Professional Ethics and Criminal Law*

KIMBERLEY BROWNLEE

University of Warwick

ABSTRACT

According to Antony Duff, certain realms of wrongdoing are properly the business of only the members of a particular scheme of practice – those members are the relevant public to whom other members are accountable. The polity is one such scheme of practice and the criminal law addresses the wrongs that are properly the polity's business. The criminal law is essentially a code of civic ethics for the members of a polity to hold one another to account. To elucidate these ideas, Duff draws an analogy between the criminal law and other codes of ethics, notably, codes of professional ethics, which also concern the conduct of a particular set of people acting within a particular system of practice. This article explores the merits of Duff's analogy between professional codes of ethics and the criminal law. First, the article details some problematic features of professional ethics codes, such as their disinterest in the moral merits of the profession they regulate and their tendency not only to be rigid and clunky, but also to shield members from full accountability. Second, the paper shows that many of the flaws in ethics codes are to be found unavoidably in the criminal law as well, which casts doubt on the claim that the criminal law is well-placed to identify and address wrongs that are genuinely morally wrong independent of and prior to their criminalization.

Keywords: Antony Duff, codes of ethics, criminal law, professional ethics, public wrongs, wrong

* I thank Simon Gansinger and two anonymous referees for valuable written feedback on this paper. For a helpful discussion, I thank both Antony Duff and the participants of the Symposium on Antony Duff's *Realm of Criminal Law* at Pompeu Fabra University, which I attended via Skype on 8 February 2019.

1. INTRODUCTION

In Chapter 2 of *The Realm of Criminal Law*, Antony Duff argues that *legal moralism* need not be moralistic in a pejorative sense. Indeed, we can develop a plausible version of legal moralism that doesn't seem to recommend a state-controlled witch-hunt whereby legislators seek out moral wrongdoing so that it can be criminalized and punished. To develop this plausible version of legal moralism, we must focus on *public wrongs*, but we must start with the public part of *public wrongs*, rather than the wrong part of *public wrongs*. That is to say, we must start with the *public realm* – the realm in which public wrongs are identified – and determine what is the business of the polity. As Duff puts it:

“Rather than starting with the whole realm of moral wrongs as our canvas, and then asking which of them should be the criminal law's business, we must think about the criminal law's business, as a distinctive kind of legal institution; and to do that we must think about the polity's business (its *res publica*), since the criminal law's proper business must be to contribute, in some distinctive way, to the polity's business (79).”¹

To flesh out these ideas of the *public realm*, the *polity's business*, and *public wrongs*, Duff draws an analogy between codes of professional ethics, which are concerned with misconduct within a particular system of practice, and the criminal law, which is concerned with wrongdoing that falls within the distinctive practice of civic life – the life of a polity. The criminal law can be seen (with some qualifications) as a code of civic ethics, Duff says.

My aim here is to examine the merits of Duff's analogy between codes of professional ethics and the criminal law. I highlight some problematic features of professional ethics codes, beginning with the fact that they often reflect insiders' lack of self-scrutiny about the moral merits of their profession along with the fact that codes are rigid and clunky, and tend to shield members from full accountability. Some of these problems are non-contingent: they arise from the very nature of such codes. Other problems depend on how the code is designed. I then show that several of the non-contingent faults of ethics codes are to be found, unavoidably, in the criminal law too. In doing so, I raise some general concerns about how Duff carves up the moral landscape and instrumentalizes moral reasoning.²

1 The page references are taken from the online version of Duff (2018).

2 For a related discussion, see Zaibert (2018) 118ff.

2. CODES IGNORE THE MORAL STATUS OF THE PROFESSION

2.1 Duff's Account of How a Profession Might Develop a Code of Ethics

Duff states that a code of professional ethics will define the kinds of wrongdoing which amount to professional misconduct and which the people bound by that code ought to avoid. Also, typically though not necessarily, a code will provide a process through which charges of misconduct can be adjudicated, and suitable sanctions imposed if those charges are proved (80).

Duff observes that, logically speaking, if not chronologically speaking, when the members of a profession are working out their governing structures and practices, their first item of business cannot be to design a code of ethics for themselves. To know what falls within the scope of a code of *professional* ethics, the drafters must first know what goals and activities fall within the *res publica* – the public realm – of their profession.

