

Justifying Public Justice

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Abstract

Criminal law contains a set of powers and permissions that enable it to fulfil its functions. A central feature of contemporary criminal law is that these powers and permissions are predominantly allocated to public officials acting in their capacity as such. Many of these normative incidents are entirely withheld from private persons, while some—like those involved in an arrest—are granted to private persons on a much more limited basis than they are to public officials. Call this feature the *standard allocation* of criminal law's powers and permissions.

Most agree that the standard allocation is justified. However, the question of what this justification is has been relatively neglected. The purpose of the thesis is to address this question, which I label the *allocative* question.

Statists claim that the standard allocation is justified because achieving some value—which is *personal* to public officials—is *necessary* to justify allocating criminal law's powers and permissions to an agent. A value is personal to public officials if it is such that only public officials are, even in principle, capable of realising it.

The thesis refutes Statism by challenging two arguments advanced in its defence: one, based on criminal law's *functions*, the other, on the *role* of lawmakers—who are the public officials charged with allocating criminal law's powers and permissions.

It then develops an *Instrumentalist* answer to the allocative question. According to Instrumentalism, criminal law is a way to achieve values that anyone, at least in principle, could realise. The standard allocation is justified insofar this arrangement helps criminal law to best deliver these *impersonal* values at a lesser cost in other values. The thesis also defends Instrumentalism from two main objections, namely,

that Instrumentalism (i) fits poorly with criminal law doctrine and (ii) is in tension with the Wrongfulness Constraint on criminalisation.

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Chapter 1: Introduction

I. Criminal Law's Powers and Permissions

Criminal law contains a set of powers and permissions that enable it to fulfil its functions. Although not all these normative incidents are unique to the criminal law, it is in this body of law—and this body of law alone—that they are made systematically available in respect of most of the wrongs regulated.

Consider *permissions* first. Permissions exempt their beneficiaries from duties to perform or not to perform certain actions. As a consequence, conduct that would normally be wrongful is rendered legally permissible when undertaken by these beneficiaries. A distinguishing feature of the permissions contained in the criminal law is that they correspond to negative duties the violation of which often constitutes a criminal wrong. Let us note just a couple of examples to illustrate.¹ The most recognisable is the infliction of punishment. The modes of hard treatment typically used as forms of punishment often amount to intentional and grave interferences with the offender's rights to freedom, property, or her bodily integrity which we are ordinarily under a duty, backed up by the criminal law, to refrain from. The same is true about the force deployed to perform an arrest, the restriction of freedom involved in a detention, and the infringement of the rights to property, privacy, or to our own bodies, attendant to a search. Permissions also attach to actions not generally thought of as coercive, the commission of which is nonetheless also often criminal. One example is the interception and recording of some forms of private communication.²

¹ For more examples, see Markus Dubber, 'A Political Theory of Criminal Law: Autonomy and the Legitimacy of State Punishment' (2004) <<https://ssrn.com/abstract=529522>> accessed 11 September 2017, 2–3.

² Regulation of Investigatory Powers Act 2000, s 1.

Powers, on the other hand, entitle their holders to—inter alia—impose duties on, grant permissions to, or annul certain claims of, others. For instance, a judge’s exercise of the power to convict and sentence a defendant imposes a duty on some other agent to inflict the mandated punishment, and grants that other a permission to inflict said punishment. This agent is also thereby vested with a claim against third parties interfering with her discharging of the duty. At the same time, the sentence deprives the convicted offender of her claim against the specific form of hard treatment imposed as punishment, and further places her under a duty to submit to it (eg a duty not to escape prison or to surrender part of her assets). Powers are also involved in a more direct way in the infliction of some forms of punishment. When an offender fails to pay a fine imposed as punishment, normally there will be some agent not only permitted to take physical control of the offender’s property but also *empowered* to deprive her from, or alter, her rights over such property so as to secure payment. Another example of the powers involved in the criminal law is the exercise of the power to prosecute. Its effect is to (i) place a defendant under a duty to attend trial (which it is permissible to enforce coercively),³ (ii) annul her previous immunity to the powers of the adjudicative agent, and (iii) impose a duty on the latter to issue a verdict, either convicting or acquitting the defendant. Lastly, consider arrests, which involve both a power and a permission conferred to the arresting agent. In virtue of the former, the agent can, by making the arrest, (i) place the arrestee under a duty not to resist the arrest, and (ii) place third parties under a duty not to obstruct it. In

³ Bail Act 1976, s 6; Criminal Law Act 1967, s 3.

virtue of the latter, it is permissible for the arrester to use reasonable force to make the arrest.⁴

A central feature of contemporary criminal law is that the powers and permissions it contains are predominantly allocated to public officials acting in their capacity as such. Indeed, many of these normative incidents are entirely withheld from private persons,⁵ while some are granted to private persons on a much more restricted basis than to their public official counterparts. As a result, when private persons perform many of the aforementioned actions, they not only fail to impose the relevant duties on their targets but, more importantly, they commit crimes. Call this feature the *standard allocation* of criminal law's powers and permissions.

For example, private persons are normally permitted to perform arrests. Yet, this is so within much more limited bounds than police officers or officials from other enforcing agencies. To take English law as an example, the permission to make arrests granted to private persons is subject to (i) the offence (whether it has already occurred or it is being committed) being an indictable one, (ii) the unavailability of a police officer to make the arrest, and (iii) there being the risk that but for the arrest, the arrestee will harm herself, harm others, damage property, or flee before a police officer can take her into custody.⁶ It is also the case

⁴ See John Gardner, 'Justification Under Authority' (2010) 23 Canadian Journal of Law & Jurisprudence 71, 90–1.

⁵ That is, 'agents who are *not* acting in an *official* capacity', as state actors, *agents*, or *representatives* of the state (Cécile Fabre, 'Privatizing War' in Jack Knight and Melissa Schwartzberg (eds), *NOMOS LX—Privatization* (New York UP 2018) 307. Emphases in original). See similarly, Gillian Hadfield and Barry Weingast, 'What is Law? A Coordination Model of the Characteristics of Legal Order' (2012) 4 Journal of Legal Analysis 471, 473. Unless otherwise stated, all emphases throughout the thesis, marked with *italics*, are added.

⁶ Police and Criminal Evidence Act 1984, s 24 (a).

that the conditions of validity placed on arrests performed by private persons are stricter than those on arrests carried out by police officers.⁷ Other systems allocate their permissions differently. Spanish law, for instance, allows private persons to make arrests in response to some conduct that does not constitute a criminal offence,⁸ while the permission for private persons contained in Chilean law is subject to a time limit counted from the commission of the suspected offence.⁹ However, in the three jurisdictions just mentioned, the further permission to engage in a search of the arrestee's body and property immediately upon the performance of an arrest is allocated *only* to police officers. In relation to powers, English law also recognizes the power of private persons to bring prosecutions. However, any such prosecution may be taken over and eventually discontinued by the Crown Prosecution Service (CPS).¹⁰ Some civil law jurisdictions grant broader prosecuting powers on private persons.¹¹ Still, in many of these jurisdictions, it is only public prosecutors who have powers over other agencies which enable them to command the investigation of the suspected offence.

⁷ Gardner (n 4) 92.

⁸ This is the case of the defendant who fails to appear at trial which, in contrast to English law, is not a criminal offence: *Ley de Enjuiciamiento Criminal* (Law of Criminal Procedure), s 490.

⁹ Currently, 12 hours: *Código Procesal Penal* (Code of Criminal Procedure), ss 129 and 130.

¹⁰ Prosecution of Offences Act 1985, s 6. See also John Spencer, 'The Victim and the Prosecutor' in Anthony Bottoms and Julian Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Routledge 2011). Further, it has been held that the issuing of a caution by the police or the CPS prevents a private person from bringing a prosecution in respect to the same offence (see Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4 edn, OUP 2010) 223 who make reference to *Jones v Whalley* [2006] UKHL 41, [2007] 1 AC 63). It is worth bearing in mind that in some jurisdictions, such as England and Wales, powers to charge, prosecute and punish are held not only by the CPS and the criminal courts, respectively, but spread among different public agencies.

¹¹ For some examples, see Johanna Göhler, 'Victim Rights in Civil Law Jurisdictions' in Darryl K Brown, Jenia Iontcheva Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (OUP 2019) 272-80.

Notwithstanding the previous examples, typically only public officials hold the necessary powers and permissions to undertake some of the most salient criminal justice actions such as, inter alia, the detention of suspected offenders, the search of their bodies and property, forcibly compelling them to attend their trial, issuing a verdict and sentence, and inflicting punishment.¹²

Most agree that the standard allocation of criminal law's powers and permissions (or something close to it) is justified.¹³ Yet, the question of what this justification is has been relatively overlooked.¹⁴ Call this the *Allocative* question.

The reasons for this neglect are varied. Some are simply, as Wellman puts it, 'unreflective statist':¹⁵ that criminal law's powers and permissions should be

¹² This may need to be qualified given that, for example, some forms of punishment commonly referred to as *shaming* or *degradation* sanctions can be construed as involving both the partial private determination (power) and infliction (permission) of criminal punishment: see Alon Harel, 'Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions' (2008) 14 *Legal Theory* 113, 131–2 (for a contrary view: Malcolm Thorburn, 'Why Only the State may *Decide* when Sanctions are Appropriate' in Paul Robinson, Stephen Garvey and Kimberly Ferzan (eds), *Criminal Law Conversations* (OUP 2011) 139–142).

¹³ Some advocate making the allocation of criminal law's powers and permissions to private parties more extensive. Brooks defends what he calls 'punitive restoration', whereby those with a stake in the penal outcome jointly *determine* the appropriate form of sanction, which may include a term of imprisonment: Thom Brooks, 'Punitive Restoration: Giving the Public a Say on Sentencing' in Albert Dzur, Ian Loader and Richard Sparks (eds), *Democratic Theory and Mass Incarceration* (OUP 2016).

¹⁴ John Gardner takes this question to be a significant omission from Hart's (and many others') writings on punishment (see his Introduction to HLA Hart, *Punishment and Responsibility* (John Gardner ed, 2 edn, OUP 2008) xlix–liii). Lucia Zedner makes a similar observation: '[M]ost Anglo-American treatises focus on the question of *why* we should punish, *how much* punishment can be justified, and *when* or under what circumstances infliction of hard treatment is warranted. In so doing, they fail to ask *who* may punish. (...), in the UK, the question of who has standing to punish and what grounds the authority of the punisher to allocate and inflict the pains of punishment has attracted relatively little attention. (...). [T]he [current] central role of the state is generally simply assumed rather than addressed by many theorists of punishment (Lucia Zedner, 'What is Lost When Punishment is Privatised?' in Tom Daems and Tom Vander Beken (eds), *Privatising Punishment in Europe* (Routledge 2018) 167–68. Emphases in original). After claiming that victims, their associates and perhaps others, can be justified in punishing a criminal offender, Douglas Husak says: 'Exactly why some severe modes of punishment are available to the state and not to private actors raises a number of questions for which I have no clear answer' (Douglas Husak, 'What's Legal about Legal Moralism?' (2017) 54 *San Diego Law Review* 381, 393 fn 17).

¹⁵ Christopher Wellman, 'Rights and State Punishment' (2009) 106 *Journal of Philosophy* 419, 420. Similarly, John Gardner, *Offences and Defences* (OUP 2007) 282–83.

predominantly allocated to public officials is simply taken as a given. As a result, for instance, penal theorists have often conceived of their task as concerned with the justification of *state* punishment, such that the allocative question does not come up.¹⁶ Others—also focused on punishment—think that criminal punishment is, by definition, punishment determined and imposed by public officials. Similarly, others contend that punishment presupposes the authority of the punishing agent over the individual who is subject to the punishment or some other relation of superiority or hierarchy between them. On this view, private persons, who are equals (or, at any rate, they are equals in the context of the criminal law), cannot punish each other.¹⁷ And others claim that, although private persons can punish one another, they cannot punish one another *for* crimes.¹⁸

However, these conceptual claims are unpersuasive and, in any case, uninformative. First, if private persons are empowered and permitted by the law to punish, this seems enough to regard them as *authorised* to this effect.¹⁹ Moreover, anyone—whether authorised or otherwise—can punish another *for* a crime they have committed: as Gardner notes, for this to be the case it is just required that the fact of the commission of the crime is among the punisher's reasons to impose the

¹⁶ As Zedner (n 14) observes with regards to punishment, the explanation is partly historical because for the past two hundred years it has been public officials those who have been empowered and permitted to determine and inflict criminal punishment.

¹⁷ Jeffrie Murphy, 'A Paradox in Locke's Theory of Natural Rights' (1969) 8 *Dialogue* 256, 261; George Fletcher, 'Punishment and Compensation' (1981) 14 *Creighton Law Review* 691, 699; Guyora Binder, 'Punishment Theory: Moral or Political?' (2002) 5 *Buffalo Criminal Law Review* 321; Alon Harel, *Why Law Matters* (OUP 2014) 53, 97.

¹⁸ Harel, *Law* (n 17) 72, 96.

¹⁹ Daniel McDermott, 'The Duty to Punish and Legitimate Government' (1999) 7 *The Journal of Political Philosophy* 147, 161-163.

punishment.²⁰ That this may not count as *criminal* punishment, if true, says nothing about whether we can be justified to empower and permit private persons to inflict the modes of hard treatment typically constitutive of criminal punishment. As Gardner puts it, the issue is to

explain why punishments, or certain types of punishments such as those involving attacks on life and limb, or loss of liberty, or the appropriation of money, should be monopolized by the law in the stronger sense of being undertaken by the law itself—by legal officials—and not merely by ordinary people who are subject to the limits and guidance of the law in undertaking them.²¹

The allocative question should be distinguished from the related, but separate, *General Justification* question. We saw that the measures facilitated by criminal law's powers and permissions often interfere with the rights or substantial interests of those subject to them. This fact is a strong reason against undertaking said measures—so much so that it is presumptively wrong to do so. Yet, criminal law's powers and permissions make the undertaking of these measures legally permissible. The General Justification question refers to the values that these measures can achieve, which give us *defeasibly* sufficient reason to engage in them and to make such engagement legally permissible—a reason that defeats the aforementioned objection against undertaking these measures.²² Thus, the answer to the General Justification question tells us *why* we are justified in granting criminal law's powers and permissions. The answer to the Allocative

²⁰ Gardner in Hart (n 14) xxv. Similarly, Douglas Husak, 'Does the State have a Monopoly to Punish Crime?' in Chad Flanders and Zachary Hoskins (eds), *The New Philosophy of Criminal Law* (Rowman & Littlefield 2015) 100.

²¹ Gardner in Hart (n 14) liii.

²² As Edwards explains, a reason *r* is a defeasibly sufficient reason to do *x* if it is not a necessary condition of the permissibility of doing *x* that there be any additional reason to do *x*, and if *r* is susceptible of being defeated by reasons not to *x* (James Edwards, 'Criminal Law's Asymmetry' (2018) 9 *Jurisprudence* 276, 282 fn 20). Hence, the answer to the General Justification question is a justification that is *tailored* to the specific objection mentioned in the text to this note, not an all-things-considered justification for making criminal law's powers and permissions available (Mitchell Berman, 'Punishment and Justification' (2008) 118 *Ethics* 258, 262–67).

question tells us to *whom* we are justified in allocating these powers and permissions.²³

II. General Purpose of the Thesis

The purpose of this thesis is to address the allocative question, thus remedying in part its neglected status. In particular, there are *three* independent aspects of the standard allocation that stand in need of justification, namely, (i) the allocation to public officials of the set of criminal law's powers and permissions required to engage in the actions mentioned above (arrests, detentions, searches, verdicts, punishment, etc); (ii) the fact that these same powers and permissions are withheld from, or significantly circumscribed in respect of, private persons; and (iii) the *control* granted to public officials over the exercise of criminal law's powers and permissions. This last aspect points to the fact that public officials are not only allocated criminal law's powers and permissions, while at the same time they are largely withheld from private persons, but these officials are also the ones to *decide* whether—and how—to exercise them in the first place. Private persons are not granted powers to alter the permissions and powers of public officials in this respect, nor are the latter's powers modulated by claim rights held by private persons against these officials performing or not performing some of the actions they are empowered to perform. To illustrate, consider the power to bring a prosecution: normally, private persons do not hold a power or right to either force a public prosecution or to prevent one from moving forward. Further, although private persons hold the power to bring a prosecution, thereby putting the court

²³ The general justificatory and allocative questions are distinguished in Gardner in Hart (n 14) lii-liii; Wellman (n 15) 420. As Gardner puts it, '*assuming that the guilty wrongdoer should indeed be punished by someone, [why should] the criminal law [meaning: "public officials"] (as opposed to victims or their families or their sympathizers) (...) be the one to exact the punishment*' (Gardner, *Offences* (n 15) 282-83).

under a duty to issue a verdict, such a power is vulnerable—or at any rate it is in English law—to the decision of the main public agency charged with prosecuting criminal cases. Also, victims cannot prevent the issuing of a conviction or sentence by, say, pardoning the offender.²⁴

It is worth making some clarificatory remarks about the scope of the thesis question. The first is that the thesis assumes that the General Justification question can be answered—that is, that there can be defeasibly sufficient reason for criminal law to make available its powers and permissions to some agents. Still, the connection between the General Justification and Allocative questions is one of the central themes of the thesis. The second is that I take it for granted that it is the task of the state alone to issue criminal laws and allocate its powers and permissions. The allocative question focuses on the task of *enforcing* the criminal law—where “enforcement” refers (roughly) to the undertaking of some (typically) coercive measures for the prevention of breaches of the criminal law, ascertaining the occurrence of a breach, and the infliction of hard treatment by way of criminal punishment in response to the breach (together with the powers attendant to these activities).²⁵

A third clarification concerns the relationship between the allocative question and that of the justification of *privatisation*. Whether the allocative and privatisation questions are the same or different questions depends on our

²⁴ This element of *control* is not absolute. For instance, in England (i) public prosecutors have a duty to seek compensation for the victim if she so wishes; (ii) the issuing by the police of Penalty Notices for Disorder (a form of out-of-court punishment) is subject to the consent of the victim; (iii) decisions not to prosecute may be challenged through judicial review. On other jurisdictions, the public prosecution of some offences is subject to the consent/request of the victim (or some other designated agents in the absence of the victim).

²⁵ In this sense, Zedner (n 14) 172; Fabre (n 5) 303; Daniel Guillery, ‘States and the Limits of Feasibility: Enforcement, Morality and Possibility’ (PhD Thesis, University College London 2018) 19.

conception of privatisation. Usually, discussions about privatisation refer to whether it is justified for the state to *delegate* the performance of some activity or delivery of some good to private actors, who thereby act *on behalf* of the state.²⁶ This is *not* our question. The allocative question is not that of whether criminal justice activities may be justifiably delegated by the state. It is rather the justification of having public officials and their delegates, on the one hand, and those who are neither, on the other, treated differently by the criminal law.²⁷ Privatisation may also take the form of the state withdrawing from the provision of services it used to provide, leaving their delivery up to private persons, either with or without the support of the state.²⁸ Inverting the standard allocation by withdrawing criminal law's powers and permissions from public officials and allocating them to private persons would then amount to the aforementioned type of privatisation. Since our question is what justifies the standard allocation, its answer will tell us whether and why privatisation so understood is justified.

The thesis will develop one answer to the allocative question and engage in a detailed refutation of two versions of a competing account.

²⁶ Ashwini Vasanthakumar, 'Privatising Border Control' (2018) 38 OJLS 411, 413.

²⁷ Delegation involves an authorisation on the delegate to act *on behalf* of the delegator. As Edwards points out, empowering and permitting an agent to perform some activity is not necessarily to delegate the activity to the agent. Edwards illustrates with the case of parents: 'The law gives parents power over their children that others lack, and permits them to do things to their children that others may not. It thereby authorises parents to act in ways that help them raise their children. It does not follow that state officials who make such laws thereby delegate the raising of children to parents. This would follow only if parents were authorised to raise their children *on the state's behalf*' (Edwards (n 22) 281 – emphasis in original). The same thought would apply to the allocation of criminal law's powers and permissions to private persons: it would not follow that the state thereby delegates criminal justice activities to private persons. The allocative question can be understood as the question of the justification for criminal justice activities having to be carried out largely by, or on behalf of, the state (see, in a similar sense, Eric MacGilvray, 'Freedom, Responsibility, and Privatization' in Jack Knight and Melissa Schwartzberg (eds), *NOMOS LX—Privatization* (New York UP 2018) 238-39).

²⁸ Vasanthakumar (n 26) 413.

III. Taxonomy: Statists and Instrumentalists

Despite the lack of systematic treatments of the allocative question, one may still identify two types of views about this question in the literature. The identification of these views is, it should be noted, partly interpretive. The reason is that accounts tend to focus on some aspect of the standard allocation (eg on why powers and permissions are allocated to public official, but not on why they are also withheld from private persons) or on specific powers and/or permissions (eg those involved in the infliction of punishment). Some of these accounts may, nonetheless, be construed so as to provide a general answer to the allocative question (which, in any case, they do purport to be offering). In this thesis, I distinguish these two types of views by reference to the *nature of the value(s)* to which they appeal to answer the general justification question.²⁹ Let us refer to them as *Statist* and *Instrumentalist* views about the allocative question.

The thesis rejects statism and defends an instrumentalist answer to the allocative question.

A. Statism

Statists think that the values that answer the general justification question are such that only public officials are, even in principle, capable of realising them. We can call these values *personal* to public officials.

Some, *relational* statist, appeal to a personal value that is *relational*. A value is *relational* if (i) it is a valuable attribute of a relationship that obtains between persons; and (ii) it constitutes a relational reason for those who are participants in

²⁹ This distinction is also applied in Edwards (n 22). A similar classification is adopted in Harel, 'Only the State' (n 12). However, Harel equivocates between conceptual or definitional claims about punishment and axiological claims about the nature of the goods that justify it.

the valuable relationship. A relational reason is a reason that is 'personal in respect of conformity': it is a reason to which only parties to the relationship can conform.³⁰ Not all reasons derived from the value of a relationship are relational reasons in this sense. Agents may perform actions that contribute to the existence and preservation of a relationship to which they are not members.

On relational statist views, the justification for allocating criminal law's powers and permissions is that their exercise is partly constitutive of a valuable political relationship that obtains between the members of certain kinds of political communities. On these views, some wrongs implicate a feature which is essential to this relationship. Criminal law exists to respond to these wrongs and contribute constitutively to the existence of this kind of community, which it does only if members engage in the activities in question *collectively*. Public officials gain the relevant powers and permissions by acting in the name and on behalf of the political community as a whole, so that the acts of these officials constitute acts of latter. It is because public officials—and public officials alone—can make this constitutive contribution that the standard allocation is justified.

On one version of relational statism, criminal law helps to *sustain* a valuable relationship that *pre-exists* it. As we will see, on one prominent view of this type, criminal law preserves the valuable relationship of fellow citizenship in a political community that remains true to its self-defining values or that maintains its *civic integrity*. On another version, criminal law's powers and permissions are justified by the value of a relationship that they *bring about*, and which cannot exist in

³⁰ The term 'personal in respect of conformity' comes from Gardner, *Offences* (n 15) 62. See also, John Gardner, 'Relations of Responsibility' in Rowan Cruft, Matthew Kramer and Mark Reiff (eds), *Crime, Punishment, and Responsibility* (OUP 2011) 89. Anthony Reeves calls these reasons 'relationship-dependent' in 'Liability to International Prosecution: The Nature of Universal Jurisdiction' (2017) 28 *European Journal of International Law* 1047, 1057.

criminal law's absence. On one view, this relationship is one of *equal freedom or independence* between members of a political community.

We can formalise the statist answer to the allocative question as follows:

- a) Achieving value ϕ can be a defeasibly *sufficient* reason to allocate criminal law's powers and permissions.
- b) Value ϕ is personal to the political community as a whole.
- c) Public officials can act in the name and on behalf of the political community as a whole, so that the acts of these officials constitute acts of the whole community.
- d) Achieving value ϕ is *necessary* to justify the allocation of criminal law's powers and permissions to an agent.
- e) *Only* public officials can act in the name and on behalf of the political community as a whole (hence, value ϕ is—derivatively—personal to public officials).

Premises a), b) and c) justify allocating criminal law's powers and permissions to public officials, while adding d) and e) completes the case for *withholding* these powers and permissions from private persons.

Before outlining the Instrumentalist position, it may be worth to make two clarifications about statist views.

First, the statist's main claim is not definitional or conceptual: their answer to the allocative question is not that the activities underpinned by criminal law's powers and permissions are, by definition, state actions. Official acts are a non-contingent means to the realisation of the *values* that give defeasibly sufficient reason to allocate the powers and permissions required to permissibly carry out criminal justice activities. Anyone can perform these activities, but only public officials can realise the relevant personal value by thus performing them.³¹

³¹ Although some statist's use scare quotes to refer to criminal punishment imposed by private persons, which suggests they do not regard it as "true" criminal punishment (eg R.A. Duff, 'Relational Reasons and the Criminal Law' in Stuart Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law*, vol 2 (OUP 2013) 206).

Relatedly, statist do not claim that these personal values have no rational salience for private persons. The contention is that private persons are *logically* disabled from responding to the reasons given by these values by exercising the set of powers and permissions made available by the criminal law. Hence, any attempts to this effect are unjustified. However, private persons do have reason, on the strength of the same values, to assist public officials to perform these actions, and to perform *other* actions themselves conducive to the fulfilment of criminal law's functions. Private persons might, for example, have duties to report crimes, serve as jurors, give testimony at trial or, more generally, not to obstruct the actions of public officials.

B. Instrumentalism

Instrumentalists see criminal law as a way to achieve values that anyone, at least in principle, could realise. On instrumentalist views, these *impersonal* values give us the answer to the general justification question.³² According to these views, the standard allocation of criminal law's powers and permissions is justified because such an arrangement helps criminal law to deliver more of these impersonal values at a lesser cost in other values. As we will see once I set out the account more fully, an instrumentalist answer is thus essentially contingent on empirical facts about the attributes possessed by the public officials allocated criminal law's powers and permissions and by the agencies they are part of. And, in contrast to statist accounts, instrumentalist views can be of a piecemeal nature. Indeed, the precise form that the allocation of criminal law's powers and permissions should take depends on the effects of the overall resulting arrangement. Thus, an

³² The label 'personal' and 'impersonal' are drawn from Edwards (n 22). An alternative is 'agent-dependent' and 'agent-independent', respectively. For a roughly similar characterisation of statist and instrumentalist accounts, see Harel, *Law* (n 17) 2–6, 65–81.

instrumentalist approach can yield different prescriptions for each of the powers and permissions made available by the criminal law: it could, for example, provide one answer for powers and another one for permissions, or different answers for the different clusters of powers and permissions that underlie the range of measures enabled by them. As we will see, this constitutes a decisive advantage of Instrumentalism as it fits better with the three aspects of the standard allocation identified above and with the fact that *some* powers and permissions (eg those involved in the performance of an arrest) are allocated to private persons, something which statist views have trouble accounting for.

Having set out both the statist and instrumentalist views, we can see how the allocative and general justificatory questions are connected. It is the nature of this connection which distinguishes statist from instrumentalists. On the former, the kind of values that answer the general justification question is such that these values directly and immediately determine the answer to the allocative question. On the latter, the answer to the general justification question provides part, but not all, of the answer to the allocative question. To answer it, one needs to establish whether the standard allocation will provide better conformity with the reasons given by the relevant impersonal values which, due to their nature, is a contingent matter.

IV. Structure of the Thesis and Outline of Main Arguments

As I noted above, the thesis seeks to advance an instrumentalist answer to the allocative question. For this purpose, it begins with a refutation of different versions of premise d) above ('achieving value ϕ is necessary to justify the allocation of criminal law's powers and permissions to an agent'), which is essential to the statist case for withholding criminal law's powers and permissions

from private persons. The thesis engages across two chapters with two of the most prominent relational statist answers to the allocative question, critically examining their accounts of the premise just mentioned.

Refuting the statist views will leave us with an instrumentalist account as the default answer to the allocative question. On this basis, Chapter 4 develops one version of such an instrumentalist answer, and Chapter 5 defends it from objections. Chapter 6 will be a concluding chapter.

Chapter 2 engages with one relational statist view, which I call the *Civic Integrity* view. According to the Civic Integrity view it is a *necessary* reason for allocating criminal law's powers and permissions to an agent that this will enable that agent to discharge citizens' *obligations of civic integrity* (ie premise (d) above).³³ This is something that public officials alone can do. The chapter refutes two versions of what it calls the *Functional Defence* of premise (d). According to the Functional Defence, discharging obligations of civic integrity is criminal law's *distinctive function*, and this distinctive function constrains whether—and how—to allocate criminal law's powers and permissions.

Chapter 3 offers a different reading of the Civic Integrity view, and also outlines a competing relational statist view, which I label the *Freedom as Independence* view. The chapter then examines an alternative—*Role-based*—defence of premise (d) from the perspective of both views.

According to the Role-based defence, the *role* of public officials is to be agents or *fiduciaries* of their political communities. This role requires them to act on a narrower set of reasons than those that apply to us in our ordinary lives. On

³³ ψ is a *necessary* reason to ϕ iff, in the absence of ψ , ϕ cannot be justified.

both the Civic Integrity and Independence views, that set does not include sufficient—or any—reason to allocate criminal law’s powers and permissions to private persons.

I make a two-part case against the Role-based defence. The first part questions the account of role—or fiduciary—morality that underlies that defence. On this account, stepping into a role *undermines* or *disables* any reason not flowing from the goals of the practice of which the role is part. Practice-independent reasons are simply deprived of their status as reasons for these occupants. I argue instead that practice-independent reasons remain applicable to role-occupants.

The Role-based defence is an expression of what I label the *discontinuity view*. On this view, the moral norms that apply to occupants of official public roles—and, thereby, to the justification of state action—are (in a variously specified sense) independent, autonomous, or discontinuous from the moral norms that apply to us in our everyday lives. I argue that the Civic Integrity and Freedom as Independence accounts *presuppose* views in ordinary morality, on the strength of which some moral norms that apply to private persons cease to apply to public officials. Therefore, these accounts give us no grounds to believe that the discontinuity view is true.

The second part of the chapter then challenges the specific substantive moral conceptions presupposed by these accounts of the goals and values that define the role of state agents and their relationship with the political community.

Chapter 4 advances my instrumentalist answer to the allocative question. It develops the claim that the standard allocation of criminal law’s powers and permissions is justified because this arrangement helps criminal law to best deliver impersonal values. After dispelling a few potential misconceptions about

Instrumentalism, I sketch an instrumentalist justification of the standard allocation.

Chapter 5 rebuts several objections to Instrumentalism. The two most important are that (i) instrumentalism is a poor fit with criminal law doctrine, and (ii) instrumentalism is in tension with the Wrongfulness Constraint on criminalisation because it warrants the punishment of private persons who are all-things-considered morally justified in violating the allocative rules. As to the former, I will suggest that the objection gets much of its traction from, *inter alia*, (a) an unduly narrow view of the factors that make up the instrumental justification for the standard allocation, and (b) a failure to appreciate the implications of the standard allocation being a system of rules. With regards to the latter, I concede that according to instrumentalism, some ‘vigilante’ punishments are not even *pro tanto* wrong. Yet, I argue that the state permissibly prosecutes, convicts, and punishes these ‘morally innocent’ vigilantes. In other words, the wrongfulness constraint is ordinarily defeated with regards to them. One important feature of the answer to the allocative question developed in this chapter is that it is *not* committed to the proposition that the standard allocation is justified (although I offer many considerations to think that it is). Rather, the answer is an account of the nature or form that the justification of the standard allocation (or changes to it) ought to have.

Chapter 6 sums up the arguments and conclusions of the previous chapters.

Chapter 2: A Functional Defence of the Standard Allocation

The purpose of this chapter is to critically examine one relational statist answer to the allocative question, which I will call the *Civic Integrity* view. As we saw in Chapter 1, one of the central premises of statist views is that achieving a value which is personal to public officials is necessary to justify the allocation of criminal law's powers and permissions to an agent. On the Civic Integrity view, it is the value of discharging *citizens' obligations of civic integrity* that plays that necessary role. The chapter challenges what I label the *Functional Defence* of the premise just mentioned. According to the Functional Defence, discharging citizens' obligations of civic integrity is criminal law's *distinctive function*, and this distinctive function constrains whether—and how—to allocate criminal law's powers and permissions.

The chapter has three parts.

Part 1 develops the Civic Integrity view. It starts by introducing the notion of "integrity" and explains how, on this view, it grounds obligations that are discharged through the criminal law. It then sets out the justification of the standard allocation given by the Civic Integrity view (ie its answer to the allocative question).

In Part 2, two versions of the Functional Defence are developed and refuted. One version—*Monism*—depends on the claim that criminal law's distinctive function is its *only* function. The chapter advances several function-related arguments to reject this claim. On the other version—*Subordination*—criminal law's distinctive function is criminal law's *primary* function. According to Subordination, criminal law's distinctive and primary function enjoys lexical

priority: conformity to reasons derived from criminal law's secondary functions is subordinated to conformity to reasons given by criminal law's distinctive and primary function. The upshot is that only the fulfilment of criminal law's distinctive function can give *sufficient* reason to allocate powers and permissions to an agent. The chapter rejects both the claim that criminal law's distinctive and primary function enjoys *lexical priority*, and the claim that discharging obligations of civic integrity is the primary function of criminal law. The examination of the Functional Defence concludes by suggesting that the answer to the allocative question must be found in features of the criminal law other than its functions.

Part 3 challenges one such answer. According to this alternative answer to the allocative question, the standard allocation is justified because public officials alone can give offenders what they *deserve*.

Part 1: Political Communities, Civic Integrity, and the Criminal Law

I. Reasons of Integrity

A. Values and Identity: Individuals and Groups

According to a prominent relational statist account, the value which is necessary to justify the allocation of criminal law's powers and permissions to an agent derives from a particular feature of (some) political communities which may be thought of as their value-laden identity. To illustrate this notion of identity, and thereby introduce the account, consider the following picture of the roles that values play in our lives.

Values give us reasons, some of which ground obligations, to act in ways that promote and/or honour these values. Think about honesty. It is plausible that the value of honesty is part of what gives us a general obligation to tell the truth, which means we sometimes commit a wrong when we lie.¹ Another obligation that the value of honesty may give us is to respond to the wrongs of dishonesty we and others commit. There are several ways to respond to wrongs of others, but one that seems particularly appropriate is to call wrongdoers to account and condemn them for their behaviour. Some say that in responding to wrongdoing in this way, one honours the values that the conduct violated.² Provided we do sometimes have these obligations—to tell the truth and to call the untruthful to

¹ The specific value and the obligation to which it gives rise serves purely illustrative purposes. It may be that there is actually no general obligation to tell the truth (Kate Greasley, 'The Morality of Lying and the Murderer at the Door' (2019) 38 *Law and Philosophy* 439, 451ff). If so, some other value will do.

² Macalester Bell, 'The Standing to Blame: A Critique' in Justin Coates and Neal Tognazzini (eds), *Blame: Its Nature and Norms* (OUP 2013) 267-68.

account—and provided they are at least partly grounded in the value of honesty, both derive part of their normative force *directly* from this value.

However, values can also justify our obligations in a more indirect fashion. One could, for example, consciously self-identify as an honest person, make honesty a constitutive element of one's identity. A consequence of committing ourselves to the value of honesty in this way is that, by failing to act as reasons of honesty would have us act, we do not thereby only betray the value of honesty, but also betray *ourselves*.³ It is at least sometimes the case that staying true to oneself is of value and when it is this fact gives us *additional* reasons to, *inter alia*, tell the truth and respond to untruthfulness in others. Let us refer to these latter additional reasons as reasons of *integrity*.⁴ Reasons of integrity, or the value of conforming to them, derive partly from the values that constitute one's identity, yet they are not entirely reducible to them. Therefore, when we—for instance—call the untruthful to account out of a concern with sustaining the conception we hold of ourselves, we are not responding merely to the intrinsic normative force of the value of honesty, but also to the value of integrity. Put briefly, reasons of integrity are reasons to act in ways that express one's commitment to the values through which we define ourselves. Further, when simple reasons of honesty are not sufficient to require us to call the dishonest to account, reasons of integrity may sometimes contribute to making the calling obligatory.⁵ This obligation to call to

³ Ibid 268.

⁴ The notion of "integrity" draws from Samuel Scheffler, 'The Normativity of Tradition' in Samuel Scheffler (ed), *Equality and Tradition* (OUP 2010) 294. It is used in a similar sense by Williams in J.J.C. Smart and Bernard Williams, *Utilitarianism: For and Against* (CUP 1973).

⁵ Scheffler (n 4) 294.

account becomes then an obligation of integrity, one partly grounded in our own interests and thus, one we partly owe to ourselves.

Groups may also display value-laden identities of the kind illustrated above. As a consequence, they can be subject to similar reasons of integrity and may incur obligations of the same nature. To see this, think of the many groups that are defined by the engagement of their members in a common practice or the pursuit of a collective project, a practice or project which is constituted by a set of goals and values that are inherent in it (and thereby in the group itself). Groups such as political parties, churches, sports teams, professional associations, and the academic community of a university are sometimes conceived of in these terms. One aspect of the special character of groups of this kind, or even a condition of their very existence, is that their members self-identify as such, so that the fact of membership figures as a constituent of these members' identity. This identification, in turn, involves sharing a commitment to the set of values that are inherent in the mutual practice or project. It follows that this commitment by members amounts to a constitutive feature of the group. Hence, many argue that members of these groups are subject, qua members, to reasons of integrity which—given the nature of their self-identification—are ultimately grounded in the identity of the group. As suggested above, among those reasons are obligations of integrity to (i) call fellow members to account for conduct that contravenes the self-defining values of the group, and (ii) give an account of oneself when called to account for such conduct.

B. Associative Obligations of Integrity

So far, in appealing to the value of integrity, we have only gestured towards the justification of these responsive obligations. One particular account of the grounds

of these obligations as they apply to the members of groups conceives of them as *associative* obligations.

Associative obligations are special obligations owed to one another by participants in intrinsically valuable relationships, or by members of intrinsically valuable groups.⁶ These are obligations (i) that the participants and members would lack were they not participants or members, or (ii) that exceed their ordinary obligations towards non-participants. The justification of these obligations is taken to lie in their *constitutive* contribution to the particular aspects of the relationship or group that make it intrinsically valuable.

Groups like the ones mentioned in the previous section are sometimes said to instantiate intrinsic goods or to be of intrinsic value themselves. As was suggested, one of the features that furnishes them with this kind of value is the possession of a self-defined identity given by the shared commitment of its members to a set of values. In this regard, we may say that calling to account and answering for wrongs that contravene the values of the group not only serves instrumentally to entrench its members' commitment to these values, but is further expressive, and thereby constitutive, of that commitment. Indeed, a failure to respond in this way would expose their shared adherence as hollow, and thus the identity of the group shaped by these values (and thereby of the members

⁶ More precisely, of relationships or groups that are 'defeasibly valuable' (John Gardner, *From Personal Life to Private Law* (OUP 2018) 48-49). Indeed, although there are relationships and groups that are normally valuable, they can also on occasions be the source of *dis*value. Participants or members do not incur associative duties if the relationship or group lacks '*net*' value (Samuel Scheffler, 'Relationships and Responsibilities' (1997) 26 *Philosophy & Public Affairs* 189, 198; John Horton, 'In Defence of Associative Political Obligations: Part Two' (2007) 55 *Political Studies* 1, 10). But see Yael Tamir, *Liberal Nationalism* (Princeton UP 1995) 101-102, who thinks that morally repugnant groups do give rise to (usually defeasible) associative obligations; and Joseph Raz, 'Identity and Social Bonds' (2018) King's College London Law School Research Paper No 19-4 <<https://dx.doi.org/10.2139/ssrn.3270853>> accessed 8 February 2019, who seems to suggest that morally defective or "net *dis*-valuable" groups can give rise to associative obligations to *reform* them (I will come back to Raz's point in Chapter 3).

themselves) as insincere. If plausible, it seems a short step to the claim that having and discharging *obligations* which require members to respond to wrongs that implicate the identity of the group contributes constitutively to the group's identity and therefore to the group qua intrinsically valuable association. Hence, these obligations are justified by a value that they help to constitute.⁷ Let us call them *associative obligations of integrity*.

1. Associative Obligations of Integrity: Personal and Relational

Not only individual members, but the group itself can incur associative obligations of integrity. As we saw, these obligations have to do with manifesting adherence to a value, specifically, by calling to account and answering for a wrong that violates it. This is something that, in principle, anyone could do. However, associative obligations of integrity require members to uphold a value qua defining of their relationship as fellow members, which they can only achieve by acting among themselves qua members. When it comes to the identity of the group, it must be members *collectively* who call wrongdoers to account: the value of integrity is personal to the agent—in this case, the group itself—whose identity it is. For the same reason, members must respond to the group as a whole to discharge their obligation to answer.

Consider universities, membership in which many think has intrinsic value. We can conceive of their academic members as communities constituted, at least in part, by a common project of producing and disseminating knowledge. Inherent in this endeavour are values such as scientific rigour and honesty, to which academics will often be committed in a way they take to be defining of their

⁷ Joseph Raz, 'Liberating Duties' (1989) 8 *Law and Philosophy* 3, 20-21. See further, Scheffler, 'Relationships and Responsibilities' (n 6) 200-201.

membership in the community. On the basis of the shared commitment of its members, the university can present itself as the embodiment of the common project that defines it.

Now imagine that one of these academics is found to have rigged the results of an experiment. We saw above that the values to which she is committed give her reasons to answer for her wrong, both as a matter of appropriately valuing the values that her conduct flouted and as something she owes to herself if she is to remain true to her identity.⁸ She can conform to those reasons by giving an account of herself to, say, her partner or a close friend. Yet, such a response would be inadequate for the purpose of upholding her commitment to these values as constituents of the relationship in which she stands with her fellow academics and the community as a whole. For this purpose, the wrongdoer must answer for her wrong specifically to her fellows. Nor is it enough for her to answer to colleagues individually: even if the wrongdoer is called to account by, and answers to, several of her colleagues, it is still the case that the community must, if it is to take seriously the values contravened by one of its members, *collectively* respond to the wrong by calling the wrongdoer to account. Only in this way can the community manifest its commitment to the values that define it qua community. And, for the same reason, the wrongdoer—as a member of this community—has to answer for her wrong before the community as a whole. Only in this way she can display an appropriate recognition of the place that the relevant values have in the collective endeavour of which she is a part. A failure of the community to engage in these

⁸ This is not meant to be exhaustive: her reasons to answer include, inter alia, reasons that derive from facts about persons who may have been wronged and/or harmed by her conduct.

actions can be seen as a lack of integrity, for it would betray the common endeavour and the values it takes to be defining of itself.

To put it in the terms introduced in Chapter 1, associative obligations of integrity are *relational reasons*. They not only derive from the relationship of fellow membership in a valuable group but, given the personal nature of the constituent of the value that grounds them, only participants can conform to them in their interactions with one another. As Scheffler points out, one difference between the associative obligations that arise within relationships (such as friendships or families) and those that arise within groups (like a religious community or a political party) is that group membership may give rise to some ‘special responsibilities *to the group* that transcend any responsibilities one has to the individual members’.⁹

II. Obligations of Civic Integrity and the Standard Allocation of Criminal Law’s Powers and Permissions

Some claim that a political community can be a group of the valuable kind that gives rise to associative duties.¹⁰

According to some proponents of this claim, this is the case when its members display the features referred to above of self-identification and joint

⁹ Scheffler, ‘Relationships and Responsibilities’ (n 6) 197. See also Christopher Bennett, ‘Expressive Punishment and Political Authority’ (2011) 8 *Ohio State Journal of Criminal Law* 285, 306. Throughout the thesis, I will use the terminology associated to relationships and groups, and the terms “duty” and “obligation”, indistinctly.

¹⁰ For the claim that membership in a political community grounds associative obligations, see Andrew Mason, ‘Special Obligations to Compatriots’ (1997) 107 *Ethics* 427; John Horton, ‘In Defence of Associative Political Obligations: Part One’ (2006) 54 *Political Studies* 427; Horton, ‘Part Two’ (n 6). For an appeal to the intrinsic value of this relationship as the source of these obligations, see Mason (this note); Stephen Perry, ‘Associative Obligations and the Obligation to Obey the Law’ in Scott Hershovitz (ed), *Exploring Law’s Empire* (OUP 2008) 196 (who attributes this view to Dworkin); Samuel Scheffler, ‘Membership and Political Obligation’ (2018) 26 *Journal of Political Philosophy* 3.

commitment to values.¹¹ On an influential view of this kind, the political community's self-defining values constitute its "civil order" and citizens incur associative obligations to engage in the reciprocal actions of calling to account and answering for the wrongs that violate the values of this civil order, precisely because this is required for the political community to remain a form of intrinsically valuable group.

On the view in question, these associative obligations of *civic* integrity are given effect through the criminal law. Since on this view criminal law's concern is with the sustenance of a community's self-definition or identity, let us call it the "*Civic Integrity*" view. The Civic Integrity view is outlined by Duff in the following terms:¹²

[I]n defining its civil order, a polity defines and presents itself as being committed to the values that structure that civil order: but to fail to respond to violations of those values is to undermine that self-definition, and so its own identity; for such failure is inconsistent with the normative commitment professed by that definition. (...) a society that fails to respond to violations of its purported civil order is not one that is truly constituted by (a commitment to) that order. (...) [A] liberal republic will plausibly provide that response through

¹¹ David Miller, *On Nationality* (OUP 1997) 22-23, 65; Horton, 'Part Two' (n 6) 10. Both emphasise the role that identification to a specific political community plays as part of the grounds of associative obligations. According to Duff, provided that a 'sufficient proportion' of members self-identify as such, the remaining "formal" members are also subject to associative obligations on grounds of their membership (which presupposes that such threshold number of self-identified members is necessary for the community to be of value): R.A. Duff, *The Realm of Criminal Law* (OUP 2018) 191, 228.

¹² Antony Duff is the lead proponent of this view, and sides with the majoritarian view mentioned above (n 6), claiming that membership in 'unjust or oppressive' polities does not bring associative obligations with it (Duff (n 11) 191). This chapter and part of the next largely take his account as an exemplar of the view under discussion. The notion of integrity conveniently captures Duff's idea that these duties are grounded in the community's need to 'remain true to itself' or in the importance of not 'betray[ing] the defining values of the polity': R.A. Duff and Sandra Marshall, 'Public and Private Wrongs' in James Chalmers, Fiona Leverick and Lindsay Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh UP 2010) 83-84. A similar view is endorsed, among others, by Christopher Bennett (Christopher Bennett, *The Apology Ritual* (CUP 2008) 141-43 and *passim*), and Joshua Kleinfeld (Joshua Kleinfeld, 'Reconstructivism: The Place of Criminal Law in Ethical Life' (2016) 129 *Harvard Law Review* 1485). Both see criminal law as charged with sustaining the identity of the political community, whose members collectively have a duty to uphold, although Kleinfeld does not conceive of this role in terms of the discharge of *associative* obligations.

a system of criminal law and criminal trials: that is how it takes civic wrongdoing seriously.¹³

Criminal law serves this end, in its substantive part, by identifying the relevant subset of wrongs that violate the community's public values ('public wrongs') and, in its procedural part, by providing formal conduits for members to discharge these duties.¹⁴ In particular, Duff claims that the citizens' obligations of civic integrity are discharged through the criminal trial and punishment:

An appropriate response to wrongdoing, if the wrongdoing is our business, is to try to hold the wrongdoer to account—to call her to answer for her wrongdoing (...). This is an essential aim of the criminal trial, as a process through which the polity calls alleged wrongdoers to answer to charges of public wrongdoing, and to answer for those wrongs if they are proved.¹⁵

While regarding punishment he explains that,

[W]e can understand criminal punishment as continuous with the criminal trial: as a forceful way of trying to persuade the offender to confront the wrong that she committed (to answer adequately for a wrong must involve facing up to it), and to make appropriate moral reparation to those she has wronged.¹⁶

Proponents of the Civic Integrity view claim that it provides the justification for the standard allocation of criminal law's powers and permissions. The following two sections outline the central tenets of the view. Part 2 engages in an examination of one of these tenets.

¹³ Duff (n 11) 215.

¹⁴ R.A. Duff, 'Responsibility, Citizenship and Criminal Law' in R.A. Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 127–29, 140; R.A. Duff, 'Towards a Modest Legal Moralism' (2014) 8 *Criminal Law and Philosophy* 217, 222. On the clause 'relevant subset of wrongs', see text to n 19.

¹⁵ R.A. Duff, 'Relational Reasons and the Criminal Law' in Stuart Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law*, vol 2 (OUP 2013) 205.

¹⁶ *Ibid.*

A. Allocation of Criminal Law's Powers and Permissions to Public Officials

According to the Civic Integrity view, what justifies making criminal law's powers and permissions available is that this helps make it the case that members of a political community discharge their obligations of civic integrity. As we saw, obligations of civic integrity are such that citizens can conform to them only insofar it is the political community *as a whole* that calls wrongdoers to account and has them answer for their wrongs.¹⁷ This can be achieved, many claim, by the actions of public officials. These officials act in the name and on behalf of the political community as a whole, such that their acts *count as* those of the latter.¹⁸ Allocating the powers and permissions required to administer both the criminal trial and punishment to public officials enables citizens to discharge their obligations to collectively call one another to account, and answer to the political community, for public wrongs.

Notice that public wrongs can also give rise to reasons other than associative obligations of civic integrity: we have reasons to prevent public wrongs, to repair associated harm, and to restore the relationship between victims

¹⁷ In Duff's words: '[T]he criminal law's authority lies primarily in its procedural dimension, as the power to call alleged wrongdoers to public account, to judge their conduct, and to condemn and punish their criminal wrongdoing; and that authority is relational, in that it depends on the criminal law's status as the law of a political community, whose *members can collectively claim such authority over each other*' (ibid 207). See also Duff, 'Responsibility' (n 14) 139-40; Duff, *Realm* (n 11) 208-209, 215; Bennett, 'Expressive' (n 9) 306.

¹⁸ Or, at any rate, provided they satisfy some threshold level of legitimacy: Bennett, *Apology* (n 12) 143; Michelle Dempsey, *Prosecuting Domestic Violence* (OUP 2009) 49ff; Mary Sigler, 'Private Prisons, Public Functions, and the Meaning of Punishment' (2010) 38 *Florida State University Law Review* 149; R.A. Duff, 'A Criminal Law We Can Call Our Own' (2017) 111 *Northwestern University Law Review* 1491, 1498-99. Notice that the claim that public officials can act in the name and on behalf of the political community as a whole (and, further, that only public officials can do so) is widely shared, but rarely argued for. Unfortunately, it goes beyond the scope of this thesis to address this claim. Duff appears to suggest that this is the case because public officials are *authorised* by the political community (R.A. Duff, 'Political Retributivism and Legal Moralism' (2012) 1 *Virginia Journal of Criminal Law* 179, 183-4; Duff, 'Relational' (n 15) 206). Yet, even if criminal justice officials may be authorised by lawmakers to perform their tasks, it is hard to see any act whereby the political community has in turn authorised lawmakers.

and wrongdoers. While on this view there is always a reason to criminalise public wrongs in order to discharge obligations of civic integrity, there is also reason for the law to conform (or help us conform) to these other reasons. Whether criminalisation is all-things-considered justified in a given case depends not only on the attendant material costs of enforcing obligations of civic integrity, but also on the effect that criminalisation will have on the law's (and our own) conformity to reasons of these other kinds. Thus, although obligations of civic integrity are always *a* reason to criminalise public wrongs, they are not always a sufficient one.¹⁹ When they are indeed sufficient (or part of a sufficient set), they are a reason to allocate the powers and permissions by means of which they can be discharged to the political community's public officials.

The foregoing overview allows us to set out in schematic form a general argument appealing to associative obligations of civic integrity for allocating criminal law's powers and permissions to public officials:

- i. Members of intrinsically valuable groups incur associative obligations. These obligations are justified by the constitutive contribution they make to the intrinsic value of the group.
- ii. A political community is an intrinsically valuable group as and when a sufficient proportion of its citizens self-identify as members who share a commitment to a set of substantive values that define the community's civil order (ie its identity).²⁰
- iii. Such a political community retains its intrinsic value only so long as the community remains true to its identity (ie maintains its civic integrity). This requires that the community as a whole calls to account those citizens whose conduct contravenes the polity's values (ie perpetrate public wrongs), and that the latter answer to the former for such conduct.

¹⁹ Duff, 'Towards a Modest' (n 14) 229–231; Duff, *Realm* (n 11) 280–292. Hence, crimes will be a subset of all public wrongs. The other reasons mentioned in the text centre on the wrongfulness (and/or harmfulness) of the conduct, whereas criminal law is meant to give saliency also to its *public* character (ie to the fact that it violates the polity's civil order, requiring the polity to reassert its commitment to its self-defining values in response).

²⁰ See references to Duff at nn 11, 12, 14.

- iv. Because obligations of civic integrity contribute constitutively to the community remaining true to its identity, citizens have these associative obligations.²¹
- v. Public officials act in the name and on behalf of the political community as a whole.
- vi. Therefore, criminalising public wrongs, thus making available criminal law's powers and permissions, and allocating them to public officials will, at least sometimes, result in citizens discharging their associative obligations.²²
- vii. Law makers have sufficient reason to do what the political community as a whole has sufficient reason to do.²³
- viii. When there is sufficient reason for citizens to discharge their associative obligations to call to account and answer in respect to a public wrong, law makers have sufficient reason to criminalise the corresponding wrong and allocate the required powers and permissions to public officials, which enables its members to discharge the obligations mentioned in (iv).

B. Withholding of Criminal Law's Powers and Permissions from Private Persons

If the above argument is sound, there is a case for allocating criminal law's powers and permissions to public officials. On the Civic Integrity view, we are justified in allocating these powers and permissions *only* to public officials.²⁴ As suggested in Chapter 1, the withdrawal of criminal law's powers and permissions from private persons is justified with *two* additional premises:

- ix. *Only* public officials can act in the name and on behalf of the political community as a whole.²⁵

²¹ Hence, there is a constitutive or non-instrumental connection between the criminal law and its justifying value: see Duff, 'Our Own' (n 18) 1499; Duff, *Realm* (n 11) 277, 295. Chiao makes a similar observation about this kind of view (Vincent Chiao, 'A Response to Professor Kleinfeld's Reconstructivism: The Place of Criminal Law in Ethical Life' (2016) 129 *Harvard Law Review Forum* 258, 261, 265).

²² 'Sometimes' given that, among others, many public wrongdoers are never caught, and many of those who are caught are diverted away from trial. For sake of simplicity, I set aside measures imposed by prosecutors or police officers which may count as having the offender answer for her wrong.

²³ The need for this premise is also mentioned in James Edwards and Andrew Simester, 'What's Public About Crime?' (2017) 37 *OJLS* 105, 112, and it is examined in Chapter 3.

²⁴ Duff, 'Political' (n 18) 183-84; Duff, 'Relational' (n 15) 206; Duff, *Realm* (n 11) 39; Bennett, *Apology* (n 12) 141-43, 150-51.

²⁵ Antony Duff has pointed out to me that he does not believe this to be the case. Indeed, in previous work Duff has conceived of roles for private citizens in the criminal process (jurors and victims) where they ought to speak partly on behalf of the community, acting as its representatives, which is also the case of private persons who perform arrests (see R.A. Duff, *Punishment, Communication and Community* (OUP 2001) 96, 159ff; R.A. Duff, 'Restoration and Retribution' in Andrew von

- x. It is a *necessary* reason for allocating criminal law's powers and permissions to an agent that this will enable that agent to discharge citizens' obligations of civic integrity.

Our focus in this chapter is on premise (x).²⁶ As suggested, one implication of (x) is that there is sufficient reason to confer criminal law's powers and permissions to an agent *only if* that agent is capable of using them to discharge obligations of civic integrity. However, the fact that discharging obligations of civic integrity justifies allocating criminal law's powers and permissions to public officials does not imply that *other* values cannot similarly justify allocating these powers and permissions to an agent. We might think instead that if a valuable state of affairs can be achieved by allocating criminal law's powers and permissions to an agent, then that is a reason to thus allocate them.²⁷ If true, there may be sufficient reason to allocate criminal law's powers and permissions even when this does not result in the discharge of obligations of civic integrity. The upshot would be that premise (x) fails and, with it, the answer given by the Civic Integrity view to the allocative question. Proponents of the Civic Integrity view need to explain why other values—which may be impersonal or, at any rate, not personal to public

Hirsch, Julian Roberts and Anthony Bottoms (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart 2003) 53, 56-57; R.A. Duff and Sandra Marshall, 'Communicative Punishment and the Role of the Victim' (2004) 23 *Criminal Justice Ethics* 39. See also R.A. Duff, 'What's Wrong with Vigilantism? Citizens as Agents of the Criminal Law' (The Political Turn(s) in Criminal Law Theory, Online, March 2020)). However, Duff thinks that private persons cannot do so in the context of punishment (nor as adjudicators). The question is then what—if not instrumental considerations—makes punishment (and adjudication) special. The idea of obligations of civic integrity is my attempt to supply an answer on Duff's behalf. In any case, the requirement of having to speak in the name and on behalf of the polity is grounded in premise (x), which I dispute in this and the following chapter. Therefore, whether private persons actually can speak on behalf of the polity becomes irrelevant if premise (x) is undermined. See also n 18 above.

²⁶ Equivalent to premise (d) noted in Chapter 1.

²⁷ Niko Kolodny, 'Instrumental Reasons' in Daniel Star (ed), *The Oxford Handbook of Reasons and Normativity* (OUP 2018) 758. In the same sense, Joel Feinberg, *Harmless Wrongdoing* (OUP 1988) 20, 37-38, 125; Joseph Raz, 'Facing Up: A Reply' (1989) 62 *Southern California Law Review* 1153, 1230; Gerald Dworkin, 'Devlin Was Right: Law and the Enforcement of Morality' (1999) 40 *William and Mary Law Review* 927, 943-44; David Brink, 'Retributivism and Legal Moralism' (2012) 25 *Ratio Juris* 496, 510. The statement covers only reasons in *favour* regardless of their weight. It does not consider the force of reasons against and the possibility of excluded reasons.

officials—cannot justify allocating criminal law’s powers and permissions to an agent.

Part 2 explores one defence of premise (x) that proponents of the Civic Integrity view may be taken to offer. It develops two versions of this defence, both of which are found to be wanting.²⁸

First, however, notice that the Civic Integrity view provides, at best, an *incomplete* answer to the allocative question. On this view, the allocation of criminal law’s powers and permissions to public officials and withholding them from private persons is based in obligations of civic integrity. However, obligations of civic integrity are discharged through the criminal trial and imposition of punishment, which is how offenders are called to account by the polity. Arrests, searches, and detentions facilitate the criminal trial and punishment; hence their justification derives from the good of civic integrity. Still, these activities do not instantiate the value of civic integrity—they are merely instrumental to its achievement—so the personal nature of the value does not determine the nature of the agent that ought to undertake these activities. Moreover, many arrests, searches, and detentions are routinely carried out without ever aiming to call wrongdoers to answer and punish them. The Civic Integrity view is silent on to whom the powers and permissions to engage in *pretrial* criminal justice activities should be allocated (and therefore does not explain why some are entirely withheld from private persons whereas others are

²⁸ Admittedly, the most basic challenge to premise (x) has to do with the associative nature of the duties that justify criminal law’s powers and permissions and their allocation. The topic of associative duties between compatriots is, of course, too broad. Still, in Chapter 3 (section V.A.1) I do attempt to show that obligations to call to account and answer through the criminal law are either (i) better not conceived of as associative, or (ii) if associative, not justified mainly by the value of civic integrity.

only partially so).²⁹ In any case, the purpose of this chapter is to show that the Civic Integrity view fails even if it is restricted to the powers and permissions involved in the criminal trial and punishment.

²⁹ The same point is made in James Edwards, 'Criminal Law's Asymmetry' (2018) 9 *Jurisprudence* 276, 288. One may claim that the incompleteness of the account is a virtue, given that it leaves outside the scope of the exclusive allocation it grounds those powers and permissions that are enjoyed by private persons (eg those involved in arrests). However, some remarks by Duff suggest that he intends his account to provide a comprehensive justification for the allocation of powers and permissions to all actors across the criminal justice system (Duff, 'Responsibility' (n 14) 131; R.A. Duff and others, 'Introduction: Towards a Theory of Criminalization?' in R.A. Duff and others (eds), *The Political Morality of Criminal Law* (OUP 2014) 17). In any case, the instrumentalist account that will be developed in chapter 4 is not similarly incomplete and therefore fits the standard allocation much better.

Part 2: Functional Defence

One defence of premise (x) appeals to the *functions* of criminal law. To see how such an argument could proceed, we first need to say a few things about how functions ought to be understood.

At a general level, the function of an artefact is what the artefact is for or what it is supposed to do. In this regard, recall that by allocating powers and permissions, criminal law facilitates the undertaking of arrests, searches, detentions, prosecutions, trials, and punishments. Facilitating these activities is not, however, a function of the criminal law, but instead one of the means through which criminal law fulfils its functions. Functions (or, at any rate, the functions of social institutions qua artefacts) should instead be conceived in *value-laden* terms, this is, by reference to the good that their performance brings about.³⁰ One may thus distinguish, on the one hand, what criminal law *does* and, on the other, what it is *used for* or the *purpose* of allowing the abovementioned activities: the latter correspond to criminal law's functions.³¹ Such a value-laden conception allows us to meaningfully talk about criminal law malfunctioning, and to compare different

³⁰ In this sense, Michael Moore, 'Law as a Functional Kind' in Robert P George (ed), *Natural Law Theory* (Clarendon Press 1992) 211; Michael Moore, *Placing Blame* (OUP 2010) 26ff; Kenneth Ehrenberg, *The Functions of Law* (OUP 2016) 25. See also Neil MacCormick, *Institutions of Law* (OUP 2007) 293, 305. Perhaps the enablement of criminal justice measures can be regarded as one of criminal law's "intermediary" functions. In that case, our concern is then with criminal law's "final" functions. Note also that the notion of "good" is meant to encompass both "real" and "putative" goods (for a contrary view: Moore, *Placing* (this note) 26ff). This to allow for the possibility of functions such as, say, the preservation of class rule and suppression of the exploited classes: see, eg Evgeny Pashukanis, *Law and Marxism* (Ink Links 1978) ch 7. Still, since functions can be conceived of at different levels of generality, the example just mentioned can be thought of as a "mediate" function of systems of criminal law that have different "proximate" functions (which are often associated to the functions or justifications of punishment). It is the latter we are concerned with. Also, as said in Chapter 1, I assume that granting criminal law's powers and permissions is justified, and thus that its functions achieve real goods.

³¹ Arno Wouters, 'The Function Debate in Philosophy' (2005) 53 *Acta Biotheoretica* 123, 147. Otherwise, one would have to claim that any object that does anything has a function (see Korsgaard's "mechanical device" example in Christine Korsgaard, 'Aristotle's Function Argument' in Christine Korsgaard (ed), *The Constitution of Agency* (OUP 2008) 140-41). See also Seumas Miller, *The Moral Foundations of Social Institutions* (CUP 2009) ch 2. The broad conception of 'function' in the main text will be qualified below.

systems of criminal law by reference to their effectiveness in fulfilling their functions.³²

Functions can further be classified as *distinctive* or *shared*. As the names suggest, distinctive functions distinguish an artefact from others, while shared functions are common to more than one artefact. Some claim that criminal law has a *distinctive function*, and that this distinctive function constrains the appropriate uses to which criminal law can be put.³³

One version of this claim is *conceptual*: allocating criminal law's powers and permissions in ways which do not fulfil criminal law's distinctive function counts merely as engaging in a 'pretence' of criminal law.³⁴ Though I find this conceptual claim unpersuasive, nothing turns on its truth here.³⁵ It does not tell us whether we are justified in pretending to engage in criminal law by altering criminal law's standard allocation to fulfil other functions. In what follows, I will refer to laws

³² In a similar sense, MacCormick (n 30) 293-95, 305. A value-laden conception is consistent with some usage in the criminal law literature: for example, Nicola Lacey, *State Punishment* (Routledge 1988) 98-108, 181-86; Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing* (OUP 2005) ch 2, and with the connection between the general justification and allocative questions suggested in Chapter 1. As Searle explains, functional ascriptions to biological objects are also value-laden: they are restricted to the good brought about by the object (John Searle, 'Social Ontology and the Philosophy of Society' in Eric Margolis and Stephen Laurence (eds), *Creations of the Mind: Theories of Artifacts and Their Representation* (OUP 2007) 8, eg the function of the heart is to pump blood, rather than to make a thumping sound).

³³ Moore, *Placing* (n 30) 70-72; Michael Moore, 'Responses and Appreciations' in Kimberly Kessler Ferzan and Stephen Morse (eds), *Legal, Moral, and Metaphysical Truths* (OUP 2016) 357; Kleinfeld (n 12) 1488-90, 1518, 1537-41, 1545, 1548; Duff, *Realm* (n 11) 256-57. This idea seems reminiscent of Aristotle's who, as Nozick explains, 'held that what is special to a thing marks its function, and so fixes its peculiarly appropriate form of behavior, its mode of flourishing' (Robert Nozick, *Philosophical Explanations* (Belknap Press 1981) 515. See also, Korsgaard (n 31).

³⁴ For a similar suggestion, Duff, *Realm* (n 11) 249-50. See also 62-63; but see 51, where Duff suggests that the proper approach must be substantive, not conceptual.

³⁵ I think the better view is that criminal laws are classified or identified in terms of the measures they make available (eg making the perpetrator of some conduct liable to prosecution, conviction and punishment), rather than by their functions. This idea has support in the general jurisprudence and artefactual literatures more broadly: see Kenneth Ehrenberg, 'Functions in Jurisprudential Methodology' (2013) 8 *Philosophy Compass* 447, 453; Ehrenberg, *Functions* (n 30) 31-32. This is not to claim, however, that there is a set of necessary and sufficient conditions to classify a law as criminal (in this sense, Victor Tadros, *Wrongs and Crimes* (OUP 2016) 90, 160).

that allocate powers and permissions to arrest, search, detain, try, and punish as “criminal laws”, regardless of the agent to whom these powers and permissions are allocated and regardless of whether this results in the fulfilment of criminal law’s distinctive function.

Another version is *normative*. According to this version, whether there is sufficient, or any, reason to allocate criminal law’s powers and permissions to an agent depends on whether criminal law’s distinctive function is fulfilled.³⁶ We already saw that according to the Civic Integrity view, criminal law’s distinctive function is to discharge obligations of civic integrity.³⁷ If these two claims are correct, so is premise (x): it is a *necessary* reason for allocating criminal law’s powers and permissions to an agent that this will enable that agent to discharge citizens’ obligations of civic integrity. Call this version the *Functional Defence*.³⁸

There appear to be two ways in which the Functional Defence of premise (x) can be developed. One rests on the suggestion that criminal law’s distinctive function is its *only* function.³⁹ Call this version of the Functional Defence, *Monism*. A different suggestion is that criminal law has multiple functions, all of which give

³⁶ ‘Once we recognize criminal law as a distinctive kind of practice, (...) we can see that here too there are distinctive kinds of reason, flowing from the practice’s distinctive aims, to which (*and only to which*) participants should attend when discharging their roles within the practice’: R.A. Duff, ‘Criminal Law and Criminalization’ (2018) 18 *Jerusalem Review of Legal Studies* 62, 72; See also 63.

³⁷ Notice that this account of criminal law’s distinctive function has the value-laden character referred to above (text to n 30). Indeed, as we saw, obligations of civic integrity are justified in a value they themselves help to constitute and are thus valuable in themselves. Hence, criminal law’s distinctive function is to bring about this value.

³⁸ The claim can be put in terms of “wholesale” functions of the criminal law (as a whole) or functions of criminal law as a *type*, and the “retail” functions that each individual or *token* criminal law may fulfil.

³⁹ Perhaps the main proponent of the view that criminal law has a single function, which determines whether and what we have reason to criminalise, is Moore: eg Moore, *Placing* (n 30) 25–29, chs 1–3. See further n 41.

positive reasons to criminalise and allocate powers and permissions. However, the reasons to have criminal law fulfil its shared functions are subordinated to (i) the fulfilment of criminal law's distinctive function, and (ii) not undermining the value distinctively achieved by criminal law. Call this version of the Functional Defence, *Subordination*.

The next two sections set out and reject both versions of the Functional Defence.

I. Functional Defence: Monism

One argument that is offered to substantiate premise (x) seems to be the following:

- (A) *Only* the fulfilment of a function of criminal law is reason to allocate criminal law's powers and permissions to an agent (*Functionalism*);⁴⁰
- (B) Criminal law has a *single* function, namely, to discharge obligations of civic integrity (*Monism*);⁴¹
- (C) Allocating criminal law's powers and permissions to private persons cannot contribute to the fulfilment of this function.
- (D) Therefore, there is *no* reason to allocate those powers and permissions to private persons.

Premises (A) and (B) allow us to reformulate premise (x) as follows: The *only* reason (which makes it a *necessary* reason) for allocating criminal law's powers and permissions to an agent is to enable that agent to discharge citizens' obligations of civic integrity.

Let us set (A) aside for now. Functional Defence_(Monism) fails because (B) is false: criminal law has functions other than its distinctive function. One obvious

⁴⁰ Notice that a value-laden conception of functions does not resolve the issue of whether Functionalism is true: we still need to know why the good that we identify as the function of the criminal law is the only good that gives us reasons to grant powers and permissions.

⁴¹ R.A. Duff, 'Legal Moralism and Public Wrongs' in Kimberly Kessler Ferzan and Stephen Morse (eds), *Legal, Moral, and Metaphysical Truths* (OUP 2016) 97-100; Duff, *Realm* (n 11) 98, 165-166, 232, 282. In all these places, Duff seems to suggest that our reasons to criminalise are given *only* by criminal law's distinctive function.

additional function is the prevention of harms and/or wrongs, the fulfilment of which is not personal to public officials. We can see this, first, by looking at different ways to identify the functions of an artefact.

A. Functions

On one view, the functions of an object are identified simply by appealing to its capabilities:

Capacity: X is a function of Y iff X is a good that Y is capable of achieving.⁴²

There are multiple effects that may be attributed to the operation of criminal law, some of which are valuable. According to *Capacity*, each of these valuable effects would correspond to a function of criminal law. If *Capacity* is right, Monism would be false and, according to Functionalism, the achievement of all and any of these values would give reason for criminal law to grant powers and permissions. However, *Capacity* is not an accurate definition of function because not all of the effects of a thing count as its functions. As Preston puts it, 'a thing may engage in all sorts of performances many of which have nothing to do with its functions, taken strictly'.⁴³ In particular, *Capacity* elides the distinction between a thing's functions and its *side-effects* or *by-products*. The function of the metal buckle of a belt is not to deflect bullets, although sometimes it can have this effect. Criminal law might create jobs and boost the economy, yet we do not normally think that

⁴² John Gardner, *Law as a Leap of Faith* (OUP 2012) 207 fn 37. See also Moore, *Placing* (n 30) 26 (Moore restricts the possible goods only to intrinsic ones, and further assumes that there will only be *one* intrinsic good that a thing achieves).

