

Responsibility, Authority, and the Community of Moral Agents  
in Domestic and International Criminal Law

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**Abstract**

Antony Duff argues that the criminal law's characteristic function is to hold people responsible. It only has the authority to do this when the person who is called to account, and those who call her to account, share some prior relationship. In systems of domestic criminal law, this relationship is co-citizenship. The polity is the relevant community. In international criminal law, the relevant community is simply the moral community of humanity. I am sympathetic to his community-based analysis, but argue that the moral community must play a greater role in the domestic case and that the collection of individual political communities must play a greater role in the international case.

**Keywords**

Responsibility; authority; justice; community

**1. Introduction**

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4 Antony Duff provides a sophisticated account of domestic<sup>1</sup> and international criminal law that  
5 binds together responsibility and authority.<sup>2</sup> He argues that a key function of the criminal law is  
6 to hold people responsible for their actions, and that trials are a form of dialogue in which the  
7 polity expresses its values and the alleged perpetrator must give an account of his conduct. This  
8 function of the criminal law is more crucial than deterrence or giving offenders the punishment  
9 they deserve. Duff argues that carrying out this function always raises the question of who has  
10 the authority to hold alleged wrongdoers responsible. Responsibility and authority are  
11 inseparable. The criminal law possesses authority only when the person held responsible, and  
12 those calling him to account, are all members of a community. In his analysis of the domestic  
13 criminal law he concludes that the relevant parties must all be citizens of the same polity. In the  
14 international criminal law, the relevant community is the moral community of humanity.

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31 In Section 2, I will present Duff's theory of responsibility and authority in the criminal law. In  
32 Section 3, I argue that we should combine Duff's view with P.F. Strawson's reactive attitudes  
33 account of responsibility.<sup>3</sup> In Section 3, I criticize Duff's understanding of the role of citizenship  
34 (in domestic criminal law) and humanity (in the international criminal law). His argument for the  
35 importance of citizenship in the domestic law is that the most compelling alternative, appealing  
36 to the moral community, is unsatisfying in the way that any cosmopolitan theory that does not  
37 properly value local attachments is unsatisfying. I will argue that this conclusion is reached only  
38 via a false dichotomy. The moral community is relevant in both the domestic and international  
39 cases, but this does not mean we cannot account for the value of local attachments within our  
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54 <sup>1</sup> Antony Duff, 'Responsibility, Citizenship, and Criminal Law', in RA Duff and Stuart P Green,  
55 (eds.), *Philosophical Foundations of Criminal Law* (Oxford University Press, New York, 2011) pp.  
56 125-148.

57 <sup>2</sup> Antony Duff, 'Authority and Responsibility in International Criminal Law', in Samantha Besson and  
58 John Tasioulas, (eds.), *The Philosophy of International Law* (Oxford University Press, New York,  
59 2010) pp. 589-604.

60 <sup>3</sup> Peter F. Strawson, *Freedom and Resentment, and Other Essays* (Methuen, New York, 1962).

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4 politics. The moral community must play a greater role in the domestic case, and the  
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6 international case must rely on more than merely the community of moral agents.  
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## 10 11 12 13 14 15 16 **2. Duff's Account of Responsibility and Authority** 17 18 19 20

