Symposium
on Antony Duff's
The Realm of Criminal Law

The Public Realms: On How to Think About Public Wrongs*

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ABSTRACT

This paper presents a way of thinking about public wrongs, offered as a friendly amendment to the view articulated by Antony Duff in his recent book, *The Realm of Criminal Law* (2018). The view defended here is distinct from Duff's in three ways. First, it denies a sharp distinction between public and private accountability, preferring instead to view matters as scalar. Second, it asks whether conduct is wrong, before asking whether it is a *public* wrong. Third, it views public accountability as taking place within various public realms, rather than conceiving of the public realm as primarily associated with the state. Along the way, this paper presents a brief sketch of public and private accountability and illustrates both the structural and practical implications of these two different ways of thinking about public wrongs.

Keywords: Public wrongs, Private wrongs, Criminalization, Accountability

1. INTRODUCTION

A central theme of Antony Duff's scholarship is that criminal law is best understood as a communicative enterprise through which the members of a political community call one another to account for (alleged) wrongdoing (See especially, [Duff 1986, Duff 2001, Duff 2007, Duff 2018])¹. By declaring

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1 For ease in what follows, I will omit the word "alleged." It is true, of course, that in calling to account, we might get things wrong in terms of identifying the correct norms that should guide our conduct, supposing that it is our business to call someone to account for their wrongdoing, or simply be incorrect about the facts of what happened (e.g. where the person called to account is not the person who committed the wrong).

certain kinds of conduct to be criminal wrongs, enforcing such criminal laws, and imposing criminal punishments, criminalization partly constitutes the civil order of that political community (Duff 2018: 182, 203). So far, I agree entirely. Indeed, I might even go further to say that criminalization partly constitutes the character of that political community (Dempsey 2009): a point to which we will return in what follows.

This way of viewing criminalization makes salient the fact that a political community does at least three things through its criminal law. First, it reminds members of the community about the norms that (it claims) should guide their conduct. Second, it clarifies the scope and substance of those norms in cases of disagreement or confusion. Third (and importantly to what follows), it declares that certain wrongs are the “criminal law’s business” (Duff 2018: 79; quoting Wolfenden 1957: para. 61). That is, by criminalizing a particular wrong (Φ -ing), the political community thereby claims that it is justified in declaring Φ -ing to be a criminal wrong, calling Φ -ers to account through its criminal process, and subjecting Φ -ers to criminal punishment.

In his most recent book, *The Realm of Criminal Law*, Duff puts the third point as follows: criminalization “make[s] clear that these are the polity’s *public* norms, as distinct from whatever private norms citizens or groups of citizens might espouse outside the civic realm” (2018: 207). At this point, I find myself in disagreement with Duff, on three related fronts. First, while I agree that some aspects of living in community are more-or-less public and some are more-or-less private, I worry that Duff draws too sharp a distinction between the public and private spheres. On my view, the distinction between the public and private is not a matter of drawing lines between a polity’s norms (norms which Duff calls *public* in the quote above) and the norms of citizens or groups of citizens (which Duff calls *private* in the quote above). Rather, the distinction between public and private is more a matter of a sliding scale that admits many gray areas.² Second, when we think about calling one another to account for wrongdoing, we should not seek to draw a distinction between the nature of the norms themselves (either public norms or private norms, as Duff

2 On my reading of Duff, he seems to prefer drawing rather sharp lines between the public and private realms, rather than thinking in terms of degree. I believe that Duff’s account can accommodate degrees, as his discussion of “pure crimes” versus “pure torts” at p. 294 suggests. So perhaps my friendly amendment here is simply a plea for further clarification from Duff on this point if I have misread him. My thanks to an anonymous reviewer for pushing me on this point. In any event, however, on my view, a tort should be understood as a public wrong, insofar as the public justifiably responds to the wrong by providing a forum in which the victim can seek redress. It is an indirect public response to the wrong, but a response (by the public) nonetheless.

would say). Rather, we should understand the distinction between public and private in this context as one that turns on the *justifiability of calling one another to account for wrongdoing in a more-or-less public or private ways*. Third, in order to determine whether a more-or-less public or private calling to account is justifiable when it comes to any particular conduct, we must first understand whether the conduct is wrong and, if so, why.

