition from Scotland?<sup>12</sup> However, my concern here is not with the details of his argument, but with the conception of criminal law that it reflects: a conception that gives criminal law, domestic as well as international, a scope or ambit that is in principle unlimited; a conception on which a polity therefore has good reason to extend both the ambit of its criminal law and the jurisdiction of its criminal courts across the entire world, even if it must then recognise good countervailing reasons to limit that jurisdiction, and perhaps that ambit, to a rather more modest, primarily territorial, scope.

Central to that conception, as Asp develops it, is the thought that criminal law is and must be concerned with wrongfulness; and, crucially, that it is concerned with wrongfulness as such—with the very fact that a type of conduct is morally wrongful: ‘the act of criminalising something is an act that expresses a normative statement about an abstract class of behaviour’.<sup>13</sup> Thus what justifies the criminalization of murder or rape is the wrongfulness of such conduct; and it would be very odd, indeed outrageous, for a legislature to declare that murder or rape is a wrong when committed in England, but is not a wrong, or is a ‘criminal law-nothing’,<sup>14</sup> when committed in another country.

If we now ask why the criminal law should be thus focused on wrongful conduct, or (which is the more apposite question) why a polity should maintain an institution with such a focus, one obvious answer is Michael Moore’s: those who culpably commit moral wrongs deserve to suffer punishment, and it is the proper function of criminal law to ensure the infliction of such deserved punishment.<sup>15</sup> It is a familiar point that Moore’s brand of legal moralism gives the criminal law an (in principle) vastly expansive scope in relation to the types of conduct that we have reason to criminalize: we have reason to criminalize, indeed we ought to criminalize, every kind of moral wrongdoing, however ‘private’ or personal it might be—although as it turns out we have better

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<sup>12</sup> Compare *Strafgesetzbuch* § 7(2). I should note here one complication that I will ignore in this paper: the fact that the domestic criminal law of states that belong to the European Union is in various—and increasing—ways subject to requirements laid down by the EU (see generally V Mitsilegas, *EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe*; Hart Publishing, 2016).

<sup>13</sup> Asp, ‘Extraterritorial Ambit’, 41.

<sup>14</sup> Asp, ‘Extraterritorial Ambit’, 40. It is worth noting that whilst his argument is illustrated by examples of very serious criminal wrongs; it would also apply to less dramatically serious wrongs such as theft. He does allow that a state might properly limit the ambit of offences that have an essentially local character (such as ‘less serious disturbances of the public peace’), and also makes clear that his argument does not apply to ‘merely regulatory’ offences (‘Extraterritorial Ambit’, 41); but it will apply to wrongs far less serious than murder—and it is not clear why disturbing the public peace is any more ‘local’ than theft.

<sup>15</sup> See e.g. M S Moore, *Placing Blame: A Theory of Criminal Law* (Oxford University Press, 1997), ch. 1; ‘A Tale of Two Theories’ (2009) 28 *Criminal Justice Ethics* 27.

countervailing reasons, flowing from such values as privacy and liberty, not to criminalize many kinds of wrongful conduct.<sup>16</sup> What is less often noted is a point that Asp's argument makes clear: that a Moorean legal moralism also gives domestic criminal law a vastly expansive, indeed an in principle unlimited or universal, scope in relation to the location of the kinds of conduct that any legislature has reason to criminalize. If moral wrongdoing deserves punishment, it presumably deserves punishment wherever, by whomever, against whomever it is committed. So we all have reason to promote the imposition of such penal suffering on wrongdoers anywhere in the world, and thus reason as legislators to bring all wrongdoers within the reach of our domestic criminal law.<sup>17</sup> Those reasons are not restricted by geography or by territory. The French legislature has reason to bring within the scope of French criminal law not just wrongs committed in France, but those committed anywhere in the world—to count as a crime under French law, triable in French courts, wrongs committed anywhere in the world, including, for instance, theft committed by a Turkish citizen on the streets of Istanbul. (Correlatively, of course, the Turkish legislature has reason to count as criminal under Turkish law a theft committed by French citizen on the streets of Paris.) Once again, Moore can point out, as Asp does, that there are persuasive countervailing reasons against giving domestic criminal law such global scope: reasons to do with the feasibility and costs of trying to enforce such a globally ambitious criminal law, and with the importance of respecting other states' sovereignty; but we need to appeal to such reasons to show why French legislators should not give French criminal law a universal ambit, and French courts universal jurisdiction over all wrongs.

(A conception of the kind that Asp favours need not, of course, rely on a Moorean brand of moralized retributivism. It could portray the criminal law's concern with wrongdoing as a matter of deterrence rather than of retribution, for instance. States should criminalize wrongs in order to deter their commission, but the value or importance of deterring a wrong does not depend on its location: so the French legislature has reason to seek to deter via criminalization the commission of wrongs anywhere in the world—although it has better countervailing reasons to focus, for the most part, on wrongs committed within French territory.)

There is something deeply counter-intuitive about this conception of the scope—of the ambit and jurisdiction—of domestic systems of criminal law: about the idea that the German legislature has reason (in principle) to criminalize wrongful acts committed not just within Germany, or by or against German citizens,<sup>18</sup> but by anyone against anyone, anywhere in the world: surely a theft committed between Nigerian citizens on a street in Abuja is not simply a wrong that, on balance and all things considered, should not be brought within the jurisdiction of the German courts; it is simply, *ab initio*, not the business of Germany or its criminal law.

We can now look back to Beccaria, for a suggestion of a different conception of the proper role of domestic systems of criminal law. On Asp's or Moore's view, 'an evil act committed at Constantinople' could indeed, in principle, be 'punished in Paris'—be brought within the ambit of French criminal law and the jurisdiction of French criminal courts: for judges, speaking and

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<sup>16</sup> See e.g. Moore, *Placing Blame*, ch. 18; 'Liberty's Constraints on What Should be Made Criminal', in R A Duff et al (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press, 2014) 182.

<sup>17</sup> '[T]he world is better if it is morally better, and to the extent legislators can achieve that moral betterment through law, they should do so' (M S Moore, 'Four Reflections on Law and Morality' (2007) 48 *William & Mary Law Review* 1523, 1540.

<sup>18</sup> See n. 9 above.

acting in the name of the law, are in principle the ‘upholders’ not just of French but of ‘human sensibilities’—of the moral values that speak to those sensibilities.<sup>19</sup> To which Beccaria replies that that is not the proper business of the criminal law, or of its judges: their role is, rather, more modestly and with less moralistic fervour, to uphold ‘the contracts which bind men together’. Now one *could* take this to imply an equally universal or unlimited (in principle) scope for the criminal law: for if ‘the contracts which bind men together’ should be upheld, they should surely be upheld wherever and between whomever they are made. A contract made in Constantinople is as worthy of being enforced as one made in Paris; and even if, for the kinds of reason that Asp notes, it should not in practice be enforceable in a French court, that simply marks a pragmatic limitation on the in principle universal scope of French law. The same might still seem to follow if we read Beccaria (more plausibly) as being concerned not with all kinds of contract, but with those social contracts that, on his view, ‘bind men together’ into political communities:<sup>20</sup> for the contract that binds Turkish citizens together is surely as valuable, as worthy of being upheld, as is that which binds French citizens together: it would be odd, indeed outrageous, for a legislature to declare that a breach of the French social contract is a criminalizable wrong, but that an evil committed in Istanbul, in violation of the Turkish social contract, is not a wrong, or is a ‘criminal law-nothing’.<sup>21</sup>

However, there is another, and more plausible, way to read Beccaria’s contractualist account: that French criminal law is itself a creature, a creation, of the particular social contract by which the people of France bind themselves together as the French polity; and that its proper concern is, therefore, with—and only with—upholding the terms of that particular contract. For criminal law cannot, on any contractualist view, be something outside or apart from the social contract by which a polity or a state is created:<sup>22</sup> rather, it is created, along with the other public institutions of the polity, as part of the very process of contracting. The contract specifies the terms on which these contractors are to live together, as fellow citizens of this polity: but since the contractors will recognize that they also require some mutual assurance that those contractual terms will be

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<sup>19</sup> Beccaria, *On Crimes and Punishments*, ch. 29, 74; see at n. 1 above. Or, as Stephen would say, they uphold the feelings (of hatred, revenge, resentment) that ‘the grosser forms of vice’ arouse ‘in healthily constituted minds’: Stephen, *Liberty, Equality, Fraternity*, 162; see at n. 2 above.