⁴³ Beth Preston, 'Why is a Wing Like a Spoon? A Pluralist Theory of Function' (1998) 95 *The Journal of Philosophy* 215, 218. Likewise, Green claims that, 'The functions of some thing are consequences or effects that it has; but not all of its consequences or effects count as its functions' (Leslie Green, 'The Functions of Law' (1998) 12 *Cogito* 117, 117). Similarly, Moore, 'Functional' (n 30) 208–209, 211; Moore, *Placing* (n 30) 26–27. See further, Michael Moore, *Law and Psychiatry* (CUP 1984) 26–32; Wouters (n 31) 133–34.

achieving these effects is a function of the criminal law. Capacity further fails to make space for new, occasional or idiosyncratic uses to which a thing can be put, which do not ordinarily count as functions *of* the thing: one can use a wire hanger to open a lock or a screwdriver to open a can of paint, yet one would not classify opening locks or cans as functions of these artefacts (although one might say that the thing is *functioning as* or *can serve the function of* opening locks or cans).⁴⁴

A better conception identifies the functions of an artefact with the effects that account for the artefact's existence or persistence:

Explanatory: X is a function of Y iff X best explains the existence and/or persistence of Y (or its features).⁴⁵

The application of this definition to the realm of physical artefacts tends to be straightforward. In this domain, it is normally possible to appeal to the intentions of creators, the physical structure of the object and the historical pattern of standard uses to which similar objects have been put. These considerations allow us to say, for example, that the function of chairs is to support seated persons, which is the use of chairs that explains why these artefacts are

⁴⁴ As Green says, 'Notice that we normally define such functions in terms of standard intended uses, rather than actual or possible uses, because the functions of something are thought to be public and common rather than private and idiosyncratic. The fact that I sometimes use a floodlight as a doorstop does not mean that the function of floodlights is to stop doors, though we might say this one is functioning *as* a doorstop' (Green (n 43) 117). See also, Mark Perlman, 'The Modern Philosophical Resurrection of Teleology' (2004) 87 *The Monist* 3, 32; Wouters (n 31) 133–35.

⁴⁵ Green (n 43) 118: '[A] consequence is a function [of a feature or item] if and only if the disposition to produce the relevant consequence figures in the *best explanation* of the existence or persistence of that feature or the item'; Ehrenberg, *Functions* (n 30) 21: 'A thing's proper function is the characteristic ends that it yields (or is supposed to yield) which explain its presence, development, or selection'.

manufactured and acquired. Were the need to support seated humans somehow disappear, chairs would presumably cease to be produced.⁴⁶

However, the explanatory approach cannot not yield any determinate ascription of functions to the criminal law, and thus it is hard to see how it could vindicate Monism. Criminal law is commonly the creation of a multimember decision-making organ of the state whose intention (assuming one can be attributed) is the result of a complex array of factors ranging from moral principle to political strategy and the peculiarities of institutional design.⁴⁷ This makes the appeal to the intention of creators highly artificial and arbitrary, while at the same time it seems that the structures and the pattern of uses of the criminal law are compatible with it having several functions.

Still, an alternative explanatory approach designed to elucidate the functions of criminal law is jointly descriptive and normative instead of historical. Its purpose is to make normative sense of the practice by trying to discern the values that it can be taken to protect or bring about.⁴⁸ In this sense, some suggest that one can identify the functions of the criminal law by thinking in terms of the different goods that the practice is capable of achieving, and identifying the one(s) that would give us sufficient reason to create and engage in it (where the notion of “sufficiency” is *prior* to a consideration of the costs of the practice). On this view, these sufficient reasons correspond to the function of the criminal law. All other

⁴⁶ Preston (n 43) 220–241. See also, Perlman (n 44) 31–33.

⁴⁷ David Enoch, ‘Intending, Foreseeing, and the State’ (2007) 13 *Legal Theory* 69, 86–87.

⁴⁸ This is the idea underlying the method of *rational reconstruction*: MacCormick (n 30) 293–95; R.A. Duff and Stuart Green, ‘Introduction: Searching For Foundations’ in R.A. Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 3–4; Duff, *Realm* (n 11) Introduction and ch 1. See also, Victor Tadros, ‘Institutions and Aims’ in Maksymilian Del Mar and Zenon Bankowski (eds), *Law as Institutional Normative Order* (Ashgate 2009) 84.

beneficial effects of the practice count among the practice's side-effects or by products, which can contribute to making it justified overall to create and maintain the practice by, for example, off-setting its costs. Given that it is plain that such an approach does nothing to vindicate Monism, at this point some of its proponents claim that it is the goods that an institution uniquely or distinctively serves which provide sufficient reason to create it (in the limited sense of "sufficient" just outlined).⁴⁹ Thus:

Distinctiveness: X is a function of Y iff X best explains the existence and/or persistence of Y (or its features) and is a good that Y is uniquely or distinctively capable of achieving.

Evidently, if criminal law is indeed uniquely or distinctively capable of discharging obligations of civic integrity, and this is the only good that criminal law distinctively brings about, *Distinctiveness* would make discharging obligations of civic integrity criminal law's only function. And if only the fulfilment of a function of criminal law gives reason to allocate its powers and permissions to an agent, Functional Defence_(Monism) would succeed in validating premise (x) above. However, even prior to determining whether criminal law is actually distinctive in the sense advanced by the Civic Integrity account, it should be clear that *Distinctiveness* is unsound.

Although it seems intuitively plausible to attribute functions to *biological* objects or to their different features on the basis of the beneficial effects that they can uniquely contribute to the organism or a wider system of which they are part,

⁴⁹ This seems to be Moore's approach: Moore, 'Responses' (n 33) 345-48. Similarly, Duff, *Realm* (n 11) 12-13, 79, 96-98. See also, R.A. Duff, 'Perversions and Subversions of Criminal Law' in R.A. Duff and others (eds), *The Boundaries of Criminal Law* (OUP 2010) 106-107; and Duff and others (n 29) 42-43, 46, for the suggestion that 'good reasons' to criminalise derive from, or must point to, criminal law as a *distinctive* method of regulation.

the case for doing the same for artefacts in general and social institutions in particular is much less plausible. First, some artefacts only have *shared* functions: chairs, beanbags and benches are all different artefacts that have as their function the support of seated persons. Given that the good that these artefacts achieve, which amounts to the reason for manufacturing and acquiring them, is not unique to any single one of them, *Distinctiveness* would imply that these artefacts do not have a function.⁵⁰ As Preston notes, artefact functions are ‘multiply realizable’: cultures often contain several types of artefacts all designed to serve basically the same function.⁵¹ More to the point, some social institutions pursue ends that might be taken to be distinctive to them, which are moreover the reasons for establishing these institutions, while at the same time they pursue other non-distinctive ends which are also among their functions. Universities distinctively engage in the production and dissemination of knowledge, and the provision of tertiary education (or, at any rate, they do so in a manner that is distinctive to them). Yet, universities are also structured and organised so as to provide welfare support to their students, which many think ought to be a mandatory function of these institutions. This is a function that universities share with other institutions.⁵² Therefore, it seems mistaken to suppose that the goods distinctively or uniquely achieved by an institution exhaust the institution’s functions.

A different problem, which goes to the Explanatory aspect of Distinctiveness, is that this way of thinking about the functions of an institution presupposes that the reasons for creating an institution, whether or not they

⁵⁰ See Korsgaard (n 31) 131-32.

⁵¹ Beth Preston, ‘Philosophical Theories of Artifact Function’ in Anthonie Meijers (ed), *Philosophy of Technology and Engineering Sciences*, vol 9 (Elsevier 2009) 214-15.

⁵² Admittedly, in both examples, a different *individuation* of the artefact/social institution and/or the functions could yield a different conclusion.

correspond to distinctively achieved goods, exhaust the functions of the institution. To exemplify, it is sometimes thought that a state's only functions are those which make the creation of the state *necessary*. For many, the state is necessary—either as a conceptual or empirical matter—to achieve peace and secure our rights. Achieving these goods, it may be said, is the reason that individuals in a state of nature have to form a state. Yet, in order to fulfil this function, the state will typically have to enact a system of coercive rules. This feature gives rise to further demands, which entail new functions that the state must seek to fulfil. Many claim that the set of coercive rules adopted by the state must be justifiable to everyone subject to them. This, in turn, is thought to require that everyone has a relatively equal capacity to participate in the process through which these rules are produced and a similar influence in the formation of the policies enshrined through those rules. One way to satisfy this demand is for the state to recognise political rights. However, for reasons widely acknowledged, these political rights can be rendered ineffective as a result of significant levels of material inequality among those who formally enjoy them. This suggests that states may and should pursue an additional redistributive goal to legitimise their system of rules which,⁵³ although tied to the function that justifies creating a state, nevertheless constitutes a function on its own. It is still the case that, on this view, redistributing resources is not the reason for creating the state, and it is plausible that it would not be a sufficient reason for those in a state of nature to join a state. Further, keeping the peace and securing rights still seems to be a sufficient reason

⁵³ Christopher Wellman, 'Relational Facts in Liberal Political Theory: Is There Magic in the Pronoun 'My'?' (2000) 110 *Ethics* 537, 546; Michael Blake, 'Distributive Justice, State Coercion, and Autonomy' (2002) 30 *Philosophy & Public Affairs* 257, 260, 284; Thomas Christiano, *The Constitution of Equality* (OUP 2008) ch 3, esp 197-99. For a different account of why duties of equality are triggered by the existence of a state, see Thomas Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy and Public Affairs* 113.

to retain the state. Yet, none of this implies that the state does not also have a redistributive function.⁵⁴ It would show, at most, that this redistributive function is in some sense secondary to the primary peace-securing function. This distinction will be relevant below.

The general point is that, as Raz puts it, once institutions exist, they may be legitimately used to pursue purposes different to those which justify their creation or perpetuation.⁵⁵ Sometimes, changes in circumstances or the particular contexts that institutions bring about can, as Raz adds, cause the institutions to acquire new functions and justifying reasons, without deflecting from their core functions or primary justification.⁵⁶ This is a plausible way to explain the above example of the university's welfare function. The provision of welfare support can be seen as a response to the conditions in which universities—especially residential ones—fulfil the purposes that justify their existence and persistence. A similar thing can be said about the criminal law. Assume that it is the discharge of obligations of civic integrity which gives us sufficient reason to bring about such an institution.⁵⁷ Still, an institution with the features of the criminal law can serve other valuable functions once we have it. Neither an appeal to criminal law's distinctiveness as the body of law that discharges citizens' obligations of civic integrity, nor to the notion of reasons sufficient to create an institution, supports the claim that criminal law has a single function.

⁵⁴ Tadros makes a similar argument in 'Institutions' (n 48) 85-87.

⁵⁵ Joseph Raz, *The Morality of Freedom* (Clarendon 1986) 263 (making the point about legal institutions).

⁵⁶ Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 *Minnesota Law Review* 1003, 1028.

⁵⁷ Which seems to be Duff's claim (see n 49).

Most think that one of these other functions is the prevention of harm and/or wrongs. Yet, some have sought to deny this. Hence, before moving forward to evaluate the second version of the Functional Defence identified above, let us briefly do away with some function-related arguments intended to exclude prevention from criminal law's functions. This is important because prevention is the most plausible candidate for a sufficient reason, which is not personal to public officials, to allocate powers and permissions to private persons.

B. Criminal Law's *Preventive* Function.

As suggested above, some seem to restrict the role of preventing harm and/or wrongs merely to a positive side-effect of the operation of criminal law which serves to offset its costs, and which thus helps justify criminal law's pursuit of its distinctive function.⁵⁸ The following subsections show that three reasons which have been offered to suggest that prevention is not a function of criminal law are all unpersuasive.

1. Incompatibility

One may think that prevention is incompatible with the fulfilment of criminal law's distinctive function. On Duff's view, prevention is an 'insatiable' goal: there is no scarcity of wrongs and/or harms to be prevented. Given its insatiable nature, adopting prevention as a function of the criminal law might motivate law-makers to criminalise conduct that is not wrong or not publicly wrong, allowing this goal to overtake the fulfilment of criminal law's distinctive function.⁵⁹ As a result,

⁵⁸ Michael Moore, 'A Tale of Two Theories' (2009) 28 *Criminal Justice Ethics* 27, 44; Moore, 'Responses' (n 33) 345-48; Duff, 'Legal Moralism' (n 41) 97.

⁵⁹ R.A. Duff, 'A Criminal Law for Citizens' (2010) 14 *Theoretical Criminology* 293, 298. A similar point is made in Kleinfeld (n 12) 1541-43.

criminal law's ability to pursue its distinctive end would be lessened, and its distinctive character consequently eroded.⁶⁰

Why this (or another) form of incompatibility means that we have to opt for the function of criminal law that is distinctive is unargued for. Also, there is no reason to think that institutions cannot have partially, or even totally incompatible functions. Governments must ensure the security and the liberty of their subjects. Often these functions come into conflict, yet both still remain functions that governments ought to fulfil.⁶¹

With regards to criminal law in particular, recognising the existence of preventive reasons to criminalise non-wrongful conduct or non-publicly wrongful conduct, does not entail that it is all-things-considered justified to do so. As Simester and Edwards note, having prevention as a legitimate function of the criminal law is compatible with endorsing a wrongfulness or a public wrongfulness constraint on criminalisation.⁶² Hence, incompatibility does not appear to be a reason to exclude prevention from criminal law's functions. Duff could reply that the goal of prevention still exerts pressure on law-makers to override these constraints.⁶³ However, to claim that prevention is one of the functions of criminal law, and thus supplies reasons for having the practice, need not be to claim that law-makers and courts must, or even may, act *for* the reason

⁶⁰ Duff, 'Perversions' (n 49) 105–107, 112. Moore offers a different incompatibility argument in Moore, *Placing* (n 30) 28.

⁶¹ How this conflict ought to be managed is, of course, a matter of controversy.

⁶² Andrew Simester and James Edwards, 'Prevention with a Moral Voice' in Andrew Simester, Antje du Bois-Pedain and Ulfrid Neumann (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Bloomsbury 2014) 47–48.

⁶³ Duff, 'Citizens' (n 59) 297–98.

that criminalisation and punishment will prevent wrongs.⁶⁴ As Gardner explains, the reasons that contribute to making the positive case for having and engaging in a practice need not be coextensive with the reasons for which participants in the practice may justifiably act.⁶⁵ Hence, Duff's claim would only go to show that law-makers should not act for reasons of prevention, which is compatible with prevention being a function of the criminal law. More specifically, it would show that they should not act for preventive reasons in ways that detracted from criminal law's distinctive function.

2. Effectiveness

A different suggestion is that prevention is not a function of the criminal law since criminal law is of limited efficacy in deterring crimes or, at any rate, there are other—and perhaps better—ways of preventing wrongful conduct.⁶⁶ I will have something more to say about this in the next section, but a simple answer is available for now. Some performance or the achievement of some effect can be among an artefact's functions despite the artefact not being particularly effective in this respect. This is true even with regards to things normally regarded as having a single function: a badly manufactured knife, lousy at cutting, still has cutting as its function.⁶⁷ A heart that fails to pump blood may either be a defective heart or a heart whose function is *not* to pump blood. One needs an independent

⁶⁴ James Edwards, 'Theories of Criminal Law', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2018) <<https://plato.stanford.edu/archives/fall2018/entries/criminal-law/>> accessed 13 February 2019.

⁶⁵ John Gardner, *Offences and Defences* (OUP 2007) 202–204.

⁶⁶ Moore, *Placing* (n 30) 28–29.

⁶⁷ Perlman (n 44) 34–35.

normative case to establish whether ineffectiveness implies absence or false attribution of function, rather than simply *malfunction*.⁶⁸

Now, one might say that the previous claims are restricted to artefact *tokens*, whereas the suggestion above was that criminal law as a *type* is relatively ineffective at preventing harms and/or wrongs. Malfunction is a phenomenon that pertains to tokens relative to the type of which they are instances. Matters would be different, it might be said, if all tokens of the type (ie *all* knives) were not very effective at fulfilling the putative function (ie at cutting). That putative function could not then be a function at all.

Not so. After all, the development of artefact types is largely driven by the need to improve or substitute existing artefacts with others that are more effective at serving the *same* function. Something similar is the case with regards to the evolution of biological objects and traits.

The point is further borne out by some phenomena the accommodation of which is—according to the philosophical literature on functions—a *desideratum* of any adequate notion of function. One such phenomenon is that of *phantom functions*. An artefact has such a function when it is produced and disseminated ‘to serve a specific function, but no exemplar of it has ever been structurally capable of performing that function or, in the nature of things, ever will be’.⁶⁹ According to many accounts, phantom functions qualify as functions due to the fact that they explain the thing’s design, reproduction and patterns of use, these

⁶⁸ Wouters (n 31) 128.

⁶⁹ Preston, ‘Philosophical’ (n 51) 217. For examples, see *ibid* 217, 223; Ehrenberg, *Functions* (n 30) 127-28 and sources cited therein.

being the main criteria for functional ascriptions.⁷⁰ If phantom functions are actual functions, *a fortiori* criminal law's supposed limited efficacy at preventing harm and/or wrongs does nothing to disqualify the achievement of this effect as one of its functions. Alternatively, if we treat phantom functions simply as an extreme type of malfunction or mistaken attribution, it is still commonly agreed that, at most, an object requires an apt physical structure, and only some minimal capacity to produce an effect, in order for this performance to be classified as one of its functions.⁷¹ It is hard to deny that criminal law satisfies this criterion with respect to prevention. We may draw a parallel to an example from the realm of biology: the pattern of wing coloration of certain moths has the function of providing camouflage, even if variations with a different pattern exist which fulfil this function much better.⁷² One might say in response that the less effective pattern of coloration will be selected against and eventually disappear. True enough. It is still the case that, while in existence, providing camouflage is the function of this relatively inapt trait of moths. Similarly, with the criminal law: its limited preventive efficacy can be a reason to abolish or to reform it, both of which are compatible with prevention being one of its functions.

⁷⁰ Preston, 'Philosophical' (n 51) 218, 227. As Neander notes, 'the function of an artefact is the purpose or end for which it was designed, made, or (minimally) put in place or retained by an agent' (Karen Neander, 'The Teleological Notion of "Function"' (1991) 69 *Australasian Journal of Philosophy* 454, 462). See also "Explanatory" notion of function at n 45.

⁷¹ Pieter Vermaas and Wybo Houkes, 'Ascribing Functions to Technical Artifacts: A Challenge to Etiological Accounts of Functions' (2003) 54 *British Journal of the Philosophy of Science* 261. See also Peter McLaughlin, *What Functions Explain: Functional Explanation and Self-Reproducing Systems* (CUP 2000) 47, who claims that the function of an artefact is 'the end to which it is a means—whether successful or unsuccessful—for whoever made it, acquired it, used it (...).' Burelli rightly points out that things can have functions even if they 'systematically and persistently' fail to perform them—what matters is that the function contributed to the creation of the thing (Carlo Burelli, 'Political Normativity and the Functional Autonomy of Politics' (forthcoming) *European Journal of Political Theory*).

⁷² Wouters (n 31) 134. Ehrenberg extends the claim to artefacts, including the law: 'many tools or practices can have moral aims without expecting those aims to be satisfied in any general way better than alternatives': Ehrenberg, *Functions* (n 30) 84-85.

Or consider a social institution: the state. Many think a function of the state is to achieve distributive justice. And most consider this to be the case despite the fact that, by itself, the state can only achieve a limited amount of this kind of justice (which, on some views, is necessarily very far from the ideal).⁷³ Now, one might argue that this is *not* a case of ineffectiveness: the function of the state is simply to achieve a limited amount of justice, and it can perform optimally in this regard. However, if this is true, the same can be said about the amount of prevention that the criminal law achieves. More likely though, there is a share of distributive justice that it is the function of the state to bring about, and more often than not states perform very badly in this respect. Yet, it is because a function of the state is to achieve distributive justice that we have reason to improve its capacity to do so. As suggested in the two previous paragraphs, the same applies to the criminal law.

As we will see, plausibly the effectiveness of an artefact at producing some valuable effect may determine the justificatory *importance* of this performance among the artefact's function, but it does not, without more, determine whether or not it is actually one of its functions. We will also see that, with regards to the criminal law, prevention is significantly more important than the suggestion considered in this subsection implies.

3. Doctrines

A final suggestion is advanced by Moore. He claims that '[i]f one were seeking to maximize deterrence or incapacitation, we would not have the doctrines that we do'.⁷⁴ Thus, Moore adds, deterring crimes is not a function of criminal law. This

⁷³ See, eg. G.A. Cohen, *Rescuing Justice and Equality* (Harvard UP 2008). Cohen argues that the role of the state with respect to distributive justice is limited because this type of justice requires that members of society make egalitarian choices in their daily lives, choices that are beyond the reach of the state. 'Justice', Cohen says, 'is an unachievable (*although nevertheless governing*) idea' (254).

⁷⁴ Moore, *Placing* (n 30) 29. Moore is referring here to Anglo-American criminal law, in respect to which he gives the example of the punishments associated to the different forms of intentional

argument fails. We would only expect criminal law doctrines to maximise prevention if prevention were the *only* function of criminal law. The fact that these doctrines are not arranged so as to achieve this aim does nothing to suggest that prevention is not *one* of criminal law's functions.

Moreover, although it is true that the deliberate structuring of an artefact to achieve a certain effect endows the artefact with the function of achieving this effect,⁷⁵ the converse is not true: not all functions are gained by design. A common distinction is made in the literature between 'design functions' and 'use functions' (or, effects the thing is *designed to* achieve and effects the thing is *used for* achieving). Usually, these functions correspond to the intentions of different agents—designers and users—both of which can equally endow an artefact with functions at different moments in time.⁷⁶ Still, these may also be the intentions of the *same* agent at a *single* point in time. One can design an artefact to serve a specific function but use it to fulfil an additional function as well (simultaneously or otherwise). The reasons for doing this may be several. With regards to the criminal law, whether it should be structured to further prevention depends on considerations like its efficiency in doing so and any moral constraints applicable to the pursuit of prevention through the criminal law.⁷⁷ If criminal law has preventive effects, these effects may still be part of the positive case for creating criminal laws (and these preventive effects may figure within law-makers

homicide. A separate matter is whether Moore is right to claim that the differences cannot be justified or rationalised on preventive grounds.

⁷⁵ Timothy Schroeder, 'Functions From Regulation' (2004) 87 *The Monist* 115, 123-24.

⁷⁶ Neander (n 70) 462; McLaughlin (n 71) 46-48; Preston, 'Philosophical' (n 51) 221-22.

⁷⁷ See Gardner, *Offences* (n 65) 208–209. Many claim that criminal law's doctrines or changes in sentence severity do not affect the crime rate, so it would be unwise to fashion them with this aim (Paul Robinson and John Darley, 'Does the Criminal Law Deter? A Behavioral Science Investigation' (2004) 24 *OJLS* 173). On applicable constraints, see section III (Functionalism) below.

intentions when creating these laws) even if they are not especially designed so as to further prevention.

In conclusion, the case for Monism is unsuccessful. The prevention of harms and/or wrongs is (possibly together with others) also a function of the criminal law.⁷⁸ Thus, the claim—premised on Monism—that only the fulfilment of criminal law's distinctive function gives reason to allocate criminal law's powers and permissions is false. As a result, the Functional Defence_(Monism) cannot show that it is a necessary reason for allocating criminal law's powers and permissions to an agent that this will enable that agent to discharge citizens' obligations of civic integrity. It could also be sufficient reason for allocating criminal law's powers and permissions that this will enable that agent to prevent harm, which is not a value that is personal to public officials.

II. Functional Defence: Subordination

If criminal law has as its distinctive function the discharge of obligations of civic integrity, and if the prevention of harms and/or wrongs is a function of criminal law that is shared with other bodies of law, a different defence is needed for the claim that fulfilling the former is a necessary (and potentially sufficient) reason for allocating criminal law's powers and permissions.⁷⁹

Let us return to the idea addressed in the previous section according to which the distinctive good that criminal law achieves is what gives us reason to

⁷⁸ This is again a staple feature of artefacts underlined in the literature. As Preston puts it, artefacts are 'multiply utilizable': typically, they will be created to serve several functions (Preston, 'Philosophical' (n 51) 215).

⁷⁹ The view that both the discharge of obligations of civic integrity and the prevention of wrongs are functions of the criminal law enjoys more textual support in Duff's work who, recall, is the lead defender of the view under discussion: Duff, 'Perversions' (n 49) 91; Duff, 'Responsibility' (n 14) 127; Duff, *Realm* (n 11) 244.

develop and uphold criminal law. We saw that this claim, even if true, did nothing to make achieving this good criminal law's only function. However, the notion of distinctiveness and its connection with the reasons to create and sustain an institution may be said to have a different implication.

A distinction is drawn in the philosophy of functions between the *proper* and the *system* functions of an artefact. Proper functions correspond to the effects or performances of a thing that account for its reproduction, whereas system functions are those other ends that the thing can fulfil once it exists on the strength of the former reasons.⁸⁰ Now recall the example of universities. We might say that the function we earlier identified as distinctive, namely, the production of knowledge and provision of tertiary education, is the university's proper function; whereas the delivery of welfare support to its students, a function that universities share with other institutions, is a system (perhaps better: *derived*) function. The former is the reason why universities are created and maintained, the latter is an end that the university can (and should) pursue once it comes into existence.

It seems plausible to claim that the university's proper function is also its *primary* function: that it is, in some sense, the institution's central or most important function, or the function there is most reason for the institution to fulfil. The university's derived function is, on the other hand, *secondary*, in that one of its purposes is to contribute to the institution's discharge of its proper and primary

⁸⁰ A common example given in writings on the philosophy of material artefacts is chairs: people can stand on chairs in order to reach objects placed above their height, but chairs are not manufactured or acquired for *this* purpose. Furthermore, there are other artefacts which have that end as their proper function, such as step stools or ladders. Thus, as said above, were the need to support seated humans somehow disappear, chairs would presumably cease to be produced, while step stools would continue to be created (the distinction and example come from Preston, 'Why is a Wing' (n 43) 220–241. See also, Perlman (n 44) 31–33).

function.⁸¹ Indeed, there would be no universities but for the aim of providing education, and they would not deliver welfare if they were not ultimately to fulfil this aim. Moreover, universities could arguably dispense with their welfare services and still justifiably exist, because other institutions have the provision of welfare as their proper and primary function.⁸² The same is not true of universities' educative function. This could further be taken to suggest that the university's secondary function is somehow subordinate to, or parasitic on, the university's primary function. Secondary functions are no less functions than primary ones: they are goals to be pursued by the institution, ends to which it can (or ought to) aim, once the institution exists. They do not give reason to create and maintain the institution, but they do guide its arrangement and operation; yet there may be no reason to pursue them independently of the satisfaction of the institution's primary function. In this way primary functions *constrain* the fulfilment of the secondary functions: the latter ought only to be pursued in ways that are compatible with the former.

Perhaps then a similar distinction applies to the functions of the criminal law. Duff claims that criminal law's distinctive function is what gives a polity reason to create it and preserve it in its distinctive form.⁸³ He suggests that there is

⁸¹ The term "secondary" does not necessarily designate a single relationship with the institution's primary function: sometimes it simply refers to the institution's less important functions (where the criteria of importance can be several); on other occasions it denotes subsidiary functions, ie functions we want the institution to perform in case the primary function fails; and yet on others it designates functions that contribute to the performance of the institution's primary function. This last sense is employed by Raz to distinguish between the primary and secondary functions of the law (Joseph Raz, 'The Functions of Law' in Joseph Raz (ed), *The Authority of Law* (Clarendon 1979) 168).

⁸² As we saw in the previous section, the provision of welfare is *not* (or, at any rate, not entirely) subservient to education, ie it is not a function that could be eliminated if proven not serviceable to education—it is instead a requirement imposed on universities given the conditions in which education is provided.

⁸³ See references at n 49.

reason to criminalise *only* to deliver criminal law's distinctive response to crime.⁸⁴ Thus, Duff adds, discharging obligations of civic integrity is criminal law's *proper* or *primary* function, while criminal law's preventive function is *secondary* to this primary function.⁸⁵ Duff also contends that criminal law is *perverted* when it is used to pursue purposes not proper to it,⁸⁶ and that a political community uses its criminal law appropriately only 'so long as it is using [it] to sustain its civil order'.⁸⁷ Therefore, on this view, a similar relation to the one suggested in the previous paragraph may be said to exist among criminal law's functions: conformity to reasons derived from criminal law's secondary function is subordinated (i) to conformity to reasons given by criminal law's primary and distinctive functions, and, we might add, (ii) to not undermining the value distinctively achieved by the fulfilment of those functions. Conformity to reasons of civic integrity is not subordinated in this way: those reasons can be sufficient on their own for criminalisation and for the allocation of powers and permissions.⁸⁸

If proven to be sound, this account of the relationship between criminal law's functions could justify the exclusivity aspect of the standard allocation (ie withholding criminal law's powers and permissions from private persons). Indeed, given that criminal law's preventive function must, on this view, be fulfilled in such a way that its distinctive function is *also* fulfilled, the latter is a

⁸⁴ Duff, *Realm* (n 11) 232, 244, 278, 294.

⁸⁵ Duff, 'Perversions' (n 49) 91; Duff, *Realm* (n 11) 79: '[W]e 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' (first emphasis is from original. See also, p 244).

⁸⁶ Duff, 'Perversions' (n 49) 92.

⁸⁷ Duff, *Realm* (n 11) 165–166.

⁸⁸ R.A. Duff, 'Towards a Theory of Criminal Law?' (2010) 84 *Aristotelian Society Supplementary Volume* 1, 15; R.A. Duff, 'Retrieving Retributivism' in Mark White (ed), *Retributivism: Essays in Theory and Policy* (OUP 2011) 14; Duff, *Realm* (n 11) 216, 242.

necessary (and a potentially sufficient) reason for allocating criminal law's powers and permissions to an agent, *viz* premise (x). This view retains Functionalism, and supplements it with:

Subordination: only the fulfilment of a *proper* or *primary* function of criminal law can give *sufficient* reason to grant powers and permissions.

Hence, let us reformulate the Functional Defence as follows:

- (A') Subordination: only the fulfilment of a *proper* or *primary* function of criminal law can give *sufficient* reason to grant powers and permissions;
- (B') Criminal law's distinctive function is its *only* proper or primary function.
- (C') Allocating criminal law's powers and permissions to private persons cannot contribute to the fulfilment of this function.
- (D') Therefore, there can be no *sufficient* reason to allocate those powers and permissions to private persons.

On this version of the Functional Defence, which we may call *Subordination*, the fact that discharging obligations of civic integrity is a distinctive function of criminal law matters not for whether we have *any* reason to allocate powers and permissions, but instead for whether we can have *sufficient* reason to do so. In particular, Subordination claims that preventive reasons must be "enabled" by the presence of reasons of civic integrity in order to help justify a particular form of allocation.⁸⁹

In the next two sections I reject premises (A') and (B') of the Functional Defence_(Subordination). With regards to (A'), I argue that, even granting that criminal law's distinctive function ought to be afforded some kind of primacy, it is not plausible to conceive of it in terms of Subordination. More fundamentally, however, and with regards to (B'), I deny that criminal law's distinctive function

⁸⁹ Duff, 'Political' (n 18) 193; Duff, 'Towards a Modest' (n 14) 226. The notion of "enabling reason" is drawn from Jonathan Dancy, *Ethics Without Principles* (OUP 2004) 38-52, *passim*.

is indeed primary. I claim that, if anything, it is criminal law's preventive function that is actually the primary function of criminal law.

A. The Systematic Priority of Criminal Law's Distinctive Function

The Functional Defence_(Subordination) takes criminal law's primary function to enjoy *systematic* or *lexical priority* over criminal law's secondary function. That is, irrespective of how much value could be achieved in terms of preventing harms and/or wrongs by allocating criminal law's powers and permissions in a manner incompatible with the discharge of obligations of civic integrity, there can never be sufficient reason to allocate them in this way.⁹⁰ As anticipated above, this claim is not plausible. To see this, consider the following example:

A serious crime ("φ") is perpetrated recurrently within a political community. As a response, the community's officials launch a series of publicity campaigns designed to instil in its citizens a strong adherence to the values that the conduct violates, undertake several more focused preventive strategies, and set up permanent provision of financial and emotional support for the victims of φ. Overall, the community's representatives have expressed concern about the occurrence of φ through several avenues and have remained steadfast in their commitment to the values that the conduct infringes.

However, the crime rate remains unabated which is, to a significant extent, due to the incompetence of criminal justice officials who have endeavoured to

⁹⁰ Taylor explains the idea of "systematic priority" as a requirement to 'answer all the demands that belong to domain A (...) before you move to satisfy any demand of domain B (...)' (Charles Taylor, 'Leading a Life' in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (HUP 1997) 176); while Dancy says that a 'lexically superior principle can never be defeated no matter how many subordinate principles are lined up on the other side' (Dancy (n 89) 25).

prosecute, try, and punish the perpetrators of ϕ . These officials fail to catch sufficient perpetrators and gather evidence for bringing successful prosecutions. Prison conditions are dire, and no consistent efforts are made to rehabilitate offenders, leading most of them to reoffend shortly after serving their sentence. To make matter worse, criminal justice officials are perceived as illegitimate in the sections of the community that are ridden by ϕ , making many victims reluctant to report the offence, and later participate in the trial. The state also lacks resources to either improve the capabilities of its criminal justice system or to delegate its operation to an alternative provider who, in any case, would likely be regarded as an equally illegitimate surrogate of the state.

Assume that some organised scheme of policing, trials and punishment undertaken by private persons would be more effective at quelling the commission of ϕ , at no higher cost in other values relative to the current situation. *Ex hypothesi*, the scheme of private enforcement would not result in the corresponding obligations of civic integrity being discharged. Yet, given the assumptions above, the community otherwise adheres, and expresses its commitment, to the values that ϕ violates. According to the present version of the Functional Defence, there can be no sufficient reason to empower and permit private persons to carry out the scheme just mentioned as a response to ϕ . However, it is difficult to see why. If criminal law's powers and permissions are allocated *both* to public officials and private persons, criminal law continues to facilitate the discharge of obligations of civic integrity while helping to bring about *additional* value in the form of wrong and harm prevention. In my example, it is not clear why these extra gains should be precluded from justifying alterations to the standard allocation. Not fulfilling criminal law's distinctive function in this case does *not* necessarily mean that the

function is somehow compromised or the good that underpins it disserved (instead of simply not being served). Perhaps one may claim that if private persons try and punish the perpetrators of ϕ , this necessarily entails that some obligations of civic integrity will fail to be discharged. Yet, the example stipulates that the political community's commitment to the values that ϕ contravenes is strong (and that there are anyway insufficient resources by means of which public officials might discharge those obligations), in which case the preventive value contributed by the privately-run scheme seems to outweigh the marginal gains in civic integrity achievable by public officials.

Now imagine that the actions of public officials result in ϕ being *more* prevalent than it would otherwise be. In light of the criminogenic effect of official incompetence, we are faced with two options: (i) decriminalising ϕ or (ii) allocating criminal law's powers and permissions to private persons. The Civic Integrity view entails (i). Due to the fact that the political community has established several other avenues to express its commitment to the relevant values, reasons of civic integrity to criminalise are weak (or even non-existent), particularly relative to the costs that ensue from criminalisation.⁹¹ The upshot is that the reasons for making or retaining the commission of ϕ as a criminal offence may be defeated.⁹² But this conclusion is unwarranted if the preventive set-backs of criminalisation can be avoided by (ii): either empowering and permitting private persons to pursue the perpetrators of ϕ or, doing this and additionally withdrawing powers and

⁹¹ Duff, *Realm* (n 11) 282. Duff has claimed that we have *a* reason to criminalise a wrong *if and only if* it (i) violates a value that is part of the polity's self-definition and (ii) *requires* the formal public collective response embodied in the criminal trial and potentially punishment administered by the polity's public officials: Duff, 'Towards a Modest' (n 14) 230–233.

⁹² Duff, *Realm* (n 11) 216–17, 241.

permissions from public officials. Surely the preventive gains can add up to a sufficient case for criminalising ϕ . This shows that it is hard to accept that the mere fact of non-performance of criminal law's distinctive function precludes us from using criminal law to fulfil its other functions (which do not require, as a matter of principle, that powers and permissions be allocated to public officials). This is true especially if doing so has no or little cost for criminal law's general ability to fulfil its distinctive function or for the value that this function serves.⁹³

The foregoing suggests that it is unwarranted to move straight from a claim about what is it that supposedly provides sufficient reason to create an institution—in this case, criminal law's distinctive function (ie its proper or primary function)—to claims about what we are justified in doing with criminal law once we have it (eg how to allocate powers and permissions in a given case).⁹⁴ We may have sufficient reason to use a wire hanger to open a lock or fix a tailpipe, or use a chair as a standing stool, even if this makes the hanger or the chair worse at, or unavailable for, fulfilling their proper functions.⁹⁵ A university can be justified in allocating funding or other university resources to the provision of welfare, or in altering teaching or research arrangements for the sake of student welfare, even if these actions entail costs for the production of knowledge and the provision of education. We still have and maintain the university for the fulfilment of its primary function, but we acknowledge it does not impose an absolute

⁹³ Notice that this suggests that the positive case for criminalising *public* wrongs will not be found solely in obligations of civic integrity. If so, it may follow that there can be sufficient reason to criminalise *private* wrongs as well, ie wrongs which do *not* implicate the value of civic integrity to begin with. Chapter 3 explores this idea further.

⁹⁴ Recall we are still assuming that the reasons to bring about an institution always correspond to the institution's primary function.

⁹⁵ Edwards, 'Asymmetry'(n 29) 289.

constraint on the ways the university resources can be used and arranged to pursue other goals.

The general point is the following. As we saw in the previous section, once an institution exists it may be used for purposes, and can further accrue functions, that achieve values different to those that justify its creation or perpetuation.⁹⁶ Furthermore, there can be occasions on which, although the reasons which justify the creation and perpetuation of the institution are implicated and thus call for conformity, the specific features of the situation make it the case that the gains to be had by conforming to those reasons pale in comparison to those derived from conforming to the institution's secondary functions. Sometimes, in order to achieve these latter gains the institutions' secondary functions will have to be fulfilled independently, and in ways incompatible with, or detrimental to, the functions that justify its creation and perpetuation. Yet, given that the importance of realising one value relative to another varies across cases, where the disregard for one of these values can be slight while gains in terms of the other can be significant, it is implausible to systematically condition the justifiability of using the institution on the fulfilment of its primary function. On the assumption that the good realised by the institution's primary function is sufficiently served in general so as to justify its continued existence, other functions may not only inform the design and particular features of the institution (which is what Subordination allows), but may further be pursued at some cost to the former.⁹⁷ With regards to the criminal law, to claim otherwise would require us to sacrifice a lot of prevention in cases in which the identity of the community is not very much at

⁹⁶ See text to nn 55, 56.

⁹⁷ Tadros, 'Institutions' (n 48) 85–88; Victor Tadros, *The Ends of Harm* (OUP 2011) 90–91.

stake. Functional Defence _(Subordination) does not make allowance for this, for it requires *every* criminal law to conform to the reasons that supposedly justify the creation of criminal law as a practice.⁹⁸

The above suggests that advancing a claim of systematic or lexical priority is a fundamental problem for the version of the Functional Defence under consideration.⁹⁹

If we thus reject the idea that criminal law's primary function according to the Civic Integrity view enjoys systematic priority over its other functions, Functional Defence_(Subordination) fails, so premise (x) remains undefended.¹⁰⁰

B. The Primary Status of Criminal Law's Distinctive Function

1. Distinctiveness as such

Consider first the assumption that the distinctive character of one of criminal law's functions matters, if not for excluding the attribution of other non-distinctive functions to the criminal law, at least for restricting the content of these other

⁹⁸ Compare with Kleinfeld, who claims that reasons deriving from criminal law's shared 'control' function (ie prevention) may be sufficient to criminalise, only so long as it is not used in such a way as to undermine its own capacity to secure its distinctive function or the value that underpins it (Kleinfeld (n 12) 1537-41). The arguments of this section are meant to show that such a claim is still too strong.

⁹⁹ One suggestion which Duff seems to make is that the priority of criminal law's distinctive function derives from its character as *internal* to this body of law (Duff, 'Perversions' (n 49) 86, 92; Duff, *Realm* (n 11) 256-57). It is unclear how we ought to interpret this claim. In any case, not much turns on this supposed internal character. Compare it with law in general and the value or goals comprised by the rule of law. As Fuller observed, the rule of law amounts to the *inner morality* of the law; conformity to it is what Raz calls 'the most important *inherent* value of the law', its 'specific excellence'. Still, many think that the law is subject to every other moral value or objective (which are *external* to the law) and thus that the rule of law should be balanced against competing claims grounded on them (see Joseph Raz, 'The Rule of Law and its Virtue' in Richard Bellamy (ed), *The Rule of Law and the Separation of Powers* (Ashgate 2005) 208-11; Gardner, *Leap* (n 42) 33-34, 195-96).

¹⁰⁰ Compare with Tadros, for whom the prevention of harms and wrongs is criminal law's primary function, ie that which provides us with reason to develop and maintain criminal law as a practice. Still, criminal law's other functions, although not having implications for whether criminal law institutions should be developed and maintained, do for the *kind* of institutions that should be put in place, and may further be fulfilled 'as long as the main aims of criminal justice are not set back too significantly' (Tadros, *Ends* (n 97) 91).

functions and the manner in which they can be fulfilled. This assumption, and thus the equation of distinctiveness and primacy is, however, unwarranted. If conclusions about the justifiable uses of criminal law do not follow from some properties of it, it is hard to see why they would follow instead from the fact that these properties are distinctive or unique to this body of law. What matters, it seems, is the nature of the property itself, particularly the importance or weight of its moral value, rather than the fact that it is distinctive or unique. The latter need not imply any specific conclusion about the former. Criminal law's primary function must correspond to the effects we have most reason to achieve given their moral or social importance—normally those of most value—irrespective of whether they are distinctive or not. It is on these grounds that criminal law's functions should be prioritised. The same applies, as we saw, regardless of whether the function is in some sense “internal” to criminal law.¹⁰¹

Nozick brings out the point nicely when he asks: ‘If man turned out to be unique only in having a sense of humor, would it follow that he should concentrate his energies on inventing and telling jokes?’¹⁰² Or as Frankfurt puts it,

[T]hose attributes which are the subject of our most humane concern with ourselves and the source of what we regard as most important (...) in our lives (...) would be of equal significance to us even if they were not in fact peculiar and common to the members of our own species. What interests us most in the human condition would not

¹⁰¹ This paragraph draws from Nozick (n 33) 515-18. See also, Leslie Green, ‘Law as a Means’ in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart 2010) 186-87; Leslie Green, ‘The Nature of Limited Government’ in John Keown (ed), *Reasons, Morality and Law* (OUP 2013) 195. The sense of “priority” is not lexical or systematic: as noted above, sometimes the value that can be produced by promoting something more valuable ‘may be smaller than the amount of value that can be produced by promoting more of something less valuable: George Sher, *Beyond Neutrality* (CUP 1997) 58.

¹⁰² Nozick (n 33) 516. Nozick is taking issue with Aristotle's view of Functions as applied to persons.

interest us less if it were also a feature of the condition of other creatures as well.¹⁰³

Going back to our discussion about functions in section I.A above, it is thus also unwarranted to assume—as the Civic Integrity view does—that what gives us reasons to create and retain a thing is that thing’s distinctive or unique effects.

2. Alternative Means

If the suggestion of the last sub-section is sound, a defence of the primary role attributed to criminal law’s distinctive function and, consequently, of its constraining effect on the appropriate uses of criminal law, must turn on some feature of this function other than its distinctive character *per se*.

A related explanation appeals not directly to the distinctive nature of discharging obligations of civic integrity, but instead to the shared character of criminal law’s preventive function. The claim is that criminal law is *relatively* ineffective in fulfilling this shared function compared to the other available modes of legal regulation or social institutions more broadly. According to this claim, although criminal law is a means capable of preventing harm and/or wrongs, other institutions serve this end equally well or better than the criminal law. This better performance can be owed either to the fact that these other institutions have a higher preventive yield than the criminal law or, while having the same preventive yield, they achieve this result at less cost in other values. This is an empirical statement. Let us grant it for now.

On this view, criminal law’s relative ineffectiveness at preventing harms and/or wrongs makes its preventive function secondary in terms of its

¹⁰³ Harry Frankfurt, ‘Freedom of the Will and the Concept of a Person’ in Harry Frankfurt (ed), *The Importance of What We Care About* (CUP 1988) 12.

justificatory importance.¹⁰⁴ One upshot of this supposed relative ineffectiveness on the Civic Integrity view is, as we saw, the subordination of criminal law's preventive function to its distinctive function. To recall, subordination here means that preventive reasons must be enabled by the presence of reasons of civic integrity in order to be able to count in favour of criminalisation and/or a particular form of allocation.¹⁰⁵ In other words, it means that preventive reasons do not stand on their own as positive reasons for these purposes.

It is not clear what we should make of this argument. As was explained in section I.B.2 above, the effectiveness of a thing at achieving certain effect does not, in itself, entail that achieving this effect is/is not a function of the thing. Nonetheless, effectiveness is indeed important with regards to whether we can have sufficient reason to use it in order to bring about this effect. As Green argues, the value of fulfilling a function varies according to its effectiveness, such that '[m]any things should be done only if they can be performed above a certain threshold or standard'.¹⁰⁶ Thus, if fulfilling criminal law's preventive function will be excessively costly relative to its benefits, any reason in favour of using criminal law for this purpose is simply overridden or outweighed. Yet, that is uncontroversial. Moreover, the Subordination thesis involves a claim about the presence or strength of *positive* reasons or reasons in favour of allocating criminal law's powers and permissions, not about—or at least not directly—about how

¹⁰⁴ Duff suggests that to identify the primary reason for a political community to create or maintain a system of criminal law (and for criminalising morally wrongful conduct) one should not look to criminal law's preventive efficacy, because this might not be greater than that of other available techniques: see, Duff, 'Perversions' (n 49) 107; Duff, 'Towards a Theory' (n 88) 14-15; Duff, 'Retrieving' (n 88) 14; Duff, 'Legal Moralism' (n 41) 97. A similar claim is found in Moore, *Placing* (n 30) 29. Gardner attributes a cognate view to Ashworth in Gardner, *Offences* (n 65) 204 fn 7.

¹⁰⁵ See text to n 89.

¹⁰⁶ Green, 'Functions' (n 43) 123.

each of them fare in comparison with the reasons against. Let us assume, then, that using criminal law for preventive purposes has net positive value.

Some claim that features of one action can affect the features of a different action in terms of their quality or weight as reasons in favour of engaging in it.¹⁰⁷ Then, it may be the case that—even if preventing harms and/or wrongs is an end we have conclusive reasons to achieve and criminal law is a means capable of achieving this end—the presence of better alternatives undermines the importance or force of preventive reasons in the justification of criminal law relative to reasons given by its distinctive function. There are different ways to argue for the relevance of this idea in connection to the Subordination claim.

One way to understand the claim is that the presence of alternative (and potentially better) instruments for preventing harms and/or wrongs means that criminal law is not *necessary* to achieve this end. Therefore, there is no reason, or at least no reason independent from the concurrence of reasons given by criminal law's distinctive function, to allocate powers and permissions for preventive purposes. The presupposition is then that we only have reason to employ the means that are *necessary* to achieve what we have reason to do. However, this presupposition is false. As Kolodny argues, the reason we have to achieve an end “transmits” not only to the means that are necessary and/or sufficient for this purpose, but to *any* means the use of which makes *probable* the achievement of the end. According to Kolodny, in such a case, the strength of the reason to use the

¹⁰⁷ Dancy (n 89) 105-106.

means is the result of the strength of the reason to achieve the end and the probability of its achievement brought about by the means.¹⁰⁸

Now, assume that preventing instances of ϕ is valuable and that there is thus reason to do so. Assume further that criminalising ϕ will be *sufficient* to prevent some threshold number of ϕ 's. In isolation and leaving its associated costs aside, the reason to prevent ϕ fully counts as a reason to use criminal law, that is, it is the same reason, with the same strength. In this regard, another possible way to understand the suggestion that the presence of alternative preventive means implies that there can be no sufficient reason to criminalise in order to prevent (ie not conditional upon its enablement by reasons of civic integrity) is that criminal law is superfluous for this purpose: the same number of ϕ would have been prevented by these other means which are also sufficient for this purpose and they would be in operation irrespective of whether criminal law is employed. In such a case, we could say that there is no reason, not even a defeated one, to use the criminal law for the end of preventing ϕ .¹⁰⁹ The superfluous character of criminal law could explain the justificatory downgrading of its preventive function.

However, assigning this superfluous character to the criminal law is implausible. More likely, there is normally a choice to be made between different mechanisms to achieve preventive ends. Assume that there are only two actions, X and Y, that we can perform in order to prevent some harm ϵ . To simplify, assume further that the only value that can be achieved by performing X and Y is the

¹⁰⁸ Kolodny (n 27) 752-53; cf Gardner, who claims that '[w]e do not (...) have *pro tanto* reason to do whatever will be *necessary* to do whatever we have reason to do. Rather, we have *pro tanto* reason to do whatever will be *sufficient* to do whatever we have reason to do' (Gardner, *Offences* (n 65) 204 fn 7).

¹⁰⁹ This notion of "superfluous" draws from Kolodny (n 27) 748-51.

prevention of harm ϵ . Both X and Y are equally effective in preventing ϵ , but Y does it at *less* cost. Still, considering both preventive gains and associated costs, both X and Y yield positive net value. As explained above, there is, in principle, the same reason in favour of performing X and Y but, in this case, also more reason *against* performing X, given its greater cost. If X and Y are *mutually exclusive*, there is no reason to perform X and only reason to perform Y.¹¹⁰ However, if X and Y are *not* mutually exclusive and there can be additional gains in ϵ by combining them, we may have reason, even sufficient reason, to perform *both*.

The most plausible assumption is that criminal law is not only usually *supplementary* to other modes of legal and social control, but an essential element in a larger scheme of prevention, and crucially supportive of the other aspects of this scheme.¹¹¹ In this sense, the importance of criminal law's preventive capacity for its justification must be judged relative to the preventive efficacy of a similar scheme in which criminal law would be absent. In the latter scenario, it is very likely that rates of offending would increase substantially.¹¹² It may be that, in invoking the presence of supposedly better alternative preventive means to back the Subordination claim, its defenders have in mind the consequences that increases in sentence severity or changes to particular criminal law doctrines have for prevention. And, indeed, it is widely recognised that these have near to null deterrent consequences.¹¹³ Yet, this is the wrong focus. It is the existence of an

¹¹⁰ Justin Snedegar, *Contrastive Reasons* (OUP 2017) 7, 37, 78-79, cf Kolodny (n 27) 750, who claims there is reason to perform X, but that it is defeated.

¹¹¹ MacCormick (n 30) 208.

¹¹² Victor Tadros, 'Replies' (2012) 5 *Jerusalem Review of Legal Studies* 89, 92.

¹¹³ Or, at any rate, deterrent effects large enough to justify the social and economic costs of these measures (Robert Apel and Daniel Nagin, 'General Deterrence' in Michael Tonry (ed), *The Oxford Handbook of Crime and Criminal Justice* (OUP 2011) 180).

effective system of criminal law in general and the criminalisation of specific offences that is thought to have significant deterrent effect (bearing in mind that deterrence is only *one* mode in virtue of which prevention can be achieved).¹¹⁴ If this is the case, criminal law may be uniquely suited to prevent the occurrence of instances of wrongdoing that would otherwise have happened had they not been criminalised. Given criminal law's ability to, at the very least, address these additional number of wrongs, the fact that other means of prevention might achieve preventive gains in a less burdensome manner does nothing to downgrade prevention to a subordinate role in the general justification for having and using criminal law.¹¹⁵ In fact, a particular aspect of criminal law that has been found to have deterrent effect is the perception about the likelihood of capture and conviction.¹¹⁶ This is something on which particular modes of allocating criminal law's powers and permissions can have an influence. If this is the case, establishing that criminal law's preventive function is a primary function (either its only primary function or together with the function of discharging duties of civic integrity) becomes of particular consequence for the allocative question (and more so if modes of allocation can be proven to be preventively efficacious through means other than deterrence). Lastly, there may be circumstances in which

¹¹⁴ Ibid. Also, Daniel Nagin, 'Criminal Deterrence Research at the Outset of the Twenty-First Century' in Michael Tonry (ed), *Crime and Justice*, vol 23 (The University of Chicago Press 1998); Andrew von Hirsch and others, *Criminal Deterrence and Sentence Severity* (Hart 1999); Anthony Doob and Cheryl Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice* 143; Robinson and Darley (n 77).

¹¹⁵ It may be worth pointing also to criminal law's ability to prevent wrongs by disgruntled victims or their associates: Gardner, *Offences* (n 65) ch 11, although for Gardner this effect derives from the administration of trials and punishments by public officials. Hershovitz gives the same function to tort law: Scott Hershovitz, 'Tort as a Substitute for Revenge' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014).

¹¹⁶ Steven Durlauf and Daniel Nagin, 'Imprisonment and Crime: Can Both Be Reduced?' (2011) 10 *Criminology and Public Policy* 13; Daniel Nagin, 'Deterrence in the Twenty-First Century' in Michael Tonry (ed), *Crime and Justice*, vol 42 (The University of Chicago Press 2013); and references at n 114.

criminal law is in fact the most cost-effective means for preventing some particular harm or wrong, in which case it seems that preventive reasons can be sufficient (and thus primary) in the justification for their criminalisation.

3. Constitutiveness

One aspect we have not touched upon directly is the idea that having and discharging duties of civic integrity is constitutive of a political community (or, at any rate, of its intrinsically valuable instantiation). This makes criminal law partly constitutive of the political community given the role it performs with respect to its civil order.¹¹⁷ Duff has further suggested that the lack of a genuine political community undercuts not only the justification of criminal law, but the legitimacy (or even the very existence) of the law and the state in general.¹¹⁸ This would make criminal law 'central' to a political community, which would require subjecting its uses to the fulfilment of its distinctive function.¹¹⁹

The problem with this argument is that, even if we have an overriding reason to maintain a political community that remains true to its self-defining values, sustaining the civil order (or realising the good of civic integrity) does not require the discharge of obligations of civic integrity. The reason is simple: if collectively responding to public wrongs is an expression of adherence to the values that these wrongs violate, then endeavouring to ensure that the polity's values are not violated to begin with can also be an expression of *collective* commitment. Promoting a value in this way seems to be both more important and no less constitutive of the value of civic integrity than honouring it by responding

¹¹⁷ See references in n 21.

¹¹⁸ R.A. Duff, *Answering for Crime* (Hart 2007) 44; Duff, 'Responsibility' (n 14) 137-38, 141.

¹¹⁹ Duff, 'Perversions' (n 49) 107; Duff, 'Retrieving' (n 88) 15.

after it has been violated. And, for this purpose, the identity of the agent exercising criminal law's powers and permissions is immaterial.

To see why, accept that we could better prevent public wrongs by allocating criminal law's powers and permissions to private persons. Suppose that one reason is that we are certain that these wrongs will be responded to more consistently than through public enforcement. Given that the commission of public wrongs impinges on, and compromises, the identity of the community, the community's commitment to its self-defining values rings hollow if it refrains from resorting to a mechanism that will reduce the likelihood of this happening.¹²⁰ Granted, by allocating criminal law's powers and permissions to private persons, criminal law's distinctive function, as it has been conceived, fails to be performed. However, the value of civic integrity is nonetheless achieved. It is still law-makers, qua public officials acting in the name and on behalf of the political community, who would empower and permit private persons to enforce the criminal law in order to increase its preventive effect. If this is right, the function of discharging obligations of civic integrity and the function of preventing the commission of public wrongs are 'functional equivalents': both achieve the same good.¹²¹ If private persons can contribute in this way to civic integrity, this casts doubt on the personal nature of the good which, on the Civic Integrity view, justifies the

¹²⁰ In a similar sense, Chiao (n 21) 262; Peter Jaworski, 'Privatization and the Ought/State Gap' in Jack Knight and Melissa Schwartzberg (eds), *NOMOS LX—Privatization* (New York UP 2018) 95-97.

¹²¹ The notion of 'Functional Equivalents' is from Wouters (n 31) 132, cf Dempsey (n 18) 97, 196-97. Dempsey claims that criminal law's expressive and constitutive function is achieved only through the political community's *own* denunciation of the wrong by having the wrongdoer answer to itself, which cannot be salvaged by other expressive outlets like criminal legislation (similarly, Bennett, *Apology* (n 12) 142-43). Dempsey may be right that other outlets do not amount to a denunciation of the wrong by the community, but it does not follow that the expressive and constitutive value cannot be achieved in a different way.

standard allocation (or, more precisely, its personal nature in connection to the public officials charged with the processes of calling to account and punishing).

It is also worth noting that one may think that obligations of civic integrity are subject to a kind of “right-reason” requirement: for these obligations to be discharged, agents exercising criminal law’s powers and permissions must have among their *motivating* reasons the fact that, in so acting, they express the community’s commitment to its self-defining values and thus realise the good of civic integrity. This is one way in which obligations of civic integrity may be deemed to resemble some special obligations that are part of other intrinsically valuable relationships. Consider the case of friendship. We have obligations to be partial to the interests of our friends such that we may be required to devote our time and resources to care for them in ways we are not similarly required to do with respect to others. Yet, one is not properly discharging these obligations—and thus relating to one another as friends—when undertaking these actions for the reason that, say, they contribute to the fulfilment of our *general* obligations of care or to the maximization of friendships in the world. Our reason for so acting has to be the fact that the other is our friend.¹²² For the reasons given above, the right-reason requirement—assuming it cannot be satisfied by private law-applying and law-enforcing agents—can nonetheless be met by law-makers. They can act *for* the expressive reason given by the good of civic integrity when allocating criminal law’s powers and permissions to private persons.

¹²² Niko Kolodny, ‘Which Relationships Justify Partiality? The Case of Parents and Children’ (2010) 38 *Philosophy & Public Affairs* 37, 56-57; Gardner, *Personal Life* (n 6) 29-38. Also, Stephen Darwall, ‘Responsibility within Relations’ in Brian Feltham and John Cottingham (eds), *Partiality and Impartiality* (OUP 2010) 152-53, 163.

The functional equivalence between the function of discharging obligations of civic integrity and the prevention of public wrongs further suggests that the order of importance of these functions should be the opposite to the one defended by the Civic Integrity view. If criminal law can bring about the good of civic integrity by fulfilling any of its two functions, the state of affairs where public wrongs are prevented is, *ceteris paribus*, better than one in which a public wrong is perpetrated and responded to. Assume that the public response entirely negates the loss in civic integrity brought about by the crime. Still, preventing public wrongs avoids the adverse impact that these wrongs and their attendant harm (the harm constitutive of or resulting from the wrong itself and the harm caused by criminal law's responses) have for victims, offenders and third parties. If public officials can have sufficient reason to see to it that public wrongs are properly responded to, they too can have sufficient reason to see to it that these wrongs are prevented.¹²³ If they can achieve the latter at less cost by empowering and permitting private persons, they can then have sufficient reason to do just this given that, as suggested above, more value is achieved (or more disvalue is avoided) in this way.

In conclusion, even if criminal law's distinctive function were to discharge obligations of civic integrity, what matters is whether this is its most important function. If what has been said so far in Part 2 of the chapter is correct, the case for the primary importance of criminal law's distinctive function does not appear to be forthcoming. And this is true despite granting that criminal law is necessary for discharging these obligations. Moreover, even if civic integrity is indeed essential to a political community conceived as an intrinsically valuable form of human

¹²³ James Edwards, 'An Instrumental Legal Moralism' in John Gardner, Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law* vol 3 (OUP 2018) 171.

association, we have seen that criminal law can still bring about this good by allocating criminal law's powers and permissions to private persons, albeit not in the distinctive way that public officials are able to do. As argued above, the order of criminal law's functions suggested by the Civic Integrity account should thus be reversed. It follows that the Civic Integrity account is incapable of justifying the standard allocation by appealing to the idea that criminal law has as its distinctive function the discharge of duties of civic integrity. If criminal law's preventive function is primary—or at least has primacy relative to a function of criminal law which realises a good personal to public officials—there can be sufficient reason to allocate powers and permissions purely on preventive grounds. When this is the case, one needs a further argument to ground the standard allocation.

III. Functionalism

The previous sections criticised two versions of the Functional Defence of the claim that discharging obligations of civic integrity is the only, or only (potentially) sufficient, reason to allocate criminal law's powers and permissions. First, criminal law has functions other than discharging obligations of civic integrity, most notably the prevention of wrongs and/or crimes. And second, there is good reason to think that this latter function is equally, if not more, important than criminal law's distinctive function. Even if it were the case that criminal law's preventive function is secondary to criminal law's distinctive and primary function, there can still be sufficient reason to have criminal law fulfil this secondary function in ways incompatible with its primary function.

There is, however, a deeper concern. In order to examine the answer given by the Civic Integrity view to the allocative question, we have been assuming that appealing to the functions of the criminal law could help us make progress with

the normative question of what the justification of the standard allocation is. Yet, although it is not uncommon to come by statements such as “X should not be used for Y *because* Y is not the function of X”, it is hard to see how functions can be dispositive in this way when X is physically capable of bringing about Y. As we saw, at an elementary level the function of X is what X “is for” or what it is “supposed to do”. Wire hangers are *for* hanging clothes. Still, one can use them for purposes they are not *for* (like opening locked doors or fixing a broken tailpipe), and yet, one would not say that the wire hanger has been *misused* or that one did something *wrong*.¹²⁴ Functional attributions are descriptive (even if value-laden), and, as Ehrenberg puts it (drawing from Hume), ‘no amount of information about what is the case can be used by itself to reach a conclusion about what ought to be done. Every normative argument must have a normative premise smuggled in somewhere’.¹²⁵ Our question so far could thus be rephrased in terms of what makes criminal law different, or which are the normative considerations that actually underpin an appeal to its functions. Once rephrased in this way—that is, once we appeal directly to the underlying normative considerations—it is even harder to see why we should accept the Civic Integrity view. As we saw in the previous section, that view appeals to obligations that are secondary—by the lights of the underlying normative considerations, they are a fallback to which we must resort in the event of a prior failure. We have stronger reasons to avoid that failure, by preventing wrongs that violate the political community’s civil order from occurring in the first place.¹²⁶

¹²⁴ Perlman (n 44) 36-37.

¹²⁵ Ehrenberg, *Functions* (n 30) 4 (reference omitted).

¹²⁶ Moreover, if offenders have enforceable associative obligations to *honour* the values they have breached (as the Civic Integrity view has it), they also have enforceable obligations to *promote* these same values by undergoing burdens aimed at preventing their violation.

It is important to be clear that what was identified above as premise (x), or the functionalist view on which it rests, should not be taken as a claim about when it is *all-things-considered* justified or permissible to use criminal law. On such a reading, it would have been manifestly false. As Tadros points out:

Criminalising is an act, and, like any other act, whether we perform it depends in part of the consequences of performing it. If refraining from doing an act will have very bad consequences, typically we ought to do it, even if doing it is *pro tanto* wrong [and it] will result in [criminal law] performing its core functions badly.¹²⁷

We might be categorically required to pursue an aim which, given the circumstances, can only be achieved through the criminal law. In this case, it would be permissible to use the criminal law for this purpose, even in ways unrelated to its functions. At most, we should see premise (x) as the grounds of an overridable objection to using criminal law for purposes other than the fulfilment of its functions.

However, the different avenues to ground this objection by an appeal to features about criminal law's distinctive function offered by the Civic Integrity view were found to be unpromising. I think that the explanation for this failure is that claims about criminal law's functions cannot play the normative role attributed to them by the Civic Integrity view and by the Functional Defence of that view. Criminal law is ultimately an instrument, a tool, and as Nozick aptly puts it:

There is no side constraint on how we may use a tool, other than the moral constraints on how we may use it upon others. There are procedures to be followed to preserve it for future use ("don't leave it out in the rain"), and there are more and less efficient ways of using

¹²⁷ Victor Tadros, 'The Wrong and the Free' in Kimberly Kessler Ferzan and Stephen Morse (eds), *Legal, Moral, and Metaphysical Truths* (OUP 2016) 90.

it. But there is no [other] limit on what we may do to it to best achieve our goals.¹²⁸

Nozick's passage suggests that one can breach a duty by using an artefact for a purpose it is not for (eg a person can stab another with a chisel) but that the wrongfulness or wrong-making features of the conduct are exhausted by the breach of duty and the attendant harm. There is no role in this regard for the fact that the artefact was used for a function not proper to it. The same applies to rendering an artefact unable to perform its proper function when there is a duty to have this function fulfilled, even if there is no alternative way to discharge the relevant duty. True, the constraints that apply to the use of an instrument can be violated *by* using the instrument for a purpose other than those which correspond to its functions. But these constraints are not violated *because* it is so used. In short, functions fulfil an explanatory, not a prescriptive role. This is why attempts to imbue criminal law's functions with normativity are unsuccessful.¹²⁹

¹²⁸ Robert Nozick, *Anarchy, State and Utopia* (Blackwell 1974) 31. Compare with Farmer, who thinks that criminal law's *distinctive aim*, what makes it 'intelligible', is securing a society's 'civil order'. Still, Farmer adds, 'My thesis (...) cannot be used to answer the question of whether or not the use of the criminal law is appropriate' (Lindsay Farmer, *Making the Modern Criminal Law* (OUP 2016) 302).

¹²⁹ Recently, Burelli has claimed that functions are normative, not merely descriptive, properties. Burelli's main interest is to show that politics is autonomous from morality, that is, that there are normative claims that are internal to the political domain. On Burelli's view, political normativity is grounded in the function of political institutions, which is to 'secure binding collective decisions under persistent disagreement'. Burelli argues that political institutions can be evaluated in terms of their effectiveness at achieving their function, independent from moral considerations such as justice, fairness, freedom, and equality). Further, this functional normativity enjoys strong priority over moral values, values which can only be pursued if the function of politics is fulfilled to a minimum level and to the extent it does not undermine it. The reason is that 'good' political institutions can achieve the stability, order, and safety, and the conditions of cooperation that allow human groups to exist. Absent these conditions, moral concerns would become irrelevant (Burelli n 71). However, Burelli's account fails to show that functions are normative properties, and that the normativity of politics is internal to it. It is the *moral* values of stability, order, etc. that give us (normative) reasons to have political institutions that are effective at discharging their function, reasons which partly derive from the further moral goods that the aforementioned values enable us to pursue. This makes political 'normativity', *pace* Burelli, parasitic or merely instrumental to genuine moral normativity (see further, Chapter 3, section V.A).

The upshot of the foregoing is that an objection to allocating criminal law's powers and permissions so that obligations of civic integrity do not get discharged must be found in features of the criminal law *other* than its functions. Plausibly, it can be *pro tanto* wrong to criminalise morally innocent conduct, as it might result in blaming and intentionally inflicting hard treatment on persons who have acted in a morally permissible manner.¹³⁰ Arguably, it may also be a *pro tanto* wrong to criminalise conduct that is culpably wrong, but not public in the sense advanced by the Civic Integrity view: the activities underpinned by criminal law's powers and permissions tend to be intrusive, such that their use might be unwarranted in cases where the targeted conduct does not violate one of the community's values.¹³¹ In both cases, criminal law does not discharge its supposed distinctive function. However, the objection rests not on the failure to fulfil a function, but in the (usually coercive and intrusive) nature of the *means* that criminal law employs to fulfil its functions and the manner in which they can infringe the subject's rights. Yet, if the focus should be instead on criminal law's means, the Civic Integrity view is unable to explain why it is objectionable to allocate criminal law's powers and permissions to private persons with regards to conduct that is both wrong and public. The next, and final, part of this chapter considers an alternative explanation.

¹³⁰ Simester and von Hirsch claim this amounts to a wrong of 'moral defamation' in their *Crimes, Harms, and Wrongs* (Hart 2011) 19-20.

¹³¹ Something which I dispute in Chapter 3. Notice though that it is conceivable that *this* objection could be defeated by allocating the powers and permissions to agents other than public officials.

Part 3: A Deontic (Desert-based) Justification of the Standard Allocation

The Functional Defences covered in this chapter relied on the idea that the failure to realise criminal law's distinctive good gave rise to an objection against allocating criminal law's powers and permissions to private persons. The final suggestion that I will address in this chapter (which also draws from Duff's version of the Civic Integrity view) appeals not to criminal law's functions, but to its characteristic *means*. According to this suggestion, the objection is that public wrongdoers are *wronged* when called to answer and punished by private persons.

Consider the following passage:

If, however, we ask more carefully just what it is that offenders could plausibly be said to deserve to suffer, we can (...) provide a better account of why criminal punishment must be imposed by the polity, and cannot be imposed by vigilante groups. (...) What the offender deserves is (...) to be called to account by those who [sic] business that wrong is, to suffer the forceful communication of the censure that they have the standing to administer, and to be required to make appropriate moral reparation to them. (...) If we ask (...) to whom they must answer as citizens for their public (ie civic) wrongs, the answer must be 'the polity', that is, their fellow citizens (...). Both his trial and his punishment, (...) must, therefore, be administered by or with the authority of his fellow citizens. But vigilante 'punishments' lack this essential legitimizing dimension: they cannot do what justice demands, or impose what the wrongdoer deserves.¹³²

The passage suggests that offenders have a desert- or justice-based right against being called to account and punished by private persons. How can this be the case? On many accounts, two of the features of punishment that render it most in need of justification are that (i) it is harmful, or it is designed to make the

¹³² Duff, 'Relational' (n 15) 205-206. In the same sense, R.A. Duff, 'In Response' in Rowan Cruft, Matthew Kramer and Mark Reiff (eds), *Crime, Punishment, and Responsibility* (OUP 2011) 359: '[W]e can best interpret retribution as a relational value: it requires not that wrongdoers suffer pains that mysteriously match their wrongs, but that they be held to account by, and required to make appropriate burdensome moral reparation to, those whom that wrongdoing properly concerns'.

offender suffer, which is analytically bad, and (ii) it (*prima facie*)¹³³ infringes the recipient's rights, and thus wrongs her. Each of these features gives rise to a distinct objection. According to some retributivists, desert not only amounts to a positive reason for inflicting punishment, but it is also a necessary (and potentially sufficient) reason for defeating these objections (or, at any rate, for defeating these objections by *cancelling* instead of overriding them, thus leaving no "moral residue" in their respect).¹³⁴ Their argument is, in brief, that (i) harm or suffering become intrinsically good when intentionally inflicted on the deserving; (ii) deserving wrongdoers incur a *duty* to serve the goods that underpin punishment, the discharge of which requires that wrongdoers are harmed. The fact that they have this duty makes the infliction of harm consistent with their rights and thus permissible.¹³⁵ The upshot is that punishment contrary to, or inconsistent with, desert *necessarily* wrongs offenders. Yet, in contrast to most retributive accounts,¹³⁶ the notion of desert suggested in the quoted passage is *punisher-dependent*: whether offenders are treated consistently with their desert depends on the *identity* of the agent inflicting the punishment. According to Duff, the objections to punishment can only be defeated by public officials, whose business is to call public wrongdoers to account.