In what follows, I will flesh out this way of thinking about public wrongs in friendly contrast to Duff's account. As we will see, my way of thinking about public wrongs fits well within Duff's broader project of understanding the criminal law as a matter of calling wrongdoers to account, and it emphasizes the ways in which a community's practices of calling to account, in part, constitute the character of that community. The essay proceeds in three steps. First, I briefly explain more-or-less private and public ways of calling wrongdoers to account, and highlight two important considerations that inform whether any such calling-to-account is justifiable: (1) whether and how the wrongdoer will otherwise be called to account; and (2) how practices of accountability are constitutive of the character of the person or group that does (or fails to do) the calling.³ Second, I explain why we must first understand whether the conduct in question is wrong and, if so, why it is wrong, before asking whether a wrong is more-or-less public or private. Third, I apply this way of thinking about public wrongs to the project of identifying various public realms and attempt to illustrate the practical difference between my account and Duff's.

2. CALLING TO ACCOUNT: IN PUBLIC AND PRIVATE

Some forms of calling others to account are more private, whereas others are more public. Three hallmarks of a public calling to account are: (1) that it is done by someone in a *representative capacity*; (2) who is acting *in the interests of* a larger group of people; and (3) that it is done in a way that is generally *observable to others*.⁴ A calling to account that is done by the direct victim of the wrong, on her own behalf, in a way that is not observable to others is what I will call *comprehensively private*. If this kind of response is the only justifiable response to the wrong, then it is a *comprehensively private wrong*. If the direct victim calls out the wrongdoer as a representative

3 By "practices of accountability," I mean to refer to whether and how a person or group either does, or does not, call wrongdoers to account.

4 Compare Duff (2018: 24, 113, 118, 229) on calling to account as a representative (my first hallmark); acting "in the interest" of the polity (my second hallmark); and (163-164; 293) on public and private spaces (my third hallmark).

of a larger group or in the interests of others (say, a rape victim calling her rapist to account by and for women generally), the calling to account is thereby somewhat more public. So, too, if she calls him to account on social media, it is all the more public. On the other end of the spectrum, a calling to account is *comprehensively* public when it is done by someone who both *represents* and is *acting in the interests of* the entire political community (“The People,” “The State,” “The Commonwealth,” etc.), and it is done in a way that is transparently *observable* to the entire political community. If this kind of response to a wrong is justifiable, then it is a comprehensively public wrong. In between these extremes, there are more-or-less private and more-or-less public ways of calling others to account – and, thus, more-or-less private and more-or-less public wrongs.

This way of thinking about public wrongs differs from Duff’s because it focuses our attention on the justification of various possible responses to the wrong, rather than the nature of the norms at issue. For Duff, when we think about calling one another to account for wrongdoing, the distinction between public and private wrongs turns on the supposed public or private nature of the norms at issue (Duff 2018: 207), or whether the wrong was committed in a public or private ‘normative space’ (Duff 2018: 165). On my account, the distinction between public and private (scalar though it is), turns on the justifiability of different ways the wrongdoer might be called to account. Specifically, it depends on who can justifiably call him to account; in whose interests can he justifiably be called to account; and what degree of observability is justifiable in calling him to account. As noted, where the only justifiable response to a wrong is one that comes from the direct victim of the wrong, acting solely in her own interests, and is done in a way that is not observable others (aside from the wrongdoer and the victim), then that wrong is properly understood as a comprehensive private wrong.⁵ However, if a more public response (e.g. calling out the wrongdoer on Twitter) is justifiable, then the wrong is properly understood as a more public wrong. If it would be justifiable for the state, acting through its official representatives (police, prosecutors, judges, jailors) to call the wrongdoer to account in a way that is transparently observable to the entire political community, then the wrong is properly understood as a comprehensively public wrong. On this account, the same wrongful conduct can be (more-or-less) private, or (more-or-less) public, depending on the justifiability of the various ways in which the wrongdoer might be called to account for that wrong.

5 I’m concerned here only with wrongs that have a direct victim, other than the wrongdoer. I agree with Duff that if no one can justifiably call me to account for my wrong, it is a private wrong (Duff 2018: 164).