21 Responsibility plays two roles in Duff's analysis of the criminal law. The first is that the  
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23 essential function of criminal law is to hold people responsible. This is responsibility in the sense  
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25 of it being warranted to call someone to account, to demand that they give a response when  
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27 challenged regarding the wrong they have allegedly done. Scanlon calls this attributive  
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29 responsibility.<sup>4</sup> Person P is attributively responsible *for* some state of affairs in virtue of what it  
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31 is that they have done. The trial holds them to account for some state of affairs, and the onus is  
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33 on the alleged perpetrator to respond, either by denying that he is attributively responsible for the  
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35 state of affairs, or by admitting he is attributively responsible but there is an excuse, or by  
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37 admitting he is attributively responsible and that he is guilty of doing wrong.  
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43 This raises the question of who has the authority to hold alleged wrongdoers to account.  
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45 Person P is responsible for some state of affairs *to* some person, community, or institution. With  
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47 the party that holds others to account we find an implicit appeal to a second form of  
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49 responsibility, what Scanlon calls substantive responsibility. These are the obligations attached  
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51 to certain identities or roles. For example, a teacher has a responsibility to teach and care for his  
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53 students. When Duff discusses authority, he focuses on the question of who has the right to call  
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58 <sup>4</sup> Thomas Scanlon, *What We Owe to Each Other* (Belknap Press, Cambridge, 1998).  
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4 the alleged wrongdoer to account. But he sometimes goes beyond this to suggest that a party may  
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6 have not only the right but also the obligation to hold the alleged wrongdoer to account. We *owe*  
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8 it to the victims to show that we take their wrongs seriously. To do this we must “share in the  
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10 wrong” with the victim and call the perpetrator to account.<sup>5</sup> We even owe it to perpetrators to  
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12 call them to account, because that is to treat them as responsible agents.  
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16 Duff attempts to define the ‘we’ that has the right, and sometimes the obligation, to do this.  
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18 The criminal law comprises the institutions and procedures through which we hold perpetrators  
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20 responsible for their wrongs. “Such a practice of calling to account is possible, however, only  
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22 within a normative community to which both called and callers can be said to belong.”<sup>6</sup> He  
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24 argues that the domestic case is the “salient paradigm” for criminal law.<sup>7</sup> Therefore, we should  
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26 start with the domestic case and then extend or adapt it to account for international criminal law.  
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31 We need to identify the relevant community, which will in turn specify the set of public  
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33 wrongs via its self-defining values. A system of domestic criminal law is not a set of prohibitions  
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35 that makes conduct wrong. Rather, the criminal law determines “which precriminal wrongs  
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37 should count as ‘public’ wrongs whose perpetrators are to be called to public account”.<sup>8</sup> ‘Public’  
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39 means neither that the offense is carried out in public, nor that the public is directly harmed (as  
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41 might be the case with harm to the environment). “To call a wrong public in this sense is not to  
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43 give a reason for the public to take an interest in it, but to express the judgment that it is their  
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45 business.”<sup>9</sup> When a wrong is the public’s business, they may call alleged wrongdoers to account.  
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56 <sup>5</sup> Duff, *supra* note 2, p.595.

57 <sup>6</sup> Duff, *supra* note 1, p.126.

58 <sup>7</sup> Duff, *supra* note 1, p. 126.

59 <sup>8</sup> *Ibid.*, p. 127.