According to Duff, his distinction between the *public realm* and the *non-public* or *private realm* is normative: whether something is a public matter turns on whether it is something that *properly* concerns the relevant 'public', i.e. whether the community or profession in question has a *legitimate* interest in the matter. A doctor's medical malpractice is a public matter within her profession. Her cheating at golf, however, is a private matter as it relates to her profession. In other words, her cheating is not the business of the members of her profession. By contrast, her cheating at golf is a public matter for the members of her golf club, and her medical malpractice is not: it's a private matter in relation to her fellow golfers. A profession or community's *res publica* '...expresses its members' normative self-understanding of what they are (of what they are about) as doctors or as academics', etc. (161).

Once the members of a profession know what the business of their profession is, they can discuss the proper content and scope of their ethics code: 'they will not begin with the whole realm of moral wrongdoing, and of all possible moral wrongdoers, as their potential canvas.' This is because '...they will already know that they are concerned (only) with professional misconduct—that is, with wrongdoing committed within the realm of the profession and its practice...' and by the members of that profession (82).

2.2 The Moral Problems with Codes of Ethics

One problem with professional ethics codes is that members of a profession

are insiders who, almost by definition in virtue of their membership, view their profession as broadly morally acceptable. As such, they're not best-placed to reflect on whether its activities and goals are *genuinely* morally acceptable. Although they probably have far greater knowledge of, and expertise in, many aspects of their work than outsiders do, nevertheless they are also more likely to rationalize their activities and goals than outsiders are, especially when outsiders have nothing at stake.

When members of a profession move to the second step in Duff's logical order of events – namely, devising their code of ethics – they signal that they take their profession's goals and activities to be morally acceptable and amenable to a code of genuinely ethical conduct. But, many professions that take this second step are morally suspect, such as professions that administer capital punishment, impose solitary confinement in prison, use extreme interrogation techniques in investigations, and engage in profit-hungry high finance that can devastate the global economy.³ A more extreme example is the SS in Nazi Germany, whose members were bound by an honor code implemented by an independent system of SS courts. According to Herlinde Pauer-Studer,

“Himmler set the standards for the SS legal system by cultivating the idea of the SS as a specific elite bound by a code of ‘honour and decency’. Members of the SS lost their status and could be excluded from the SS if they violated this code. Loyalty and honour were interpreted as unconditional obedience and ‘ethical acceptance’ of the orders of the authorities. The SS ethos rested on voluntary ‘ethical fulfilment’ of duties (Pauer-Studer, 2012, 375).”⁴

The codes of professional ethics governing such activities are morally suspect because the activities they inform are morally suspect and, in some cases, rotten to the core.

If a key activity within a profession is rotten, or if all the specific goals and activities that define that profession are rotten, then the so-called ‘misconduct’ that the ethics code identifies will include conduct that

3 A quick online search yielded the Goldman Sachs' Code of Conduct and Business Ethics: <https://www.goldmansachs.com/investor-relations/corporate-governance/corporate-governance-documents/revise-code-of-conduct.pdf>, as well as the American Correctional Association's Code of Ethics: http://www.aca.org/ACA_Prod_IMIS/ACA_Member/About_Us/Code_of_Ethics/ACA_Member/AboutUs/Code_of_Ethics.aspx?hkey=61577ed2-c0c3-4529-bc01-36a248f79eba, and the Code of Business Ethics and Conduct for the private military company Academi, formerly Blackwater: <https://www.academi.com/pages/about-us/code-of-conduct>.

4 I thank Simon Gansinger for highlighting this example.

people ought to engage in. The conduct is only 'wrong' according to the norms, expectations, and demands of the indefensible profession. It is not actually morally wrong. And certainly, the conduct is not wrong *prior* to its inclusion in the code. Following inclusion in the code, certain kinds of otherwise good conduct might become wrong – possibly – for complicated reasons. For instance, if a prison guard releases an innocent person from a brutal prison without authorization, she hasn't made his life any easier; he's now on the run. But, that is another matter.

This point is particularly relevant to Duff's analogy between ethics codes and the criminal law because Duff maintains, with some nuances, that the conduct that is to be included in the criminal code is wrong *prior* to its inclusion in the code. To maintain this view, Duff must hold that there is a disanalogy between the criminal law and many professions' codes of ethics on the grounds that, unlike morally suspect professions, the criminal law is clearly aiming at something good in his view, namely, determining how to live together; and, hence, the conduct it deems to be wrong actually is morally wrong *prior* to its inclusion in the criminal law.