The justifiability of calling a wrongdoer to account turns on many considerations – far too many to unpack here. (Indeed, giving a full accounting of every salient consideration strikes me as impossible.) However, here are two important considerations in deciding whether any given calling to account is justified. First, we should consider whether and how the wrongdoer will otherwise be called to account. If the calling to account under consideration is the only way the wrongdoer will be held to account (if it is a “last resort” for accountability), then that fact weighs in favor of its justifiability. Second, we should consider whether and how the particular calling to account under consideration is part of a broader pattern of accountability practices, and whether/how those accountability practices are constitutive of the character of the person or group that does (or fails to do) the calling. The first consideration speaks to the idea of criminal law as a “last resort”: if there are robust and effective means for calling wrongdoers to account *outside* the criminal law, then that fact relieves some of the pressure on the criminal law to do the work of calling them to account. All things being equal, the fact that there are other ways to call a wrongdoer to account makes the case for criminalization less justifiable.⁶ The second consideration speaks to the fact that political communities shape their characters through their accountability practices. By calling to account (or failing to call to account) those who commit certain kinds of wrongs (say, racist hate crimes), a political community constitutes its character as more or less racist, *ceteris paribus*. So too, as I have argued elsewhere, a community that uses its criminal law to target particular kinds of domestic violence can reconstitute its own character in valuable and virtuous ways by becoming less patriarchal (Dempsey 2009). All things being equal, if a political community uses its criminal law to cultivate valuable character traits through calling wrongdoers to account for certain kinds of wrongdoing, this makes the case for criminalization more justifiable than it otherwise would be.

3. PUBLIC WRONGS: WHICH QUESTION SHOULD WE ASK FIRST?

When it comes to identifying public wrongs, Duff insists that we must address the question, “Is it a public matter?” before we consider, “Is it wrong?” As he explains, “An account of crimes as public wrongs must begin not with wrongs, but with the public” (Duff 2018: 165). While I agree there

6 I revisit this point below in section 3.

is a methodological priority regarding the order in which we ask those two questions, I think it goes the other way. In this section, I attempt to explain why.⁷

Duff's worry seems to be that if we start by asking "Is it wrong?" we risk falling into a "Moorean legal moralism" (2018: 100). In that dystopian world, legislators will sit around debating the moral permissibility of my cancelling lunch plans with a friend for no good reason, or the white lie you told your cousin to get out of helping her move house. Clearly, these wrongs are *not* the business of the criminal law – and so Duff wants to ensure that they never even become candidates for criminalization. I agree. It *would* be disconcerting if legislators or other legal officials took seriously the question of whether such wrongs should be criminalized. Normally, they should deliberate as if these matters were not the criminal law's business (Dempsey 2011; Duff 2018: 93-95). Still, I doubt we need to prioritize the question, "Is it a public matter?" before the question, "Is it wrong?" in order to accomplish that end.

Indeed, in order to answer the question "Is it a public matter?" - framed as a *normative* question (that is, as a question of whether something *should be* regarded as a public matter) - we need to know what "it" is, so that we can consider the reasons that might weigh in favor (or against) the public taking an interest in it. That is, we need to ask the kinds of questions (with some modification) that Duff flags up on page 297:

We must ask whether it is important, and how important it is, to mark and respond to the wrong as a wrong, by seeking to call its perpetrator to account; whether it is important, and how important it is, that the calling to account be collective—that the perpetrator be called to answer by and to [some group of people, rather than only the]... direct victim; whether it is important, and how important it is, to seek an authoritative, categorical judgment of the alleged wrongdoer's guilt or innocence; and whether it is important, and how important it is, to provide for punishment to be imposed on the wrongdoer ... (Duff 2018: 297).

