

# Public Wrongs and the Criminal Law

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1.

The idea that crimes are public wrongs is a well-established one within the field of law. Its role in English Law was explicitly affirmed by Blackstone in his *Commentaries on the Laws of England*.<sup>1</sup> Recently, the idea of 'public wrongs' has also gained prominence among those working on the normative issues in criminalization, most notably in the works by Duff and Marshall.<sup>2</sup>

I have no intention to argue against this well-established idea. I do think that crimes are public wrongs, but a lot hinges on what we mean by 'public wrongs'. This paper is an attempt to explore the concepts that come into play when thinking about what constitutes public wrongs, and the role that these concepts ought to play. In particular, I shall argue 'public wrongs' should not be understood merely as wrongs that properly concern the public,<sup>3</sup> but more specifically as those which the state, as the public, ought to punish.<sup>4</sup>

This paper involves contrasting criminal law with the civil law of torts. Of course, tort law does not exhaust all the different areas of non-criminal laws in our common law systems; and no doubt it would also be fruitful to contrast with these other areas of law. Indeed, I believe some of the claims that I shall be making about tort law also apply to other areas of civil law, e.g. contracts; and I shall make this explicit in the paper when that is the case. Nevertheless, contrasting with tort law is sufficient for the purpose of establishing the above contention; and I shall therefore leave the contrast with other areas of non-criminal law for another occasion.

I shall argue for the above contention by establishing the following two claims: (a) we should not understand 'public wrongs' merely as wrongs that properly concern the public. This is because if that is the case, then not just criminal law, but also tort law, should both be understood as being concerned with public wrongs; and (b) criminal law should be understood as primarily concerned with responding to, by way of punishment, wrongs that properly concern the public; while tort law should be understood as being primarily concerned with responding to such wrongs by way of compensation. Section 2 defends claim (a), while claim (b) is discussed in sections 3 and 4. Section 5 then concludes the paper by drawing the two claims together in relation to the above contention; and briefly discusses what follows from it.

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<sup>1</sup> William Blackstone, *Commentaries on the Laws of England, Book 4* (Oxford: Clarendon Press, 1765-1769), p. 5.

<sup>2</sup> See for example, Antony Duff and Sandra Marshall, "Criminalization and Sharing Wrongs", *Canadian Journal of Law and Jurisprudence* 11(1) (1998): pp. 7-22; and more recently, "Public and Private Wrongs", in James Chalmers et al. (eds.), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh: Edinburgh University Press, 2010), pp. 70-85.

<sup>3</sup> See, for example, *Ibid*, "Public and Private Wrongs", pp. 71; and also Antony Duff, *Answering for Crime* (Oxford, Oxford: Hart Publishing, 2007), p. 140-146.

<sup>4</sup> Cf. Grant Lamond, "What is a Crime?", *Oxford Journal of Legal Studies* 27(4) (2007): pp. 609-632 at p. 621. But see also Note 53.

2.

I take as a starting point what Fletcher says, “Blackstone had a point in identifying crimes as public wrongs and torts as private wrongs”.<sup>5</sup> Private wrongs, for Blackstone, refer to “an infringement or privation of the civil rights which belong to individuals, considered merely as individuals”, while public wrongs refer to “breach and violation of the public rights and duties, due to the whole community, considered as community, in its social aggregate capacity... it affects the individual, and it likewise affects the community.”<sup>6</sup> Indeed, in this general and vague sense, one may plausibly extend this notion of private wrongs beyond torts, to other areas of civil laws in our common law systems, for example contracts, trusts and unjust enrichments. Just as torts are concerned with private wrongs in the sense that they are wrongs, not to the whole community at large, but to individuals qua individuals; contracts and trusts are concerned with wrongs, also not to the whole community at large, but to individuals (groups of individuals or legal persons) qua contractual parties and qua beneficiaries respectively. Similarly, unjust enrichment is also not concerned with wrongs to the whole community at large, but more specifically with wrongs to the plaintiffs had the defendants kept their enrichments.<sup>7</sup> If this is the case, then one can generalize and say that criminal law is concerned with public wrongs, while these civil laws are concerned with private wrongs.<sup>8</sup> It is here that one can see the idea that crimes are public wrongs. Nevertheless, what I am interested here is how best to understand ‘public wrongs’ (and correlatively ‘private wrongs’) in a way that takes seriously this distinction that criminal law is concerned with public wrongs, while the civil law of torts is concerned with private wrongs.

One sense in which public wrongs are public, as suggested by Blackstone in the above quote, is that they are wrongs that not only affect the victim, but also the public at large; either because they involve wronging the public as a collective, or because the public is harmed collectively as a result of these wrongs. Correlatively, private wrongs are then private in the sense that they are wrongs that only affect the victim, and not the public at large in either of the two ways I described above.

However, it is not clear whether the wrongs that tort law is concerned with, as it is found in our common law systems, really do only affect the plaintiff. Just think, for example, serious torts cases of product liability: it seems plausible that sometimes the wrongs involved affect not only the plaintiff, but also the public at large. Nevertheless, putting this aside, such

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<sup>5</sup> George Fletcher, “Domination in Wrongdoing”, *Boston University Law Review* 76 (1996): pp. 347-360 at p. 347.

<sup>6</sup> Blackstone: *Op.Cit.* Note 1.

<sup>7</sup> For the wrongs in unjust enrichments and how they differ from those in torts, trusts and contracts, see John Gardner, “Torts and Other Wrongs”, *Florida State University Law Review* 39 (2011): pp. 43-64 at p. 46. For the role of civil wrongs in these areas of civil law, see Peter Birks, “The Concept of a Civil Wrong”, in David Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995), pp. 29-51.