The idea that the criminal law aims at something good (broadly speaking) is plausible enough. But, this won't expose a disanalogy between it and morally suspect professions because, at a *very* basic level, any profession that we recognize as a profession can be seen as aiming at something good, such as getting people the drugs they need, or appropriately managing the movement of money, or dealing with serious wrongdoing. So, the analogy between codes of ethics and the criminal law still holds, but not in a way that makes either come out smelling like roses. Both can be viewed against a backdrop of broadly acceptable aims, while nonetheless being morally objectionable in their specific goals and activities.

In many professions, members' lack of self-scrutiny – lack of *capacity* for clear-eyed self-scrutiny – about the morality of their *res publica* stems partly, but only partly, from the fact that their profession long predates its code of ethics. (Duff finesses this by speaking of the logical 'if not the chronological' order of drafters' activities. He also finesses this in his discussion of the criminal law by focusing on the efforts of Founding Parents who are enjoying a *constitutional moment* in which the problem of drafting a code *ex post* for a public that already exists doesn't arise.) It's unsurprising that insiders who have long absorbed the norms and values radiating from their profession's established community will operate on the assumption that their profession is morally acceptable. But, their conviction gives us no reason to accept their testimony about their profession's moral merits.

Another problem with professional codes of ethics is that they beef up a

profession's *appearance* of ethical credibility. As Duff himself notes rather unconcernedly, people 'who seek public respectability for their practice might seek to define themselves as a profession partly by creating a code of ethics' (80). According to Bob Brecher, such ethical window-dressing is deeply problematic:

"It seems that the more immoral a society becomes, the greater its need to dress up its political and ideological priorities in ethical clothes...[E]thics so often – and so easily – serves as (attempted) justification of what is clearly morally wrong, whatever the reasons of those who make use of such 'ethical cover' (Brecher 2010, 351)." ⁵

The 'ethical cover' given by a code can make morally objectionable professions that urgently need reconsideration less vulnerable to such review. Ethical cover can make external criticism of a profession, as well as self-scrutiny, harder to mount since members can point to the Code and say that they are 'properly' managing the moral pitfalls of their work.

As this suggests, the terms 'proper' and 'legitimate' – which Duff uses to specify the appropriate focus of the criminal law – are slippery characters. Codes of ethics reflect a formal rather than a substantive view of what *properly* concerns a profession's members. If we adopt a formal notion of *propriety*, then some types of activity become not the 'proper' concern of a certain professional simply because they fall within a different profession's jurisdiction. Prison guards shouldn't be deciding without authorization to release prisoners who they believe are innocent or have been confined too long. Parole boards, judges, and senior management teams should decide upon such matters. Similarly, prison guards shouldn't be executing people on death row the night before their scheduled execution. But, the impropriety of a prison guard deciding to release a person or executing a person on death row says nothing about the moral acceptability of either of these activities as such. The formal notion of *propriety* (as something pertaining to jurisdiction) leaves unanswered whether *anyone at all* should be imprisoning people or executing people.

Moreover, taking a formal rather than a substantive view of a profession's proper concerns invites an impoverished vision of *professionalism*, one that focuses on appearances rather than substance, and adherence to the codified rules rather than respect for genuine moral concerns. Codes often highlight norms of professionalism that pertain to members' treatment of each other: the norms that regulate profession members' romantic relations with each other, their relations with senior management, their

⁵ Related to this, when codes of ethics do more than window-dressing, they seem to be plasters on enterprises that are inherently immoral.

conduct in general, and so on. But, most of those norms are content-independent and transportable from one morally suspect enterprise to another.

Even when a profession is, on balance, morally defensible, its code can still prohibit conduct which members actually should engage in, and indeed should engage in for the sake of the *res publica* of their profession. For instance, the American Correctional Association Code of Ethics states that:

“Members shall make public criticism of their colleagues or their agencies only when warranted, verifiable, and constructive.”⁶

That trinity of requirements - warranted, verifiable, and constructive – is too demanding. It requires not just that a member’s proposed public criticism of a colleague be warranted and verifiable, but also that it be *constructive*. And, presumably, criticism that is (perceived as) non-constructive or destructive could include criticism that could harm the profession’s public image. As this example shows, codes of ethics can subject members to professional pressures to be unprofessional in a richer sense by directing them to act unethically. Even the codes of morally acceptable professions do this when they are clunky, inflexible, and general when morality requires specificity, subtlety, and context-sensitivity.