60 <sup>9</sup> *Ibid.*, p. 128.  
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4 This can only be legitimate in virtue of some prior relationship that gives A the right or standing  
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6 to call B to account, and that makes A's alleged wrongdoing B's business.<sup>10</sup>  
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9 In virtue of community membership, they must share a relationship that is substantive enough  
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11 to authorize the practice of holding to account. This makes the wrong committed by one the  
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13 proper concern of the other. Without that, B has no authority to call A to account because the  
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15 wrong is not his proper concern. Duff argues that this authority cannot be simply created by the  
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17 institutions or practices of criminal law. It must derive from some prior community relationship.  
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19 What community could ground this authority? One candidate is the community of moral agents.  
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21 Duff's own arguments might push one towards this answer. If public wrongs must be moral  
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23 wrongs, that is, conduct that was wrong prior to any particular criminal law's existence, why not  
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25 appeal to the moral community of humanity? We are each capable of being responsible for our  
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27 conduct, and we collectively have the authority to call each other to account for wrongs.  
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33 Duff rejects this answer for being unable to justify certain features of the actual (and ideal)  
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35 legal landscape. For example, crimes committed by Polish citizens in Poland are not prosecuted  
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37 by courts in England. If the authority to hold people responsible for their wrongs is generated by  
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39 the moral community, then what justification can we give for this phenomenon? Duff argues that  
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41 this approach can only justify the Territorial Principle (a system of criminal law claims sole  
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43 authority over wrongs committed within the state) in terms of efficiency. It recognizes no  
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45 intrinsic value in a polity holding its own citizens to account for their public wrongs. This  
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47 practice is only justified if it serves the function of the criminal law more efficiently than a  
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49 genuinely international alternative, due to lower costs, easier access to information, cultural  
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51 considerations, and so on.  
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<sup>10</sup> *Ibid.*, p. 132.  
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4 Duff objects that this is an unsatisfying justification of the Territorial Principle. He draws an  
5 analogy between this case and what he finds unsatisfying about all impersonal, universalized  
6 moral theories. Such theories either cannot make sense of local attachments or ascribe to them  
7 the wrong sort of value. He clearly thinks this understanding of the community that underwrites  
8 the criminal law is analogous to, or entails, a cosmopolitan ethical view that does not recognize  
9 intrinsic value in local attachments. The citizenship relation has a special form of value that  
10 cannot be reduced to merely pragmatic considerations. Duff provides a series of examples that  
11 are supposed to convince the reader that local attachments matter. It was unsatisfying to try  
12 Augusto Pinochet outside Chile. It was important and valuable that Saddam Hussein was tried in  
13 Iraq. A victim of a serious attack would be unsatisfied were his attacker to be convicted in a  
14 foreign court.<sup>11</sup> These local, particular, attached moral sentiments must find expression in the  
15 community that gives authority to the criminal law. Therefore the ‘we’ who hold alleged  
16 wrongdoers to account must be narrower than the entire moral community. It should be the  
17 citizens of a polity. Making the community the polity serves two important functions. First, it  
18 gives the standing required to authoritatively hold people responsible. Second, it provides a way  
19 to pick out, from the set of moral wrongs, the subset of public wrongs. It accomplishes both of  
20 these functions through the polity’s self-defining values.

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46 “Public wrongs are our wrongs as citizens---wrongs in which we take a proper interest, to  
47 which we should collectively respond, for which we claim the right (and perhaps the duty) to call  
48 the perpetrator to answer to us.”<sup>12</sup> Some of these wrongs are materially public, in the sense that  
49 the entire public is harmed. But that is not necessary. Most public wrongs are done to  
50 individuals, yet these are public wrongs because they violate our public values. We share the

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59 <sup>11</sup> *Ibid*, p. 136.

60 <sup>12</sup> *Ibid*, p. 139.  
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4 wrong with the victim. Our concern for the victim as a fellow citizen makes the wrong our  
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6 business, as does our recognition of the wrongdoer as a fellow citizen. A wrong done by one of  
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8 us, when it violates our shared public values, is our business, and therefore we may (and perhaps  
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10 ought to) hold its perpetrator responsible.<sup>13</sup>  
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14 Duff argues that making the polity the relevant community will specify a set of public  
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16 wrongs, because “however minimal the public sphere of matters that concern all citizens is taken  
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18 to be, any polity must have a public sphere, structured by its self-defining values”.<sup>14</sup> Thus the  
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20 authority of the criminal law is grounded in something that is historically and conceptually prior:  
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22 the co-citizen relationship among the polity’s people. The polity’s self-defining values then  
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24 determine the set of public wrongs. Wrongs that violate those public values are public wrongs.  
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26 This does not mean conduct that counts as a public wrong in one polity is not wrongful when  
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28 committed in another. It can also be wrongful elsewhere, but is not our proper concern. “What is  
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30 at issue here, however, is what concerns us as citizens, and what concerns the criminal law of  
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32 this particular polity; we cannot see a rape committed in Poland as a wrong committed within our  
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34 civic enterprise as a polity or, therefore, as a wrong that concerns our criminal law.”<sup>15</sup> The polity,  
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36 its self-defining values, and the citizenship relationship among its members jointly determine the  
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38 set of public wrongs and generate the authority required to hold people responsible for their  
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40 wrongs.  
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## 48 **2.1 Extension to the International Criminal Law**