<sup>8</sup> By distinguishing criminal law and civil law in this way (and later in sections 3 and 4 of the paper, in terms of the legal processes they respectively exemplify), I am not denying that there are other ways to fruitfully approach the distinction between criminal law and civil law. It is just that I have chosen to put them aside for the purposes of this paper. Nevertheless, for example, for an analysis of the distinction in terms of procedures, see Carol Steiker, “Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide”, *Georgetown Law Journal* 85(4) (1997): pp.775-819; for one that is in terms of responsibility, see Peter Cane, *Responsibility in Law and Morality* (Oxford, Oregon: Hart Publishing, 2002) pp. 50-51. As for a general discussion on the distinction between criminal law and torts, see Kenneth Simons, “The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives”, *Widener Law Journal* 17 (2008): pp. 719-732.

an understanding of public wrongs also seems to mischaracterize the nature of traditional *mala in se* crimes that are central to the criminal law. As Duff argues persuasively, “If we... argue that such *mala in se* as murder and rape count as public wrongs only because they too have a harmful or wrongful impact on ‘the public’, as well as on their individual victims, we are likely to distort the wrongfulness that makes them criminalisable. Even if a rapist takes unfair advantage over the law-abiding (which is at best arguable), or creates ‘social volatility’ or undermines trust, that is not what is central to the criminal wrongfulness of his action; what he is properly convicted and punished for is the wrong done to his victim”.<sup>9</sup> Accordingly, to avoid this problem, Duff argues that “[w]e should interpret a ‘public’ wrong, not as a wrong that injures the public, but as one that properly concerns the public, ie the polity as a whole”.<sup>10</sup>

Thus, rather than conceiving public wrongs as wrongs that also affect the public at large (either because they involve wronging the public as a collective, or because the public is harmed collectively as a result of these wrongs), and private wrongs as wrongs that only affect the plaintiff, we should conceive public wrongs as wrongs that properly concern not just the victim (if there is one), but also the public at large; and correlatively, private wrongs as wrongs that do not properly concern the public, but only the victims (or plaintiffs).

To say that a wrong properly concerns the public, is to say that it is the proper business of the public community, or that the public community has a legitimate interest in it;<sup>11</sup> and this implies that the public community, or more concretely the state as embodying and acting on behalf of the public, may *permissibly* take actions in response to it, for example by censuring or seeking redress from the perpetrators of such wrongs. Nevertheless, one must be careful to distinguish such wrongs from those that *affect the public’s interest*, and those that *wrong the public*. Of course, one reason for the public to have a legitimate interest in a wrong is that it affects the public’s interest. But affecting the public’s interest does not necessarily imply that the public has a legitimate interest in it. Thus even when your significant other’s work performance is adversely affected by the fact that you cheated on him or her; it does not follow that as an employer, I have a legitimate interest in the wrong you have done, just because my interests as an employer is affected by it. Similarly, it does seem to follow necessarily that whenever the public is wronged by a wrongdoing, then that wrongdoing is the proper business of the public. Yet the public can have a legitimate interest in a wrongdoing even when it does not wrong the public; just as your parents can have a legitimate interest in your wrongdoing (e.g. cheating on your significant other), even when they are not wronged by it. It is therefore a mistake to straightforwardly identify wrongs that properly concern the public with either those that affect the public’s interest, or those that wrong the public.<sup>12</sup>

What then makes it the case that a wrong properly concerns the public, if it is not merely because it affects the public’s interest or because it wrongs the public? This is an important question to answer. However, for the purposes of this paper, I shall follow Duff’s and Marshall’s answer that a wrong properly concerns the public, in virtue of it violating the shared values that normatively define the political community in which fellow citizens are

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<sup>9</sup> Duff: *Op.Cit.* Note 3, p. 141.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, pp. 50-51 & 142.

<sup>12</sup> Indeed, it is precisely in not identifying them in this way that makes Duff’s conception of ‘public wrongs’ immune from his own objections against conceiving ‘public wrongs’ as wrongs that also affect the public at large. See text at Note 9.

participants.<sup>13</sup> Correlatively, in the following we should conceive wrongs that do not properly concern the public, as wrongs that violate some values, but not these shared values. Note however that what I want to focus on here is not whether violating shared values makes a wrong the proper concern of the public.<sup>14</sup> Rather, putting this issue aside, what I want to focus on is whether this distinction of public wrongs and private wrongs, conceived merely as those that properly concern the public and those that do not properly concern the public, does and should map onto the distinction between criminal law and tort law. I shall argue in the following that this does not seem to be the case.

On the one hand, Duff and Marshall explicitly maintain that to say that certain wrongs properly concern the public, and thus are public wrongs, "... is at most to say that we have some good reason to criminalise such wrongs – which leaves open the possibility that we have even better reasons not to criminalise many such wrongs", but maybe subject them to other kinds of legal regulation, for example the civil law.<sup>15</sup> Thus it does not follow necessarily from the fact that a wrong is a public wrong that properly concerns the public, that it should be part of the criminal law and therefore are crimes proper. Under Duff's and Marshall's understanding, a wrong being a public wrong is only a necessary condition for its criminalization, rather than a sufficient condition. Accordingly, not all public wrongs should be part of the criminal law; and if there are good reasons to subject some of them to civil law (it remains to be seen what those reasons might be), then these public wrongs should be part of civil law (including, but not exclusively of tort law).

On the other hand, it is also not clear that tort law is, or should be, concerned with private wrongs in the sense described above. To put the question rather bluntly here: if private wrongs are wrongs that do not properly concern the public, but only the plaintiff, then why do, and should, we have torts against such wrongs? Take the previous example of cheating on one's significant other as a wrong. I take it that in the liberal democratic societies that we find ourselves in, we do not legally regulate it, neither should we do so. This is because, at least within liberal democratic societies, cheating on one's significant other is a wrong that is not of the proper concern of the public. To legally regulate it, is to transgress into a sphere of individuals' conduct that is not of the legitimate concern of the public. Thus the fact that certain wrongs are private wrongs that do not properly concern the public, seems to count against subjecting them to legal regulation.

Of course, one might have qualms over the above example; but the point here is a conceptual one which does not depend on the specific example in question: The importance of a 'private' sphere of conduct, which should be protected from the interference of the general

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<sup>13</sup> Duff & Marshall: *Op.Cit.* Note 2, "Criminalization and Sharing Wrongs", pp. 18-22 & "Public and Private Wrongs", pp. 70-72; Duff: *Op.Cit.* Note 3, pp. 141-143; Antony Duff, "Responsibility, Citizenship, and Criminal Law", in Antony Duff & Stuart Green (eds.), *Philosophical Foundations of Criminal Law* (New York: Oxford University Press, 2010), pp. 125-148 at pp. 137-140.