Codes can also help powerful people to ensure that the finger points away from them. Brecher observes that:

“...to criticize a whistle-blower such as Margaret Haywood for breaching her ethical responsibilities to her (immediate) patients at once diverts attention from the political realities governing the situation in a National Health Service (NHS) hospital where elderly patients are routinely mistreated and focuses instead on the ‘ethical’ shortcomings of the person who blew the whistle (Brecher 2010, 352).”

Haywood’s conduct aligned with a richer, more interesting and credible notion of *professionalism* that requires an understanding of the moral reasons for a profession to exist at all (if there are good moral reasons for it to exist), and honors those reasons when specific professional orders clash with them. Slavishly following the norms of a profession is not the best way to honor the responsibilities entrusted to members. Indeed, being slavishly deferential to the rules can dull the mind, the judgment, and the energy to challenge injustices when necessary, making it all the harder for members

6 American Correctional Association Code of Ethics: http://www.aca.org/ACA_Prod_IMIS/ACA_Member/About_Us/Code_of_Ethics/ACA_Member/AboutUs/Code_of_Ethics.aspx?hkey=61577ed2-c0c3-4529-bc01-36a248f79eba

to honor their real moral responsibilities.⁷

These comments on both the self-effacing nature of professions (i.e. members' inability to engage in clear-eyed self-scrutiny about their goals and activities) and the implications of that self-effacingness for how codes regulate conduct, are significant because Duff uses the boundaries of a given public realm to determine who has and who lacks the standing to object to what members of that public do. If members cannot reliably track when their fellows commit genuine moral wrongs, then they are unable to hold each other properly to account. And yet, in Duff's view, outsiders lack the standing to hold them to account, with the consequence that often they may escape real accountability. Let me elaborate.

3. DUFF'S CONTEXT-SPECIFIC PUBLIC / PRIVATE DISTINCTION IGNORES SOME PARTIES

Duff notes that his distinction between the 'public' realm and the 'private' realm is not only normative (in a formal sense), but also context-specific. As noted above:

“...a doctor's treatment of her patient counts as 'public' in the context of her medical life, but as 'private' in the context of her membership of a golf club. It is something in which her fellow doctors properly take an interest, and something for which (if it involves mistreatment) she may be called to account by her fellow doctors or by a professional disciplinary committee: but fellow members of her golf club have no such interest in it, and no standing to call her to account...Her unsporting behaviour on the golf course, by contrast, is a public matter in the context of the golf club, but private in the context of her medical life... (83).”

This distinction seems plausible at first glance, but proves to be problematic.

⁷ In their paper on distortions of normativity, Pauer-Studer and Velleman (2011, 351-2) recount the case of Johann Paul Kremer, a physician, who served at Auschwitz during the time when its gas chambers were in operation: 'Kremer's environment was one in which aspects of mass-murder were given medical labels such as "triage", "quarantine", and "therapy". Kremer fell in with this professional mind-set, viewing camp inmates as patients, as anatomical specimens, as subjects of scientific research. Because he never killed anyone with his own hands, he could think of himself as upholding the standards of his profession. And he could be complacent about his professional rectitude because of having proven himself a "fanatic of truth" in opposition to the racial science of the day. With his attention drawn to the "medical" features of his activities, and to the medical ethic that they seemed to call for, he was applying rules of normative salience that did not reveal the true moral weight of what he was doing.' I thank Simon Gansinger for highlighting this example.

Suppose the person who spots the doctor cheating at golf is a golf fan and an audience member at the tournament, not a player or referee. Is that audience member a member of the relevant community? Suppose that the viewer who spots the doctor cheating is a walker out with his son, who pauses to watch the game. Suppose the walker's young son spots the cheating too, and looks to his father to see what he will do as a model for how to behave. Is the father, or the son, a member of the relevant community?

Duff would embrace the idea, I presume, that the doctor's conduct both in golf and in medicine is not the father's business, as he's not part of the relevant public. But, this is a worrying idea since, drawing on Brecher again, 'professional codes of ethics [can] serve to protect professionals from the [wider] public rather than vice versa.' Indeed, Brecher objects more strongly to codes of ethics than I have here. He maintains that they are insidious (2010, 354). First, in his view, the very notion of *professional ethics* makes a false distinction between our moral responsibilities as people and our putative moral responsibilities as professionals. Second, codes instrumentalize moral thinking. Their function is both to hold members accountable and to protect members from moral accountability. Many parties learn to play the system to appear ethically compliant while allowing profit or power to govern their decision-making.