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53 Duff treats the international criminal law as having the same essential function as in the  
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55 domestic case: calling people to account and holding them responsible. The international  
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58 <sup>13</sup> *Ibid.*

59 <sup>14</sup> *Ibid.*

60 <sup>15</sup> *Ibid.*, p. 140.  
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4 criminal law begins “with the (collectively) personal thought ‘we ought to call them to account’:  
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6 this will show why trials are so important; it will also, when we ask who ‘we’ are, highlight the  
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8 issue of what gives international courts the authority that they claim”.<sup>16</sup> Who is this ‘we’ is and  
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10 how can it possess the authority to try alleged wrongdoers under international criminal law?  
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12 There are two types of phenomena to explain. How can a particular polity ever authoritatively  
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14 claim universal jurisdiction? For example, English law claims jurisdiction over any state official  
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16 in the world who uses torture in furtherance of his official duties. Second, how can international  
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18 tribunals and the International Criminal Court claim universal jurisdiction? There is no problem  
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20 explaining how these bodies can gain authority that is delegated to them by particular states. But  
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22 the ICC also claims universal jurisdiction when alleged crimes are referred to it by the UN  
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24 Security Council. How could it have the legitimate authority to do so? “An answer must show  
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26 that the court acts in the name of some group to whom the defendant is answerable for his  
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28 alleged crimes.”<sup>17</sup>  
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36 Duff considers two answers to this problem. This first is that wrongdoers are answerable to  
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38 the political community against which they committed their crimes, and the ICC acts on behalf  
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40 of that community. This coheres with the previous examples indicating there is more than merely  
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42 instrumental value in trying the defendant in the state where he committed his crimes. Two  
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44 phenomena generate space for the international criminal law to serve a necessary function. Some  
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46 crimes are genuinely international, such as crimes of state aggression. In this case the aggressor  
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48 and the victim are not united by citizenship, and thus an international form of criminal law is  
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50 required to call the wrongdoer to account. The second type of case occurs when a domestic legal  
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52 system fails to act on behalf of some constituent community, which may either be citizens, or a  
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59 <sup>16</sup> Duff, *supra* note 2, p. 593.

60 <sup>17</sup> *Ibid.*, p. 598.  
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4 group the state should (but does not) recognize as citizens. When that occurs, an international  
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6 court has the authority to intervene. It would be foolish to leave such matters up to the states in  
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8 question. They might be unlikely to prosecute an official who uses torture in an official capacity,  
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10 or to provide any adequate response to wrongs committed against a subjugated minority. So  
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12 while it is ideal that a wrongdoer answers directly to his particular political community, this may  
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14 not be possible. When the “crimes are serious enough to warrant the costs involved, it might be  
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16 appropriate for an international court to claim jurisdiction or, absent such a court, for courts of  
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18 other states to claim jurisdiction on behalf of the citizens whose own courts have let them  
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20 down”.<sup>18</sup> Thus national courts are left alone except when they fail to meet the minimum standard  
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22 of fulfilling their obligations or in cases where the wrongs are genuinely international. Then an  
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24 international body intervenes, but the essential structure of the criminal law does not change,  
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26 because that court still acts on behalf of the relevant polity.  
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34 Duff rejects this account for two reasons. The first is that with the most egregious crimes  
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36 against humanity, when the case for international intervention seems strongest, there might be  
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38 doubt whether there exists a political community to which the perpetrator could answer. Suppose  
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40 the target of the crimes is completely wiped out. This would leave no community to play the  
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42 necessary role. The even more pressing matter is that we still have not explained how the ICC  
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44 could have the unconditional right to act in the name of a political community. How could an  
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46 international court have a legitimate but non-delegated authority?  
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51 This leads Duff to answer that the ICC acts on behalf of humanity. “[W]hat gives it the right  
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53 to intervene on behalf of members of more local polities whose national courts have let them  
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55 down is our shared humanity; but that is not far from saying that the perpetrators should have to  
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60 <sup>18</sup> *Ibid.*, p. 599.  
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4 answer not merely to their polity, but to humanity.”<sup>19</sup> This answer makes the international case  
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6 fundamentally different from the domestic case, because humanity is not a political community.  
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8 Should we take this as evidence that the international criminal law does not have full authority  
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10 until there is a global political community, or as evidence that when we extend our domestic  
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12 analysis to the international realm, we must make some deep changes? One option is to argue  
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14 that a global political community should be our aspiration, and only when humanity forms a  
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16 political community will the international criminal law have unimpeachable authority. That is  
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18 not Duff’s position. He argues instead that we need only understand humanity as a moral  
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20 community.  
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26 As in the domestic case, Duff denies that the public wrongs of international criminal law must  
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28 harm the global moral community. One might argue that being so harmed gives humanity the  
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30 standing to call alleged perpetrators to account. On the contrary, the reason we condemn and  
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32 punish a wrongdoer is for the wrong he did to his specific victim(s). International public wrongs  
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34 are not public because they harm humanity, but because they properly concern all members of  
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36 humanity. “[T]hey are wrongs that we share in virtue of our membership of that community. A  
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38 crime against humanity should be one that properly concerns us all, in virtue simply of our  
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40 shared humanity.”<sup>20</sup>  
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46 In the international case, authority is grounded in our shared membership in the moral  
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48 community of humanity. This still leaves us with the task of specifying which particular wrongs  
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50 are international public wrongs. Duff admits that much more work needs to be done on this issue.  
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52 He does not provide a complete answer. (Neither will I.) He cites the Rome Statute’s discussion  
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59 <sup>19</sup> *Ibid.*, p. 600.