<sup>14</sup> Indeed, there is the issue of what exactly constitutes the shared values in question. As one of the reviewers points out, if they include 'the reasonableness of actions that may hurt others', then arguably some of the wrongs in tort law would also be violating the shared values in question, and therefore are 'public wrongs' in the relevant sense. This is true; but even without going into a discussion of shared values, we can already argue that the distinction between criminal law and tort law cannot be found in the distinction between wrongs that properly concern the public and those that don't.

<sup>15</sup> *Op.Cit.* Note 2, "Public and Private Wrongs", pp. 75-79.

public, even when this sphere involves wrongs, is widely recognized and accepted by many of those working on the topic of criminalization.<sup>16</sup> But what is not clear is why this should be restricted to only criminal law and criminalization. Rather, as I have been trying to argue, it should also be extended at least to the civil law of torts.<sup>17</sup> It might very well be the case that criminal law is more intrusive than tort law. But there is no reason to think that tort law does not also constitute an interference from the general public, which is illegitimate or impermissible unless what it is interfering in is something that also properly concerns the public. This is because tort law empowers individuals to seek and obtain redress for wrongs committed against them, through the state and using its judicial resources. This does not seem to be justifiable or legitimate, unless these wrongs are also the public's legitimate business: wrongs that the public, and therefore the state, may permissibly take a part in responding to. The same can also be said for the civil law of contracts. It also similarly empowers individuals as described above, but in this case more specifically for the wrong of breaching a contract that is committed against them as a contractual party. In any case, as one can see, if private wrongs are understood as wrongs that do not properly concern the public, then it seems, tort law should not be, neither is it, concerned with such wrongs.

What the above discussion shows is that if 'public wrongs' is understood as wrongs that properly concern the public, and correlatively 'private wrongs' as wrongs that do not properly concern the public, then both criminal law and tort law should be understood as being concerned with public wrongs. Thus to maintain that criminal law is concerned with public wrongs, while tort law is concerned with private wrongs, we should distinguish public wrongs and private wrongs from *within* wrongs that properly concern the public; rather than between them and, say for example, wrongs that do not properly concern the public. For the sake of clarity and simplicity in the rest of this paper, I shall be using 'wrongs' specifically to refer to 'wrongs that properly concern the public', unless stated otherwise.

3.

If what I discussed above is sound, then it seems a plausible way forward is to distinguish different *kinds* of wrongs that properly concern the public. The following suggestion from Duff and Marshall should therefore be in the right direction, or so it seems:

"Outside the law, we recognize three kinds or categories of wrong. There are, first, those that are too trivial to be worth pursuing very far... Second, there are wrongs which it would be reasonable for the wronged party to pursue, but which she might also quite reasonably shrug off as relatively unimportant... Third, there are wrongs that the victim ought to pursue, that it would be wrong to shrug off or ignore..."<sup>18</sup>

With this in mind, Duff and Marshall continue on:

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<sup>16</sup> For example, Michael Moore, *Placing Blame: A Theory of the Criminal Law* (New York: Oxford University Press, 1997), pp. 763-777; Joel Feinberg, *Harm to Self* (New York: Oxford University Press, 1986), pp. 27-71 and Duff: *Op.Cit.* Note 3, pp. 49-51.

<sup>17</sup> John Stuart Mill, for example, did not seem to think that the 'private' sphere, understood in terms of individuality, should only be protected against criminal sanctions. Rather, more expansive than that, it should be protected from the power that society (including the government) exercises over individuals. See *On Liberty* (London: Penguin Books Ltd., 1974), pp. 59-73.

<sup>18</sup> *Op.Cit.* Note 2, "Public and Private Wrongs", pp. 82-83.

“Our suggestion here is that the criminal law should reflect these distinctions, by distinguishing three categories of public wrong. The first category is covered by the *de minimis* principle: these wrongs are too trivial to merit the law’s attention at all. The second category is that in which the victim should have formal control over whether a prosecution is brought – either through a system of private prosecutions or, as we suggested above, by allowing a prosecution to proceed only at the victim’s request or only with the victim’s consent. The third category is that in which, as now, the victim has no such formal control: the prosecution can go ahead with or without the victim’s consent”.<sup>19</sup>

Building on this suggestion, one might then argue we should understand ‘public wrongs’ as referring to the third category of wrongs that properly concern the public; and correlatively, ‘private wrongs’ as referring to the second category of wrongs that properly concern the public. This allows one to maintain that criminal law is concerned with public wrongs, and tort law is concerned with private wrongs, while conceding that both of them are concerned with wrongs that properly concern the public.

Furthermore, this way of characterizing ‘public wrongs’ and ‘private wrongs’ highlights and supports another distinction between criminal law and tort law, i.e. their respective legal processes. On the one hand, criminal law is exemplified by its ‘criminal’ process, whereby it is the state, rather than the victim, that is principally in charge of the legal process.<sup>20</sup> As Duff and Marshall explain, “A ‘criminal’ model puts the community (the state) in charge. The case is investigated by the police; the charge is brought by Regina, the People or the State; whether it is brought, and how far it proceeds, is up to the prosecuting authority; it is not for the victim to decide whether any decision it produces is enforced”.<sup>21</sup> Note, however, I do not take this to imply that victims ought to play no role in the ‘criminal’ process. Rather, I take it that although the state should be principally in charge of the legal process, it should nevertheless allow victims and their views to play some role in it, in a way that most probably is greater and more significant than the role they are playing in current practices.<sup>22</sup> Anyway, in contrast to this, tort law is exemplified by the ‘civil’ process, whereby it is the victim (or plaintiff), rather than the state, that is principally in charge of the legal process. As Duff and Marshall explain again, “A ‘civil’ model puts the victim in charge. She is the complainant who initiates the proceedings against the person who (allegedly) wronged her; it is for her to carry the case through, or to

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<sup>19</sup> *Ibid.* p. 83.

<sup>20</sup> Of course, as a matter of fact, it is the victim who is *de facto* in charge of the legal process, for example by not reporting the crime or refusing to be a witness. However, the claim here is that formally, in principle, it should be the state, rather than the victim, that is principally in charge of the legal process in criminal law; while the reverse holds when it comes to civil laws. Now, whether or not victims are right in not reporting a crime or refusing to be a witness is, I take it, a different question. See Note 22 for more of this.