The claim that powers and permissions ought to be withheld from private persons because they cannot give offenders their just deserts rests on the oft-

¹³³ That is, it *seems* to, or *on appearance*, infringes rights (John Searle, 'Prima Facie Obligations' in Joseph Raz (ed), *Practical Reasoning* (OUP 1978)).

¹³⁴ See Mitchell Berman, 'Punishment and Justification' (2008) 118 *Ethics* 258, 273.

¹³⁵ See Moore, *Placing* (n 30) 87-91, 154, 171-172 (who thinks that desert is both necessary and sufficient to cancel these objections: 90-91); Duff, *Realm* (n 11) 224; and, seemingly, Bennett, *Apology* (n 12) 149.

¹³⁶ For example, Moore, *Placing* (n 30) 28-30; Gardner's Introduction to HLA Hart, *Punishment and Responsibility* (John Gardner ed, 2 edn, OUP 2008) xxvii-xxviii and sources cited therein.

advanced idea that responsibility is relational: it is only appropriate for A to respond to B's *ϕing* if B's *ϕing* is A's business, and whether it is A's business to respond to B's *ϕing* depends on the relationship in which A and B stand. Hence, those who fail to treat offenders in the way they deserve may be said to count as "meddlers".¹³⁷ We saw that the Civic Integrity view provides an account of why it is the political community's business to respond to public wrongs. However, the problem with this defence for withholding criminal law's powers and permissions is that crimes admit descriptions other than being public wrongs, in the sense of being wrongs that violate a political community's civil order or its self-defining values. To state an obvious point, many crimes breach ordinary moral duties owed to others, independently from any role or particular status, and they may also contravene values which are constitutive of relationships or associations other than that of fellow citizenship. Victims and/or participants in these other relationships can deliver responses to crimes which both emphasise their wrongfulness and the fact that the wrong impinges on values that define a specific relationship or group. Indeed, their responses can also count as expression of their adherence to these values. Hence, these responses are intrinsically appropriate in a manner akin to that provided by criminal law's distinctive function, although connected to different features of the wrong.¹³⁸ Thus, most (including Duff) would agree that crimes, as moral wrongs, are the business of agents other than the wrongdoer's political community. As Renzo summarises the thought: 'we are

¹³⁷ Some think meddlers wrong the targets of their intervention: see Linda Radzik, 'On Minding Your Own Business: Differentiating Accountability Relations within the Moral Community' (2011) 37 *Social Theory and Practice* 574, 575; Ori J. Herstein, 'Understanding Standing: Permission to Deflect Reasons' (2017) 174 *Philosophical Studies* 3109, 3113; James Edwards, 'Standing to Hold Responsible' (2019) 16 *Journal of Moral Philosophy* 437, 454-55. Others suggest that they also wrong those whose actual business is to respond to the conduct: Gabriel Mendlow, 'The Moral Ambiguity of Public Prosecution' (2021) 130 *Yale Law Journal* 1146.

¹³⁸ See Duff, 'Towards a Modest' (n 14) 226-231; Duff, *Realm* (n 11) 293.

often responsible for the same course of action to different audiences'.¹³⁹ If public wrongs are the business of agents other than the political community, wrongdoers are responsible for their conduct to these other agents, who can thus give wrongdoers what they deserve by calling to account and punishing them for their wrongs.

Duff might claim in response that:

[O]ur concern here is not with the moral wrongs of moral agents, but with the criminal wrongs committed by citizens of a polity: wrongs defined as public wrongs (ie as the business of the polity) by its criminal law. If we ask who has the standing to call citizens to account for such wrongs, or to whom they must answer as citizens for their public (ie civic) wrongs, the answer must be 'the polity', that is, their fellow citizens.¹⁴⁰

The passage suggests the following possibility: the existence and content of criminal laws depends (at least in democratic states) on the whole political community. It follows that criminals are answerable to the political community alone (ie to its public officials).¹⁴¹ The conclusion is, however, much too quick. That an agent enjoys authority to issue norms—or that the existence and content of these norms otherwise depends on the agent—does not entail that those who breach those norms are answerable to the same agent, let alone exclusively.¹⁴²

¹³⁹ Massimo Renzo, 'Responsibility and Answerability in the Criminal Law' in R.A. Duff and others (eds), *The Constitution of the Criminal Law* (OUP 2013) 224.

¹⁴⁰ Duff, 'Relational' (n 15) 205–206. Similarly, Duff, 'Responsibility' (n 14) 133: 'even if all moral wrongdoing is in principle the business of all moral agents, this does not provide a plausible account of whose business crime is: of who has the standing to call criminal wrongdoers to account'.

¹⁴¹ R.A. Duff, 'IV—Answering for Crime' (2006) 106 *Proceedings of the Aristotelian Society* 87, 94. Chau addresses a similar suggestion in Peter Chau, 'Duff on the Legitimacy of Punishment of Socially Deprived Offenders' (2012) 6 *Criminal Law and Philosophy* 247, 250–51.

¹⁴² Shlomit Wallerstein, 'Delegation of Powers and Authority in International Criminal Law' (2015) 9 *Criminal Law and Philosophy* 123, 132; Douglas Husak, 'Does the State have a Monopoly to Punish Crime?' in Chad Flanders and Zachary Hoskins (eds), *The New Philosophy of Criminal Law* (Rowman & Littlefield 2015) 109–10.

Rules about performance-enhancing substances are issued by, *inter alia*, sports organisations. Yet, athletes who breach those rules may be answerable not only to the organisation's officials, but also to fellow athletes, relatives, and friends (and perhaps to fans as well).

Further, wrongs such as rape, assault, murder, and other forms of *mala in se* exist independently of the law that criminalises them. As Duff rightly points out, those who perpetrate these wrongs are held to account for breaching duties owed to others simply in virtue of their moral status, regardless of any specific role or relationship. Criminal law *declares* the pre-legal wrongfulness of these actions.¹⁴³ If the 'moral wrongs of moral agents' and the 'criminal wrongs committed by citizens' are just the same wrongs, the fact that these wrongs are criminalised by the political community does nothing to show that perpetrators are answerable for these wrongs to the political community alone. It may be the business of others (eg victims) to respond to these wrongs as well.

Now, the existence and content of some wrongs *is* contingent on a political community and the establishment of specific institutional arrangements within it. There can be no tax frauds without the laws that create the tax system and the obligations to pay tax. However, the reasons for having a tax system and which make breaching tax obligations wrong also derive from facts about the moral status of persons as such. Taxes help fund institutions the function of which is to serve important interests of persons. Tax frauds violate duties that are ultimately

¹⁴³ Duff, 'Political' (n 18) 196. The last sentence involves a slight simplification for two reasons: (i) *mala in se* are made more *determinate* by the law that criminalises them, and (ii) the way in which these wrongs are conceived of, and the reasons for making them criminal, have varied across different historical settings. In some of these settings, a particular status has been part of the definition of the wrong (on the latter, see Lindsay Farmer, 'Criminal Law as an Institution' in R.A. Duff and others (eds), *The Political Morality of the Criminal Law* (OUP 2014) 97). Still, in both cases the law is nonetheless trying to reflect a wrong that exists independently of it.

grounded in these interests.¹⁴⁴ Then, the fact that the existence of these wrongs depends on the political community does not entail that it is the business of the political community alone to hold the perpetrators responsible.

Another reason to doubt the claim in the passage above is that public wrongdoers are sometimes subject to different forms of “social” or “private” punishments, the permissibility of which is not commonly contested.¹⁴⁵ Associations sometimes expel members and consumers organise boycotts against companies whose executives have been found to be guilty of criminal conduct. These responses are plainly punitive, provided the intention of those engaging in them is that their recipients are harmed or suffer for their wrongs,¹⁴⁶ and sometimes may even be more severe than the punishment imposed by the state for the same behaviour. As long as the fact that the conduct to which these social or private measures are responding is criminal figures as one of the reasons for undertaking these responses, it is the case that their perpetrators are being punished *for* their crimes.¹⁴⁷

A different reading of the passage quoted above points, however, to another possibility: whether it is A’s business to respond to B’s *ϕ*ing depends not only on the relationship in which A and B stand, but on the *means* that A employs

¹⁴⁴ In a similar sense, Tadros, *Wrongs* (n 35) 128-30. It is sometimes claimed that wrongs such as tax fraud violate duties owed to one another as *fellow citizens*. I doubt this is the case. Citizens and non-citizens alike incur obligations to pay taxes, which help fund institutions that provide services irrespective of the status of their beneficiaries. In any case, if the duties were owed to one another on the basis of fellow citizenship, this does not explain why it must be the business only of citizens *collectively* to hold tax fraudsters responsible.

¹⁴⁵ Or, when it is thus contested, it is not because these private punishers would be meddling or responding to wrongs it is not their business to concern themselves with (see Linda Radzik, ‘Boycotts and the Social Enforcement of Justice’ (2017) 34 *Social Philosophy and Policy* 102).

¹⁴⁶ John Gardner, ‘Punishment and Compensation: A Comment’ in Russell Christopher (ed), *Fletcher’s Essays on Criminal Law* (OUP 2013) 73-74.

¹⁴⁷ Gardner in Hart (n 136) xxv. Similarly, Husak (n 142) 99-100.

for this purpose. As Edwards puts the point, 'holdings are defective if B is held responsible for X by A, but A has no business *doing Y to B for X* (...) even if X is A's business'.¹⁴⁸ Whether the means "Y" are appropriate may also turn on the relationship in which A and B stand. On this view, it is true that athletes who violate rules regarding the use of performance-enhancing substances are answerable to agents other than the officials of the relevant sports association. However, it is the business of these officials alone to hold the athletes responsible *through the formal disciplinary mechanisms* set up by the organisation. The same may be said about crimes. Criminals are answerable for their actions to several others. Yet, it is the business of public officials alone to call criminals to account and punish them through the means made available by the criminal law.

Consider the following example. Grant that it is the students' business to hold one another responsible for failing to prepare for class. They might do this in two ways, namely (i) by refusing to share notes or (ii) by barring those who fail to prepare from the classroom.¹⁴⁹ Plausibly, only (i) is appropriate to the relationship between students, while (ii) is a means appropriate to the relationship between the students and their teacher. A similar claim seems to apply to this other example. A student, when being dropped off at school by his parents, behaves very insolently towards them in the presence of their teacher. Plausibly, the student's teacher is warranted to issue some form of rebuke. She is not, however, equally entitled to impose a short period of detention during recess, which could be regarded as equivalent in severity to some measures that it may be appropriate for the student's parent to employ. The underlying intuition in these cases seems to

¹⁴⁸ Edwards, 'Standing' (n 137) 44.

¹⁴⁹ The example is borrowed from *ibid.*

be that certain means “belong” to certain practices or relationships, such that some wrong is committed when these means are used for purposes or by persons who do not belong to the relevant practice. Thus, on the basis of the passages quoted above, we might say that in the first example, by using (ii) the students would usurp the means that belong to the student-teacher relationship, whereas in the second the teacher, although she uses the means that belong to the relationship in which she stands with the student, does so inappropriately for conduct which is alien to the same relationship. In both cases, while wrongdoers deserve to be held responsible by those who are in fact holding them responsible, they do not deserve to be held responsible *through the specific means* being used by the holders. Thus, as suggested above, it might make sense to say that in both cases, the holders are meddling, and thus wronging the wrongdoers. Perhaps the same can be said about the criminal law which, as we saw above, Duff suggests “belongs” to the political community conceived of as a distinctive practice.¹⁵⁰ The use of its means is then restricted to the agents of this practice. Then, taking Edwards’s formulation from above, the claim is that private persons do not stand in a relationship such that it is their business to hold one another responsible for their crimes *using the means of the criminal law*, so that they would wrong one another were they to do so.¹⁵¹ According to Duff, *because* it is not their business, private persons have *no* reason at all to hold one another responsible in that way.¹⁵²

Here I will provide only the sketch of a response, so as to preface the following chapter where similar thoughts are developed more fully (although

¹⁵⁰ Duff, ‘Responsibility’ (n 14) 138.

¹⁵¹ As we will see in Chapter 3 (n 197), this argument imposes—if any—an implausibly weak constraint on the allocation of criminal law’s powers and permissions to private persons to be able to effectively justify the standard allocation.

¹⁵² Duff, *Realm* (n 11) 92-96.

from a different angle). Whether Duff's claim succeeds depends on the justification of *relations of responsibility*, that is, on the justification for making the response to wrongs and the means for so responding the business of some agents and not others. In particular, the question is how relations of responsibility may themselves be grounded in other "substantive" relationships in which those who are responsible to one another may stand.

On the one hand, relationships matter in *themselves*, as *objects of protection*. Considerations of *privacy* are relevant in this regard. Some relationships involve constant renegotiation of their terms and of what counts as wrongdoing. They will thrive if their members have space for making mistakes, leave some wrongs without a response, or devise forms of holding one another to account in ways specially adjusted to the nature of the relationship.¹⁵³ Furthermore, as King puts it, 'certain relationships are structured by a mutual vulnerability to the attitudes of the other', that is, making some domain the exclusive business of some others may *itself* be partly constitutive of a relationship.¹⁵⁴ Thus, these relationships may be threatened if third parties could freely hold their participants to answer for wrongs perpetrated within their context. Other considerations are what we may call *strictly relational*. As we have seen in this chapter, faced with a wrong that threatens to undermine the relationship, sometimes it is only parties to it that can respond in ways that serve to remedy or re-establish the relationship. By pre-empting the response of the teacher, the students who bar their unprepared fellows from class preclude an opportunity for the teacher to reassert her authority over the

¹⁵³ Ferdinand David Schoeman, *Privacy and Social Freedom* (CUP 1992) 21, 177-78.

¹⁵⁴ Matt King, 'Skepticism about the Standing to Blame' in David Shoemaker (ed), *Oxford Studies in Agency and Responsibility*, vol 6 (OUP 2019) 278. See also, Garrath Williams, 'Sharing Responsibility and Holding Responsible' (2013) 30 *Journal of Applied Philosophy* 351, 351-58; Jörg Löschke, 'Authority in Relationships' (2015) 23 *International Journal of Philosophical Studies* 187, 188-91.

unprepared students, and for the latter to manifest respect for her, both of which are intrinsic features of a (good) student–teacher relationship. The same applies, *mutatis mutandis*, to the relationship between the insolent student and her parents.

On the other hand, relationships also matter *instrumentally*, as a *source of abilities*. Standing with others in a relationship might give us particular abilities including—but not limited to—epistemic advantages to respond effectively (in a non-strictly relational sense) to the wrongs of our fellows (whether these wrongs pertain to the relationship itself or not). For example, participants will normally be better attuned to the nature and seriousness of the wrong and the blameworthiness of the wrongdoer—all of which often have contextual components. Similarly, participants are likely to be more astute both to the benefits and to the risks of holding the wrongdoer responsible, or of particular ways of doing so. To be sure, the aforementioned competence-related considerations touch upon the relational concerns outlined above—indeed, they are partly grounded in the need to preserve our relationships in good shape.¹⁵⁵ Still, competence considerations are centrally underpinned by concerns about fairness, proportionality, the prevention of further bads, and others.

Competence considerations are such that anyone can, in principle, conform to them. Just as they may serve to restrict the agents whose business it is to respond to some wrongs to the participants of some special relationship, competence considerations can also give reasons to agents outside the relationship to respond to these wrongs. The same is true of the means available to hold wrongdoers

¹⁵⁵ This is one way in which competence and relational considerations intersect: for third parties to get a better grasp of these aspects would very likely require a substantial invasion of privacy.

responsible. Think again about the example of the unprepared students. Imagine the authority of the teacher has been almost irreparably undermined, or that she misguidedly believes that the students will mend their ways without the need to sanction them, thus refusing to do so. Yet, some students persist in the wrong, seriously hampering the class for everyone. If the only way in which the group will prepare for class is by barring them from the classroom until they do their work, the other students may have sufficient reason to do so. More generally, there might be cases in which competence considerations take precedence over relational considerations, or where those whose business it is to respond to the wrong in virtue of the relationship in which they stand with the wrongdoer are unavailable.¹⁵⁶ In these cases, third parties may have sufficient reason to intervene and to either employ the means of their relationship to respond to wrongs that fall outside it, or to 'usurp' the means of a different relationship. Duff's thought that we have *no* reason to hold another responsible if we do not stand in a relationship that makes the wrong or the means our business *mistakenly* presupposes that the *only* reasons to hold one another responsible are relational (relationship-sustaining) reasons. We have seen that this is not the case.

More important, however, is that there is no reason to think that relations of responsibility—whose business it is to respond to which wrongs, perpetrated

¹⁵⁶ Sometimes a third party is simply competent and well placed to achieve a very important good or avert some big evil (G.A. Cohen, 'Casting the First Stone: Who Can, and Who Can't, Condemn the Terrorists?' (2006) 58 *Royal Institute of Philosophy Supplements* 113, 119-20 at fn 10).

by whom, and with what means—are only relationally grounded. Some relations of responsibility may be grounded entirely in competence considerations, while others in a combination of both relational and competence considerations.¹⁵⁷ The upshot is that competence considerations may not only, as above, justify an agent's response to a wrong despite not being her business to do so—they may also determine whose business it is to respond to the wrong in the first place. Relationships of responsibility need not be grounded in other substantive relationships. Therefore, to know whether Duff is right to claim that criminal wrongdoers deserve to be held responsible through the means of the criminal law *only* by public officials, such that they are wronged otherwise, we need an explanation for the attribution of the criminal law to political, not moral (or no), communities. This chapter gave us reasons to think that the value of civic integrity is not a good answer.

If the Civic Integrity account is to succeed in justifying the standard allocation it must offer an alternative way to show that *only* the duties that obtain and can be conformed to within the context of the relationship between fellow members of a political community justify resorting to the measures underpinned by criminal law's powers and permissions. It must then provide a different defence for the claim that, although public wrongdoers may deserve to answer to several agents, only their "civic" desert (and not the desert that brings about, say, the impersonal good of retributive justice) counts for allocating criminal law's powers and permissions.

¹⁵⁷ Pace R.A. Duff and Sandra Marshall, 'Crimes, Public Wrongs, and Civil Order' (2019) 13 *Criminal Law and Philosophy* 27, 29.

The following chapter examines one such defence, which appeals to the reasons that apply to law-makers—who are charged with allocating criminal law’s powers and permissions—in virtue of their *role* as agents of the state. It does so by also considering the arguments offered by a different statist relational account, which appeals to the personal value of *independence* or *equal freedom*.

Chapter 3: A Roles-based Defence of the Standard Allocation

Here is another way in which the relational statist justification for the standard allocation of criminal law's powers and permissions can be presented:

- (A) There is reason to allocate criminal law's powers and permissions to an agent *iff* ψ (where ψ is the achievement of a relational value that is personal to public officials);
- (B) It is permissible to allocate criminal law's powers and permissions to an agent *only if* there is reason to allocate criminal law's powers and permissions;
- (C) It is permissible to allocate criminal law's powers and permissions to an agent *only if* ψ .¹

Our concern in this chapter is with (A). One defence of (A) has it that the *role* of lawmakers—who are the public officials responsible for allocating criminal law's powers and permissions—is to be *fiduciaries* of their political communities. This role requires them to act on a narrower set of reasons than those that apply to us in our ordinary lives. According to this defence, the narrower set of reasons that applies to lawmakers in virtue of their role does not include sufficient—or any—reason to allocate criminal law's powers and permissions to private persons. In particular, their reasons are given only by a value—which is personal to public officials—that proponents of this defence claim “defines” the political community of which they are fiduciaries.

Section I elaborates this defence, which I will call the Roles-based Defence of the standard allocation. In particular, I explain how this defence is an instantiation of a broader view—the Discontinuity View—whereby, as Edwards

¹ This structure of justification for the standard allocation replicates what Edwards labels (regarding principles of criminalisation) an ‘argument from *reasons*’, namely, one that identifies the conditions under which there *is* reason to allocate criminal law's powers and permissions to an agent. Arguments from reasons contrast with arguments from *defeaters*: those that identify reasons *not* to allocate criminal law's powers and permissions to an agent, which ‘defeat any reasons to [allocate criminal law's powers and permissions] unless certain conditions (...) are met’ (James Edwards, ‘Master Principles of Criminalisation’ (2016) 7 *Jurisprudence* 138, 140-42).

puts it, some of the moral norms that apply to private persons ‘cease to apply to officials for reasons that cannot be traced back to the aforementioned moral norms’.² Sections II and III set out two relational statist accounts and their versions of the Roles-based defence of the standard allocation. Section IV challenges the view of role-morality on which these accounts rest and offers a more plausible one. It argues further that on either view of role-morality, whether lawmakers ought to conform solely to their role-based political reasons depends—contrary to the suggestion of the Discontinuity View—on *prior* claims in ordinary morality. Section V revisits—and partly revises—the accounts set out in sections II and III to show that they offer no grounds to think otherwise. It argues further that both accounts—and the Roles-based defence with them—should be rejected because the claims in ordinary morality on which they rest have unappealing implications. Section VI refutes the descriptive adequacy of one of the statist views addressed in this chapter.

I. The Political Justification of Criminal Law and the Fiduciary Role of Public Officials

Some think that the justification of state actions, policies and institutions must be—in a sense that is variously specified—isolated, independent, or autonomous from ordinary morality. On this view, not all evaluative facts count as reasons in favour of state action. The thought is not uncommon. Consider the doctrine of political liberalism by way of illustration. Proponents claim that the justification of political institutions is constrained by the fact that persons subject to their authority endorse conflicting—albeit reasonable—religious, moral, and philosophical doctrines.³ Political institutions must then be grounded in reasons

² James Edwards, ‘Criminal Law’s Asymmetry’ (2018) 9 *Jurisprudence* 276, 290-91.

³ ‘Reasonable’ is a *technical* term within this tradition, and there is some controversy about its meaning. Still, being reasonable is, roughly, to acknowledge the reality of disagreement and of

that reasonable persons—at some level of idealisation—could accept. These reasons are found in what political liberals call a “political conception of justice”, which “brackets” controversial values or conceptions of the good found in the conflicting religious, moral and philosophical doctrines espoused in a society.⁴ Yet, the political conception of justice must be capable of being endorsed by members of society from within the moral doctrines they hold, while neither deriving from, nor making reference to, the content of any of these moral views. Thus, according to political liberals, moral doctrines provide grounds for each of those subject to the authority of the state to accept the relevant reasons, but do not themselves justify exercises of state authority.⁵

A growing number of writers have advanced the claim that the justification of *criminal law* is primarily a matter of political, not moral, theory, where the relationship between both disciplines is conceived in the aforementioned terms.⁶ According to these writers, the justification of criminal law is subject to an injunction against appealing to any and all moral reasons and must instead resort

some of the circumstances that lead to it, and to be motivated to regard others as free and equal (David Enoch, ‘Against Public Reason’ in David Sobel, Peter Vallentyne and Steven Wall (eds), *Oxford Studies in Political Philosophy*, vol I (OUP 2015) 121-22). See also, Leif Wenar, ‘Political Liberalism: An Internal Critique’ (1995) 106 *Ethics* 32, 34ff.

⁴ See Steven Wall, *Liberalism, Perfectionism, and Restraint* (CUP 1998) 29.

⁵ John Rawls, *Political Liberalism* (Columbia UP 1996) 387; Jonathan Quong, ‘Public Reason’, *The Stanford Encyclopedia of Philosophy* (Spring edn, 2018) <<https://plato.stanford.edu/archives/spr2018/entries/public-reason/>> accessed 20 October 2020. Contrast with Nozick, who espouses the opposite approach. On his view, ‘[m]oral philosophy sets the background for, and boundaries of, political philosophy. What persons may and may not do to one another limits what they may do through the apparatus of a state (...). The moral prohibitions it is permissible to enforce are the source of whatever legitimacy the state’s fundamental coercive power has’ (Robert Nozick, *Anarchy, State and Utopia* (Blackwell 1974) 6). Thus, political philosophy is simply moral philosophy applied to the (coercive) actions undertaken by one specific moral agent, namely, the state.

⁶ Chad Flanders, ‘Punishment, Liberalism and Public Reason’ (2017) 36 *Criminal Justice Ethics* 61, 71-73; R.A. Duff, *The Realm of Criminal Law* (OUP 2018) 149, 187; Malcolm Thorburn, ‘Constitutionalism and the Limits of Criminal Law’ in R.A. Duff and others (eds), *The Structures of Criminal Law* (OUP 2011) 87, 97.

to values and principles of a distinctively political character. As some put it, criminal law theory is not a species of applied moral philosophy: it does not consist simply in the application of the correct moral theory to the features that distinguish criminal law from other types of interactions between persons.⁷ Being an aspect of the justification of criminal law, the claim also covers the justification for allocating criminal law's powers and permissions to an agent.

The above view about the justification of criminal law and the allocation of its powers and permissions is sometimes developed by appealing to notions of *roles* and *role-morality*. In short, the claim is that lawmakers—who are the agents charged with allocating criminal law's powers and permissions—are, in virtue of their roles, subject only to the aforementioned distinctively political values and principles.

A role is a distinctive position within a social practice or institution, formally constituted by a set of rights, duties, powers and permissions that role-occupants gain to allow them to fulfil the functions of the role or discharge the responsibilities attached to it.⁸ Upon stepping into a role, persons become subject to a special set of role-based reasons or norms concerned with the achievement of

⁷ Malcolm Thorburn, 'Two Conceptions of Equality Before the (Criminal) Law' in François Tanguay-Renaud and James Stribopoulos (eds), *Rethinking Criminal Law Theory* (Hart 2012) 4-8; R.A. Duff, 'Relational Reasons and the Criminal Law' in Stuart Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law*, vol 2 (OUP 2013) 200; R.A. Duff and others, 'Introduction: Towards a Theory of Criminalization?' in R.A. Duff and others (eds), *The Political Morality of Criminal Law* (OUP 2014) 17; Flanders (n 6) 71-73. See also Arthur Ripstein, *Force and Freedom* (HUP 2009) 1, 7-9.

⁸ For several relatively concurring notions, see Michael Hardimon, 'Role Obligations' (1994) 91 *The Journal of Philosophy* 333, 334; Arthur Isak Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (Princeton UP 1999) 46, 51-52, 109; Joseph Raz, 'Incorporation by Law' (2004) 10 *Legal Theory* 1, 8-9; Kimberley Brownlee, 'Responsibilities of Criminal Justice Officials' (2010) 27 *Journal of Applied Philosophy* 123, 125; John Gardner, 'Criminals in Uniform' in R.A. Duff and others (eds), *The Constitution of the Criminal Law* (OUP 2013) 117; Tim Dare, 'Robust Role-Obligation: How Do Roles Make a Moral Difference?' 50 *The Journal of Value Inquiry* 703, 704; Leslie Green, 'Law and the Role of a Judge' in Kimberly Kessler Ferzan and Stephen Morse (eds), *Legal, Moral, and Metaphysical Truths* (OUP 2016) 329.

the goals and values that constitute the practice or institution of which the role is part.⁹ As Gardner explains, roles are ‘demarcated not only by a repertoire of actions which incumbents may in principle be justified in performing, but also by a *repertoire of reasons* on which incumbents must act if their actions are to be justified’.¹⁰

One such role is that of a *fiduciary*. Fiduciaries are agents responsible for acting on behalf of another person or group in connection with a particular matter or within a relatively delimited domain of activity. Some fiduciaries exist to perform tasks which their beneficiaries cannot carry out on their own or would carry out less effectively. Parents are sometimes regarded as their children’s fiduciaries, charged with making choices for them until they reach maturity.¹¹ Different kinds of groups have officers entrusted with giving effect to the goals and values inherent in their practice. Corporations employ directors and managers to conduct business for the benefit of their share- or stakeholders, while trade union representatives act on behalf of union members in matters pertaining to working conditions. One constitutive duty of the role of fiduciary is the duty of *loyalty*, whereby fiduciaries are required to act exclusively for the interests and ends of their beneficiaries. For instance, officers have to employ the resources of the group on whose behalf they act solely for the purpose of achieving the goals and promoting the values that define the group’s practice. Thus, they are

⁹ Duff, *Realm* (n 6) 101. See also, R.A. Duff, ‘Legal Moralism and Public Wrongs’ in Kimberly Kessler Ferzan and Stephen Morse (eds), *Legal, Moral, and Metaphysical Truths* (OUP 2016) 103-105.

¹⁰ John Gardner, *Offences and Defences* (OUP 2007) 202-204, 211.

¹¹ Lionel Smith, ‘Parenthood is a Fiduciary Relationship’ (2020) 70 *University of Toronto Law Journal* 395.

precluded from putting these resources to an alternative use which would bring more good overall.

Some argue that *public officials*, including *lawmakers*, are fiduciaries of their political communities. How can this be? Fiduciaries normally relate to a single beneficiary or to a discrete class of beneficiaries with substantially uniform interests.¹² For instance, shareholders or trade union members have, in their capacity as such, some relatively distinct set of goals that constrain the ends for which their fiduciaries may permissibly act. In contrast, members of political communities have a wide-ranging diversity of interests and aims.¹³ This is important because lawmakers are (or claim to be) *authorities* and, according to one influential view, authorities 'mediate between ultimate reasons and the people to whom they apply' in order to help them conform to these reasons.¹⁴ On this view, the directives of legitimate authorities are justified by the same reasons that apply to their subjects. This poses a problem for those who would appeal to the role of lawmakers to develop the claim that criminal law is subject to a distinctive kind of normative justification in the terms outlined above. Since people are subject to morality, which bears on the interests and aims they have, acting only on a special and restricted set of reasons relative to morality seems at odds with the role of lawmaker qua fiduciary.

¹² Theodore Rave, 'Fiduciary Principles and the State' in Evan Criddle, Paul Miller and Robert Sitkoff (eds), *The Oxford Handbook of Fiduciary Law* (OUP 2019) 335.

¹³ See Christopher Bennett, *The Apology Ritual* (CUP 2008) 156-58. As Rave puts it, '[a]ccepting the basic premise that the state should act in the interest of the people, fundamental challenges remain in figuring out what that public interest is (...)' (Rave (n 12) 327).

¹⁴ Joseph Raz, 'Authority, Law, and Morality' in Joseph Raz (ed), *Ethics in the Public Domain* (OUP 1995) 215.

However, recall the thought (which we encountered in Chapter 2) that political communities are intrinsically valuable relationships or practices, defined by a specific set of goals and values. Some think that the values that define the political community supply the content for the political theory based on which criminal law—and the allocation of its powers and permissions—must be justified. On this view, the reasons entailed by the values that define the political community demarcate not only the role of lawmakers qua fiduciaries, but also that of a *citizen*.¹⁵ Further, and this is key, these role-based reasons are *all* the reasons that apply to lawmakers and citizens. Therefore, lawmakers exercise their authority and discharge their duty of loyalty by acting *only* for the aforementioned reasons—and these are the *only* reasons to which citizens may appeal when, say, deliberating about the laws that should be enacted.¹⁶ The roles of citizen and of public official are mirror images: both are defined by the same set of reasons—so the latter are conceived of as fiduciaries of political communities constituted by citizens understood in the sense just outlined.

The above view presents a discontinuity between the reasons that apply to us in our everyday lives and the “political reasons” applicable to occupants of official public roles.¹⁷ Only the latter set can contribute to the justification of state action, and of criminal law as an instance of it. Call this the *discontinuity* view. As

¹⁵ On this notion of ‘political theory’ and its connection with the role of citizen: see Duff and others (n 7) 42-43; Duff, ‘Legal Moralism’ (n 9) 105. See also, R.A. Duff, ‘A Criminal Law for Citizens’ (2010) 14 *Theoretical Criminology* 293, 300-301; Duff, ‘Relational’ (n 7) 203.

¹⁶ Ripstein (n 7) 256; Arthur Ripstein, ‘Form and Matter in Kantian Political Philosophy: A Reply’ (2012) 20 *European Journal of Philosophy* 487, 494; Duff, *Realm* (n 6) 94ff. The idea that citizens are subject to the same set of political reasons that justify state action is also part of some versions of the political liberal doctrine outlined above (see, eg Jonathan Quong, *Liberalism Without Perfection* (OUP 2010) ch 9).

¹⁷ Or as it is sometimes expressed, a discontinuity between ‘morality and politics’, ‘morality and law’ or ‘ordinary morality and political morality’.

I suggested in the previous chapter, many argue that the fact that an act or state of affairs is good is—or entails—a reason to perform the act or bring about the state of affairs.¹⁸ Call this, the *value/reason nexus*. Therefore, if a valuable state of affairs—say, a reduction of harms and wrongs—can be achieved by allocating criminal law’s powers and permissions to an agent, then that is a reason to thus allocate them. If true, there may be sufficient reason to allocate criminal law’s powers and permissions even when this does not result in the achievement of the personal value ψ . The value of reducing harms and wrongs is impersonal. It could therefore justify the allocation of criminal law’s powers and permissions to private persons. Premise (A) above, and therefore, (C) would then be false. The discontinuity view denies the value/reason nexus: that a fact establishes that X is valuable does *not* entail that this fact gives everyone reason to do or bring about X. Some additional feature is required. On this view, lawmakers only have reason to allocate criminal law’s powers and permissions in valuable ways when the value in question is *internal* to the role they occupy. As I said at the outset, one defence of (A) above has it that the narrower set of reasons that applies to lawmakers does not contain sufficient—or more radically—*any* reason to allocate criminal law’s powers and permissions to private persons, while it does include (defeasibly) sufficient reason to allocate them to public officials. Call this the *Roles-based Defence* of the standard

¹⁸ Chapter 2 n 27. The exception are cases of *logical self-defeatingness*: it is in the nature of certain goods that they cannot be brought about by intentionally aiming for them (Matthias Brinkmann, ‘Indirect Instrumentalism about Political Legitimacy’ (2019) 6 *Moral Philosophy and Politics* 175, 181). Gardner and Macklem exemplify this point by appealing to virtues: ‘[T]here is no courage in actions performed *in order to* display courage, no compassion in actions performed *for the sake of* being compassionate, and so on’ (in their ‘Reasons’ in Jules Coleman, Kenneth Einar Himma and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 456-57). Brinkman mentions ‘falling in love’ and ‘spontaneity’. In Raz’s terms, reasons to be courageous, compassionate, to fall in love or be spontaneous can be *conformed to*, not *complied with* (Joseph Raz, *Practical Reasons and Norms* (2 edn, OUP 1999) 179ff.

allocation.¹⁹ According to the Roles-based defence lawmakers may have *no* reason to do what they would have been morally permitted or even required to do but for their law-making role. Because they may have no such reason, law-makers may be morally required not to do what they would otherwise have been morally permitted or required to do. This implication seems odd to the extent that moral considerations are often taken to be overriding for the purpose of determining the deontic valence of an action.²⁰ Proponents of the Role-based defence reply that lawmakers are subject to the distinctly political morality of their roles, the upshot of which is that they have no reason to allocate criminal law's powers and permissions to private persons.

In the next two sections, I outline two relational statist accounts and their versions of the Roles-based defence of the standard allocation.

II. The Freedom as Independence View²¹

One relational account is grounded in the thought that persons have an innate right to freedom, understood as the capacity to set and pursue purposes independent from another's unilateral will or choice. Freedom, so understood, requires coercively enforceable rights over the means through which we can pursue our purposes—most importantly, our bodies and external objects.²² On this

¹⁹ This is *not* an instance of self-defeatingness (see n 18). According to the Roles-based defence, values that lawmakers *can* logically realise by aiming at them nonetheless give them *no* reason to do so.

²⁰ Sarah Stroud, 'Moral Overridingness and Moral Theory' (1998) 79 *Pacific Philosophical Quarterly* 170.

²¹ This view draws from Kant's political philosophy. Although I give another label to this view, sometimes—for ease of exposition—I will refer to it simply as "Kantian" (and to its proponents, mainly but not only, Arthur Ripstein and Malcolm Thorburn, as "Kantians"), which involves no judgment as to the view's interpretative accuracy of Kant's philosophy.

²² Arthur Ripstein, 'Authority and Coercion' (2004) 32 *Philosophy & Public Affairs* 2, 9, 12, 31; Ripstein, *Force* (n 7) 13.

view, only the state may permissibly wield the powers and permissions necessary to define and enforce our rights because its officials act in the name and on behalf of everyone subject to its authority—that is, as an expression of an *omnilateral* or united will of all conceived of collectively, which is no-one’s private or unilateral will.²³ Kantians claim that the state is thus essential for the existence of a political community in which the intrinsically valuable relationship of equal freedom among members is instantiated. Call this view the *Freedom as Independence* view.

On the Freedom as Independence view, the conditions that allow citizens to interact in terms of equal freedom are preserved only so long as the state acts as a *fiduciary* of the people:²⁴ lawmakers must legislate *as if* citizens were giving laws to themselves—and citizens may give themselves only those laws that are consistent with their freedom. Only then do the acts of lawmakers count as the united will of the collective.²⁵ Consistency with freedom requires that freedom itself be the *sole* purpose of state action. According to Ripstein, the right to freedom is the only justification for the use of coercive power by the state.²⁶ On the Freedom

²³ Ripstein, *Force* (n 7) 147, 154, 165-68, 172, 181-83, 196; Chiara Cordelli, ‘Privatization Without Profit?’ in Jack Knight and Melissa Schwartzberg (eds), *NOMOS LX—Privatization* (New York UP 2018); Thorburn, ‘Constitutionalism’ (n 6) 97-98; Thomas Sinclair, ‘The Power of Public Positions: Official Roles in Kantian Legitimacy’ in David Sobel, Peter Vallentyne and Steven Wall (eds), *Oxford Studies in Political Philosophy*, vol 4 (OUP 2018) 30-33.

²⁴ For references to the fiduciary role of public officials, see Ripstein, *Force* (n 7) 192-94, 202; Ripstein, ‘Form’ (n 16) 493-94; Malcolm Thorburn, ‘Justifications, Powers, and Authority’ (208) 117 *The Yale Law Journal* 1070, 1103ff; Malcolm Thorburn, ‘Criminal Law as Public Law’ in R.A. Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 39-42.

²⁵ Ripstein, *Force* (n 7) 175-76, 192-96, 202, 207. Thorburn puts it in similar terms: ‘when a legitimate public authority acts, it is, in an important sense, *us* collectively deciding how *we* shall act so as to secure the conditions of *our* individual sovereignty’: Thorburn, ‘Equality’ (n 7) 9-10 (emphases in original). See also Thorburn, ‘Constitutionalism’ (n 6) 98-99. On this view, the state *constitutes* the collective in whose name and behalf it acts, and to which its actions are attributed (Ripstein, *Force* (n 7) 196). The upshot is, as Sinclair says, that Kantians regard the state as ‘perfectly representative’ of the political community on whose behalf it acts: (n 23) 34.

²⁶ Ripstein, *Force* (n 7) 14, 31, 266.

as Independence view, freedom is *empty* of all interests.²⁷ By grounding rights, freedom enables everyone to pursue their purposes with the means one is entitled to by right, consistently with everyone's freedom.²⁸ Kantians claim that, were lawmakers to act upon any other reason—eg reasons deriving from a particular conception of happiness, the good or the welfare of individuals—they would be subjecting the freedom of those under their authority to some purpose that is necessarily private, and thereby to the unilateral will of some. Therefore, lawmakers are barred *ab initio* from pursuing any such purpose.²⁹ This is the Freedom as Independence view's version of the discontinuity view. As Pallikkathayil puts it, '[t]he state is not responsive to all the reasons that there are but instead only to a specific kind of reason. (...) [I]t is a view that treats the political as its own domain, (...) as importantly distinct from the rest of morality'.³⁰ Reasons concerned with creating and sustaining the necessary conditions for relationships of equal freedom are all the reasons that lawmakers qua fiduciaries have. On this view the reasons to which lawmakers qua authorities help persons conform are only those that the latter have *in common* for forming a political

²⁷ In this sense, Alan Brudner, *Punishment and Freedom* (OUP 2009) 21-24, who defends a view in some respects similar to the one being outlined here.

²⁸ Hamish Stewart, 'The Wrong of Mass Punishment' (2018) 12 *Criminal Law and Philosophy* 45, 48-49: '[T]he purpose of the legal order is not to promote any particular good but to solve the problem of how a plurality of free, purposive, and equal persons can interact with each other in a way that preserves their freedom.'

²⁹ Ripstein, *Force* (n 7) 26-27, 192-93, 202-207, 260; Thorburn, 'Public Law' (n 24) 39-40; Thorburn, 'Constitutionalism' (n 6) 99-101, 104 fn 23; Malcolm Thorburn, 'Proportionate Sentencing and the Rule of Law' in Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice* (OUP 2012) 283-84; Malcolm Thorburn, 'Judgement, Communication and Coercion: What's Wrong with Private Prisons?' (2015) 2 *Critical Analysis of Law* 234, 242.

³⁰ Japa Pallikkathayil, 'Neither Perfectionism nor Political Liberalism' (2016) 44 *Philosophy & Public Affairs* 171, 196.

community, ie the securement of freedom as independence.³¹ As Ripstein expresses the thought,

The citizens are not entitled to act for themselves considered severally; they can only act for themselves considered as a collective body. Public officials are thereby precluded from acting for the citizens considered severally. That means, (...) that something has gone wrong when a legislative body considers questions about what would be worth doing except from the point of view of purposes that make the state necessary.³²

A. Criminal Law and the Standard Allocation of its Powers and Permissions

According to the Freedom as Independence view, the state is justified because it alone can secure the conditions of equal freedom or independence for those subject to its authority. Given that independence requires that no-one is subject to another's unilateral will, the authority of the state to set the terms of rightful interaction as the embodiment of the omnilateral will must remain supreme. Kantians claim that there are some wrongs which challenge this supremacy. Wrongs that do so are those the perpetrators of which intentionally or recklessly interfere with others' legally-defined rights or ignore some state ruling. Such wrongdoers take themselves to be entitled to unilaterally define the means available for the pursuit of their ends, and thus claim self-exemption from the state's authority.³³

Criminal law exists to resist these wrongs and, as such, is a condition of the justification of the state (and, therefore, of the intrinsically valuable relationship of

³¹ Evan Fox-Decent, 'Fiduciary Authority and the Service Conception' in Andrew Gold and Paul Miller (eds), *Philosophical Foundations of Fiduciary Law* (OUP 2014) 383, 386. See also text to n 25.

³² Ripstein, 'Form' (n 16) 494.

³³ Thorburn, 'Constitutionalism' (n 6) 99-101.

equal freedom).³⁴ Kantians claim that making available criminal law's powers and permissions is justified because (a) the prospect of their exercise—chiefly those that underpin punishment—prevents the aforementioned wrongs and (b) their exercise reasserts the authority of the state in the wake of wrongdoing.³⁵ In turn, the standard allocation is justified because the exercise of these powers and permissions by private persons amounts to the imposition of their unilateral will.³⁶ Any justification for allocating these powers and permissions to private persons cannot but rest on reasons *other than freedom* or incompatible with it, which—we saw—have no force for lawmakers. 'Freedom', Ripstein says, 'must be repaired in a way that itself preserves equal freedom rather than subverting it'.³⁷ Public officials alone can exercise criminal law's powers and permissions as an expression of a united will, respecting the freedom of their subjects.

It is helpful to formalise the Freedom as Independence view's version of the Roles-based defence:

1. A political community exists solely for the purpose of instantiating a relationship of equal freedom or independence among its members;
2. Lawmakers are fiduciaries of their political communities;
3. As fiduciaries, their reasons are given exclusively by the purposes of the political community; *therefore*,
4. Lawmakers have reason to allocate criminal law's powers and permissions to an agent *iff* that agent can realise the value of independence or equal freedom by exercising said powers and permissions (premise A above);

³⁴ Ripstein, *Force* (n 7) 183, 196, 205, 309; Malcolm Thorburn, 'Punishment and Public Authority' in Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds), *Criminal Law and the Authority of the State* (Hart 2017) 9; Malcolm Thorburn, 'Criminal Punishment and the Right to Rule' (2020) 70 *University of Toronto Law Journal* 44, 46, 49, 60.

³⁵ Ripstein, *Force* (n 7) 306ff. See also, Thorburn, 'Constitutionalism' (n 6) 99-100; Thorburn, 'Proportionate' (n 29) 281-82.

³⁶ Arthur Ripstein, 'Reclaiming Proportionality' (2017) 34 *Journal of Applied Philosophy* 1, 9; Thorburn, 'Constitutionalism' (n 6) 99; Thorburn, 'Equality' (n 7) 10; Thorburn, 'Judgement' (n 29) 241-43.

³⁷ Arthur Ripstein, 'Private Order and Public Justice: Kant and Rawls' (2006) 92 *Virginia Law Review* 1391, 1418. See also, Ripstein, *Force* (n 7) 223.

5. It is permissible for lawmakers to allocate criminal law's powers and permissions to an agent *only if* these lawmakers have reason to allocate criminal law's powers and permissions to that agent (premise **B** above);
6. It is permissible for lawmakers to allocate criminal law's powers and permissions to an agent *only if* that agent can realise the value of independence or equal freedom by exercising said powers and permissions (premise **C** above);
7. Only public officials can realise the value of independence or equal freedom by exercising said powers and permissions;³⁸ *therefore*,
8. It is only permissible for lawmakers to allocate criminal law's powers and permissions to public officials.

The following section briefly revisits the Civic Integrity view we encountered in the previous chapter and develops its version of the Roles-based defence of the standard allocation.

III. The Civic Integrity View

As we saw in chapter 2, according to the Civic Integrity view, a political community is an intrinsically valuable relationship as and when a sufficient proportion of its citizens self-identify as members who share a commitment to a set of values that define the community's civil order. Citizens incur associative obligations, in virtue of their membership, because having and discharging obligations of this kind contributes constitutively to the aspects of the relationship that make it intrinsically valuable. One such obligation is to uphold the values of the civil order by responding to wrongs that violate them, which citizens discharge

³⁸ Although space precludes a detailed treatment of the issue, it is worth mentioning that there is not much in the Kantian view to explain why is it that public officials—and only public officials—can act in the name of the political community. The notion that the state constitutes the community on whose behalf it acts (see n 25) resolves the question by mere stipulation. The idea that public officials act within offices created by lawmakers who only respond to freedom-based reasons is unhelpful: unless we are given an explanation otherwise, it seems that anyone is capable of acting for freedom-based reasons and of enforcing norms grounded on them: as Dorfman and Harel note, if it is the content of the decision that makes it 'public', there is nothing distinctive about public officials in this regard: see their 'Law as Standing' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law*, vol 4 (Forthcoming). As with Duff (Chapter 2 n 25), we can set this matter aside because the claim that the permissible exercise of criminal law's powers and permissions depends on the ability to act in the name of the political community rests on premise (A) from the beginning of the chapter (text to n 1), which I reject in this chapter.

by calling each other to account for their wrongs. On this view, criminal law exists to allow citizens to discharge these obligations.

A. Civic Integrity and the Standard Allocation

Duff suggests that the reasons that derive from the values of the political community's civil order are *all* the reasons to which citizens and lawmakers are subject in their capacity as such:³⁹

[O]nly some kinds of good will generate reasons for criminalization. It is not part of our role as legislators of the criminal law, or as officials (or citizens) whose role it is to administer and apply the law, to ask in general terms 'what good can we do?' (...): not because only a limited range of prospective goods is, as a matter of practical fact, likely to generate sufficiently strong reasons for action, but because her role [as a legislator of the criminal law] determines what good reasons are relevant. (...) 'So too with the criminal law: our understanding of the kind of practice it is (which includes our understanding of its role in a polity) will determine its proper aims; and these will determine what can count as a good reason to criminalize (...) criminal law is concerned with civil order, and with kinds of wrong that impinge on that order'.⁴⁰

The upshot is that there is reason to criminalise a wrong *if and only if* this enables citizens to discharge their associative obligations to respond to public wrongs. This involves two claims: (i) there is reason to allocate the powers and permissions necessary to try and punish people for ϕ *if and only if* ϕ is an act-type that gives rise to obligations of civic integrity, ie it violates one of the defining values of the political community; and (ii) there is reason to allocate criminal law's powers and permissions to an agent *if and only if* that agent is capable of using

³⁹ On the role of citizen, see n 15. On the corresponding role of lawmakers, see R.A. Duff, *Answering for Crime* (Hart 2007) 49; R.A. Duff, 'Towards a Theory of Criminal Law?' (2010) 84 *Aristotelian Society Supplementary Volume* 1, 3-5, 14ff; R.A. Duff, 'Retrieving Retributivism' in Mark White (ed), *Retributivism: Essays in Theory and Policy* (OUP 2011) 6; Duff, *Realm* (n 6) 149.

⁴⁰ Duff, *Realm* (n 6) 257. See further 91–101, 255–258; Duff, 'Relational' (n 7) 203; Duff, 'Legal Moralism' (n 9) 103–105; Duff and others (n 7) 19–22.

them to discharge obligations of civic integrity.⁴¹ As we saw, on this view only public officials are capable of discharging these obligations. Thus, it is only permissible to allocate criminal law's powers and permissions to them.

It is also helpful to formalise the Civic Integrity view. However, we will see in section V.A below that there is a gap in this view. Once that gap is filled, we will be able to formalise it.

IV. The Morality of Roles

According to the Role-based defence, the role of lawmakers is to be agents or *fiduciaries* of their political communities. This role requires them to act on a narrower set of reasons than those that apply to us in our ordinary lives. On both the Civic Integrity and Independence views, that set of role-based reasons—the only reasons that these officials have—includes *no* reason to allocate criminal law's powers and permissions to private persons. Norms of freedom and civic integrity are reasons for allocating these powers and permissions to public officials alone. Whether the Roles-based defence succeeds depends, in part, on the view of role-morality on which it rests.

There seem to be two general ways to justify the claim that role-based reasons are exhaustive of the morality applicable to lawmakers. One suggestion is simply that all morality is role-relative, that is, that all reasons are role-based reasons. On this view, all moral norms that apply to persons are given by the different roles they occupy, and their normative situation is fully constituted by these different roles.⁴² This claim is hard to accept because there are obvious

⁴¹ Duff, *Realm* (n 6) 165-66, 232, 244, 277-78, 294.

⁴² This position has been attributed to MacIntyre (see Hardimon (n 8) 338; Michael Da Silva, 'Legal Roles and Moral Duties' (MA Thesis, Rutgers 2013) 18); and it is defended (not free from inconsistencies) by Günther Jakobs, *La Imputacion Objetiva en el Derecho Penal* (Manuel Cancio Meliá

instances of general or common moral obligations—like the duties not to murder, lie or rape—that apply to everyone, irrespective of the roles they occupy. One might claim in response that common moral obligations are such because they happen to accrue to every role. However, this response involves a form of moral distortion: it amounts to the claim that we have an obligation not to murder as, or because we are, lawyers, parents, spouses, or trade union representatives. General moral obligations cannot be appropriately described as common role–obligations in this way.⁴³ It is also difficult to see how conflicts between role–obligations pertaining to the different roles that some occupy simultaneously ought to be adjudicated if not by appealing to common background moral norms. Another, more plausible, suggestion is that all reasons that apply to role-occupants qua role-occupants are role–based, which need not presuppose in turn that all morality is role–based. On this view, we are subject to a common set of reasons as human beings but, as role-occupants, a different—and more limited—set of reasons applies to us. Let us attribute the latter view to those who hold the Freedom as Independence and Civic Integrity views. It is worth noticing, however, that the plausibility of this picture inversely correlates to the pervasiveness of roles: the larger the domain of our moral life that is lived through different roles, the smaller the domain in which reasons we have simply as human beings apply. The latter may end up becoming vanishingly small. Therefore, to be viable, the relational statist views just mentioned need to presuppose a non-trivial domain for common

tr, Ad-Hoc 1996) *passim*, esp 25-27, 32-34, 63-67, 81-86, 89. Some remarks by Duff (Duff, *Realm* (n 6) 96) and Marshall (Sandra Marshall, "It Isn't Just About You": Victims of Crime, their Associated Duties, and Public Wrongs' in R A Duff and others (eds), *The Political Morality of Criminal Law* (OUP 2014) 294) may suggest a similar view.

⁴³ David Luban, *Lawyers and Justice* (Princeton UP 1988) 108-111; Hardimon (n 8) 338, 340, 359.

morality to apply—otherwise, their views simply amount, in substance, to the first view rejected above.⁴⁴

Some think that roles *undermine* for their occupants the reasons that would otherwise apply to them as human beings.⁴⁵ Call this the Roles as Reason–Underminers or *Reasons–Undermining* account of role morality for short. According to *Reasons–Undermining*, some moral norms, which apply to private persons, cease to apply to officials—have no normative force whatsoever—for reasons that cannot be traced back to said moral norms.⁴⁶ They cease to apply for no reason other than they are not part of the goals and values of the institution of which the role is part. On this view, norms apply to role–occupants only to the extent that they derive from, or are otherwise required by, the purpose of the institution to which the role belongs and, importantly, only *because* they are thus required.⁴⁷ One explanation has it that (stepping into) a role is a fact or state of affairs that *alters the nature of the actions* performed by role-occupants, with the effect of similarly altering the practical reasons that apply to them.⁴⁸ Think of relatively well-defined institutional roles (which is what the role of lawmaker is). Proponents of *Reasons–Undermining* claim that, when fulfilling their roles, occupants exercise a form of institutional agency, distinct—in kind—to their

⁴⁴ But see Held, who claims that almost all of morality is role morality: Virginia Held, ‘The Division of Moral Labour and the Lawyer’ in David Luban (ed), *The Good Lawyer* (Rowman & Allanheld 1983) 66.

⁴⁵ The idea that roles *undermine* reasons draws from Garrett Cullity, ‘The Context-Undermining of Practical Reasons’ (2013) 124 *Ethics* 8 and Garrett Cullity, ‘Weighing Reasons’ in Daniel Star (ed), *The Oxford Handbook of Reasons and Normativity* (OUP 2018). Many ideas in this section draw from him. The notions of *disabling* and *undercutting* refer to the same phenomenon (see, respectively, Jonathan Dancy, *Ethics Without Principles* (OUP 2004) and Mark Schroeder, ‘Holism, Weight, and Undercutting’ (2011) 45 *Noûs* 328).

⁴⁶ See n 2 .

⁴⁷ Cullity, ‘Undermining’ (n 45) 26; Cullity, ‘Weighing’ (n 45) 439.

⁴⁸ Cullity, ‘Undermining’ (n 45) 20, 31, 34. See also, Applbaum (n 8) ch 5.

individual or personal agency. It is the institution that acts through its officers. The reasons and norms to which the institutional agency of a role-occupant is subject are therefore fixed solely by the purposes of the institution and the function that the role fulfils in relation to the institution's goals and values.

There is good textual evidence to believe that the Reasons-Undermining view of role morality underlies both the Freedom as Independence view and, especially, the Civic Integrity view.⁴⁹ However, I will not try to substantiate this interpretative claim here. Instead, what I will do is this. First, I will show that Reasons-Undermining is a mistaken view of role-morality. Second, I will outline a more plausible account of the effects that stepping into a role has on the reasons that apply to us. This account is also available for the Freedom as Independence and Civic Integrity views. However, I suggest that *whichever* of the two accounts of role-morality these views adopt, their claims in political morality rest on *prior* substantive claims in ordinary or all-things-considered morality. The suggestion is then confirmed by briefly revisiting the Freedom as Independence and Civic Integrity views. Therefore, these views give us no grounds to believe in the discontinuity view. When read as making claims in ordinary morality, I submit that these views have unpalatable implications and should therefore be rejected. If so, the Role-Based defence of premise (A) above fails and, with it, the Freedom as Independence and Civic Integrity answers to the allocative question.

A. Against Reasons-Undermining

The Reasons-Undermining view fails if it can be shown that role-occupants remain subject to role-independent reasons upon stepping into their roles and,

⁴⁹ See, for example, Duff, *Realm* (n 6) 62-63, 91-101, 255-258; Thorburn, 'Constitutionalism' (n 6) 99; Ripstein, 'Form' (n 16).

moreover, that they may be permitted or required to act for them. Let us consider some examples before developing a more general argument.

Pond. “Singer Gates” is a charity whose sole purpose is to supply treatment for a rare lethal illness that affects inhabitants of a very poor country. The illness causes the lungs of patients to rapidly fill up with fluid, leaving them unable to breathe. Alan is an officer at Singer Gates whose job is to transport the life-saving medicine from a secure facility in the capital of the country to the towns—usually remote and conflict-stricken—where most patients live. One day, while Alan is on his way to deliver medicine for a child, he notices another child drowning in a pond. There is no-one else around that could save the drowning child. Alan knows that if he stops to save her, which he could easily do, the sick child will not receive her medicine on time and die. If he continues on his way, the drowning child will die. Alan decides to continue. The drowning child dies but the sick child gets her medicine on time and survives.

Intuitions may differ on whether Alan was right to continue on his way to deliver the medicine to the sick child. Still, most in his place would experience the situation as some form of practical conflict. Alan is unlikely to feel indifferent to the fact that he was in a position to save the drowning child but decided against doing so. The suggestion need not be that Alan acted wrongly—on the contrary, many might argue that Alan did as he ought to have done in the circumstances. Yet, even if the conflict was adequately resolved, Alan is likely to regret that he was not able to save the drowning child, nonetheless.

It is hard to believe that, if Alan were to experience such emotions, his reaction would be irrational or unintelligible. One explanation is that Alan had a role-independent reason to save the drowning child which was either outweighed or excluded in this context by his role-based reason to deliver the medicine to the sick child. Outweighed or excluded reasons still obtain and exert some normative pull on Alan. Regretting that he did not save the drowning child can be viewed as a rational response to the fact that there was nothing else Alan could do in order

to conform to the reason to save her.⁵⁰ Many, including Alan, might also think that it would have been better if by some random occurrence he had been able to conform to both the role-based reason and the excluded or outweighed role-independent reason.⁵¹ Yet, on the Reasons–Undermining view, Alan’s feelings appear to be irrational or unintelligible, as he has no reason to save the drowning child.

In response, a proponent of the Reasons–Undermining view could claim that, had Alan actually failed to conform to a reason that applied to him to save the drowning child, one should ascribe to him other reasons to, say, make amends, apologise or undertake other similar actions (if appropriate recipients of these actions can be identified)—something which one would be disinclined to do. However, whether Alan has any reason to apologise or make amends seems to depend on him having breached an *obligation* to save the drowning child, which Pond does not stipulate he was under. It suffices that Alan had a simple reason to save the drowning child competing with an obligation to save the sick child for his feelings to be appropriate. Moreover, even if it were the case that Alan had a duty

⁵⁰ See Monika Betzler, ‘Sources of Practical Conflict and Reasons for Regret’ in Peter Baumann and Monika Betzler (eds), *Practical Conflicts* (CUP 2004) 197-200, 203; Leonard Kahn, ‘Conflict, Regret and Modern Moral Philosophy’ in Thom Brooks (ed), *New Waves in Ethics* (Palgrave MacMillan 2011) 15; N.P. Adams, ‘In Defense of Exclusionary Reasons’ (2021) 178 *Philosophical Studies* 235. This suggests that there are many reasons that apply to us to which we will never possibly conform. Still, as Gardner points out, it does not follow that our lives must be blighted by agent-regret. This conclusion would ignore the many reasons we have to bring about value in the future, which count, often decisively, against spending our time regretting our failure to conform to others (John Gardner, ‘Wrongs and Faults’ in Andrew Simester (ed), *Appraising Strict Liability* (OUP 2005) 58-59. As we will see below, justified roles play an important part in attenuating the case for regret.

⁵¹ Raz, *Practical Reasons* (n 18) 41-45, 184-85. As Gardner and Macklem express the thought, ‘It would always be better to do as every reason would have one do, defeated or otherwise, thanks to the fact that every reason corresponds to a value. In a situation of rational conflict reasons pull one in two or more incompatible directions. (...) Tautologously, it is best to act for the best, or in other words, not to perform an action that realizes less value than some other action that one might have performed. But of course it would be better still if by some miraculous change in circumstances, as well as doing what the undefeated reasons would have one do, one also did as the defeated reasons would have one do. This applies as much to outweighed as to excluded reasons’ (Gardner and Macklem (n 18) 464).

to save the drowning child, overridden by his role-based duty, secondary duties to apologise or make amends are not generic: not all breaches of duty or pro tanto wrongs generate such secondary duties. As Moore explains, 'sometimes (...) the moral consequence of a reason being a pro tanto duty is only that of feeling a certain way or having a certain belief'.⁵² The fact that Alan had to consider which course of action to take and regrets not having been able to save the drowning child indicates that he indeed had reason to do so.

Still, the proponent of the Reasons–Undermining account might retort that I am misrepresenting the moral situation here. The fact that it seems natural for Alan to pose himself the question about which course of action to take, to experience it as a conflict, and to deliberate accordingly, does not presuppose that he had reason for both actions. Instead, the question and subsequent deliberation carried out by Alan is actually aimed at assessing whether he had any reason at all to save the drowning child to begin with.⁵³ Furthermore, the objector might add, accepting that Alan had no reason to save the drowning child does not commit one to regarding as irrational or unintelligible the feelings and thoughts that ensued after he had acted. People may often be confused about the way in which stepping into a role affects the reasons that apply to them, and the fact that Alan qua human being may have had a reason to save the drowning child can make evaluating the situation more complex for him. This is one reason why people may be mistaken about the existence of reasons for action, which can explain the moral pull of the apparent reason to save the drowning child. Provided the mistake is

⁵² Michael Moore, 'Responses and Appreciations' in Kimberly Kessler Ferzan and Stephen Morse (eds), *Legal, Moral, and Metaphysical Truths* (OUP 2016) 335.

⁵³ Massimo Renzo, 'Responsibility and Answerability in the Criminal Law' in R.A. Duff and others (eds), *The Constitution of the Criminal Law* (OUP 2013) 210-13.

justified, we are warranted in treating Alan's feelings as rational.⁵⁴ Thus, nothing in the case at hand suggests the existence of a reason to save the drowning child because said reasons cannot simply be taken to be implied by the supposed rationality of regret.

A defender of the Reasons–Undermining view might also draw a distinction between different kinds of reasons. Consider the following passage:

I agree that values speak to us all (...), but that is not to say that they all speak to us all *as agents*: sometimes the appropriate response to a value is a respect or recognition with no practical implications, (...) –not because I am not well–placed to help realize it, but because it is not connected to me as an agent. The site of my agency (as of anyone's agency) is not the whole world; my agency is grounded in the more limited, particular forms of life in which I function, and find my reasons for action.⁵⁵

The passage suggests that values are—or entail—reasons for everyone to respond to them by engaging in certain actions and/or adopting some attitudes towards them.⁵⁶ However, our roles determine in particular whether we have reason to respond to some value in a way that involves our agency, eg by actively promoting the value or directly attempting to realise it. Thus, the fact that—in virtue of his role—Alan had no reason to save the drowning child need not imply that the value of the child's life gave him no reason to react to it in other appropriate ways. The conflict and rational regret felt by Alan reflects the existence of these latter reasons which, however, have no 'practical implications' for him due to the role he

⁵⁴ We may put this in terms of a distinction between 'objective' and 'subjective' rationality, where the former is a function of the reasons there *are*, while the latter is a function of the reasons the agent *takes there to be*. Thus, even if Alan qua officer at Singer Gates had *no* reason to save the drowning child, his attitudes can still count as (subjectively) rational (see Joshua Gert, 'Underdetermination by Reasons' in Daniel Star (ed), *The Oxford Handbook of Reasons and Normativity* (OUP 2018) 444).

⁵⁵ Duff, *Realm* (n 6) 96 (emphasis in the original).

⁵⁶ See Robert Nozick, *Philosophical Explanations* (Belknap Press 1981) 429-30 for an extensive list of appropriate responses to value.

occupies. Thus, we might say that what Alan experiences is not agent–regret as suggested above, but instead *spectator*–regret: that is, a form of regret ‘not connected with actions and choices of one’s own that can be regretted for having been either committed or omitted’, but with the proper appreciation of (the loss of) a value that perhaps another agent had reason to protect or bring about.⁵⁷ This latter form of regret does not reveal the existence of reasons for action that remain in force even when one does not conform to them.

Yet, it seems that what goes on in Pond is something beyond mere lamentation at the occurrence of some harm or loss of value. The drowning of the child is not some merely regrettable event with which Alan had nothing to do and could do nothing about, but a loss of value he was uniquely placed to prevent. This is why some form of agent–regret, which presupposes the existence of reasons for action, seems more apposite.⁵⁸ Be that as it may, I can concede that Pond—although suggestive—is nonetheless inconclusive. Still, the idea that role–occupants are subject to role–independent reasons may be bolstered further by considering the relevance of *stakes*. Consider the following example.

High Stakes Pond. Same as Pond, but instead of one child, there are *five* children drowning in a pond on Alan’s way to deliver the medicine.

I take it that Alan has a decisive or categorical reason to save the five children, which outweighs his role–based reason to carry the life-saving medicine to the sick child. Indeed, the claims of the five children should be *aggregated*—refusing to save the five treats their claims as weightless and thus their moral status as irrelevant to what Alan should do. This is true even taking into account

⁵⁷ Betzler (n 50) 199-200; Kahn (n 50) 16. The appropriateness of spectator–regret is compatible with the agent having no agent–relative reason to make amends, apologize or the like.

⁵⁸ See Bernard Williams, *Moral Luck* (CUP 1981) 27-30.

that Alan owes a special, role-based, duty to the sick child. If one thinks that special obligations are stronger than ordinary obligations of comparable content and that the reasons to save the five are insufficient to defeat Alan's role-based duty, one should just increase the size of the drowning group. At some point the claims of the many prevail over those of the few.⁵⁹ That the practice to which Alan's role belongs contains no norms requiring him to save random children drowning in ponds—or, further, that doing so may be contrary to the norms of the practice—does not make it the case that Alan has no reason to save the children. The Reasons–Undermining view implausibly suggests that Alan has *no* reason to save the five.

A proponent of Reasons–Undermining might claim in response that only this kind of “high-stakes” situations give rise to reasons for everyone, simply in virtue of our humanity and irrespective of our roles.⁶⁰ Yet, it is hard to see why only these kinds of high stakes situations would give reasons to everyone, whereas lower intensity situations would not. If Alan has a decisive reason to act against his role-based reasons when the degree of suffering or harm involved is amplified, suffering or harm must also be a reason for Alan when it is less intense or widespread—only a weaker one.⁶¹ To claim, for instance, that every role incorporates a set of “high-stakes reasons” seems unpromisingly ad hoc. A better view is that the relevance of stakes shows that our intuitions as to whether a fact is or is not a reason for something are often influenced by the weight of the reason

⁵⁹ Thomas Scanlon, *What We Owe to Each Other* (HUP 1998) 232. Not everyone agrees that claims can be aggregated in this way: John Taurek, ‘Should the Numbers Count?’ (1977) 6 *Philosophy & Public Affairs* 293. For effective rebuttals, see Derek Parfit, ‘Innumerate Ethics’ (1978) 7 *Philosophy & Public Affairs* 285; John Halstead, ‘The Numbers Always Count’ (2016) 126 *Ethics* 789.

⁶⁰ Duff, ‘Relational’ (n 7) 203 fn 45; Duff, *Realm* (n 6) 61-63, 96.

⁶¹ Cullity, ‘Undermining’ (n 45) 12; Matt King, ‘Attending to Blame’ (2020) 177 *Philosophical Studies* 1423, 1432.

relative to the ones with which it conflicts.⁶² Something similar is true about excluded reasons. As Adams explains, reasons that in principle are excluded may under some circumstances become so important that they ought to be complied with.⁶³ As I argue in the next section, exclusionary reasons are part of the infrastructure of a moral division of labour. In Alan's case, reasons to help others in ways that interfere with the fulfilment of his role are ordinarily excluded to allow him to better realise that goods that underpin that role. Still, reasons for that division may not obtain in the circumstances or be overridden—then reasons that were excluded re-enter the role-occupant's rational horizons. If role-independent reasons were undermined, instead of merely excluded or outweighed, this would not be possible because undermined reasons simply cease to exist as reasons for role-occupants in virtue of their content. Accepting that increasing stakes affects reasons for action commits us to seeing role-independent reason as at most (defeasibly) excluded, not undermined.

Let us finally consider two examples offered by Duff (slightly modified for stylistic purposes) in defence of the Reasons–Undermining account of role morality. When correctly understood, they do not sit well with the idea that role-occupants are subject only to role-based reasons.

Profitable Examination. A committee of examiners is trying to decide whether to award a distinction to a thesis, and one offers as an additional, balance-tipping, reason in favour of doing so that the student's parents would then make a large donation to the university.⁶⁴

⁶² Matthew Bedke, 'The Iffiest Oughts: A Guise of Reasons Account of End-Given Conditionals' (2009) 119 *Ethics* 672, 685; Schroeder (n 45) 334-336.

⁶³ Adams (n 50) 251.

⁶⁴ R.A. Duff, 'Criminal Law and Criminalization' (2018) 18 *Jerusalem Review of Legal Studies* 62, 71. See also Duff, *Realm* (n 6) 255-56.

On Duff's view, 'examining a thesis is an activity that is carried out within the academic practice of university education—an activity conducted by people in their roles as academic examiners'.⁶⁵ Therefore, only facts about the scholarly quality of the work are reasons for awarding a mark: these facts constitute the role-based reasons, which are the only reasons, that academics have. In this respect, the fact that certain mark will result in a donation to the university is 'not a reason at all'.⁶⁶

The notion of "balance-tipping reason" suggests that the examiners have all reached a point where, after considering all of the applicable practice-based reasons, they find it equally justifiable to award or not to award a distinction. If so, Profitable Examination is a case of (context-relative) under-determination: the reasons related to the 'academic practice of university education' have simply "run out", yielding two equally eligible alternative courses of action. (Notice that the situation is odd: presumably a thesis that has satisfied the standard for a distinction should be marked accordingly. Alternatively, the practice might contain or allow for the construction of a closure rule which determines the right outcome in this kind of situation. Perhaps a better example would then be that of an admissions officer faced with two equally qualified candidates, one of which brings with her a large donation to the university). The problem the academics face is that, despite having no sufficient role-based reasons to adjudicate the matter, they still have to discharge their role-based duty to mark the thesis, that is, they have to fulfil their roles. Yet, if role-based reasons are the only reasons these academics have, it is hard to see how they might go about doing that non-

⁶⁵ Duff, 'Criminal Law' (n 64) 71.