<sup>20</sup> See *On Crimes and Punishments*, ‘To the Reader’ 4-5, and ch. 3.

<sup>21</sup> Asp, ‘Extraterritorial Ambit’, 40; see at n. 14 above. This reading of Beccaria can be related to the general view of the relationship between values and reasons espoused by, for instance, John Gardner and Michelle Dempsey. If we recognize, as we surely should (or as contractualists surely should) that there is value in the upholding of social contracts, we must also recognize that that value is a source of reasons for action for anyone who can help to realize it: thus if the French legislature could help to uphold the Turkish social contract, for instance by criminalizing breaches of it, it has reason to do so. See e.g. J Gardner, ‘Complicity and Causality’ (in Gardner, *Offences and Defences*, Oxford University Press, 2007, 57), 62-3, and ‘Relations of Responsibility’ (in R Cruft et al (eds), *Crime, Punishment, and Responsibility*, Oxford University Press, 2011, 87), 89-91; M M Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (Oxford University Press, 2009), 83 (on the ‘normal correspondence thesis’, that ‘if a person can realize a value through her action, then normally she will have a reason so to act as to realize that value’), and ‘Public Wrongs and the “Criminal Law’s Business”’, in *Crime, Punishment, and Responsibility*, 254.

<sup>22</sup> We can leave aside here the question of whether the social contract should be understood as one through which a polity is created; or one through which the members of a polity create the institutional apparatus of the state.

upheld or enforced (given the ever-present human likelihood that some people will be tempted to violate them), they will include in the contract provisions for dealing with breaches of it; and that will be the role of their criminal law. But if that is how we should understand criminal law, or at least domestic criminal law, we can see why French criminal law should not be concerned with thefts in Turkey: not because such thefts are not, in the French legislators' judgment, wrongs, as violations of the Turkish contract, or because they are, in the abstract, 'criminal law-nothings'; but because they do not impinge on or violate the French social contract, and are thus not the business of the French legislature. If I contract with you to provide certain services in return for certain payments, we might include in the contract provisions to deal with a breach of its terms: but we have no reason at all to include in our contract provisions to deal with breaches of other contracts between other people; and just the same is true of the parties to a social contract. They need not judge other contracts to be any less worthy of being upheld, or judge breaches of those contracts to be any less wrong, or less worth preventing: qua parties to this contract, they should not be making such judgments—they are not their business.<sup>23</sup>

I do not intend here to rely upon, let alone to defend, Beccaria's (or anyone else's) version of contractualism; Beccaria serves, for my present purposes, simply as a clear, and therefore useful, example of a kind of conception of criminal law very different from the conception to which Asp and Moore appeal. On that conception, criminal law is to be understood in political terms—in terms of its role within the institutional apparatus of the state; it is therefore also to be understood—at least, again, if we focus on domestic criminal law—as essentially local in its scope: it is not concerned with wrongdoing in the abstract, but with local violations of the norms or institutions that structure the polity whose law it is. Beccaria is thus a proponent of a 'public law' model of criminal law—to which we must now turn.

### 3. *Criminal Law as Public Law*

Some theorists, notably Malcolm Thorburn and Vincent Chiao, have been reviving what they call a 'public law' conception of criminal law and criminal justice.<sup>24</sup>

Thorburn and Chiao resist what they portray as the unduly moralized conceptions of criminal law that they ascribe to theorists such as Moore (and me): it should, they insist, be understood as a coercive institution of the state, serving the proper aims of the state, aims that do not essentially

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<sup>23</sup> We will of course then also need to give an account of transnational and international criminal law, and of their relationship to domestic criminal law, and to meet the objection that the most plausible normative account of that relationship is one of delegation—that domestic systems of criminal law should be rationalized as doing their local bit towards the fulfilment of certain universal values. I cannot discuss this issue here: but see at nn 71-3 below.

<sup>24</sup> See M Thorburn, 'Criminal Law as Public Law' (in R A Duff and S P Green (eds), *Philosophical Foundations of Criminal Law*, Oxford University Press, 2010, 21), 24; V Chiao, 'What is the Criminal Law For?' (2016) 35 *Law and Philosophy* 137, 138; also Thorburn, 'Constitutionalism and the Limits of the Criminal Law', in R A Duff et al (eds), *The Structures of the Criminal Law* (Oxford University Press, 2011) 85, and 'Punishment and Public Authority', in A du Bois-Pedain et al (eds) *Criminal Law and the Authority of the State* (Hart, 2017) 7; Chiao, 'Two Conceptions of the Criminal Law', in C Flanders and Z Hoskins (eds), *The New Philosophy of Criminal Law* (Rowman & Littlefield, 2016) 19, *Criminal Law in the Age of the Administrative State* (Oxford University Press, 2018). See also S Garvey, 'Was Ellen Wronged?' (2013) 7 *Criminal Law and Philosophy* 185, on a 'political' as against a 'moral' model of criminal law.

include making citizens moral, or responding punitively to their moral wrongdoing. The proper purpose of the state, on Thorburn's account, is to 'put in place a rightful context for our actions', so that we can 'interact with others in a way that is respectful of everyone's freedom'; a context 'within which we can be free and independent persons ... as we live together with others'.<sup>25</sup> That context is constituted by a range of state institutions, and sustained by criminal law as a coercive practice that serves to 'resist any attempt to supplant the law's rules with private preferences'.<sup>26</sup> What the state thus provides, and the criminal law enforces, is a set of jurisdictional provisions, defining what falls within each person's private jurisdiction (as a free and equal moral agent), and what rather falls within the jurisdiction of the state acting in our name and on our behalf: the criminal law is concerned 'with the protection of jurisdiction, both public and private, rather than with the identification of moral wrongs';<sup>27</sup> what the state should therefore criminalize are 'efforts to undermine the whole system of equal freedom itself',<sup>28</sup> by exceeding one's own jurisdiction and invading that of the state. Chiao's focus is, rather, on the rule of law and the possibility of social life. Criminal law 'supports the possibility of the rule of law—a collective life under stable public institutions—by providing crucial support to shared attitudes of reciprocity'; it does this as 'a coercive rule-enforcing institution providing an assurance of general cooperation with legal rules'.<sup>29</sup> Criminal law might also serve other ends, but that is its 'one important function', which it can serve by threatening and imposing harsh sanctions on those who violate the rules.

There are important differences between Thorburn's and Chiao's views—about the nature of the order that criminal law serves to secure, about the way in which criminal law helps to secure that order, and thus also about the most significant features of the criminal law itself. What their views share, however, is an insistence on setting criminal law in the context of the state, and of the distinctive ends that the state should serve; a rejection of Moore's suggestion that the state should take the punishment of moral wrongdoing as a primary aim—not just because they reject Moore's particular brand of retributivism, but because they deny that the criminal law has any such primary concern with moral wrongdoing; and an argument that there is a distinctive kind of political order (a system of equal freedom as a context in which people can live together as free and equal moral agents; collective life under stable institutions) that the state should maintain and that criminal law can help to sustain. On this view,

the criminal law is not an autonomous normative universe to be understood and justified in terms drawn from inter-personal morality. It is an integral component of society's basic structure, and should be understood and justified in those terms, regardless of whether it does or does not additionally punish moral wrongdoing as such.<sup>30</sup>

We can set this kind of 'public law' account in the context of the idea that criminal law serves to protect 'the king's [or the queen's] peace'; or, as we might put it in a more democratic time, 'the People's Peace'.<sup>31</sup> Adam Ferguson gave classic expression to this conception—

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<sup>25</sup> 'Constitutionalism and the Limits of the Criminal Law', 88, 97.