I think these are (many of) the right kinds of questions to be asking when

7 My point here is not to claim that Duff denies that public wrongs are wrongs. Certainly, he is clear that public wrongs are wrongs. My point is methodological: when we think about what counts as a public wrong, should we start by thinking about whether it is public, or whether it is wrong? As the quote above illustrates, Duff's methodological priority is to begin with the question of whether it is public. My methodological priority is to begin with whether it is wrong. Duff and I both agree that that when it comes to criminalization, we should not go directly from the premise "X is wrong," to the conclusion, "X is a candidate for criminalization." That is, neither one of us fall into what he calls "Moorean legal moralism." My thanks to an anonymous reviewer for pushing me to clarify this point.

we think about what properly falls within the criminal law's business – and what wrongs count as public wrongs more generally. But, of course, we can't even begin to ask these questions unless we know something about whether the conduct is wrong and, if so, why it is wrong. If we adopt Duff's methodological priorities, the answer to each question would simply be, "I don't know – I'm not even sure it's a wrong yet. I'm still focused on whether it's a public matter."

My worry about Duff's ordering of the questions is two-fold. First, if we start by asking, "Is it a public matter?" we risk missing those things that *should* be understood as public matters, but currently are viewed as private matters. For example, we might skip past a wrong involving sexual cajoling, which results in nonetheless consensual sex, because we properly judge that the conduct is not a public matter suitable for criminalization.⁸ If we skip past that wrong, we miss the opportunity to recognize the ways in which *other* public responses – albeit non-criminal responses – might be appropriate. While sexual cajoling may not be a proper matter for criminalization, perhaps it *is* a matter for state intervention in terms of public education aimed at shifting social norms. Or, perhaps it is a matter for a less comprehensive public response: that is, a response not by the state acting on behalf of the political community as a whole, but a response by some group acting within a more limited understanding of the public sphere. For example, perhaps it is a matter for school discipline, suspension from an athletic team, condemnation by one's peer group, or public accountability on social media, etc.

This first part of my worry is illustrated in Duff's characterization of the wrong of betraying a friend by "selling salacious gossip [about my friend] to the popular press" (Duff 2018: 99). On Duff's view, one way to make sense of criminalizing such a wrong is "to begin from a totalitarian, rather than a liberal, conception of the polity and its *res publica*: a conception according to which the polity has a proper interest in every aspect of its citizens' lives" (ibid). For Duff, once law-makers begin "weighing the reasons for and against criminalizing the wrong I do to my friend, [they] already go wrong by seeing the relationship of which that wrong is part as any of [the polity's] business—as something to which it has reason to attend." According to Duff, this approach would be "totalitarian" because some things (here, relations between friends) are simply not the polity's business (ibid). In making this point, Duff quotes my work, from a chapter in which he and I engaged in a similar debate regarding "the criminal law's business." The quote from Duff (quoting me), goes as follows: "...[they]

⁸ See, for example, Kim Ferzan's illuminating discussion of the Aziz Ansari case (Ferzan 2019).

already go wrong by seeing the relationship of which that wrong is part as any of [the polity's] business—as something to which it has reason to attend, as part of ‘a full philosophical account of the reasons that actually do bear on the justifiability’ of its decisions.” Duff (2018: 99), quoting (Dempsey 2011: 256). Yet, the thesis of my chapter which Duff quotes was that there is conceptual space between the reasons to which law-makers have reason to attend (those reasons that are “the law-makers’ business”) and “a full philosophical account of the reasons that actually do bear on the justifiability” of their decisions. The former set of reasons are limited by political considerations (e.g. the *res publica* of the polity for which they are creating law). These kinds of reasons are the business of law-makers. On this, I take it that Duff and I agree. The latter set of reasons are limited only by their merit (whether they are genuine reasons – that is, value-laden facts). These kinds of reasons are the business of philosophers, who should aim to take on board “a full philosophical account of the reasons that actually do bear on the justifiability” of law-maker’s decisions.

While Duff’s thin account of criminalization does not make any substantive claim regarding whether selling gossip about a friend is a private or public wrong, his discussion on this point is reminiscent of the view taken of the marital relationship, which shielded domestic violence from public accountability until recently. According to Duff, domestic violence is now properly regarded as public (despite being previously regarded as private), due to “the gradual recognition of [the institution of marriage] as ‘public’ [which] marked a development in our collective understanding of that institution” (2018: 165). On my view, this account gets matters in reverse order. It is not that a development in our collective understanding of marriage made domestic violence a public wrong. It was always a public wrong for a husband to beat his wife, we just did not do anything about it until recently.⁹ That is to say, it has always been justifiable for domestic batterers to be called to account in ways that bear the hallmarks of public accountability outlined above: to call them to account *by a representative* of the political community; to do so *in the interests of* the political community (not just the victim); and to do so in a way that was *observable* by the entire political community. The problem was simply that, in practice, we either did not call batterers to account at all, or we left domestic abuse to more private forms of accountability.