⁶⁶ Ibid. Kamm appears to hold a similar view: F.M. Kamm, *Morality, Mortality* vol 1 (OUP 1998) 159.

arbitrarily. In this case, role-independent reasons can help them discharge their role-based duty. Certainly, they must appeal to considerations that are actual reasons, which rules out facts such as the student's hair colour or the weather, which track no value at all. And, of course, awarding a distinction in order to benefit from a donation can be a source of disvalue too, and thus of reasons against this course of action—it might, for instance, be unfair to other students not similarly privileged or erode the prestige of the university. It might end up being preferable to toss a coin. But the aforementioned considerations against taking the donation into account may not be present in the scenario. In any case, the circumstances are such that whether and how academics ought to consider the reason given by the prospect of a donation is not settled simply by appeal to the academic role of the decision-makers. As we have seen, sometimes it may be justified—or even required—to conform to excluded reasons when the stakes are high enough. Profitable Examination suggests that the same is true about role-independent reasons when role-based reason under-determine the right outcome.⁶⁷ To see this more clearly, imagine the same situation, but change 'the prospect of receiving a donation' for 'the prospect of making the student happy'—and add that no-one else stands to be disadvantaged as a result of the mark given to the work. The latter is not a role-based reason as Duff would conceive of them. Still, it seems that the committee may defensibly appeal to such a reason to break the deadlock. Thus, Duff's example does not support the claim that roles

⁶⁷ In short, the point of this subsection is that Duff's example appears to be one of under-determination only because of his restrictive view of the reasons that apply to role-occupants. Hence, nothing of what has been said presupposes a view about actual cases of under-determination by reason as discussed in the relevant literature, which are not practice- or role-bound, ie a view as to what explains cases of under-determination and how to conceive of their resolution. For an overview of different accounts, see Gert (n 54).

undermine reasons and that role-occupants are subject to role-based reasons only.⁶⁸

Profitable Friendship. (A different) Alan is offered money for selling salacious gossip about his famous friend Brad to the popular press.

Duff argues that: ‘if [Alan] see[s] this as a reason to sell the gossip [he has] already gone wrong (and betrayed [his] friendship), even if [he] then recognize[s] that the reasons against selling the gossip are much stronger than the reasons for doing so’.⁶⁹ Duff elaborates by claiming that, given the relationship in which Alan and Brad stand—and thereby the role of friends they occupy vis-à-vis each other—the prospect of making money gives Alan *no* reason to accede to the offer.⁷⁰ The nature of Alan’s role undermines competing considerations, rather than simply outweighing or excluding them.

Duff’s argument seems to be the following. Making money is, all other things equal, a good thing, and it is a good thing *for* Alan as well. Selling salacious gossip to the popular press about his friend Brad is a *means* to the valuable end of making money. Thus, as was seen at the beginning of the chapter, we might think that Alan has at least some reason to sell salacious gossip to the popular press

⁶⁸ The notion explored in the preceding paragraphs of “reasons running out” might be a more general feature of views that posit some form of autonomy of the political domain (see, with regards to Rawlsian political liberalism, David Reidy, ‘Rawls’s Wide View of Public Reason: Not Wide Enough’ 6 *Res Publica* 49). This incompleteness, in turn, threatens to undermine the very possibility of said autonomy due to the need to appeal to reasons outside the domain of politics to justify actions within it—a thought which will be addressed further in section V below.

⁶⁹ Duff, *Realm* (n 6) 99.

⁷⁰ *Ibid.* Notice that the passage quoted from Duff reads better as a claim about the *attitude* that Alan ought to have with respect to some reasons than one about what reasons Alan actually *has*. Below I argue that this subjective interpretation is the correct one in *Profitable Friendship*. This ambiguity is explicit in McDowell, who advances a similar notion. The virtuous person, says McDowell, sees ‘the relevant [ethical] reasons for acting, on occasions when they co-exist with considerations that on their own would be reasons for acting otherwise, as, not overriding, but silencing those other considerations—as bringing it about that, in the circumstances, *they are not reasons at all.*’ (John McDowell, ‘The Role of *Eudaimonia* in Aristotle’s Ethics’ in John McDowell (ed), *Mind, Value, and Reality* (HUP 1998) 17).

about his friend Brad.⁷¹ And we might also think that this reason is nonetheless defeated by stronger reasons against selling said gossip—entailed, say, by the value of their friendship—such that Alan ought not to do so all-things-considered. What this reasoning gets wrong, on Duff's view, is that it fails to appreciate that Alan's role renders the means *objectionable*—it is normally wrong to spread gossip about a friend—which entails that the valuable end of making money gives him *no* reason to employ the means. Duff further contends that simply by taking himself to have a reason to that effect, Alan has already wronged Brad.

Let us accept Duff's claim that already in seeing the prospect of financial gain as a reason, Alan has wronged Brad. Still, there are two problems with Duff's argument. The first has to do with his characterisation of the moral situation at hand. If it were in fact the case that Alan had no reason to sell gossip about Brad, his seeing it as a reason would reveal some sort of rational or cognitive shortcoming.⁷² However, the notion of betraying a friendship suggests something more substantive than this. We might say that Alan, confronted with a choice between Brad's welfare and achieving some good for himself whose achievement is, in the current circumstances, detrimental to Brad's welfare, should opt for the former without a second thought. And further, Alan should not regret in the slightest that he had to relinquish a good for the sake of his friend. Both giving consideration to the opportunity to make money at the expense of Brad's welfare and lamenting not doing so would show that Alan mis-values his friendship with Brad.⁷³ Alan's wrong, his betrayal, consists in not having the appropriate

⁷¹ See text to nn 18, 77.

⁷² But see n 54.

⁷³ Here, I am drawing from Jeffrey Seidman, "Two Sides of "Silencing"" (2005) 55 *The Philosophical Quarterly* 68, 74.

dispositions, attitudes or motivational patterns that are inherent in a friendship. In the terms of this chapter, Alan's role gives him reasons—that might add up to a duty—to have a subjective disposition such that he will not *treat* financial gain as a reason to betray Brad's trust.⁷⁴ He will not assign it any weight in his deliberations and, *a fortiori*, will not be motivated by it. Alan breaches this duty by merely contemplating the possibility of selling gossip about his friend. That is what Duff's description of the situation, if not the claim he wants to substantiate on its basis, correctly identifies. Notice that even if there is no such duty, pondering the prospect of financial gain as a reason to harm Brad nonetheless displays a form of vice of character on Alan's part, which acquires a special significance in the context of a friendship. This is an additional reason *against* considering, and further, selling the gossip, which may affect our intuitions about the presence of reasons in favour of doing so. The key point is this: the truth of these claims is not only compatible with Alan having some reason to sell salacious gossip about a friend but actually *presupposes* him having such a reason. Alan displays the required traits of character and thus his worth as a friend only by refraining from being motivated by a consideration that is a genuine reason for action. We might also say that the value that the money has *for* Alan—and therefore the strength of the reason to acquire it—pales in comparison to the value that the relation and Brad's welfare has for him, which can further explain the (incorrect) intuition that Alan has no reason to sell the gossip.⁷⁵

⁷⁴ Borrowing for Scanlon, the good friend 'well before the stage at which [she] decide[s] what to do' sees '*reason to exclude* some considerations from the realm of relevant reasons (under certain conditions)' (Scanlon (n 59) 156-57). In the next section I develop an account of roles that emphasises precisely the notion of *exclusion* against that of undermining and argue that in either case there must be a *reason* (to exclude or to undermine).

⁷⁵ Seidman (n 73) 74.

Say Alan needs money for some very important cause and selling gossip about Brad is the only way available to him to obtain money. It is hard to believe that this is something Alan has no reason to do. So, raising the stakes again bolsters the claim that his role as friend does not undermine his reasons to act against Brad's interests. It only alters their weight or displaces them to a secondary role in his practical reasoning. Notice that Alan, even if justified in selling gossip, would still wrong Brad by doing so in such circumstances—and thus would be required to make amends, apologise and/or offer Brad an explanation. Crucially, he can avail himself of reasons to justify his behaviour. The fact that friendship needs to be compatible with other ends implies that it would be implausible to claim that it is always wrong, much less that there is *no* reason, to knowingly do anything that will negatively affect one's friends.⁷⁶

The second problem with Duff's account can be seen by putting his argument in formal terms:

1. λ is valuable;
2. ϕ ing is a means to λ ;
3. ϕ ing is wrong;

Therefore,

4. λ is no reason for ϕ ing;

And, additionally,

5. Seeing λ as a reason for ϕ ing is wrong.

We already said that (5) may be true, or at any rate it is in Profitable Friendship. The trouble with the argument is in its conclusion (4), which clearly does not follow from the first three premises.

⁷⁶ See Scanlon (n 59) 54.

The reason we have to achieve an end generates what are sometimes called “instrumental reasons”, ie reasons for taking the steps, or adopting the means, to facilitate the achievement of the end.⁷⁷ Often, however, there will be reasons against taking a particular step or adopting a means. Sometimes, reasons against will outweigh the instrumental reasons in favour of the means or will be such as to ground a duty not to adopt the means. Duff’s argument implies that, whenever this is the case, reasons in favour of the means are undermined—they disappear. Implausibly, this amounts to denying that there are ever outweighed or excluded reasons or, at any rate, that there can be no reasons in favour of perpetrating a wrong.⁷⁸ Now imagine Brad is a three–times Academy Award winner. As a way to thank Alan for his life–long support and friendship, Brad gives him one of his statuettes, as a gift. Alan knows that he could sell the trophy and get enough money to pay for a nice weekend in a ski resort. Surely Alan’s reasons to sell the trophy are simply outweighed, not undermined, even if selling the trophy would be wrong or, at any rate, objectionable. Notice further that selling salacious gossip is not a wrong that is specific to friendship—it is typically wrong even if the victim is a relative stranger (although it may be *worse* if committed against a friend and its *wrongfulness* may be partly based on different—additional—considerations specific to friendship).⁷⁹ If the victim were indeed a stranger, it would be odd to claim that, given its wrongfulness, Alan had *no* reason to sell the gossip. It is hard to see why the extra features that accrue to the wrong in the context of a friendship

⁷⁷ This is a very rough characterisation of what is called the “Facilitative Principle” (Joseph Raz, ‘The Myth of Instrumental Rationality’ in Joseph Raz (ed), *From Normativity to Responsibility* (OUP 2011) or the “General Transmission Principle” (Niko Kolodny, ‘Instrumental Reasons’ in Daniel Star (ed), *The Oxford Handbook of Reasons and Normativity* (OUP 2018)).

⁷⁸ For a related thought, see Kolodny (n 77) 758. Perhaps Duff’s suggestion is that, by acting against role–based reasons in this way, one ceases to occupy the role. I address this in the next section.

⁷⁹ Gardner, ‘Criminals’ (n 8) 106–108; See also, David Owens, *Shaping the Normative Landscape* (OUP 2012) 30–31.

should imply otherwise. Lastly, consider these two scenarios: (i) Laszlo murders his wealthy grandfather, to which he is his only heir, in order to go on vacation with the inheritance money; (ii) Laszlo murders his wealthy grandfather, to which he is his only heir, to buy medicine for a very debilitating condition with the inheritance money. Let us assume that Laszlo commits a wrong in both scenarios. Duff's view suggests, implausibly, that there is no moral distinction among the two scenarios, given that in neither of them Laszlo had *any* reason in favour—however weak—to kill his grandfather.

1. Institutional *v* Individual Agency

Defenders of the Reason–Undermining view might claim that I have mischaracterised their view by failing to attend to the distinction mentioned at the beginning of the section between *institutional* and *individual* agency. Here is why these defenders may say that the distinction is relevant. Stepping into an institutional role does not make the reasons role–occupants have as human beings disappear—yet, these role-independent reasons are reasons for exercising one's individual agency only. An agent can find herself within overlapping and conflicting reason–giving contexts simultaneously, where the reasons for performing an action qua individual may potentially outweigh the reasons to exercise her institutional agency. In that case, she should exercise her individual agency, and thus not conform to her role–based reasons. Role–based reasons exhaustively determine what role–occupants ought to do in their capacity as such, but not what they ought to do all–things–considered.

It is difficult to know what to make of this suggestion, for it is not clear what the distinction actually amounts to. One possibility is that, while role–based reasons do not exhaustively determine what role-occupants ought to do all–things–considered, they do settle what *counts as* exercising their institutional

agency: a role-occupant acts qua role-occupant so long as she pursues the goals of the practice, ie conforms to her role-based reasons.⁸⁰ But this cannot be right. If this were the case, there would be nothing distinctive about the Reasons–Undermining view: in High Stakes Pond, Alan would have no reason to save the drowning children qua officer at Singer Gates, but he would have a reason to—and ought to—save the children as a human. Similarly, lawmakers qua public officials would have no reason to allocate criminal law’s powers and permissions to private persons, but they would—and sometimes ought to—as humans. More importantly, as Gardner explains, role–occupants do not cease to occupy their roles by failing to conform to their role-based reasons. If they did, role-occupants who breached their role–based obligations would stop being role-occupants. It would then be impossible for them to fail to conform to their role–based obligations. Hence, there must be some ‘non-moral criteria’ for someone to count as a role–occupant.⁸¹ One such criterion is the possession of the powers and/or permissions that allow them, inter alia, to administer the means that belong to the practice.

Alternatively, the point might be that when it comes not to *whether* to exercise their institutional agency, but to *how* to do so, role–occupants’ reasons qua human being are no reasons at all in this respect—they are undermined. This would imply, as some suggest, that Alan has no reason to use the means of the institution to save the drowning children.⁸² This is unconvincing. Imagine that Alan is only able to easily save the drowning children in High Stakes Pond because

⁸⁰ Seumas Miller, *The Moral Foundations of Social Institutions* (CUP 2009) 52-54; Applbaum (n 8) 82-85; Cullity, ‘Undermining’ (n 45) 17.

⁸¹ John Gardner, *Law as a Leap of Faith* (OUP 2012) 209; Gardner, ‘Criminals’ (n 8) 104-105.

⁸² Cullity, ‘Undermining’ (n 45) 23; Cullity, ‘Weighing’ (n 45) 439; Duff, *Realm* (n 6) 86-87.

he is carrying an inflatable raft provided by Singer Gates for performing some of his role-based tasks. If so, it is partly *because* Alan has the raft that he has decisive reason to save the drowning children—the fact that Alan is capable of making the easy rescue entails that he has reason, and in this case is required, to do so.

Still, a defender of Reasons–Undermining might argue that all of the above only shows that institutional role-occupants should, on occasions, approach their roles instrumentally, using their role and the means it makes available to pursue ends other than the institution’s. Role-occupants ought, when their role-obligations conflict with stronger all-things-considered moral requirements, conform to the latter and “usurp” the institution’s agency (or, alternatively, “pretend” to be exercising their institutional role). As Cullity puts it, ‘those would be cases of justified theft: theft of another’s agency’.⁸³ Relational statist could then say that whenever lawmakers are permitted, all-things-considered, to allocate criminal law’s powers and permissions to private persons they are acting wrongfully (ie against their role-based reasons)—as usurpers or impostors—albeit with justification given by their stronger role-independent reasons. I return to this point at the end of section B below. For now, notice that this response concedes that role-based reasons are *not* all the reasons that apply to role-occupants in their capacity as such. Persons do not step *out* of their normative situation as human beings to step *into* some role and become clean slates to be populated exhaustively by the reasons that derive from the practice’s goals and values. Lawmakers may have decisive reasons to allocate criminal law’s powers and permissions to private agents notwithstanding their role as fiduciaries of a practice the defining value of which gives them no such reason. It follows that, in its current form, premise (A)

⁸³ Cullity, ‘Undermining’ (n 45) 33 fn 51. On the notion of “pretence” in the previous sentence, see Duff, *Realm* (n 6) 62-63, 249-50.

cannot be true, at least not on the basis of the discontinuity view as developed via the Reasons-Undermining account of role-morality.

In the next section, I outline a different account of role-morality and develop its implications for the statist views that we have considered in this chapter.

B. Roles as Division of Labour: Reasons-Excluding

A better way to think about roles is as moral devices that enable a valuable division of labour. The fact that some consideration does not derive from the values that define a practice does not deprive this consideration of its status as a reason. Role-occupants bring into their roles all the reasons that would otherwise apply to them. However, justified roles give their occupants reasons to exclude and not comply with some reasons, so as to give priority to the purposes they are tasked with pursuing. As Raz explains, within a well-coordinated system of roles, conformity with role reasons is the way in which role-occupants best contribute to conformity to the reasons that apply to everyone irrespective of their roles.⁸⁴

Indeed, many practices and institutions instantiate or specialise in the pursuit of goods that are constituents of a worthwhile life. In virtue of occupying roles within these practices and institutions, persons gain moral reasons to conform to the norms and fulfil the tasks that define their roles. True, one upshot of rejecting Reasons-Undermining is that the reasons role-occupants gain must now compete with the moral reasons that apply to them irrespective of the role.⁸⁵ Still, the achievement of the goods these practices and institutions instantiate or pursue presupposes that role-based reasons must, ordinarily, defeat competing

⁸⁴ Raz, *Practical Reasons* (n 18) 196. Similarly Held (n 44) 64-65; Luban (n 43) 121, 125-26; John Gardner, 'The Negligence Standard: Political Not Metaphysical' (2017) 80 *The Modern Law Review* 1, 1-2, 10-11. Thus, as I hinted at n 50, roles can help attenuate agent-regret.

⁸⁵ Edwards, 'Asymmetry' (n 2) 291.

role-independent reasons—which they might do either by outweighing or excluding them.⁸⁶ Requiring role-occupants to engage in comprehensive first-order moral reasoning for every decision would undermine the practice's ability to coordinate behaviour and achieve its ends. As Wasserstrom puts it, 'roles provide a degree of moral simplification that makes it much easier to determine what one ought to do or what is right for one to do'.⁸⁷ But this is so because attending equally to all reasons would be counterproductive in terms of conformity to these *same reasons*.⁸⁸ As Profitable Examination and Profitable Friendship suggest, the academic practice of university education and the relationship of friendship presuppose that some reasons related to the prospect of financial gain have to be either excluded from consideration by role-occupants or have their strength reduced relative to the role-based reasons that are central to these practices. We might also think that it would be impossible for a charity, like the one in Pond, to alleviate some particular form of suffering if its officers had reasons of equal strength to attend to every other instance of comparable suffering that they might encounter while fulfilling their roles. Still, as those examples showed, role-based reasons do not exhaust the morality that is applicable to role-occupants: role-independent reasons not only help determine whether they ought to exercise their institutional agency in a case where such exercise is called for, but also help determine how role-occupants ought to exercise this agency and whether it ought to be put to the service of goods that do not pertain to the practice or institution of which they are part. Roles will not always save role-occupants

⁸⁶ Adams (n 50) 246-48.

⁸⁷ Richard Wasserstrom, 'Roles and Morality' in David Luban (ed), *The Good Lawyer* (Rowman & Allanheld 1984) 29. Similarly, Held (n 44) 64-65.

⁸⁸ Alan Goldman, *The Moral Foundations of Professional Ethics* (Rowman and Littlefield 1980) 22-24; Garrath Williams, 'Infrastructures of Responsibility: the Moral Tasks of Institutions' (2006) 23 *Journal of Applied Philosophy* 207.

from facing conflicting moral demands and release them from the need to engage in all-things-considered moral reasoning. Role-occupants cannot always escape blame simply by rigorously conforming to their role-based reasons (as the Reasons-Undermining view appears to allow).⁸⁹ Sometimes, the description that best fits a person is not that of a role-occupant, but instead that of capable bystanders with respect to the promotion of some important good or the avoidance of a loss.⁹⁰ Lawmakers can be in this situation in relation to the allocation of criminal law's powers and permissions.

The above suggests that whether—and the extent to which—role-based reasons succeed in defeating competing role-independent reasons depends, in part, on the (strength of) the substantive justification of the practice to which the role belongs. It also rests, inter alia, on the importance of the role or the particular role-action or role-obligation within the context of the institution, and on the normatively salient features of the set of circumstances in which role-occupants find themselves.⁹¹ For instance, had Alan in Pond been an officer in a charity whose sole purpose was the achievement of a good of much lesser importance than the life of the drowning child, or had he been on his way to discharge an additional, non-life saving duty of his role, his role-based reasons would have been unable to defeat the conflicting role-independent reasons that applied to him.

⁸⁹ In this sense, Luban (n 43) 124, 139-140; Michael Davis, 'Thinking Like an Engineer: The Place of a Code of Ethics in the Practice of a Profession' (1991) 20 *Philosophy & Public Affairs* 150, 155; Brownlee (n 8) 136.

⁹⁰ This point has been illustrated in the literature by appealing to the case of two Community Support Officers who, in 2007, refused to attempt a rescue of a child drowning in a pond, and instead—following procedure—called for an ambulance that arrived too late (<http://news.bbc.co.uk/1/hi/england/manchester/7008077.stm>). The case is referenced in Brownlee (n 8) 127 and Edwards, 'Asymmetry' (n 2) 291-92.

⁹¹ Luban (n 43) xxii, 123, 131-35, 140. As Scanlon argues, 'the strength of a reason is an essentially comparative notion, understood only in relation to other particular reasons' (Thomas Scanlon, *Being Realistic About Reasons* (OUP 2014) 111. See also, Applbaum (n 8) 88-92; Goldman (n 88) 2-18, 22, 31-32; Daniel Markovits, *A Modern Legal Ethics* (Princeton UP 2010) 158-61.

The upshot for the Freedom as Independence and Civic Integrity views is as follows.

Both views contend that lawmakers are subject to role-based reasons alone, such that they only have reason to allocate criminal law's powers and permissions to public officials. However, on the view of role-morality just outlined, this cannot be because their reasons to do otherwise are undermined. Lawmakers remain subject to reasons that neither derive from, nor are entailed by, the relational values that—according to the Freedom as Independence and Civic Integrity views—define political communities. Therefore, these views have to argue that lawmaker's role-based reasons are such that they exclude or otherwise defeat *every* other conflicting moral reason. This is a tall order. It requires showing that lawmakers should conform to their role-based reasons alone *because* they have overriding—*role-independent*—moral reason to do so. This claim cannot but rest on the view that, *on the correct moral theory*, the value from which their political reasons derive—the value that the institution of which their role is part exists to achieve—has *systematic priority* over all other values. Only then are the reasons given by this relational value such that they systematically defeat all other conflicting reasons.⁹² Since they retain normative force, reasons not entailed by the relevant relational value can still be appealed to for the purpose of shaping actions justified by the reasons entailed by the relational value. However, whenever reasons given by the relational value tell *against* ϕ (where ϕ can be any action, but in this case refers to the allocation of criminal law's powers and permissions to private persons, which

⁹² To return to an example from above, we might read political liberalism in a similar way, ie as presupposing some moral value—say, autonomy or respect—that trumps reasons deriving from comprehensive conceptions of the good and thereby requires officials to conform only to reasons included in the political conception of justice (Dale Dorsey, 'Political Liberalism, Political Independence, and Moral Authority' in David Sobel, Peter Vallentyne and Steven Wall (eds), *Oxford Studies in Political Philosophy*, vol 1 (OUP 2015) 101ff).

the relevant relational value on the accounts under discussion will *necessarily* tell against), these reasons must be such that they always defeat reasons *for* ϕ .⁹³ Whether the argument succeeds depends on the soundness of a moral theory that features the abovementioned systematic priority. Thus, the accounts of political morality espoused by the Civic Integrity and Freedom as Independence views rest on *prior* commitments in ordinary morality.

As anticipated above, Reasons–Undermining leads to a similar conclusion. In sub-section 1 above we rejected the suggestion that the very concept of a role—or, at any rate, of the role of lawmaker—entails that role–occupants cease to be so merely by acting on reasons other than those that derive from the values that define the practice of which the role is part. Cullity’s suggestion there was weaker. It was that it is necessarily (at least) *pro tanto* wrongful to act for role–independent reasons when they conflict with role–based reasons. To countenance this claim, the Freedom as Independence and Civic Integrity views must offer an account of the justification of the content of the role. The Reasons–Undermining view gives the impression that a role (or stepping into one) is a non–reason fact or feature of a state of affairs that undermines other reasons. The suggestion now is that, *if* roles were to undermine reasons, this would be a feature of the role–based reasons that define the role.⁹⁴ It is some quality of these reasons that has the implication that it

⁹³ As Kahn explains, one may conceive of the Kantian position in both ways considered so far, namely, either as a (i) a system where there are only decisive reasons for action (ie only reasons of freedom as independence), or (ii) as a system that incorporates *one* intrinsically decisive reason (ie a ‘property which provides this reason is such that, whenever it is instantiated, it settles the matter of what there is overall reason to do, regardless of whatever other facts obtain’) together with any number of subordinate *contributory* reasons, the existence of which is consistent with the decisive reason and thus can help shape the rationality of action in accordance to it (Kahn (n 50) 20-22). Similarly, Garrath Williams, ‘Between Ethics and Right: Kantian Politics and Democratic Purposes’ (2012) 20 *European Journal of Philosophy* 479, 479.

⁹⁴ For this distinction, see Sean McKeever and Michael Ridge, *Principled Ethics* (OUP 2006) 123-24, 128.

is always pro tanto wrongful for occupants to act for role-independent reasons in ways incompatible with role-based reasons. However, as with the Reasons-Excluding view of roles developed above, whether this is the case cannot but be based on the all-things-considered moral strength of the justification of the role. This justification is what typically explains why anyone should occupy the role of lawmaker conceived in the terms the Civic Integrity and Freedom as Independence views do.⁹⁵ Since an agent who currently does not occupy a role cannot have role-based reasons to step into it, the reasons for doing so must be ordinary moral reasons. Institutions and the roles they create cannot bootstrap a justification for their existence and maintenance. It must be independently plausible that morality requires lawmakers to perform only those acts that contribute to the promotion or protection of ψ or, at any rate, that this is the case within the political realm—particularly in the domain of criminal justice and the allocation of criminal law’s powers and permissions. This is what, if Cullity is right, would make acting for role-independent reasons pro tanto wrongful (or *impermissible*, insofar as said claim is restricted to the practice—the political domain—of which the role is part). In short, even if one takes the Reasons-Undermining view, it is ordinary morality that grounds the role-specific requirements that bear on their occupants. Therefore, whether lawmakers ought to conform to their role-based “political” reasons alone would here again depend on whether the *correct moral theory* tells us that the values from which these reasons

⁹⁵ For a similar suggestion, see Jeffrey Brand-Ballard, *Limits of Legality* (OUP 2010) 97. See also, Mike Martin, ‘Professional and Ordinary Morality: A Reply to Freedman’ (1981) 91 *Ethics* 631, 633; Benjamin Freedman, ‘A Meta-Ethics for Professional Morality’ (1978) 89 *Ethics* 1, 11-12. I set aside that one may have decisive reason to occupy an *unjustified* role.

derive have systematic priority in,⁹⁶ or are the only ones applicable to, the political realm.⁹⁷

V. Civic Integrity and Freedom as Independence as Applied Moral Theories

The purpose of this section is (i) to elaborate on the ordinary moral claims on which the Civic Integrity and Freedom as Independence views rest, and (ii) argue that said claims are *not* morally plausible. The upshot is that the Role-based defence of the standard allocation should be rejected.

A. Self-Government, Not Civic Integrity

A central aspect of the Civic Integrity view as developed by Duff is that political communities may structure themselves on the basis of *any* set of values and aims.⁹⁸ As Duff explains, 'a crucial task for those engaged in the civic enterprise is to work out, through a robust public deliberation, the nature of that enterprise, and what belongs to it'.⁹⁹ As we saw, the role-based or political reasons to which alone lawmakers should conform on this view are those concerned exclusively with the advancement of these values and aims.

⁹⁶ In Chapter 2, I rejected a similar claim of systematic priority between criminal law's functions. Yet, here the claim is made in the context of morality, or political morality, more broadly. Many deny the plausibility of this kind of priority (eg James Griffin, *Well-being* (OUP 1989) 83; John Broome, *Weighing Lives* (OUP 2004) 24-25). Yet, besides the statist views being considered here, it has some defenders (eg Dale Dorsey, 'Headaches, Lives and Value' (2009) 21 *Utilitas* 36).

⁹⁷ In a similar sense, Dorsey, 'Political Liberalism' (n 92) 101-106. See also, Michael Stocker, 'Moral Duties, Institutions, and Natural Facts' (1970) 54 *The Monist* 602; A. John Simmons, 'External Justifications and Institutional Roles' (1996) 93 *The Journal of Philosophy* 28.

⁹⁸ Some commentators have recently endorsed this reading of Duff's views (see Kimberley Brownlee, 'Professional Ethics and Criminal Law' (2019) 7 *Law, Ethics and Philosophy* 173, 187; Patrick Tomlin, 'Duffing Up the Criminal Law?' (2020) 14 *Criminal Law and Philosophy* 319). I will address some of its implications presently.

⁹⁹ Duff, 'Relational' (n 7) 201.

We may think of the political reasons to which lawmakers are subject as instrumental reasons: the reasons lawmakers have to allocate criminal law's powers and permissions to an agent are parasitic on the reasons they have to achieve the aims to which these powers and permissions are an efficacious means. We saw that reasons to achieve ends transmit to the means that serve those ends.¹⁰⁰ If the argument of the previous section is correct, whether the collective ends of the political community are mandatory for public officials (such that they are required to take these ends—and *only these ends*—into account) necessarily depends on *further* reasons. Any such reasons lie beyond the scope of political morality and take us to the domain of all-things-considered moral justification. Think of repugnant goals. These goals cannot be reason-giving for officials (or anyone) regardless of whether they have been collectively embraced by the community because no-one has reason to adopt such goals in the first place.¹⁰¹ We have no reason to take up the means to advance these goals. Proponents of the Civic Integrity view would reply that their claim is that the political reasons to which public officials are exclusively subject derive from worthwhile ends only. Still, these ends—valuable as they may be—come to be part of the political community's common enterprise in virtue of the choice of their members. These choices entail, *inter alia*, that some will incur obligations to answer through the criminal law with its attendant costs, and that public officials will have no sufficient reason to pursue some other very valuable goals, which they might be well-placed to achieve. Hence, choices about what belongs and does not belong to the political community's common enterprise stand in need of justification, which

¹⁰⁰ See text to n 77.

¹⁰¹ Jonathan Leader Maynard and Alex Worsnip, 'Is There a Distinctively Political Normativity?' (2018) 128 *Ethics* 756, 780.

again takes us beyond the supposedly independent domain of political normativity. If so, the reasons lawmakers have to allocate criminal law's powers and permissions will be moral reasons parasitic on the reasons they have to adopt the ends.¹⁰²

What are these further reasons? The Civic Integrity view provides no explicit answer. This is the gap to which we alerted to in section III.A above.¹⁰³ We saw in Chapter 2 that according to the Civic Integrity view political communities are analogous to other communities or relationships of intrinsic value in that, *inter alia*, their members incur associative obligations of integrity to respond to the wrongs that violate the defining values of the community. Assuming this is true, there is still an important difference between them. The common practice that defines groups of intrinsic value normally identifies them as an instance of some *type*, ie as a sports team, church, university, etc. Sports teams constitute themselves for the performance of a sport, while churches do it for the profession of a faith and universities for the production and dissemination of knowledge. Given their specific nature, some values and aims are understood as inherent in the collective endeavour that identifies the aforementioned groups as instances of their type. The intrinsic value is instantiated in the pursuit of the endeavour than defines the group. Then, members' obligations of integrity advance, and are ultimately justified in, the intrinsic value of the group (this is, we saw, the standard view of the justification of associative obligations). Hence, the value of integrity has to be

¹⁰² Ibid 779. This should not be very controversial. The aims we adopt can occupy different places in our lives: they may be temporary pastimes, central life-long commitments, or something in between. As Scanlon explains, the different roles that aims play in our life will imply different reason-giving force in relation to other concerns. Thus, the reasons we give for adopting and assigning aims a particular place in our life need to be sufficient to justify the priority they thereby acquire (Scanlon, *What We Owe* (n 59) 53).

¹⁰³ Text following n 41.

seen as dependent on, or a constituent of, the more basic intrinsic value of the group itself. The achievement of such value can then explain why is it that those charged with administering the means and mechanisms of these groups ought to use them solely to give effect to members' associative obligations justified in the above way.

The same is not obviously true of political communities for, as Duff maintains—in principle—they could structure themselves based on any set of values and aims. It then appears as if citizens' associative obligations are grounded simply in the fact that they have chosen certain values and aims. This suggests, implausibly, that the common practice that defines the political community—the locus of the intrinsic value of political membership—is the pursuit of civic integrity *itself* (ie the goal of staying true to the values with which the community has chosen to identify). Unlike other groups that give members associative obligations, we do not have an account of the value of the type of political community on which Duff's view rests (and to which associative obligations of integrity ultimately contribute).¹⁰⁴ This is important because, as Horton explains,

[B]ecause polities (...) have a certain kind of generic value (...) our political obligations can be expected to focus particularly on the conditions of this good and the specific forms—beliefs, practices and institutions—through which it is realised.¹⁰⁵

¹⁰⁴ Duff often remarks that the value of the relationship of political community is *internal* to it, yet there is no indication as to the character of such value (see Sandra Marshall and R.A. Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 21; Duff, 'Towards a Theory' (n 39) 5; R.A. Duff, 'Responsibility, Citizenship and Criminal Law' in R.A. Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 135). Other writers do provide more or less explicit accounts of this value, see eg John Horton, 'In Defence of Associative Political Obligations: Part Two' (2007) 55 *Political Studies* 1; Samuel Scheffler, 'Membership and Political Obligation' (2018) 26 *Journal of Political Philosophy* 3.

¹⁰⁵ Horton (n 104) 14.

Without such an account, we cannot know whether (i) citizens incur associative obligations to respond to wrongs against the community's self-defining values nor (ii) whether lawmakers have reason to allocate criminal law's powers and permissions *solely* to enable the discharge of these obligations. Given that according to Duff one 'crucial task' of members is to deliberate and choose the values and aims that will define their common practice, one possible account appeals to the very value of having members choose in this way.

Many think that by embracing some aim, we acquire some *further* distinctive reasons (ie reasons beyond those that the value of the aim gives to everyone else) not only to care about the promotion of the aim but also to care *more* about the promotion of our aim than that of other equally or more valuable aims that we have not similarly embraced. Crucially, we also acquire distinctive reasons to advance the promotion of the end *ourselves*. As Duff suggests in his work, one way to do this is to respond to wrongs that set back these aims. These further reasons derive from the value that the very act of choosing and pursuing the aim we have chosen has for us, which it does not have for those who have not similarly embraced the aim in question.¹⁰⁶ As Raz explains, '[i]n embracing goals and commitments, in coming to care about one thing and another (...) [o]ne creates values, generates (...) reasons which transcend the reasons one had for undertaking one's commitments and pursuits.¹⁰⁷ The same may be true of collectives like a political community and we may think, following Bennett, that

¹⁰⁶ Niko Kolodny, 'Which Relationships Justify Partiality? General Considerations and Problem Cases' in Brian Feltham and John Cottingham (eds), *Partiality and Impartiality* (OUP 2010) 179 (references omitted); Niko Kolodny, 'Aims as Reasons' in R. Jay Wallace, Rahul Kumar and Samuel Freeman (eds), *Reasons and Recognition* (OUP 2011) 64-69. These distinctive reasons are personal in respect of conformity, ie reasons to which only the agent that has adopted the particular aim can conform.

¹⁰⁷ Joseph Raz, *The Morality of Freedom* (Clarendon 1986) 387; see also Joseph Raz, *Engaging Reason* (OUP 1999) 63-64.

in their case the value is that of group autonomy or *collective self-government*.¹⁰⁸ Self-Government can then be seen as the value to which the discharge of obligations of civic integrity contributes and on which they are justified.

Put in terms of the previous paragraph, what the Civic Integrity view must be taken to claim in defence of its answer to the allocative question is that reasons of self-government are not just added on top of the reasons that the community has for caring about the promotion of every valuable end. Instead, these reasons are exclusively constitutive of the polity's common practice. As a result, lawmakers should conform *only* to reasons of self-government (or, more precisely, to the reasons *enabled by* the value of self-government). Lawmakers have reason to allocate criminal law's powers and permissions only to public officials because it is only in this way that the political community conforms to the reasons it has for advancing, by *itself*, the values—and only the values—that it has embraced.¹⁰⁹ Let us refer to this view as the *Self-Government* view.¹¹⁰ As anticipated in section IV.B,

¹⁰⁸ Bennett argues that what makes a political community an intrinsically valuable relationship, and the common practice that defines it, is simply that of being a self-governing association (Bennett (n 13) 158-60).

¹⁰⁹ There is good textual support in Duff's work for this line of thought. Duff emphasises the irreducibly relational nature, and therefore rejects an ultimately impersonal justification, of duties to call to account and answer through the criminal law (Duff, 'Relational' (n 7)). With Marshall, Duff claims that these duties are grounded in the value that citizens find *within* their relationships with each other (Marshall and Duff (n 104) 21; Duff, 'Responsibility' (n 104) 134-5). Similarly, Duff says that criminal law is the law of citizens qua citizens and is thus 'concerned with the implications for *this polity* of the values that it expresses, and with the conduct of *its* citizens in relation to those values' (Duff, 'Towards a Theory' (n 39) 6).

¹¹⁰ Duff has rejected a somewhat cognate characterisation of his view in R.A. Duff, 'In Response' in Rowan Cruft, Matthew Kramer and Mark Reiff (eds), *Crime, Punishment, and Responsibility* (OUP 2011) 354. However, I think it is the only, or at any rate, most plausible way to make sense of his answer to the allocative question. Moreover, it sits well with several of his remarks, eg Duff, 'Towards a Theory' (n 39) 6-7: 'It is their law (...) not a set of commands imposed on them from the outside, but a law that expresses the values by which they define themselves as a polity; not a law issued by a sovereign demanding their obedience, but a law that speaks in their own collective voice, in terms of values that are their own. (...) citizens can see themselves (...) as authors of their law' (similarly, Duff, *Answering* (n 39) 50; R.A. Duff, 'Perversions and Subversions of Criminal Law' in R.A. Duff and others (eds), *The Boundaries of Criminal Law* (OUP 2010) 91; Duff, *Realm* (n 6) 118, 120, 208; 195: 'if the law, and in particular the criminal law, is our law, it should be a law that we play an active part in sustaining and enacting (not merely a law that we obey as subjects); (...) if

the Self-Government view is that we can properly appreciate the moral significance of the common practice of a political community by viewing it as an intrinsically valuable relationship of self-government which, crucially, requires treating the value of self-government as having lexical priority over other values. Otherwise, the view's claims about the reasons lawmakers have to allocate criminal law's powers and permissions would not hold.¹¹¹ As suggested, this is a matter of ordinary substantive moral reasoning, to which I turn in the next subsection.

As promised, let us formalise this view.

1. The intrinsic value of a political community is given by its nature as a relationship of self-government (gap-filling premise);
2. Criminal law's powers and permissions can constitutively contribute to the realisation of the relational value of self-government;
3. The relational value of self-government has systematic priority over all other values (gap-filling premise);
4. Lawmakers are fiduciaries of their political communities; *therefore*,
5. Lawmakers have *sufficient* reason to allocate criminal law's powers and permissions to an agent *iff* that agent can realise the value of collective self-government by exercising said powers and permissions;
6. It is permissible for lawmakers to allocate criminal law's powers and permissions to an agent *only if* lawmakers have sufficient reason to allocate criminal law's powers and permissions; *therefore*,
7. It is permissible for lawmakers to allocate criminal law's powers and permissions to an agent *only if* that agent can realise the value of collective self-government by exercising said powers and permissions;
8. Only public officials can realise the value of collective self-government by exercising said powers and permissions; *therefore*,
9. It is permissible for lawmakers to allocate criminal law's powers and permissions to public officials *alone*.

Before evaluating the Self-Government view, recall that in Chapter 2 we briefly examined the claim that wrongdoers deserved to be called to account by

we are to govern ourselves, then we must be active in that enterprise of governance'). See also references n 109.

¹¹¹ As has been said, Duff suggests that there is a single value that criminal law exists to achieve (eg Duff, *Realm* (n 6) 98, 166), so other values give lawmakers *no* reason to use the criminal law.

those whose business the wrong is, and that crimes are only the business of the political community as a whole. We saw this claim failed because crimes, being moral wrongs, are the business of agents other than the wrongdoers' political community. Duff's response, that 'our concern here is not with the moral wrongs of moral agents, but with the criminal wrongs committed by citizens of a polity' was also found wanting. The Roles-based defence provides a different reading of this response: although criminal wrongdoers may be answerable for *doing* to agents other than the community's public officials, they are not answerable *through the criminal law* because lawmakers only have sufficient reason to give effect to the relation of answerability that exists between a citizen and their community. Only this "civic" desert, derived from the value of self-government, is reason-giving to these public officials.

1. Against Self-Government

It is hard to believe that self-government can have anything near to systematic priority over all other values. Already one limit to the fiduciary conception of the role of public officials has been acknowledged: fiduciary obligations cannot be absolute because repugnant goals have no normative force for public officials—even if freely adopted by the political community. Similarly, proponents of the Self-Government view must accept that the community's purposes and aims, worthwhile as they might be, cannot be conceived of or pursued in ways that entail the violation of important *negative* duties owed to others, be they members or non-members. To put it bluntly, associations are normally not permitted to murder, maim, rape, or steal to achieve their valuable purposes.¹¹² This applies to political communities as well. Duties of this kind, which individuals have simply in their

¹¹² Similarly, Allen Buchanan, 'The Internal Legitimacy of Humanitarian Intervention' (1999) 7 *Journal of Political Philosophy* 71, 78. Also, Simon Caney, *Justice Beyond Borders* (OUP 2006) 140.

capacity as human beings, are not defeated by the value of self-government. The reason for this is simply that these duties are grounded in fundamental interests that human beings have as such, which are not normally overridable. Thus, self-government cannot be the trump-all value that the Self-Government view presupposes.

Notice also that the Self-Government view may countenance a conception of the values and aims of the political community entirely centred in the political community's narrow self-interest, which thereby recognises no *positive* responsibilities of its members towards non-members, particularly those outside the territorial boundaries of the polity. On the Self-Government view, the state acts legitimately only when it concerns itself with the common good of the political community as defined through its civil order. Therefore, a state that undertakes actions of assistance in favour of non-members—if such actions cannot be supported by the correct interpretation of the community's civil order—violates its fiduciary role.¹¹³ As Duff contends, the state is not an instrument for the moral betterment of the world.¹¹⁴ Yet, Duff acknowledges that this narrowly self-interested view of political communities is unappealing.¹¹⁵ His response to this concern is that it is 'likely and plausible' that the polity should conceive of its civil order '*partly* in terms of what they owe to others' found both within and without the territorial boundaries of the polity.¹¹⁶ However, as seen above, what gets

¹¹³ In this sense, Buchanan (n 112) 75-76.

¹¹⁴ Duff, *Realm* (n 6) 91-93.

¹¹⁵ As it is to most, except perhaps for political realists in international relations (Julian Korab-Karpowicz, 'Political Realism in International Relations', *The Stanford Encyclopedia of Philosophy* (Summer edn, 2018) <<https://plato.stanford.edu/archives/sum2018/entries/realism-intl-relations/>> accessed 2 March 2020.

¹¹⁶ Duff, *Realm* (n 6) 156-57 (emphasis in original).

included in the civil order is ultimately a matter for citizens to freely decide.¹¹⁷ Thus, the Self-Government view supplies no grounds for objecting to a civil order conceived solely in narrowly self-interested terms. On this view, a political community can freely decide whether it owes *any* obligations towards non-members. (Notice that, were the community to choose to owe obligations, these would be—at the basic level—associative obligations owed to members themselves, not to non-members—which we may think involves some form of moral distortion).

However, if it is true that some interests constrain political communities in the form of negative obligations, it is hard to see why political communities and/or their agents will be subject to *no* positive obligations that serve to protect the same interests.¹¹⁸ It is not very plausible that whether there are such positive obligations towards non-members—and also their content and scope—depends on the pure choice or inclinations of the potential duty-holders.¹¹⁹ Which positives duties political communities and their fiduciaries have is not something that can be established by appealing to the value of self-government alone. To claim the opposite—to claim that the value of self-government has systematic priority over all other values—presupposes, as Anderson and Pildes put it, that we can ‘suddenly become exempt from fundamental moral demands simply by acting together on shared goals, rather than independently on personal goals’.¹²⁰ But this

¹¹⁷ Which is consistent with the context of the passage cited in the previous sentence.

¹¹⁸ Buchanan (n 112) 80-81. In the same sense, Caney (n 112) 140.

¹¹⁹ Caney (n 112) 132.

¹²⁰ Elizabeth Anderson and Richard Pildes, ‘Expressive Theories of Law: A General Restatement’ (2000) 148 *University of Pennsylvania Law Review* 1503, 1519. Anderson and Pildes reject this claim, adding that ‘there is no reason to think that, in acting together, we become subject to a fundamentally different *kind* of moral or rational demand than applies to us when we act

presupposition is problematic. Some of the obligations that individuals have may only be adequately discharged collectively. Consider wrongs or harms that no person is individually capable of preventing or alleviating. It follows from this fact that no single person is responsible for preventing these wrongs or harms. However, some such wrongs or harms *can* be prevented or alleviated by the combined efforts of many. While individuals may have no obligation to address these wrongs or harms, they still can have reasons to see to it that they are prevented or alleviated—reasons which may add up to an obligation to, as Hindriks puts it, ‘join forces’.¹²¹ When we have individual obligations that we can only discharge collectively, we have an obligation to adopt shared goals. It cannot be that by the mere fact of acting collectively we can avoid this responsibility— if that were the case it would entitle us to simply circumvent individual obligations.

Sometimes, the most effective or only way in which individuals may conform to these reasons is through the action of the state, which is free from many of the limitations that may make it the case that individuals do not acquire obligations to directly prevent or mitigate some wrong or harm ϕ . If so, individuals may incur obligations related to the prevention or alleviation of ϕ simply in virtue of having a state capable of preventing or alleviating ϕ , obligations which they would not have had as individuals in a different context. Alternatively, we might say that individuals have fully formed pro tanto obligations to prevent or alleviate ϕ , which nonetheless they have reason to delegate to the state for them to be discharged more effectively on their behalf. Given the state’s capabilities these

independently’ (emphasis in original). For a similar thought, see Jeff McMahan, *Killing in War* (OUP 2009) 82.

¹²¹ Frank Hindriks, ‘The Duty to Join Forces: When Individuals Lack Control’ (2019) 102 *The Monist* 204.

obligations are 'magnified', ie become broader and more stringent.¹²² The Self-Government view allows individuals to leave these obligations behind in virtue of becoming members of a political community which, as suggested, can be one particularly effective way of acting together. Therefore, proponents of the Self-Government view seem to face a dilemma: they must claim either (i) that citizens, when acting on their own behalf (ie not through their fiduciaries), can give absolute priority to their interest over those of others—as their fiduciaries are supposed to do—and thus escape their obligations toward others or, (ii) accept that individuals have obligations towards others which are not overridden simply on the basis of self-interest and are thus not permitted to have the state act only on behalf of their collectively-defined good, as this would—again—allow them to eschew the obligations they have as individuals.¹²³

The above matters for our purposes because some people might be better protected from wrongs and/or harms described in the previous paragraph by a scheme of measures that includes the use of criminal law. A society may be such that some very serious and harmful wrongs that are widespread within it violate none of the society's self-defining values. This may be due, for example, to the power and influence that perpetrators of these wrongs have in the make-up of the society's civil order. However, it follows from the Self-Government view that there can be no reason to afford any kind of formal legal recognition—criminal or otherwise—to such a wrong. State action as a whole is limited by the content of

¹²² See Richard Vernon, 'Humanitarian Intervention and the Internal Legitimacy Problem' (2008) 4 *Journal of Global Ethics* 37, 40-41.

¹²³ Similarly, Thomas Pogge, 'The Bounds of Nationalism' (1997) 26 *Canadian Journal of Philosophy* 463, 474-75. This has been referred to as the "hired hands" problem, ie regarding the acts of representatives as permissible despite the fact that the acts of their principals are wrong (Appelbaum (n 8) 8).

the political community's civil order.¹²⁴ Thus, victims and potential victims of these wrongs are left hostage to the morally defective traits of said order—they are in a position in the political community akin to that which on this view non-members may find themselves in. These victims can object to a conception of the political community and the state one upshot of which is to deprive them of one important form of protection. Where it imposes such grave costs on members' ordinary or private lives, it is not plausible to claim that the criminal law we should have is a criminal law that only helps sustain citizens' political lives or their lives qua citizens. If we think that individuals have at least some duties to save others from serious harm, which they may only or most effectively discharge by acting together, the Self-Government view should strike us as very problematic.

Instead, the very fact that the aforementioned wrongs violate none of the community's self-defining values may be a reason—even a defeasibly sufficient one—to criminalise these wrongs.¹²⁵ These are reasons that lawmakers have, regardless of how we think about their role and relationship to the political communities on whose behalf they act. Nonetheless, we may still be able to conceive of these reasons as associative obligations. Societies such as those described in the previous paragraph, albeit seriously defective, can still be of intrinsic value to their members. As a result, members may incur associative

¹²⁴ Duff, *Realm* (n 6) 280-92. See also, Victor Tadros, 'Criminalization and Regulation' in R.A. Duff and others (eds), *The Boundaries of Criminal Law* (OUP 2010); Ambrose Lee, 'Public Wrongs and the Criminal Law' (2015) 9 *Criminal Law and Philosophy* 155. In the extreme, a Duffian political community may render some serious wrong ineligible for the law's attention by disassociating from a previously self-defining value, perhaps thanks to the influence of the powerful groups mentioned in the text (in this sense, James Edwards, 'No Offense' in Larry Alexander and Kimberly Kessler Ferzan (eds), *The Palgrave Handbook of Applied Ethics and the Criminal Law* (Palgrave Macmillan 2019) 506-508, 513-14).

¹²⁵ For similar claims, see Michelle Dempsey, *Prosecuting Domestic Violence* (OUP 2009) chs 8-9; Victor Tadros, *Wrongs and Crimes* (OUP 2016) 126-28. See also, John Tasioulas, 'Crimes of Offence' in Andrew Simester and Andreas von Hirsch (eds), *Incivilities* (Hart 2006) 156; Edwards, 'No Offense' (n 124).

obligations of *reform* which they can discharge by calling to account and answering through the criminal law.¹²⁶ Criminal law could be part of a scheme of measures intended to change public attitudes and the conventional morality endorsed by most members of a political community. As some have pointed out, criminalisation may play some part in the identification of neglected moral norms and in promoting their recognition among society, which it can do both by publicly declaring them and attaching stigma to their violation, together with motivating compliance by the threat of prosecution, punishment, and conviction. When successful, the community might internalise the previously neglected moral norm, allowing the threat of sanction to recede to the background relative to forms of social and self-censure upon law-breaking.¹²⁷

Finally consider the following. In Chapter 2, we saw that the Civic Integrity—now, Self-Government—view finds intuitive appeal in the analogy drawn by Duff and others between a political community and intrinsically valuable practices or relationships such as professions, clubs, and universities. On this view, criminal law is a resource that ‘belongs’ to political communities conceived as distinct practices, which is thereby legitimately used only to serve the practice’s internal good.¹²⁸ The analogy is unhelpful to the Self-Government view

¹²⁶ See Chapter 2, n 28, and Joseph Raz, ‘Identity and Social Bonds’ (2018) King's College London Law School Research Paper No 19-4 <<https://dx.doi.org/10.2139/ssrn.3270853>> accessed 8 February 2019, 15.

¹²⁷ Leslie Green, ‘Should Law Improve Morality?’ (2013) 7 *Criminal Law & Philosophy* 473, 483-86; Kimberley Brownlee and Richard Child, ‘Can the Law Help Us to Be Moral?’ (2018) 9 *Jurisprudence* 31, 33-34, 38-39.

¹²⁸ Duff, ‘Responsibility’ (n 104) 138. As Green puts it, ‘people create and maintain institutions for specific purposes (...). Requiring institutional agents to do a never-ending list of good deeds would make it impossible for them to perform their intended roles. Therefore, one might think, institutional agents cannot legitimately accept greater responsibilities than they are authorised to accept by their members’ (Michael Green, ‘Institutional Responsibility for Moral Problems’ in Andrew Kuper (ed), *Global Responsibilities: Who Must Deliver on Human Rights?* (Routledge 2005) 130-31).

for the following reason: the freedom associations have to define their common good, and to use their resources for its pursuit, is constrained by the impact this has on non-members. Some associations marshal resources to which non-members may have a legitimate claim on account of their basic needs. These claims may thus not only override the associative duties of members, but further determine which duties may be incurred by members in the first place.¹²⁹ This is true, for example, of political communities and their duty to protect non-members from certain forms of harm by admitting them within their jurisdiction, or of an all-male club being forced to admit women in order to make available some goods that the latter could not easily access elsewhere.¹³⁰ It seems, *a fortiori*, that the same is true in some cases of the members of the groups themselves with respect to interests that are not part of the group's collective good. Yet, as I have argued, on the Self-Government view victims' claim against public officials to hold their wrongdoers responsible (ie claims to benefit from the resource that criminal law is) have no—or no sufficient—weight *vis-à-vis* the polity's prerogative to dispose of its resources as it sees fit.¹³¹ Raz and Margalit make the point with regards to self-government:

¹²⁹ Claims about the limits to the associative freedoms of groups and practices parallel the well-known distributive objection to associative obligations: on the former, see Kimberley Brownlee, 'Freedom of Association' in Kasper Lippert-Rasmussen, Kimberley Brownlee and David Coady (eds), *A Companion to Applied Philosophy* (Wiley Blackwell 2016) 368; whereas on the latter, Samuel Scheffler, 'Families, Nations and Strangers' in Samuel Scheffler (ed), *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (OUP 2001) 56ff.

¹³⁰ In *Roberts v United States Jaycees* 468 US 609, 618 (1984) and in *Board of Directors of Rotary Int'l v Rotary Club of Duarte* 481 US 537 (1987), the United States Supreme Court upheld the application of anti-discrimination legislation to require two all-male clubs, the United States Junior Chamber (of Commerce) and the Rotary International, to admit women to membership.

¹³¹ On the distributive nature of decisions of criminalisation, specifically in terms of the allocation of social advantage and scarce resources, see Vincent Chiao, 'What is the Criminal Law For?' (2016) 35 *Law and Philosophy* 137, esp 148-52. Viewing criminalisation decisions through distributive lenses further underscores the oddity of giving more weight to the polity's claim to dispose of this resource for their autonomously conceived good than to the claims of victims, ie the worse-off.

The case for self-government is hedged by considerations of the interest of people other than members of the groups, *and by the other interests of members of the group, i.e. other than their interests as members of the group.*¹³²

More important however is that, as Brownlee and Jenkins underline, the scope and value of the freedom enjoyed by collective associations does not remain the same across different types of groups.¹³³ There is an important dis-analogy here between a political community and other groups or practices. The freedom that private groups and practices have to define their own good and allocate their resources for the common good of its members presupposes a political community which does not have the same latitude in its use of the state. As Raz points out, a system of social roles may instantiate a valuable form of division of labour and justify role-occupants conformity to their role-based reasons over other reasons that apply to them. But this justification depends on the system being 'well-coordinated *not to leave anyone unprotected*'.¹³⁴ For this to be so, the state must act as a form of backstop, seeing to it that no-one falls between the cracks left by other valuable relationships and groups.¹³⁵ However, the lexical primacy given to the value of self-government by the Self-Government view allows for injustice by members of the political community and precludes public officials from remedying it, even when this might come at little cost to other values. This fact—that is, that public officials *can* provide the needed protection and remedy the

¹³² Joseph Raz and Avishai Margalit, 'National Self-Determination' in Joseph Raz (ed), *Ethics in the Public Domain* (OUP 1995) 139.

¹³³ Kimberley Brownlee and David Jenkins, 'Freedom of Association', *The Stanford Encyclopedia of Philosophy* (Summer 2019 edn, 2019) <<https://plato.stanford.edu/archives/sum2019/entries/freedom-association/>> accessed 18 December 2019.

¹³⁴ Raz, *Practical Reasons* (n 18) 196.

¹³⁵ For a parallel point, see Andrea Sangiovanni, 'Global Justice, Reciprocity and the State' (2007) 35 *Philosophy and Public Affairs* 3, 12.

injustice—coupled with the fact the *no one else* can do the same (or at least not adequately) entails that these officials have a duty to do so.¹³⁶ It is implausible that moral mistakes committed by the community when choosing its self-defining values warrants the further wrong of—to take the case discussed above—leaving victims unprotected. We should not accept that the reasons the political community had at the time of self-definition cease to be reasons at the stage of law-making. More generally, we should reject both Duff's account of a political community as a distinctive practice and of the role of public officials as mere representatives of a practice so conceived.

In sum, premise (3)—and probably (1)—from the argument at the end of section V.A above are unsound. It follows that we should reject the Self-Government answer to the allocative question.

B. Freedom as Independence

We saw above that the Self-Government account gave us no grounds to support the discontinuity view, confirming the conclusions from our examination of role-morality. The account had to be read as making a substantive moral claim about the priority of the value of Self-Government. When understood in this way, the view is unappealing. The same is true of the Freedom as Independence view.

The Freedom as Independence view's argument for the discontinuity view and the distinctly political nature of criminal law's justification can be summarised as follows. According to Kantians, the autonomy of political morality is due to the

¹³⁶ In a way, 'can implies ought'. The idea resembles the notion advanced by Finnis of a 'duty to govern', whereby effectiveness at performing an important and necessary task is a defeasibly sufficient reason to have a duty to perform it (See John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 246-47 and discussion in Leslie Green, 'The Duty to Govern' (2007) 13 *Legal Theory* 165, esp 169-171).

normative significance of *coercion*.¹³⁷ On this view, coercive acts are those that limit or interfere with freedom, that is, actions which subject one person to the choice of another.¹³⁸ Kantians single out coercive acts as exhaustive of the political domain, subject to a distinct set of political norms.¹³⁹ These are norms of freedom—coercion is justified *solely* for the purpose of guaranteeing equal freedom itself.¹⁴⁰ Norms of freedom are the only norms to which lawmakers should appeal. As we saw, norms of freedom are, *by definition*, not grounded in more basic moral values or norms and coercion grounded in reasons other than freedom is contrary to freedom.

As to the criminal law, Kantians claim it is 'uniquely' or 'fundamentally' coercive, due to the powers and permissions it makes available. Criminal law's powers and permissions allow for the invasion of person's legally recognised private rights which, we saw, are constitutive of freedom for Kantians.¹⁴¹ This coercive nature distinguishes criminal law from all interactions that may take place between private persons which, Kantians claim, are never legitimately coercive.¹⁴² Therefore, the justification of the allocation of criminal law's powers and permissions cannot derive from the same norms that govern interactions between private persons but must instead be of a 'wholly unique' kind, ie

¹³⁷ And, by extension, the exercise of normative powers to impose coercively enforceable obligations: Ripstein, *Force* (n 7) 168-72; Cordelli (n 23) 119: 'If I could unilaterally change your normative situation—your obligations—(...) I would have title to coerce you into respecting my own rights, as subjectively determined through my own unilateral judgment (...) [and thus] violate your freedom'.

¹³⁸ Ripstein, 'Authority' (n 22) 8; Ripstein, *Force* (n 7) 54, 81.

¹³⁹ In this sense, Jonathan Turner, 'Political Theory as Moral Philosophy' (DPhil Thesis, University of Oxford 2018) 102.

¹⁴⁰ Ripstein, *Force* (n 7) 54-55, 81.

¹⁴¹ Thorburn, 'Constitutionalism' (n 6) 87, 96-97; Thorburn, 'Public Law' (n 24) 22-24, 27-29; Thorburn, 'Judgement' (n 29) 240, 243.

¹⁴² This claim is very doubtful, but we can leave it aside.

governed solely by norms of freedom.¹⁴³ The upshot, we are told, is that criminal law's powers and permissions are allocated to public officials on the basis of their status as such, that is, as the only agents capable of expressing an omnilateral will—not on grounds of the all-things-considered balance of reasons or their abilities relative to private persons.¹⁴⁴ Ultimately, then, the Kantian claim about the allocative question is that it cannot be answered by appealing to general morality because the norms that govern acts of coercion are normatively *basic*.

One way to understand the claims in the last paragraph is that the significant differences—reflected in the standard allocation—in what norms permit and empower agents to do cannot but be explained by the fact that these norms do not derive from the same normative system. However, as Maynard and Worsnip argue, appealing to differences in the *content* of norms does not suffice to substantiate said claim.¹⁴⁵ The specific normative capabilities possessed by criminal justice officials might be merely the outcome of the application of common general norms to the importantly different circumstances within which they are situated relative to private persons. In short, anyone in similar circumstances would justifiably benefit from the same powers and permissions.¹⁴⁶ Notice that to affirm that the principles that apply to the private and public

¹⁴³ Thorburn, 'Constitutionalism' (n 6) 87; Thorburn, 'Punishment' (n 34) 17.

¹⁴⁴ Thorburn, 'Constitutionalism' (n 6) 93; Thorburn, 'Equality' (n 7) 4-8; Thorburn, 'Proportionate' (n 29) 272. This is both a normative and a descriptive claim. In the latter sense, it purports to offer a better fit with criminal law than competing views (see, eg Thorburn, 'Constitutionalism' (n 6) 92-93). Chapter 4 challenges this claim. Below I address other issues concerning the fit of this view with criminal law.

¹⁴⁵ Maynard and Worsnip (n 101) 761-62, 777. Martin makes a cognate point in relation to professional moralities: 'Engrossment with the fact that professionals acquire special moral obligations can lead one to exaggerate the differences between ordinary and professional morality' (Mike Martin, 'Rights and the Meta-Ethics of Professional Morality' (1981) 91 *Ethics* 619, 623).

¹⁴⁶ For similar points about roles and the normative incidents attached to them, see Stocker (n 97) 607; Judith Andre, 'Role Morality as a Complex Instance of Ordinary Morality' (1991) 28 *American Philosophical Quarterly* 73; Dare (n 8) 710-11; and Gardner, 'Negligence' (n 84) 1-2.

domains derive from the same set of more basic norms is *not* to imply, as Nagel explains, that the principles that apply to the public domain *derive from* those that govern the private. The rejection of the discontinuity view does not entail that moral norms are applied *first* to the private realm, and only *then* to the political context. The claim is instead that both sets of principles are ultimately grounded in the same set of basic moral norms, and are the result of applying these norms to the different circumstances of private and political contexts—in other words, they ‘share a common basis without one being derived from the other’.¹⁴⁷ Thus, the suggestion is not that the characteristic features of the state and the activities underpinned by criminal law’s powers and permissions are normatively irrelevant. It is, instead, that the normative difference these features make are ordinary moral differences (as we will see in Chapters 4 and 5).

However, the main problem with the Kantian argument for the discontinuity of political morality as it bears on the justification of the standard allocation is the following. It is only if we accept the Kantian notion of freedom, the normative significance of coercion, *and* the resulting status of freedom as the sole value from which political norms derive, that the justification of criminal law and the standard allocation must be elucidated independently from moral theory. On the Freedom as Independence view, we are actually right in approaching political philosophy in general, and the justification of criminal law and the allocation of its powers and permissions in particular, by considering the whole array of moral values and their application to the political realm. As we had anticipated in our examination of role-morality above, where we go wrong according to this view is by not realising that morality itself gives the value of

¹⁴⁷ Thomas Nagel, ‘Ruthlessness in Public Life’ in Stuart Hampshire (ed), *Public and Private Morality* (CUP 1978) 79.

freedom lexical priority over all others.¹⁴⁸ In other words, the autonomous nature of the justification of criminal law *depends* on Freedom as Independence being the correct answer to the allocative question—not the other way around. Hence, the success of the Freedom as Independence view rests on the independent moral appeal of such a view, which I challenge in the next section.¹⁴⁹

Notwithstanding the foregoing, one may also doubt whether norms of freedom can actually be *basic* in the aforementioned sense. One worry is that freedom as independence might be circular and/or empty.¹⁵⁰ This has already been hinted at above. On the one hand, Kantians claim that the right to freedom *grounds* all other rights. In doing so, it determines what counts as a wrong and therefore the grounds of permissible coercion.¹⁵¹ On the other, however, the right to freedom is *defined* by the rights we have: it is the entitlement to use the means to which we have a right to set and pursue purposes for ourselves, independent of another person's choice or will.¹⁵² If so, the right to freedom *presupposes* a

¹⁴⁸ In a similar sense, Turner (n 139) 103-104. As Turner explains, it is 'important to distinguish between arguments that show (i) that, *whatever the correct political theory*, philosophers are barking up the wrong tree if they try to find or construct it by doing moral philosophy, from arguments that show (ii) that P is the correct political theory, and *given that P is correct*, political theory must be (that is, the correct political theory has been shown to be) autonomous with respect to moral theory'. Kantians claim their view is an instance of (i), when it is actually one of (ii) (ibid 73).

¹⁴⁹ According to Ripstein, we cannot simply start from moral philosophy in order to justify coercion, that is, by asking about which values and purposes would be sufficiently important for which to coerce someone because 'almost no one is prepared to accept that, as a general matter, people may be forced to do what they ought to do, just because something important is at stake' (Ripstein, 'Authority' (n 22) 5; Similarly, Thorburn, 'Justifications' (n 24) 1118, 1125-26. Ripstein is right insofar 'no one' only encompasses his fellow Kantians. Anyone who does not subscribe to his account of freedom and its position within political morality is likely to be perfectly well prepared to justify coercion in the way he rejects. We will see that Ripstein offers little by way of argument to support the moral attractiveness of his view.

¹⁵⁰ See, in this sense, Laura Valentini, 'Kant, Ripstein and the Circle of Freedom: A Critical Note' 20 European Journal of Philosophy 450, 453-54; Andrea Sangiovanni, 'Can the Innate Right to Freedom Alone Ground a System of Public and Private Rights?' (2012) 20 European Journal of Philosophy 460; 460-62, and his 'Rights and Interests in Ripstein's Kant' in Sari Kisilevsky and Martin Stone (eds), *Freedom and Force* (Hart 2017).

¹⁵¹ Text to n 26.

¹⁵² Text to nn 22, 179.

normative account of the scope of our entitlements to our bodies and external objects that cannot but be based on considerations other than freedom. Freedom does not appear to be doing the justificatory work it is supposed to do. To put it differently, the Kantian stated position is that independence is an *input* to ground laws, and thereby permissible coercion. A different view is that independence is an *output*, the resulting value of having laws and conforming to them. Some suggestions by Kantians point in this direction.¹⁵³ The difficulty for Kantians is that on the latter view, laws are justified on considerations *other than* independence—considerations about which they do not give any indication. As I show below, Kantians are caught in a bind. On the one hand, on the output view of the role of independence, ordinary and political morality are *continuous*, and Kantianism contains no resources to block the allocation of criminal law’s powers and permissions to private persons. In fact, it has no answer to the allocative question. On the other hand, the input view is substantively unappealing. Let us first illustrate the foregoing by reference to some general examples in political morality, and then focus on its implications for the allocation of powers and permissions in particular.

Consider the following example. On Ripstein’s view, the state establishes and regulates public roads to make private interactions possible, thereby enabling the exercise of freedom. If all land were privately owned, our ability to pursue almost any purpose we might have would be subject to the unilateral choice of others consisting in letting us pass through their land. Hence, roads must be public spaces. According to Ripstein, the public nature of roads explains why *begging* is contrary to freedom and thus ought to be prohibited: ‘as a matter of public right

¹⁵³ See, eg, text to nn 159-164.

(...) the beggar does wrong by appropriating public space for private purposes. (...) Universal practice would make those spaces unavailable to the public or impede public use of the space'.¹⁵⁴ However, begging seems to be in this respect on a par with jogging, walking with a baby on a stroller and almost any other currently permissible private use of a public road. Freedom (as input) cannot explain why begging ought to be prohibited whereas these other activities are permissible. As Ripstein explains, the state is required to provide public roads and is therefore authorised to regulate their terms of use on behalf of everyone. The person who violates these terms, interferes with said exercise of public authority.¹⁵⁵ Only once begging is prohibited, necessarily on the strength of *other* considerations, can we say that begging violates freedom (as output).

Something similar is true about another one of Ripstein's examples. Ripstein claims I do you no wrong if I my shop drives yours out of business by offering the same products at a lower price, irrespective of how harmful this might be for you. The reason is that both of us have a right to offer products at a lower price than the other, while none has a right that the other refrains from doing so. Hence, I do not violate your freedom by driving you out of business in this way. In fact, the state would wrong *me* if it were to prohibit the use of my abilities and resources in this way.¹⁵⁶ However, this again *presupposes* a distinction between legitimate and illegitimate business, on the basis of which one is able to determine whether a particular form of market interaction involves a violation of rights, and thus of freedom. Some pricing practices designed to drive a competitor out of

¹⁵⁴ Ripstein, *Force* (n 7) 263.

¹⁵⁵ *Ibid* 262.

¹⁵⁶ *Ibid* 49.

business, like predatory pricing (ie the reduction of prices to a loss-making level), are unlawful. Those who engage in that kind of practice wrong their competitors and the general public.¹⁵⁷ It is only the fact that some pricing practices are prohibited and others are not which can explain why within Ripstein's framework the former count as wrongful while the latter are mere permissible changes in the context in which other competitors operate. This necessary background of regulations is what makes it possible to speak of violations of freedom and cannot but be established by considerations other than freedom.

In response to a cognate objection, Ripstein claims his Kantian account is neither circular nor empty. Instead, it is *indeterminate*, which on his view is a virtue. In line with the discontinuity view, Ripstein argues that it is a mistake to expect institutions to approximate moral results that exist and are fully defined independent of them, results the elucidation of which would be the task of a philosophical account.¹⁵⁸ On his view, freedom tell us that persons must have rights over their own bodies and external objects to pursue their purposes, and that there must be public institutions charged with legislating, adjudicating and enforcing our rights to sustain the conditions of equal freedom. The execution of these tasks is left to the judgment of the officials who fill the roles in these institutions.¹⁵⁹ This response does not help. It entails that the *kind* of rights we have,

¹⁵⁷ Richard Whish and David Bailey, *Competition Law* (Ninth edn, OUP 2018) 756-57. The ability to successfully engage in predatory pricing normally depends on a business's position of dominance in the market, which could have been achieved by legitimate means.

¹⁵⁸ See Ripstein, *Force* (n 7) 1, 7-8, 217-8, 224-5, 238, 255. It is worth noting that instrumentalist views of the kind to which Ripstein is alluding here and in other places most certainly need not claim that the task of public institutions is to approximate moral outcomes that are fully specified independent of them. One reason is that there are several ways in which the law fills gaps found in morality (see John Gardner, 'Ethics and Law' in John Skorupski (ed), *The Routledge Companion to Ethics* (Routledge 2010).