<sup>26</sup> 'Constitutionalism', 88.

<sup>27</sup> 'Criminal Law as Public Law', at 31.

<sup>28</sup> 'Constitutionalism', at 100.

<sup>29</sup> 'What is the Criminal Law For?', at 138, 139; see *Criminal Law in the Age of the Administrative State*, xxx.

<sup>30</sup> Chiao, 'What is the Criminal Law For?', at 139.

<sup>31</sup> Sir Carleton Allen, *The Queen's Peace* (Stevens and Sons, 1953) 183: 'the People's Peace', Allen thought, was 'the sinews of a healthy social life', and had replaced the idea of the king's peace.

We are not to expect that the laws of any country are to be framed as so many lessons of morality, to instruct the citizen how he may act the part of the virtuous man. Laws, whether civil or political, are expedients of policy ... to secure the peace of society.<sup>32</sup>

The ‘peace of society’, which might be called civil peace,<sup>33</sup> should not of course be equated with the mere absence of overt conflict—we should not mistake a desert for peace:<sup>34</sup> for civil peace is indeed a *civil*, ordered, social mode of life. But—for reasons that should become clearer in what follows—I would rather talk of civil order, since (so long as we avoid the cruder connotations of ‘law and order’ politics) this implies an ordered civic (legal and institutional, but also informal) structure to a polity’s life. Thorburn and Chiao portray criminal law as functioning to sustain a kind of civil order: a political ordering (a system of equal freedom that enables people to live together as free and equal moral agents; collective life under stable institutions) that constitutes the essential framework of the polity. Beccaria also portrays the criminal law as sustaining civil order—an order that is, on his account, to be understood in contractualist terms.

Public law theorists of criminal law are, I think, absolutely right to argue that this is the way in which we should understand, and normatively theorize, criminal law; and that once we take on this approach, we will see more clearly the radical implausibility of the kind of legal moralism of which Moore is the most prominent proponent.<sup>35</sup> This does not show, however, that we should abandon legal moralism: it shows, rather, that the morality with which criminal law is properly concerned is the public morality of a polity’s civil order. In what follows I will try to justify this claim, beginning with a slightly fuller account of the idea of civil order, as the order that criminal law should function to sustain.

#### 4. *Constituting Civil Order*

A polity’s civil order consists most obviously in the formal structure of laws and institutions through which it organizes and conducts its public affairs—its institutions not just of governance, but of civic life more generally, including (in polities like our own) those concerned with health care, with education, with welfare, and so on. But civil order is not just this kind of formal legal or institutional order. For, first, it includes the (supposedly) shared aims and values by which its institutions are meant to be structured and which its laws are meant to reflect; and, second, it also has a more informal, social dimension that consists in its citizens’ (more or less widely) shared extra-legal understandings of how they should conduct themselves, and behave towards each

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<sup>32</sup> A Ferguson, *Principles of Moral and Political Science* (W Creech, 1792), vol. II, 145, quoted by L Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press, 2016), 37; I am greatly indebted to Farmer’s discussion of civil peace and civil order.

<sup>33</sup> See D N MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007), esp. ch. 12; A E Bottoms, ‘Civil Peace and Criminalization’, in R A Duff et al (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press, 2014) 232.

<sup>34</sup> See Lord Byron, *Bride of Abydos*, Canto 2, stanza 2: ‘He makes a solitude, and calls it—peace’ (drawing on the remark about the Romans’ imperial behavior that Tacitus ascribed to the Caledonian chieftain Calgacus: ‘*ubi solitudinem faciunt, pacem appellant*’; *Agricola*, ch. XXX); and see Farmer, *Making the Modern Criminal Law*, 28.

<sup>35</sup> Thorburn and Chiao also class me, along with John Gardner, as belonging to the misguidedly moralist school of criminal law theorists, and I must admit that some of my previous work has given grounds for such a criticism; but this is not the place to discuss the extent to which I have previously fallen into such error.

other, as members of the polity—though I will not be able to discuss this dimension here.<sup>36</sup> In polities that have a written constitution, we can often find in that document the outlines of their conception of their civil order—of the civil order that they purport to aspire to create and sustain.

A constitution will typically begin with a more or less rhetorically ambitious declaration of the polity's guiding aims. Thus the 'Republic [the *res publica*, one might say] of Poland shall be the common good of all its citizens',<sup>37</sup> while the Islamic Republic of Iran is 'based on belief in... the One God, ... His exclusive sovereignty and right to legislate, and the necessity of submission to His commands';<sup>38</sup> Argentina's 1994 Constitution was established in order to

form a national union, guarantee justice, secure domestic peace, provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves, to our posterity, and to all men of the world who wish to dwell on Argentine soil;<sup>39</sup>

and the American Constitution declares that

the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>40</sup>

In such declarations, and in other clauses of the constitution, we thus find assertions of the core values to which the polity professes allegiance, the goods that its citizens and its institutions seek to achieve, and the rights (against the state and against each other) that its citizens are to enjoy. A constitution will also typically specify the central institutions of law and governance, the powers and duties they are to have, and the relationships between them.

Thus, to take just one convenient example, the Polish constitution goes on to fill out some of the bare framework laid down by Article 1 (quoted above). It identifies the general values, such as 'social justice' (art. 2), and the 'inviolable' 'dignity of the person' (art. 30), which are to be foundational to the polity's governance; the various 'freedoms and rights' that are to be respected and fostered, as well as the 'obligations' of citizenship (ch. 2), including such familiar rights as freedom, equality, privacy, due process, and assembly; the social institutions and practices, such as marriage (art. 18) and private ownership in a 'social market economy' (art. 20), through which individuals are to be enabled to pursue their own private goods; and the institutions of law and government through which the polity is to govern itself and pursue its common good (such as the Sejm and the Senate, the President and the Council of Ministers, the judiciary, and the separation of powers between them; art. 10). These provisions help to specify the content of 'the common good', and the institutional means through which that good is to be fostered and sustained; they

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<sup>36</sup> The informal, social dimension of civil order can be simply illustrated by the shared conventions that guide our behaviour towards each other in public spaces, including, for one instance, the ways in which queuing is (or is not) organized, typically by unstated but generally understood—and often firmly enforced—rules (which would make an interesting case study).

<sup>37</sup> For an English translation of the Constitution, see <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

<sup>38</sup> For English translations of the Iranian Constitution, and others, see <http://www.servat.unibe.ch/icl/index.html>.

<sup>39</sup> <http://www.senado.gov.ar/web/interes/constitucion/english.php>.

<sup>40</sup> We could also of course look to the Declaration of Independence: its assertions of equality, of the rights to life, liberty, and the pursuit of happiness, and of the need to 'institute new Government, laying its foundation on such principles and organizing its powers in such form, as ... shall seem most likely to effect their Safety and Happiness', are also partial delineations of the civil order of the new polity.

also thus help to define, and their implementation helps to constitute, the civil order of Poland as a polity. Of course, much in the constitution, especially in its declarations of the polity's defining values, will be left underspecified: the values at stake (social justice, inviolable dignity, freedom, equality, privacy, due process and so on) will need to be more precisely determined, often by the polity's courts; which is also to say that, even without any formal constitutional change, the civil order of any viable polity will be a constantly developing work in progress, rather than an order that is set in stone.