I am not as skeptical as Brecher is about codes of ethics since, if well-designed, they can help us at least a bit to navigate treacherous moral waters that we have not encountered before, that we cannot have clear moral intuitions about, and that we have no good analogues for in our ordinary lives. But, if codes of ethics are as morally objectionable as Brecher argues, or even as I have argued, what does this mean for Duff's analogy between them and the criminal law?

Duff would no doubt acknowledge that professional codes of ethics have many the problems I have identified. If many of these problems are indeed unavoidable and, hence, make professional codes 'insidious' as Brecher puts it, then we must ask whether codes offer a good model for how to think about the criminal law. Duff is well aware that similar problems beset many criminal legal systems. The question is whether such problems are an inescapable feature of criminal codes as such and, if they are, whether that makes the criminal law morally suspect too. I will return to this theme below.

4. CAN THERE BE GOOD NAZI FATHERS OR RESPECTABLE WIFE-ABUSING ETHICISTS?

Another issue worth highlighting pertains to *who* is doing the professional (or public) wrong. Duff says:

“I should make clear what I am and am not arguing: in particular, I am not arguing that fellow members of a person’s profession should just ignore the serious moral wrongs that he commits if they do not bear on his professional conduct. Suppose that I come to know about some egregious moral wrong committed by an academic colleague—perhaps a wrong that is also criminal: he has left his partner in a cruelly damaging way, or committed a fraud against the polity (evading his taxes) or a corporation. Suppose too that the wrong has no direct impact on or implication for his academic conduct: he still behaves properly towards students and colleagues; he is still honest in his teaching and research. Suppose too that I and my university rightly do not share the extensive definition of academic misconduct that includes some version of ‘gross moral turpitude’. In that case, I have no reason to respond to, to take any notice of, his conduct *as an academic colleague*: no reason to call him to account for it in our professional dealings, or to table it for discussion at a departmental meeting, or to report it to the university authorities as a disciplinary matter. It is not a matter of academic conduct, and therefore cannot be a case of academic misconduct: which is to say that it is not my business as his academic colleague (86).”

There are two sentences in this passage that I wish to flag:

“Suppose...that the [academic’s] wrong has no direct impact on or implication for his academic conduct: he still behaves properly towards students and colleagues; he is still honest in his teaching and research.”

And:

“Suppose too that I and my university rightly do not share the extensive definition of academic misconduct that includes some version of ‘gross moral turpitude’. In that case, I have no reason to respond to, to take any notice of, his conduct *as an academic colleague*.”

In terms of morality, can we divorce our spheres of activity so sharply? Could a Nazi prison guard actually be a good and loving father to his children despite his day job? Could an academic actually be a good, honest, respectable, and responsible colleague and teacher even if he’s cruel to his wife or corrupt in his activities as a citizen? This is an empirical question, and we won’t settle it here. It is at least possible, and sometimes likely, that

a person's behavior in one sphere will bleed into his behavior in other spheres, that his private attitudes about women or the law will creep into his attitudes about his professional duties, colleagues, and students through his manner, moods, opinions, and conduct.

Moreover, even if his behaviors in different spheres remain distinct and wholly detached from each other, his personal behaviors could become known to colleagues and, more importantly, to students who operate within an institutional setting that encourages them to revere their professors. The exposure of his non-professional wrongs cannot but influence students' impressions of him and his scholarship as well as, possibly, their sense of how they should conduct themselves. If non-professional wrongs do bleed into his professional life, then, contrary to Duff's second statement highlighted above, colleagues do have a reason, in principle, to take notice of his non-professional conduct *as academic colleagues*. Although a professional tribunal is not the right body to hold him to account for non-professional wrongs that fall outside its jurisdiction, colleagues have reasons to attend to the repercussions of those wrongs for his standing and behavior within the profession.