¹⁵⁹ Ripstein, *Force* (n 7) 224, 255-56, 265; Ripstein, 'Form' (n 16) 489. See also, Hamish Stewart, 'The Place of Instrumental Reasoning in Law' (2020) 11 *Jurisprudence* 28.

the *range* of means over which they can be had, their *scope*, and what counts as a *limitation* of these rights, are entirely defined by all the considerations that the account is meant to exclude from the domain of political morality. Freedom ends up being the *outcome* of—instead of a limit to—the way in which those considerations are combined. As a result, coercion ends up being justified on the basis of all those other values, making political morality *continuous* with the rest of morality.¹⁶⁰

The same applies to the standard allocation of criminal law's powers and permissions. Thorburn argues explicitly against instrumentalist positions such as the one defended in this thesis. He claims that it is *not* open to the state to consider handing the administration of criminal justice (or parts thereof) to private persons, even if the latter were to do so (i) subject to the limits and the guidance of the law, and (ii) more effectively and cheaply than the state. The administration of criminal justice—especially criminal punishment—is something that only public officials have the standing to undertake.¹⁶¹ However, recently Thorburn has suggested that a public official *just is* someone empowered and permitted by the law to carry out criminal justice activities. For instance, private persons who engage in a 'citizen's arrest' are public officials on this view, and more generally, any private person who can avail herself of a justification defence to engage in coercive acts that are

¹⁶⁰ Or take Stewart's remarks to the effect that justice and *freedom* are *constituted* by the law, not independent values that the law serves. Stewart, like Ripstein, argues that the law is justified because it constitutes rightful relations, where 'rightfulness' cannot be specified apart from the law itself. He claims that a law is illegitimate if it (i) is grounded in some private purpose and/or (ii) imposes a restriction on conduct that is necessary neither to the constitution of individual rights nor to any proper public purpose (Stewart, 'Instrumental Reasoning' (n 159) 29-33). The problem with (i) is that, for Kantians, freedom is the only public purpose, which is in turn constituted by (it is the outcome of) the law and the rights the same law defines. Then, laws must be grounded in the same private purposes that Kantians purport to exclude. As to (ii), as we will see in the next section, one way to make (partial) sense of it is to conceive of freedom as entailing a maximal conception of rights. Such conception is substantively unappealing.

¹⁶¹ Thorburn, 'Constitutionalism' (n 6) 92-96; Thorburn, 'Proportionate' (n 29) 272-79; Thorburn, 'Judgement' (n 29) 240ff.

typically carried out by (state) public officials.¹⁶² However, if Thorburn's view is simply that state-issued laws ought to regulate who gets to arrest and punish (ie that powers and permissions are sufficient to create the public office which, in turn, can be filled by any private person), his position would be almost indistinguishable from Instrumentalism and, moreover, from that of those who defend thoroughgoing forms of privatisation.¹⁶³ This in turn means all values can, in principle, bear on the defensible allocation of criminal law's powers and permissions. This is the output view outlined above, which makes ordinary and political morality continuous. Further, such an interpretation is inconsistent with Thorburn's robust conception of a public official (an agent who is 'in an important sense, *us*'), which does not evoke the notion of private persons going about arresting, convicting and punishing subject to the law's limits and guidance.¹⁶⁴

¹⁶² This suggestion was made by Thorburn in conversation, and it is also reflected in Malcolm Thorburn, 'Policing and Public Office' (2020) 70 *University of Toronto Law Journal* 248.

¹⁶³ A phenomenon to which Thorburn objects in Thorburn, 'Judgement' (n 29). As Flanigan puts it, 'proponents of privatization may allow that some public rules are good while maintaining that they ought to be enforced with citizens' consent. And to the extent that proponents of the public provision of services only mean to advocate for institutions in which some rules are public and universal, then they do not disagree with proponents of privatization after all' (Jessica Flanigan, 'Coercion and Privatization' in Jack Knight and Melissa Schwartzberg (eds), *NOMOS—LX Privatization* (New York UP 2018) 147).

¹⁶⁴ See n 25 and text to n 161. And, as I also said above, contradictory with other parts of his work. To put it differently, Thorburn's position trades on the following ambiguity. When we say that punishment should be monopolised by the law or the state, we might be referring to two different things. The first is the claim that punishment should be monopolised by the law, as Gardner puts it, 'in the sense that those who punish should be limited by law in when and how they punish, and that the law that limits them should also be capable of guiding them in doing so'. As Gardner points out, 'the same point applies *mutatis mutandis* to a wide range of exercises of power, and not only to punishments'. The second is the claim that, borrowing from Gardner again, punishments, or certain types of punishments such as those involving attacks on life and limb, or loss of liberty, or the appropriation of money, should be monopolized by the law in the stronger sense of being undertaken by the law itself—by legal officials—and not merely by ordinary people who are subject to the limits and guidance of the law in undertaking them' (Gardner's Introduction to HLA Hart, *Punishment and Responsibility* (John Gardner ed, 2 edn, OUP 2008) liii). Similarly, Cécile Fabre, 'Privatizing War' in Jack Knight and Melissa Schwartzberg (eds), *NOMOS LX—Privatization* (New York UP 2018) 307. The allocative question is the question about the justification of the latter. That is the question that the bulk of Thorburn's work appears to be answering. Thorburn's recent suggestion relates to the former, weaker and uncontroversial, sense of monopoly.

In the next section I argue that the Freedom as Independence view should be rejected because of its unappealing moral implications, both in general and specifically with regards to the allocation of criminal law's powers and permissions.

1. Against Freedom as Independence

a) General

The Freedom as Independence view rests on the compelling thought that no one is in charge of another. The problem suggested in the previous section is that said thought has no force unless it can ground—or at least exclude—some specifications of our entitlements over our bodies and external objects.¹⁶⁵ Some of Ripstein's remarks suggest that the specification of our rights must be compatible with the equal right of others. This alone will not do for such equality is consistent with the entitlement to use each other's bodies in ways which most, and particularly Kantians, find wrongful (eg some forms of non-consensual harmless touching). Besides, as we saw, Kantians claim their account is able to *explain* the wrongfulness of these forms of interaction.¹⁶⁶ An additional feature that can be gleaned from Ripstein's work is that rights specifications—the scope of our freedom—ought to be *maximal*, ie limited only for the sake of the possibility of having rights or freedom itself.¹⁶⁷ Rights afford their holders discretionary control over their bodies and the ability to acquire and exercise the same control over external objects, such that they are free to set and pursue purposes for themselves. The exercise of this purposiveness, however, is bound to have effects that intrude

¹⁶⁵ Similarly, Sandy Steel, 'Saving Private Wrongs' (2017) 14 Jerusalem Review of Legal Studies 1, 16-17.

¹⁶⁶ Ripstein, *Force* (n 7) 45-47.

¹⁶⁷ *Ibid* 19, 63-64; n 160.

into one another's ability to enjoy their means. Yet, Ripstein would argue that rights have to be such that, to borrow an example from Mack, the noise produced as a result of starting one's car in one's driveway does not violate the rights of one's neighbour. On this view, only these most minimal of intrusions—those that result from the ordinary use of our means and that, were they deemed wrongful, would render rights nugatory and thus unable to serve their purpose—are intrusions which cannot count as rights-violations. Prohibiting these intrusions would, in effect, prohibit using our means, with the result that everyone would be in charge of each other—subject to each other's unilateral choice. All else above that threshold is, on this view, impermissible.¹⁶⁸ The following example, adapted from Ripstein, fleshes out this notion and reveals its unattractiveness.

Hanging Fruits. Abe is starving. He can only avoid death by eating the last remaining fruits that hang from a tree. However, Abe is too weak to climb up or shake the tree to obtain the fruits. Big Brody is nearby. If Big Brody were just to lean against the tree, the fruits would fall, and Abe would be able to eat them.¹⁶⁹

According to Ripstein, Abe has no claim against Big Brody, who is under no obligation to lean against the tree. The same is true if there were five (or five thousand) people in Abe's situation and Big Brody could save them all by leaning against the tree just once. All Big Brody would be doing by not leaning against the tree is failing to provide Abe (and the others) with a favourable context for the use of his means. Big Brody does no wrong, because he does not deprive Abe of his ability to use his own means for his own purposes. Neither the nature of the interest at stake (viz self-preservation), nor the number of people that could be saved, matter for the purpose of determining Big Brody's obligations. On their

¹⁶⁸ Arthur Ripstein, *Private Wrongs* (HUP 2016) 103. See also Steel (n 165) 8-9. For a cognate view, on which this paragraph draws, see Eric Mack, 'Elbow Room for Rights' in David Sobel, Peter Vallentyne and Steven Wall (eds), *Oxford Studies in Political Philosophy*, vol 1 (2015).

¹⁶⁹ For more examples of this sort, see Victor Tadros, 'Independence Without Interests?' (2011) 31 OJLS 193.

own, these elements do not ground an enforceable duty of rescue. A third-party, Carson, would wrong Big Brody by pushing him against the tree, even if this was the only way to save Abe and it caused Big Brody nothing more than a bruise. Carson would be usurping Big Brody's means for the sake of others.¹⁷⁰

Perhaps Ripstein could make space for some limited right of necessity in analogous cases (although this already involves a balancing of interests that is inconsistent with his account). Think of legal systems that impose duties to rescue. These tend to include an obligation on the beneficiary to compensate the rescuee to the duty-holder.¹⁷¹ In *Hanging Fruits*, we might have the intuition that if Carson is permitted to push Big Brody, Abe would incur some form of secondary obligation to Big Brody. Ripstein may argue this shows that Big Brody is wronged by Carson. I am not sure this is true but consider the following variation: Big Brody *refuses* to lean against the tree, even in the face of Abe's pleas. Big Brody just can't be bothered, as he is too busy bird-watching. If Carson were to push Big Brody, with the same outcome as above, it is hard to see why anyone would owe secondary duties to Big Brody. The best explanation is that, given the balance of interests involved, Big Brody's right over his body is simply not *as* expansive as the Kantian account *assumes*, so as to preclude negligible sacrifices for the sake of saving lives.

¹⁷⁰ Ripstein, *Force* (n 7) 242, 274-77. As Ripstein puts it: 'The entitlement under right that no person needs to accommodate him- or herself to the specifics of another person's purposes is perfectly general, and so applies to even the limiting case of the other person's minimal purpose of keeping alive. (...) The conclusion that I do not wrong you by failing to help you when you are in need is thus a special case of the more general claim that each of us is entitled to set and pursue our own purposes. It precludes any encumbrance of freedom based on a particular purpose, however pressing that purpose might be' (274-75). Notice that, given that freedom protects the purposiveness of beings with *end-setting capacity*, on the Kantian account Carson would presumably be permitted to throw an orphan baby at the tree to cause the fruit to fall (see Tadros, 'Independence Without Interests?' (n 169) 201).

¹⁷¹ Ripstein, *Force* (n 7) 276-77.

Examples such as the above pose a problem for the Freedom as Independence view because its proponents simply take the right of freedom as a *normative starting point*, ‘which carries the justificatory burden of the entire argument’ and do not offer much, if anything, by way of a case for its value.¹⁷² More importantly, this unqualified and maximalist account of rights entails a *minimalist* account of permissible state action, action which—we know—has to be consistent with its subjects’ freedom. On this view, it seems to follow that states cannot, *inter alia*, tax their citizens for any purpose other than the sustenance of the very apparatus of the state, which is a condition of the possibility of freedom. Anything beyond that would amount to forcing some to put their means to the service of others’ material purposes. Some might welcome this implication, but Ripstein is not one of them. He claims that his Kantian account is not libertarian and ‘does not preclude most of the familiar activities of modern states (...) nothing in Kant’s account precludes overinclusive implementation’.¹⁷³ Ripstein contends that, to think otherwise, ignores ‘the sequenced nature of Kant’s argument,’ that is, the fact that public institutions may introduce restrictions on rights on top of those warranted at the level of private right (ie the norms that govern the interaction between free persons with respect to their entitlements to external things and performances of others, which further fully specify relationships of equal freedom between persons).¹⁷⁴ For example, Ripstein thinks that taxation to support the poor can be understood as a requirement that is immanent in the

¹⁷² Ibid 14. See also 15, 31, 111.

¹⁷³ Ibid 223. See also, 267-68; Ripstein, ‘Form’ (n 16) 488.

¹⁷⁴ Ripstein, *Force* (n 7) 13, 17; Ripstein, ‘Form’ (n 16) 488. See also Rafeeq Hasan, ‘Freedom and Poverty in the Kantian State’ (2018) 26 *European Journal of Philosophy* 911, 918-19, 928 fn 29.

rightful condition insofar as it is required for equal freedom.¹⁷⁵ His argument runs as follows:¹⁷⁶

- (1) A system of property rights is a requirement of freedom;
- (2) The condition of public lawgiving that makes the acquisition of property binding and enforceable on others is a united will;
- (3) The power of the united will to make law is restricted by the laws that people could give themselves;
- (4) People cannot give themselves laws that are contrary to their inner duty of rightful honour (ie their freedom as independence);
- (5) Any law that people cannot give to themselves cannot give rise to enforceable property rights;
- (6) A system of property entails the possibility that all external objects become appropriated so that there are no means left for some people to appropriate. These property-less individuals are the *poor*; *therefore*,
- (7) The poor are dependent on the choice of owners to allow them to occupy space or use external objects. In such a situation, the right of the poor to use their own persons to secure their continued capacity to set and pursue purposes (ie their survival) is dependent on another. The poor are in the juridical position of a slave or serf.
- (8) An arrangement in which it is possible that one person's entitlement to use anything is entirely left to the discretion of others is inconsistent with the innate right of humanity. Free persons cannot share a united will in such circumstances—they lack the moral power to join with others to give themselves laws that create such a possibility, so the arrangement cannot give rise to enforceable property rights;
- (9) There is an apparent conflict between (1) and (8);
- (10) The only way that property rights can be made enforceable is for the system that makes them so to contain a provision protecting persons against dependence, thus making it consistent with everyone's equal freedom.
- (11) The state must set up a system of public taxation to provide for those in need. Taxation is consistent with the freedom of those who are taxed (thus, permissible) because their property—their entitlement to exclude others from their goods—depends on its consistency with equal freedom, which in turn rests on its consistency with the conditions for a united will.

¹⁷⁵ Indeed, Ripstein reaffirms the view that 'failure to give to those in need does not wrong them at the level of private right. (...) So the state's power to redistribute cannot be traced to some antecedent obligation on the part of the wealthy to bring it about that the needy receive more than they have. Instead, the state's duty to support the poor must itself be a freestanding duty, something that the state must do in order to be a rightful condition at all' (Ripstein, *Force* (n 7) 269-270).

¹⁷⁶ Ibid 267-284.

There are problems with this argument. Take premise (6). It rests on the assumption, unargued for in Ripstein's work, that everything that is not owned is necessarily subject to private appropriation. Premise (6) merely reproduces the maximal conception of rights that is the normative starting point of Ripstein's account. In Chapter 8 of *Force and Freedom*, Ripstein offers a freedom-based justification for public roads, claiming that roads cannot be conceived of 'as simply unowned, in which case anybody who wants to could come along and claim [them] as his or her own property'.¹⁷⁷ As noted above, according to Ripstein the state establishes and regulates public roads to make private interactions possible, thereby enabling the exercise of freedom. If all land were privately owned, says Ripstein, the ability of owners themselves to pursue almost any purpose they might have would be subject to the unilateral choice of another, choice consisting in letting others pass through their land. Hence, roads must be public spaces, not subject to appropriation. However, it seems that the freedom-based rationale for public roads can be extended, so that other tracts of land are excluded from the possibility of private appropriation and thus available for the poor to live. After all, both public roads and this solution tackle the same problem: systematic dependence on another's choice. The problem identified in premise (7) above would not arise.

The above points to a related issue with conclusion (11). Notice that the poor, as characterised by Ripstein, the property-less, are not actually in the juridical position of a slave or serf by Ripstein's own lights. The property-less remain formally entitled to enter into an employment contract, acquire property and benefit from it on the same terms as those who already own property. The

¹⁷⁷ Ibid 249.

problem is, as Penner notes, that taxation is an inadequate solution for the problem in the terms posed by Ripstein, given that ‘all the landowners on [Ripstein’s] “solution” could still refuse to contract with the poor (...) to provide them with accommodation’.¹⁷⁸ Ripstein’s framework contains no grounds for the state to intervene provided everyone is able to enjoy the means *currently* at their disposal, and limitations to this enjoyment are only justified by others’ entitlement to do the same with the means currently at theirs.¹⁷⁹ Given that, on Ripstein’s view, keeping alive is just another one of people’s purposes that need not be accommodated by another’s use of her means, it seems more consistent with freedom that the state just leaves the property-less to die. If the state is entitled to prevent this from happening through redistributive taxes, it seems that the latter are—within Ripstein’s framework—disguised means to get people to discharge duties of rescue based on what he would label ‘material interests’, which Kantians preclude as grounds of state actions. Consider also the following:

Baggy Trousers. Abe and his family are starving in the state of nature. They come across an amount of un-owned food, enough to get them through the day. Abe grabs it, but immediately suffers a muscle spasm and drops it. As he is about to take the food back, Big Brody—who was taking a walk after having an abundant meal—snatches the food and stuffs it underneath his baggy trousers, just for the sake of it.

As above, on the Freedom as Independence account, Big Brody has done no more than change the context within which Abe and his family may exercise their freedom. He does no wrong by taking and retaining the food items, whereas Abe would wrong Big Brody if he were to attempt to recover the food in any way that touches Big Brody’s body. Big Brody would have only wronged Abe if he had

¹⁷⁸ James Penner, ‘The State Duty to Support the Poor in Kant’s Doctrine of Right’ (2010) 12 *The British Journal of Politics & International Relations* 88, 99-100.

¹⁷⁹ Ripstein, *Force* (n 7) 63-64; 275: ‘private right protects each person’s purposiveness by protecting each person in what *he or she already happens to have*’.

forcibly taken the items from his physical possession or pushed him out of the way to prevent him from grabbing the food in the first place. The civil condition retains this feature of private right. Ripstein says that,

I make your trip to the store a waste of your labor if I buy the last quart of milk before you get there, but this interference is not a wrong to you. *You* wasted your efforts; *I* just exercised my freedom. I wrong you if I interfere with your person— pushing you out of the way as you reach for the milk.¹⁸⁰

According to Ripstein, buying the last quart of milk is not an interference with anyone's independence because it imposes no limits on anyone's ability to use their own means to pursue their own purposes. As we have seen, it is merely a change in context such that another's means (viz another potential buyer's money) are made useless for her particular purpose (viz buying milk). The buyer's 'entitlement to change the world in those ways', Ripstein says, '*just is* their right to independence'.¹⁸¹ However, as Hasan notes, within Ripstein's framework it is entirely permissible—and the state would have no legitimate cause to intervene—were a speculator to buy up all of the available milk to sell it at inflated prices, even if this would risk, *inter alia*, children going malnourished. In this case, the speculator has affected no one's capacity to choose nor deprived anyone of the means at their disposal.¹⁸² Further, anyone would be entitled to buy up all of the milk and put it to no use at all because, on Ripstein's view, a person may use or dispose of her property as she sees fit as long as it does not interfere with another's use of their property.¹⁸³ This is an extension of Big Brody's freedom in *Baggy Trousers* to simply let the food rot beneath his trousers. Given that limitations of

¹⁸⁰ Ibid 101 (emphasis in original).

¹⁸¹ Ibid 16.

¹⁸² Hasan (n 174) 917.

¹⁸³ Similarly, James Penner, *Property Rights: A Re-examination* (OUP 2020) 197.

freedom on the basis of concerns other than freedom are impermissible on the Kantian account, Ripstein's framework only allows for intervention at the point when some are reduced to a state close to that of a slave or serf. At this point, redistributive taxation will at most be inadequate and, moreover, unable to ground anything close to the activities carried out by modern states, which do much more than simply put the property-less over the threshold of survival (or, at any rate, are expected to do so).

As I suggested above, the primacy given by Kantians to their unqualified conception of freedom is further revealed as unattractive by noticing some of its implications for the allocation of criminal law's powers and permissions itself.

b) Allocation of Powers and Permissions

Suppose that by allocating criminal law's powers and permissions to private persons, lawmakers could bring about a reduction in crime. Grant also that the number of potential victims of crime that are saved by this arrangement is larger than the number of potential wrongdoers who would be subject to the exercise of criminal law's powers and permissions by private persons. According to Kantians, thus allocating powers and permissions is impermissible because their exercise by private persons is contrary to independence. Therefore, lawmakers *wrong* individuals against whom these powers and permissions are exercised by allocating them to private persons. On this view, it is impermissible for lawmakers to allocate powers and permissions to private persons despite the fact that by reducing crime—which itself violates freedom—freedom is promoted overall. Kantians claim that freedom is not a target to be promoted, but a right that places an *absolute deontic restriction* on conduct.¹⁸⁴ As we saw, Ripstein states that 'freedom

¹⁸⁴ Ripstein, *Force* (n 7) 15.

must be repaired in a way that itself preserves equal freedom rather than subverting it'.¹⁸⁵

A norm against ϕ ing is a deontic restriction if it makes it impermissible for an agent to ϕ even if by doing so other agents are prevented from ϕ ing such that the number of ϕ ings is minimised overall, all else being equal. A deontic restriction thus mandates an agent to conform to a norm, not to maximise overall conformity to it.¹⁸⁶ Some doubt that deontic restrictions are justified.¹⁸⁷ Whether or not this is true, the case for the Kantian restriction is very weak.

As suggested in the previous section, much of the intuitive appeal of the Kantian view comes from the compelling thought that no one is in charge of another so no one can be used as a mere instrument for the fulfilment of another's ends. Kantians illustrate the thought by appeal to slavery. Slavery is impermissible—even if agreed upon by slave and master—and it remains wrongful, even if perhaps less bad, were it the case that the slave is much better in terms of welfare than she would otherwise be.¹⁸⁸ Still, the scenario at hand is nothing of this sort. *Ex hypothesi*, no one is being used as a means for another's end given that the allocation of powers and permissions is grounded in the promotion of an end—freedom—that (for Kantians) is necessarily shared by all.¹⁸⁹

¹⁸⁵ n 37.

¹⁸⁶ Larry Alexander and Michael Moore, 'Deontological Ethics', *The Stanford Encyclopedia of Philosophy* (Winter edn, 2016) <<https://plato.stanford.edu/archives/win2016/entries/ethics-deontological/>> accessed 21 September 2020.

¹⁸⁷ See Samuel Scheffler, *The Rejection of Consequentialism* (Clarendon 1982) chapter 4; Derek Parfit, *Reasons and Persons*, vol 1 (OUP 1984) chapter 4; David Enoch, 'Intending, Foreseeing, and the State' (2007) 13 *Legal Theory* 69.

¹⁸⁸ Ripstein, *Force* (n 7) 36.

¹⁸⁹ Kantians might insist that independence is a good to be respected, not promoted, and that, in any case, private persons cannot promote independence. In response, individuals *can* promote

Moreover, no-one is being required to undertake burdens that they would otherwise not be made to bear but for the adoption of the aforementioned preventive gains as grounds for allocating criminal law's powers and permissions to an agent. Suspects and offenders are already liable to the exercise of penal powers and permissions under legally defined circumstances, the difference being only the identity of the agents that would exercise them in this scenario. Even if we grant the Kantian claim that offenders are wronged simply in virtue of being subject to the exercise of powers and coercion by private persons, in the scenario defined above the outcome of a departure from the standard allocation saves innocent victims from being *both* harmed and wronged *in the same way*, i.e., by being subject to private coercion (while suspects and offenders are wronged but not harmed in a way that they would have otherwise not been).

Kantians may respond that, although it is true that suspects and offenders are already liable to the harm involved in the exercise of criminal law's powers and permissions, allocating these to private persons wrongs them for the sake of others' benefit, which is impermissible.¹⁹⁰ Notice, however, that potential victims that are saved as a consequence of the allocation of powers and permissions to private persons would have otherwise also been wronged (and harmed) for someone else's benefit, namely, that of their attackers. Although I doubt that the aforementioned injunction is true, we can modify the example above so that suspects and offenders *also* stand to benefit from the allocation of criminal law's powers and permissions to private persons.

independence by exercising criminal law's powers and permissions, even if—assuming the Kantian view on this point—they do so only *indirectly* (by preventing crimes). Besides, as I go on to argue, even setting that aside, the Kantian position rests on a series of implausible commitments.

¹⁹⁰ Ripstein, *Force* (n 7) 5: 'Nor can others justify authority over you, or use force against you, on the ground that the restrictions thereby placed on you will generate greater benefits for others'.

Suppose that, were criminal law's powers and permissions be allocated to private persons, this would result in lesser setbacks to the welfare of suspects and offenders relative to the same actions when undertaken by public officials. This might be so, say, because private persons happen to be less prone to employ excessive force when pursuing a suspect or performing an arrest, or because private persons tend to inflict punishment on convicted offenders more humanely and successfully in terms of promoting their rehabilitation. In this scenario, the gains in terms of welfare for suspects and offenders are achieved at no cost in prevention or other values that would otherwise be realised if powers and permissions were standardly allocated. Bear in mind also that any preventive gains achieved mean that fewer people become offenders and thus liable to the—supposedly wrongful—exercise of criminal law's powers and permissions by private persons.

Kantians claim that modifying the standard allocation so as to achieve the benefits described in the above scenario is unjustified: gains in welfare for suspects and offenders give lawmakers no sufficient reason to allocate criminal law's powers and permissions to private persons.¹⁹¹ According to Ripstein, persons cannot be benefited against their will and it is each alone who is entitled to decide for herself what she will count as a benefit, so lawmakers are precluded from attributing some end other than freedom to citizens.¹⁹²

¹⁹¹ Thorburn, 'Proportionate' (n 29).

¹⁹² 'The person who uses your body or a part of it for a purpose you have not authorized makes you dependent on his or her choice; your person, in the form of your body, is used to accomplish somebody else's purpose, and so your independence is violated. *This is true even if that person does not harm you, and indeed, even if he benefits you*' (Ripstein, *Force* (n 7) 15). See also 5, 26-27, 34-38, 242-43. In this sense, see also Williams, 'Ethics and Right' (n 93) 482.

Lawmakers are precluded from pursuing any end other than freedom on behalf of some or all of their citizens *even if* they were to ascertain those ends that these citizens actually hold. Imagine, for example, that *everyone* agreed on certain facts about the welfare of persons, on how private persons can secure them by exercising criminal law's powers and permissions, and on counting them as benefits for themselves. On the Kantian view, unanimity does not alter the fact that the gains in welfare described above remain a private purpose, which public officials are precluded from pursuing to the extent and through means that—as in the case at hand—are inconsistent with their subjects' freedom. The reason is that, as has been suggested earlier, persons have a self-regarding duty not to consent to arrangements that are contrary to their freedom, and lawmakers cannot enact a law that people could not give to themselves.¹⁹³

But this is not plausible or, at any rate, not in a case where those subject to the exercise of criminal law's powers and permissions stand to gain from these powers and permissions being allocated to private persons. Even if we were to grant that the self-regarding duty covers a case such as the one above, we should at least recognise that duty-bearers have a right to violate such a self-regarding duty.¹⁹⁴ Arguably, recognising this right does not change the fact that private persons exercising criminal law's powers and permissions would nonetheless

¹⁹³ As Ripstein explains, 'The people give themselves laws not for their advantage, but for their independence, which they cannot trade against anything. On the Kantian view, the fundamental test of any law is whether all could consent to it given their inner duty of rightful honor, (...). You couldn't agree to a law that suspended that obligation, even if you expected material gain, because the state is never a tool for pursuing private purposes' (Ripstein, *Force* (n 7) 222-23). See also, Ripstein, 'Form' (n 16) 494.

¹⁹⁴ On the notion of having a right to violate one's duty, see David Enoch, 'A Right to Violate One's Duty' (2002) 21 *Law and Philosophy* 355. Enoch argues for the *conceptual* possibility of there being such a right, adding that whether such possibility is realised depends on substantive argument. In this respect, duties to oneself are particularly good candidates for duties whose bearers have a right to violate.

wrong suspects and offenders over whom these powers and permissions are exercised. However, one can expect that suspects and offenders would prefer falling into the hands of private persons rather than into those of public officials, despite the fact that this would mean *ex hypothesi* that their freedom is being violated and they are thus being wronged. The reason is that most will often prefer to suffer less harm, even if this is a result of wrongdoing, than to suffer more harm in order to avoid being wronged. It is analytically bad to be wronged, the badness of which is independent of the setback to interests that one may experience as a consequence. However, as Tadros argues, 'a relatively small reduction in the risk of being harmed can outweigh the interest that we have in others recognising our moral status' (ie in not being wronged).¹⁹⁵ If so, particularly when it comes to the significant harms imposed by criminal justice measures, the badness of the wrong in question seems minor compared to the gains in wellbeing that in the scenario above obtain as a result of allocating powers and permissions to private persons. Thus, allocating them to private persons is justifiable in such a scenario. As Simmons suggests, there is no strong case for opposing wrongs that victims would prefer to suffer over the potential alternative consequences.¹⁹⁶

It is course not a fatal objection against a deontologically-based argument that it does not hold in the face of massive costs. Neither is it to show that the relevant right-holders can sometimes be benefited by having their rights violated. However, given that offenders are already liable to be harmed and the only

¹⁹⁵ Victor Tadros, *The Ends of Harm* (OUP 2011) 106. See also Jeff McMahan, 'Humanitarian Intervention, Consent, and Proportionality' in Ann Davis, Richard Keshen and Jeff MacMahan (eds), *Ethics and Humanity* (OUP 2010) 60-61. Some harms stem from the very fact of being wronged, irrespective of any further setback of interests (eg a feeling of humiliation or shame). These harms should also be counted on the harms "ledger" when determining whether a wrong is tolerable for the sake of an overall reduction of harm: Peter Singer, 'Bystanders to Poverty' in Ann Davis, Richard Keshen and Jeff McMahan (eds), *Ethics and Humanity* (OUP 2010) 197.

¹⁹⁶ A. John Simmons and Christopher Wellman, *Is There a Duty to Obey the Law?* (CUP 2005) 192-93.

element that changes in the scenario is the identity of the person doing the harming, it is hard to see why considerations of costs and benefits would not play the main role in grounding the appropriate allocation of criminal law's powers and permissions.¹⁹⁷

In reality, it is unlikely that the unanimity assumed in the scenario above will obtain. Some may prefer not to have their welfare protected as a result of allocating criminal law's powers and permissions to private persons and may be interested in nothing beyond their freedom being upheld—even at the cost of forfeiting a substantial decrease in the harm they would otherwise suffer. The Kantian state assures them in their right not to share some particular end. However, it is difficult to believe that these objectors' right to independence precludes lawmakers from allocating criminal law's powers and permissions to private persons. As observed in the previous paragraph, allocating criminal law's powers and permissions to private persons does not seem to add any constraints on people's capacity to set and pursue purposes. Furthermore, if it is impossible or too costly to identify in advance those that would object to their independence being traded for welfare gains for themselves and others so as to tailor the enforcement of criminal law accordingly, it remains the case that the reasons we have to promote welfare (including the welfare of these objectors) override the reasons to respect their freedom.¹⁹⁸ It is not very plausible that freedom would bar benefiting citizens in non-freedom related ways by having private persons give

¹⁹⁷ The foregoing considerations explain why the desert-based constraint proposed by Duff in Chapter 2 fails.

¹⁹⁸ For a similar point, see Dorsey, 'Political Liberalism' (n 92) 105–106. There is an air of paradox in the Freedom as Independence view's radical exclusion of the goods that the right to freedom is supposed to enable people to pursue. The hypothesis of this section was that altering the standard allocation might reduce overall harm; yet, for Kantians, harm is relevant only insofar it is wrongful which, in the case of lawful coercion by public officials, by definition it is not.

effect to burdens the justification of which may be unimpeachable from the perspective of the Freedom as Independence view. Also, as I contended above, it is implausible to claim that we are not permitted to trade violations of independence of the sort involved in the exercise of powers and permissions by private persons for the violations to which crimes amount.

c) “Localised” State of Nature

Before turning to the last section, consider what appears to be a contradiction in the Kantian account. As we saw in section II above, the problem in the state of nature is that any exercise of coercion or power by private persons (exercises which are necessary to acquire and enforce the rights that constitute freedom) is contrary to freedom and therefore impermissible. This is true irrespective of how well-intentioned and based in sound moral principle such exercises might be.¹⁹⁹ The impossibility of rightfully exercising powers and coercion in the state of nature means that such an entitlement *originates with, and belongs to, the state*. Kantians further claim that the state is *not* free to allocate criminal law’s powers and permissions that belong to itself to private persons. The legal permissibility of, inter alia, self-defence and citizens’ arrests would then seem to pose a problem for this view as they involve the allocation to private persons of permissions to coerce and powers to impose duties on others. Thorburn claims that what private persons in these situations are doing is to act as stand-in public officials or public officials *pro tempore* because they exercise normative entitlements that belong to the state, and this is only warranted where public officials are unavailable or unwilling to discharge their duties.²⁰⁰ This response

¹⁹⁹ Hamish Stewart, ‘Criminal Punishment as Private Morality’ (2015) 9 Criminal Law and Philosophy 21, 34.

²⁰⁰ Thorburn, ‘Public Law’ (n 24) 36 fn 51. Notice that if the mere allocation of criminal law’s powers and permissions to an agent were sufficient to constitute the agent into an official (as we saw

seems ad-hoc. On the Kantian view, private persons are entitled to non-wrongfully coerce others when public officials are *contingently* unavailable, yet they are not similarly entitled when these officials are *systematically* unavailable. Systematic unavailability of public officials is the feature that defines the state of nature. Some set of circumstances in a civil condition might be characterised in those same terms (or, alternatively, as a “localised” state of nature). Imagine a part of a country dominated by the *Mafia* or a drug *cartel* where the state is entirely ineffective or absent. Inhabitants manage to set up their own ‘protective association’ to apprehend, try and punish members of the *Mafia* or the *cartel* and also common criminals, all of which used to roam free due to the unavailability of the state. Inhabitants do all of this in accordance with the applicable substantive and procedural law of the land. The Freedom as Independence account implies that the inhabitants wrong suspects and offenders by setting up the association. But this seems to be true only by *fiat*. If anything, the systematic unavailability of the state *enhances*, not weakens the case for private coercion.²⁰¹ This further suggests that the basic powers and permissions accrue to private persons as such in the state of nature, and their extensions, limitations and allocations in the civil condition respond to instrumentalist concerns. Once Kantians admit that citizens are allocated powers and permissions to arrest on instrumental grounds (and labelling citizens who find themselves in the relevant circumstances ‘public officials *pro tempore*’ does nothing to change the fact that this is what they are doing), it is difficult to see why the grounds for allocating the remaining powers

Thorburn has recently suggested (text to n 162), it becomes pointless to label the arresting private citizen or the self-defender as an official *pro tempore* or emergency stand-in—they would simply be “ordinary” officials.

²⁰¹ Chapter 5, n 164.

and permissions involved in criminal justice should be any different.²⁰² This is the claim that will be more fully defended in Chapters 4 and 5.²⁰³

VI. Fit

Kantians also claim that the Freedom as Independence view “fits” better than competing views with criminal law *as it is*. Such as defence is relatively independent of a normative defence of the primacy of independence and, if true, would show that the view succeeds as a *descriptive* account of criminal law. I turn to this claim below (although more will be said about the issue of fit in Chapter 5).

A. Crimes

Recall that according to the Freedom as Independence view, crimes are defined by reference to a specific and uniform aim that wrongdoers are said to have. On this view, the *criminally* wrongful act perpetrated by, say, the thief, is not the violation of the victim’s property right, but the fact that—in choosing to do so—she has claimed an exemption from the authority of state-given law to establish the terms under which individuals may interact with one another. She has done so by unilaterally determining the means available for the pursuit of her ends. The thief has sought to usurp the role of the state as the exclusive lawgiver in the jurisdiction

²⁰² *Pace* Thorburn (Thorburn, ‘Constitutionalism’ (n 6) 93), this seems to be acknowledged in English law. Take the following remarks by Lord Sumption in *Hayes v Willoughby* [2013] UKSC 17, [2013] 1 WLR 935 [13]: ‘[A]lthough it was no doubt drafted mainly with an eye to the prevention or detection of crime by public authorities [the defence found in section 1(3)(a) of the Protection of Harassment Act] applies equally to private persons who take it upon themselves to enforce the criminal law. *Within broad limits, the law recognises the right of private persons to do this, but vigilantism can easily and imperceptibly merge into unlawful harassment*’.

²⁰³ It is particularly striking to conceive of the private self-defender as a state agent (Thorburn, ‘Justifications’ (n 24) 1125; Thorburn, ‘Judgement’ (n 29) 242). This amounts to the claim that in self-defence, the relevant relation is between the state and the aggressor—the defender ‘drops out of the picture’. Besides, as I claim in the main text, and as Ferzan also notes, this view of the defender cannot explain (except instrumentally, that is) why private persons cannot undertake other criminal justice activities. State agents may not only be unavailable to defend a private person from an aggressor, but also to run a trial or punish a criminal: Kimberly Kessler Ferzan, ‘Self-Defense and the State’ (2008) 5 Ohio State Journal of Criminal Law 449, 461 fn 64.

and thus challenged the possibility of a system of equal freedom.²⁰⁴ Crimes are wrongs ‘against the state’s claim of legitimate law-making authority’ as the embodiment of the omnilateral will or, equivalently, against the right of the people to collectively give laws to themselves.²⁰⁵ I now argue that this conception fits poorly with some central features of the criminal law.

The first feature is ignorance of law. Were the law to understand intentional or reckless wrongs as attempts to usurp its authority, mistake or ignorance of law would negative the offence and thus the conduct would not be punishable. Yet, Anglo–American law very rarely recognises mistake of law as a defence. At most, it accommodates the relevant facts under a different category or only as grounds for mitigation at the sentencing stage.²⁰⁶ This is true about mistakes both as to the existence and scope of a prohibition and the existence and scope of a justificatory defence. Some continental or mixed jurisdictions are somewhat more generous, granting a “mistake of law” defence provided the mistake was *unavoidable* (which is further interpreted very stringently).²⁰⁷ Thorburn claims that ‘all that is required

²⁰⁴ Ripstein, *Force* (n 7) 313; Thorburn, ‘Constitutionalism’ (n 6) 88, 99-101; Thorburn, ‘Punishment’ (n 34) 9, 15, 25; Thorburn, ‘Criminal’ (n 34) 48, 58-59, 61.

²⁰⁵ Thorburn, ‘Punishment’ (n 34) 15. See also, Ripstein, *Force* (n 7) 312-13.

²⁰⁶ Douglas Husak, *Ignorance of Law* (OUP 2016) 67-88 (US); David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod’s Criminal Law* (15 edn, OUP 2018) 127-29, 337-39 (UK); Kent Roach, ‘Canada’ in Alan Reed and others (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate 2014) 211-12 (Canada). In some cases, however, a mistake of law means that the defendant lacks the mens rea of the offence. For instance, according to Section 2(1)(a) of the Theft Act 1968, a mistake in law as to the right to take property negatives the element of “dishonesty” (see Jonathan Herring, *Criminal Law* (OUP 2018) 681-82).

²⁰⁷ Catherine Elliot, ‘France’ in Alan Reed and others (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate 2014) 223-24; Kai Ambos and Stephanie Bock, ‘Germany’ in Alan Reed and others (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate 2014) 237-38; Magnus Ulväng and Petter Asp, ‘Sweden’ in Alan Reed and others (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate 2014) 312-13; Alex Van Weezel, *Error y Mero Desconocimiento en el Derecho Penal* (Legal Publishing 2008) (Chile). South African law simply requires the mistake to be genuine, while reasonableness precludes a charge of negligence: Gerhard Kemp, ‘South Africa’ in Alan Reed and others (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate 2014) 297-98.

[for criminal liability] is subjective awareness that one is engaging in conduct that one *ought to have known* was criminal'.²⁰⁸ However, if this is the case, the feature that makes conduct wrongful for purposes of the criminal law cannot be that the offender intentionally sought to supplant the law's ordering with her own's preferred arrangements.²⁰⁹ One cannot intend to engage with something if one is unaware of its existence. This leads to a second, related problem.

The Freedom as Independence view emphasises that wrongful acts have no legal effect: they do not change the rights of victims, exempt the wrongdoer from the law, or negate the entitlement of the legal system to govern her conduct. These facts give legal subjects an external incentive to conform to the law.²¹⁰ Assuming that most offenders are or should be aware of this feature of the legal system, it is hard to see how we can sensibly construe their actions as attempts to challenge, or as choices to exempt themselves from, the authority of the state. Legal subjects must know that their wrongful actions are radically inadequate to that end and are therefore *pointless*.²¹¹ Moreover, following Kant, Ripstein claims that 'to choose something, a person must take himself to have means available to achieve it (...) having means with which to pursue purposes is conceptually prior to setting those purposes'.²¹² Offenders normally do not have the means to usurp the authority of the state.²¹³ It then seems that, by the Freedom as Independence account's own

²⁰⁸ Thorburn, 'Constitutionalism' (n 6) 105 fn 28.

²⁰⁹ Cf *ibid* 101-102.

²¹⁰ Ripstein, *Force* (n 7) 306. Ripstein adds that 'anything you do contrary to sovereignty is without legal effect' (314).

²¹¹ *Ibid*.

²¹² *Ibid* 14. Similarly, Ripstein, 'Private Order' (n 37) 1402-403.

²¹³ As Ripstein puts it, 'a person cannot act so as to exempt herself from the law'—it is juridically impossible. Therefore, 'she must be taken to have chosen something else' (Ripstein, *Force* (n 7) 315-16).

lights, the conduct of criminal offenders cannot express an attempt to challenge the state as the supreme lawgiver in the jurisdiction. If it did, an odd implication would seem to follow. It appears that, on this view, criminal behaviour amounts to a form of conceptually *impossible attempt*.²¹⁴

B. Punishment

Some related problems concern this view's conception of the (i) *function* that punishment serves, and (ii) the *nature* of its justification.

As to (i), on the Freedom as Independence view the function of punishment is to reassert or actualise the authority of the state in the wake of the individual challenges to it expressed in crimes.²¹⁵ To this end, says Ripstein, punishment deprives crimes of their legal as well as their factual effects.²¹⁶ As to (ii), Kantians maintain that punishment is not justified by its consequences or as a response to contingent patterns of human behaviour. Its availability is instead an *a priori* or conceptual entailment of the state's right to rule.²¹⁷ They add that the structure of the relationship between public right (that is, the right of the state to rule in a jurisdiction) and punishment parallels that between private right and remedy: punishment is the remedy for the violation of public right.²¹⁸ Yet, these two

²¹⁴ I take it that such kind of impossible attempts are most closely analogous to impossibility *in fact* which, depending on the jurisdiction, may or may not be punishable. A positive answer is given in English law (Ormerod and Laird (n 206) 494-98; Herring (n 206) 765-69, 791, 808-809); and a negative in Chile (Sergio Politoff, *Los Actos Preparatorios del Delito: Tentativa y Frustración* (Editorial Jurídica de las Américas 2009) 133-146).

²¹⁵ See Ripstein, *Force* (n 7) 302-303; Thorburn, 'Punishment' (n 34) 9-10, 19, 30-31; Thorburn, 'Criminal' (n 34) 56-57.

²¹⁶ Ripstein, *Force* (n 7) 323-24.

²¹⁷ Ibid 301-303. As explained in section II.A above, the availability of criminal punishment is, for Kantians, a necessary condition of the state's claim to authority, as it guarantees the supremacy of said authority (ibid 303; references n 34).

²¹⁸ Ibid 306-308; Thorburn, 'Punishment' (n 34) 20; Thorburn, 'Criminal' (n 34) 47-51, 60-61.

features, that is, punishment's function and the nature of its justification, cannot be true together.

Consider first that, in order to make it the case that crime has no legal effect, it is enough that the state invalidates any change in the law that the offender may have been taken to have sought through his act. This is clear in the case of *mala in se*, where the *formal* public wrong (that is, the crime; the wrong against the appropriate form of lawgiving, against the state as the embodiment of the united will of all) is committed *via a material* private wrong (ie the violation of rights of an individual victim).²¹⁹ Here the enforcement of a civil remedy makes it both legally and factually the case that the wrong has neither changed the right of the victim nor the entitlement of the state to regulate conduct.²²⁰ The wrongdoer has put back the means (or a substitute) within the right-holder's exclusive control and/or disgorged the gains gotten as a result of her wrong. Thus, the consequences of the crime are fully "negated" through the civil remedy, so the authority of the state remains invulnerable, just as the individual victim's right.

Certainly, a system of enforceable civil remedies might not be sufficient in a different sense. Many wrongdoers can be difficult to catch or might not have the resources to repair the losses suffered by their victims. Further, or as a result, too many wrongdoers might be difficult to deter, with the upshot that the *factual* supremacy of the state—its effectiveness in guiding conduct 'in space and time'—might be undermined.²²¹ Offenders normally do not challenge the normative

²¹⁹ Mary Newhouse, 'Two Types of Legal Wrongdoing' (2016) 22 *Legal Theory* 59. See also, text to n 225.

²²⁰ Even this may not necessary: on some views, one may have a (legal) right without a remedy: Daniel Friedmann, 'Rights and Remedies' in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart 2005) 8.

²²¹ Ripstein, *Force* (n 7) 318.

supremacy of the state, but they might very well do so in factual terms. However, whether punishment—understood as a set-back to the offender from the status quo ex ante—is required to remedy the situation cannot but be an empirical or contingent matter. One needs to ascertain that criminal behaviour factually dents the ability of the state to guide conduct and provide assurance and that punishment is necessary to sustain it. Typically, a private wrong will impair the actual effectiveness of the right for its holder, so civil remedies are granted to repair the losses and/or disgorge the benefits resulting from the infringement of a right, ie to cancel its material consequences. The same is not true in the case of the right of the state to rule. Whether punishment in addition to a system of civil remedies or other mechanisms of prevention is required for purposes of deterrence and assurance must depend on consequences and patterns of human behaviour.²²² The availability of a civil remedy may indeed be constitutive of having a private right or, at any rate, to be so within the Kantian framework. Yet, punishment does not seem to be constitutive in the same sense. If this is correct, what a civil condition seems to necessitate a priori or conceptually is just the availability of civil remedies.

²²² Kant says that in lying, 'I bring about, as far as I can, that statements in general are not believed, and so too that all rights which are based on contracts come to nothing and lose their force; and this is a wrong inflicted upon humanity generally' (Immanuel Kant, *On a Supposed Right to Lie from Philantropy* (CUP 1996 [1797]) 612). Ripstein cites and expands on Kant's claim that '[w]hoever steals makes the property of everyone else insecure', which is true more generally of crime in relation to the possibility of a civil condition. Ripstein contends that, '[n]one of these [claims] enters Kant's account as an empirical claim about the inevitable or even probable effects of crime (Ripstein, *Force* (n 7) 301, 310-11). Yet, whether a lie, a theft or some other crime entail the collapse of contracts, property, and the civil condition, respectively, are empirical questions the answers to which depend on the consequences of those acts. If Kant and Ripstein's claims were accurately to explain the wrongfulness and the grounds for punishing these acts, it would follow that a potential liar, thief, or criminal who knows that her action will have no incidence whatsoever in bringing about the state of affairs to which Kant and Ripstein appeal, has no reason not to engage in the action (in this sense, Claudio Michelon, *Being Apart from Reasons* (Springer 2006) 89. See also, Kate Greasley, 'The Morality of Lying and the Murderer at the Door' (2019) 38 *Law and Philosophy* 439). This is problematic because, as Raz puts it, '[I]t is a melodramatic exaggeration to suppose that every breach of law endangers, by however small a degree, the survival of the government, or of law and order' (Raz, *Morality* (n 107) 102).

C. Harm

To finish, there is a further issue of fit worth mentioning. It has to do with the role and importance of harm within this account.

The idea of reversing the offender's maxim of action against herself suggests a form of *lex talionis* which Ripstein, following Kant, claims should be honoured 'in spirit'.²²³ On this, Ripstein explains that 'the formal nature of criminal wrongdoing generates the perspective from which this issue can be addressed', and that the quantum of punishment must be proportional to the gravity of the wrong.²²⁴ Recall, however, that on this view the notion of 'formal' refers to the fact that criminal wrongfulness concerns not the violation of rights of an individual victim—that is the material wrong—but a wrong against the appropriate form of lawgiving, that is, against the state as the embodiment of the united will of all. Yet, Ripstein goes on to say, that

In assessing the gravity of the wrong, the particular public law the criminal violated provides an appropriate measure, for the material wrong is the precise manner in which the criminal has committed the formal wrong.²²⁵

But this cannot be right. If criminal punishment ought to track the gravity of the wrong, it must be the gravity of the criminal wrong. On this view, the wrong-making feature of all crimes is one and the same, namely, that they are challenges to the authority of the state.²²⁶ This entails either that all crimes are not only

²²³ Ripstein, *Force* (n 7) 318.

²²⁴ *Ibid* 317.

²²⁵ *Ibid* 318.

²²⁶ This is similar to Kelsen's view. As MacCormick describes it 'all wrongs in law are prohibited wrongs and are thus wrong in the same way and for the same reason—because prohibited' (Neil MacCormick, *Institutions of Law* (OUP 2007) 214). The idea that all crimes are *mala prohibita* is also found in Vincent Chiao, *Criminal Law in the Age of the Administrative State* (OUP 2018) 178.

wrongful for the same reason, but also to the same degree, or that criminal wrongfulness does not correlate to material wrongfulness. It is true that some rights may be regarded as more important to freedom than others, but legal orders tend to punish murder more severely than theft, even if theft—because it takes place much more often—could be regarded as a greater threat to the authority of the state than murder. In response, Kantians maintain that it is not the task of a normative theory of punishment to devise a precise scale of punishment in accordance with the seriousness of the crimes.²²⁷ The problem, however, is that the theory developed by Kantians not only offers no guidance as to how to link the gravity of the offence with the severity of crime, but it runs counter to how legal practice makes such an assessment.²²⁸

To state the obvious, core *mala in se* offences are defined and distinguished by reference to the type and extent of harm inflicted on the direct individual victim, and the manner in which this harm is brought about. Both are essential elements in the assessment of the seriousness of the offence, and determine the offender's desert and, consequently, the severity of the sentence.²²⁹ This reveals a central concern with the moral wrongfulness and consequences of the wrong suffered by the victim rather than the authority of the state.²³⁰ And the same is

²²⁷ Ripstein, *Force* (n 7) 318 fn 41.

²²⁸ The need for a normative theory of punishment to shed light on modes and levels of punishment and their appropriateness to different kinds of offences, so that it is able to guide criminal law practice, has been emphasised in Andreas von Hirsch, *Censure and Sanctions* (Clarendon 1993) 6; R.A. Duff, *Punishment, Communication and Community* (OUP 2001) 131. Appealing to the greater scope for moral granularity at the sentencing stage—to aggravating and mitigating features of the 'private' wrong—does not help Kantians as these circumstances must still be features of *the criminal wrong*, which their account detaches from the wrong done against the victim.

²²⁹ Russell Christopher, 'Deterring Retributivism: The Injustice of Just Punishment' (2001) 96 *Northwestern University Law Review* 843, 934ff; Ian Edwards, 'Victims, Sentencing Guidelines, and the Sentencing Council' in Andrew Ashworth and Julian Roberts (eds), *Sentencing Guidelines: Exploring the English Model* (OUP 2013).

²³⁰ Gardner, *Offences* (n 10) ch 2.

replicated in the discourse of officials in the courtroom, such as judges and prosecutors.²³¹ All of this is unrelated to what makes crime wrong on the Kantian account given that in it, as Thorburn puts it, ‘the victim, from the point of view of punishment, is neither here nor there’²³²—so there is no basis for considering the harm suffered by her. However, an account of criminal law concerned with the substantive wrong suffered by the victim is consistent with practice. This is problematic for a view that presents itself as offering a better fit with criminal law than its competitors.

This chapter challenged the account of role-morality on which the Roles-based defence rests and offered a better view of the way in which roles modulate the reasons that apply to us. The chapter also argued that, on either view of role-morality, the Self-Government and Freedom as Independence views gave no grounds for the claim that the reasons that apply to lawmakers qua public officials are discontinuous or autonomous from the morality that applies to us in our everyday lives. Furthermore, the moral claims presupposed by the Self-Government and Freedom as Independence views were shown to have unappealing implications for the criminal law, and for political morality more broadly. As a result, both accounts were found wanting as normative views. As suggested above, the Freedom as Independence view also fails as a descriptive account of the criminal law. In sum, both the Self-Government and Freedom as Independence views, the two most prominent statist accounts of the justification of the standard allocation, fail.

²³¹ R.A. Duff, ‘Torts, Crimes and Vindication: Whose Wrong Is It?’ in Matthew Dyson (ed), *Unravelling Tort and Crime* (CUP 2014) 163.

²³² Thorburn, ‘Punishment’ (n 34) 26.

In the next chapter, I develop an Instrumentalist answer to the allocative question.

Chapter 4: Instrumentalism

Chapters 2 and 3 considered two defences, one functional, one role-based, of the claim that it is permissible to allocate criminal law's powers and permissions to an agent *only if* ψ (where ψ is the achievement of a relational value that is personal to public officials). Both of these defences were found wanting. Chapter 3 further suggested that the Self-Government and Freedom as Independence views do not show that public officials are subject to a distinct set of moral values or norms which is autonomous or discontinuous from the morality that applies to us in our non-official roles. That is sufficient to reject the aforementioned statist answers to the allocation question.

This chapter develops an *Instrumentalist* justification of the standard allocation. The next chapter completes the case for Instrumentalism as the answer to the allocative question by defending it from objections.

Section I briefly addresses some common misconceptions about Instrumentalism. Section II sketches the instrumentalist justification of the standard allocation. Due to the nature of instrumentalism, the answer to the allocative question offered here can be no more than a sketch. As I suggested in Chapter 1, an instrumentalist justification rests on a set of assumptions and it is essentially contingent on empirical facts—mainly, but not only—about the attributes possessed by the public officials allocated criminal law's powers and permissions and by the agencies they are part of. The upshot is the following: if the assumptions turn out to be false, or the empirical considerations on which the instrumentalist justification rests change, and the true set of facts does not support the standard allocation, criminal law's powers and permissions ought to be allocated differently. This would do nothing to disprove Instrumentalism as the

right kind of answer to the allocative question. It would be Instrumentalism itself which would support the different form of allocation.

I. Instrumentalism: Some Preliminary Clarifications

According to Instrumentalism, criminal law is a means to achieve values that anyone could, at least in principle, realise. On this view, it is these impersonal values which give us the answer to the general justification question. The instrumentalist answer to the allocative question is that the standard allocation of criminal law's powers and permissions is justified insofar as this arrangement is what helps criminal law best deliver these impersonal values, at a lesser cost in other values.

Some objections to instrumentalism are based on misconceptions about the view. It is worth briefly dealing with these objections before providing a sketch of an instrumentalist account and responding to more substantive objections.

A. Impersonal, not Instrumental, Values

Some take Instrumentalism to be the view that the form that the allocation of criminal law's powers and permissions ought to take is that which better serves instrumental *values*, such as economic efficiency or accountability. According to one objection, it is intrinsic values—such as justice, dignity, the protection of civil liberties, and the securement of peace and order—which are overriding when it comes to deciding who ought to be empowered and permitted to apply and enforce the criminal law.¹

¹ For example, Lucia Zedner, 'What is Lost When Punishment is Privatised?' in Tom Daems and Tom Vander Beken (eds), *Privatising Punishment in Europe* (Routledge 2018).

This objection misunderstands Instrumentalism. Statist and Instrumentalist accounts are distinguished by the personal / impersonal nature of the values to which they appeal. The personal / impersonal distinction refers to the *kind of agent* who is able to realise a value. The impersonal values to which Instrumentalists appeal can be both instrumental and intrinsic values.² In fact, the instrumentalist answer to the allocative question that will be developed below gives pride of place to the intrinsic values mentioned above. To illustrate this point, take the following concise statement by Tadros of a standard instrumentalist view with respect to the allocation of the powers and permissions involved in the infliction of punishment:

My views about legitimacy and authority are primarily instrumentalist—the agent who has legitimacy and authority to punish is that which best serves the aims of punishment, whilst satisfying the constraints that apply. As long as the person enforcing (...) punishment is more effective than other providers, and will satisfy other constraints such as accuracy, proportionality and so on, better than other providers, that person typically has a right to enforce.³

What instrumentalists *do* believe is that, to the extent that it is justified to allocate criminal law's powers and permissions to public officials, this is *not* because—as statist would have it—the agency of public officials is *partly constitutive* of the values that justify making these powers and permissions available in the first place. The central claim made by Instrumentalism is that—at least when it comes to criminal justice—the state and its officials are instruments

² The instrumental value of something is derivative from, or reflective of, the value of the thing or state of affairs to which it is causally related, which must ultimately be something of intrinsic value. Therefore, in the end, a focus on instrumental value still concerns the realisation of intrinsic value or avoidance of disvalue of the same kind.

³ Victor Tadros, 'Punishment and the Appropriate Response to Wrongdoing' (2017) 11 *Criminal Law and Philosophy* 229, 233. Constraints—it should be clarified—which anyone could, at least in principle, be able to satisfy. Otherwise, the view would not be instrumentalist.

for bringing about some independently desirable state of affairs.⁴ Put differently, the justification of the standard allocation is based on *extrinsic*, rather than intrinsic, properties of the state and its public officials. This means that the allocative question cannot be resolved in principle without attending to the contingent features that tend to distinguish public officials and private persons.⁵

B. Instrumentalism, not Consequentialism

It may seem that instrumentalism as an answer to the allocative question relies on an (in this thesis) undefended consequentialist moral outlook, that is, the view that the normative status of an action is entirely a function of its consequences.⁶ However, instrumentalism may, but need not be, consequentialist. To give just one example: an instrumentalist could argue that the good consequences brought about by the standard allocation are *just part* of what contributes to its justification. She could argue that the allocation of criminal law's powers and permissions to an agent also must satisfy *constraints*—such as consent—which are not, in turn, justified by the consequences that complying with them can produce.⁷ Such a view remains instrumentalist to the extent that the relevant constraints can be, at least in principle, satisfied by anyone. Similarly, deontologists can favour an instrumentalist justification of a form of allocation based on its tendency to

⁴ Matthias Brinkmann, 'Indirect Instrumentalism about Political Legitimacy' (2019) 6 *Moral Philosophy and Politics* 175, 177.

⁵ Peter Jaworski, 'Privatization and the Ought/State Gap' in Jack Knight and Melissa Schwartzberg (eds), *NOMOS LX—Privatization* (New York UP 2018) 80.

⁶ Walter Sinnott-Armstrong, 'Consequentialism', *The Stanford Encyclopedia of Philosophy* (Winter edn, 2015) <<https://plato.stanford.edu/archives/win2015/entries/consequentialism/>> accessed 9 April 2017.

⁷ See, eg, A. John Simmons and Christopher Wellman, *Is There a Duty to Obey the Law?* (CUP 2005) ch 8.

promote rights-fulfilment without itself violating any rights.⁸ In the next chapter we will see other ways in which Instrumentalism diverges from consequentialism.

C. Retributivism and Instrumentalism

Consider a related source of confusion with respect to retributivist answers to the general justification question. Retributivists argue that intentionally bringing about the suffering of a deserving wrongdoer through the imposition of punishment is intrinsically valuable or valuable in itself: it achieves retributive justice or, more broadly, the good of giving wrongdoers their just deserts. On this view, punishment is valuable *non-instrumentally*, and we have defeasibly sufficient reason to make available criminal law's powers and permissions in virtue of the fact that punishments brings this non-instrumental value about.⁹ Against consequentialism, retributivists claim that the good consequences that might follow from punishment serve to justify punishment only by offsetting its drawbacks, and so are secondary to punishment's normative or evaluative status.¹⁰ Still, despite taking a non-instrumentalist view of the value of punishment, and a non-consequentialist view of its justification, many retributivists *are* instrumentalists when it comes to answering the allocative question. These retributivists believe that retributive justice is an impersonal value. What justifies the standard allocation is that it delivers more of the intrinsic value that justifies punishment at a lower cost in other values.¹¹ Notice that this is true for both so-

⁸ A point Arneson makes with regards to the justification of democracy in 'Democracy Is Not Intrinsically Just' in Keith Dowding, Robert Goodin and Carole Pateman (eds), *Justice and Democracy* (CUP 2004) 41.

⁹ Indeed, on this view, the criminal process is justified because it enables the justified imposition of punishment (see, for example, Michael Moore, *Placing Blame* (OUP 2010) ch 1; Liz Campbell, Andrew Ashworth and Mike Redmayne, *The Criminal Process* (5th edn, OUP 2019) 22-25.

¹⁰ Moore (n 9) 28, 70-71, 156, 170-72.

¹¹ Michael Moore, 'A Tale of Two Theories' (2009) 28 *Criminal Justice Ethics* 27.

called “deontological” and “consequentialist” retributivists. Deontological retributivists take retributive justice to impose a duty to punish *every* deserving wrongdoer, which thus can require punishing an identified culpable wrongdoer even if this knowingly causes a more serious offender or a larger number of equally deserving offenders to escape punishment. Consequentialist retributivists conceive of the retributive duty as one that mandates the *maximization* of the value of retributive justice, and which can thus be fulfilled by foregoing the punishment of a culpable wrongdoer if doing so is conducive to the punishment of a larger number of (or of more deserving) culpable wrongdoers.¹² In either case, the standard allocation is justified instrumentally: as the arrangement that leads to better compliance with the relevant retributive duty at a lower cost in other values.

D. Discontinuity and Instrumentalism

Finally, recall that Chapter 3 rejected the Self–Government and Freedom as Independence accounts of the autonomy of the justification of criminal law, and of the allocation of its powers and permissions, from ordinary or general morality. But there are versions of this discontinuity thesis, as I called it, that are compatible with Instrumentalism. For example, we saw in the previous chapter that, according to political liberals, the justification of criminal law and the allocation of its powers and permissions should not appeal to reasons pertaining to controversial moral doctrines or conceptions of the good.¹³ Others think that justifications must appeal to values that can be found in the shared political commitments of a liberal democratic society, such that proponents of these

¹² See Moore, *Placing* (n 9) 154ff; Michael Cahill, ‘Retributive Justice in the Real World’ (2007) 85 *Washington University Law Review* 815, 825ff.

¹³ Chapter 3, text to nn 3-5. See also, Chad Flanders, ‘Public Wrongs and Public Reason’ (2016) 55 *Dialogue* 45; Chad Flanders, ‘Punishment, Liberalism and Public Reason’ (2017) 36 *Criminal Justice Ethics* 61.

justifications can reasonably expect that others could endorse them.¹⁴ Many values that are admissible under a political liberal view are impersonal (deterrence being the most obvious one), such that instrumentalism can be perfectly compatible with—whilst constrained by—political liberalism.

II. Instrumentalist Justification of the Standard Allocation

To illustrate the way in which an instrumentalist answer to the allocative question might go, we can consider some possible negative effects of *not* standardly allocating criminal law's powers and permissions. In Section A, I address the effects of allocating these powers and permissions *only* to private persons (a system of *pure private enforcement* for short).¹⁵ In Section B, I turn to those of allocating criminal law's powers and permissions to *both* private persons and public officials on equal or similar terms. Jointly, these negative effects suggest that we are justified in allocating criminal law's powers and permissions to public officials *and* withholding or withdrawing them significantly from private persons, respectively. In the next chapter, I rely on the sketch offered below as part of the response to what I will label the Objection from Fit.

A. Allocation to Public Officials

Consider first the scenario of pure private enforcement. There are three sets of considerations that recommend the allocation of criminal law's powers and permissions to public officials. I elaborate them under the headings of 1. *Insufficient Delivery*, 2. *Externalization*, and 3. *Inequality*.

¹⁴ Zachary Hoskins, 'Public Reason and the Justification of Punishment' (The Political Turn(s) in Criminal Law Theory, Online Workshop, February 2021).

¹⁵ To reiterate (chapter 1, text to n 25), in this world there is a state that legislates criminal law and allocates the powers and permissions it makes available. Hence, what follows is *not* a state of nature scenario.

1. Insufficient Delivery

A system of pure private enforcement is likely to deliver little of the values that criminal law seeks to achieve (*insufficient delivery*).

The main cause for insufficient delivery is the *under-enforcement* of criminal law, which could in turn be a consequence of several factors. One such factor is that private persons may not have sufficient *incentives* to hold wrongdoers responsible. Pursuing criminal justice is costly, and its typical disposals do not confer tangible benefits on plaintiffs but are instead enjoyed by many others (or by no-one, such as the value of retributive justice). Also, many wrongs which involve significant social costs or risks thereof have little or no impact on individual people, impact which might otherwise motivate them to bring their perpetrators to justice.¹⁶ Another factor is that private persons tend to *lack the resources* and *expertise* required to effectively enforce the criminal law, especially given that some wrongs are hard to uncover and their perpetrators difficult to track down.¹⁷ Yet another factor is that some victims are relatively *powerless*: wrongdoers may resort to violence or manipulation to dominate them,¹⁸ while others may further fail to attract the support of people willing and able to hold wrongdoers accountable on their behalf.

¹⁶ Christopher Wellman, *Rights Forfeiture and Punishment* (OUP 2017) 82-83. Offences that may fit this description are (i) motoring offences, eg dangerous driving, driving under the influence of drink or drugs, motor racing in public highways (Road Traffic Act 1988, ss 2, 4, 5, 12); (ii) some possession offences, eg firearms; (iii) offences that cause 'accumulative' or 'conjunctive' harms, eg pollution offences (see Andrew von Hirsch, 'Extending the Harm Principle: 'Remote' Harms and Fair Imputation' in Andrew Simester and A. T. H. Smith (eds), *Harm and Culpability* (Clarendon Press 1996) 265. The problem of combined private costs and social rewards leading to underinvestment in the provision of a good is familiar from the law and economics or public choice literature: see, eg Steven Shavell, 'The Optimal Structure of Law Enforcement' (1993) 36 *Journal of Law & Economics* 255, 269-270; Dennis C. Mueller, *Public Choice*, vol III (CUP 2003) 9-15.

¹⁷ Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (OUP 2010) 141.

¹⁸ See sources in n 63.

Insufficient delivery is particularly problematic if one of the reasons for which criminal law makes available its powers and permissions is to deter wrongdoing, for it is thought that the (perception of) likelihood of conviction and punishment is the main factor underpinning criminal law's deterrent capacity—whereas punishment severity plays a negligible role.¹⁹ Some have suggested that the advent of public policing and prosecution—with the consequent increase in the regularity of enforcement—was driven by the aim to do away with the reliance on the infliction of extremely severe punishments on a small number of people.²⁰ However, notice that the problem of insufficient delivery might obtain even if a large proportion of perpetrators are arrested, prosecuted and punished. To prevent harms and/or wrongs—if this is what gives us defeasibly sufficient reason to make available criminal law's powers and permissions—these actions must reach a wide audience, which must also believe that the threat of these actions will remain consistent and credible over time. Dispersed private enforcers are likely to underperform in this respect.²¹ Moreover, many think that the case for punishments of the kind and intensity that are routinely imposed by the criminal justice system depends entirely on, or at least needs to be supplemented by, benefits in the form of crime reduction.²² If the assumption just made about the performance of private persons is true, then it will normally be impermissible for

¹⁹ See Horst Entorf and Hannes Spengler, 'Crime, Prosecutors, and the Certainty of Conviction' (2015) 39 *European Journal of Law and Economics* 167; sources cited in chapter 2 nn 113, 114, 116.

²⁰ Vincent Chiao, *Criminal Law in the Age of the Administrative State* (OUP 2018) 16-17 and sources cited therein; Clive Emsley, *Policing and Its Context 1750-1870* (Macmillan 1983) 59. As Edmundson suggests, 'any given degree of perceived extremity can be attained either by combining a low probability of "conviction" with an extreme penalty, or by combining a higher probability of conviction with a lesser penalty' (William Edmundson, *Three Anarchical Fallacies* (CUP 1998) 168).

²¹ Wellman (n 16) 82-83. Insufficient delivery will also be a cause of concern for retributivists, particularly those of the consequentialist variant (see text to n 12).

²² Gardner's Introduction to HLA Hart, *Punishment and Responsibility* (John Gardner ed, 2 edn, OUP 2008) xxxi, 1.

private persons to impose these punishments. Allocating the relevant powers and permissions to capable agents, with the resources for achieving these benefits, can then be seen as a way to buttress the justification of the practice.²³ To be sure, some of these problems may be overcome by private enforcement agencies or similar institutions, but not all (or at least not entirely): for instance, it is possible that these agencies will not be concerned with pursuing wrongs that have no significant impact on their members or whose prosecution is not immediately beneficial to them and who, as a result, are unlikely to contribute resources for their pursuit.

Insufficient delivery is a serious shortcoming of a system of pure private enforcement which goes to the heart of criminal justice. Still, there are wider costs or forms of disvalue that would arise in such a system that are also relevant to the justification of the standard allocation.

2. Externalization

Much of the value in our lives comes from the autonomous choice and pursuit of personal projects, commitments, and relationships. As a result, many think that individuals have a prerogative to devote attention and resources to these aspects of their lives out of proportion to the value that they have from an impersonal point of view.²⁴ Such an 'agent-centred prerogative' underpins, in turn, a *restrictive conception of responsibility*.²⁵ As individuals, we bear more responsibility for the

²³ Ibid 1; Victor Tadros, 'Responses' (2013) 32 *Criminal Law and Philosophy* 241, 250. Some disagree: Hanna thinks that, at least applied to the state, the consequence is the opposite. According to Hanna, given the state's larger resources, it has other—less burdensome—enforcement options available to achieve the goods that justify criminal punishment. As a result, the justification of the latter is undermined—criminal punishment may end up being impermissible in the context of a capable state (Nathan Hanna, 'It's Only Natural: Legal Punishment and the Natural Right to Punish' (2012) 38 *Social Theory and Practice* 598, 598-616).

²⁴ Samuel Scheffler, *The Rejection of Consequentialism* (Clarendon 1982) 17, 21, 62.

²⁵ As Scheffler explains, an agent-centred prerogative is only one possible form for taking this entitlement into account (ibid 58-60, 67).

harms and ills we intend or that arise as a direct consequence of our actions, than for those we merely foresee, simply allow, or fail to prevent. Thus, our negative duties—to refrain from harming others—are stricter than our positive ones—to provide assistance or undertake other positive acts for others' benefit. Therefore, the latter less frequently outweigh our entitlement to pursue our personal interests and projects.²⁶ Insofar the aforementioned implications of our nature as autonomous agents are true and important, it is desirable that our social and institutional order reflects them, helping individuals to lead their lives in the terms just described.²⁷

In this respect, allocating criminal law's powers and permissions only to private persons poses a dilemma: on the one hand, if persons are legally permitted to act on agent-relative preferences, this is likely to lead to the insufficient delivery problem outlined above, as many will be justifiably disinclined to devote their energy and resources to the delivery of criminal justice if this would be detrimental to their own projects and commitments. Also, some of those who do engage in the pursuit of criminal justice might see it as a way to promote the values or aims to which they are personally committed, which can in turn make the pursuit less fair, impartial or respectful of those subject to it.²⁸ However, at least in some circumstances, private persons will be under pro tanto moral duties to pursue criminal justice—or, at any rate, to see to it that criminal justice is delivered. This might be because we have a duty of justice to seek that wrongdoers are given their just deserts or, more plausibly, because of the consequential benefits that result

²⁶ Michael Green, 'Institutional Responsibility for Moral Problems' in Andrew Kuper (ed), *Global Responsibilities: Who Must Deliver on Human Rights?* (Routledge 2005) 118-120.