The second part of my worry is that in order to answer Duff’s true

9 I place the husband in the role of the abuser because that is overwhelmingly the form that domestic violence has taken historically, and husbands were granted legal immunity under the defense of chastisement. I do not, of course, deny that women/wives can, do, and have committed domestic violence. For a disaggregation of distinct forms of domestic violence, see (Dempsey 2009: ch. 6).

question – the normative question of what should count as a public matter – we need to start by asking what values can be realized by treating a wrong as a public matter.¹⁰ That is, we must ask what reasons we have for calling for accountability in a more public, rather than merely private, way. This is a question we simply cannot begin to ask unless we first ask what, if anything, makes the conduct wrong. For example, if part of what makes some instances of domestic violence wrongful is the fact that they tend to promote and sustain patriarchal structural inequalities in society generally, this tells us something important about the reasons we might have for treating those wrongs as public rather than private. That is, it tells us something about why a comprehensive public response to those wrongs is more likely to be justifiable. Specifically, it tells us two things. First, if some instances of domestic violence tend to promote and sustain patriarchal structural inequalities in society generally, that tells us that the character of our political community is marred by patriarchal structural inequalities which establish the social context in which such wrongs are committed (Dempsey 2009: chs. 6-7). If our society is marred by this character defect, we have reason to cultivate a more valuable (non-patriarchal) character. Second, given that calling certain kinds of wrongdoing to account can reconstitute our character in valuable ways, criminalizing this kind of wrongdoing can realize such value (what I have called *constitutive value*), and thus lend weight to the justification of criminalization (ibid). My point here is simply that if we do not start by asking whether the conduct is wrongful, and if so, why it is wrongful, we cannot begin to see the reasons that might weigh in favor (or against) responding to it in a private or public manner. We need to know why it is wrong, so that we can know whether its wrongfulness is grounded (in part) in a character defect of our community. For, if that is the case, it lends strength to the case for a public response to the wrong - perhaps one rising to the level of criminalization.

4. THE VARIOUS PUBLIC REALMS: ALTERNATIVE SITES OF PUBLIC ACCOUNTABILITY (ASPAs)

This section identifies various public realms, and illustrates the relevance of two considerations in thinking about the justifiability of calling wrongdoers to account: (1) whether and how the wrongdoer will otherwise be called to account; and (2) how practices of accountability are constitutive of the character of the person or group that does (or fails to do) the calling.

10 On Duff's search for a normative theory of criminalization, see (Duff 2018: 3-6).

In one of the most instructive parts of *The Realm of Criminal Law*, Duff draws an analogy between the criminal law and self-regulating professional organizations, such as the medical profession, legal profession, academia, etc. (Duff 2018: 80-91). In his discussion, Duff draws attention to the fact that there are a vast range of public realms. He observes, almost sheepishly, that he is using the label “public’...in an admittedly slightly unusual way,” by conceptualizing accountability to one’s professional organization (or even one’s golf club) as a form of “public” accountability (Duff 2018: 83). I suppose Duff might be correct in thinking it slightly unusual to call these normative contexts “public” – but doing so is tremendously illuminating. Let’s call these non-criminal, yet still public, normative contexts, “Alternative Sites of Public Accountability” or ASPAs for short.