<sup>21</sup> *Op.Cit.* Note 2, “Criminalization and Sharing Wrongs”, p. 15.

<sup>22</sup> Given the purposes of this paper, I am afraid that a detailed defence of this is not possible here. But see Antony Duff, “Restoration and Retribution”, in Andrew von Hirsch et al. (eds.), *Restorative Justice and Criminal Justice* (Oregon: Hart Publishing, 2003), pp. 43-59; *Op.Cit.* Note 2, “Public and Private Wrongs”, pp. 81-82; and Sandra Marshall, “Victims of Crime: Their Station and its Duties”, *Critical Review of International Social and Political Philosophy* 7(2) (2004): pp. 104-117.

drop it... it is for her to decide whether the case is brought and pursued, and whether the decision is enforced; there is no thought that she has a duty to bring a case".<sup>23</sup>

As one can see, if public wrongs are wrongs that victims ought to pursue, then it seems the 'criminal' process is appropriate to the criminal law, which is concerned with such public wrongs. Similarly, if private wrongs are wrongs that victims could reasonably decide to pursue or not, then it seems the 'civil' process is appropriate to tort law, which is concerned with such private wrongs.

Yet, despite all this, the problem with this characterization of public wrongs and private wrongs is that it results in a rather implausible picture of criminal law and tort law. There is a sense in which criminal law and civil law, as they are found in our common law systems, are concerned with different kinds of wrongs. This is especially the case when we contrast criminal law with the civil law of contracts, where the latter are concerned with contractual wrongs. It might very well be plausible to see such wrongs as different from the ones that concern the criminal law, and it might also be plausible to argue that with regard to these kinds of wrongs, the wronged party may 'reasonably shrug off as relatively unimportant' to pursue.<sup>24</sup> The same can also be said about some torts: it is surely a wrong that people trespass into others' private property. But it also seems like a kind of wrong that, even though it is reasonable for the owners to pursue the case against those who trespass their private property, especially when they incur a loss because of it, it is also reasonable for the owners to choose not to do so.

But things look a bit different when we contrast criminal law with other torts. It seems that they are sometimes concerned with the same kind of wrongs. As Lamond observes, "Many crimes, especially traditional crimes against the person and property, have a civil law analogue".<sup>25</sup> Just as there are criminal laws against bodily assaults, there are also torts against bodily assaults.<sup>26</sup> Thus rather than saying that criminal law and tort law are each concerned with *different kinds* of wrongs, it seems more accurate to say that the wrongs that they are concerned with *overlap* with each other.

Thus if we understand public wrongs and private wrongs as two different kinds of wrongs that properly concern the public, it seems that we would then be unable to account for the fact that, in many of our common law systems, the wrongs that criminal law and tort law are each concerned with overlap with each other. But it seems plausible that they should, at the very least, overlap with each other; that there should be, for example, criminal laws against bodily assaults and torts against bodily assaults. If that is the case, then to arrive at an adequate understanding of 'public wrongs' and 'private wrongs', we should not just be distinguishing *different kinds* of wrongs within the wrongs that properly concern the public. Rather, we should

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<sup>23</sup> *Op.Cit.* Note 2, "Criminalization and Sharing Wrongs", p. 15. See also John Goldberg and Benjamin Zipursky, "Torts as Wrongs", *Texas Law Review* 88(5) (2010): pp. 917-986 on torts as a civil recourse. Note also that all this is compatible with the claim that even under the 'civil' process, the state may permissibly, and indeed does, take measures to incentivise plaintiffs to bring claims forward.

<sup>24</sup> Maybe the same can also be held for other areas of civil laws: trusts and unjust enrichments, which are respectively concerned with equitable wrongs and wrongs of not disgorging unjust enrichments.

<sup>25</sup> Lamond: *Op.Cit.* Note 4, p. 630.

<sup>26</sup> Of course, the same wrong can be described differently in criminal law and civil law, because of their respective differences in, say, legal liability. But that does not detract from the fact that their differing descriptions are referring to the same wrong, i.e. the conduct in question.

also be focusing on the *different responses* that criminal law and tort law afford to these wrongs, and conceive ‘public wrongs’ and ‘private wrongs’ in terms of these responses.

4.

But what are the responses that criminal law and tort law respectively afford to wrongs that properly concern the public? Here is one suggestion: criminal law responds to them by way of punishment, while tort law responds to them by way of compensation. The thought here is that criminal law is primarily concerned with punishing those who have committed such wrongs; by doing so, not only does it deter them from re-offending and others from committing such wrongs, it also censures (or more seriously, condemns) such wrongs and those who commit them.<sup>27</sup> On the other hand, tort law is primarily concerned with determining and exacting compensation from those who commit such wrongs to compensate for the losses that individuals suffer as a result of such wrongs.<sup>28</sup>

Of course, punitive (or exemplary) damages can be awarded in tort cases; and at least in some common law systems, like for example the English one, compensation orders can be imposed for criminal offences.<sup>29</sup> All these might lead one to conclude that “... the dividing line [between criminal law and civil law including torts] lies, not in the distinction between punitive and compensatory function. Indeed, the common law has never restricted punishment exclusively to the domain of the criminal law, or compensation exclusively to the domain of the civil law”.<sup>30</sup>

However, it is not at all clear that all these undermine the claim that criminal law is primarily concerned with punishment, while tort law is primarily concerned with compensation. Firstly, on compensation orders and criminal law: one must note that an order of compensation can be a form of punishment;<sup>31</sup> and arguably, appropriately so in some cases.<sup>32</sup> Thus the question to ask here is not merely whether there are compensation orders, but whether they are imposed as a form of punishment; and even in cases where they are not, whether they are imposed in addition to punishment. Similarly, on punitive damages and tort law: punitive damages raise a lot of questions; for example, whether their imposition can ever be justified given the civil law procedures in torts.<sup>33</sup> But assuming that they are defensible for the sake of

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<sup>27</sup> I take it that legal punishment, if it is to be justified at all, must involve the communication of censure or condemnation. But I remain open as to whether any additional element of deterrence can be justified or not. Thus I shall address both the elements of censure and deterrence when I talk about legal punishment in this paper. The issue also partly turns on whether the ‘hard treatment’ aspect of legal punishment, if it can be justified at all, can only be justified in terms of deterrence, or can nevertheless be justified as part of the communicative process of censure. For a view of the former, see Andrew von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (New York: Oxford University Press, 2005), pp. 17-27 & 92-109; while for a view of the latter, see Antony Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2001), pp. 79-88 & 106-112.