²⁷ Thomas Nagel, *Equality and Partiality* (OUP 1991) 83.

²⁸ Chiara Cordelli, 'How Privatization Threatens the Private' (2013) 16 *Critical Review of International Social and Political Philosophy* 65.

from the regular enforcement of the criminal law. In a system of pure private enforcement, these duties are likely to go largely unfulfilled for the reasons just given. The upshot is not only that criminal justice remains undone, but also that private persons become wrongdoers themselves (even if justified or, at any rate, excused). On the other hand, if the allocation of criminal law's powers and permissions to private persons were accompanied by the imposition of legal duties to exercise them—and assuming these duties are significantly burdensome—much of the value that comes from individuals leading their own lives would be lost. The loss of value would be accentuated if the aforementioned duties were accompanied by demands of accountability, standards of fairness, impartiality and respect (ie those typical of state action). The latter is true of private agencies or corporations as well, particularly when their motive for getting involved in criminal justice is to pursue some particular end or conception of the good (eg a religious one). Indeed, subjection to the aforementioned standards can run counter to the associations' liberty to express and act from their values and commitments in the application and enforcement of the criminal law.²⁹

The state and its public officials (qua public officials), unlike individuals, do not—as Nagel puts it—'have their own lives to lead'.³⁰ As such, they do not possess the features that ground the agent-relative prerogative and the restrictive

²⁹ Ibid; Chiara Cordelli, 'Privatization Without Profit?' in Jack Knight and Melissa Schwartzberg (eds), *NOMOS LX—Privatization* (New York UP 2018) 120-21; Ashwini Vasanthakumar, 'Privatising Border Control' (2018) 38 OJLS 411, 428. Jody Freeman takes a contrasting view in 'Extending Public Law Norms Through Privatization' (2003) 116 Harvard Law Review 1285, arguing that extending to private agents the norms that typically apply to state action (something she labels 'publicization') can, in some cases, be an appropriate way to address the problems (some of which will be discussed below) of entrusting the delivery of some public good to private—generally for-profit—agents.

³⁰ Nagel (n 27) 59.

conception of responsibility just mentioned.³¹ Further, public officials can be more easily paid to pursue wrongdoers, trained, and provided by the state with the means required to undertake criminal justice activities.³² As a result, many of the countervailing reasons to the pursuit of criminal justice outlined above have less force for them. Therefore, these officials are able to perform what Cordelli calls an ‘externalization function’, whereby state institutions ‘discharge burdens that would in their absence fall (at least in part) on individuals themselves’.³³ In doing so, the state relieves individuals of those burdens so that they can permissibly devote their resources to the pursuit of their own good. As suggested, most of this good is *personal* to private persons. This is one way in which an instrumentalist justification of the standard allocation is pluralistic: it too rests in part on the promotion of personal value; just not personal to the state and its officials.

We saw that states do not possess the features of individuals that ground the agent-centred prerogative. States typically also have some capacities that individuals lack, and do not bear some burdens and limitations of individuals that help underpin the restrictive conception of responsibility. For instance, states are often better placed than individuals to know about the more remote or indirect effects of their actions and omissions. These differences matter because the assumption by the state of the duties that would otherwise fall on individuals does not leave these duties unaltered. Since there is less reason to restrict the responsibility of the state and its officials compared to individuals, the former can

³¹ Green (n 26) 123-24; David Enoch, ‘Intending, Foreseeing, and the State’ (2007) 13 *Legal Theory* 69, 91-93.

³² Andrew Simester and Andrew von Hirsch, *Crimes, Harms, and Wrongs* (Hart 2011) 198.

³³ Cordelli, ‘Privatization Without Profit?’ (n 29) 119. For instance, public control of the criminal process can save victims from sustaining the emotional toll of the process and allow them to focus on their recovery (Ronen Perry, ‘Empowerment and Tort Law’ (2009) 76 *Tennessee Law Review* 959, 972, 985-86).

justifiably be made to bear duties (especially positive duties to investigate, prosecute, try, and punish) that are both wider in scope and more stringent. Consider in particular the duty not to harm. Not only will states have, as individuals do, stringent (negative) duties not to *cause* harm, they will also have—now in contrast to individuals—wider and more stringent (positive) duties to *protect* or save others from harm. When the state engages in criminal justice activities, it does a lot of harm—to guilty and innocent alike—for which the state is responsible. Yet, for the reasons just outlined, the state is *also* responsible for the wrongful harm it fails to prevent by not performing these same activities.³⁴ There is in addition, as Edwards explains, an *evaluative* dimension to the violation of these duties that is peculiar to the state. Given the state's special duties to protect from harm those under its jurisdiction, when the state harms the innocent or fails to protect someone from harm that it could have easily prevented, it does the very opposite of what the relevant duties would have it do. All else being equal, doing the opposite of what a duty would have one do is worse than merely breaching that duty. Thus, when criminal law's powers and permissions are allocated to public officials, these officials 'are under *extra rational pressure* to do the job well—to prevent us from being wrongfully harmed by others, and to avoid wrongfully harming us themselves'.³⁵ That counts as another powerful reason for thus allocating these powers and permissions.

There is an obvious interplay between the structure of the duties of individuals and those of institutions, in this case the state. In particular, the

³⁴ Green (n 26) 125; Enoch (n 31) 91-93.

³⁵ James Edwards, 'Criminal Law's Asymmetry' (2018) 9 *Jurisprudence* 276, 298. See also, John Gardner, 'Criminals in Uniform' in R.A. Duff and others (eds), *The Constitution of the Criminal Law* (OUP 2013) 106-108.

existence of a capable state makes it the case that the positive duties of individuals take an *indirect* form: instead of devoting their energy and resources to the direct undertaking of criminal justice activities, individuals are required to create, sustain and enhance the state agencies which in turn engage in those activities.³⁶ Notice that this attenuates the distinction between the structure of the responsibility of private persons and that of the state and its officials. When powers are standardly allocated, private persons may seem no longer to have many or very stringent positive duties to prevent others from being wronged or protect them from harm, their duties being now largely restricted to the usual negative duties not to actively wrongfully harm others. As I have argued, this allows them to concern themselves with the pursuit of their own good. Yet, the positive duties to prevent and protect remain, and are instead owed *through the state institutions* that everyone is duty-bound to support, institutions which, as I also argued, are responsible both for the harms and wrongs they cause and fail to prevent.³⁷ To recall a point from chapter 3, the structural differences in the duties to which private persons and public officials are subject actually points to no basic difference between the moral reasons or principles applicable to both kinds of agents. The norms to which public officials are subject are the same norms that direct private persons to create, sustain and enhance the agencies to which these officials belong, agencies which help individuals conform to these norms. The distinct duties incurred by these two sets of agents follow from the particular properties that tend to distinguish individuals from state agencies. It is the same

³⁶ Henry Shue, 'Mediating Duties' (1988) 98 *Ethics* 687, 695-98.

³⁷ Nagel (n 27) 84. See also Richard Vernon, 'Humanitarian Intervention and the Internal Legitimacy Problem' (2008) 4 *Journal of Global Ethics* 37, 41. See also, chapter 3 text to n 121, on 'duty to join forces'. According to Shue, 'It may be the fact that positive individual duties are mostly indirect that allows some theorists of rights to assume that individuals have only negative duties toward rights to physical security like the right not to be assaulted' (Shue (n 36) 696 fn 9).

basic moral reasons or principles that require different actions, or individuate different duties, in virtue of the divergent empirical circumstances in which officials and private persons are situated.³⁸

None of this is to deny the possibility that private agencies might largely fulfil the externalisation function and overcome many of the limitations that affect private individuals mentioned above. However, having capable agencies of the sort needed has the potential to bring new costs that might outweigh their benefits in terms of the value of externalisation and their effectiveness in the pursuit of criminal justice. Some of these problems will be discussed in what follows.

A point of clarification before moving forward. The notion of externalization elaborated above evokes that of the 'division of moral labour' developed in the context of debates about distributive justice.³⁹ According to the latter idea, social institutions are meant to resolve the tension between the values of distributive justice and other—usually personal—values (such as those involved in intimate relationships) in the everyday lives of individuals. The tension arises because the two sets of values will often supply reasons favouring conflicting actions in a given context, inevitably condemning individuals to a deficit in conformity with the reasons that apply to them. On this view, the task of pursuing the values of distributive justice is assigned to social institutions, which set a framework within which individuals are left free to pursue the other set of

³⁸ Tadros, 'Responses' (n 23) 249-251; chapter 3 text to nn 145-146. See also, Liam Murphy, 'Institutions and the Demands of Justice' (1998) 27 *Philosophy & Public Affairs* 251.

³⁹ See Samuel Scheffler, 'Egalitarian Liberalism as Moral Pluralism' (2005) 79 *Proceedings of the Aristotelian Society Supplementary Volume* 229.

values involved in the conflict. As a result, the values of distributive justice give individuals only a duty to support the relevant institutions.

The externalization function performed by the state and its officials with regards to criminal justice does *not* amount to a moral division of labour *if* by the latter it is understood that the reasons supplied by the values of criminal justice *cease to be applicable* in those contexts where the individuals' personal values apply. Externalization does not imply that the values of criminal justice supply individuals with reasons for no other action than the support of criminal justice institutions—even in those contexts where powers and permissions are entirely withdrawn from private persons. As we will see in the next chapter, despite the standard allocation of criminal law's powers and permissions, the values of criminal justice continue to give reasons to private persons such that some may be morally required to inflict criminal punishment contrary to the allocative rules. In the extreme, that is, in cases of systematic failure of the standard allocation to achieve the values of criminal justice, duties to arrest, try, and punish fully revert to private persons.⁴⁰ The externalization function, as conceived in this section, is not meant to separate the contexts where criminal justice and personal values apply, but to *attenuate* the demands placed by the former on individuals.

3. Inequality

A third set of considerations has to do with different forms of inequality that are attendant to a system of pure private enforcement, which also count against this form of allocation.

⁴⁰ Chapter 5, ss I.B, II.C. For critical discussion of the moral division of labour, see Thomas Porter, 'The Division of Moral Labour and the Basic Structure Restriction' 8 *Politics, Philosophy & Economics* 173; Murphy (n 38) esp 279-82.

a) **Inequality: Burdens**

In a system of pure private enforcement, individuals not only bear disruptive burdens to pursue criminal justice, they also do so *unequally*. Those who are more capable or motivated may be willing or feel compelled to take up the task of tracking down wrongdoers and holding them responsible. Others will properly conform to the reasons they all have in common to see to it that these tasks are fulfilled precisely by leaving matters in the hands of the most capable. Yet, this will result in the former shouldering most of the attendant costs, while the benefits would accrue to everyone else. The state can solve this problem of *unequal burdens* by inviting those motivated to do so to join its ranks and spreading the costs of pursuing criminal justice more fairly through taxation.⁴¹

b) **Inequality: Subordination**

Hadfield and Weingast suggest that states with fully public and centralised enforcement systems lack incentives to conform to the rule of law and to enshrine the interests of their subjects in their legal norms. The reason is that states so arranged do not depend on the cooperation of their subjects to enforce their norms. In contrast, a fully privatised, decentralised, and voluntary regime of enforcement—or at any rate one in which voluntary participation of private persons has an *essential* role—would better promote the values just mentioned.⁴² However, the connection between reversing the standard allocation and the promotion of rule of law values is doubtful. As Fabre speculates, it is not clear why, in a world of fully decentralised private enforcers, they would not ‘outgun

⁴¹ Daniel McDermott, ‘The Duty to Punish and Legitimate Government’ (1999) 7 *The Journal of Political Philosophy* 147, 167-70.

⁴² Gillian Hadfield and Barry Weingast, ‘Is Rule of Law an Equilibrium Without (Some) Private Enforcement?’ in Jack Knight and Melissa Schwartzberg (eds), *NOMOS LX—Privatization* (New York UP 2018).

each other into terrorizing all of us into complying with their enforcement decisions’, regardless of their individual merits and demerits.⁴³

More modestly, some contend that the harshness and bias exhibited by some contemporary criminal justice systems are due to their bureaucratic character and the dominance of experts and public officials. Proponents of this claim argue that private persons hold more lenient and egalitarian attitudes towards criminal justice. As a consequence, giving ‘communities’ more control over criminal justice—in the form of increased, and sometimes decisive, lay participation in prosecutorial (eg plea bargain) and sentencing decisions—would result in a reduction in said harshness and bias.⁴⁴ If this assumption about the virtues of private persons relative to experts and public officials is true, some might argue that a more comprehensive re-allocation of criminal law’s powers and permissions from the hands of public officials to those of private persons will serve to alleviate the ills of criminal justice.⁴⁵

As it happens, the state is often a tool for some groups to entrench their social dominance, something which is vividly reflected in the realm of criminal

⁴³ Cécile Fabre, ‘Privatizing War’ in Jack Knight and Melissa Schwartzberg (eds), *NOMOS LX—Privatization* (New York UP 2018) 308. And it might not promote the reflection of the interests of subjects in the legal norms either. Indeed, as Hadfield and Weingast themselves acknowledge, ‘we expect that only the needs and interests of those people who are needed for effective collective punishment will be reflected in the rules’ (Hadfield and Weingast (n 42) n 24). Assuming the persistence of extant inequalities in power and other resources, Hadfield and Weingast’s remarks amount to an admission—as Gourevitch notes—of a system of ‘class rule’ (Alex Gourevitch, ‘What is Politics Without the State? A Reply to Hadfield and Weingast’ in Jack Knight and Melissa Schwartzberg (eds), *Nomos LX—Privatization* (New York UP 2018) 287-89).

⁴⁴ Joshua Kleinfeld and others, ‘White Paper on Democratic Criminal Justice’ (2017) 111 *Northwestern University Law Review* 1693, 1700-701, 1705; Stephanos Bibas, *The Machinery of Criminal Justice* (OUP 2012); Thom Brooks, ‘Punitive Restoration: Giving the Public a Say on Sentencing’ in Albert Dzur, Ian Loader and Richard Sparks (eds), *Democratic Theory and Mass Incarceration* (OUP 2016). For a recent survey of the proposals, see John Rappaport, ‘Some Doubts About ‘Democratizing’ Criminal Justice’ (2020) 87 *University of Chicago Law Review* 711.

⁴⁵ Private policing is, of course, already widespread in the form of private security.

justice. Members of subordinate groups are much more likely to be convicted, and to be punished more harshly, than those higher up the social hierarchy, for the same crimes.⁴⁶ However, the retreat of the state from a domain—from the regulation of some activity or the provision of some good—might also be followed by the entrenchment of concentrations of private power and coercion. To the extent that the state removes itself from a domain, but existing social hierarchies and power differentials remain, these may become greater because any moderating effect otherwise derived from the presence of the state may disappear. As to criminal justice, one possibility is that it becomes *more* oppressive and inegalitarian.⁴⁷ This inequality could manifest in several ways. For instance, some people will be powerful enough to avoid detection altogether and/or to avoid being held to account for their wrongs, while having more resources at their disposal to obtain more justice for themselves (*Unequal Enforcement*). Their resources would allow them—as they do today—to protect themselves better from crime and, moreover, displace it to less privileged groups. The same is true if powers and permissions are allocated to private agencies or other groups, particularly if their services are privately purchased. Those who can afford protection and get justice for the wrongs they suffer might have little incentive to support the provision of these goods for those who are not similarly able to secure them privately—possibly exacerbating the displacement of insecurity just mentioned (and the broader social inequalities).⁴⁸ These unequal patterns of

⁴⁶ Perhaps the clearest example of this phenomenon is the overrepresentation of African American males relative to whites at all the stages of the criminal justice process with regards to drug offences: Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press 2020).

⁴⁷ Kit Christensen, *Revenge and Social Conflict* (CUP 2016) 147.

⁴⁸ Ian Loader and Neil Walker, *Civilizing Security* (CUP 2007) pt II; Ric Simmons, 'Private Criminal Justice' (2007) 42 *Wake Forest Law Review* 911, 983. For similar thoughts in the context of military

enforcement would, in turn, reinforce existing structures of social inequality or subordination. Therefore, there are good reasons to believe that reversing the standard allocation would not do much to improve, and might worsen, the facets of criminal justice outlined above.⁴⁹

Some—particularly in the context of the United States—have claimed that the relevant communities to which control of criminal justice should be restored or allocated exist at the *neighbourhood* level, where existing levels of residential segregation would ensure the presence of the communities of value necessary for the proposals to succeed. Proponents of this view argue that, even if lay people are not generally more lenient and egalitarian,⁵⁰ they are so towards those of their same racial or ethnic group. Thus, granting them more power by, say, the integration of local sentencing juries and policing boards, would reduce the effect of bias by public officials who tend to belong to different groups.⁵¹

Fully evaluating this claim goes beyond the scope of this thesis. However, some general considerations are worth mentioning.⁵² The first, somewhat obvious point, is that neighbourhood-based criminal justice seems to assume—rather unwarrantedly—that both victim and offender will belong to the same neighbourhood community and that both will conceive of themselves as members

force, see James Pattison, 'Deeper Objections to the Privatisation of Military Force' (2010) 18 *Journal of Political Philosophy* 425, 445.

⁴⁹ Christensen (n 47) 142-43.

⁵⁰ Something which seems to be borne out by the evidence: see, Rappaport (n 44) 759ff.

⁵¹ See Bibas (n 44) 157ff; Kleinfeld and others (n 44). See also, sources in Rappaport (n 44) 731-745.

⁵² The empirical evidence said to support the view—on, inter alia, neighbourhood composition, lay leniency and egalitarianism—has been forcefully contested: see Rappaport (n 44).

of it in a strong sense.⁵³ Assuming the relevant community can be non-arbitrarily demarcated and, for the sake of argument, that people are more egalitarian and lenient towards their own, the proposal risks the negative effects of outgroup bias when the perpetrator does not belong to the same community. Secondly, neighbourhoods are interconnected. The point about crime–displacement mentioned above applies between neighbourhoods: more resourceful neighbourhoods, or those willing to impose the harshest forms of enforcement and punishment will displace crimes to others.⁵⁴ The third point is that this view rests on a flawed conception of ethnic, racial or cultural groups as monolithic, and is thus oblivious to the presence of divergent interests among members arising out of class, gender, age and other intra-group differences.⁵⁵ This is important not only because it belies the often simplistic assumptions about, and appeals to, communities of values and shared interests but also—and more to the point—because restoring the administration of criminal justice to local settings is likely to exacerbate the power differentials found at that level.⁵⁶ As Lacey summarises the thought, '[r]estoring "property" in criminal "conflicts" to the parties would mean,

⁵³ Kleinfeld et al argue that 'sentencing juries, should be drawn from within the immediate, local community in which the crime was committed' (Kleinfeld and others (n 44) 1697).

⁵⁴ Rappaport (n 44) 757-58.

⁵⁵ Stephen J. Schulhofer, 'Criminal Justice, Local Democracy, and Constitutional Rights' (2012) 111 *Michigan Law Review* 1045 1082. See, more generally, Anne Phillips, *Multiculturalism Without Culture* (Princeton UP 2007) 17-18 and sources cited therein; also Rappaport (n 44) 746ff.

⁵⁶ Rappaport (n 44) 749-750. To take an example from a different context, research has shown how local planning and zoning deliberative meetings amplify the voices of the most privileged and otherwise unrepresentative members of their 'communities', who tend to be overwhelmingly opposed to new housing (see Katherine Levine Einstein, David M. Glick and Maxwell Palmer, *Neighborhood Defenders: Participatory Politics and America's Housing Crisis* (CUP 2019) chs 5-6).

as it has always meant, greater justice for those with greater resources, and more power in the hands of the powerful'.⁵⁷

Each of the above considerations supports the following conclusion: that the effects of adopting a system of purely private enforcement would be worse than those which provide for public enforcement. These considerations are neutral, however, between (i) systems which confer criminal law's powers and permissions, to a similar degree, on both public officials and private persons; and (ii) systems which adopt the standard allocation: which confer powers and permissions on public officials that are not conferred (either at all, or to anything like the same extent) on private persons. The following sub-sections offer reasons to think that the effects of (i) would be in various respects worse than the effects of (ii).

B. Withholding from Private Persons

Recall the point made above that effective deterrence depends on the perceived likelihood of offenders being captured, convicted, and punished, and how this counted in favour of allocating criminal law's powers and permissions to public officials.⁵⁸ Why not then allocate criminal law's powers and permissions to private persons *in addition to* public officials to further solve the problem of insufficient delivery? After all, this would seem to enhance the system's capacity to convict a higher number of offenders.⁵⁹ A host of instrumentalist considerations suggests

⁵⁷ Nicola Lacey, 'Humanizing The Criminal Justice Machine: Re-Animated Justice or Frankenstein's Monster?' (2013) 126 Harvard Law Review 1299, 1324, where she adds: 'without general regulative rules, such a practice may lead to vigilantism and to rampant inequality'.

⁵⁸ Text to n 19.

⁵⁹ Some legal systems have explicitly adopted this rationale for the conferral of prosecutorial powers to private persons, eg Chile: María Inés Horvitz and Julián Lopez, *Derecho Procesal Penal Chileno*, vol I (Editorial Jurídica de Chile 2002) 285-87; Juan Pablo Arrué and Bernardita Luebert, 'La Recuperación de la Víctima y la Seguridad Ciudadana Frente al Derecho Penal Público y

that the costs of having private persons benefit from criminal law's powers and permissions could outweigh the potential gains.

One such consideration for withholding criminal law's powers and permissions from private persons is the *violation of constraints* applicable to the performance of criminal justice activities. Another is the *squandering of resources*. A third is the potential for outbreaks of *retaliatory violence*. A fourth is the *protection of victims*. And lastly, the relevance of *motives* for permissibility. I now summarise these considerations in turn.

1. Violation of Constraints

One way in which applicable constraints may be infringed is that *innocents may be punished*. Another is that the guilty may be punished *disproportionately*. Both are probable consequences of private persons' lack of expertise and resources. Another, derived from the absence of a single centralised agency charged with enforcing the criminal law, is the failure to conform to the principle of *horizontal proportionality*, which requires similarly situated offenders to be visited with equivalent sanctions.⁶⁰

2. Squandering and Retaliation

The squandering of resources may be the result, *inter alia*, of several agents competing to hold the same wrongdoer accountable or of victims or other aggrieved parties pressing ahead with unpromising prosecutions; while cycles of retaliation could be sparked, among others, by the offender and her associates believing—rightly or wrongly—that the treatment to which she has been subject

Democrático. Análisis Crítico de la Revisión Administrativa de la No Formalización' (Bachelor's Thesis, University of Chile 2013) 25, 49.

⁶⁰ Moore, 'A Tale' (n 11) 42.

was unfair. The punisher and her associates, for their part, may regard any such reaction as a new wrong and respond in kind.⁶¹

Notice that the problems outlined in this, and the previous section are not limited to private individuals: partiality towards one's own is likely to result in excessive punishment and (perhaps even greater) retaliatory conflict between competing agencies acting on behalf of opposing parties as well.⁶²

3. Victims

As to the protection of victims, recall that some of them may be relatively powerless *vis-à-vis* their wrongdoers. This is a weighty reason not to allocate victims powers over prosecutorial or sentencing decisions since this could expose them to manipulation or coercion from their wrongdoers in order to influence their decisions.⁶³ And what about victims having, for instance, the power to force the initiation of a public prosecution? One reason to deny them this capacity is that some prosecutions may not have significant chances of success, and victims may be ill-placed to assess that. Giving them the power just mentioned may lead to the squandering of resources better spent elsewhere.

4. Motives

Some add that people may be prone to arrest, investigate, prosecute and punish others out of corrupt motivations, such as a desire for revenge, self-

⁶¹ Simmons and Wellman (n 7) 8-10; Mark Reiff, *Punishment, Compensation, and Law* (CUP 2005) 74-5.

⁶² See Simmons and Wellman (n 7) 12-16; Christopher Wellman, 'Toward a Liberal Theory of Political Obligation' (2001) 111 *Ethics* 735, 743.

⁶³ Victor Tadros, *The Ends of Harm* (OUP 2011) 295-96. This might be particularly true in cases of domestic violence, see eg Carolyn Hoyle and Andrew Sanders, 'Police Responses to Domestic Violence. From Victim Choice to Victim Empowerment?' (2000) 40 *British Journal of Criminology* 14; Perry (n 33) 978, fn 142 (sources cited therein).

aggrandisement or vanity.⁶⁴ There is a good case for thinking that motivations matter (within limits) for the deontic status of these actions.⁶⁵ It is plausible that actions undertaken for the aforementioned corrupt motives—even if perfectly fitting (say, because deserved)—are at least *pro tanto* morally wrongful if for no other reason that they disrespect the moral status of their targets.⁶⁶ Further, some retributivists claim that punishment is justified only if it is imposed for the reason that it is deserved—otherwise the good of retributive justice fails to be realised.⁶⁷

Still, whatever we think about the relation between motivation and wrongfulness/ permissibility, where these motives remain unchecked, the risk of unjustified harm does not loom far away. The presence of these ‘dark emotions’⁶⁸ is a reason to allocate criminal law’s powers and permissions to public officials, and to withhold them from private persons. On the one hand, we might believe that these emotions are less prevalent in public officials than in private persons (due to, *inter alia*, training, lack of stakes in the matter, etc). On the other, and perhaps more plausibly,⁶⁹ although had in similar measures, these emotions will less often result in the violation of constraints and other wrongs in the case of

⁶⁴ Moore, ‘A Tale’ (n 11) 42.

⁶⁵ Tadros, *Ends* (n 63) ch 7, esp pp 155-66.

⁶⁶ In a similar sense, Ronen Avraham and Daniel Statman, ‘More on the Comparative Nature of Desert: Can a Deserved Punishment Be Unjust?’ (2013) 25 *Utilitas* 316.

⁶⁷ Moore, *Placing* (n 9) 170-1.

⁶⁸ Moore, ‘A Tale’ (n 11) 42.

⁶⁹ See A.C. Thompson, ‘Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes’ (*Pro Publica*, 2019) <www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes> accessed 12 April 2020; Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far Right Militancy in Law Enforcement* (Brennan Center for Justice, 2020); Katrin Bennhold, ‘She Called Police Over a Neo-Nazi Threat. But the Neo-Nazis Were Inside the Police’ *The New York Times* (Frankfurt, 4 May 2021) <www.nytimes.com/2020/12/21/world/europe/germany-far-right-neo-nazis-police.html> accessed 12 April 2021.

public officials (because, say, their effects can be more easily controlled) than if the same actions were carried out by private persons. Even if arrests and other criminal justice measure undertaken for base motives are morally wrongful, we may still be justified in empowering and permitting those corruptly motivated if this leads to overall good outcomes, especially for the interests of those subject to these measures.⁷⁰ The claim here is that this is likelier to be the case with public officials, not private persons.

The standard allocation goes some way towards addressing the problems above because state institutions have a larger ability to build up high levels of expertise and can set up effective structures of coordination among their different officials and mechanisms of scrutiny. These are reasons to think that constraints will be better respected and corrupt motives will more likely be kept in check. The very fact of centralising the enforcement of criminal law helps to address the duplicity in the use of resources. There are rule of law considerations which are relevant here as well. The aforementioned features of the state help to avoid discrepancies between the 'law as promulgated, and the law as actually administered'.⁷¹ As to preventing retaliation against the officials charged with enforcing the criminal law, we may think that some of the considerations just outlined furnish the actions of public officials with a public mantle of legitimacy. By consistently acting in conformity to known procedures and standards, public officials may be better able, as Tadros puts it, to *demonstrate* due respect for the wrongdoer's rights.⁷² Also, in our increasingly heterogenous and fragmented

⁷⁰ Cécile Fabre, 'In Defence of Mercenarism' (2010) 40 *British Journal of Political Science* 539, 551-552; Tadros, *Ends* (n 63) 160-66.

⁷¹ John Gardner, *Law as a Leap of Faith* (OUP 2012) 203-205, 210.

⁷² Tadros, *Ends* (n 63) 305. Some research has suggested that positive judgments about police legitimacy based on officers' perceived compliance with standards of justice is *negatively* correlated to positive attitudes towards the private use of violence for purposes such as protection and

societies, public officials may often be perceived as less partisan, and thus more legitimate, than private groups or individuals.⁷³ In this sense, Cordelli claims that political institutions can perform an appropriate *expressive function* that is less available to private individuals and associations which, 'given their symbolic features, fail to represent and thus render visible the ideal of equality as reciprocity among citizens, regarded as participants in a shared scheme of social cooperation (...) even if private actors *treat* people as equals'.⁷⁴ And if none of this proves enough, the sheer power of the state may suffice to dissuade attempts of retaliation against its officials. Finally, the condemnatory nature and stigma attached to the criminal conviction and punishment, together with the symbolism of the state-administered criminal process, may also serve to placate the retaliatory impulses of disgruntled victims and their associates against wrongdoers.⁷⁵

Consider also the following. As Gourevitch notes (drawing from Arendt), making everyone a participant in law enforcement was—together with their formal security apparatuses—what defined and made 20th century totalitarian

revenge: Jonathan Jackson and others, 'Monopolizing Force? Police Legitimacy and Public Attitudes Toward the Acceptability of Violence' (2013) 19 *Psychology, Public Policy, and Law* 479. Others suggest that positive judgments of legitimacy might promote compliance with the law and cooperation with law enforcement (Jonathan Jackson and others, 'Why do People Comply with the Law? Legitimacy and the Influence of Legal Institutions' (2012) 52 *British Journal of Criminology* 1051). This may be a way in which the standard allocation furthers the *primary* purpose of criminal law / discharge of our *primary* duty not to commit the offence.

⁷³ Dan Markel, 'Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate' (2001) 54 *Vanderbilt Law Review* 2157, 2199. See also, Edmundson (n 20) 175-76: 'In the pluralistic, complicated, and increasingly fragmented worlds we inhabit, there are good reasons to refer to the state a greater-than-traditional share of the task of moral correction (...) private correction is less reliable than it may have been when ties of family, religion, and community were stronger (...) private correction can be irregular, unfair, scary, risky, and invasive'.

⁷⁴ Cordelli, 'Privatization Without Profit?' (n 29) 121-22. For a sceptical discussion about expressive and symbolic differences between private and public providers, and the resulting public perceptions, see Alexander Volokh, 'Privatization and the Elusive Employee-Contractor Distinction' (2012) 46 *University of California, Davis* 133, 188ff.

⁷⁵ On the latter, see John Gardner, *Offences and Defences* (OUP 2007) 213-16, 234-38.

regimes so oppressive.⁷⁶ This feature made state control over individuals' private lives, and their subordination to the collective—embodied in the state—all the more pervasive and effective. Part of the aim of totalitarian regimes was to erode the boundaries between the public and the private by, among others, undermining private associations and relationships. This is, admittedly, an extreme example, and its appeal rests partly in the horrific nature of the laws that characterised those regimes. Yet, making criminal law's powers and permissions widely available even in just regimes—such that anyone could accuse you of some wrong and seek to hold you responsible, and potentially punish you—is likely to make interactions with others very difficult by undermining social trust, which can further be corrosive of social cohesion.⁷⁷ This is another reason to withdraw criminal law's powers and permissions from private persons.

Private agencies or corporations, particularly if they are driven by profit motives, might bring problems of their own, which in some respects parallel the considerations outlined above regarding the 'dark motives' that might drive some individuals to pursue criminal justice. One worry is that, given the—often wide—space for discretionary decision-making in the domain of criminal justice, the aim of making financial gains will impair the fairness and impartiality of the decisions made by enforcing agents at the different stages of the criminal process. We can extrapolate from some problems identified with regards to (for profit) privately-run prisons. Privately-run prisons derive their profit from their rates of occupancy,

⁷⁶ Gourevitch (n 43) 276-77; 282-83.

⁷⁷ Sandra Marshall, "It Isn't Just About You": Victims of Crime, their Associated Duties, and Public Wrongs' in R A Duff and others (eds), *The Political Morality of Criminal Law* (OUP 2014) 301-302. As Klinenberg puts it in relation to community policing schemes, viewed by some as valuable forms of people's engagement with their communities, 'the elevation of policing into a mode of social integration marks a disturbing trend towards a society where distrust, suspicion, and fear are organizing principles of politics and culture' (Eric Klinenberg, 'Bowling Alone, Policing Together' (2001) 28 *Social Justice* 75, 80.

and their officers are often empowered to make decisions that can influence the length of the punishments served inside them. For example, officers are required to provide evidence (eg of misconduct) that could affect the inmates' chances of an early release. As many have noted, the profit motive might lead officers in privately-run prisons to make decisions that unwarrantedly extend the time of confinement of the inmates.⁷⁸ Something similar can be true when powers and permissions are not standardly allocated, where the effects of the profit motive in the exercise of discretion can also undermine the objectivity of decisions at different stages of the criminal justice process.⁷⁹ It is possible that the agencies will put the interests of their clients or their own above the impartial pursuit of justice. What's more, as suggested above, the mere appearance of partiality or unfairness can be sufficient to undermine the legitimacy of the agency, especially when the targets of enforcement are not its clients, which can therefore trigger some of the problems already noted.⁸⁰

Notice also that profit-driven agencies stand to benefit from a continued perception of insecurity among the population they serve, which gives these agencies incentives to deliberately preserve said perception. One way of achieving

⁷⁸ See Paul Moyle, 'Separating the Allocation of Punishment from its Administration: Theoretical and Empirical Observations' (2001) 41 *British Journal of Criminology* 77; Sharon Dolovich, 'State Punishment and Private Prisons' (2005) 55 *Duke Law Journal* 437; Zedner (n 1) 169. There is also the incentive to cut costs in order to increase margins, often at the expense of standards and the welfare of inmates (Dolovich (this note) 474ff).

⁷⁹ For some concerns in the domain of prosecution, see Roger A. Fairfax, Jr., 'Outsourcing Criminal Prosecution' [2010] *University of Chicago Legal Forum* 265.

⁸⁰ Dolovich (n 78) 518-523; 541.

this aim is by nurturing a sense of suspicion and fear of others, and a heightened perception of threats.⁸¹ As Zedner notes with respect to private security services,

Private security relies for its expansion on leveraging fear and stoking demand for protection in ways that are erosive of public trust and corrosive of social solidarity (...). As a result, privatisation tends to undermine attempts to ensure that security provision is universal, inclusive, and equitably distributed.⁸²

Finally, recall that we said that many of the problems identified with respect to private individuals being empowered and permitted to pursue criminal justice would remain if the criminal law's powers and permissions were allocated to private agencies or corporations. Could not many of these problems be solved by the presence of a *single* agency or corporation empowered and permitted to pursue criminal justice? Possibly. But new problems would arise, and others would be intensified. Let us note just one: regulatory capture. In the scenario we are envisioning, the state is still charged with issuing the laws that determine, among others, which conduct is criminalised and the parameters of sentencing. If this big corporation (or actually, a few powerful corporations) derive their gains from, inter alia, the level of crime and incarceration, they will have every incentive to lobby for harsher and more numerous criminal laws, and invest little in measures that are likely to reduce the rate of offending.⁸³

⁸¹ Lucia Zedner, *Security* (Routledge 2009) 149-50. In the same sense, Debra Satz, 'Some (Largely) Ignored Problems with Privatization' in Jack Knight and Melissa Schwartzberg (eds), *NOMOS LX—Privatization* (New York UP 2018) 21.

⁸² Zedner, 'What is Lost' (n 1) 176. Agencies might even have an incentive not to be effective in the long run, that is, to prolong insecurity, which they might get away with in ways that are not counterproductive to their business (see discussion, in the context of private military contractors, in Pattison (n 48).

⁸³ Dolovich (n 78) 523ff; Satz (n 81) 22-24; Eric MacGilvray, 'Freedom, Responsibility, and Privatization' in Jack Knight and Melissa Schwartzberg (eds), *NOMOS LX—Privatization* (New York UP 2018) 240.

It is certainly conceivable that many of the problems outlined above can be dealt with by the right legal framework.⁸⁴ If so, the upshot is one that has already been mentioned: contrary to what some have claimed,⁸⁵ the existence of such a framework would do nothing to disprove Instrumentalism; it would simply entail that criminal law's powers and permissions could, or should, be allocated differently.

This concludes the sketch of an instrumentalist answer to the allocative question that would support the standard allocation of criminal law's powers and permissions. In the next chapter, I outline and respond to two objections to Instrumentalism.

⁸⁴ Chehtman (n 17) 141; Freeman (n 29); Satz (n 81) 24; Alon Harel, 'Why Privatization Matters: The Democratic Case Against Privatization' in Jack Knight and Melissa Schwartzberg (eds), *NOMOS LX—Privatization* (New York UP 2018) 57.

⁸⁵ Harel (n 84) 57.

Chapter 5: Instrumentalism – Responding to Objections

The previous chapter offered a sketch of an instrumentalist justification of the standard allocation. This chapter responds to two objections that may be levelled against Instrumentalism. The first, *internal*, objection is that Instrumentalism does not ‘fit’ well with criminal law doctrine and therefore cannot account for the standard allocation (Section I). The second, *external*, objection is that Instrumentalism falls afoul of the so-called Wrongfulness Constraint (Section II).

I. The Objection from Fit

Parents are granted extensive powers, permissions, and other prerogatives over their children, which they do not have relative to third parties, including other children. According to some, the justification of the parent-child relationship—complete with the normative incidents that are constitutive of the role of parent—is that this relationship best serves the interests of children (and the interests of society more generally) relative to other child-rearing arrangements. On this view, the relevant interests are non-relational (or, in our terms, impersonal), that is, they make no essential reference to the parent-child relationship itself. Pairing children with their—normally—biological parents best serves the former’s interests *instrumentally*.¹ Therefore, these interests could—at least in principle—be fulfilled under different arrangements. Thus, if it turned out that some other form of child-rearing arrangement—state-run collective nurseries or a system of nonrelated foster parents—would result in better satisfaction of the relevant impersonally defined interests, the parent-child relationship would be unjustified, ie it would

¹ See Serena Olsaretti, ‘Liberal Equality and the Moral Status of Parent-Child Relationships’ in David Sobel, Peter Vallentyne and Steven Wall (eds), *Oxford Studies in Political Philosophy*, vol 3 (2017) 63 (who rejects such a view). Versions of this view are defended by Peter Vallentyne, ‘Rights and Duties of Childbearing’ (2002) 11 *William & Mary Bill of Rights Journal* 991 and Robert Goodin, ‘Responsibilities for Children’s Wellbeing’ in Margot Prior and Sue Richardson (eds), *No Time to Lose: The Wellbeing of Australia’s Children* (Melbourne UP 2005).

be wrong all-things-considered to preserve it.² As with the instrumentalist justification of the standard allocation, this account sees the parent-child relationship as instrumentally—instead of intrinsically or constitutively—connected to the values that justify it.

Many object to this instrumentalist justification of the parent-child relationship and of the prerogatives granted to parents with respect to their own children on the basis that it is too ‘flimsy’ or contingent.³ Since it is just the balance of reasons, of which none is individualised by some essential or non-eliminable reference to the relationship itself, that favours the parent-child relationship, it seems that it should be open for parents to, say, swap “their” children provided the relevant interests would be equally or better served.⁴ Yet, the objectors claim, swapping children is rightly not permitted and an adequate justification of the parent-child relationship should rule out this kind of action. The instrumentalist justification just outlined lacks the resources to offer such a justification. According to this objection, only a relational account—one where the relevant interests can only be fulfilled, even in principle, within the parent-child relationship itself—has the relevant resources. On this view, an instrumentalist justification of child-rearing arrangements is at best a *fall-back*: to be resorted to when arrangements

² The examples are from Richard Arneson, ‘Defending the Purely Instrumental Account of Democratic Legitimacy’ (2003) 11 *Journal of Political Philosophy* 123, 128, who endorses a similar view. See also Richard Arneson, ‘Democracy Is Not Intrinsically Just’ in Keith Dowding, Robert Goodin and Carole Pateman (eds), *Justice and Democracy* (CUP 2004) 46.

³ Olsaretti (n 1) 66-67. A similar objection is sometimes levelled against instrumentalist or impersonal justifications for compatriot preference and independent statehood (non-intervention): see, Richard Vernon, ‘Humanitarian Intervention and the Internal Legitimacy Problem’ (2008) 4 *Journal of Global Ethics* 37, 39.

⁴ Niko Kolodny, ‘Which Relationships Justify Partiality? The Case of Parents and Children’ (2010) 38 *Philosophy & Public Affairs* 37, 57; Olsaretti (n 1) 63. See also, Diane Jeske, ‘Families, Friends, and Special Obligations’ (1998) 28 *Canadian Journal of Philosophy* 527, 533-34, for a parallel critical discussion of non-relational justifications of familial obligations. On such justifications, familial relationships are *extrinsic* to the justification of familial obligations, the fulfilment of which is seen merely as an effective means to fulfil more general duties owed to everyone.

justified non-instrumentally are unavailable or deficient. What's more, any arrangement that *is* justified instrumentally will involve a moral loss relative to the relational values that ground the parent-child relationship.⁵

One objection to instrumentalism as an answer to the allocative question has a similar form. According to the objection, if the values that justify making available criminal law's powers and permissions are impersonal—if, that is, they are reasons the individuation of which makes no essential reference to the agency of public officials or the community on whose behalf they act—it is possible for private persons to be better placed than public officials to deliver criminal justice. Therefore, the objection goes, whether public officials or private persons ought to be empowered and permitted to undertake criminal justice activities 'remains an open question (...) to be decided on the balance of reasons in the particular case.'⁶ It seems to follow that it may be wrong *not* to empower and permit private persons to administer a criminal trial and punish offenders. Instead, the critics claim, we find a very different picture in most legal systems. One upshot of the standard allocation is, for example, that private persons are *absolutely* barred from inflicting criminal punishment.⁷ Stewart makes the point in relation to Tadros's instrumentalist view:

⁵ R.A. Duff, 'Relational Reasons and the Criminal Law' in Stuart Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law*, vol 2 (OUP 2013) 177-78; Olsaretti (n 1) 66-67. See also John Gardner, 'The Negligence Standard: Political Not Metaphysical' (2017) 80 *The Modern Law Review* 1, 6.

⁶ Malcolm Thorburn, 'Constitutionalism and the Limits of Criminal Law' in R.A. Duff and others (eds), *The Structures of Criminal Law* (OUP 2011) 92.

⁷ For the remainder of the chapter, I will mostly focus on the infliction of punishment as it is one of the activities of criminal justice from which private persons are absolutely barred, and thus presents the *prima facie* strongest case for objecting to Instrumentalism. Recall, we saw that statist views like the ones considered in this thesis face obvious difficulties accounting for the allocation of the whole gamut of criminal law's powers and permissions, some of which benefit private persons to some extent (chapter 2, text to n 29; chapter 3, text to nn 199-203), eg the powers and permissions to perform arrests. Private persons are also entitled to undertake some investigative

So if private criminal punishment would not damage, or would even promote, peace and stability, private individuals should punish rather than leaving the task to the state. Put another way, the Natural Right of Enforcement should permit vigilantism if the state is unwilling or unable to punish offenders, and if the effects of vigilantism on social stability are not too severe. The complete disappearance of a private right to inflict criminal punishment in well-functioning legal orders should count against [Tadros's view].⁸

Criminal law not only does not leave the permissibility of inflicting criminal punishment to be decided on a case-by-case basis, it also contains an exceptionless prohibition that applies to private persons who, no matter the strength of their "instrumentalist" moral case for stepping in to punish a deserving wrongdoer, are *never* granted a justification defence for doing so.⁹ Thorburn puts the last thought in the following terms:

The disconnect between the demands of the criminal law and those of morality are well known. Much to the chagrin of those who would like to ignore the law's demands and simply 'do what's right', we find that the law is not very interested in our freestanding moral arguments about the moral justifiability of our conduct. This is true in a wide variety of contexts. (...) those who take it upon themselves to punish wrongdoers are treated as criminal vigilantes. In all these cases and many more, the criminal law treats us as vigilantes—no matter how powerful our moral arguments might be—they have no force simply because we do not have the standing to make decisions about the bodies and property of others.¹⁰

According to Thorburn, instrumentalists must explain this feature of criminal law as a mistake, an instance of the law failing to reflect the best view of the moral justification of the standard allocation. Yet, if this were the case—says Thorburn—courts 'should be rather embarrassed at being forced to deny such

and enforcement measures as an entailment of their right to property (think of the use of private security in shops).

⁸ Hamish Stewart, 'Criminal Punishment as Private Morality' (2015) 9 *Criminal Law and Philosophy* 21 33.

⁹ *Ibid* 32-33; Thorburn (n 6) 92-93.

¹⁰ Malcolm Thorburn, 'Two Conceptions of Equality Before the (Criminal) Law' in François Tanguay-Renaud and James Stribopoulos (eds), *Rethinking Criminal Law Theory* (Hart 2012) 15.

claims of justification' which, on his view, they 'show few signs' of being.¹¹ On this view, Instrumentalism is the wrong answer to the allocative question because it lacks the resources to justify the exceptionless prohibition that applies to private persons. One way to frame the objection is that instrumentalism *fits* poorly with existing criminal law doctrine and practice. Let us call it the *Objection from Fit*.¹²

It is worth noting that this objection to allocative instrumentalism is sometimes put in phenomenological terms. Perhaps few, if any, view relationships to our children (or other relatives, friends, and romantic partners) merely as an instrumentally efficient means to serve impersonal values. Conceiving of the values that justify the parent–child relationship in relational terms better accords to the self–conception of participants in these relationships (and, *inter alia*, with intuitions about the “subsidiary” role of fostering arrangements relative to parenthood).¹³ Duff suggests that just as we feel unsatisfied by instrumentalist or impersonal justifications of the parent–child relationship, we—as members of a ‘properly functioning polity’—should have the same uneasiness about this type of justification for the allocation of criminal law’s powers and permissions.¹⁴ However, it is unwarranted to assume that our relationship to the state and its officials (or to the community on whose behalf they act) is analogous to the intimate relationships in which we stand with close relatives or friends. It is

¹¹ *Ibid* 16.

¹² Thorburn expressly puts forward the objection in terms of *fit* in several of his works. See Malcolm Thorburn, ‘Criminal Law as Public Law’ in R.A. Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 23, 31, 41; Thorburn, ‘Constitutionalism’ (n 6) 92-93. Recall that chapter 3 levelled a similar objection against the Freedom as Independence view.

¹³ Kolodny (n 4).

¹⁴ R.A. Duff, ‘Responsibility, Citizenship and Criminal Law’ in R.A. Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 134-37; Duff, ‘Relational’ (n 5) 177ff (Duff makes the point with regards to the territorial scope of jurisdiction, but it applies *mutatis mutandis* to the allocation of criminal law’s powers and permissions). See also, Alon Harel, *Why Law Matters* (OUP 2014) 4-5.

perfectly conceivable (and this thesis has set out to show) that the former is instrumentally grounded on impersonal values, whereas the latter are not (or not entirely).

Leaving the above formulation aside, the Objection from Fit fails for two reasons. The first is that the objection rests on an unwarrantedly narrow view of Instrumentalism. The second is that it is oblivious to the way in which Instrumentalism is a doctrine about the justification of a *set of legal rules*, rather than a decision-making procedure to be applied on a case-by-case basis. Sections A and B below develop these responses and, in doing so, set out more fully the instrumentalist answer to the allocative question.

A. Wide Scope

The Objection from Fit has it that Instrumentalism is undermined by the possibility that private persons might, on occasions, be better placed than public officials to exercise some or all of criminal law's powers and permissions (judged in terms of the achievement of the values that justify making these powers and permissions available in the first place). To see how the aforementioned objection misconstrues Instrumentalism consider a more radical claim, namely, that private persons are *normally* better than public officials to deliver criminal justice.

According to Husak, immediate victims or vigilantes might be more capable than the state to achieve deterrence through the punishment of criminal wrongdoers. Assuming that deterrence is the value that answers the general justification question, Husak's contention is that private persons can realise more of the value that justifies making available the powers and permissions to inflict punishment. On Husak's view, it follows that Instrumentalism cannot explain why is it that the powers and permissions involved in the infliction of punishment

are withheld from private persons and allocated *only* to public officials. Thus, instrumentalism cannot justify the standard allocation, so it fails as an answer to the allocative question.¹⁵

If we accept Husak's—contentious—empirical speculation, does it follow that instrumentalism is wrong? Not necessarily. To see why, consider two versions of instrumentalism.

Best Quality Instrumentalism: it is justified to allocate to an agent (or group of agents) the powers and permissions to ϕ (eg punish) only if the agent (or group) is the most capable of all available agents (or groups) at ϕ ing.

Best Effects Instrumentalism: it is justified to allocate to an agent (or group of agents) the powers and permissions to ϕ (eg punish) only if the *overall effects* of allocating them to the agent (or group of agents) are better than those that would follow from allocating these powers and permission to any other available agent (or group).

If Husak's empirical suggestion is correct, Best Quality Instrumentalism cannot justify the standard allocation. Yet, imagine that empowering and permitting private persons to punish criminal wrongdoers would result in higher levels of deterrence and protection of the public, but would also contribute to a corrosive culture of distrust in society, leading to a number of social ills in the long run. If this were the case, on the Best Effects version of Instrumentalism it might be *unjustified* to empower/permit private persons to punish. Admittedly, this ultimately depends on how one weighs the losses in deterrence relative to the gains in terms of prevention of social ills (on which more below).¹⁶ The key point, however, is that—as we saw in the previous chapter—an instrumentalist is not precluded from taking into account the wider effects of allocating criminal law's

¹⁵ Douglas Husak, 'Does the State have a Monopoly to Punish Crime?' in Chad Flanders and Zachary Hoskins (eds), *The New Philosophy of Criminal Law* (Rowman & Littlefield 2015) 109.

¹⁶ Section 2 below (Cheapness).

powers and permissions to an agent, that is, effects other than those restricted to how capable the agent is at performing criminal justice activities. The objection unwarrantedly assumes that the considerations that go into an answer to the allocative question must be coextensive with those that answer the justificatory question. As Hart famously emphasised, there are ‘different questions’ about the practice of punishment—an assertion that we can extend to the criminal law in general—and ‘different principles’ will be relevant to these questions.¹⁷ The questions of what justifies making available criminal law’s powers and permissions and that of to whom these powers and permissions should be allocated are different questions that contribute to the justification of the practice of criminal law. Thus, different considerations will form part of the answer to these different questions.¹⁸ Allocating criminal law’s powers and permissions to an agent will have effects that go beyond their success or failure in achieving the values that justify making them available. There is no good reason to believe that these wider effects cannot form part of the answer to the allocative question. Thus, the Best Effects version of instrumentalism ought to be preferred.¹⁹ Even if it were

¹⁷ HLA Hart, *Punishment and Responsibility* (John Gardner ed, 2 edn, OUP 2008) 3.

¹⁸ Similarly, John Gardner, *Offences and Defences* (OUP 2007) 282-83.

¹⁹ The two versions of instrumentalism draw from Arneson, ‘Instrumental’ (n 2) 123. For similar ideas about the scope of instrumentalism, see Philippe van Parijs, ‘The Disenfranchisement of the Elderly, and Other Attempts to Secure Intergenerational Justice’ (1998) 27 *Philosophy and Public Affairs* 292, 324-27; John Halstead, ‘Government for the People: The Primacy of Substance in the Justification of Democracy’ (DPhil Thesis, University of Oxford 2015) 32-33; John Gardner, ‘The Evil of Privatization’ (Workshop on Alon Harel’s *Why Law Matters*, University of Warwick, May 2014). Arneson is concerned with an instrumentalist justification of democracy, which he illustrates as follows. He asks us to consider the choice between an autocracy and a democracy, and to assume that the former tends to produce ‘morally superior political decisions’ and thus a ‘more just legal order’ than democracy. Democracy, however, tends to render citizens ‘more virtuous’, which leads to morally better outcomes in general, including just acts, except for the more just political decisions achieved under autocracy. Whereas what he labels a ‘Correctness Account’ (parallel to the Best Quality version) would favour an autocracy, his ‘Best Results Account’ (which parallels the Best Effects version)—which should be preferred—justifies a democracy. For a similar view about the moral assessment of political procedures (using different labels) see Steven Wall, ‘Democracy, Authority and Publicity’ (2006) 14 *Journal of Political Philosophy* 85, 95-96; Steven Wall, ‘Democracy and Equality’ (2007) 228 *The Philosophical Quarterly* 416, 437-38.

true that private persons *always* performed better than public officials in the terms outlined by Husak, that would still be insufficient to reject the instrumentalist justification of the standard allocation.

1. Uncertainty

Some may be unsatisfied by the response above and retort that the Best Effects version of instrumentalism, with its requirement to take all causal consequences into account, is simply too cognitively demanding to be true.²⁰ As Husak puts it, an instrumentalist account ‘include[s] a tremendous amount of unwarranted speculation. (...). We simply lack confidence in the empirical hypotheses that would vindicate or undermine an instrumental defence of state authority to punish’.²¹ For some, this suffices to warrant falling back to a non-instrumentalist justification of the standard allocation.²²

This objection from uncertainty misses the mark. First, Instrumentalism accounts for the rightness or justification of some legal arrangement, so its truth is not undermined by the supposed difficulty in ascertaining its practical implications. Insofar Husak is right, it only follows that we cannot be absolutely certain that the standard allocation—or some alternative—is all things considered justified. It would be a mistake to choose the best form of fundamental justification of the standard allocation based on how simple it would be to apply it.²³ It is a distinctive feature of Instrumentalism that it relies on empirical data and

²⁰ See, for a parallel objection to an instrumentalist justification of democracy, Christopher Griffin, ‘Democracy as a Non-Instrumentally Just Procedure’ (2003) 11 *Journal of Political Philosophy* 111, 115.

²¹ Husak (n 15) 109.

²² For discussion and rejection of a related thought, see van Parijs (n 19) 331.

²³ Arneson, ‘Instrumental’ (n 2) 129.

speculation, and that its prescriptions are contingent on a set of factual assumptions subject to changing circumstances.²⁴ An Instrumentalist defence of the standard allocation, as we saw in the previous chapter, supposes—inter alia—that public officials and the agencies that they are part of display certain features that put them in a privileged position relative to private persons to exercise criminal law’s powers and permissions with the best results. This also implies that, in contrast to statist accounts, instrumentalist justifications are of a piecemeal nature. Depending on the effects of one or another form of allocation, Instrumentalism might yield different prescriptions for each of the powers and permissions made available by the criminal law, eg it could provide one answer for all powers and another one for all permissions or, more likely, different answers for each of the clusters of powers and permissions that underpin the array of criminal justice activities. This feature of instrumentalism makes it a much better fit than statism with existing doctrine and practice.

Secondly, we can be more confident in the strength of a Best Effects Instrumentalist answer to the allocative question than Husak believes. The sketch of an instrumentalist justification of the standard allocation offered on the last chapter largely relies on what I hope are common sense and intuitive empirical assumptions. These assumptions might, of course, be proven wrong. It may also be the case that the values and disvalues that result from standardly allocating criminal law’s powers and permissions ought to be balanced differently to the way they are balanced in the sketch I offer. Yet, as I also suggested, if so, it would only follow that the standard allocation ought to be modified, or that an instrumentalist

²⁴ Instrumentalism requires, in short, that we (or someone) engage in the relevant empirical work: see van Parijs (n 19) 326-27; Peter Jaworski, ‘Privatization and the Ought/State Gap’ in Jack Knight and Melissa Schwartzberg (eds), *NOMOS LX—Privatization* (New York UP 2018) 80.

defence of it should have a different form. It would not follow that instrumentalism is the wrong type of answer to the allocative question.

My response to Husak's claims might invite a further objection. I develop and respond to this objection in the following section.

2. Cheapness

The objection goes as follows. Above I suggested that, on a Best Effects version of Instrumentalism, empowering and permitting the agent most capable of achieving deterrence to perform criminal justice activities *may* be unjustified if thus allocating criminal law's powers and permissions would have bad effects (and *not* only if those bad effects would eventually lead to an increase in crime). Some may question whether there is *any* limit to the range of values and costs that ought to form part of the instrumentalist justification of the standard allocation. If some degree of deterrence can be sacrificed for the sake of avoiding certain harms not connected to the ends of criminal justice, Instrumentalism might be taken to entail that any loss in the values that answer the general justification question can be "compensated" with gains in goods typically thought to be unrelated to criminal justice. If the implication from the previous section is that some loss in deterrence may be justified for purposes of avoiding unrelated harms, why not allocate criminal law's powers and permissions in a way that will maximise, say, economic activity and job creation if the amount of good achieved will be sufficient to outweigh the loss in deterrence? Therefore, allocative instrumentalism may be thought to make reasons too *cheap*—it may be thought—that is, to make *any* good, not matter how unrelated to criminal justice, a reason to justify the allocation of criminal law's powers and permissions to an agent. Best Effects Instrumentalism, together with the rejection of the Discontinuity View, may then undermine the possibility of saying 'anything principled' about what reasons there are to allocate

criminal law's powers and permissions to an agent, and of conceiving of phenomena such as the perversion or abuse of institutions more generally.²⁵ This point is related to the objection mentioned above, according to which Instrumentalism rests on an undefended consequentialism.²⁶ It may also be thought that it is Instrumentalism's consequentialist underpinnings which explain why on this view reasons are cheap.

In response, we should distinguish an account or principles about the allocation of criminal law's powers and permissions from an account or principles to guide *deliberations* about the allocation of criminal law's powers and permissions. Some proponents of the objection appear to be concerned about the latter.²⁷ The allocation of criminal law's powers and permissions and deliberations about the allocation of criminal law's powers and permissions are two different actions, subject to different considerations. In general, reasons for/against ϕ need not coincide with reasons for/against *deliberating about* (the reasons for/against) ϕ —and for/against *deliberating in certain ways*. This is important for two reasons.

Firstly, when we are engaged in practical deliberation with others, it is not appropriate to cite and consider reasons that have very little force or are vastly outweighed—that is, reasons that are pragmatically irrelevant.²⁸ Following Schroeder, when we say that ψ is a reason for ϕ ing, we 'generally mean' that ψ is a 'relatively weighty' reason to ϕ ing. That is partly because in practical contexts, we

²⁵ R.A. Duff, *The Realm of Criminal Law* (OUP 2018) 255; R.A. Duff, 'Criminal Law and Criminalization' (2018) 18 *Jerusalem Review of Legal Studies* 62, 72.

²⁶ Chapter 4, Text to nn 6-8.

²⁷ Duff, *Realm* (n 25) chapter 6.

²⁸ Paul Grice, *Studies in the Way of Words* (HUP 1991) 26-27.

typically care about reasons because they affect what we ought to do.²⁹ As Bedke puts it, ‘when citing reasons to others one wants to get a point across (...). [W]hat makes it unnatural to cite the reason is the pragmatic oddity and practical irrelevancy of doing so given that it is massively outweighed by reasons not to’.³⁰ Relatedly, we are usually not motivated by reasons that are almost always defeated. The upshot is that a reason that counts in favour of the allocation of criminal law’s powers and permissions to an agent may be too weak to be appropriately taken into consideration as a reason for deliberating about said allocation.

Secondly, the objection may be motivated by the worry that some views or principles might be susceptible to abuse by the officials that ought to be guided by them.³¹ Proponents of the objection may think that the view espoused in Chapter 3 on which Instrumentalism rests—whereby officials are not solely subject to a limited set of reasons on account of their role—is precisely such a view.³² However, one cannot derive conclusions about what reasons *there are* from premises about how *deliberation ought to be carried out*. Rather, deliberation ought to be carried out in a way that promotes conformity with the reasons as they are, which might require one, for instance, to discount certain reasons given one’s tendency to erroneously exaggerate them.³³ This brings out the distinction between principles

²⁹ Mark Schroeder, ‘Holism, Weight, and Undercutting’ (2011) 45 *Noûs* 328, 332-336.

³⁰ Matthew Bedke, ‘The Iffiest Oughts: A Guise of Reasons Account of End-Given Conditionals’ (2009) 119 *Ethics* 672, 684.

³¹ See, for example, R.A. Duff, ‘A Criminal Law for Citizens’ (2010) 14 *Theoretical Criminology* 293; R.A. Duff, ‘In Response’ in Rowan Cruft, Matthew Kramer and Mark Reiff (eds), *Crime, Punishment, and Responsibility* (OUP 2011) 358.

³² Duff, ‘In Response’ (n 31) 358.

³³ Garrett Cullity, ‘Weighing Reasons’ in Daniel Star (ed), *The Oxford Handbook of Reasons and Normativity* (OUP 2018) 435.

that provide rules or guides to be applied in non-ideal conditions, and principles that form part of “raw morality” as it were (ie “raw” in the sense that they do not take into account the non-ideal conditions that give principles of the former kind their application).³⁴ Instrumentalism is an instance of the latter. Instrumentalism is an account of the nature of the justification of the allocation of criminal law’s powers and permissions. The fact, if it is a fact, that Instrumentalism fails to offer sufficient safeguards against abuse (or other types of wrongful conduct) by the agents whose actions it governs is no objection against it.³⁵ We will come back to these thoughts later.

The previous points can all be made in defence of a version of Instrumentalism that rests on a broader consequentialist moral theory. On this view, in principle *all* intrinsically good consequences of an action count in its favour, and the exclusion from deliberation of any such consequence or number of them is justified pragmatically, ie to the extent that this helps achieve the best consequences overall. However, as suggested above, Instrumentalism need not be consequentialist. An instrumentalist view can incorporate non-consequentialist limits to the range of values and costs that ought to form part of the justification of the standard allocation, thus responding both to the claim that Instrumentalism is a form of consequentialism and to the objection just outlined that allocative instrumentalism makes reason cheap. My aim is not to defend such a non-consequentialist version of Instrumentalism—rather, it is simply to note its possibility, which is enough for present purposes.

³⁴ Thus, principles can be sound and useful even if reasons are very cheap.

³⁵ For a cognate point in a different context, see Kjartan Koch Mikalsen, ‘The Irrelevance of History: In Defense of a Pure Functionalist Theory of Territorial Jurisdiction’ (2020) 33 *Ratio Juris* 291, 302.

The responses to crime provided by the criminal law typically involve the imposition of costs on people to pursue ends they do not necessarily endorse. In particular, punishment intentionally makes offenders worse off. Many think such treatment is impermissible (or, at least, wrongful) unless offenders have incurred a *duty* to serve the ends underlying punishment. The duty has to be such that offenders discharge it only by being intentionally harmed.³⁶ One persuasive way of grounding these duties appeals to the notion of *correction*: offenders create or are otherwise distinctively involved in a harm or problem to which correction they can, and ought to, contribute by being punished. There are different versions of this approach. On one version, offenders incur a duty to protect their victims from future wrongs (the correlative right of which victims have a duty to transfer to society).³⁷ On another version, offenders undermine the ability of people to rely on the protection of the criminal law to go about their lives free from the threat of wrongful incursions by others, an assurance that is necessary for their liberty and flourishing.³⁸ As a result, offenders incur a duty to repair the damage they cause to the worth of criminal law. In both versions, offenders discharge their duties by being punished, so as to deter others from committing crimes. On a third version, offenders violate a duty owed to others to maintain certain degree of 'moral

³⁶ See, for example, Michael Moore, *Placing Blame* (OUP 2010) 91, 154, 171–172; R.A. Duff, 'Punishment and the Duties of Offenders' (2013) 32 *Law and Philosophy* 109, 127; Victor Tadros, *The Ends of Harm* (OUP 2011); Jeffrey Howard, 'Punishment as Moral Fortification' (2016) 26 *Law and Philosophy* 45; Jacob Bronsther, 'The Corrective Justice Theory of Punishment' (2021) 107 *Virginia Law Review* 227. An equivalent role is performed by the notion that offenders *forfeit* their rights against certain forms of hard treatment Christopher Wellman, *Rights Forfeiture and Punishment* (OUP 2017) ch 2.

³⁷ Tadros (n 36).

³⁸ Bronsther (n 36).

reliability'. Punishment enforces the offender's duty to reduce her own likelihood of reoffending, thereby achieving the required degree of reliability.³⁹

The permissibility of enforcing the aforementioned duties by punishing offenders depends on the harm inflicted being both *necessary* and the most *efficient* means to serve the goods that justify the corresponding duties. Allocating powers and permissions to an agent will thus be unjustified if thus allocating them fails to achieve to a *sufficient degree* the goods that offenders have an enforceable duty to serve by being punished. This is true even if the net value brought about by the form of allocation is positive, because offenders have a valid complaint against the distribution of costs and benefits involved in the allocation when it fails to realise the goods to which they have the responsibility to contribute.⁴⁰ If all this is correct, it is impermissible to adopt a form of allocation for the sake of a good, such as employment, that offenders have no special duties to promote (because unemployment is not a problem or harm to which they have distinctively contributed) *if* this form of allocation sacrifices deterrence to such a degree that the harm suffered by offenders becomes unjustified (because not conducive to the realisation of the relevant good). In short, offenders retain a right against being intentionally harmed to solve a problem in which they are not practically implicated. This does not mean that goods not suitably connected with the actions of the offender play *no* role in the justification for the allocation of criminal law's powers and permissions. That some form of allocation will boost employment or prevent unemployment better than another *could* be a tie-breaking reason to

³⁹ Howard (n 36).

⁴⁰ This point draws from Viehoff, who defends a similar 'distributive constraint' on the justification of political power in 'The Truth in Political Instrumentalism' 117 Proceedings of the Aristotelian Society 273, 285-86.

choose the former provided both achieve deterrence to a similar degree, especially because gains in employment serve to off-set the wider costs associated with making available and exercising criminal law's powers and permissions.⁴¹ Briefly put, jobs cannot make up for a deficit in deterrence. To be sure, the point is not that offenders have *no* duty to contribute to the conditions for the achievement of goods such as employment. Everyone has such a duty. The point is rather that this is not a duty that requires them to suffer the infliction of harms such as those involved in criminal punishment—the intentionality of which makes their infliction harder to justify. Besides, whereas it is plausible to claim that the intentional infliction of harm involved in criminal punishment is necessary to deter others from offending and to therefore correct the problem to which the offender has contributed, it is unlikely that the same is true for employment, the promotion of which can be achieved by resort to less burdensome means. Hence, it is easier to justify a duty on an offender A to undergo the intentional infliction of harm to prevent an innocent B from suffering an intentional infliction of harm by C, than to justify the same duty for the sake of giving B a job.

Therefore, the idea that the permissibility of punishment depends on the duties that offenders incur can provide a limit to the range of consequences that count—or, at any rate, the extent to which they count—to the instrumental answer to the allocative question. There are restrictions on the ways in which the achievement of those goods that offenders have a duty to serve may be traded-off with other goods unrelated to the offenders' actions. It follows that a duty-based view of Best Effects Instrumentalism does not make the irrelevant relevant in the way the objection suggests. Furthermore, such a view is distinguished from a

⁴¹ See Jeff McMahan, *Killing in War* (OUP 2009) 26-27. See also Tadros (n 36) 351-54.

consequentialist version of Instrumentalism in that the aforementioned limitation is *not* pragmatically grounded.⁴² Best Effects Instrumentalism can incorporate an account of rights that restrict the permissible forms of allocation.⁴³

B. Rules

Recall that according to the Objection from Fit, Instrumentalism cannot account for—inter alia—the absolute prohibition on private persons inflicting criminal punishment that is part of the standard allocation. A vigilante who acted in a morally permissible way by instrumentalism’s own lights would be punished as a criminal. The objector claims that instrumentalism cannot account for this divergence between morally and legally justified conduct other than as a mistake or failure of the law—a mistake that in this case involves the punishment of morally innocent conduct.⁴⁴

1. Set of Rules

As we saw, one version of the objection from fit seems to be that Instrumentalism cannot account for rule-based decision making or for having rules that allocate criminal law’s powers and permissions. However, the instrumentalist answer to

⁴² The claims here resemble Kamm’s notion of ‘separate spheres’. According to Kamm, ‘we do not do with our resource [which, in our case, can be the intentional infliction of harm involved in punishment] whatever will result in as much good as possible. Rather we try to achieve the best outcome for which our resource is specifically designed. This is certainly a nonconsequentialist characteristic since we are not maximizing overall good. Another way of putting this point is that we limit the sphere in which an item can maximize good’ (F.M. Kamm, *Morality, Mortality* vol 1 (OUP 1998) 108, 148-49).

⁴³ Some instrumentalist accounts of forms of governance or of the authority and/or legitimacy of political institutions are deontological, that is, their justification rests in their ability to promote some value(s) subject to certain side-constraint, particularly in the form of rights (see Arneson, ‘Democracy’ (n 2) 41 fn 3; Matthias Brinkmann, ‘Indirect Instrumentalism about Political Legitimacy’ (2019) 6 *Moral Philosophy and Politics* 175, 178).

⁴⁴ See text to nn 9-11.

the allocative question is precisely the justification of a *set of legal rules* and it rests on the usual way in which rules (legal or otherwise) are justified.

We are not omniscient perfect reasoners. The upshot is that we are likely to make mistakes of both value and fact when trying to establish what, if anything, morality requires from us in a given situation. Moreover, reasoning takes up time, energy, and other resources, all of which are limited and could be put to other ends (which is another decision on which morality might be brought to bear). Rules typically function, and are justified insofar they tend, to help their subjects better conform to the moral reasons that apply to them independently of those rules than they would by directly appealing to those reasons themselves on a case-by-case basis. Rules achieve the aforementioned function mainly by way of *simplification*: rules substitute a complex set of considerations with a narrower and simpler set that their subjects can more easily identify and apply. This enables fallible subjects to conform with the relevant underlying reasons more often than they would if they were to directly appeal to those reasons.⁴⁵ The simplified form of rules also serves to better, more efficiently, and predictably check compliance with the relevant reasons by adjudicators.⁴⁶

Chapter 4 outlined only a few of the considerations that bear on the allocation of criminal law's powers and permissions. The conclusion was that public officials will normally be better placed than private persons to exercise these powers and permissions. If left to their own devices, individuals will tend to fail

⁴⁵ See, among others, Joseph Raz, *The Morality of Freedom* (Clarendon 1986) 52-54; Joseph Raz, *Practical Reasons and Norms* (2 edn, OUP 1999) 60-62, 192-93; Frederick Schauer, *Playing by the Rules* (Clarendon 1991); Larry Alexander and Emily Sherwin, *The Rule of Rules* (Duke University Press 2001); Larry Alexander, 'Can Law Survive the Asymmetry of Authority?' (2000) 10 *Quinnipac Law Review* 463, 473; Jeffrey Brand-Ballard, *Limits of Legality* (OUP 2010). See also, Brinkmann (n 43); Adam Cureton, 'Making Room for Rules' (2015) 172 *Philosophical Studies* 737, 744-46.