A further, interesting thought to consider is whether the relevance of an academic's conduct outside of his profession depends partly on the kind of academic he is. Duff says, referring to a stylized version of himself as an academic at the University of Stirling:

“...if I mistreat my children, this is not a violation of my academic duties, nor something for which my university has the right to hold me to account...(155).”⁸

My question is: Does it matter if it's a moral philosopher, rather than a chemist, who is cruel to his partner, guilty of corruption, or mistreating his children, especially if that philosopher defends positions that would not countenance those modes of conduct? (As a discipline, Philosophy has real-world examples of leading philosophers who defend objectivist, egalitarian views of ethics and justice, but whose alleged behavior toward women is reprehensible.) Or, does it matter if the chemist has actively championed women within academia and yet, outside of academia, is cruel to his wife? Similarly, does it matter if it's a pediatrician rather than a gerontologist who is a neglectful or vicious parent to her children?

The political equivalent might be Donald Trump, whose alleged treatment of women in personal relationships would seem to be despicable

⁸ Duff notes in a footnote that, ‘There is, of course, plenty of room for argument about what does, or does not, fall within the *res publica* of a profession...but on any account some aspects of its members' lives fall outside it.’ (155).

and, more importantly for present purposes, *criminal*. We might say that those behaviors are not the business of the Congress who might hold him to account, but those behaviors have bled into his political activities – in the form of hush money at least – and they inform people's opinions of the qualities and behaviors necessary to conduct oneself appropriately in the executive office that he holds.

In response to my above questions, I think it does matter *who* does the wrong. Contrary to Duff's view, it seems that, in at least the cases of the moral philosopher, the chemist who champions women in academia, the pediatrician, and indeed President Trump, their specific interpersonal wrongs are matters of professional misconduct, as well as non-professional wrongdoing, and hence it is their colleagues' business as *colleagues* as well as *tout court*.⁹

With these observations about codes and members on the table, let's turn to Duff's vision of the criminal law as a code of civic ethics.

5. A CODE OF CIVIC ETHICS

5.1 *The Business of the Polity*

In Duff's view, the same logical order that applies to the development of a profession's code of ethics applies to the development of the criminal law. Logically speaking, the first task is to specify what the business of the polity is and, with it, a conception of the *public realm*. Then,

“[the ‘public’ wrongs] ‘...that are, in principle, the business of the criminal law...will not need to be distinguished, within the whole realm of wrongs, from ‘private’ wrongs: they will come to our attention already marked as public wrongs, since they will come to our attention as we think about matters that are already understood as belonging in the public realm (79).”

Duff leaves questions about the polity's business unexplored in Chapter 2 where he examines legal moralism, professions, and their codes. In Chapter 4, he observes that we can list the formal elements which a specification of a polity's civil order needs to include:

9 These observations are distinct from, but related to Duff's observation that ‘...professions [such] as medicine, policing, banking, and other financial services (not to mention the law), are not self-contained enterprises that directly affect only their professional members: they deal with ‘the public’...’ (89) Also to be fair, Duff's point is that the dividing line between the wrongs that professions or the criminal law should concern themselves with is elusive.

- the central institutions of governance and law,
- the substantive ends and values towards which the polity's life is to be oriented, and
- the rights or freedoms that are to be respected both by the state (as the polity's institutional order) and by its members (158).

Further clauses and amendments then give more substantive detail to these ambitions and how they will be pursued. Duff notes that '...civil order (as I am using the idea) depends on law and the rule of law, it extends beyond the realm of legal institutions; it encompasses the informal, extra-legal practices and expectations by which our social lives as citizens are structured.' (159)

Specifying the polity's business more precisely is not straightforward since questions about that business can take at least two forms: What is the central purpose, aim, or goal of the polity? or Which matters, issues, or enterprises properly concern the polity? The two questions are related of course, and Duff references both, albeit in disjunctive terms: 'A political community, like any kind of community, must be defined (it must define itself) in terms of some shared *goals* or *activities* that constitute its business.' (155, emphasis added). Nonetheless, the two questions give different images of what we should seek to specify.

If we focus on which matters, issues, and enterprises properly concern the polity, then a host of possible answers present themselves, including security, resource allocation, regulation of membership, use of coercive force, punishment, and determination of the boundaries of jurisdiction. But, these answers are all formal answers. As such, they highlight again the slipperiness of the notion of *propriety* and what *properly* interests the polity, and they fail to guide us in our efforts to determine what to do. Being told that punishment and security are 'proper' concerns of the polity tells us nothing about how to approach them.