There is much to be gained by keeping in mind the various ASPAs out there - and the ways that ASPAs can respond to something as a “public wrong,” even when those public responses never come anywhere near the comprehensively public response of criminalization. For one thing, it reminds us that the case for criminalization of any given public wrong is strengthened, or weakened, depending on how well we do in holding perpetrators accountable in other public realms. Duff’s discussion of queue-jumping illustrates this point well (Duff 2018: 280-282). Part of the case for not criminalizing queue-jumping, even if it is a public wrong, depends on whether queue-jumpers will be held to some other kind of public accountability for their wrongs (even if the “public” here merely consists of “fellow queue members” – and the ASPA at issue is merely the site of public queue itself). As Duff correctly observes, whenever “we can, without criminalizing, achieve the good for whose sake we would criminalize,” the case in favor of criminalization is correspondingly diminished, because “criminalization would be unnecessary” (ibid:282). Conversely, when we fail to make use of ASPAs to hold each other accountable for our public wrongs, the case for using the criminal law gets stronger. The criminal law, as it were, then becomes the “last resort” for achieving the goods that can be realized through public accountability.

Consider the implications of this thought in the context of the #MeToo movement and related phenomena, such as universities holding students accountable for sexual misconduct, sports teams suspending players for sexual assault, or perpetrators being held accountable on social media. In all of these ways, political communities are creating new and multiple sites for holding wrongdoers publicly accountable for sexual wrongdoing. If we are concerned about over-criminalization, we should support these ASPAs - since, if they are effective in holding wrongdoers to public account, they take some of the pressure off the criminal law and thereby reduce the

strength of the case in favor of criminalization. Moreover, these ASPAs are valuable insofar as they allow space for a political community to debate and revise its understanding of sexual wrongdoing. Through ASPAs, members of the political community can stand against a broad range of sexual wrongdoing - including wrongs that have not been understood as matters of public concern until recently – such as unwanted sex, sexual cajoling, etc.¹¹ In doing so, ASPAs play a critical role in debating and shaping our public norms.

Some key implications of my way of thinking about public wrongs can fruitfully be compared to Duff's in the following hypothetical. Meet Dave: in addition to being a dentist and member of the American Dental Association (ADA), Dave is also a member of the National Organization of Men Against Sexism (NOMAS), The American Numismatic Society (ANS, dedicated to coin-collecting), and the Philadelphia Mummers (a group consisting of almost exclusively white men, who put on a parade in Philadelphia each New Year's Day). Dave's membership in both NOMAS and the Mummers is surprising, since the Mummer's are widely regarded as being rather sexist (Tynes 2016).¹² Still, these four organizations are four of the various ASPAs that might justifiably call Dave to account in the event that he commits a wrong.

As it happens, Dave often tells sexist jokes at work to his dental hygienist. On Duff's account, Dave's sexist jokes "come to our attention already marked as public" in the context of the dental profession, "since they will come to our attention as we think about matters that are already understood as belonging in [this] realm" (Duff 2018: 79). Specifically, we know that Dave's conduct falls within the realm of the ADA's business because the conduct occurs at work, in his dental practice. We should thus agree with the ADA when it claims to be justified in calling Dave to account for his sexist jokes under its Principles of Ethics and Code of Professional Conduct for "undermining professional relationships among team members" (ADA, 2018: 8). Whether or not Dave's conduct is wrongful, it is the business of the ADA, because it is happening in the context of a dental practice by one of its members. So, too, on Duff's account, Dave's sexist jokes "come to our attention already marked as public" in the context of Dave's membership in NOMAS, since sexist behavior, whether it is wrong or not, is "already understood as belonging in [NOMAS's] realm" (Duff: 79). Whether it's fighting sexism or being sexist, if conduct concerns sexism, it falls within the realm of NOMAS's business. We do not need to bother ourselves,

11 For discussion, see (Ferzan 2019); (West 2002).

12 Note that I am not claiming that the Mummers actually are sexist. I am merely drawing on their widely acknowledged reputation to get this hypothetical off the ground.

according to Duff, with asking whether Dave's conduct is wrong – we just need to know that it involves sexism and that he is a member of a group that makes sexism its business.

Conversely, on Duff's account, Dave's sexist jokes are simply not the business of ANS or the Mummers: neither group has any standing to call Dave to account for this conduct, because Dave's conduct does not concern his behavior *qua* coin-collector or *qua* Mummer. If Dave sold fraudulent coins to fellow collectors, then his conduct would "come to our attention already marked as public" as to the ANS. So, too, if Dave showed up late to parade practices, then his conduct would "come to our attention already marked as public" as to the Mummers. But when it comes to Dave telling sexist jokes to his dental hygienist, neither the ANS nor the Mummers have any reason to call him to account, according to Duff.