⁴⁶ Schauer (n 45) 147.

to correctly identify the instances in which the latter may not be the case and might be prone to overestimate them. As a result, private persons might undertake criminal justice activities more often than the applicable considerations would warrant. Thus, they are more likely to wrong and harm others unjustifiably than public officials if they engage in the same actions. If these speculations are true, Instrumentalism justifies having general rules determining the allocation of criminal law's powers and permissions. This would lead to a higher rate of permissible instances of criminal justice activities than if legal subjects and adjudicators were left to make the decision on a case-by-case basis.

2. Exceptionless Rule

A slightly more plausible version of the Objection from Fit is that instrumentalism is unable to justify an *exceptionless* rule prohibiting private persons from inflicting criminal punishment. As we saw, this prohibition is the result of the set of allocative rules. As hinted at above when outlining the objection, the thought that categorical rules must be supported by equally categorical justifications is not uncommon.⁴⁷ However, as Green explains,

There can be reasons to promulgate, and attempt to conform to, an absolute norm even if the reasons that justify having a norm in that field are defeasible. We may conform better to underlying (defeasible) reasons if we treat certain norms as indefeasible, and a good way to encourage treating them as indefeasible is for them to be promulgated in absolute form.⁴⁸

The idea is the same as above: rules are justified by, and help subjects better conform to, the reasons that apply to them independently of those rules. Some

⁴⁷ See, in the context of the rules of war, Christopher Kutz, 'The Difference Uniforms Make: Collective Violence in Criminal Law and War' (2005) 33 *Philosophy & Public Affairs* 148, 166-67. Kutz adds that instrumentalist or non-categorical justifications of categorical rules must be kept from subjects for the rules to function properly. I address this concern below (s II.C).

⁴⁸ Leslie Green, 'The Nature of Limited Government' in John Keown (ed), *Reasons, Morality and Law* (OUP 2013) 191 (citations omitted). See also, Brinkmann (n 43) 182.

rules may have to be absolute to perform this function. Sometimes lawmakers will be hard-pressed to craft exceptions or introduce standards that adequately reflect the defeasible or non-absolute character of the applicable reasons. Moreover, subjects might tend to incorrectly take themselves to be acting within an exception—thereby increasing the incidence of rule violations and thus lack of conformity to the relevant background considerations. Therefore, substituting a rule containing exceptions or standards for the absolute prohibition on private infliction of punishment can undermine the efficacy of the rule in forestalling error and abuse. If true, and there are further no compensating gains in the number of justified inflictions of punishment as an upshot of the introduction of exceptions in the rule, it is justified to issue the rule in exceptionless form.⁴⁹ Notice that the absolute rule not only protects potential victims of unjustified punishment but also helps would-be wrongdoers (ie private person misguidedly tempted to engage in criminal punishment) by drawing a clear line between prohibited—and thus punishable—forms of private infliction of criminal punishment (namely, all) and permitted forms of the same conduct (namely, none).⁵⁰ As Tadros claims, wrongdoing *in itself* ‘blights the lives of wrongdoers. [It] makes the lives of wrongdoers go worse’.⁵¹ It does so, says Gardner, because wrongdoing ‘leaves us with regrets that are hard to expunge’.⁵² When wrongdoers are punished, this normally makes their lives go worse still. Thus, we have reason to prevent people

⁴⁹ Niko Kolodny, ‘Political Rule and Its Discontents’ in David Sobel, Peter Vallentyne and Steven Wall (eds), *Oxford Studies in Political Philosophy*, vol 2 (OUP 2016) 55 fn 19; Andrew Cornford, ‘Rethinking the Wrongness Constraint on Criminalisation’ (2017) 36 *Law and Philosophy* 615, 640.

⁵⁰ James Edwards, ‘Criminalization Without Punishment’ (2017) 23 *Legal Theory* 69, 77. See also, Larry Alexander and Kimberly Kessler Ferzan, *Crime and Culpability* (CUP 2009) 310-11; Andrew Simester and Andrew Von Hirsch, *Crimes, Harms, and Wrongs* (Hart 2011) 76-77.

⁵¹ Victor Tadros, *Wrongs and Crimes* (OUP 2016) 1-2.

⁵² John Gardner, ‘Wrongs and Faults’ in Andrew Simester (ed), *Appraising Strict Liability* (OUP 2005) 59.

from becoming wrongdoers. Lawmakers can partly conform to these reasons by issuing rules that help people avoid wrongdoing—in this case, the wrong of inflicting unjustified punishment.

Given that the rule is partly a response to the fallibility of rule-subjects, what matters for its justification are the overall effects of its application. A few instances where the correct outcome—in light of the instrumentalist considerations that justify the rule—would have been reached by not following the rule suffice neither to undermine the rule nor the ability of instrumentalism to justify it.⁵³ As has been noted by several writers, if rules are to adequately perform their function and achieve the moral gains that justify them, they have to be, as a matter of necessity, under- and/or over-inclusive.⁵⁴ In the realm of criminal law, this means that some tokens of the prohibited type will not involve the wrong that the prohibition aims to prevent.⁵⁵ The exceptionless rule or set of rules prohibiting the infliction of criminal punishment by private persons shares this feature with every or most other rules.

As we saw above, Thorburn claims that the absence of a justification defence for the morally innocent vigilante must be taken by instrumentalists to be a mistake of law. In fact, Instrumentalism can easily explain the lack of a justification defence in criminal law for the morally justified vigilante in virtue of considerations that have already been explored. Instrumentalism is not committed

⁵³ Schauer (n 45) 149-153; James Edwards, *Legal Imperfectionism* (manuscript - on file with author).

⁵⁴ As Postema puts it: 'Rules achieve clarity, certainty, and determinateness, at the price of including either more or fewer cases in the legal categories defined by the rules than the rationale underlying the rule calls for' (Gerald J. Postema, *Bentham and the Common Law Tradition* (OUP 1986) 447, cited in Schauer (n 45) 40 fn 14). See also, *ibid* 50, 71; Alexander and Sherwin (n 45) 34-36, 54; and references n 50.

⁵⁵ Duff, *Realm* (n 25) 314.

to treating the absence of said justification as a mistake and can make sense of the fact, if it is a fact, that judges express few signs of embarrassment when denying said defence.

First, recognising a defence reintroduces difficulties that are parallel to those discussed above. Here is Gardner:

[I]t is certainly true (...) that merely being permitted to do something can serve as an encouragement to do it. (...) The courts in particular are parsimonious in permitting actions under the heading of justification partly because they are cautious about thereby encouraging resort to self-help, vigilantism, and other threats to the rule of law, as well as various other kinds of irresponsibility. (...). The courts are permitting actions in the knowledge that although they are not thereby giving anyone a reason to perform them, they are drawing attention to reasons that people may already have to perform them, picking out those reasons for special legal recognition, and thereby inviting people to foreground, and *perhaps thereby to exaggerate*, the desirability of acting for those reasons.⁵⁶

As Gardner explains, courts are—and ought to be—mindful of the risk that creating a defence will, given the fallibility of rule-subjects, increase the number of morally unjustified acts—that is, acts that would remain legally prohibited after the introduction of the defence. By recognising a defence, the prohibition against the infliction of criminal punishment by private persons might thereby fail to deter the wrongs it is designed to prevent. If the risk of this being the case is high relative to the gains that could come from recognising the defence (both in terms of morally justified instances of punishment, and of morally justified vigilantes being spared conviction and punishment), courts have sufficient reason *not* to grant a defence and preserve the over-inclusive and absolute character of the prohibition.

⁵⁶ John Gardner, 'In Defence of Offences and Defences' (2012) 4 *Jerusalem Review of Legal Studies* 110, 115.

That this is the way in which courts conceive of the exercise of their power to create defences is evidenced by Thorburn's own lead example of a case that on his view supports his objection against Instrumentalism.⁵⁷ In *Southwark London Borough Council v Williams*,⁵⁸ the defendants were a family who occupied and improved a social housing unit left vacant by the Council. They did so having been unable to find shelter elsewhere. It is plausible to think that the family's actions were morally justified on grounds of necessity. The Court of Appeal nonetheless denied the family a defence. As Lord Denning said in the case, the reason for not granting a defence was that

if hunger were once allowed to be an excuse for stealing, it would open a way through which all kinds of disorder and lawlessness would pass. So here. If homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door which no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine that they were in need, or would invent a need, so as to gain entry. Each man would say his need was greater than the next man's. The plea would be an excuse for all sorts of wrongdoing. So the courts must, for the sake of law and order, take a firm stand.

Lord Denning's argument for refusing to create a defence in the case corresponds, in essence, to the instrumentalist claim outlined above: it helps reduce the risk of agents—encouraged by the defence—committing morally unjustified acts of trespass. To be sure, this is not to say that the Court of Appeals correctly assessed the preventive gains relative to the costs of denying a defence. The claim is rather that Instrumentalism can easily account for the refusal to grant defences grounded in considerations such as these. Several other cases reflect an underlying concern by the courts to keep defences such as necessity and duress within strict limits in order to guard against misguided agents or their abusive use.

⁵⁷ The discussion of the case that follows draws from Edwards, *Legal Imperfectionism* (n 53).

⁵⁸ [1971] 2 WLR 467 (discussed in Thorburn, 'Public Law' (n 12) 32ff).

Manifest in them is also the aim to subject these defences to clear and objective parameters (“bright lines”) to facilitate their application by ex post adjudicators, derived from a concern with the fallibility not only of law-subjects, but that of the courts as well.⁵⁹

Hence, Thorburn is mistaken to claim that instrumentalists should regard the potential divergence between supposedly all-things-considered moral justification and legal justification as a mistake or failure of the law. At least in the philosophical literature on rules, much of this is relatively uncontroversial. It is therefore surprising that it has not been acknowledged by proponents of the Objection from Fit.⁶⁰ If I am right, that objection is falsified by the standard account of the function and justification of rules.

Notwithstanding the response to the Objection from Fit developed above, it may be thought that Instrumentalism can be objected to because it violates the Wrongfulness Constraint. The next section fleshes out and rebuts such an objection.

II. The Wrongfulness Constraint Objection

The version of instrumentalism defended in this thesis rests on the rejection of the discontinuity thesis. The instrumentalist claim is that it is morally justified—*all things considered*—to standardly allocate criminal law’s powers and permissions. In particular, the previous section suggested that instrumentalism can support the

⁵⁹ See, for example, *Dudley v Stephens* [1884] 14 QBD 273; *Quayle* [2005] EWCA Crim 1415, [2005] 1 WLR 3642 [75]; *Nicklinson* [2013] EWCA Civ 961, [2014] 2 All ER 32 [60] (cases of necessity); *Hasan* [2005] UKHL 22, [2005] 2 AC 467 [22] (duress). See also, David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod’s Criminal Law* (15 edn, OUP 2018) 367-69.

⁶⁰ Thorburn recently gestured towards the possibility of such a rejoinder to his objection. His reply appeals to the substantive account that we have already rejected in Chapter 3 (Malcolm Thorburn, ‘Policing and Public Office’ (2020) 70 *University of Toronto Law Journal* 248.

categorical withdrawal from private persons of the powers and permissions involved in criminal punishment. However, as hinted above, instrumentalism allows for the possibility that some private persons can—on occasions—be better placed than public officials to inflict punishment. Private persons who are in this situation and go on to inflict punishment in violation of the allocative rules would be doing nothing wrong under Instrumentalism’s own lights. This is an implication of the over-inclusive nature of the relevant rules. Given that criminal offences are rules, over-inclusion is unavoidable in criminal law. For instance, in England it is a criminal offence for an adult to sexually touch another person aged under sixteen. The consent of the child does not negate the offence.⁶¹ As Cornford explains, ‘the crime of sexual activity with a child targets a genuine underlying wrong: the exploitation of children who are not yet mature enough to make fully informed decisions about sexual activity’.⁶² However, it is over-inclusive relative to the wrong because not all instances of sexual activity between an adult and a child under sixteen-years-old are exploitative.⁶³ (It is under-inclusive too: some children aged over sixteen are not mature enough to make fully informed decisions about sexual activity, and adults who touch them sexually will thereby exploit them). Given that over-inclusive offences criminalise conduct that is not wrongful, they seem to violate the *Wrongfulness Constraint*, according to which it is impermissible to criminalise conduct that is not wrongful.⁶⁴ If it is an implication of Instrumentalism that some vigilantes do no wrong in inflicting criminal

⁶¹ Sexual Offences Act 2003, s 9 (1).

⁶² Cornford (n 49) 639.

⁶³ Ibid 639-40.

⁶⁴ James Edwards, ‘Theories of Criminal Law’, *The Stanford Encyclopedia of Philosophy* (Fall edn, 2018) <<https://plato.stanford.edu/archives/fall2018/entries/criminal-law/>> accessed 13 February 2019.

punishment, yet Instrumentalism nonetheless warrants a categorical prohibition on vigilante punishment, it appears to follow that instrumentalism is similarly inconsistent with the wrongfulness constraint.

One argument for the wrongfulness constraint appeals to the permissibility of punishment. Criminalising ϕ ing makes those who engage in ϕ ing liable to punishment. Many claim both that (i) it is permissible to criminalise ϕ ing *only if* it is permissible for the state to punish those who engage in ϕ ing, and (ii) it is permissible for the state to punish those who engage in ϕ ing *only if* ϕ ing is morally wrongful.⁶⁵ There are several ways in which writers have sought to make over-inclusive criminal offences compatible with the wrongfulness constraint. Of relevance here is the following. The over-inclusive formulation of a criminal offence can achieve legitimate goals: as suggested above, the over-inclusiveness of the offence is a result of its determinacy, which forestalls errors from both ordinary law subjects and officials. By drawing a clear line between permitted and prohibited conduct, the norm can be more effective in preventing the underlying wrong targeted by the offence. Still, the offences will only comply with the wrongfulness constraint only as long as the tokens of non-wrongful conduct that fall under the offence definition are not *substantively* criminalised—that is, only if their perpetrators are not convicted and punished for them.⁶⁶

The aforementioned line of thought seems to give Statism an edge over Instrumentalism. As we saw, Thorburn argues that the criminal law is

⁶⁵ Douglas Husak, *Overcriminalization* (OUP 2007) ch 2; Moore (n 36) chs 16, 18; Simester and Von Hirsch (n 50) 19-29; Duff, *Realm* (n 25) 58-70, ch 6. See also, Heidi Hurd, *Moral Combat* (CUP 1999) 3. The way in which the argument for the Wrongfulness Constraint is presented in the text draws from Cornford (n 49) 618, 621-22, 625; and Edwards, 'Criminalization' (n 50) 69-72.

⁶⁶ Duff, *Realm* (n 25) 61-71, 320.

discontinuous from morality because private persons who take it upon themselves to punish criminal wrongdoers, and do so in a way that may appear to be all-things-considered morally justified, are denied a defence and treated as criminals (something that judges would do without any signs of moral unease).⁶⁷ Statist offer a straightforward explanation for this. While Kantians claim that vigilantism is *necessarily* morally wrongful because it involves the exercise of private coercion, Duff argues that vigilantes wrong criminal offenders because they cannot give them what they deserve.⁶⁸ Therefore, according to statist, the criminalisation of vigilantism is *not* over-inclusive and convicting and punishing vigilantes necessarily satisfies the wrongfulness constraint. In contrast, Instrumentalism seems compelled—if it is not to run contrary to the wrongfulness constraint—to accept that innocent vigilantes (ie those who commit non-wrongful tokens of vigilantism) who find themselves in court should be granted a justification or some other kind of defence (eg *de minimis*). If so, it appears that Thorburn is right: Instrumentalism must regard the absence of these provisions as a mistake, which counts against the instrumentalist answer to the allocative question. However, as we will see, the problem for Instrumentalism seems actually more serious: Instrumentalism is likely to *require* that the prohibition on vigilantism is enforced against *all* vigilantes, irrespective of the moral status of their actions. The reason, in short, is that many of the reasons that justify *having* an exceptionless prohibition on the infliction of criminal punishment by private persons are also reasons for *enforcing* said prohibition. This puts instrumentalism in direct contradiction with

⁶⁷ See text to n 10 and n 11.

⁶⁸ Chapter 2, text to n 132.

the wrongfulness constraint. The Objection from Fit can thus be reformulated as an objection based on the wrongfulness constraint:

- i) To criminalise ϕ ing is to create liability to state punishment for ϕ ing;
- ii) It is permissible to create liability to state punishment for ϕ ing only if it is permissible for the state to punish people for ϕ ing;
- iii) *Therefore*, it is permissible to criminalise ϕ ing only if it is permissible for the state to punish people for ϕ ing;⁶⁹
- iv) It is permissible for the state to punish people for ϕ ing *only if* ϕ ing is morally wrongful
- v) *Per* instrumentalism, some vigilantes do not act morally wrongfully;
- vi) *Therefore*, some vigilantes are not permissibly punished [from (iv)];
- vii) *Therefore*, vigilantism cannot be permissibly criminalised [from (ii) to (v)];
- viii) The conclusion in (vii) is unsound;⁷⁰
- ix) *Therefore*, instrumentalism is unsound.

In the following sections, I rebut the Objection from the Wrongfulness Constraint. First, I develop a potential response to the objection which, though it reduces the objection's force, is ultimately unsuccessful as a full rebuttal (section II.A). I then provide a definitive response to the objection. The claim will be that the objection fails because it is both permissible to criminalise vigilantism *and* to punish morally innocent vigilantes (section II.B).

A. Is Vigilantism Necessarily Wrongful?

Throughout the thesis, I have presented instrumentalism as having the implication that some private persons may do nothing wrong by engaging in criminal punishment in violation of criminal law's allocative rules. That is because some vigilantes may act in conformity to the reasons that—as a general matter—justify allocating criminal law's powers and permissions to public officials. This implication of Instrumentalism is an essential premise in the reformulated

⁶⁹ Premises (i)–(iii) are drawn from Edwards, 'Criminalization' (n 50) 73-74, all of which—it should be noted—he rejects.

⁷⁰ Instrumentalists and Statists will agree it is unsound.

Objection from Fit, namely premise (v) above. One way for instrumentalists to fend off the objection is simply to deny (v) and argue that, on instrumentalist- or at any rate, instrumentalist-compatible grounds, vigilantes *necessarily* act wrongfully. If this were the case, the fact that the criminal law treats all vigilantes as criminals ceases to be an objection against Instrumentalism.

To evaluate this defence of Instrumentalism, let us follow Simester in understanding an action to be *wrongful* ‘whenever, all things considered, one ought not to do it. In turn, one ought not to do an action whenever the reasons favouring its performance are, all things considered, defeated by the reasons against’.⁷¹ Sub-sections 1 and 2 below develop the defence in detail. My conclusion will be that it does not succeed. Although the defence has some purchase for Instrumentalism because it narrows down the class of vigilantes that do nothing wrong by inflicting criminal punishment in violation of criminal law’s allocative rules, it is ultimately unsuccessful against the Objection from Wrongfulness Constraint because there remain *some* inflictions of criminal punishment by private persons that are not wrongful. I then go on to present a definitive rebuttal of the aforementioned objection: innocent vigilantes, that is, those whose breach of the allocative rules is not wrongful, can be permissibly punished.

1. A Duty to Obey *Justified* Laws?

On a widespread view, rules can create reasons. The fact that there is a rule that P ought (not) to ϕ when conditions C obtain *is a reason* for P (not) to ϕ when

⁷¹ Andrew Simester, ‘Enforcing Morality’ in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2015) 482. Simester goes on to say that ‘[w]e do need, however, to distinguish an action’s wrongfulness, or immorality, from its being a wrong. (...), an action is a wrong when it breaches a duty or violates a right. On occasion, it may be permissible—not wrongful—to perpetrate a wrong’ (ibid).

conditions C obtain, over and above the reasons for (not) ϕ that justify the rule.⁷² In Raz's terms, the reason given by the existence of a *mandatory* rule is 'protected': it is both a (first order) reason in favour of conforming to the rule *and* a (second order) reason to exclude (at least some of the) reasons *against* the conduct or omission mandated by the rule from the all things considered moral assessment of what one ought to do.⁷³ Importantly, on this view the first order reason may hold even in cases where the balance of underlying reasons that grounds the rule would have one act contrary to the prescription of the rule.⁷⁴ Hence, in virtue of the rule one *may* have conclusive reason to refrain from ϕ even though the reasons that justify the rule do not give one such a reason.⁷⁵ The foregoing applies to the law *qua* system of rules. Many think that the fact that there is a justified law that prescribes ϕ is a moral reason to ϕ in the terms outlined above. Some add that the fact that a legal norm is justified is *sufficient* to render actions contrary to it morally wrongful. For instance, Simester and von Hirsch argue that,

[i]f the proscription [against ϕ ing] is justified, we don't need supplementary grounds to show why ϕ ing is wrongful (...). If the state's exercise of authority was justified, then ϕ ing is already wrongful and, post-legally, D ought not to do it.⁷⁶

⁷² Raz, *Practical Reasons* (n 45) 51-52.

⁷³ Ibid 41-42, 61, 191-92; Joseph Raz, 'Legitimate Authority' in Joseph Raz (ed), *The Authority of Law* (2nd edn, OUP 2009) 18.

⁷⁴ John Gardner, 'Doubts about 'Democratic Legitimacy'' University of Oxford Legal Research Paper Series 3/2018 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3109457> accessed 18 March 2019, 14. Gardner labels the contrary view *rational reductivism*, viz the view whereby the rule merely summarises its underlying reasons, such that it gives no reason to do anything. The rule makes no difference to what anyone should do, so it could be done away with because conduct is justified directly by the rule's underlying reasons (ibid).

⁷⁵ According to Raz, p is a conclusive reason for x to ϕ iff p is reason for x to ϕ —which has not been cancelled—and there is no q such that q overrides p (Raz, *Practical Reasons* (n 45) 27).

⁷⁶ Simester and Von Hirsch (n 50) 28-29.

According to Simester and von Hirsch, whether the conduct of the vigilante is wrongful depends on the 'post-legal' assessment of the reasons she had to refrain from it. On this view, insofar as the exceptionless prohibition on private persons inflicting criminal punishment is justified—even if over-inclusive—its violation is wrongful *even if* the infliction of criminal punishment by the vigilante would not have been wrongful pre-legally.⁷⁷ This is a common way in which over-inclusive offences are presented as compatible with the wrongfulness constraint.⁷⁸ Recall Thorburn's contention that the criminal law's failure to grant a justification defence to those vigilantes whose conduct is non-wrongful or morally justified all-things-considered shows, against Instrumentalism, that criminal law is not concerned with all-things-considered moral justification. Given that Instrumentalism implies that some vigilantes do not act wrongfully, it either fails to accord with the law as it is or—to the extent it requires the enforcement of the prohibition against these vigilantes—it conflicts with the wrongfulness constraint. However, if Simester's and von Hirsch's contention is right, we cannot ask—as Thorburn seems to do—whether an instance of infliction of criminal punishment by a private person is wrongful *in abstraction from* the existence of the set of rules that prohibit this conduct. Insofar as the justified proscription of the private infliction of criminal punishment renders such conduct necessarily wrongful, Thorburn's objection is undermined because Instrumentalism can account for the wrongfulness of vigilantism, and thereby for the justifiability of punishing it.

Alas, this response on behalf of Instrumentalism ultimately fails. The response depends on two claims. The first is that a justified law that prohibits *ϕing*

⁷⁷ Ibid 27-29.

⁷⁸ Ibid; Duff, *Realm* (n 25) 70.

always gives us a merit-independent reason against ϕ ing, that is, a reason that is not entirely grounded in moral properties of, or facts about, ϕ ing itself.⁷⁹ We have reason to obey the law, and therefore to refrain from ϕ ing, *because* it is the law. As such, the reason holds despite the substantive merits of ϕ ing in the circumstances. The second claim is that said reason is either itself *decisive* against ϕ ing or somehow *necessarily* contributes to making it the case that the reasons to ϕ are defeated. I will deny both these claims below.

Now consider: why, in a case such as the vigilante's, would a rule requiring us to ϕ be a reason for us to ϕ even if the reasons that justify the rule would—if applied directly—require that we do otherwise?

One argument for this claim appeals directly to the function and justification of rules. As we saw above, rules are justified because, and to the extent that, they enable their subjects—by following them—to better conform to the reasons that justify the rules (reasons which apply to them independently) than by attempting to follow these reasons directly.⁸⁰ However, this benefit—that is, the maximisation of conformity with the underlying reasons—obtains only insofar subjects adopt the *general policy* of following the rule rather than their independent judgment of the merits in each case where the rule applies. It is the rule itself, rather than its underlying reasons, which must be the subject's reason for action if the advantages of having a rule are to be secured.⁸¹ Now, Raz contends that one has reason to adopt said policy because 'one has reason to do whatever will

⁷⁹ Edmund Tweedy Flanigan, 'Do We Have Reasons to Obey the Law?' (2020) 17 *Journal of Ethics and Social Philosophy* 159, 164, 171, 185.

⁸⁰ n 45.

⁸¹ Raz, *Practical Reasons* (n 45) 186, 190, 193.

facilitate conformity with reason'. This implies, on Raz's view, that the rule is a reason to perform the action prescribed by it *even when the subject knows* that the action is not supported by the underlying reasons.⁸² The advantage that the rule provides would be lost if it were open to subjects to disobey it when it failed to reflect the conduct required by the applicable reasons in the circumstances because in trying to establish whether this was the case, subjects would be relying on their—*ex hypothesi*—less reliable judgment.⁸³ If true, Raz's claim may further imply that a subject *ought* to follow a rule—and therefore acts wrongfully in violating it—irrespective of the merits of the case at hand.⁸⁴

According to Raz, it is the *same* reasons that justify *having* the rule which are also reasons to *conform* to it both without forming a judgment for oneself as to the balance of underlying reasons and despite these reasons counting in favour of one doing otherwise in the circumstances.⁸⁵ The argument fails because a justified rule need not provide *everyone* the benefit or advantage that justifies having the rule. Some people can more reliably conform to the reasons that apply to them by appealing to those reasons directly than by following a rule justified by those reasons. Let us call these people *experts* in the domain of conduct governed by the rule. Given that experts do not benefit from the rule in terms of increased compliance with reasons, they do not have the reason to follow the rule that, on

⁸² Ibid 182, 194, 197. See also, Schauer (n 45) 51-52, 71-72, 76, 100, for the claim that rules purport to provide a reason for decision even when in the circumstances it does not serve the rule's justification.

⁸³ Raz, *Morality* (n 45) 62.

⁸⁴ Raz, 'Legitimate' (n 73) 24-25.

⁸⁵ Ibid.

Raz's view, this benefit yields.⁸⁶ So much is argued by Raz himself.⁸⁷ The fact alone that the rule improves *most* people's conformity to the reasons that apply to them does nothing to give experts a reason to follow the rule that is independent of the merits of the case. As a result, the argument under consideration does not show that a rule requiring us to ϕ is *necessarily* a reason for (all of) us to ϕ even if the reasons that justify the rule would—if applied directly—require that we do otherwise. Therefore, for some of us it will not be wrongful—not even *pro tanto*—to violate a justified rule. In particular, some private persons may have the knowledge and skill to inflict criminal punishment in conformity with all of the reasons that typically would limit the powers and permissions for their justified infliction to public officials. When they do so in violation of the allocative rules, the fact alone that their conduct is proscribed by said rules is *no* reason against it.

As noted above, Gardner is one of the writers who argue that the first order reason given by justified rules holds even in cases where the balance of underlying reasons that ground the rule would have one do other than the rule requires. This is Gardner's explanation:

The trick is to think about how life would be were it not for the norm, rather than thinking how life would be were it not for the action. (...) We should think about the other good decisions we sacrifice if we react to individually terrible decisions by overthrowing, or even modifying, the system. And when think (sic) about 'other good decisions' for this purpose we should think about their goodness, not in comparison with the ideal decisions we imagine to be possible, but in comparison with the different run or pattern of decisions that

⁸⁶ Notice, though, that the time-saving and other advantages the rule might give them can be reasons in their own right to follow the rule without attempting to form a judgement as to the merits of the action in the circumstances.

⁸⁷ Raz, *Morality* (n 45) 68-74, 77-78.

might have been thrown up by alternative political systems at our disposal.⁸⁸

Gardner's argument also fails. To see this, let us distinguish two aspects of the justification of rules, namely, the (i) *substantive* and (ii) *rule-generating*, aspects.⁸⁹ As Schauer explains, the substantive justification of a rule refers to 'the background rationales or goals behind the rule'.⁹⁰ The substantive justification of the standard allocation is constituted by all of the considerations (and surely many others) that were outlined in the previous chapter. The critic of Instrumentalism points to the fact that some vigilantes may not fail to conform to the norm's substantive justification—it may even be the case that the prohibition's substantive justification yields an undefeated reason to (or no undefeated reason against) inflicting vigilante punishment in certain circumstances. Gardner's suggestion seems to be that justified norms give us reasons to conform to them in part due to the negative consequences that would arise from not having the rule, or having an alternative rule. On one reading, this points to the second aspect of the justification of rules mentioned by Schauer, that is, the *rule-generating* aspect which, 'provides the rationale for specifying the substantive justification *in the form of a rule*'.⁹¹ We saw that rules are, in part, a response to human fallibility: they are enacted to promote conformity with a set of moral reasons which, absent the rule, would be hampered by common mistakes of judgment and lack of information, among others. The rule-generating aspect of the rule's justification is its instrumental capacity to promote conformity with the moral reasons that make up its

⁸⁸ Gardner, 'Doubts' (n 74) 14-15.

⁸⁹ The labels are from Schauer (n 45) 64.

⁹⁰ Ibid.

⁹¹ Ibid.

substantive justification. As we saw, Raz claims that rules are valuable on the basis of the service they provide and, as such, give us reason to conform to them. On the position now being considered, these rule-generating reasons concern the harm that non-conformity can cause to the rule and its ability to guide conduct. These reasons are reasons to conform to the rule even if the behaviour it mandates is not supported by the rule's substantive justification.⁹²

The most obvious of the aforementioned type of reasons for conformity have to do with the risks of *example-setting*. Present rule violations—even when warranted by the rule's substantive justification—might risk future instances of disregard of the rule by the agent or others that are not equally warranted, thus reducing overall conformity with the substantive justification to which the rule seeks to give effect.⁹³ This may further lead, *inter alia*, to reduced confidence by others in the general compliance to the rule and damage expectations—eventually, violations can have a corrosive on the 'public atmosphere of respect for the law'.⁹⁴ However, whether punishing in violation of the allocative rules has effects of this sort is entirely contingent and, when these effects obtain, they might be negligible relative to the substantive reasons in favour of the breach. For these effects to take place, it is plausible that violations would have to be more than sporadic and, in any case, each vigilante's contribution to the negative overall atmosphere might still be very small. Moreover, vigilante punishments that, *inter alia*, are kept secret may do nothing to impair the effectiveness of the prohibition or respect for the law more broadly, so the aforementioned effects do not obtain as reasons against the

⁹² Alexander and Sherwin (n 45) 61.

⁹³ On the risks of example-setting as reason to conform to laws, see Hurd (n 65) 191-93; Fred Feldman, *Introductory Ethics* (Prentice-Hall 1978) 97; Larry Alexander, 'Pursuing the Good-Indirectly' (1985) 95 *Ethics* 315, 322; Raz, *Morality* (n 45) 102.

⁹⁴ Raz, 'The Obligation to Obey the Law' (n 73) 237.

conduct.⁹⁵ Gardner's claim that the relevant reasons are given by the fact that we would all be worse off under an alternative system of rules (or no system of rules at all) is not convincing for reasons already noted: the fact that an alternative world where the rules were different or absent would be worse does not entail that in the actual world, where in the circumstances we are not worse off by not conforming to the rule, we nonetheless have reason to obey.⁹⁶ (Though recall that—for those who are not pure deontological retributivists—part of the justification for inflicting criminal punishment comes—at least in most cases—from its positive consequences (eg deterrence), many of which depend on punishment being public and perceived as part of a systematic and consistent response to crime. Thus, the secret vigilante may ultimately act wrongfully in virtue of the very reasons that would apply to her apart from the rule).

Therefore, reasons we have to conform to the prohibition on the infliction of criminal punishment by private persons are all merit- or content-dependent. None of these reasons is grounded in the very fact that the allocative rules justifiably require private persons to refrain from this conduct. More generally, at least when it comes to over-inclusive rules of the type we have been considering, it is not true that they always give us a reason to conform even when the underlying reasons—if applied directly—would have us do otherwise. As a consequence, the prohibition on the infliction of criminal punishment by private

⁹⁵ Ibid 237-38. See similarly, Cureton (n 45) 746-47; Gerhard Øverland and Christian Barry, 'Do Democratic Societies Have a Right to Do Wrong?' (2011) 42 *Journal of Social Philosophy* 111, 125-28.

⁹⁶ See, similarly, Laura Valentini, 'The Content-Independence of Political Obligation: What it Is and How to Test it?' (2018) 24 *Legal Theory* 135, 143-46. The same reasoning applies to appeals to compliance: that the state of affairs where all comply with a rule is better than the state of affairs where no-one complies is no reason to comply in circumstances where, given the existing level of compliance, non-compliance by an agent leads to a better outcome overall (Alan Goldman, 'The Rationality of Complying with Rules: Paradox Resolved' (2006) 116 *Ethics* 453, 460).

persons may give subjects *no* undefeated reason to conform to it, in which case it is not wrongful to violate it: the norm's underlying wrong is not perpetrated nor is the value of the rule undermined.⁹⁷ These cases of 'harmless disobedience' show that Instrumentalism cannot appeal to the notion that the violation of justified laws is necessarily wrongful to fend of the Objection from Wrongfulness Constraint.⁹⁸

To reiterate, the above is the upshot of the instrumentalist justification of rules. If the function and justification of rules is to help subjects conform to reasons that apply to them independently of the rules, it is difficult to see how the rule would give subjects content-independent reasons for compliance—particularly when it is not true in the circumstances that following the rule leads the subject to do what she has undefeated reason to do. As Valentini explains, relying on the *effects* of complying with the law for its justification cannot deliver merit-independence because the justification itself appeals, ultimately, to the merits of the action prescribed by the norm.⁹⁹

a) A Duty to Obey *Democratic* Law?

Recall that we are evaluating different grounds for the claim that vigilante punishments are necessarily wrongful, the truth of which would help Instrumentalism to deflect the Objection from Wrongfulness Constraint. My contention is that this defence ultimately fails.

⁹⁷ Hurd (n 65) 216; Liam Murphy, 'The Normative Force of Law. Individuals and States' in John Gardner, Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law*, vol 3 (OUP 2018) 109. Raz argues that the strength of the rule as a first order reason in favour of the action mandated by the rule depends on (i) the values / reasons it serves and (ii) the risks of future disregards due to present deviation. It seems to follow that if (i) are conformed to and (ii) are absent, the first order reason given by the rule has zero weight. Yet, somehow Raz seems to think that nonetheless it is often the case that the rule should be conformed to (Raz, *Practical Reasons* (n 45) 77, 191).

⁹⁸ Similarly, Cornford (n 49) 645.

⁹⁹ Valentini (n 96) 156-57. See also Murphy (n 97) 106.

Before moving forward, it is worth briefly considering a different proposal to support Simester's and von Hirsch's claim. According to this proposal, it is the *procedural* properties of the law—in particular, the value of the *democratic* law-generating procedure—that gives subjects merit-independent, and normally conclusive, reason to comply. Many think that, by virtue of giving citizens an equal influence (or opportunity thereof) over the laws that are enacted, democratic procedures instantiate a form of valuable political or social *equality* between citizens. On this view, violating democratically-enacted law deprives citizens of said equal influence and asserts a claim of superiority over them, which amounts to a denial of their equality. Citizens have a right against each other not to have their equality denied, from which it follows that they have a right that others do not violate the law. Therefore, is it normally morally wrongful to violate the law.¹⁰⁰

This alternative proposal is unsuccessful. Grant that political or social equality is a good enough reason to have a democratic process of legislation. Failure to conform to democratically-enacted law may do *nothing* to undermine said process and its value. Then, the value of political or social equality would not be a reason to refrain from violating the law. In reply, it might be said that the value of equality gives us reasons not only to promote it (or to refrain from setting it back) but also, and more importantly, to *respect* it—which one would fail to do when violating the law, regardless of its impact in the democratic process. This is unpersuasive. Disobedience grounded *in the very reasons that justify the law in question* involves no claim contrary to the legitimacy of the democratic process or

¹⁰⁰ Thomas Christiano, *The Constitution of Equality* (OUP 2008) 250; Niko Kolodny, 'Rule Over None II: Social Equality and the Justification of Democracy' (2014) 42 *Philosophy & Public Affairs* 287, 315. For sympathetic discussion of procedurally-based (normally conclusive) reasons to obey democratic law, see further Valentini (n 96) 154-57; Flanigan (n 79); Dan Markel, 'Retributive Justice and the Demands of Democratic Citizenship' (2012) 1 *Virginia Journal of Criminal Law* 1.

one's fellow citizens' right to participate in it on equal terms. To argue otherwise would presuppose attributing to citizens (or the democratic assembly) the intention that their decision controls what is to be done in situations where the reasons that grounded their decision do not obtain or require a different course of action. Absent wider negative effects resulting from violating the law, this is not a justifiable intention to have or attribute. Furthermore, it is hard to see why social or political equality would require the aforementioned form of control or imply that an agent that fails to conform to the law in circumstances that the law did not aim to regulate asserts a claim of superiority over her fellow citizens. It is an unattractive conception of equality that mandates abiding by a democratic decision when doing so goes against the grounds of the decision itself. The failure to conform in such circumstances is entirely compatible with the non-conforming agent having the belief that the law is fully justified and, thus, with a belief in the wisdom of the democratic assembly. Therefore, violating the law in this context need not violate one's fellow citizens', nor anyone's, rights.¹⁰¹ A procedural justification of the law's reason-giving nature also leads to an instrumental account of the reasons to conform to it. The conclusions of our discussion so far are summarised by Murphy as follows:

The basic structural point is this, and it applies even if the law is as good as it could be. We cannot reason directly from what it would be good and right to have enacted and enforced as law to what it would be good or right for individuals to do. That we have the law in place that it is best to enforce (there is no better set of legal norms it would be better to enforce) does not imply that it is always obligatory for each person to follow the law.¹⁰²

¹⁰¹ Murphy (n 97) 100.

¹⁰² Ibid 107.

Murphy is simply referring to what has been called the *gap* or *asymmetry of authority*: the considerations that justify *issuing* a rule are not coextensive—although they partially overlap—with the considerations that justify *following* the rule. As a result, a rule–subject can be justified (in the sense of not being pro tanto wrong) in violating a rule that a rule–issuer was justified in enacting and demanding conformity to.¹⁰³ We will return to this point below.

2. Evidence and Risks

To recap: instrumentalism seems unable to respond the Objection from Wrongfulness Constraint by claiming that vigilantism, qua a violation of justified laws, is necessarily wrongful. Here is a different strategy to support the claim that vigilantism is necessarily wrongful.

Let us start by distinguishing between *fact*-relative wrongfulness and *evidence*- (and *belief*-) relative wrongfulness. The claim from the previous section that some vigilantes may do no wrong in violating criminal law’s allocative rules was *fact*-relative: all the morally relevant facts may be such that these vigilantes have no undefeated reason to conform to criminal law’s allocative rules. Still, it will tend to be uncommon for a vigilante—at least *ex ante*—to *know* whether all the morally relevant facts that contribute to the justification of her prospective behaviour obtain. Recall that private persons will tend, inter alia, to lack the expertise, information, and resources to ascertain a suspect’s guilt and to punish proportionately. They are further unlikely to ensure equal punishment across similarly situated offenders. The exceptionless prohibition on privately inflicted

¹⁰³ ‘The question of why to have rules is (...) different from the question of why to follow them, or even why to take them seriously’ (Schauer (n 45) 134; see also, 98 fn 26); Frederick Schauer, ‘Rules and the Rule of Law’ (1991) 14 Harv JL & Pub Pol’y 645, 691; Alexander, ‘Asymmetry’ (n 45); Alexander and Sherwin (n 45) 54, 60, 77. The point has recently been made with regards to the criminal law in Re’em Segev, ‘Moral Innocence and the Criminal Law: Non-Mala Actions and Non-Culpable Agents’ (2020) 79 The Cambridge Law Journal 549 557-58.

criminal punishment that is part of the standard allocation reflects the assessment that private persons are prone to mistakes when judging for themselves that they are justified in inflicting punishment in the circumstances. In this regard, the allocative rules are *evidence* for private persons of their propensity to err.¹⁰⁴ Therefore, the rules give them reason to *believe* that they would act wrongfully by engaging in the proscribed conduct. This, in turn, gives private persons reason to reduce their confidence in their judgement as to the justifiability of violating the rule.¹⁰⁵ In the circumstances, the allocative rules may be the best evidence available that a prospective infliction of punishment would be wrongful. As a result, the available evidence may be such that private persons have undefeated reason to believe that inflicting criminal punishment would be wrongful.¹⁰⁶ The upshot is that a private person who inflicts criminal punishment in those circumstances acts wrongfully in the *evidence*-relative sense. If she holds the belief that her actions would be wrongful relative to the facts, she acts wrongfully in the belief-relative sense too.¹⁰⁷ Importantly, supposing that the facts could actually be ascertained *ex post*, the fact-relative justifiability of the vigilante's action does not negate its wrongfulness in the other two senses. Consider:

False Covid Party. Aaron realises he has lost his sense of taste and smell. He gets a PCR test for Covid-19 which comes out positive. Unbeknownst to him, the test was faulty, and the result is actually a *false* positive. Aaron does not in fact

¹⁰⁴ Alexander and Sherwin (n 45) 61-62. It is worth noting that Raz says that 'many exclusionary reasons are (...) "evidential" in character (...) their justification is that conformity to them will lead to improved conformity with the excluded reasons' (Raz, *Practical Reasons* (n 45) 186).

¹⁰⁵ Raz, *Practical Reasons* (n 45) 197.

¹⁰⁶ GE Moore held a strong version of this view: 'It seems, then, that with regard to any rule which is *generally* useful, we may assert that it ought *always* to be observed, not on the ground that in *every* particular case it will be useful, but on the ground that in *any* particular case the probability of its being so is greater than that of our being likely to decide rightly that we have before us an instance of its disutility. In short, though we may be sure that there are cases where the rule should be broken, we can never know which those cases are, and ought, therefore, never break it' (GE Moore, *Principia Ethica*, 162, sect. 99, quoted in Schauer, *Playing* (n 45) 46 fn 9).'

¹⁰⁷ Derek Parfit, *On What Matters*, vol I (OUP 2011) 150-51; Tadros, *Ends* (n 36) 217ff

have Covid-19. He then invites five friends to his place to have a party, which they enjoy while observing no social distancing measures. None of them was aware of Aaron's symptoms or the fact that he had a PCR test.

Grant that, *ceteris paribus*, a person who has Covid-19 has an undefeated reason to self-isolate and avoid all contact with people from outside her household unless said contact is absolutely essential and always while observing stringent social distancing measures. Acting contrary to said reason makes the conduct wrongful. Assume that his symptoms together with the positive PCR test results gave Aaron undefeated reason to believe he had in fact contracted Covid-19. It is quite plausible to claim that Aaron's conduct is wrongful even if it posed *no* risk of spreading Covid-19 to his friends. We can reasonably claim that Aaron should not have invited his friends for a party at his place—a claim that we could maintain even after finding out that the test results were mistaken.

As noted, vigilantes who would be innocent in the terms discussed in the previous section may nonetheless act wrongfully in the evidence- and/or belief-relative sense. Consider also the following example:

Blind Curve. Aaron is driving his car to a ski resort on a busy winding road up the mountain. Anxious to try out his new snowboard, Aaron overtakes the car in front of his at high speed on a blind curve, ignoring the signs prohibiting such manoeuvre. Luckily, there was no car behind the curve and the car he overtook had slowed down to facilitate Aaron's manoeuvre.

On the facts, Aaron may have done nothing wrong: as von Hirsch notes, given that there was no car behind the curve coming in the opposite direction, Aaron's action did not endanger another. However, in the circumstances Aaron could not have known whether this was actually the case, and further had reason to believe that the odds were high. Thus, he acted wrongfully in the evidence-relative sense. It would seem entirely appropriate if, after the fact, someone told

Aaron that he *ought not* to have overtaken the car in the blind curve. We might also see Aaron's actions as having undertaken an unreasonable risk.¹⁰⁸

Indeed, that the evidence and/or belief-relative standard can be dispositive as to the moral nature of an action has been persuasively argued in other contexts.¹⁰⁹ Still, a similar argument can be made appealing to *risks*. By virtue of their lack of expertise relative to public officials, the moral nature of the punishments imposed by private individuals (that is, whether they are justified or not) depends on luck to a greater extent than those imposed by public officials. In being prone to punish, private persons may subject others to a risk of unjustified harm. It is widely accepted that mere risk imposition can be wrongful. It is wrong to operate heavy machinery under the influence of alcohol or to drive at 100mph through a residential area, even if no one suffers harm as a result.¹¹⁰ One way to substantiate this thought is on a *probabilist* view of reasons, that is, the view that the strength of our reasons for a course of conduct varies with the *expected* (dis)value of the conduct. On this view, as Zimmerman maintains, 'what one ought to do is a function of the risks that one runs by virtue of the actions one intentionally performs'.¹¹¹ The upshot is that, if the probability that the infliction of punishment by private persons will be unjustified is higher than the expected value of a punishment that would be justified in the circumstances, the prospective

¹⁰⁸ Andrew von Hirsch, 'Extending the Harm Principle: 'Remote' Harms and Fair Imputation' in Andrew Simester and A. T. H. Smith (eds), *Harm and Culpability* (Clarendon Press 1996) 263.

¹⁰⁹ Russell Christopher, 'Self-Defense and Objectivity: A Reply to Judith Jarvis Thomson' (1997) 1 *Buffalo Criminal Law Review* 537; Kimberly Kessler Ferzan, 'Culpable Agression: The Basis for Moral Liability to Defensive Killing' (2012) 9 *Ohio State Journal of Criminal Law* 669, 690; Seth Lazar, 'Necessity in Self-Defense and War' (2012) 40 *Philosophy & Public Affairs* 3, 8-9; Tadros, *Ends* (n 36) 217ff.

¹¹⁰ Seth Lazar, 'Risky Killing: How Risks Worsen Violations of Objective Rights' (2019) 16 *Journal of Moral Philosophy* 1, 10.

¹¹¹ M. J. Zimmerman, 'Risk, Rights, and Restitution' (2006) 128 *Philosophical Studies* 285, 297.

vigilante has an undefeated reason to refrain from punishment—thereby acting wrongfully if she inflicts the punishment. As above, it remains the case that she should not have thus acted even though the punishment as inflicted turns out to be justified.¹¹² Another way to ground the wrongfulness of mere risk imposition is to appeal to the *attitudes* that are expressed towards others in exposing them to risks. Lazar argues that A shows *disrespect* towards B by acting in a way that is likely to wrong or harm her unjustifiably, irrespective of whether the action results in the relevant harm or wrong.¹¹³ He adds that A also renders B *insecure*: '[w]e are insecure to the extent that others make our avoidance of wrongful harm depend on luck'.¹¹⁴ On this view, the higher the probability that A's action will result in wrongful harm, the more she makes B depend on luck to avoid said harm. In doing so, A fails to display appropriate regard for B's interest.¹¹⁵ A's behaviour may also undermine B's *autonomy*: A has limited the scope of B's freedom from wrongful harm—B's options to go about free from said harm have been reduced.¹¹⁶ As a result, B may have a *right* against A to refrain from intentionally performing the action that exposes her to a risk of unjustified harm—a distinct complaint from the one B has to not be subject to unjustified harm. If the foregoing is correct, actions of vigilantes may be considered wrong on grounds of risk-imposition. To be sure, public officials who are in the business of enforcing the criminal law also subject others to a risk of wrongful harm. Those who are wrongfully harmed have a

¹¹² It is worth noting that one implication is that the vigilante is liable to defensive harm from the target, even if the latter is guilty of the offence for which the vigilante aims to punish her.

¹¹³ Lazar, 'Risky' (n 110) 6-7.

¹¹⁴ Ibid 8.

¹¹⁵ Ibid 8-9.

¹¹⁶ Ibid 8; Similarly, John Oberdiek, 'Towards a Right Against Risking' (2009) 28 Law and Philosophy 367.

complaint *ex post*, that is, once they are actually unjustifiably harmed. Still, *ex hypothesi*, the corresponding risks are low relative to those imposed by private persons, so the expected value of the actions of public officials will tend to be sufficient to make the imposition of these risks permissible.¹¹⁷

3. Implications for Instrumentalism

Many think that vigilantes act wrongfully, even when they happen to “get it right”. The considerations discussed in the sections above go some way towards substantiating this thought. Instrumentalists can avail themselves of these considerations to reduce the force of the Objection from Wrongfulness Constraint. However, as already suggested, this is not enough to vindicate Instrumentalism because two problems remain. The first is that the wrong committed by the vigilantes considered in the previous section is different from the mischief that the categorical prohibition on the infliction of punishment by private persons seeks to prevent. Risk- or evidence-based wrongs are different—and typically lesser—wrongs than the wrong of inflicting unjustified criminal punishment.¹¹⁸ The punishment for the latter wrong is likely to be disproportionate for someone who is guilty of the former wrong. Yet, a lower punishment might compromise the ability of the prohibition to deter would-be vigilantes.¹¹⁹ The second problem is that it remains the case that some vigilantes—given their particular expertise, the deterrent potential of their punishment, the degree of guilt of the wrongdoer or some other reason—will not have exposed the wrongdoer to an unjustifiable risk

¹¹⁷ Of course, this need not be the case: if the state and its public officials were terrible at punishing, they should not punish; they should not punish even those who they happen to punish rightly.

¹¹⁸ Duff, *Realm* (n 25) 329.

¹¹⁹ In the same sense, but in a different context, Alec Walen, ‘Criminal Law and Penal Law: The Wrongness Constraint and a Complementary Forfeiture Model’ (2020) 14 *Criminal Law & Philosophy* 431, 439-41.

of harm, neither on the facts nor the evidence. If these vigilantes believed that there was no undefeated reason to refrain from inflicting punishment, they were warranted in having this belief. All other things equal, the actions of these vigilantes are not wrongful. As a result, Instrumentalism cannot help itself to the claim that vigilantism is necessarily wrongful, and thus still appears to be liable to the objection under discussion.

In response to these two problems, in the following section I reject a *strong* understanding of the wrongfulness constraint, whereby it is necessarily impermissible to criminalise and punish innocent vigilantes. We should rather conceive of the wrongfulness constraint in a *moderate* form. The upshot is that the constraint can be *overridden* in the case of innocent vigilantes—their conviction and punishment is thereby a *justified wrong*. I also offer some considerations in support of the claim that innocent vigilantes are *liable* to be punished for violating criminal law's allocative rules, such that the wrongfulness constraint does not apply to them. As a consequence, they are *not* wronged by their convictions and punishment. Even if the latter claim is rejected, the considerations offered in its support buttress the case for deeming the conviction and punishment of morally innocent vigilantes a justified wrong.

B. The Permissibility of Punishing the Morally Innocent Vigilante

Most think that there are no absolute constraints—like all moral objections, constraints can be overridden when the stakes are high enough. The objection against punishing the morally innocent is thus only *pro tanto*. My strategy below is therefore not to rehash the aforementioned line of thinking. Rather, I offer a positive case for defeating the wrongfulness constraint that is specific to the situation of the morally innocent vigilante and the institutional position of the

courts charged with trying them. As I mentioned above, some aspects of this case might suggest that the objection is not merely overridden but cancelled. Nonetheless, it is not necessary to commit to this stronger conclusion to rebut the objection under consideration.

1. Institutional Position of the Court

As we saw in section I.B.2 above, Instrumentalism can provide an explanation of why morally innocent vigilantes are denied a justification defence that is consistent with the way courts themselves approach the issue. It is also worth noting that Instrumentalism need not countenance a form of 'acoustic separation' whereby courts follow a decision rule of acquitting morally justified vigilantes, which is nonetheless concealed from the public to prevent the risks outlined in that same section.¹²⁰ From the perspective of Instrumentalism, there are two problems with this proposal.¹²¹ The first is that judges, qua law-subjects, are fallible too, and are exposed to many of the mistakes that private persons are in their role as law subjects. It may be that more often than not judges will mistakenly identify morally innocent vigilantes and that assessing said innocence in a case-by-case basis is inefficient, given the unlikelihood that the balance of reasons will be in favour of private enforcement. The second is that, even though the decision rule that contains the justification is concealed, the court's decision to acquit would be public. The court's deviation from what appears to be the applicable conduct rule has a greater likelihood of encouraging unjustified rule-breaking by other actors (mostly private persons but also other judges) than the conduct of a single

¹²⁰ Meir Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' in Paul Robinson, Stephen Garvey and Kimberly Kessler Ferzan (eds), *Criminal Law Conversations* (OUP 2011).

¹²¹ Some have noted other problems with the idea of acoustic separation. For instance, Duff thinks it involves a form of mistreatment of citizens (Duff, *Realm* (n 25) 69).

vigilante. The court's behaviour—by reducing the credibility of the rule—may as a result cause greater harm to the rule and to the substantive goals of the rule by undermining the practice of rule-following. Therefore, in principle, the reasons for conformity that apply to courts are stronger than those that bear on the conduct of private persons precisely because of the potentially larger systemic effects of non-conformity by the former.¹²²

None of this is to deny that the effects of an individual decision to acquit may be negligible, or that the damage to the stability and effectiveness of the prohibition (or the legal system more widely) might only come about as a result of an accumulation of similarly individually morally justified decisions. There may be a threshold beyond which the benefits of not enforcing the prohibition (in terms of innocents spared punishment and the imposition of morally justified vigilante punishments) are outweighed by the cumulative damage to the rule and the harm associated to the morally unjustified vigilante punishments that are likely to follow. It is difficult to see why courts would have decisive reason to enforce the rule *before* the threshold is met (and they would have said reasons *after* the threshold is met *only if*, by conforming to the rule, they contribute to repairing the damage done to the effectiveness of the rule and the legal system more broadly).¹²³ Thus, in theory, there is an optimal pattern of deviations from the enforcement of the prohibition against vigilantism whereby the benefits outweigh the costs in the terms just outlined. However, as Goldman explains, several considerations also suggest that judges ought nonetheless to conform to the rule in question—that is,

¹²² See Raz, *Morality* (n 45) 102; Raz, 'Obligation' (n 73) 237-38; Alexander and Sherwin (n 45) 72, 81; Brand-Ballard (n 45) 185-87; Murphy (n 97) 114ff.

¹²³ As Goldman points out, if there is no threshold, the contribution of each judge to the cumulative harm is negligible, so each may have decisive reason to deviate from the rule (in this case, to acquit the morally innocent vigilante): Alan Goldman, *Practical Rules: When We Need Them and When We Don't* (CUP 2002) 44.

that they may have decisive reason *not* to guide their decisions by attempts to conform to the aforementioned pattern. Two of these considerations are worth noting here. The first consideration is *epistemic*, and further brings out the relevance of fallibility: individual judges are likely unable to gauge the overall effects of their decision to deviate from the rule. In particular, they are likely to fail in identifying the optimal pattern or the degree to which their decisions will contribute to approaching—or crossing—the threshold (which partly depends on the conduct of other judges, about which they might be ignorant or with whom they will be unable to coordinate), the bad consequences of which we are assuming outweigh the good that accrues from the individual decision.¹²⁴ The second consideration is *moral*, and we have already hinted at it in the previous chapter: establishing such a pattern of decision-making introduces an element of inequality between similarly situated innocent vigilantes, which can be comparatively unjust.¹²⁵ If so, lawmakers may have sufficient reason to require judges to conform to a rule mandating them to punish *all* private persons who inflict private punishment in violation of the allocative rules, even if *some* private persons will turn out, as a matter of fact, to be morally innocent vigilantes.¹²⁶ Strict adherence by judges to said requirement is likely to promote better results in terms of the

¹²⁴ Goldman, 'Rationality' (n 96) 456. As Brand-Ballard notes, nothing in principle prevents judges from gathering the necessary information and coordinating. However, that will surely be difficult and very time-consuming, so much so that it can outweigh the benefits of attempting to do so (Brand-Ballard (n 45) 234-37). Besides, the consideration mentioned in the text following this note would still apply.

¹²⁵ Goldman, *Practical Rules* (n 123) 43-45. Given these considerations, we need not take a position in the debate about the moral nature of individual action in cases of collective harm where either individual action makes a negligible or imperceptible difference, or threshold scenarios, where an individual act triggers the bad outcome (see Shelly Kagan, 'Do I Make a Difference?' (2011) 39 *Philosophy and Public Affairs* 105 and Julia Nefsky, 'Consequentialism and the Problem of Collective Harm: A Reply to Kagan' (2011) 39 *Philosophy & Public Affairs* 364).

¹²⁶ Brand-Ballard (n 45) 132-133; Schauer, *Playing* (n 45) 132-133.

very values that the standard allocation seeks to promote.¹²⁷ The key point is that some of the same reasons that justify the enactment of the over-inclusive and exceptionless prohibition on the private infliction of punishment are reasons that favour, sometimes conclusively, the enforcement of said prohibition. Thus, Instrumentalism warrants both the formal and substantive criminalisation of the morally innocent vigilante's conduct.¹²⁸

Admittedly, for the reasons already explored, a gap is bound to replicate between lawmakers and judges qua law-subjects.¹²⁹ Judges might have undefeated reason to acquit a morally innocent vigilante in the circumstances, despite the justified character of the rule requiring them to do otherwise. Yet, the fact of uncertainty here is crucial. In circumstances of uncertainty both as to the morally relevant facts that contribute to the justifiability of the vigilante's actions and to the potential effects following from her acquittal, judges can be justified in adopting a practice of strict adherence. Indeed, as suggested above, the rule gives judges reason to *believe* that this is the case such that conforming to the rule can be justified despite the balance of underlying reasons supporting the opposite conduct. It justifies the standing disposition by judges to conform without, as Raz says, even attempting to make a judgement on the merits of the specific case. Although justified rules cannot give judges a *duty* to conform when the balance of underlying reasons would have subjects do otherwise, they can nonetheless ordinarily function to *justify* said conformity, despite the balance of reasons. The

¹²⁷ Hurd (n 65) 191-92, 206; Murphy (n 97) 114-15.

¹²⁸ Segev presents a long list of offences that are overinclusive, many central to criminal law, which are believed by most to be justified. It is therefore not very plausible to maintain that those who perpetrate them should not be substantively criminalised (ie convicted and punished), lest the credibility of the relevant prohibition is undermined as a result (Segev (n 103) 563).

¹²⁹ Alexander and Sherwin (n 45) 78.

upshot is the same as above: courts are justified in convicting and punishing morally innocent vigilantes.

We might think that the wrongfulness constraint does not apply to the court that convicts and punishes a morally innocent vigilante in circumstances of uncertainty described above. As Cole puts it, ‘perhaps the absolute norm is that we may not punish those whom we know are morally innocent’.¹³⁰ Some may retort that—by not recognising a justification defence and thus precluding an inquiry into the moral status of the vigilante’s actions—the state has been ‘indifferent, or insufficiently attentive’¹³¹ as to said moral status and is therefore guilty of ‘wilful blindness’.¹³² That is not the case: on the assumption that there is a strong correlation between the violation of the allocative rules and moral wrongfulness, the charge of wilful blindness is hard to sustain.¹³³ The reason why the wrongfulness constraint *does* apply is that it is most plausibly grounded in *patient-centred* considerations, that is, in the right of the innocent not to be convicted and punished. This right is infringed despite the court being justified in not inquiring into her innocence. Besides, the considerations outlined in the preceding paragraphs also countenance the *knowing* conviction and punishment

¹³⁰ Kevin Cole, ‘Real-World Criminal Law and the Norm Against Punishing the Innocent’ in Heidi Hurd (ed), *Moral Puzzles and Legal Perplexities* (CUP 2019) 394.

¹³¹ Patrick Tomlin, ‘Innocence Lost: A Problem for Punishment’ (2017) 36 *Law & Philosophy* 225–230.

¹³² Cole (n 130) 394.

¹³³ *Ibid.* Segev claims that exceptionless and overinclusive criminal prohibitions may be justified even when the majority of the actions they proscribe are morally innocent. This is true (i) if a rule of this nature is better than the alternatives at preventing wrongful tokens of the proscribed action, and (ii) in cases of cumulative harms—ie cases where each action is not harmful, and therefore not wrongful, but together cause the relevant harm—such that the prohibition will prevent enough of these actions and therefore forestall the relevant harm (Segev (n 103) 559–60). I agree and think it applies to the prohibition of private punishment under discussion. Yet, this is more likely when there are no powerful reasons to engage in the proscribed conduct, such that it is legitimate to require people to refrain from it and punish them if they do not obey—which I claim is true with regards to vigilantism (section 2 below).

of the morally innocent vigilante. Therefore, if we think that morally innocent persons have a right against being convicted and punished, when morally innocent vigilantes are convicted and punished as a result of the practice just outlined, they are *wronged* in a fact-relative sense. However, as I have suggested, this wrong can be *justified* (ie the constraint can be defeated) (i) in a fact-relative sense, based on—inter alia—the prevention of wrongful harm that would have been inflicted by subsequent unjustified vigilantes who would have taken the acquittal as warrant for their wrongful behaviour, or (ii) in an evidence-relative sense, when the rule that prohibits private persons from inflicting criminal punishment and mandates judges to punish those who do so constitutes an undefeated reason to believe that this is the right course of conduct.¹³⁴ On this basis, we should reject the Objection from the Wrongfulness Constraint: on instrumentalist grounds, it may be morally permissible to punish morally innocent vigilantes.¹³⁵

Although the wrongfulness constraint is often referred to in absolute or *quasi*-absolute terms, none of the above should come as a surprise. Most would accept that there are many instances of permissible infliction of harm against innocents outside the criminal law. It is not clear what would make the criminal law special such that said harm would be impermissible. Some suggest that what distinguishes criminal law is the stigma, censure or condemnation associated to it:

¹³⁴ Walen (n 119) argues that something similar is the true when (i) the state convicts and punishes an innocent person based on evidence establishing her guilt beyond a reasonable doubt; (ii) the state denies a person a defence because she is unable to establish it to the relevant standard of proof (437).

¹³⁵ More weakly, given the circumstances of uncertainty already mentioned and the recognition of their own fallibility, courts that rely on justified rules to convict and punish morally innocent vigilantes are in any case blameless, and therefore excused (for the suggestion, see Brand-Ballard (n 45) 269). Still, an excuse does not make conduct permissible. For reasons given above, I think the conduct is justified.

criminalising conduct constitutes a statement of its wrongful nature and punishment for its commission involves the aforementioned condemnation for culpable wrongdoing. Engaging in these actions against conduct that is not morally wrongful is therefore to convey unwarranted condemnation—it amounts to a *lie* or a form of moral *defamation*.¹³⁶ However, if there is no *quasi*-absolute constraint outside the criminal law against harming the innocent—that is, a constraint that is largely insensitive to the degree of harm involved relative to the importance of the relevant goods that can be secured as a result of inflicting said harm—there is hardly such a constraint against the typically lesser wrongs lying or defamation. Therefore, there is no reason why criminal law would be special with respect to the permissibility of harming the innocent insofar the distinguishing feature of this harm—namely, the blame it conveys—is not in itself subject to a *quasi*-absolute constraint.

The next section offers an additional rationale—now focused on the moral position of the vigilante—for defeating the wrongfulness constraint, thereby rebutting the objection based on it. I first develop it as a case for thinking that the wrongfulness constraint is *cancelled* in the circumstances, such that courts that convict and punish morally innocent vigilantes commit *no* wrong. At the end I suggest that, even if that case fails, it is still sufficient to defeat the wrongfulness constraint with the result—already noted above—that the conviction and punishment of the morally innocent vigilante is a *justified* wrong.

2. The Moral Position of the Vigilante

A morally justified vigilante puts the court trying her in an apparent dilemma: it either punishes—and therefore wrongs—her to protect other innocents from the

¹³⁶ Simester and Von Hirsch (n 50) 19-20; Walen (n 119) 445-46.

risks of morally unjustified vigilantism, or refrains from punishing her, thereby putting those other innocents at risk of suffering wrongful harm. This need not make the actions of the vigilante morally wrongful. Some argue that the reasons that justify the court's decision to convict and punish are reasons that also count against the actions of the vigilante. On this view, the vigilante's violation of the law is genuinely justified only if her *acquittal* will not, *inter alia*, risk that some might incorrectly take said decision to warrant their morally—and legally—unjustified acts of vigilantism. If the reasons are strong enough for the court to justify the punishment and conviction of the vigilante, they are strong enough to make the actions of the vigilante wrongful.¹³⁷ This argument fails because the *weight* of the relevant reasons may diverge among the different actors involved. Some of the reasons that a private person can have to inflict criminal punishment may derive from her personal projects and relationships. She might have a personal interest in holding the wrongdoer to account—say, because she is the victim or an associate—or might have made the pursuit of criminal justice a life commitment. As we saw, many think that private persons benefit from an agent-centred prerogative, whereby they may assign their projects and relationships greater weight than what is warranted from an impersonal standpoint.¹³⁸ As a result of this prerogative, an agent may have undefeated reason to inflict criminal punishment because the reasons to do so are, *for her*, weightier than the reasons against that come from the damage this would do to impersonal goals and the personal projects and relationships of others. However, a second agent may have undefeated reasons—either from her personal perspective or from the impersonal standpoint—to prevent the vigilante from pursuing her goals. This second agent

¹³⁷ Hurd (n 65) 314-15.

¹³⁸ Chapter 4, s Externalization (text to nn 24-27).

may be permitted to force the vigilante to forfeit her personal goal for the purpose of producing an overall better state of affairs (eg an overall reduction of harm), which the vigilante might not have been required to do voluntarily.¹³⁹ More importantly, the state should—all else being equal—be impartial and give equal weight to the goals of each person. As a consequence, the state’s reason to prevent harm to others may be stronger than the vigilante’s reasons to engage in the infliction of criminal punishment. The upshot is that the balance of reasons that applies to the court charged with trying the vigilante may be different to the one to which the vigilante was subject at the time of her actions. By punishing this morally innocent vigilante, the court may thereby reduce the punishment of morally innocent vigilantes in general—as prospective ones will be deterred—and, as noted, reduce the incidence of unjustified punishment—due to the deterrence of *unjustified* vigilantes. Therefore, it remains the case that the court can have undefeated reason to punish a vigilante who also had undefeated reason to act as she did.¹⁴⁰ Still, the vigilante could have easily refrained from inflicting criminal punishment in violation of the allocative rules and thus putting the court in the aforementioned dilemma. The fact that punishing the vigilante is necessary for the court to address the problem that the vigilante herself has created, and that the vigilante had sufficient opportunity to avoid creating the problem and being punished, suggest that the vigilante is *liable* to be punished and therefore lacks a valid complaint against said treatment.¹⁴¹

¹³⁹ Samuel Scheffler, *The Rejection of Consequentialism* (Clarendon 1982) 37-38; Kamm (n 42) 170; Leo Katz and Alvaro Sandroni, ‘Role Morality’ in Larry Alexander and Kimberly Kessler Ferzan (eds), *The Palgrave Handbook of Applied Ethics and the Criminal Law* (Palgrave Macmillan 2019) 701.

¹⁴⁰ Similarly, James Edwards and Andrew Simester, ‘Wrongfulness and Prohibitions’ (2014) 8 *Criminal Law and Philosophy* 171 183-84, fn 48.

¹⁴¹ This account of liability and its conditions rests on McMahan (n 41) 8-10, 19.

As a result, the punishment of the morally justified vigilante is not even *pro tanto* wrong—she is not wronged by the punishment she suffers. To be sure, a sufficient opportunity to avoid the conduct and the subsequent punishment removes the objection to the latter only if requiring the private person to refrain from inflicting criminal punishment is otherwise morally justified. For this to be the case, the interest in the behaviour that the subject is being required to refrain from must be relatively weak and/or the interests in having subjects refrain from it must be strong. I claim both of these conditions hold with regards to the infliction of criminal punishment by a private person. Particularly, from the perspective of the would-be vigilante, inflicting criminal punishment will typically be merely morally permissible, not mandatory.¹⁴² Conversely, if both interests were weak, that is, not only the interest of the agent in engaging in the relevant conduct, but also the interest in having her refrain from it, punishing the agent is unjustified despite her having sufficient opportunity to avoid it.¹⁴³ It is worth emphasising that, whereas the vigilante can refrain from the prohibited behaviour and thereby avoid punishment, victims of unjustified vigilantism are not similarly placed to avoid the wrongful harms they suffer. Given that the vigilante is not vulnerable in this way, we can justify having her refrain from violating the allocative rules in order not to make others vulnerable.¹⁴⁴

¹⁴² Below I address the significance of this *not* being the case (see text to n 146).

¹⁴³ Consider the following example: A orders B to never attend church, threatening to take \$100 from her purse every time she does. B is a Jew (or Muslim, or Buddhist), so she has no interest in attending church and it is very easy for her to refrain from doing so. Without more, it is impermissible for A to take the money if B happens to attend church (similarly, Brand-Ballard (n 45) 102).