<sup>28</sup> See also Gardner: *Op.Cit.* Note 7, pp. 47-57.

<sup>29</sup> Lucia Zedner, “Reparation and Retribution: Are They Reconcilable?”, *The Modern Law Review* 57 (1994): pp. 228-250 at pp. 239-240.

<sup>30</sup> Ralph Cunningham, “Should Punitive Damages be Part of the Judicial Arsenal in Contract Cases?”, *Legal Studies* 26(3) (2006): pp. 369-363 at p. 381.

<sup>31</sup> See, for example, Duff: *Op.Cit.* Note 27, p. 161. See also Zedner: *Op.Cit.* Note 29, pp. 239-240.

<sup>32</sup> Here I have in mind, for example, minor offences of property damage.

<sup>33</sup> For a good critical discussion of the arguments against punitive damages, see Cunningham: *Op.Cit.* Note 30, pp. 380-384.



argument,<sup>34</sup> we still need to ask whether compensatory damages are the default awards on which punitive damages are ‘piggybacked’, in the sense that they are awarded either to complement compensatory damages or when there can be no compensatory damages.

Of course, it is a matter of legal doctrinal research whether, as they are found in our common law systems, compensation orders in criminal law are indeed imposed as a form of punishment, or in addition to it; and punitive damages do indeed ‘piggyback’ on compensatory damages in tort law in the way I described. However, this is beyond the ambit of this paper. Nevertheless, in the absence of such research proving otherwise, the above discussion shows the mere fact that there are compensation orders in criminal law, and punitive damages in tort law, does not by itself undermine the claim that criminal law is primarily concerned with punishment, while tort law is primarily concerned with compensation. It is just that while they are respectively concerned with that, they are also sometimes concerned with other goals or purposes that can be served respectively by compensation orders and punitive damages.<sup>35</sup>

Indeed, there is another (more theoretical) reason to hold this claim about criminal law and tort law: it can support the distinction between the ‘criminal’ process in criminal law and the ‘civil’ process in tort law; as I shall try to argue in the following.

Recall that, according to Duff and Marshall, wrongs properly concern the public (i.e. the *polis*, the state, fellow citizens etc.), in virtue of the fact that such wrongs violate the shared values that normatively define the political community in which fellow citizens are participants. It is in this sense that such wrongs, when committed, are shared by both the victims and fellow citizens.<sup>36</sup>

Given the nature of such wrongs, the public, state, *polis* therefore ought to respond to them by way of punishment. As Duff argues, “They are wrongs that must be publicly identified and condemned, in that for a polity not to condemn them, or not to make efforts to identify and condemn their perpetrators, would be to fail to take seriously both the wrongs as they impact on their victims, and the values to which the polity is supposedly committed”.<sup>37</sup> Of course, the state is, in some sense, responding to such wrongs when it publicly declares them as wrongs and assigns punishments to them. However, responding to them in a way that takes seriously their being wrongs, the values they violate and their impact on the victims, does not merely involve recognizing them as wrongs worthy of punishment, neither does it just involve (in a way more like the ‘civil’ process) responding to such wrongs only when a case for them so happens to be brought forward. It also involves taking an initiative to investigate alleged wrongdoing, identify the perpetrators, censure them for their wrongdoings, and if possible, deter them or others from such wrongdoings. In other words, it is by being principally in charge

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<sup>34</sup> For example, Markel defends punitive damages as intermediate sanctions (between compensatory damages and criminal fines) that advance the public’s interest in retributive justice because of the practical limitations of the criminal law. As intermediate sanctions, they do not need procedures as robust as those in the criminal law, though admittedly they should be more stringent than those afforded in the civil law. See Dan Markel, “Retributive Damages: A Theory of Punitive Damages as Intermediate Damages”, *Cornell Law Review* 94 (2009): 239-340.

<sup>35</sup> Thus, for example, compensation orders can be imposed in addition to punishment, to spare the victim from claiming compensatory damages from the defendant through a separate civil case, which in turn reduces institutional costs. As for punitive damages, it can be awarded, for example, to advance the public’s interest in retributive justice, when the criminal law fails to do so because of its practical limitations. See above note for the latter.

<sup>36</sup> *Op.Cit.* Note 13.

<sup>37</sup> Duff: *Op.Cit.* Note 3, p. 143.

of the legal process in the criminal law, that the state is responding to wrongs that properly concern the public, and punishing them, in a way that takes these wrongs, and the values they violate, seriously. Hence the proper legal process for criminal law is the 'criminal' process.

Of course, as I have already explained earlier, arguing that the state is principally in charge of the legal process in criminal law does not preclude the role that victims ought to play in it. This comes out in the above discussion, since part of what we are taking seriously when responding to such wrongs is their impact on victims. Nevertheless, in arguing that the state ought to respond to such wrongs by way of punishment, I do not mean that they ought to do so categorically, since it might be outweighed by other considerations. Thus with regard to criminalization, some wrongs might be (in line with the *de minimis* principle) so trivial or minor that do not worth or deserve the state's punitive response.<sup>38</sup> Even for those wrongs where that is not the case, we must still ask what are the costs and risks that are involved in criminalizing them:<sup>39</sup> whether, say for example, doing so would lead to more harm than good; and be prepared to concede that sometimes, some of them might just very well be too costly for the state to respond by way of punishment, and therefore they should not be criminalized.<sup>40</sup> Even for those that are rightfully criminalized, it might still be the case that the state ought not to respond to the wrong (e.g. by pursuing the case through the prosecution) in this particular instance because of other countervailing considerations; for example when doing so would have a detrimental impact on the victims, or on the significant and important interests of the public. Thus in arguing that the state ought to respond to wrongs that properly concern the public by way of punishment, and that the 'criminal' process is the proper legal process for criminal law because of that, I am not denying the relevance of other reasons (e.g. the ones I mentioned above) in decisions for the criminalization and prosecution of such wrongs which, where appropriate, may count against their criminalization or prosecution.