One important feature of any but the most totalitarian civil orders is that they will include a distinction between the public and the private. For they define the polity's public realm: that is, they define those matters that properly concern the polity's governing institutions and its citizens—those that belong to their shared life as citizens; but in doing so they also, whether explicitly or implicitly, define the spheres of private life into which the polity is not to intrude. Furthermore, in any liberal polity, those private spheres will be seen as valuable goods that must be protected against intrusion, especially intrusion by the state: that protection is provided by a familiar range of constitutional rights, as well as by shared informal understandings. This is an important point for my purposes, since it helps distinguish the version of legal moralism that I will defend from the more familiar Moorean version that public law theorists rightly attack. The central claim of what we can call public legal moralism is that criminal law is concerned, not with moral wrongs as such (not, even in principle, with *all* moral wrongs), but only with 'public' wrongs; and what makes a wrong public, on this account, is not some inherent characteristic of the wrong itself, or the fact that it has some adverse consequential impact on 'the public', but that it falls within or impinges on the public realm that is defined by the polity's civil order.<sup>41</sup> To call a wrong a public wrong is thus not to describe its inherent character or its impact; rather, it is to locate it within a particular (and often contestable) normative space.

To understand why criminal law is concerned with 'public' wrongs, what that claim means, and what role criminal law can play in relation to such wrongs, we need an account of criminal law—of what kind of institution this is.

## 5. Criminal Law

I do not propose to offer an empirical description of criminal law as it actually operates (that would be a complicated and depressing business); nor do I offer a neutral analysis of the concept of criminal law—for instance of the necessary and sufficient conditions for anything to count as a system of criminal law. Instead I offer a 'rational reconstruction' of criminal law: an account

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<sup>41</sup> The argument that we should understand crimes as public wrongs (though not in the sense in which Blackstone talked of public as against private wrongs: see Sir William Blackstone, *Commentaries on the Laws of England* (4 vols; Clarendon Press 1765-9), Bk IV, ch. 1, p. 5) has come in for recent criticism: see e.g. Moore, 'Liberty's Constraints' (n. 16 above), 198-200; J Edwards and A P Simester, 'What's Public About Crime?' (2017) 37 *Oxford Journal of Legal Studies* 105. This reflects the failure by proponents of that argument to do enough to explain the relevant concept of the 'public', and the role that the idea of crimes as public wrongs could usefully play in discussions of criminalization (e.g. S E Marshall and R A Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law & Jurisprudence* 7, 'Public and Private Wrongs', in J Chalmers et al (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press, 2010) 70; D N Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2007), 135-9; and G Lamond, 'What is a Crime?' (2007) 27 *Oxford Journal of Legal Studies* 609.

grounded in what I take to be salient features of existing systems of criminal law like our own—features that include the rhetoric of such systems—but one that aims to (re)construct from those features a normatively interesting picture of a particular kind of institution, with a distinctive set of aims and values.<sup>42</sup> But the reconstructor’s choice of the ‘salient features’ is of course likely to reflect her own normative interests, and I do not argue that other accounts of criminal law are, as conceptual analyses, mistaken:<sup>43</sup> my claim is only that what I offer here is a normatively fruitful conception of criminal law as an institution that can play a distinctive, and valuable, role in the life of a liberal republic.

There are three central dimensions to a contemporary system of criminal law, which give it a distinctive place in the polity’s institutional structure.

First, the substantive criminal law defines a range of offences, and the defences that enable someone who commits an offence to avoid conviction: in doing so, it thus defines a set of public wrongs—kinds of conduct that are to be formally, publicly, condemned as wrong. Although the substantive criminal law is often described as ‘prohibiting’ the kinds of conduct that it defines as criminal, this is misleading: it implies that the law’s purpose is to issue edicts that the citizens are to obey, and that in thus prohibiting conduct the law claims the power to make wrongful conduct that was not already wrongful. But the criminal law does not claim any such power: rather, it claims the authority to declare certain pre-existing wrongs (wrongs, that is, that can be identified as wrongs independently of the criminal law) to be public wrongs that concern the polity as a whole; and to provide, when necessary, authoritative definitions of those wrongs as criminal wrongs.

This declaratory authority is most clearly seen in the case of so-called ‘*mala in se*’: crimes consisting in conduct that is (or so the law claims) wrongful independently of its legal regulation. When the criminal law defines murder, rape, assault, theft, criminal damage, and so on as crimes, it is not *prohibiting* the kinds of conduct that it thus defines as criminal, or making them wrong: it takes for granted that they are wrong, and declares them to be public wrongs (though it is also true that the law must provide relatively clear definitions of those wrongs that can be applied by the courts, which will involve some more precise determination of our pre-legal conceptions of such wrongs).<sup>44</sup> But the same is also true of so-called ‘*mala prohibita*’—offences consisting in conduct that is not, or might not be, wrongful independently of its legal prohibition. Here, it is true, we are dealing with legal prohibitions: but it is not, strictly speaking, the criminal law that does the prohibiting. What we have is, rather, a two-stage process of criminalization. Driving

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<sup>42</sup> See D N MacCormick, ‘Reconstruction after Deconstruction: A Response to CLS’ (1990) 10 *Oxford Journal of Legal Studies* 539.

<sup>43</sup> Contrast, for instance, Chiao’s minimalist account of criminal law, as ‘a generically coercive rule-enforcing institution’ (distinguished from other such institutions by the harshness of the sanctions that it imposes), whose justifying function is to ‘contribute[] to making social cooperation under the rule of law possible’: ‘What is the Criminal Law For?’, at 139 (see also 144, 159; a crucial constraint is that the use of criminal law to enforce the rules of our public institutions must be consistent with the principles that make those institutions valuable).

<sup>44</sup> This claim is over-simplified, though not in a way that undercuts its force here: for in defining crimes, even the most central *mala in se*, the criminal law is constructing a conception of a particular kind of public wrongs, out of pre-legal materials that might be inchoate or contested: on this issue, see L Farmer, ‘Criminal Wrongs in Historical Perspective’ in R A Duff et al (eds) *The Boundaries of the Criminal Law* (Oxford University Press, 2010) 214, and *Making the Modern Criminal Law* chs 8-9.

offences provide good examples of this process. A statute lays down a regulation proscribing or prescribing some type of conduct: regulations, for instance, that specify speed limits which all drivers are required to obey, or that require drivers to have driving licences and carry insurance. Assuming (as the law must assume) that such regulations as these have a legitimate claim on our obedience, we then do wrong if we break them; and the criminal law, in making it an offence to break the speed limit or to drive without a license or without insurance, declares the wrong to be a public wrong. The criminalized wrong is thus still a ‘pre-existing wrong’, in the sense that the criminalized conduct is wrongful prior to and independently of the *criminal* law, though it might not be wrongful independently of its legal regulation; the criminal law, as a distinctive kind of law, now functions not to create the wrong, but to declare its public character—and to provide a suitable response to it.<sup>45</sup>

For, second, the criminal law gives effective force to such declarations of public wrongs by providing a criminal process of trial and punishment. To criminalize a type of conduct is now not merely to declare that it is a public wrong; it is to make it the case that it is liable to be *treated* as public wrong, in that those who engage in it are liable to be called to public account for it through a criminal trial, and to be punished for it if convicted at trial.

The significance of the criminal trial is often downplayed both in the practice of criminal law and in criminal law theory: in jurisdictions that operate pervasive practices of plea bargaining there are very few contested trials; and theorists often portray the trial, and the criminal process as a whole, in essentially instrumental terms, as a procedure that connects crime to punishment by identifying those who, having committed crimes, are liable to be punished. But we can build a rather different account of the proper aims of the criminal trial if we think more carefully about some central aspects of the structure and rhetoric of our existing institutions—for instance about the importance attached to the defendant’s presence, to whether a defendant is ‘fit to plead’, to the entering of a plea of ‘Guilty’ or ‘Not Guilty’, to confrontation in court between defendant and witnesses or accusers, and to the formality of the verdict. On this alternative account, the trial is understood as a process of calling to account or to answer—as a process through which the polity calls those accused of committing public wrongs to answer to their fellow citizens.<sup>46</sup> More precisely, the defendant is called first to answer *to* the charge, which is done by pleading either ‘Guilty’, thus admitting the culpable commission of a criminal wrong, or ‘Not Guilty’, thus challenging the prosecution to prove its case (the importance of the plea is shown in part by the significance of a refusal to plead; a defendant who rejects the authority of the court, or of the law under which she is tried, can display that rejection in a refusal to enter a plea, or to play any part in the trial). If the prosecution proves that the defendant committed the offence charged, or the defendant admits its commission, the defendant is called to answer *for* that offence: this can be done either by offering a defence, which seeks to justify or to excuse the commission of the offence; or by accepting one’s guilt. The formal verdict then either condemns the defendant’s

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<sup>45</sup> See further R A Duff, *Answering for Crime* (Hart Publishing, 2007), esp. chs 4.4, 7.3. To assume ‘that such regulations as these have a legitimate claim on our obedience’ is no to rely on a supposed general obligation to obey the law; it is, rather, to assume that the regulations can be justified as good faith attempts to serve some aspect of the common good.