On my account, we do not start with the assumption that conduct "comes to our attention already marked as public" in some context. Rather, in order to know if the conduct is a public wrong (in any sense), we first need to know whether the conduct is wrong, and why, so that we can consider which, if any, calling to account (public or private) might be justifiable. With Dave's workplace sexist jokes, it is easy enough to see why the conduct is wrong and why there would be a strong case justifying the ADA and NOMAS for calling him to account for it. In their distinctive ways, each can make salient different aspects of the wrong by calling Dave to account. The ADA can make salient the aspects of the wrong that relate to dental workplace professionalism, while NOMAS can make salient the aspects of the wrong that relate to sexism. In making these aspects of Dave's wrongdoing salient, each group realizes values central to their missions.

Duff would perhaps rather phrase this last point in terms of the *res publica* of the organizations (2018: 81), rather than their missions. In contrast, I would not want to trade on the positive connotation of *res publica* to motivate the assumption that an organization's realization of its mission is valuable.¹³ Rather, on my account, it remains an open question. In the *Dave* hypothetical, I assume that the missions of the ADA and NOMAS are valuable: that is, I assume it is a good-making feature of the world that organizations like these should exist and further the goals

13 The ordinary meaning of *res publica* is associated with the "common good" (emphasis added) (OED 2010). Duff's use of the term is stripped of value – mostly. At some points, he characterizes the *res publica* of an organization as the "the *proper* concerns and aims, of the practice in question" (2010: 81). At other points, even on the same page, Duff makes use of a more analytic conception of the *res publica* of an organization – as "what, given its aims, falls within its scope" – irrespective of whether those aims are valuable or disvaluable (ibid).

grounded in their missions. If these were not valuable organizations, then furthering goals grounded in their missions would not realize any value. (Compare the Nazi party calling one of its members, Nick, to account for denying Aryan supremacy. In calling Nick to account for denying a tenet central to their mission, the Nazis do not realize value, despite the fact that calling Nick to account would further a goal grounded in their mission. This is so because the mission of the Nazi party is not itself valuable.¹⁴)

All that said, however, there is so far very little that distinguishes my account from Duff's when it comes to calling Dave to account. If we grant the assumption that the ADA and NOMAS are valuable organizations, and that calling Dave to account realizes values grounded in their missions, then my account, too, has a story to tell as to why Dave's conduct falls within the ADA's and NOMAS's business. Structurally, its different than Duff's account, but it gets us to the same place so far.

Yet, when we ask whether the ANS or the Mummers might justifiably call Dave to account, my way of thinking about public wrongs raises considerations that are off-limits according to Duff. Imagine that the ANS and the Mummers have become aware of Dave's sexist workplace jokes and are considering whether to ask him to account for his conduct or risk being disinvited to the annual ANS meeting or barred from the annual Mummer's parade. On Duff's account, the ANS and Mummers are already out-of-bounds for even entertaining the possibility of such a response. According to my way of thinking about public wrongs, however, we would need more information before evaluating the justifiability of the ANS or the Mummers calling Dave to account. Again, we would start by asking whether Dave's conduct was even wrongful in the first place – for, if it was not wrongful, then it would not be justifiable for anyone to call him to account for it.¹⁵ Second, we would need to know whether Dave has been held accountable, either publicly or privately, for his wrongful conduct – for, if he has not been held accountable in any other context, this fact would add to the case in favor of the ANS or Mummers calling Dave to account for his wrongdoing. (On its own, it would not suffice to justify either group calling him to account, but it would lend some strength to the case in favor of doing so.) Third, we would need to consider what values might be realized by the ANS and/or the Mummers calling Dave to account.

Recall that when Dave is called to account by the ADA and NOMAS,

14 To be clear, on my view, it is not justifiable to call someone to account for conduct that is not morally wrong, simply because it goes against a (purported, but not genuine) value that the group or polity has embraced. Thank you to an anonymous reviewer for requesting clarification on this point.