If, by contrast, we focus on what is the central purpose or goal of the polity, then we move closer to something substantive, but face a host of candidate goals, some of which are incompatible with each other and some of which are impoverished. One comparatively rich answer, which the Secretary General of the OECD got members to endorse, is that the end of government is the wellbeing of the people. This is impressive ambition. A similar, though underspecified answer comes in Article 1 of the Polish constitution, which Duff quotes: the 'Republic of Poland shall be the common good of all its citizens' (154). As Duff notes, the content of

'common good' could be fleshed out in terms of a wide variety of values (not all of which equate to wellbeing).

An alternative vision of the polity presents it in night-watchman terms, which, to my mind, offers an impoverished vision of a *res publica*, in the same way that a set of doctors would have an impoverished vision of their *res publica* if they specified their treatment and care ambitions in the minimalistic terms of merely keeping people alive.

Similarly, just as a set of doctors would have a morally suspect vision of their *res publica* if they specified it in terms of treating one or two ailments that predominantly affected people like themselves, so too a polity would have a morally suspect vision if it took the interests of one set of people as the 'good' it should secure, valuing other people as three-fifths of a man, for example.

However, even when doctors have an impoverished or suspect vision of their *res publica*, a particular valuable goal still drives them, namely, protecting health. Which is more than can be said of some professions, such as executioners or interrogators who use extreme techniques like torture. Although, as noted above, at a very basic level, these enterprises can be viewed against a backdrop of morally plausible aims (namely, the aim of dealing with serious wrongdoing), nevertheless the specific goals that drive their work are reprehensible. The question is: Is the criminal law like doctors' codes, or occasionally more like executioners' codes? As noted above, Duff maintains that polities and the criminal law are clearly aiming at something good, namely, determining how we are to live together. But, this may claim too much on behalf of the criminal law. When a polity's vision for itself is morally suspect, it may be driven less by the good aim of determining how to live together than by the suspect aim of ensuring that those on top remain there.

Since not all polities have a morally acceptable self-understanding, just as not all professions have a morally acceptable self-understanding, we should not take a polity's declared *res publica* as an unassailable reference point for what *properly* concerns it. And, since political insiders, like professional insiders, are poorly placed to engage in clear-eyed self-scrutiny, we should be hesitant to accept their declarations about the nature, function, and value of their code of civic ethics. Just as we need an independent defense for establishing or retaining any given profession, so too we need an independent defense for establishing or retaining a given public realm and the code of civic ethics created to regulate it.

Duff stresses at the outset of Chapter 2 that, although different polities will have different outlooks and visions for themselves, his interest is not in

what a given polity positively declares to be morally wrong, but in what is *actually morally wrong*. We want to allow then that, although there is scope for cultural variation in the specification of the business of the polity, nevertheless many polities fundamentally get it wrong, and are built around ideas that should not be the driving purposes of polities. What they declare to be ‘wrong’ is *not* morally wrong either *tout court* or in relation to the specific interests of that ‘public’.

5.2 *Founding Parents and Other Problems*

Duff says that Founding Parents ‘...cannot take the existence of criminal law for granted; they must justify its creation and maintenance...we will need a justification, in terms of the polity’s appropriate aims. That justification will need to be grounded in a political theory of the polity,...’ (97) The term *appropriate* here is like the terms *proper* and *legitimate* noted above. It’s a slippery character. In the case of the law, this slipperiness is partly a matter of final jurisdiction. The state presents itself as the final authority on the boundaries of jurisdiction. Hence, the appropriate aims of the polity are (ostensibly) largely what the polity says they are. And, Duff acknowledges that, unlike drafters of professional codes, a set of Founding Parents could, in principle, decide that their criminal code will see every kind of moral wrong as a candidate for criminalization. But, he says that it’s highly implausible that they should do so; such an approach is inconsistent with core liberal values, and it relies on a deeply retributivist outlook. This answer offers some reassurance – that there are broad substantive limits to what reasonable Founding Parents’ vision will be for their polity – but nonetheless these insiders, who may well lack the capacity for clear-eyed self-scrutiny, seem to be given the final say, in Duff’s view, on their polity’s appropriate aims.

A further problem concerning Founding Parents, as well as all drafters of Codes, which I didn’t highlight above, pertains to who those drafters are. The language of *Founding Parents* is as jarring as it is illuminating. One problem with Duff’s description of the drafters as ‘Founding Parents’ is that it occludes the fact that the people drafting the laws in almost all polities have not been Parents, but Fathers and, indeed, white Fathers. And, in cases like the US, the thinking of those Fathers has had considerable influence over judicial reasoning and legislative activity. (Presumably, it would be, or should be, problematic for the medical profession if only male doctors were permitted to participate in devising its code of ethics, regardless of what they devised.) This leaves us with the question: Can legitimate and morally acceptable polities be produced through suspect

constitutional processes?