¹⁴⁴ The notion of *forfeiture* of the right against the treatment involved in punishment would play the same role as that of *liability* being used here—in both cases, the conviction and punishment of the innocent vigilante does not implicate her rights. Walen employs the notion of forfeiture in this sense (Walen (n 119) 441-46). Still, Walen claims that his idea of forfeiture does not undermine the significance of the wrongfulness constraint. The reason seems to be that, on his view, forfeiture is mostly concerned with so-called regulatory or *mala prohibita* offences (where typically tokens of the proscribed conduct are not morally wrongful or they are so to a lesser extent than what would

Notice also the following.¹⁴⁵ Assume, contrary to what was claimed above, that the reasons given by the negative systemic effects of an instance of vigilantism that goes unpunished do not vary in weight relative to the positions of the vigilante and the court. Or assume that, even considering the differential weight of these reasons, the violation of the allocative rules is unjustified. These are cases where the negative effects of both the actions of the vigilante and her acquittal outweigh the benefits of the punishment inflicted by the vigilante, rendering it morally unjustified. Punishing the vigilante will tend to correct the negative effects that would otherwise have followed from the example of her unpunished violation of the allocative rules. The upshot is that punishment can make the rule violation morally justified. This is true in a fact-relative sense (because the negative consequences of the vigilante's action will not ensue) and may also be the case in an evidence- (and belief-) relative sense if the vigilante has undefeated reason to believe that she will be punished (that is, if she has undefeated reason to believe that the negative effects of her action will not ensue). The paradox, as Alexander

warrant the sanction imposed for their commission) and that forfeiture makes permissible the infliction of *penalties*, not punishment (the latter understood as involving moral condemnation for guilty wrongdoing). On Walen's view, the wrongfulness constraint applies to criminal law, whereas forfeiture underpins what he calls *penal* law, adding that a judge that convicts an offender for a non-morally wrongful offence, should make clear that the sentence is 'merely' for a penal infraction, that is, that it involves no finding of guilty wrongdoing. In his paper (to which I came after developing the arguments for this chapter), Walen makes some cognate claims to the ones being advanced here. However, there are some key differences: (i) my claims are not restricted to regulatory or mala prohibita offences. The case of vigilantism involves a morally innocent token of mala in se offences—and there is good reason to think that there are many other examples of the same type. Think of the imminence requirement that applies to the law of self-defence: some killings that do not satisfy the imminence requirement are nonetheless morally justified killings in self-defence (because, say, the attack was highly likely and would have been near impossible to thwart once it became imminent). It may nonetheless be justified not to relax the requirement (which will have as a consequence the punishment of some morally innocent self-defenders). As Baron explains, 'the imminence requirement provides a safeguard of sorts: in insisting that self-defensive killing be limited to thwarting an imminent attack, we reduce the risk that a life will be taken needlessly' (Marcia Baron, 'Gender Issues in the Criminal Law' in John Deigh and David Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (OUP 2011) 363. Baron compellingly argues that the requirement should nonetheless be relaxed); (ii) Walen argues that his account of penal law only extends to conduct that is merely morally permissible. Below I argue that private persons who inflict criminal punishment in fulfilment of a moral *duty* may also be liable to conviction and punishment, such that they are not wronged by them.

¹⁴⁵ Drawing on Alexander and Sherwin (n 45) 83-85.

and Sherwin note, is that punishment has the effect of turning an unjustified rule violation into a justified one, thereby constituting punishment of a morally justified agent. This buttresses the conclusion that punishing a morally justified rule violator may not be even *pro tanto* wrongful.

One seemingly problematic implication of the foregoing is that the punishment inflicted on the vigilante may deter other similar violations, that is, violations that are justified *if* punished. As said, I assume that reasons to inflict vigilante punishment are normally weak, and do not amount to duties. At least from the would-be vigilante's personal perspective, the prospect of being punished for violating the allocative rules will make it more worthwhile to forego vigilantism and avoid punishment herself. This is desirable, as it reduces the overall amount of suffering imposed. The same considerations address the converse problem. The prospect of punishment, by removing reasons against vigilantism (as it may correct its negative consequences), might have the effect of encouraging rule violations. However, if the punishments inflicted on rule-violators are sufficiently costly, these punishments will not tend to have the aforementioned unwanted effects.

However, it is conceivable that in some circumstances, the reasons in favour of violating the allocative rules, especially from the personal perspective, will be strong and may even be categorical.¹⁴⁶ In these cases, inflicting vigilante punishment may still cause future instances of unjustified violations of the allocative rules and potentially undermine the value of the rule itself. In such cases, the willingness of the vigilante to undergo punishment for her violation of the

¹⁴⁶ One example may be that of a victim seeking the punishment of a war criminal who wrongfully evaded conviction or punishment.

rules can help to justify her actions.¹⁴⁷ She may have a duty to suffer punishment despite her actions being morally required. As a result, her punishment does not wrong her.

None of the above detracts from the claim that, given the risks of vigilantism, the propensity to error of both ordinary rule-subjects and judges (who are also rule-subjects), and the uncertainty involved in assessing the moral justification of particular instances of vigilantism, lawmakers are justified in issuing a categorical rule prohibiting the private infliction of punishment. They are similarly justified in requiring courts to enforce that prohibition invariably. Courts themselves are also justified to adhere to the rule without attempting to assess the balance of reasons applicable to the circumstances. Still, even considering the imposition of punishment on vigilantes, it remains the case that there is a gap between what lawmakers are justified in demanding and what law-subjects are justified in doing.¹⁴⁸ As shown above, it is both true that some violations of the allocative rules are morally justified and that it may not be even *pro tanto* wrong to punish these morally justified vigilantes.

However, as suggested above, according to many the wrongfulness constraint is based on the fact that criminal punishment conveys blame.¹⁴⁹ It is plausible that the problem that the vigilante creates can be resolved by hard treatment that lacks the aforementioned censorious element. Given that blame is

¹⁴⁷ It is sometimes argued that the willingness of the civil disobedient to undergo punishment is part of what justifies her conduct: Kent Greenwalt, 'A Contextual Approach to Disobedience' (1970) 70 *Columbia Law Review* 48, 69-71. Goldman also suggests, more generally, that individuals can be justified in disobeying justified rules 'if they are willing to risk the sanctions' (Goldman, 'Rationality' (n 96) 469.

¹⁴⁸ Alexander and Sherwin (n 45) 77-86.

¹⁴⁹ See n 136.

thought to be a necessary feature of criminal punishment, morally innocent vigilantes—although liable to hard treatment—may retain an objection against being blamed for their conduct, an objection that is *not* cancelled for the considerations developed in the preceding paragraphs. The upshot is that said considerations would not amount to a case for cancelling the wrongfulness constraint as applied to the morally innocent vigilante but merely for defeating it: the reasons to punish the vigilante—complete with the blame that is inherent to punishment—defeat the objection against being blamed for morally innocent conduct. A potential avenue of response is to claim that punishment need not involve this element of moral condemnation. However, engaging in said conceptual dispute would take us too far afield. Moreover, supporters of the wrongfulness constraint may simply drop their objections to the punishment of the morally innocent if, somehow, their punishments are devised not to convey blame or stigma. Another response would be to claim that—for the reasons suggested above—accepting the costs involved in blame-conveying punishment is necessary for the vigilante to render her conduct morally permissible. The upshot would be, as above, that their punishment would not even be *pro tanto* wrongful. Be that as it may, the objection of the morally innocent vigilante against punishment is in any case defeated.

The final section addresses a residual concern that might be had with regards to Instrumentalism.

C. Self-Effacingness and Publicity

We saw that even though it is not always wrong for private persons to inflict criminal punishment, a case can be made for issuing and conforming to an absolute rule prohibiting the infliction of criminal punishment by private persons. Those who non-wrongfully violate the allocative rules have no conclusive

objection against being punished for the purpose of deterring those who might mistakenly judge themselves to be justified in engaging in a similar violation.

Some might nonetheless consider this reliance on punishment of the morally innocent to be problematic for reasons other than the supposed violation of the wrongfulness constraint. The thought is that general awareness of the instrumentalist justification of the standard allocation might erode allegiance to the allocative rules because legal subjects will always have some reason to ask themselves whether, in a given instance, following the rule is all-things-considered justified. In turn, the upshot might be the multiplication of wrongful violations of the allocative rules. Punishments might prove insufficient to deter these violations, say, because they are not imposed with sufficient regularity or fail to reach a wide audience. Even the consistent enforcement of the allocative rules against rule-breakers might prove insufficient to do away with these violations. At the extreme, the bad consequences that can follow from the general acceptance of Instrumentalism may undermine the instrumentalist justification for the standard allocation itself due to the lack of compliance with its rules. Therefore, some may object to instrumentalism on grounds that it is *self-defeating*.¹⁵⁰ A statist justification, in contrast, seems to preclude any negative effects that may result from its general acceptance.

The general awareness of the instrumentalist justification of the standard allocation might well be counterproductive—yet the fact that bad effects result from its general acceptance does not make it self-defeating. Instrumentalism is akin to consequentialism in this regard, that is, it is an account of the justification

¹⁵⁰ For an elaboration of the objection in a different context, see Halstead (n 19) 164-68. See also, Kutz (n 47) 167 who gestures towards the objection in his critique of instrumental justifications of the laws of war.

of a set of legal rules, not a decision-making or deliberative procedure to be popularised and adopted by legal subjects. The bad consequences that might follow from its popularisation do not make the account false or otherwise incorrect¹⁵¹—it simply means that Instrumentalism might need to be *self-effacing*. As Halstead explains, ‘a normative theory is self-effacing if and only if it says that some or all people *morally* ought not to believe it’ (because it is best that we do not do so).¹⁵² Therefore, Instrumentalism can have the implication that the motivation or beliefs of legal subjects ought to diverge from the justification of the rules and of action in accordance with them.¹⁵³ Instrumentalism might also need to be partly *esoteric*, that is, known by a few and kept from the many. As said, none of this entails that Instrumentalism fails in its own terms or otherwise disqualifies Instrumentalism as the best justification of the standard allocation. As Parfit points out, ‘to be self-effacing is not to be self-defeating (...) the aim of a theory is not to be believed, but to be true, or to be the best theory. That a theory is self-effacing does not show that it is not the best theory’.¹⁵⁴

¹⁵¹ It would be a mistake to think that it is only consequentialists or instrumentalist who appeal to a defence of this kind: see Koch Mikalsen (n 35) 302 for a similar defence against the charge that the Kantian functionalist account of territorial jurisdiction presented in his paper might encourage acts of aggression and conquest.

¹⁵² Halstead (n 19) 168. Many think that some or all the reasons that justify certain institutions are not there to be acted upon, appealed, or otherwise accessible to its participants or those subject to these institutions: see Barton Schultz, ‘Henry Sidgwick’, *The Stanford Encyclopaedia of Philosophy* (Fall edn, 2019) <<https://plato.stanford.edu/archives/fall2019/entries/sidgwick/>> accessed 27 March 2020) (on Sidgwick and Utilitarianism); Halstead (n 19) 168-170 (democracy); John Gardner, ‘Private Authority in Ripstein’s Private Wrongs’ (2016) 14 *Jerusalem Review of Legal Studies* 52, 62-63 (authorities in general); Gardner, *Offences* (n 18) 202-204, 211 (criminalisation and criminal punishment); Peter Railton, ‘Alienation, Consequentialism, and the Demands of Morality’ (1984) 13 *Philosophy and Public Affairs* 134, 167.

¹⁵³ Scheffler (n 139) 44.

¹⁵⁴ Derek Parfit, *Reasons and Persons*, vol 1 (OUP 1984) 24 (he extends the point for *esoteric* theories at 40-43). It is worth noting that even judges might be partly blind to the justification of the rules, which might explain the attitudes that, according to Thorburn, they adopt when punishing morally justified vigilantes (see text to n 11).

Now, some might respond that the self-effacing nature of Instrumentalism violates a *publicity constraint*, whereby a theory is *invalid* if it cannot be publicly advertised as correct without being counterproductive or self-defeating.¹⁵⁵ However, as many have argued, the publicity-based objection as it stands ignores the distinction between ‘truth-conditions’ (or truth-value) and ‘acceptance-conditions’ (or acceptance-value) of a claim.¹⁵⁶ It begs the question against Instrumentalism to simply assume that whether Instrumentalism ought to be popularly accepted and adopted as a decision-making procedure cannot itself be determined by an instrumentalist assessment, whereby publicity is accounted as one value to be weighed together with others. In other words, it cannot be simply assumed that publicity is a foundational requirement.¹⁵⁷

As Alexander and Sherwin would note, the exceptionless character of the prohibition of private infliction of criminal punishment involves a kind of *deception*. The rule is *false* as a statement that inflicting criminal punishment in violation of the allocative rules is *always* wrong, while it is *true* as a statement of the action that will be best if taken in *all* cases that fall under the rule (because a true account of its justification would, *inter alia*, invite challenges as outlined above).¹⁵⁸ Therefore, one may take the objection from publicity as concerned with this element of deception involved in Instrumentalism. However, this kind of

¹⁵⁵ Brinkmann (n 43) 188. The publicity requirement is famously advanced by Rawls with regards to theories of justice (John Rawls, *A Theory of Justice* (HUP 1971) 133). See, also Alexander, ‘Pursuing’ (n 93) 326; David Brink, *Moral Realism and the Foundations of Ethics* (CUP 1989) 259 for an elaboration of the publicity requirement (which they do not endorse).

¹⁵⁶ Railton (n 152) 155-56, 167; Parfit, *Reasons* (n 154) 24, 40-43; Brink (n 155) 87-90; 259-262; Scheffler (n 139) 45-54.

¹⁵⁷ Alexander and Sherwin (n 45) 90-91; Brink (n 155) 259-262; Scheffler (n 139) 46; Railton (n 152) 167.

¹⁵⁸ Alexander and Sherwin (n 45) 87.

deception seems to be an unavoidable feature of the justification of rules, if they are to be successful in preventing moral error through the simplification of the range of applicable considerations.¹⁵⁹ Furthermore, the avoidance of deception could not plausibly be taken to ground the publicity constraint. Deception need not even be *pro tanto* wrong if it is necessary to prevent serious wrongs, as is the case with the prohibition on the private infliction of punishment.¹⁶⁰ As Schauer explains, from the perspective of the rule-imposer, it is preferable for subjects to avoid other-regarding wrongful and/or harmful behaviour unthinkingly than to thoughtfully—yet mistakenly—engage in conduct that wrongfully harms others.¹⁶¹

More importantly, however, is that instrumentalism is at most only *partially* self-effacing. As already mentioned, circumstances may be such that private persons are morally permitted (and may further have a duty) to violate the allocative rules, even if this entails that they become liable to be punished as a result. Further, instrumentalism requires, as Brink puts it, that ‘some agents, in some circumstances, should take the time and effort to assess the consequences of past and continued adherence’ to the standard allocation.¹⁶² That is, given that the allocation of criminal powers and permissions is justified on the grounds that it helps criminal law better achieve some set of impersonal values at a lesser cost in other values, their ‘reallocation is always a live issue’.¹⁶³ The standard allocation

¹⁵⁹ Ibid 91.

¹⁶⁰ Ibid 90-91; Alexander, ‘Asymmetry’ (n 45) 474-80.

¹⁶¹ Frederick Schauer, ‘Imposing Rules’ (2005) 42 San Diego Law Review 85, 90; Railton (n 152) 167.

¹⁶² Brink (n 155) 261.

¹⁶³ Robert Goodin, ‘What is So Special About Our Fellow Countrymen?’ (1988) 98 Ethics 663, 680-81.

remains justified as long as the state remains normally more efficient (in the broad sense developed in Chapter 4) than private persons in the pursuit of criminal justice. In contrast to statist accounts, Instrumentalism admits the possibility that the task of delivering criminal justice may *legitimately* revert to private persons. Insofar the state's criminal justice system becomes less effective and just than widespread private enforcement, private persons may be morally obliged to undertake the discharge of the relevant duties. As Tadros puts it,

'[i]f individuals can protect themselves to an equal or greater extent by punishing the wrongdoer individually, without imposing any greater cost on the offender or others, she may be permitted to do that rather than authorizing the state to do so. Individual punishment will, in that case, be preferable to state punishment'.¹⁶⁴

To finish, recall that I assumed in Chapter 1 that it is the state that is charged with allocating criminal law's powers and permissions. The state claims that the form of allocation it determines is justified, and that it is further permitted to enforce this determination coercively. Yet, in the aforementioned circumstances, it may not be morally permissible for the state to allocate criminal law's powers and permissions only, or almost exclusively, to public officials and for the state to enforce that determination coercively.¹⁶⁵ The justification for punishing morally innocent vigilantes may be entirely undermined as a result.

¹⁶⁴ Tadros, *Ends* (n 36) 306. See also, in the same sense, Adil Ahmad Haque, 'The Revolution and the Criminal Law' (2013) 7 *Criminal Law and Philosophy* 231; François Tanguay-Renaud, 'Victor's Justice: The Next Best Moral Theory of Criminal Punishment?' (2013) 32 *Law and Philosophy* 129, 134-135; Brinkmann (n 43) 193-94. This point was anticipated in Chapter 4, text to n 40.

¹⁶⁵ See Daniel Guillery, 'States and the Limits of Feasibility: Enforcement, Morality and Possibility' (PhD Thesis, University College London 2018) 22-23.

Chapter 6: Conclusion

This thesis sought to shed light on the allocative question. We saw that an answer to this question must rest on a view about the kind of *values* that give defeasibly sufficient reason to make available criminal law's powers and permissions and the *agents* that can better conform to the reasons given by these values. It advanced an Instrumentalist answer to the allocative question and rejected the two most prominent versions of Statism. For this purpose, the thesis refuted different versions of the claim that achieving some value ψ , which is personal to public officials, is a necessary condition to allocate criminal law's powers and permissions to an agent.

First, the thesis engaged with the Civic Integrity view and rejected the Functional Defence of the standard allocation. For this purpose, Chapter 2 challenged the claim that the standard allocation is justified because only public officials can discharge citizens' obligations of civic integrity by calling wrongdoers to account, which, on this view, is—alternatively—criminal law's *only* or *primary* function.

A different, more promising, Role-based defence of the standard allocation was scrutinised in Chapter 3. The chapter developed a different reading of the Civic Integrity view—which it dubbed the Self-Government view—and introduced the statist, Kant-inspired, Freedom as Independence answer to the allocative question. The chapter showed that the Self-Government and Freedom as Independence views rest on flawed accounts of role-morality and of the relationship between the considerations that bear on the justification of the actions of public officials and those that apply to us in our everyday lives. Both views allow for reinterpretation consistent with sound accounts of the aforementioned

issues. However, such reinterpretation is not redeeming as both are exposed as substantively implausible views about political morality, with unattractive implications both for the criminal law and the allocation of its powers and permissions. Chapter 3 also suggested that the Freedom as Independence view, contrary to the claims of its proponents, fails as a descriptive account of the criminal law.

Having rejected the most prominent statist alternatives, Chapter 4 offered a sketch of an Instrumentalist justification of the standard allocation. The chapter elaborated on several kinds of considerations that should make up the content of an instrumentalist answer to the allocative and suggested they succeed in justifying the standard allocation.

Finally, Chapter 5 defended the instrumentalist answer developed in the previous chapter from two main objections, namely, that the kind of Instrumentalism proposed in the thesis is (i) a poor fit with criminal law, and (ii) in tension with the so-called Wrongfulness Constraint. The answer to these objections revealed Instrumentalism's virtue of being, in contrast to the statist views examined in the thesis, a *complete* and *fine-grained* answer to the allocative question. The chapter argued that Instrumentalism can justify the criminalisation and punishment of vigilantism, even though some vigilantes may do no wrong in violating criminal law's allocative rules. Chapter 5 also responded to several criticisms—based on, *inter alia*, *uncertainty*, *cheapness*, and *publicity*, to which the Instrumentalist rebuttal to the objections from Fit and the Wrongfulness constraint may be thought to give rise. Chapter 5 concluded by pointing out an important implication of Instrumentalism: when public officials cease to be better placed to realise the impersonal values that justify making available criminal law's powers and permissions, their exercise may fully revert to private persons. If, in those

circumstances, the state does not allocate these powers and permissions to private persons, its justification for punishing vigilantes may become completely undermined. As Chapters 4 and 5 reaffirmed, the thesis is committed to Instrumentalism as an answer to the allocative question, rather than to the standard allocation.

Bibliography

- Adams NP, 'In Defense of Exclusionary Reasons' (2021) 178 *Philosophical Studies* 235
- Alexander L, 'Pursuing the Good-Indirectly' (1985) 95 *Ethics* 315
- , 'Can Law Survive the Asymmetry of Authority?' (2000) 10 *Quinnipac Law Review* 463
- and Ferzan KK, *Crime and Culpability* (Cambridge Introductions to Philosophy and Law, CUP 2009)
- and Moore M, 'Deontological Ethics', *The Stanford Encyclopedia of Philosophy* (Winter edn, 2016)
- and Sherwin E, *The Rule of Rules* (Duke University Press 2001)
- Alexander M, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press 2020)
- Ambos K and Bock S, 'Germany' in Reed A and others (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate 2014)
- Anderson E and Pildes R, 'Expressive Theories of Law: A General Restatement' (2000) 148 *University of Pennsylvania Law Review* 1503
- Andre J, 'Role Morality as a Complex Instance of Ordinary Morality' (1991) 28 *American Philosophical Quarterly* 73
- Apel R and Nagin D, 'General Deterrence' in Tonry M (ed), *The Oxford Handbook of Crime and Criminal Justice* (OUP 2011)
- Applbaum AI, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (Princeton UP 1999)
- Arneson R, 'Defending the Purely Instrumental Account of Democratic Legitimacy' (2003) 11 *Journal of Political Philosophy* 123
- , 'Democracy Is Not Intrinsically Just' in Dowding K, Goodin R and Pateman C (eds), *Justice and Democracy* (CUP 2004)
- Arrué JP and Luebert B, 'La Recuperación de la Víctima y la Seguridad Ciudadana Frente al Derecho Penal Público y Democrático. Análisis Crítico de la Revisión Administrativa de la No Formalización' (Bachelor's Thesis, University of Chile 2013)
- Ashworth A and Redmayne M, *The Criminal Process* (4 edn, OUP 2010)
- Avraham R and Statman D, 'More on the Comparative Nature of Desert: Can a Deserved Punishment Be Unjust?' (2013) 25 *Utilitas* 316
- Baron M, 'Gender Issues in the Criminal Law' in Deigh J and Dolinko D (eds), *The Oxford Handbook of Philosophy of Criminal Law* (OUP 2011)

- Bedke M, 'The Iffiest Oughts: A Guise of Reasons Account of End - Given Conditionals' (2009) 119 *Ethics* 672
- Bell M, 'The Standing to Blame: A Critique' in Coates J and Tognazzini N (eds), *Blame: Its Nature and Norms* (OUP 2013)
- Bennett C, *The Apology Ritual* (CUP 2008)
- , 'Expressive Punishment and Political Authority' (2011) 8 *Ohio State Journal of Criminal Law* 285
- Bennhold K, 'She Called Police Over a Neo-Nazi Threat. But the Neo-Nazis Were Inside the Police' *The New York Times* (Frankfurt 4 May 2021) <www.nytimes.com/2020/12/21/world/europe/germany-far-right-neo-nazis-police.html> accessed 12 April 2021
- Berman M, 'Punishment and Justification' (2008) 118 *Ethics* 258
- Betzler M, 'Sources of Practical Conflict and Reasons for Regret' in Baumann P and Betzler M (eds), *Practical Conflicts* (CUP 2004)
- Bibas S, *The Machinery of Criminal Justice* (OUP 2012)
- Binder G, 'Punishment Theory: Moral or Political?' (2002) 5 *Buffalo Criminal Law Review* 321
- Blake M, 'Distributive Justice, State Coercion, and Autonomy' (2002) 30 *Philosophy & Public Affairs* 257
- Brand-Ballard J, *Limits of Legality* (OUP 2010)
- Brink D, *Moral Realism and the Foundations of Ethics* (Cambridge Studies in Philosophy, CUP 1989)
- , 'Retributivism and Legal Moralism' (2012) 25 *Ratio Juris* 496
- Brinkmann M, 'Indirect Instrumentalism about Political Legitimacy' (2019) 6 *Moral Philosophy and Politics* 175
- Bronsther J, 'The Corrective Justice Theory of Punishment' (2021) 107 *Virginia Law Review* 227
- Brooks T, 'Punitive Restoration: Giving the Public a Say on Sentencing' in Dzur A, Loader I and Sparks R (eds), *Democratic Theory and Mass Incarceration* (OUP 2016)
- Broome J, *Weighing Lives* (OUP 2004)
- Brownlee K, 'Responsibilities of Criminal Justice Officials' (2010) 27 *Journal of Applied Philosophy* 123
- , 'Freedom of Association' in Lippert-Rasmussen K, Brownlee K and Coady D (eds), *A Companion to Applied Philosophy* (Wiley Blackwell 2016)

- , 'Professional Ethics and Criminal Law' (2019) 7 *Law, Ethics and Philosophy* 173
- and Child R, 'Can the Law Help Us to Be Moral?' (2018) 9 *Jurisprudence* 31
- and Jenkins D, 'Freedom of Association', *The Stanford Encyclopedia of Philosophy* (Summer 2019 edn, 2019)
- Brudner A, *Punishment and Freedom* (OUP 2009)
- Buchanan A, 'The Internal Legitimacy of Humanitarian Intervention' (1999) 7 *Journal of Political Philosophy* 71
- Burelli C, 'Political Normativity and the Functional Autonomy of Politics' (forthcoming) *European Journal of Political Theory*
- Cahill M, 'Retributive Justice in the Real World' (2007) 85 *Washington University Law Review* 815
- Campbell L, Ashworth A and Redmayne M, *The Criminal Process* (5th edn, OUP 2019)
- Caney S, *Justice Beyond Borders* (OUP 2006)
- Chau P, 'Duff on the Legitimacy of Punishment of Socially Deprived Offenders' (2012) 6 *Criminal Law and Philosophy* 247
- Chehtman A, *The Philosophical Foundations of Extraterritorial Punishment* (OUP 2010)
- Chiao V, 'A Response to Professor Kleinfeld's Reconstructivism: The Place of Criminal Law in Ethical Life' (2016) 129 *Harvard Law Review Forum* 258
- , 'What is the Criminal Law For?' (2016) 35 *Law and Philosophy* 137
- , *Criminal Law in the Age of the Administrative State* (OUP 2018)
- Christensen K, *Revenge and Social Conflict* (CUP 2016)
- Christiano T, *The Constitution of Equality* (OUP 2008)
- Christopher R, 'Self-Defense and Objectivity: A Reply to Judith Jarvis Thomson' (1997) 1 *Buffalo Criminal Law Review* 537
- , 'Deterring Retributivism: The Injustice of Just Punishment' (2001) 96 *Northwestern University Law Review* 843
- Cohen GA, 'Casting the First Stone: Who Can, and Who Can't, Condemn the Terrorists?' (2006) 58 *Royal Institute of Philosophy Supplements* 113
- , *Rescuing Justice and Equality* (Harvard UP 2008)
- Cole K, 'Real-World Criminal Law and the Norm Against Punishing the Innocent' in Hurd H (ed), *Moral Puzzles and Legal Perplexities* (CUP 2019)

- Cordelli C, 'How Privatization Threatens the Private' (2013) 16 *Critical Review of International Social and Political Philosophy* 65
- , 'Privatization Without Profit?' in Knight J and Schwartzberg M (eds), *NOMOS LX—Privatization* (New York UP 2018)
- Cornford A, 'Rethinking the Wrongness Constraint on Criminalisation' (2017) 36 *Law and Philosophy* 615
- Cullity G, 'The Context-Undermining of Practical Reasons' (2013) 124 *Ethics* 8
- , 'Weighing Reasons' in Star D (ed), *The Oxford Handbook of Reasons and Normativity* (OUP 2018)
- Cureton A, 'Making Room for Rules' (2015) 172 *Philosophical Studies* 737
- Da Silva M, 'Legal Roles and Moral Duties' (MA Thesis, Rutgers 2013)
- Dan-Cohen M, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' in Robinson P, Garvey S and Ferzan KK (eds), *Criminal Law Conversations* (OUP 2011)
- Dancy J, *Ethics Without Principles* (OUP 2004)
- Dare T, 'Robust Role-Obligation: How Do Roles Make a Moral Difference?' (2016) 50 *The Journal of Value Inquiry* 703
- Darwall S, 'Responsibility within Relations' in Feltham B and Cottingham J (eds), *Partiality and Impartiality* (OUP 2010)
- Davis M, 'Thinking Like an Engineer: The Place of a Code of Ethics in the Practice of a Profession' (1991) 20 *Philosophy & Public Affairs* 150
- Dempsey M, *Prosecuting Domestic Violence* (OUP 2009)
- Dolovich S, 'State Punishment and Private Prisons' (2005) 55 *Duke Law Journal* 437
- Doob A and Webster C, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice* 143
- Dorfman A and Harel A, 'Law as Standing' in Green L and Leiter B (eds), *Oxford Studies in Philosophy of Law*, vol 4 (Forthcoming)
- Dorsey D, 'Headaches, Lives and Value' (2009) 21 *Utilitas* 36
- , 'Political Liberalism, Political Independence, and Moral Authority' in Sobel D, Vallentyne P and Wall S (eds), *Oxford Studies in Political Philosophy*, vol 1 (OUP 2015)
- Dubber M, 'A Political Theory of Criminal Law: Autonomy and the Legitimacy of State Punishment' (2004) <<https://ssrn.com/abstract=529522>> accessed 11 September 2017

Duff RA, *Punishment, Communication and Community* (Studies in Crime and Public Policy, OUP 2001)

——, 'Restoration and Retribution' in von Hirsch A, Roberts J and Bottoms A (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart 2003)

——, 'IV—Answering for Crime' (2006) 106 *Proceedings of the Aristotelian Society* 87

——, *Answering for Crime* (Hart 2007)

——, 'A Criminal Law for Citizens' (2010) 14 *Theoretical Criminology* 293

——, 'Perversions and Subversions of Criminal Law' in Duff RA and others (eds), *The Boundaries of Criminal Law* (OUP 2010)

——, 'Towards a Theory of Criminal Law?' (2010) 84 *Aristotelian Society Supplementary Volume* 1

——, 'In Response' in Cruft R, Kramer M and Reiff M (eds), *Crime, Punishment, and Responsibility* (OUP 2011)

——, 'Responsibility, Citizenship and Criminal Law' in Duff RA and Green S (eds), *Philosophical Foundations of Criminal Law* (OUP 2011)

——, 'Retrieving Retributivism' in White M (ed), *Retributivism: Essays in Theory and Policy* (OUP 2011)

——, 'Political Retributivism and Legal Moralism' (2012) 1 *Virginia Journal of Criminal Law* 179

——, 'Punishment and the Duties of Offenders' (2013) 32 *Law and Philosophy* 109

——, 'Relational Reasons and the Criminal Law' in Green S and Leiter B (eds), *Oxford Studies in Philosophy of Law*, vol 2 (OUP 2013)

——, 'Torts, Crimes and Vindication: Whose Wrong Is It?' in Dyson M (ed), *Unravelling Tort and Crime* (CUP 2014)

——, 'Towards a Modest Legal Moralism' (2014) 8 *Criminal Law and Philosophy* 217

——, 'Legal Moralism and Public Wrongs' in Ferzan KK and Morse S (eds), *Legal, Moral, and Metaphysical Truths* (OUP 2016)

——, 'A Criminal Law We Can Call Our Own' (2017) 111 *Northwestern University Law Review* 1491

——, 'Criminal Law and Criminalization' (2018) 18 *Jerusalem Review of Legal Studies* 62

——, *The Realm of Criminal Law* (OUP 2018)

- , 'What's Wrong with Vigilantism? Citizens as Agents of the Criminal Law' (The Political Turn(s) in Criminal Law Theory, Online, March 2020)
- and others, 'Introduction: Towards a Theory of Criminalization?' in Duff RA and others (eds), *The Political Morality of Criminal Law* (OUP 2014)
- and Green S, 'Introduction: Searching For Foundations' in Duff RA and Green S (eds), *Philosophical Foundations of Criminal Law* (OUP 2011)
- and Marshall S, 'Communicative Punishment and the Role of the Victim' (2004) 23 *Criminal Justice Ethics* 39
- and Marshall S, 'Public and Private Wrongs' in Chalmers J, Leverick F and Farmer L (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh UP 2010)
- and Marshall S, 'Crimes, Public Wrongs, and Civil Order' (2019) 13 *Criminal Law and Philosophy* 27
- Durlauf S and Nagin D, 'Imprisonment and Crime: Can Both Be Reduced?' (2011) 10 *Criminology and Public Policy* 13
- Dworkin G, 'Devlin Was Right: Law and the Enforcement of Morality' (1999) 40 *William and Mary Law Review* 927
- Edmundson W, *Three Anarchical Fallacies* (CUP 1998)
- Edwards I, 'Victims, Sentencing Guidelines, and the Sentencing Council' in Ashworth A and Roberts J (eds), *Sentencing Guidelines: Exploring the English Model* (OUP 2013)
- Edwards J, *Legal Imperfectionism* (manuscript - on file with author)
- , 'Master Principles of Criminalisation' (2016) 7 *Jurisprudence* 138
- , 'Criminalization Without Punishment' (2017) 23 *Legal Theory* 69
- , 'Criminal Law's Asymmetry' (2018) 9 *Jurisprudence* 276
- , 'An Instrumental Legal Moralism' in Gardner J, Green L and Leiter B (eds), *Oxford Studies in Philosophy of Law* vol 3 (OUP 2018)
- , 'Theories of Criminal Law', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2018)
- , 'No Offense' in Alexander L and Ferzan KK (eds), *The Palgrave Handbook of Applied Ethics and the Criminal Law* (Palgrave Macmillan 2019)
- , 'Standing to Hold Responsible' (2019) 16 *Journal of Moral Philosophy* 437
- Edwards J and Simester A, 'Wrongfulness and Prohibitions' (2014) 8 *Criminal Law and Philosophy* 171
- and Simester A, 'What's Public About Crime?' (2017) 37 *OJLS* 105

Ehrenberg K, 'Functions in Jurisprudential Methodology' (2013) 8 *Philosophy Compass* 447

——, *The Functions of Law* (OUP 2016)

Einstein KL, Glick DM and Palmer M, *Neighborhood Defenders: Participatory Politics and America's Housing Crisis* (CUP 2019)

Elliot C, 'France' in Reed A and others (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate 2014)

Emsley C, *Policing and Its Context 1750-1870* (Macmillan 1983)

Enoch D, 'A Right to Violate One's Duty' (2002) 21 *Law and Philosophy* 355

——, 'Intending, Foreseeing, and the State' (2007) 13 *Legal Theory* 69

——, 'Against Public Reason' in Sobel D, Vallentyne P and Wall S (eds), *Oxford Studies in Political Philosophy*, vol I (OUP 2015)

Entorf H and Spengler H, 'Crime, Prosecutors, and the Certainty of Conviction' (2015) 39 *European Journal of Law and Economics* 167

Fabre C, 'In Defence of Mercenarism' (2010) 40 *British Journal of Political Science* 539

——, 'Privatizing War' in Knight J and Schwartzberg M (eds), *NOMOS LX—Privatization* (New York UP 2018)

Fairfax RA, Jr., 'Outsourcing Criminal Prosecution' (2010) *University of Chicago Legal Forum* 265

Farmer L, 'Criminal Law as an Institution' in Duff RA and others (eds), *The Political Morality of the Criminal Law* (OUP 2014)

——, *Making the Modern Criminal Law* (Criminalization, OUP 2016)

Feinberg J, *Harmless Wrongdoing* (OUP 1988)

Feldman F, *Introductory Ethics* (Prentice-Hall 1978)

Ferzan KK, 'Self-Defense and the State' (2008) 5 *Ohio State Journal of Criminal Law* 449

——, 'Culpable Agression: The Basis for Moral Liability to Defensive Killing' (2012) 9 *Ohio State Journal of Criminal Law* 669

Finnis J, *Natural Law and Natural Rights* (Clarendon Law Series, 2nd edn, OUP 2011)

Flanders C, 'Public Wrongs and Public Reason' (2016) 55 *Dialogue* 45

——, 'Punishment, Liberalism and Public Reason' (2017) 36 *Criminal Justice Ethics* 61

- Flanigan ET, 'Do We Have Reasons to Obey the Law?' (2020) 17 *Journal of Ethics and Social Philosophy* 159
- Flanigan J, 'Coercion and Privatization' in Knight J and Schwartzberg M (eds), *NOMOS—LX Privatization* (New York UP 2018)
- Fletcher G, 'Punishment and Compensation' (1981) 14 *Creighton Law Review* 691
- Fox-Decent E, 'Fiduciary Authority and the Service Conception' in Gold A and Miller P (eds), *Philosophical Foundations of Fiduciary Law* (OUP 2014)
- Frankfurt H, 'Freedom of the Will and the Concept of a Person' in Frankfurt H (ed), *The Importance of What We Care About* (CUP 1988)
- Freedman B, 'A Meta-Ethics for Professional Morality' (1978) 89 *Ethics* 1
- Freeman J, 'Extending Public Law Norms Through Privatization' (2003) 116 *Harvard Law Review* 1285
- Friedmann D, 'Rights and Remedies' in Cohen N and McKendrick E (eds), *Comparative Remedies for Breach of Contract* (Hart 2005)
- Gardner J, 'Wrongs and Faults' in Simester A (ed), *Appraising Strict Liability* (OUP 2005)
- , *Offences and Defences* (OUP 2007)
- , 'Ethics and Law' in Skorupski J (ed), *The Routledge Companion to Ethics* (Routledge 2010)
- , 'Justification Under Authority' (2010) 23 *Canadian Journal of Law & Jurisprudence* 71
- , 'Relations of Responsibility' in Cruft R, Kramer M and Reiff M (eds), *Crime, Punishment, and Responsibility* (OUP 2011)
- , 'In Defence of Offences and Defences' (2012) 4 *Jerusalem Review of Legal Studies* 110
- , *Law as a Leap of Faith* (OUP 2012)
- , 'Criminals in Uniform' in Duff RA and others (eds), *The Constitution of the Criminal Law* (OUP 2013)
- , 'Punishment and Compensation: A Comment' in Christopher R (ed), *Fletcher's Essays on Criminal Law* (OUP 2013)
- , 'The Evil of Privatization' (Workshop on Alon Harel's Why Law Matters, University of Warwick, May 2014)
- , 'Private Authority in Ripstein's Private Wrongs' (2016) 14 *Jerusalem Review of Legal Studies* 52

- , 'The Negligence Standard: Political Not Metaphysical' (2017) 80 *The Modern Law Review* 1
- , 'Doubts about 'Democratic Legitimacy'' University of Oxford Legal Research Paper Series 3/2018
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3109457> accessed 18 March 2019
- , *From Personal Life to Private Law* (OUP 2018)
- and Macklem T, 'Reasons' in Coleman J, Himma KE and Shapiro S (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004)
- German M, *Hidden in Plain Sight: Racism, White Supremacy, and Far Right Militancy in Law Enforcement* (Brennan Center for Justice, 2020)
- Gert J, 'Underdetermination by Reasons' in Star D (ed), *The Oxford Handbook of Reasons and Normativity* (OUP 2018)
- Göhler J, 'Victim Rights in Civil Law Jurisdictions' in Brown DK, Turner JI and Weisser B (eds), *The Oxford Handbook of Criminal Process* (OUP 2019)
- Goldman A, *The Moral Foundations of Professional Ethics* (Philosophy and society, Rowman and Littlefield 1980)
- , *Practical Rules: When We Need Them and When We Don't* (CUP 2002)
- , 'The Rationality of Complying with Rules: Paradox Resolved' (2006) 116 *Ethics* 453
- Goodin R, 'What is So Special About Our Fellow Countrymen?' (1988) 98 *Ethics* 663
- , 'Responsibilities for Children's Wellbeing' in Prior M and Richardson S (eds), *No Time to Lose: The Wellbeing of Australia's Children* (Melbourne UP 2005)
- Gourevitch A, 'What is Politics Without the State? A Reply to Hadfield and Weingast' in Knight J and Schwartzberg M (eds), *Nomos LX—Privatization* (New York UP 2018)
- Greasley K, 'The Morality of Lying and the Murderer at the Door' (2019) 38 *Law and Philosophy* 439
- Green L, 'The Functions of Law' (1988) 12 *Cogito* 117
- , 'The Duty to Govern' (2007) 13 *Legal Theory* 165
- , 'Law as a Means' in Cane P (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart 2010)
- , 'The Nature of Limited Government' in Keown J (ed), *Reasons, Morality and Law* (OUP 2013)
- , 'Should Law Improve Morality?' (2013) 7 *Criminal Law & Philosophy* 473

- , 'Law and the Role of a Judge' in Ferzan KK and Morse S (eds), *Legal, Moral, and Metaphysical Truths* (OUP 2016)
- Green M, 'Institutional Responsibility for Moral Problems' in Kuper A (ed), *Global Responsibilities: Who Must Deliver on Human Rights?* (Routledge 2005)
- Greenwalt K, 'A Contextual Approach to Disobedience' (1970) 70 *Columbia Law Review* 48
- Grice P, *Studies in the Way of Words* (HUP 1991)
- Griffin C, 'Democracy as a Non-Instrumentally Just Procedure' (2003) 11 *Journal of Political Philosophy* 111
- Griffin J, *Well-being* (OUP 1989)
- Guillery D, 'States and the Limits of Feasibility: Enforcement, Morality and Possibility' (PhD Thesis, University College London 2018)
- Hadfield G and Weingast B, 'What is Law? A Coordination Model of the Characteristics of Legal Order' (2012) 4 *Journal of Legal Analysis* 471
- , 'Is Rule of Law an Equilibrium Without (Some) Private Enforcement?' in Knight J and Schwartzberg M (eds), *NOMOS LX—Privatization* (New York UP 2018)
- Halstead J, 'Government for the People: The Primacy of Substance in the Justification of Democracy' (DPhil Thesis, University of Oxford 2015)
- , 'The Numbers Always Count' (2016) 126 *Ethics* 789
- Hanna N, 'It's Only Natural: Legal Punishment and the Natural Right to Punish' (2012) 38 *Social Theory and Practice* 598
- Haque AA, 'The Revolution and the Criminal Law' (2013) 7 *Criminal Law and Philosophy* 231
- Hardimon M, 'Role Obligations' (1994) 91 *The Journal of Philosophy* 333
- Harel A, 'Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions' (2008) 14 *Legal Theory* 113
- , *Why Law Matters* (OUP 2014)
- , 'Why Privatization Matters: The Democratic Case Against Privatization' in Knight J and Schwartzberg M (eds), *NOMOS LX—Privatization* (New York UP 2018)
- Hart HLA, *Punishment and Responsibility* (2 edn, OUP 2008)
- Hasan R, 'Freedom and Poverty in the Kantian State' (2018) 26 *European Journal of Philosophy* 911

Held V, 'The Division of Moral Labour and the Lawyer' in Luban D (ed), *The Good Lawyer* (Rowman & Allanheld 1983)

Herring J, *Criminal Law* (OUP 2018)

Hershovitz S, 'Tort as a Substitute for Revenge' in Oberdiek J (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014)

Herstein OJ, 'Understanding Standing: Permission to Deflect Reasons' (2017) 174 *Philosophical Studies* 3109

Hindriks F, 'The Duty to Join Forces: When Individuals Lack Control' (2019) 102 *The Monist* 204

Horton J, 'In Defence of Associative Political Obligations: Part One' (2006) 54 *Political Studies* 427

——, 'In Defence of Associative Political Obligations: Part Two' (2007) 55 *Political Studies* 1

Horvitz MI and Lopez J, *Derecho Procesal Penal Chileno*, vol I (Editorial Jurídica de Chile 2002)

Hoskins Z, 'Public Reason and the Justification of Punishment' (The Political Turn(s) in Criminal Law Theory, Online, February 2021)

Howard J, 'Punishment as Moral Fortification' (2016) 26 *Law and Philosophy* 45

Hoyle C and Sanders A, 'Police Responses to Domestic Violence. From Victim Choice to Victim Empowerment?' (2000) 40 *British Journal of Criminology* 14

Hurd H, *Moral Combat* (Cambridge studies in philosophy and law, CUP 1999)

Husak D, *Overcriminalization* (OUP 2007)

——, 'Does the State have a Monopoly to Punish Crime?' in Flanders C and Hoskins Z (eds), *The New Philosophy of Criminal Law* (Rowman & Littlefield 2015)

——, *Ignorance of Law* (OUP 2016)

——, 'What's Legal about Legal Moralism?' (2017) 54 *San Diego Law Review* 381

Jackson J and others, 'Why do People Comply with the Law? Legitimacy and the Influence of Legal Institutions' (2012) 52 *British Journal of Criminology* 1051

Jackson J and others, 'Monopolizing Force? Police Legitimacy and Public Attitudes Toward the Acceptability of Violence' (2013) 19 *Psychology, Public Policy, and Law* 479

Jakobs G, *La Imputacion Objetiva en el Derecho Penal* (Ad-Hoc 1996)

Jaworski P, 'Privatization and the Ought/State Gap' in Knight J and Schwartzberg M (eds), *NOMOS LX—Privatization* (New York UP 2018)

- Jeske D, 'Families, Friends, and Special Obligations' (1998) 28 *Canadian Journal of Philosophy* 527
- Kagan S, 'Do I Make a Difference?' (2011) 39 *Philosophy and Public Affairs* 105
- Kahn L, 'Conflict, Regret and Modern Moral Philosophy' in Brooks T (ed), *New Waves in Ethics* (Palgrave MacMillan 2011)
- Kamm FM, *Morality, Mortality* vol 1 (OUP 1998)
- Kant I, *On a Supposed Right to Lie from Philanthropy* (CUP 1996 [1797])
- Katz L and Sandroni A, 'Role Morality' in Alexander L and Ferzan KK (eds), *The Palgrave Handbook of Applied Ethics and the Criminal Law* (Palgrave Macmillan 2019)
- Kemp G, 'South Africa' in Reed A and others (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate 2014)
- King M, 'Skepticism about the Standing to Blame' in Shoemaker D (ed), *Oxford Studies in Agency and Responsibility*, vol 6 (OUP 2019)
- , 'Attending to Blame' (2020) 177 *Philosophical Studies* 1423
- Kleinfeld J, 'Reconstructivism: The Place of Criminal Law in Ethical Life' (2016) 129 *Harvard Law Review* 1485
- Kleinfeld J and others, 'White Paper on Democratic Criminal Justice' (2017) 111 *Northwestern University Law Review* 1693
- Klinenberg E, 'Bowling Alone, Policing Together' (2001) 28 *Social Justice* 75
- Koch Mikalsen K, 'The Irrelevance of History: In Defense of a Pure Functionalist Theory of Territorial Jurisdiction' (2020) 33 *Ratio Juris* 291
- Kolodny N, 'Which Relationships Justify Partiality? General Considerations and Problem Cases' in Feltham B and Cottingham J (eds), *Partiality and Impartiality* (OUP 2010)
- , 'Which Relationships Justify Partiality? The Case of Parents and Children' (2010) 38 *Philosophy & Public Affairs* 37
- , 'Aims as Reasons' in Wallace RJ, Kumar R and Freeman S (eds), *Reasons and Recognition* (OUP 2011)
- , 'Rule Over None II: Social Equality and the Justification of Democracy' (2014) 42 *Philosophy & Public Affairs* 287
- , 'Political Rule and Its Discontents' in Sobel D, Vallentyne P and Wall S (eds), *Oxford Studies in Political Philosophy*, vol 2 (OUP 2016)
- , 'Instrumental Reasons' in Star D (ed), *The Oxford Handbook of Reasons and Normativity* (OUP 2018)

- Korab-Karpowicz J, 'Political Realism in International Relations', *The Stanford Encyclopedia of Philosophy* (Summer edn, 2018)
- Korsgaard C, 'Aristotle's Function Argument' in Korsgaard C (ed), *The Constitution of Agency* (OUP 2008)
- Kutz C, 'The Difference Uniforms Make: Collective Violence in Criminal Law and War' (2005) 33 *Philosophy & Public Affairs* 148
- Lacey N, *State Punishment* (Routledge 1988)
- , 'Humanizing The Criminal Justice Machine: Re-Animated Justice or Frankenstein's Monster?' (2013) 126 *Harvard Law Review* 1299
- Lazar S, 'Necessity in Self-Defense and War' (2012) 40 *Philosophy & Public Affairs* 3
- , 'Risky Killing: How Risks Worsen Violations of Objective Rights' (2019) 16 *Journal of Moral Philosophy* 1
- Lee A, 'Public Wrongs and the Criminal Law' (2015) 9 *Criminal Law and Philosophy* 155
- Loader I and Walker N, *Civilizing Security* (CUP 2007)
- Löschke J, 'Authority in Relationships' (2015) 23 *International Journal of Philosophical Studies* 187
- Luban D, *Lawyers and Justice* (Princeton UP 1988)
- MacCormick N, *Institutions of Law* (OUP 2007)
- MacGilvray E, 'Freedom, Responsibility, and Privatization' in Knight J and Schwartzberg M (eds), *NOMOS LX—Privatization* (New York UP 2018)
- Mack E, 'Elbow Room for Rights' in Sobel D, Vallentyne P and Wall S (eds), *Oxford Studies in Political Philosophy*, vol 1 (2015)
- Markel D, 'Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate' (2001) 54 *Vanderbilt Law Review* 2157
- , 'Retributive Justice and the Demands of Democratic Citizenship' (2012) 1 *Virginia Journal of Criminal Law* 1
- Markovits D, *A Modern Legal Ethics* (Princeton UP 2010)
- Marshall S, "'It Isn't Just About You": Victims of Crime, their Associated Duties, and Public Wrongs' in Duff RA and others (eds), *The Political Morality of Criminal Law* (OUP 2014)
- and Duff RA, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7

- Martin M, 'Professional and Ordinary Morality: A Reply to Freedman' (1981) 91 *Ethics* 631
- , 'Rights and the Meta-Ethics of Professional Morality' (1981) 91 *Ethics* 619
- Mason A, 'Special Obligations to Compatriots' (1997) 107 *Ethics* 427
- Maynard JL and Worsnip A, 'Is There a Distinctively Political Normativity?' (2018) 128 *Ethics* 756
- McDermott D, 'The Duty to Punish and Legitimate Government' (1999) 7 *The Journal of Political Philosophy* 147
- McDowell J, 'The Role of *Eudaimonia* in Aristotle's Ethics' in McDowell J (ed), *Mind, Value, and Reality* (HUP 1998)
- McKeever S and Ridge M, *Principled Ethics* (OUP 2006)
- McLaughlin P, *What Functions Explain: Functional Explanation and Self-Reproducing Systems* (CUP 2000)
- McMahan J, *Killing in War* (OUP 2009)
- , 'Humanitarian Intervention, Consent, and Proportionality' in Davis A, Keshen R and MacMahan J (eds), *Ethics and Humanity* (OUP 2010)
- Mendlow G, 'The Moral Ambiguity of Public Prosecution' (2021) 130 *Yale Law Journal* 1146
- Michelon C, *Being Apart from Reasons* (Springer 2006)
- Miller D, *On Nationality* (OUP 1997)
- Miller S, *The Moral Foundations of Social Institutions* (CUP 2009)
- Moore M, *Law and Psychiatry* (CUP 1984)
- , 'Law as a Functional Kind' in George RP (ed), *Natural Law Theory* (Clarendon Press 1992)
- , 'A Tale of Two Theories' (2009) 28 *Criminal Justice Ethics* 27
- , *Placing Blame* (OUP 2010)
- , 'Responses and Appreciations' in Ferzan KK and Morse S (eds), *Legal, Moral, and Metaphysical Truths* (OUP 2016)
- Moyle P, 'Separating the Allocation of Punishment from its Administration: Theoretical and Empirical Observations' (2001) 41 *British Journal of Criminology* 77
- Mueller DC, *Public Choice*, vol III (CUP 2003)
- Murphy J, 'A Paradox in Locke's Theory of Natural Rights' (1969) 8 *Dialogue* 256

- Murphy L, 'Institutions and the Demands of Justice' (1998) 27 *Philosophy & Public Affairs* 251
- , 'The Normative Force of Law. Individuals and States' in Gardner J, Green L and Leiter B (eds), *Oxford Studies in Philosophy of Law*, vol 3 (OUP 2018)
- Nagel T, 'Ruthlessness in Public Life' in Hampshire S (ed), *Public and Private Morality* (CUP 1978)
- , *Equality and Partiality* (OUP 1991)
- , 'The Problem of Global Justice' (2005) 33 *Philosophy and Public Affairs* 113
- Nagin D, 'Criminal Deterrence Research at the Outset of the Twenty-First Century' in Tonry M (ed), *Crime and Justice*, vol 23 (The University of Chicago Press 1998)
- , 'Deterrence in the Twenty-First Century' in Tonry M (ed), *Crime and Justice*, vol 42 (The University of Chicago Press 2013)
- Neander K, 'The Teleological Notion of "Function"' (1991) 69 *Australasian Journal of Philosophy* 454
- Nefsky J, 'Consequentialism and the Problem of Collective Harm: A Reply to Kagan' (2011) 39 *Philosophy & Public Affairs* 364
- Newhouse M, 'Two Types of Legal Wrongdoing' (2016) 22 *Legal Theory* 59
- Nozick R, *Anarchy, State and Utopia* (Blackwell 1974)
- , *Philosophical Explanations* (Belknap Press 1981)
- Oberdiek J, 'Towards a Right Against Risking' (2009) 28 *Law and Philosophy* 367
- Olsaretti S, 'Liberal Equality and the Moral Status of Parent-Child Relationships' in Sobel D, Vallentyne P and Wall S (eds), *Oxford Studies in Political Philosophy*, vol 3 (2017)
- Ormerod D and Laird K, *Smith, Hogan, and Ormerod's Criminal Law* (15 edn, OUP 2018)
- Øverland G and Barry C, 'Do Democratic Societies Have a Right to Do Wrong?' (2011) 42 *Journal of Social Philosophy* 111
- Owens D, *Shaping the Normative Landscape* (OUP 2012)
- Pallikkathayil J, 'Neither Perfectionism nor Political Liberalism' (2016) 44 *Philosophy & Public Affairs* 171
- Parfit D, 'Innumerate Ethics' (1978) 7 *Philosophy & Public Affairs* 285
- , *Reasons and Persons*, vol 1 (OUP 1984)
- , *On What Matters*, vol I (OUP 2011)

- Pashukanis E, *Law and Marxism* (Ink Links 1978)
- Pattison J, 'Deeper Objections to the Privatisation of Military Force' (2010) 18 *Journal of Political Philosophy* 425
- Penner J, 'The State Duty to Support the Poor in Kant's Doctrine of Right' (2010) 12 *The British Journal of Politics & International Relations* 88
- , *Property Rights: A Re-examination* (Oxford legal philosophy, OUP 2020)
- Perlman M, 'The Modern Philosophical Resurrection of Teleology' (2004) 87 *The Monist* 3
- Perry R, 'Empowerment and Tort Law' (2009) 76 *Tennessee Law Review* 959
- Perry S, 'Associative Obligations and the Obligation to Obey the Law' in Hershovitz S (ed), *Exploring Law's Empire* (OUP 2008)
- Phillips A, *Multiculturalism Without Culture* (Princeton UP 2007)
- Pogge T, 'The Bounds of Nationalism' (1997) 26 *Canadian Journal of Philosophy* 463
- Politoff S, *Los Actos Preparatorios del Delito: Tentativa y Frustración* (Editorial Jurídica de las Américas 2009)
- Porter T, 'The Division of Moral Labour and the Basic Structure Restriction' (2009) 8 *Politics, Philosophy & Economics* 173
- Postema GJ, *Bentham and the Common Law Tradition* (OUP 1986)
- Preston B, 'Why is a Wing Like a Spoon? A Pluralist Theory of Function' (1998) 95 *The Journal of Philosophy* 215
- , 'Philosophical Theories of Artifact Function' in Meijers A (ed), *Philosophy of Technology and Engineering Sciences*, vol 9 (Elsevier 2009)
- Quong J, *Liberalism Without Perfection* (OUP 2010)
- , 'Public Reason', *The Stanford Encyclopedia of Philosophy* (Spring edn, 2018)
- Radzik L, 'On Minding Your Own Business: Differentiating Accountability Relations within the Moral Community' (2011) 37 *Social Theory and Practice* 574
- , 'Boycotts and the Social Enforcement of Justice' (2017) 34 *Social Philosophy and Policy* 102
- Railton P, 'Alienation, Consequentialism, and the Demands of Morality' (1984) 13 *Philosophy and Public Affairs* 134
- Rappaport J, 'Some Doubts About 'Democratizing' Criminal Justice' (2020) 87 *University of Chicago Law Review* 711

- Rave T, 'Fiduciary Principles and the State' in Criddle E, Miller P and Sitkoff R (eds), *The Oxford Handbook of Fiduciary Law* (OUP 2019)
- Rawls J, *A Theory of Justice* (HUP 1971)
- , *Political Liberalism* (Columbia UP 1996)
- Raz J, 'The Functions of Law' in Raz J (ed), *The Authority of Law* (Clarendon 1979)
- , *The Morality of Freedom* (Clarendon 1986)
- , 'Facing Up: A Reply' (1989) 62 *Southern California Law Review* 1153
- , 'Liberating Duties' (1989) 8 *Law and Philosophy* 3
- , 'Authority, Law, and Morality' in Raz J (ed), *Ethics in the Public Domain* (OUP 1995)
- , *Engaging Reason* (OUP 1999)
- , *Practical Reasons and Norms* (2 edn, OUP 1999)
- , 'Incorporation by Law' (2004) 10 *Legal Theory* 1
- , 'The Rule of Law and its Virtue' in Bellamy R (ed), *The Rule of Law and the Separation of Powers* (Ashgate 2005)
- , 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 *Minnesota Law Review* 1003
- , 'Legitimate Authority' in Raz J (ed), *The Authority of Law* (2nd edn, OUP 2009)
- , 'The Obligation to Obey the Law' in Raz J (ed), *The Authority of Law* (2 edn, OUP 2009)
- , 'The Myth of Instrumental Rationality' in Raz J (ed), *From Normativity to Responsibility* (OUP 2011)
- , 'Identity and Social Bonds' (2018) King's College London Law School Research Paper No 19-4 <<https://dx.doi.org/10.2139/ssrn.3270853>> accessed 8 February 2019
- and Margalit A, 'National Self-Determination' in Raz J (ed), *Ethics in the Public Domain* (OUP 1995)
- Reeves A, 'Liability to International Prosecution: The Nature of Universal Jurisdiction' (2017) 28 *European Journal of International Law* 1047
- Reidy D, 'Rawls's Wide View of Public Reason: Not Wide Enough' (2000) 6 *Res Publica* 49
- Reiff M, *Punishment, Compensation, and Law* (CUP 2005)

- Renzo M, 'Responsibility and Answerability in the Criminal Law' in Duff RA and others (eds), *The Constitution of the Criminal Law* (OUP 2013)
- Ripstein A, 'Authority and Coercion' (2004) 32 *Philosophy & Public Affairs* 2
- , 'Private Order and Public Justice: Kant and Rawls' (2006) 92 *Virginia Law Review* 1391
- , *Force and Freedom* (HUP 2009)
- , 'Form and Matter in Kantian Political Philosophy: A Reply' (2012) 20 *European Journal of Philosophy* 487
- , *Private Wrongs* (HUP 2016)
- , 'Reclaiming Proportionality' (2017) 34 *Journal of Applied Philosophy* 1
- Roach K, 'Canada' in Reed A and others (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate 2014)
- Robinson P and Darley J, 'Does the Criminal Law Deter? A Behavioral Science Investigation' (2004) 24 *OJLS* 173
- Sangiovanni A, 'Global Justice, Reciprocity and the State' (2007) 35 *Philosophy and Public Affairs* 3
- , 'Can the Innate Right to Freedom Alone Ground a System of Public and Private Rights?' (2012) 20 *European Journal of Philosophy* 460
- , 'Rights and Interests in Ripstein's Kant' in Kisilevsky S and Stone M (eds), *Freedom and Force* (Hart 2017)
- Satz D, 'Some (Largely) Ignored Problems with Privatization' in Knight J and Schwartzberg M (eds), *NOMOS LX—Privatization* (New York UP 2018)
- Scanlon T, *What We Owe to Each Other* (HUP 1998)
- , *Being Realistic About Reasons* (OUP 2014)
- Schauer F, *Playing by the Rules* (Clarendon 1991)
- , 'Rules and the Rule of Law' (1991) 14 *Harv JL & Pub Pol'y* 645
- , 'Imposing Rules' (2005) 42 *San Diego Law Review* 85
- Scheffler S, *The Rejection of Consequentialism* (Clarendon 1982)
- , 'Relationships and Responsibilities' (1997) 26 *Philosophy & Public Affairs* 189
- , 'Families, Nations and Strangers' in Scheffler S (ed), *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (OUP 2001)
- , 'Egalitarian Liberalism as Moral Pluralism' (2005) 79 *Proceedings of the Aristotelian Society Supplementary Volume* 229

- , 'The Normativity of Tradition' in Scheffler S (ed), *Equality and Tradition* (OUP 2010)
- , 'Membership and Political Obligation' (2018) 26 *Journal of Political Philosophy* 3
- Schoeman FD, *Privacy and Social Freedom* (CUP 1992)
- Schroeder M, 'Holism, Weight, and Undercutting' (2011) 45 *Noûs* 328
- Schroeder T, 'Functions From Regulation' (2004) 87 *The Monist* 115
- Schulhofer SJ, 'Criminal Justice, Local Democracy, and Constitutional Rights' (2012) 111 *Michigan Law Review* 1045
- Schultz B, 'Henry Sidgwick', *The Stanford Encyclopaedia of Philosophy* (Fall edn, 2019)
- Searle J, 'Prima Facie Obligations' in Raz J (ed), *Practical Reasoning* (OUP 1978)
- , 'Social Ontology and the Philosophy of Society' in Margolis E and Laurence S (eds), *Creations of the Mind: Theories of Artifacts and Their Representation* (OUP 2007)
- Segev Re, 'Moral Innocence and the Criminal Law: Non-Mala Actions and Non-Culpable Agents' (2020) 79 *The Cambridge Law Journal* 549
- Seidman J, 'Two Sides of "Silencing"' (2005) 55 *The Philosophical Quarterly* 68
- Shavell S, 'The Optimal Structure of Law Enforcement' (1993) 36 *Journal of Law & Economics* 255
- Sher G, *Beyond Neutrality* (CUP 1997)
- Shue H, 'Mediating Duties' (1988) 98 *Ethics* 687
- Sigler M, 'Private Prisons, Public Functions, and the Meaning of Punishment' (2010) 38 *Florida State University Law Review* 149
- Simester A, 'Enforcing Morality' in Marmor A (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2015)
- Simester A and Edwards J, 'Prevention with a Moral Voice' in Simester A, du Bois-Pedain A and Neumann U (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Bloomsbury 2014)
- Simester A and von Hirsch A, *Crimes, Harms, and Wrongs* (Hart 2011)
- Simmons AJ, 'External Justifications and Institutional Roles' (1996) 93 *The Journal of Philosophy* 28
- Simmons AJ and Wellman C, *Is There a Duty to Obey the Law?* (CUP 2005)
- Simmons R, 'Private Criminal Justice' (2007) 42 *Wake Forest Law Review* 911

- Sinclair T, 'The Power of Public Positions: Official Roles in Kantian Legitimacy' in Sobel D, Vallentyne P and Wall S (eds), *Oxford Studies in Political Philosophy*, vol 4 (OUP 2018)
- Singer P, 'Bystanders to Poverty' in Davis A, Keshen R and McMahan J (eds), *Ethics and Humanity* (OUP 2010)
- Sinnott-Armstrong W, 'Consequentialism', *The Stanford Encyclopedia of Philosophy* (Winter edn, 2015)
- Smart JJC and Williams B, *Utilitarianism: For and Against* (CUP 1973)
- Smith L, 'Parenthood is a Fiduciary Relationship' (2020) 70 *University of Toronto Law Journal* 395
- Snedegar J, *Contrastive Reasons* (OUP 2017)
- Spencer J, 'The Victim and the Prosecutor' in Bottoms A and Roberts J (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Routledge 2011)
- Steel S, 'Saving Private Wrongs' (2017) 14 *Jerusalem Review of Legal Studies* 1
- Stewart H, 'Criminal Punishment as Private Morality' (2015) 9 *Criminal Law and Philosophy* 21
- , 'The Wrong of Mass Punishment' (2018) 12 *Criminal Law and Philosophy* 45
- , 'The Place of Instrumental Reasoning in Law' (2020) 11 *Jurisprudence* 28
- Stocker M, 'Moral Duties, Institutions, and Natural Facts' (1970) 54 *The Monist* 602
- Stroud S, 'Moral Overridingness and Moral Theory' (1998) 79 *Pacific Philosophical Quarterly* 170
- Tadros V, 'Institutions and Aims' in Del Mar M and Bankowski Z (eds), *Law as Institutional Normative Order* (Ashgate 2009)
- , 'Criminalization and Regulation' in Duff RA and others (eds), *The Boundaries of Criminal Law* (OUP 2010)
- , *The Ends of Harm* (OUP 2011)
- , 'Independence Without Interests?' (2011) 31 *OJLS* 193
- , 'Replies' (2012) 5 *Jerusalem Review of Legal Studies* 89
- , 'Responses' (2013) 32 *Criminal Law and Philosophy* 241
- , 'The Wrong and the Free' in Ferzan KK and Morse S (eds), *Legal, Moral, and Metaphysical Truths* (OUP 2016)
- , *Wrongs and Crimes* (OUP 2016)

- , 'Punishment and the Appropriate Response to Wrongdoing' (2017) 11 *Criminal Law and Philosophy* 229
- Tamir Y, *Liberal Nationalism* (Princeton UP 1995)
- Tanguay-Renaud F, 'Victor's Justice: The Next Best Moral Theory of Criminal Punishment?' (2013) 32 *Law and Philosophy* 129
- Tasioulas J, 'Crimes of Offence' in Simester A and von Hirsch A (eds), *Inciivilities* (Hart 2006)
- Taurek J, 'Should the Numbers Count?' (1977) 6 *Philosophy & Public Affairs* 293
- Taylor C, 'Leading a Life' in Chang R (ed), *Incommensurability, Incomparability, and Practical Reason* (HUP 1997)
- Thompson AC, 'Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes' (*Pro Publica*, 2019) <www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes> accessed 12 April 2020
- Thorburn M, 'Justifications, Powers, and Authority' (2008) 117 *The Yale Law Journal* 1070
- , 'Constitutionalism and the Limits of Criminal Law' in Duff RA and others (eds), *The Structures of Criminal Law* (OUP 2011)
- , 'Criminal Law as Public Law' in Duff RA and Green S (eds), *Philosophical Foundations of Criminal Law* (OUP 2011)
- , 'Why Only the State may *Decide* when Sanctions are Appropriate' in Robinson P, Garvey S and Ferzan K (eds), *Criminal Law Conversations* (OUP 2011)
- , 'Proportionate Sentencing and the Rule of Law' in Zedner L and Roberts J (eds), *Principles and Values in Criminal Law and Criminal Justice* (OUP 2012)
- , 'Two Conceptions of Equality Before the (Criminal) Law' in Tanguay-Renaud F and Stribopoulos J (eds), *Rethinking Criminal Law Theory* (Hart 2012)
- , 'Judgement, Communication and Coercion: What's Wrong with Private Prisons?' (2015) 2 *Critical Analysis of Law* 234
- , 'Punishment and Public Authority' in du Bois-Pedain A, Ulväng M and Asp P (eds), *Criminal Law and the Authority of the State* (Hart 2017)
- , 'Criminal Punishment and the Right to Rule' (2020) 70 *University of Toronto Law Journal* 44
- , 'Policing and Public Office' (2020) 70 *University of Toronto Law Journal* 248
- Tomlin P, 'Innocence Lost: A Problem for Punishment' (2017) 36 *Law & Philosophy* 225
- , 'Duffing Up the Criminal Law?' (2020) 14 *Criminal Law and Philosophy* 319

- Turner J, 'Political Theory as Moral Philosophy' (DPhil Thesis, University of Oxford 2018)
- Ulväng M and Asp P, 'Sweden' in Reed A and others (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate 2014)
- Valentini L, 'Kant, Ripstein and the Circle of Freedom: A Critical Note' (2012) 20 *European Journal of Philosophy* 450
- , 'The Content-Independence of Political Obligation: What it Is and How to Test it?' (2018) 24 *Legal Theory* 135
- Vallentyne P, 'Rights and Duties of Childbearing' (2002) 11 *William & Mary Bill of Rights Journal* 991
- van Parijs P, 'The Disenfranchisement of the Elderly, and Other Attempts to Secure Intergenerational Justice' (1998) 27 *Philosophy and Public Affairs* 292
- Van Weezel A, *Error y Mero Desconocimiento en el Derecho Penal* (Legal Publishing 2008)
- Vasanthakumar A, 'Privatising Border Control' (2018) 38 *OJLS* 411
- Vermaas P and Houkes W, 'Ascribing Functions to Technical Artifacts: A Challenge to Etiological Accounts of Functions' (2003) 54 *British Journal of the Philosophy of Science* 261
- Vernon R, 'Humanitarian Intervention and the Internal Legitimacy Problem' (2008) 4 *Journal of Global Ethics* 37
- Viehoff D, 'The Truth in Political Instrumentalism' (2017) 117 *Proceedings of the Aristotelian Society* 273
- Volokh A, 'Privatization and the Elusive Employee-Contractor Distinction' (2012) 46 *University of California, Davis* 133
- von Hirsch A, *Censure and Sanctions* (Clarendon 1993)
- , 'Extending the Harm Principle: 'Remote' Harms and Fair Imputation' in Simester A and Smith ATH (eds), *Harm and Culpability* (Clarendon Press 1996)
- and Ashworth A, *Proportionate Sentencing* (Oxford Monographs on Criminal Law and Criminal Justice, OUP 2005)
- and others, *Criminal Deterrence and Sentence Severity* (Hart 1999)
- Walen A, 'Criminal Law and Penal Law: The Wrongness Constraint and a Complementary Forfeiture Model' (2020) 14 *Criminal Law & Philosophy* 431
- Wall S, *Liberalism, Perfectionism, and Restraint* (CUP 1998)
- , 'Democracy, Authority and Publicity' (2006) 14 *Journal of Political Philosophy* 85

- , 'Democracy and Equality' (2007) 228 *The Philosophical Quarterly* 416
- Wallerstein S, 'Delegation of Powers and Authority in International Criminal Law' (2015) 9 *Criminal Law and Philosophy* 123
- Wasserstrom R, 'Roles and Morality' in Luban D (ed), *The Good Lawyer* (Rowman & Allanheld 1984)
- Wellman C, 'Relational Facts in Liberal Political Theory: Is There Magic in the Pronoun 'My'?' (2000) 110 *Ethics* 537
- , 'Toward a Liberal Theory of Political Obligation' (2001) 111 *Ethics* 735
- , 'Rights and State Punishment' (2009) 106 *Journal of Philosophy* 419
- , *Rights Forfeiture and Punishment* (OUP 2017)
- Wenar L, 'Political Liberalism: An Internal Critique' (1995) 106 *Ethics* 32
- Whish R and Bailey D, *Competition Law* (Ninth edn, OUP 2018)
- Williams B, *Moral Luck* (CUP 1981)
- Williams G, 'Infrastructures of Responsibility': the Moral Tasks of Institutions' (2006) 23 *Journal of Applied Philosophy* 207
- , 'Between Ethics and Right: Kantian Politics and Democratic Purposes' (2012) 20 *European Journal of Philosophy* 479
- , 'Sharing Responsibility and Holding Responsible' (2013) 30 *Journal of Applied Philosophy* 351
- Wouters A, 'The Function Debate in Philosophy' (2005) 53 *Acta Biotheoretica* 123
- Zedner L, *Security* (Key ideas in criminology, Routledge 2009)
- , 'What is Lost When Punishment is Privatised?' in Daems T and Vander Beken T (eds), *Privatising Punishment in Europe* (Routledge 2018)
- Zimmerman MJ, 'Risk, Rights, and Restitution' (2006) 128 *Philosophical Studies* 285