15 By “wrongful” here, I mean that the conduct is at least *pro tanto* wrong.

their calling to him account realizes values that are central to their missions. The same cannot be said when it comes to the ANS and the Mummies. For Duff, that's the end of the story. When he is called to account by the ANS and the Mummies, Dave can simply (and, according to Duff, correctly) reply: "I don't have to account for my conduct to you. It's none of your business."

On my view, things are a bit more complicated, depending on the values that might be realized by calling Dave to account. For example, if the Mummies calling Dave to account were part of a broader good-faith attempt to transform their sexist ways (that is, to reconstitute their sexist character), then *ceteris paribus* they would have a stronger case in favor of calling him to account than the ANS would have.¹⁶ Indeed, it might even be justifiable for the Mummies to call Dave to account for his sexist jokes, despite the fact that their mission concerns performing in an annual parade, not fighting sexism. When it comes to the ANS, things seem rather less complicated. Their mission concerns coin-collecting, not dental practice professionalism and not sexism. Given the terms of the hypothetical so far, we have no reason to think that the ANS's calling Dave to account will realize any significant value. Thus, it seems unlikely that it would be justifiable for the ANS to call Dave to account. We can thus conclude, in agreement with Duff, that Dave's conduct is none of their business. Indeed, it seems that the ANS would not be justified in calling Dave to account even if we take on board a full philosophical account of the reasons that bear on the justifiability of their doing so.¹⁷ My point is simply that we cannot reach that conclusion without first identifying whether and why Dave's conduct is wrong in the first place, and considering the values that the ANS might realize in calling Dave to account.¹⁸

16 Again, I'm not offering any factual claims about the Mummer's actual character.

17 Depending on the extent of Dave's misconduct, the ANS might be justified in disinviting Dave to the annual meeting – but only for preventative reasons, to avoid the possibility of his sexually harassing fellow attendees. They would not, however, be justified in calling him to account for his past wrongs, or imposing retributive punishment.

18 We can imagine a modified hypothetical where we include the fact that the ANS is concerned to diversify its membership and encourage more women to participate in their annual meeting – and stipulate that doing so would be valuable. In that case, the goal of creating a welcoming and respectful space at their annual meeting might lend some justification to their calling Dave to account, on pain of being disinvited to the meeting if he fails to explain himself, apologize if unjustified, etc. My point is simply that these facts matter, because they bear on whether the ANS would realize value in calling Dave to account, such that their doing so might be justifiable, under some variant of the hypothetical.

5. CONCLUSION

This paper has presented a way of thinking about public wrongs, with the goal of offering an alternative to the view articulated by Antony Duff, most recently in his book, *The Realm of Criminal Law* (2018). Of course, the view defended here owes much to Duff's work as it has developed over the decades. Most importantly, it is grounded in Duff's important insight that criminal law is best understood as a communicative enterprise through which the members of a political community call one another to account for wrongdoing. Moreover, it draws on the Duffian theme that a community's accountability practices, in part, make that community what it is. While we have slightly different ways of putting that last point, I take us to be in substantive agreement.

We part ways, however, when it comes to how to think about public wrongs. The view defended here is distinct from Duff's in three ways. First, it denies a sharp distinction between public and private accountability, preferring instead to view matters as a matter of degree. Second, it requires that we ask whether conduct is wrong, before asking whether it is a *public* wrong. Third, it views public accountability as taking place within various public realms, rather than conceiving of the public realm as primarily associated with the state. In explaining and defending this alternative way of thinking about public wrongs, this paper has presented a brief sketch of public and private accountability, and illustrated both the structural and practical implications of Duff's account of public wrongs, as compared to my account.

In the end, I suspect Duff will view this paper as yet another failed attempt to defend a modified version of "Moorean legal moralism" (Duff 2018: 93-96). Perhaps, if accused, I should plead guilty this time. For Duff's alternative, I fear, prevents us – as philosophers – from taking on board a full philosophical account of the reasons that actually do bear on the justifiability of calling someone to account for their wrongdoing. While perhaps legal officials ought not to take all of these considerations on board in their deliberations regarding what to criminalize – we, as philosophers, ought to keep them in view. The account of public wrongs offered here strikes me as one way to keep the full range of considerations in view, as we continue to work toward an illuminating account of justifiable criminalization.

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