What about tort law then? Do the considerations that support the 'criminal' process in criminal law not also support the same process in tort law? Does the state also not seem to take seriously such wrongs "as they impact on their victims", and the loss they suffer as a result of them, if it does not respond to them by way of compensation? That, I concede, is true; and that is why there should be tort laws that determine and exact compensation for these wrongs. However, there is a reason here that stops these same considerations from taking us all the way to the 'criminal' process, as it was the case in criminal law; and that reason is that tort law is primarily concerned with compensation, as a way of responding to wrongs that properly concern the public.

When we talk about compensation, more specifically compensation in tort law, which the wrongdoer owes to those who suffer a loss because of his wrongdoing;<sup>41</sup> we are talking

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<sup>38</sup> See, for example, Duff & Marshall: *Op.Cit.* Note 2, "Public and Private Wrongs", p. 83; and Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008), pp. 137-145.

<sup>39</sup> Not just monetary related ones, but most importantly and significantly, moral costs and risks. See, for example, Andrew Ashworth & Lucia Zedner, "Prevention and Criminalization: Justifications and Limits", *New Criminal Law Review* 15(4) (2012): pp. 542-571 at pp. 551-552.

<sup>40</sup> Whether they should be subject to other forms of legal regulation is another question.

<sup>41</sup> Of course, there are other kinds of compensation. For example, as a welfare provider, the state might owe compensation for the loss that victims of crime suffer, even when the state played no role whatsoever in these crimes; or it might also owe compensation for the loss that its citizens incur merely as a result of bad luck etc... However, these are not the kinds of compensation that we are talking about in tort law.

about what they are *legitimately entitled* to from the wrongdoer, in virtue of the loss they suffered from his wrongdoing, to compensate this loss of theirs. This entitlement, I take it, is grounded in the defendant's (secondary) obligation to best fulfill the reasons that underlie the (primary) obligation owed to the plaintiff, which arises in virtue of the defendant violating the latter obligation in committing the tort.<sup>42</sup> Of course, it does not merely follow from this that the secondary obligation has to take the form of compensating losses. However, since the primary obligations in torts are largely negative,<sup>43</sup> it seems that the best way for the defendant to fulfill the reasons that underlie these primary obligations owed to the plaintiff, when he has already violated them, should at least include compensating the losses that the plaintiff suffered because of the violation. Thus if A has already injured B through A's negligence, then it seems that the best way for A now to fulfill the reasons for not injuring others through negligence, should at least include compensating the losses that B suffers because of the injuries caused by his negligence.<sup>44</sup> It is this secondary obligation to compensate losses that grounds the kind of compensation in tort law, and what exactly that amounts to is made determinate and precise by tort law. Nevertheless, as it should be clear from the talk of 'obligation' here, this compensation is something that the defendants owe to the plaintiffs. It is something that the plaintiffs are legitimately entitled to from the defendants, and therefore may legitimately demand for it from them; and that should be made available to the plaintiffs if they happen to do so, but they may also legitimately refrain from demanding for it. Thus plaintiffs should be the ones who are principally in charge of the legal process in tort law. This is because the kinds of compensation that tort law is primarily concerned with are what they are legitimately entitled to, for which they may legitimately pursue from the defendant, or not. Had this not been the case, then it is hard to see how the compensation that tort law is primarily concerned with are those that the defendants owe to the plaintiff, and from whom the plaintiff is legitimately entitled to. Hence the proper legal process for tort law is the 'civil' process.

Indeed, I think the above argument can also be similarly extended to the civil law of contracts. Just like in committing a tort, a defendant also violates a (primary) obligation owed to the plaintiff in breaching a contract. This then also gives rise to a (secondary) obligation the defendant owes to the plaintiff, to best fulfill the reasons that underlie the now violated (primary) obligation. Of course, unlike torts, the primary obligations in question here are voluntarily incurred. But there is no reason to think that just because the primary obligation is voluntarily incurred, then a secondary obligation cannot arise when the former is violated; since the reasons underlying the now violated, but voluntarily incurred, primary obligation are still present, they should still be fulfilled in the (second) best way. Thus if I fail to deliver my product at a specified time as per our contract, the reason behind this primary obligation that I have violated is still present, i.e. that I have agreed to deliver my products to you, which should still be fulfilled in the best way now possible, e.g. that I now belatedly deliver my product to you.

It is true that, as the example shows, because the primary obligations in contracts are largely positive, it seems that the secondary obligations which arise from them would be

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<sup>42</sup> John Gardner, "What is Tort Law for? Part 1: The Place for Corrective Justice", *Law and Philosophy* 30(1) (2011): pp. 1-50 at pp. 28-37.

<sup>43</sup> Note that even if there are positive primary obligations in torts, this does not undermine the argument or the conclusion. See the subsequent discussion on contract law.

<sup>44</sup> *Ibid.*, p. 40.

specific performance rather than compensation: if I have already failed to perform an act as required, then the second best thing I can do now is to perform that act. However, as Gardner points out, compensation (especially monetary) is normally preferable to specific performance as a *legal* remedy for breaches of contract, because of the practical difficulties of legally enforcing specific performance for such cases, which can be bypassed with compensation.<sup>45</sup> Thus the form this secondary obligation takes in contract law is normally compensation rather than specific performance. It is in this sense that I would maintain contract law is also primarily concerned with responding to wrongs by way of compensation, just like tort law.

Of course, there are awards of punitive damages in contracts, just like in torts;<sup>46</sup> but here, we similarly need to ask whether they ‘piggyback’ on compensation and specific performance, in the sense that they are awarded either to complement them, or when there can be no compensation or specific performance. Furthermore, given the nature of the primary obligations in contracts, the ‘losses’ to be compensated here would most probably be conceptualized differently from those in torts. Since the primary obligations in contracts are largely positive, the ‘loss’ to be compensated here, as the second best way to fulfill the reasons that underlie such positive obligations which have already been violated, should (all things being equal) be conceptualized in terms of the plaintiff’s position that is expected from the performance of the contract: If I fail to deliver you my products as per our agreement, then the second best thing I can do now, short of belatedly delivering you my products, is to compensate you to the position that is expected had I originally delivered you my products. On the other hand, since the primary obligations in torts are largely negative, the ‘loss’ to be compensated here should (all things being equal) be conceptualized in terms of the plaintiff’s position had the tort not taken place: If I fail to take reasonable care and injure you, then the second best thing I can do now (I cannot not injure you now of course) is to compensate you to the position had I not injured you in the first place. Thus, in maintaining that contract law, like tort law, is also primarily concerned with responding to wrongs by way of compensation; it does not follow that the ‘losses’ or ‘damages’ to be compensated are to be conceptualized in the same way between the two, given that their respective primary obligations are largely different.