<sup>46</sup> For a detailed development of this account, see R A Duff, L Farmer, S E Marshall and V Tadros, *The Trial on Trial (3): Towards a Normative Theory of the Criminal Trial* (Hart Publishing, 2007). We also need to attend, of course, to the processes and officials that link alleged crimes to trials, notably the police and prosecutors.

conduct as a criminal wrong, thus holding the defendant to public account for that wrong; or declares that the defendant's guilt has not been proved, so that the presumption of innocence, to which all citizens are entitled, remains undefeated.<sup>47</sup>

(Such a conception of the criminal trial might seem quaint in a jurisdiction that depends as heavily as the US does on a practice of plea-bargaining that can produce the notorious 'Alford' plea: 'I'm not guilty but I plead guilty'.<sup>48</sup> What this shows, however (I hope) is not that we must abandon that conception, but that even if some kinds of agreed plea are legitimate,<sup>49</sup> this kind of practice of plea-bargaining is no longer a practice of criminal justice.)

It might seem that I have been ignoring the most significant feature of a system of criminal law—that it involves the infliction of punishment on those convicted of committing crimes. For, according to many theorists, both the substantive criminal law and the criminal process must be understood as preludes to criminal punishment: we define crimes in the substantive criminal law, and maintain a criminal process through which we can identify those who commit those crimes, in order to provide for their punishment.<sup>50</sup> The aims of that punishment might be retribution—the imposition of a deserved quantum of suffering on wrongdoers; or the prevention of the kinds of conduct that cause harm or that disturb the conditions of social life, by deterring or incapacitating those who might engage in such conduct: but whatever the aims might be, the most salient and significant feature of criminal law is that it involves punishment.

We need not engage here in the (probably futile) argument about whether punishment is a necessary or defining feature of criminal law—whether a system that defined 'offences' and that provided a system of 'trials' at which those accused of committing such offences were called to formal public account and condemned if proved guilty, but that imposed no further sanctions on those thus proved guilty, should count as a system of 'criminal' law. We need simply note that punishment is indeed a salient feature of our systems of criminal law, and that it is normatively highly problematic, given the hardships that it imposes on those subjected to it. Any normative account of criminal law must therefore either offer an explanation of what kinds of punishment, serving what ends, a system of criminal law can properly provide for; or explain how criminal law is possible, how it can hope to achieve its justifying aims, without punishment. All I will say at the moment is that, important though punishment is, we should not assume that it must provide the primary point or focus of criminal law. I will argue later that there is a significant value for a polity in the kind of formal definition of public wrongs that substantive criminal law provides, and in the formal process of calling alleged wrongdoers to public account that the criminal trial constitutes—a value that is independent of criminal punishment in that it would subsist even if no further formal consequences followed from a criminal conviction.

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<sup>47</sup> It might be objected that the account I have sketched here is unduly parochial, since it is grounded in features of a roughly 'adversarial' system of criminal trials. That is true: but I hope that an account of the criminal trial as a process of calling to public account can also apply to different, more 'inquisitorial', systems.

<sup>48</sup> *North Carolina v Alford* 91 S Ct 160 (1970). In fairness to the Court, which upheld Mr Alford's conviction, it should be noted that one reason it gave for doing so was that there was strong evidence that he was guilty: but see A D Redlich and A A Özdogru, 'Alford Pleas in the Age of Innocence' (2009) 27 *Behavioral Sciences and the Law* 467.

<sup>49</sup> See e.g. R L Lippke, *The Ethics of Plea Bargaining* (Oxford University Press, 2011).

<sup>50</sup> See e.g. Moore, *Placing Blame*, ch. 1; Husak, *Overcriminalization*, 78; Thorburn, 'Constitutionalism', 96; Chiao, 'What is the Criminal Law For?', 137.

I have so far described a distinctive kind of legal institution or practice: one that defines a set of public wrongs, that provides for those accused of committing such wrongs to be formally and publicly called to account, and that imposes punishment on those proved to have committed such wrongs. Our next question must be: what proper role, if any, can such an institution play in the governing structure of a polity—in particular (since this should be the kind of polity in which we aspire to live) in the governing structure of a democratic republic?

### *6. Criminal Law and Civil Order*

The role of criminal law in a democratic republic is, to put it briefly, to help to sustain its civil order. The task of this section is to explain that claim.

A polity's civil order is structured by a range of values, both explicit and implicit. As we saw in the Polish constitution, it includes various goods that are to be fostered and protected; various rights that are to be respected and secured; and a range of institutions that must be able to operate efficiently if they are to serve the common good. Now if we lived in communities of angels, or of saints, we could rely on ourselves and each other to respect these goods, rights and institutions in our actions, and to play our appropriate parts in the pursuit of the common good that they serve; but we know all too well that we are neither angels nor saints. Nor are we amoral psychopaths, to whom goods and rights mean nothing: if we were, we would not even be able to grasp the idea of a political community to which we belong, or of its common good as something that has a claim on our allegiance. We are human. That is to say, in part, that we have some grasp of and concern for moral and political values, including those in which our political obligations are grounded; we can recognize the importance of the values that structure the civil order of our polity, and can realize that they give us reason not to act in ways that violate or threaten them. But we are also prone not to pay enough attention to those values, or not to be sufficiently guided by them in our actions; we are prone to put our own interests first when we should not, prone to be careless of the rights and interests of others, prone to be sometimes moved by enmity or hatred rather than by appropriate civic motives. We are radically fallible and imperfect: if a civil order depended solely on our civic good will, it would not survive.

(It might be added that if this 'we' refers to the members of a contemporary society, we are also radically divided, by such deep differences in beliefs, values, and conceptions of what 'our' civil order or common good should be that it is impossible to talk of a civil order structured by a shared conception of the polity's goods and goals. I will discuss this issue briefly in s. 8.)

In constructing our civil order, we therefore need to think about how we ought to respond to conduct that violates or threatens its constitutive values, not through incompetence or incapacity, but from ill will or lack of proper care: like any human practice or form of life, a polity needs to have, as part of its structure, ways of dealing with civic misconduct. Some of those ways will be ways of preventing such misconduct in advance: but we must know that, if citizens are to retain the kinds of freedom, dignity and privacy that a decent polity will accord them, any acceptable preventive measures will always be fallible: people will still be tempted to do wrong, and will still give in to those temptations. How then should a polity respond to such wrongdoing? More precisely, how can it respond in ways that still address and treat its citizens, as they are entitled to be addressed and treated, as responsible members of the political community? For a polity that takes the moral status, the 'inviolable dignity',<sup>51</sup> of its citizens seriously must treat and address

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<sup>51</sup> See Polish Constitution, art. 30.

them as responsible agents, even (perhaps especially) when they have done wrong: its responses to wrongdoing must still respect the wrongdoer's dignity as a citizen; they must, that is, be such that citizens can impose them on each other, and can subject themselves to them, without thereby losing their civic status.<sup>52</sup>