Two further problems with criminal codes that are akin to the problems of professional codes are, first, that much of the criminal law is written *ex post*, long after a polity has entrenched itself as a 'legitimate' entity. When this is the case, the criminal law reflects the polity's self-effacing attitude toward its *res publica*; the law is built on the assumption that the polity's goals and activities are indeed legitimate, when in fact they might not be. Second, even in a polity with a morally respectable set of goals and activities, the criminal law is clunky, inflexible, and general. Both codes and the criminal law, to the extent that it resembles them, limit and distort moral consideration.

6. CONCLUSION

This paper has highlighted problems in Duff's use of an analogy with professional codes of ethics to flesh out an image of the criminal law as a code of civic ethics which, like professional codes, regulates the conduct of members of a particular 'public' realm. First, members – as insiders – are biased toward their enterprise and, hence, are poorly placed to judge its merits or devise a code to regulate conduct. Second, the enterprise that members seek to regulate with a Code may be morally abhorrent. Indeed, the most morally suspect professions and states seem to dress up their regulation of their activities in the most morally-purifying language. Third, both empirically and morally, people cannot isolate their different spheres of activity within different 'public' realms. When they do wrong in one sphere, that wrong is often the business of people whom Duff would deem to be outsiders. Fourth, the business of the polity cannot be specified adequately in formal terms alone; substantive commitments have to be made, and insiders – Founding Parents or code drafters – should not have the final say on what those commitments should be. Finally, it matters who the code drafters are. In the case of the criminal law, we can reasonably wonder whether it's morally suspect because it has been drafted largely by one segment of society, privileged white men.

In closing, let me note two points of disanalogy between professional codes and the criminal law. These points won't undercut my main conclusion that we have reason to be wary of both codes and any criminal law like them as accurate trackers of moral wrongdoing and accountability regardless of the *res publicae* they regulate. But, these points of disanalogy do highlight the limits of appealing to professional codes to inform our thinking about the criminal law.

First, one minor point of disanalogy that Duff notes is that: unlike the criminal law, ‘A professional code might cover not only matters of ethical (mis)conduct, but also matters of competence... (i.e. fitness to practise medicine; responsibility to remain informed of new findings, keep skills up to date, maintain level of cognitive and physical competence, etc.)’ (80).

Second, another disanalogy is that most, if not all, professional codes include a sentence at the outset along the lines that, upon appointment, all members are required to confirm their commitment to this code of conduct.¹⁰ By contrast, although voluntarist accounts of political obligation have their defenders, and although immigrants often do have to declare their allegiance, nevertheless most members of a polity do not join it voluntarily and, typically, their polity cannot revoke their membership.

Codes of professional ethics are a seemingly useful analogue for the criminal law because they are codified. They have the same ‘look’ as the formal part of the criminal law. But, their use in an analogy comes at a high price and may heighten, rather than lessen, critics’ skepticism about Duff’s account of public wrongs and our standing to hold each other to account.

BIBLIOGRAPHY

- Brecher, B. 2010. ‘The Politics of Professional Ethics’. *Journal of Evaluation in Clinical Practice*, 16(2), 351–355.
- Duff, A. 2018. *The Realm of Criminal Law*. Oxford: Oxford University Press.
- Pauer-Studer, H. 2012. ‘Law and Morality under Evil Conditions: The SS Judge Konrad Morgen’. *Jurisprudence* 3(2), 367–390.
- Pauer-Studer, H., and J. D. Velleman. 2011. ‘Distortions of Normativity’, *Ethical Theory and Moral Practice* 14, 329–356.
- Zaibert, L. 2018. *Rethinking Punishment*. Cambridge: Cambridge University Press.

¹⁰ The General Medical Council’s Code of Conduct opens with the statement: ‘For us to command the confidence of all of our key interests, it is necessary that Council as the governing body should adopt and comply with appropriate standards of conduct. Upon appointment, all Council members are required to confirm their commitment to the Members’ Code of Conduct.’ See: <https://www.gmc-uk.org/about/how-we-work/governance/council/code-of-conduct>