Nevertheless, in any case, whatever form this secondary obligation takes in contract law, be it compensation or specific performance, it is something that the defendant owes to the plaintiff in virtue of breaching the contract, to which the plaintiff is legitimately entitled to from the defendant; and if the above argument is sound, then the proper legal process for contract law is also the ‘civil’ process.

However, all this talk of ‘legitimate entitlement’ suggests an objection against the ‘criminal’ process in criminal law: aren’t victims of wrongs also legitimately entitled to punish the wrongdoer? If so, does it not also follow that it should be the ‘civil’ process in criminal law, contrary to what I have argued earlier? It might very well be true victims of wrongs are also

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<sup>45</sup> *Ibid.*, pp. 44-45. For example, it would be easier and less oppressive to exact monetary compensation from unwilling and uncooperative defendants than to enforce specific performance. Indeed, in such cases, enforcing specific performance might be detrimental to the plaintiff, e.g. when it leads to a sub-standard performance, which can be bypassed with monetary compensation. Of course, if the defendant was willing and cooperative to start with, then most probably it would have been settled out of court.

<sup>46</sup> However, as I understand it, courts are much more reluctant in awarding punitive damages for breaches of contract than they are for torts.

legitimately entitled to punish the wrongdoer,<sup>47</sup> but there is a crucial difference here between criminal law as punishment and tort law as compensation. Both, as I have argued, are concerned with wrongs that properly concern the public. But as argued by Duff and Marshall, the public *shares* these wrongs with the victims, in virtue of the fact that such wrongs violate the shared values that normatively define the political community in question.<sup>48</sup> Of course, we should not take this so far as to say that the public is also wronged by such wrongs;<sup>49</sup> but the argument for the ‘criminal’ process in criminal law is that not only do such wrongs properly concern the public because of this, but the public owes it to its fellow members, and indeed the victim as a fellow member, to take seriously these wrongs and the shared values they violate, by punishing them; and correlatively, as members of the political community, victims also owe it to the public (and arguably themselves), to pursue this cause.<sup>50</sup> Note that this element of ‘sharing’ is noticeably absent in compensation for the losses from these wrongs. Although the public shares these wrongs with the victims in the way I described above, it does not share the losses that victims suffer as a result of these wrongs. It might share a loss in the sense that it, just like the victims, suffers a loss as a result of these wrongs. But in that case, the public is as much a ‘victim’ of these wrongs as individual victims. Thus the above argument for the ‘criminal’ process in criminal law is not available in the case of tort law,<sup>51</sup> and if my previous argument on the nature of compensation as what plaintiffs (or victims) are legitimately entitled to is sound, then the proper legal process for tort law should be the ‘civil’ process.

So, although criminal law and tort law are both concerned with wrongs that properly concern the public; criminal law is primarily concerned with responding to them by way of punishment, while tort law is primarily concerned with responding to them by way of compensation. I have also shown that this latter claim similarly holds for contract law. Furthermore, as I have argued, by conceiving them in this way, we can also see why their respective legal processes are appropriate to each of them. Since criminal law is primarily concerned with affording a punitive response to wrongs that properly concern the public, it is therefore appropriate for the state to be principally in charge of the legal process (i.e. the ‘criminal’ process). On the other hand, since tort law (and contract law) is primarily concerned with affording a compensatory response to such wrongs - where this is something that plaintiffs are legitimately entitled to from the wrongdoers - it is therefore the plaintiffs, rather than the state, who should be principally in charge of the legal process (i.e. the ‘civil’ process).<sup>52</sup>

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<sup>47</sup> See, for example, John Locke, “The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government”, in Peter Laslett (ed. & intro.), *Two Treatises of Government* (Cambridge, New York, Melbourne: Cambridge University Press, 1988), §8-13; but see also §128-130.

<sup>48</sup> See Note 13.

<sup>49</sup> As Lamond rightly argues against, see *Op.Cit.* Note 4, pp. 616-620.

<sup>50</sup> Duff & Marshall: *Op.Cit.* Note 2, “Criminalization and Sharing Wrongs”, pp. 18-22 & “Public and Private Wrongs”, pp. 84-85. See also text at Note 37.

<sup>51</sup> The same applies to contract law, but I shall not expand on this for the sake of brevity.

<sup>52</sup> Or to put all this more generally: there are two issues here; (i) whether the state’s response to such wrongs is punitive or compensatory, and (ii) whether the state is responding to them directly or indirectly. The argument here is that there is a relationship between the two, given the nature of the wrongs and the responses in question. If the state’s response is punitive, then it should take the form of a direct response; while if the state’s response is compensatory, then it should take the form of an indirect response. For the general distinction between direct and indirect responses to wrongs; see, for example, Michelle Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (New York: Oxford University Press 2009), pp. 95-98 & 185-192.

Accordingly, 'public wrongs' should therefore be understood as wrongs which should be punished by the state; while 'private wrongs' are wrongs which the state should, for those who suffer losses because of them, determine and obtain the compensation that they are entitled to from the perpetrators. It is in this sense that we should understand the distinction that criminal law is concerned with public wrongs, while the civil law of torts (and contracts) is concerned with private wrongs. Indeed, if what I have argued above is sound, then this understanding also supports the 'criminal' process in criminal law and the 'civil' process in the civil law of torts (and contracts).

5.