A plausible answer to this question is that it should respond through a system of criminal law of the kind that I sketched in s. 5 above: a system that declares and defines the kinds of wrong that are to count as public wrongs, and that takes commissions of those wrongs seriously by calling to formal public account those who commit them. The declarations and definitions of criminal wrongs that make up the special part of the substantive criminal law serve both to show the polity's commitment to the values that are at stake, and to give citizens fair warning that the commission of these wrongs will make them liable to criminal prosecution. The criminal process of prosecution, trial and conviction is then an appropriate way of doing justice to the victims of crime (when the crime is a victimizing one), to the values that the crime violated, and also to the offender himself as a responsible member of the polity. We show our recognition of the wrongs suffered by victims of crime by trying to call to account those who wronged them; this is a kind of vindication, distinct from any material help, that victims should value. We show our concern for the values that were violated by taking those violations seriously in this way; commitment to a value involves being ready to respond to its violation. We address the offender as a responsible member of the polity by calling him to account for his actions: for to be a responsible agent is to be capable of answering for my actions; and to treat another as a responsible fellow member of a normative community is, *inter alia*, to be prepared to call him to answer for his violations of the community's shared values. In this way we build criminal law and the criminal process into the constitution of the polity and its civil order: the way in which we respond to civic wrongdoing is a significant aspect of the civil order that structures our lives as citizens.<sup>53</sup>

I have not yet mentioned punishment as an aspect of the polity's response to crime, in line with my suggestion in s. 5 that we should not see punishment as the primary aspect or purpose of criminal law; nor can I discuss it further here, although a normative theory of criminal law must of course have something to say about punishment—either about what role it can play within the civil order of a democratic republic, or about how we could do without it. All I will say here is that if we are to see punishment, along with other elements of criminal law, as part of a polity's civil order, we must show how it could itself be a civic enterprise—something to which citizens can subject each other, and themselves, as fellow members of the political community. That is a challenging, but I think not impossible, task, if we are ready to reimagine criminal punishment as a kind of penal burden that citizens can be expected to undertake for themselves.<sup>54</sup>

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<sup>52</sup> Both these claims—that a polity should treat its members as responsible citizens, and should do so even when they commit crimes—need defending, especially the latter, given the prevailing tendency, at least in Britain and the US, to see offenders as enemies rather than as citizens (see G Jakobs, 'Bürgerstrafrecht und Feindstrafrecht' (2004) *Höchstrichterliche Rechtsprechung Strafrecht* 88, and D Ohana, 'Günther Jakobs's Feindstrafrecht: A Dispassionate Account', in M D Dubber (ed.), *Foundational Texts in Modern Criminal Law* (Oxford University Press, 2014) 353); but I cannot provide that defence here. I also need to explain the criminal law's relationship to non-citizens who come within its jurisdiction: see (briefly) at nn 67-8 below.

<sup>53</sup> See further s. 7 below.

<sup>54</sup> See further R A Duff and S E Marshall, 'Civic Punishment', in A Dzur et al (eds), *Democratic Theory and Mass Incarceration* (Oxford University Press, 2016), 33.

It might now seem that, despite agreeing with the ‘public law’ theorists that we must theorize criminal law politically, as a part of public law, I have simply (re-)allied myself with Moore: for while I have not adopted his retributivist conception of the aims of criminal law (that its function is to impose deserved punishment on culpable wrongdoers), I am arguing that the central purpose of criminal law is to provide for an appropriate response to moral wrongdoing—which is also the core of his argument. We might disagree about just what that appropriate response involves: he focuses on punishment, while I focus on a public calling to account. But we appear to agree more fundamentally about what criminal law is for: its proper purpose is to provide such a deserved response to culpable wrongdoing.

This appearance of agreement is, however misleading, since whereas on Moore’s account the criminal law is in principle concerned with *every* kind of moral wrongdoing, wherever, and by or against whomever, it is committed,<sup>55</sup> on the account I am offering here a polity’s criminal law is concerned only with wrongs committed within its own public realm—wrongs that violate its own civil order. If I cheat on my partner, or betray my friend’s confidence, or let my colleagues down by not taking my academic responsibilities seriously, I commit what might be a quite serious and harmful wrong—one for which I certainly deserve to be called to account and criticized by those whom it concerns. On Moore’s account, we therefore have reason to criminalize such conduct—although we probably also have stronger reason not to do so. On my account, we have no reason at all to criminalize it, since such dealings between partners, friends and colleagues do not fall within the public realm—they do not impinge on the polity’s civil order, which structures our dealings and interactions not as lovers, friends or colleagues, but simply as citizens. So too, on Moore’s account the Polish parliament has reason to include within the scope of Polish criminal law not only thefts or assaults committed within Poland, but those committed anywhere in the world—assaults or thefts committed in Edinburgh as well as those committed in Warsaw (though it probably has stronger countervailing reasons not to do so): for such wrongs deserve retribution wherever they are committed; the world is therefore morally improved if they are punished; and legislators therefore have reason to assist such moral improvement if they can. On my account, however, the Polish legislature has *no* reason to criminalize wrongs committed in Edinburgh:<sup>56</sup> its business is with the civil order of Poland, and with wrongs that violate or threaten that order—an order that is essentially local.

An account of civil order, and of criminal law as helping to sustain the polity’s civil order, thus enables us to give more content to the idea of crimes as public wrongs, and to build a more plausible, because less expansive, version of legal moralism. Criminal law is properly focused on moral wrongdoing: its distinctive purpose, as part of the legal structure of a polity (the purpose that distinguishes it from other kinds of legal regulation) is to provide an appropriate, public way of formally recognising and condemning wrongdoing, and of calling those who engage in (or are plausibly accused of engaging in it) to public account. However, as part of the political structure of the polity, it is concerned only with wrongs that fall within the public realm—wrongs, that is, that violate or threaten the polity’s civil order.

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<sup>55</sup> See at nn 15-17 above on the two ways in which Moore’s legal moralism is (over-)expansive.

<sup>56</sup> Although it does have reason to make provision for Poland to assist other polities in maintaining their own civil order, as a matter of international cooperation between nations. This explains the practice of extradition. Polish law and Polish courts cannot properly call me to account for a theft I committed in Edinburgh; but if I am found in Poland, and Scotland requests my extradition, they can send me to Scotland to answer for my wrong there.

Such an account leaves, of course, a lot of work to be done (and a lot of controversy to work through) in order to determine what kinds of conduct should be criminalized. It does not provide us with a neat set of principles of criminalization that we could apply to decide the proper scope and content of the criminal law; instead, it tells us what kinds of argument are relevant to the question of criminalization. We should distinguish two stages in the kind of public deliberation that leads to a decision about criminalization.

The first stage determines whether we have reason, in principle, to criminalize a certain type of conduct. We have such reason, on the account offered here, if, and only if, the conduct falls within the public realm of the polity—if and only if it bears on the polity’s civil order; and if and only if it is, in that context, wrongful, as violating or threatening some aspect of that civil order; we may find assistance at this stage in the polity’s constitution, if it has a written or determinate constitution of an appropriate kind, which specifies the foundational values of the polity’s civil order. The second stage determines whether that reason to criminalize is a good enough reason. Sometimes, given for instance the costs of criminalization and the relatively minor character of the wrong concerned, we should do nothing formal: a polity whose civil order includes a practice of queuing has reason to criminalize queue-jumping, as a violation of an aspect of that order; but it is unlikely that that rather minor disruption of civil order will be serious enough to warrant any formal legal response. Even when the wrong is serious enough to warrant some kind of formal, legal response, we need to ask whether criminalization is the most appropriate response: should we instead make it a matter of civil rather than of criminal law, leaving it to the victim to choose whether to seek a legal remedy; or should we provide a response, as advocates of ‘restorative justice’ suggest, that focuses more on repairing harm and damaged relationships than on holding wrongdoers to account? Our question becomes, that is, not the question of whether we have good reason to criminalize a type of wrongful conduct, but whether we have good (enough) reason to criminalize it rather than responding to it in one of these other ways—or indeed doing nothing formally about it.

I cannot discuss either of these stages of deliberation further here.<sup>57</sup> Instead, I should explain in a little more detail an important aspect of the relationship that this account posits between the criminal law and civil order—and between the kinds of wrong that we have reason to criminalize and the violation of that order.

### *7. Public Wrongs, Criminal Law, and the (De)Constitution of Civil Order*

I have said nothing so far about the kinds of conduct that, on this account of criminal law as sustaining a polity’s civil order, a legislature might properly see reason to criminalize. Just what those kinds would be must of course depend on how the polity in question defines its civil order (or, for normative theorists or engaged citizens, how it should define its civil order); but I should say a little more here to illustrate the ways in which conduct can be understood as constituting a public wrong because it violates the civil order.

On some versions of legal moralism, the most obvious candidates for criminalization are the familiar kinds of victimizing *mala in se*: if we are to criminalize moral wrongs, we must surely criminalize such obvious wrongs as murder, rape, and other kinds of attack on the person (or on

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<sup>57</sup> But see R A Duff, *The Realm of Criminal Law* (Oxford University Press, 2018), chs 6-7. In the case of *mala prohibita* we could identify three stages, the first stage being that at which we decide to create a pre-criminal regulation, whose breach we might then have reason to criminalize.

their property); what might be much less obvious is why we should criminalize the various kinds of *mala prohibita* that consist in the breach of some legal regulation.<sup>58</sup> On an account of crimes as public wrongs that violate the polity's civil order, by contrast, at least some *mala prohibita* are obvious candidates for criminalization, as are other kinds of conduct that directly impact on the polity's public institutions or its civic life; it might be rather less obvious why central *mala in se*, consisting in wrongs directed against individual victims, should be criminalizable. Conduct that undermines the functioning of civic institutions—electoral malpractice, for instance, or bribery of officials, or perverting the course of justice, or tax or social security fraud—is clearly eligible for criminalization as constituting a public wrong; so is conduct in breach of regulations that are well designed to serve some aspect of the common good—regulations concerning, for instance, environmental harms, or health and safety at work, or driving; so is conduct that disturbs 'public order'—although there are familiar difficulties in determining the proper scope of public order offences.<sup>59</sup> But whilst murder and rape are clearly serious wrongs, why should they count, on this view, as 'public', criminalizable wrongs—when they can be committed in private, without any discernible public impact?

To explain why such wrongs are criminalizable, we need not seek out some further effects that they might have on the life of the polity or its citizens,<sup>60</sup> or effects that failure to criminalize them might have.<sup>61</sup> We can say that such wrongs count as public wrongs because they are clearly inconsistent with, manifest violations of, any remotely plausible conception of civil order—any conception, that is, of how the members of a polity can live together as citizens. Some kinds of interpersonal wrong belong, from the polity's perspective, to a private realm: they violate the bonds of intimate relationships, of friendship, or of professional collegiality, but not those of our civic life. If I betray my lover's or my friend's trust, or let down my colleagues, this might be a serious wrong—so serious that it threatens or destroys our relationship; but it does not deny or negate the conditions under which we can live as citizens who share a civic life. Murder and rape, however, flagrantly negate those conditions: how could we imagine a polity in which it was permissible (as far as the polity was concerned) for citizens to murder or rape each other at will? We need not distinguish different conceptions of civil order, reflecting different political theories of state and polity, here: any viable conception of civil order must count these as serious public wrongs.<sup>62</sup> This is not to say that their wrongfulness consists, in the polity's or the law's eyes, in their violation of civil order; that would be a distortion. Their wrongfulness consists in the wrong that they do to their individual victims—that is what the murderer or rapist is to be convicted of and punished for: but what constitutes them as public wrongs, and brings them within the ambit

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<sup>58</sup> See e.g. Husak, *Overcriminalization*, 103-19.

<sup>59</sup> See C Wells and O Quick, *Lacey, Wells and Quick Reconstructing Criminal Law: Text and Materials* (4th edn; Cambridge University Press, 2010), chs 4-7; D Ormerod and K Laird, *Smith and Hogan's Criminal Law* (14th edn; Oxford University Press, 2015), ch. 32.

<sup>60</sup> For instance by causing 'social volatility' (see L C Becker, 'Criminal Attempts and the Theory of the Law of Crimes' (1974) 3 *Philosophy and Public Affairs* 262), or loss of trust (see S Dimock, 'Retributivism and Trust' (1997) 16 *Law and Philosophy* 37).

<sup>61</sup> See e.g. J Gardner and S Shute, 'The Wrongness of Rape', in J Horder (ed.), *Oxford Essays in Jurisprudence*, 4th Series (Oxford University Press, 2000) 193.

<sup>62</sup> Compare Hart's discussion of the 'minimum content of natural law': H L A Hart, *The Concept of Law* (3rd ed.; Oxford University Press, 2012), ch. 9.

of the polity's criminal law and the jurisdiction of its courts, is that they are radically inconsistent with its civil order—that is what makes them the business of the polity, and thus of its criminal law.<sup>63</sup>

The same point—that what constitutes certain kinds of wrong as public wrongs is not their consequential impact on the polity's civil order, but their inherent inconsistency with its central values—can also be illustrated by less serious wrongs. Thus when a French mayor prohibited 'dwarf-tossing', the decision was upheld by the Conseil d'Etat, on the grounds that the municipal police had authority to 'take all measures to prevent a violation of public order, one of whose elements is respect for human dignity', and that this 'attraction' contravened 'respect for the dignity of the human person'.<sup>64</sup> The relationship between respect for human dignity and 'public order'—the civil order of the French polity—is constitutive, not contingent or causal: thus what justifies a ban on activities that violate human dignity is not that they might cause some breach of public order, but that they themselves constitute such a breach, since they violate an important dimension of public order; a display of dwarf-tossing that passed off peacefully would therefore still constitute a violation of public order.

Such *mala in se* are criminalizable not because they have some contingent or consequential impact on civil order, but because they are intrinsically inconsistent with, and so destructive or deconstructive of, a civil order that is structured by the values they violate. An analogous point should also be noted about the relationship between the criminal law, as I have portrayed it, and the civil order that it serves to sustain: the relationship is not merely contingent and instrumental, but constitutive.

The claim that criminal law helps to sustain civil order might be read as giving criminal law an essentially instrumental role in relation to a pre-defined civil order. We begin, that is, with a conception of civil order; we then find a role for criminal law as a technique for preventing kinds of conduct that are likely to disrupt or undermine that order. Now criminal law obviously has an important preventive dimension—although to say that leaves open the question of how far such prevention is to be achieved through the normative persuasion that is intrinsic to its definitions of public wrongs and its procedures for calling to account those who commit such wrongs, and how far by more prudential modes of deterrence, or by incapacitative measures; but we must notice that it also serves partly to constitute the civil order that it helps to sustain.

A polity that maintains an institutional practice of criminal law—a practice that defines and declares a set of public wrongs, and holds those who commit such wrongs to public account—is a polity that takes civic wrongdoing seriously: it is concerned not merely to prevent the kinds of conduct that are in some way undesirable or harmful, but to mark out for formal censure certain kinds of wrongdoing. Second, it is a polity that takes agency and responsibility seriously, and insists on treating its members as responsible citizens: the criminal law addresses them as agents who can guide their own conduct by appropriate reasons (the reasons to which the law appeals in defining conduct as criminal, as well as the more prudential reasons that the criminal law might

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<sup>63</sup> That they violate this polity's civil order is a condition of their criminalization by this polity's law: see Duff, *Answering for Crime*, ch. 4.3. Compare Thorburn, 'Constitutionalism and the Limits of the Criminal Law', 102: 'The wrong of rape—and of murder, assault, etc—is precisely the objectification of one person by another, but that objectification is of concern to the state because it is the state's job to ensure the survival of the system that makes it possible for us all to interact on terms that preserve the status of us all as free and equal moral agents.'