This paper does not purport to offer clear criteria for criminalization, let alone what exactly should or should not be criminalized; and for that matter, neither is this paper about what exactly should or should not be subjected to the civil law of torts. Rather, it is about the concepts that come into play when we think about criminal law and criminalization, how we should understand them, and the roles that they should play in our theorization of the criminal law and criminalization. I have argued for two claims: (a) we should not understand 'public wrongs' merely as wrongs that properly concern the public. This is because if that is the case, then not just criminal law, but also tort law, should both be understood as being concerned with public wrongs; and (b) criminal law should be understood as primarily concerned with responding to, by way of punishment, wrongs that properly concern the public; while tort law should be understood as being primarily concerned with responding to such wrongs by way of compensation. If all this is true, we should therefore understand 'public wrongs' as wrongs that should be punished by the state, and 'private wrongs' as wrongs that the state should, for those who suffer losses because of them, determine and obtain the compensation that they are entitled to from the perpetrators; while bearing in mind that (i) a wrong can merit both state punishment and compensation of losses by the perpetrator, and (ii) they are all wrongs that properly concern the public. The 'publicness' of public wrongs does not lie so much in the fact that they are wrongs that properly concern the public. This is because 'private wrongs' are also wrongs that properly concern the public, if we are to maintain that tort law is concerned with private wrongs, as I have argued in section 2. Rather, their 'publicness' lies in the nature of the punitive response that is owed to them, in which the state (as the public) plays a distinctive role that is altogether absent in the compensatory response owed to private wrongs; and it is also in this sense that private wrongs are 'private', as opposed to 'public'.

Of course, much more needs to be said about this understanding of 'private wrongs'. This paper mainly focused on torts, and related to contracts at various points; but what about trusts and unjust enrichments? However, given that I am more interested in the criminal law and criminalization in this paper; I would like to end this paper by discussing what follows from the above understanding of 'public wrongs', and put 'private wrongs' aside for another occasion.

There is nothing particularly novel about the above understanding of 'public wrongs'. Lamond also argues that 'public wrongs' should be understood as wrongs that the state, as the public community, is responsible for punishing; and he makes it clear that what he means by

that is that they are wrongs which ought to be punished by the state.<sup>53</sup> But in any case, if ‘public wrongs’ is to be understood in this way, then this has some rather significant implications on its role in thinking about the normative issue of criminalization.

To a certain extent, the overall argument advanced in this paper about ‘public wrongs’ is a deflationary one. If ‘public wrongs’, as I have argued, is to be understood as wrongs that should be punished by the state, then insofar as the question of what should be criminalized is essentially the same question as what should be punished by the state, appealing to the notion of ‘public wrongs’ here would be rather circular and unhelpful. It is merely a placeholder for whatever that should be punished by the state, and this advances nothing to our understanding of what indeed should be punished by the state, and hence indeed should be criminalized. To advance our understanding here, and answer the question adequately, we need to look past the notion of ‘public wrongs’ to the underlying grounds for state punishment; and this involves asking the following questions: Is it a wrong? Is it a wrong that properly concerns the public? Is it a wrong that merits punishment? Is it a wrong that merits not just punishment, but state punishment? Do those who commit such wrongs deserve to be punished? Etc...<sup>54</sup> Of course, there is still the issue of whether we have asked *all* the relevant questions here;<sup>55</sup> but once we have answered all of them adequately, what we then have *is* already an answer to the question of what should be criminalized. The notion of ‘public wrongs’ is therefore only an idle wheel in all this.<sup>56</sup> The same can also be said for ‘private wrongs’, insofar as it plays the same kind of role in the normative theorization of the civil law of torts (and contracts).

If all this is true, we are then faced with the following dilemma: On the one hand, despite what has been argued so far, we may still insist that ‘public wrongs’ should be understood merely as wrongs that properly concern the public. It would then be non-circular and helpful. But then we would have to distinguish it clearly from what we mean, when we follow Blackstone, in saying that criminal law is concerned with public wrongs while tort law is concerned with private wrongs; and acknowledge that ‘public wrongs’ in this sense is as relevant to the latter as it is to the former. On the other hand, we might accept what has been argued so far, and understand ‘public wrongs’ as wrongs that should be punished by the state. In that case, we need to admit ‘public wrongs’ is circular and unhelpful; and that it is the

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<sup>53</sup> Lamond: *Op.Cit.* Note 4, p. 627. Nevertheless, I am not convinced with his criticism of Duff and Marshall, which is grounded in seeing them as arguing that ‘public wrongs’ should be understood as wrongs *to* the public. Granted, if that was the case, Lamond’s criticisms are spot on (see also text at Note 49). But it is hard to see how that is what Duff and Marshall meant, in light of what was discussed in section 2 of this paper (text at Note 9). That said, Lamond’s criticisms were based on their 1998 paper (*Op.Cit.* Note 2), and their position has changed a lot since then. This paper is therefore an attempt to defend a similar conclusion, but in light of a more up-to-date version of Duff’s and Marshall’s position.

<sup>54</sup> See also, for example, Antony Duff, “Towards Modest Legal Moralism”, *Criminal Law and Philosophy* (forthcoming) doi: 10.1007/s11572-012-9191-8.

<sup>55</sup> For example, whether the conduct in question is also harmful to others in the relevant sense. See, for example, Andreas von Hirsch, “Harm and Wrongdoing in Criminalization Theory”, *Criminal Law and Philosophy* (forthcoming) doi: 10.1007/s11572-012-9192-7.

<sup>56</sup> Cf. Duff: *Op.Cit.* Note 3, p. 142; “But the ‘public’ character of crime is therefore an implication, rather than a ground, of its criminalisable character: the reasons that justify its criminalisation are the very reasons why it is ‘public’. An appeal to the ‘public character of crime thus cannot directly help us determine the legitimate grounds for criminalisation: but it can point us in the right direction by focusing attention on the idea of the ‘public’”.

grounds for state punishment, and the multifarious considerations that bear on them, that are doing the real work here.

Yet, if the arguments in this paper are sound, then I think we should grab the second horn of the dilemma. Not only would this allow us to maintain Blackstone's distinction, it would also highlight the importance of the multifarious considerations that bear on the issue of criminalization. Furthermore, it would also show, as I have tried to in this paper, that what is distinctive about criminal law is also the kind of response that it affords to wrongs, the role that the state should play in it, and the legal process that is appropriate to it; and all these are just as important as the nature and the kinds of wrongs that properly concern the public, when we are thinking about the normative issue of criminalization.