<sup>64</sup> Conseil d'État statuant au contentieux, n°143578, lecture du 27 octobre 1995.

offer insofar as it aims, as a second best, to deter); and it calls them to answer, as responsible agents, for their alleged wrongs, through the criminal trial. In maintaining such an institution, a polity thus constitutes itself and its civil order in a particular way, as one that is structured by these kinds of concern, and this kind of respect for its citizens.

In an often-quoted remark, Winston Churchill said: ‘The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country’.<sup>65</sup> One might equally say that the way in which a polity uses the criminal law—its ‘mood and temper ... with regard to’ public wrongs and those who commit them—is not just an unfailing test, but a crucial dimension, of its civil order.

### 8. *Three Objections*

Finally, I should note three objections to, or three apparent problems for, the account I have sketched in this paper—although I cannot respond to them in detail here.<sup>66</sup>

That account focuses on domestic criminal law, as sustaining and partly constituting the civil order of a political community of citizens: the criminal law is their law as members of the polity; it purports to reflect and protect the values by which their shared civic life is structured. The first objection to such an account is that it says nothing about the many non-citizens who are bound by a contemporary polity’s criminal law: those who are in the polity as short-term visitors or as long-term residents, and who might become either victims of crime or defendants in its criminal courts.<sup>67</sup> Indeed, the objector might continue, in saying nothing about the status of non-citizens, I implicitly deny their moral or civic standing: they do not have, it seems, the kind of claim to the law’s protection (the protection that it is supposed to offer all citizens, including both victims and offenders) that citizens have as a matter of right. The simple answer to this objection is that we should take seriously the normative concept (the role) of guest. Although guests are not (cannot by definition be) full members of the community in which they are guests, they are owed duties of hospitality by their hosts, and in return owe duties to their hosts: which is to say in part, in the case of criminal law, that citizens owe it to guests to seek to protect them, as they seek to protect each other, against the kinds of wrong with which the criminal law deals, and to seek to call to account those who commit such wrongs against guests; and also that guests owe it to their hosts to respect their laws and to answer for the wrongs they commit in their hosts’ civic home. There is of course much more to be said both about citizenship (in particular about how easily it should be acquired, or lost), and about different kinds of guest (including those ‘uninvited guests’ who enter a country illegally): but though this account attaches normative significance to citizenship, and thus by implication to the distinction between citizens and non-citizens, it does not deny to non-citizens the kind of equality under and before the law that matters.<sup>68</sup>

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<sup>65</sup> In a speech in the House of Commons: Hansard, 20 July 1910, col. 1354 (<https://api.parliament.uk/historic-hansard/commons/1910/jul/20/class-iii>).

<sup>66</sup> I deal with them in more detail in *The Realm of Criminal Law* (n. 57 above).

<sup>67</sup> See e.g. L Zedner, ‘Is the Criminal Law only for Citizens? A Problem at the Borders of Punishment’. In K F Aas and M Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press, 2013), 40.

<sup>68</sup> It is also worth emphasising that on this view the fact that a criminal wrong is committed against, or by, a non-citizen makes no difference to its character or seriousness: the question is not what makes an attack on a person wrong, but what makes it our civic business, and thus the business of our criminal law.

The second objection to be noted here concerns the preconditions of criminal law as I have portrayed it. Criminal law is, I have argued, the law of a political community, one structured by a set of shared values that define its civil order: but, it might be objected, we cannot find any such community in our contemporary, conflicted societies. We can find communities—communities of shared values and understandings: but these are in very familiar ways deeply at odds with each other, and what we lack is an overarching or underlying political community defined by values in which all citizens can be said to share.<sup>69</sup> In such a situation, the task of law, and of criminal law in particular, cannot be to give expression to the shared values of the polity, since there are none: it can only be either to impose the values of one, dominant group on other less powerful groups—to disguise the exercise of brute power in the trappings of legality; or, more optimistically, to enable a more or less peaceful *modus vivendi* between these disparate normative communities.<sup>70</sup> This kind of objection leads us into the well-trodden terrain of debates about ‘multi-culturalism’, and about the possibility and reach of ‘public reason’—debates into which I cannot enter here. All I can say here is, first, that we should not over-estimate the extent of agreement necessary for political community: we must be able to reach collective agreement, a shared understanding, on some matters, both procedural and substantive (including agreement about how we can set about resolving, or bypassing, our substantive disagreements); but that is consistent with the existence of deep differences and disagreements—differences and disagreements that a liberal polity will indeed seek to protect. Second, we should not forget that community can be as much a matter of (shared) aspiration as of achieved fact: we can constitute ourselves as a community in part by the very attempt to do so. Third, insofar as even these modest kinds of agreement are unavailable or impossible, so too is genuine political community (for we cannot assume that such community is always either actual or possible); insofar as such agreement is, if not wholly absent, no more than partial, so too is political community.

I do not mean to downplay the extent to which the account offered here is an idealised one—an account of what political community ought to be, or of what we should aspire to build; or the distance between such an ideal and the actual societies in which we live; or the extent to which so many of those who appear in our criminal courts, or are otherwise burdened by the coercive attentions of our criminal law, have been effectively excluded from participation in the political community to which they formally belong, and in whose voice the criminal law claims to speak to them. There are, as many theorists and campaigners have forcefully argued, serious questions about the possibility of doing criminal justice in a pervasively unjust society: but to tackle those questions we also need to have an idea of what criminal justice would amount to, and of what its preconditions are; that is what this account aims to provide.

The third objection I will note here concerns international law. The account I have offered focuses on the domestic criminal law of nation states, and could be readily adapted to cover, for instance, the criminal laws of states that belong to a federal system, and transnational criminal laws such as that of the European Union:<sup>71</sup> for in these kinds of case we can identify a political community (at least a nascent or aspirational community) whose law it is. But what can such an

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<sup>69</sup> I leave aside here the yet more pessimistic suggestion that, since the failure of the ‘Enlightenment Project’, we have lost any kind of substantial moral or political community: see A MacIntyre, *After Virtue: A Study in Moral Theory* (3rd edn; Bloomsbury, 2007), chs 1-6.

<sup>70</sup> For a recent version of this objection, see Edwards and Simester. ‘What’s Public About Crime?’ (n. 41 above).

<sup>71</sup> See Mitsilegas, *EU Criminal Law After Lisbon* (n. 12 above).

account say about international criminal law, as applied by the ICC and other international criminal tribunals; or about the claims to ‘universal jurisdiction’ over certain kinds of crime committed by and against anyone anywhere in the world that domestic systems of law sometimes make?<sup>72</sup> If criminal law must (as I argue) be the law of a political community, what then is the political community whose law international criminal law is, and in whose voice international criminal law can claim to speak? A familiar and tempting answer is that the community is that of ‘humanity’: international criminal law is properly concerned with ‘atrocities that deeply shock the conscience of humanity’,<sup>73</sup> and its courts therefore speak in the name of humanity, calling to account perpetrators who, given the atrocious nature of their crimes, should have to answer not just to their local polity, but to humanity. That tempting answer will not do, however, since we cannot see humanity as a political community (not even as one that exists in aspiration) to which all human beings belong as ‘citizens of the world’. We might instead, and more plausibly, talk of an international community whose membership consists not of individual human beings, but of nations, or peoples; and suggest that when international criminal law is applied to ‘crimes against humanity’, the international community of nations is acting on behalf of the citizens of one of its members, whose own state apparatus has radically failed to discharge its duties towards them. The development and defence of this suggestion would require another paper; all I would claim here is that an account of criminal law that ties it to political community has some resources with which to theorise international criminal law.

I have noted three objections to the account of criminal law sketched in the earlier sections of this paper, and indicated the lines along which I would reply to them. There is of course more to be said about those replies, and there will be more objections to be faced—but not in this paper.

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<sup>72</sup> See n. 7 above.

<sup>73</sup> Rome Statute of the International Criminal Court, Preamble.