60 <sup>20</sup> *Ibid.*, p. 600.

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4 of “unimaginable atrocities that deeply shock the conscience of humanity”.<sup>21</sup> The implication  
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6 seems to be that moral egregiousness is the key to filling out this summation of his view: “some  
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8 kinds of wrong should concern us, are properly our business, in virtue of our shared humanity  
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10 with their victims (and perpetrators): for such wrongs the perpetrators must answer not just to  
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12 their local communities, but to humanity”.<sup>22</sup>  
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16 I will now provide a critical analysis of Duff’s account of the relationship between  
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18 responsibility and authority. In Section 3 I argue that P.F. Strawson’s reactive-attitudes account  
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20 of responsibility can both fill a gap in Duff’s theory and further explain the moral psychology  
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22 behind the international criminal law. In Section 4 I criticize Duff’s view that the authority of the  
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24 international law is generated by the moral community of humanity and provide an alternative  
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26 explanation.  
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### 36 **3. Where is Responsibility?**

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41 Duff does not provide any full theory of responsibility. However, it is clear that he favors a  
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43 reasons-responsiveness view.<sup>23</sup> This grounds responsibility in a capacity to recognize reasons  
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45 and to act or refrain from acting on the basis of reasons. Such an approach is more concerned  
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47 with the link between reasons and actions than with any metaphysical conception of free will.  
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49 Duff also thinks that responsibility in the sense relevant to criminal law is always relational and  
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51 practice based. By relational, he means it is always a matter of some subject being *responsible*  
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57 <sup>21</sup> *Ibid.*, p. 601.

58 <sup>22</sup> *Ibid.*

59 <sup>23</sup> Antony Duff, ‘Who is Responsible, for What, to Whom?’, 2 *Ohio State Journal of Criminal Law* (2005) 441-  
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4 *for* some object, and *responsible to* some body. It is practice based because to be responsible is  
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6 to be liable to be held to responsible by someone within some particular institution or practice.  
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8 Within the practices relevant to criminal law, “we take it for granted that most adult human  
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10 beings are responsible subjects”.<sup>24</sup> He instead focuses on the separation between cases in which  
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12 we take it for granted that a subject is responsible and the conditions that prevent someone from  
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14 being capable of being responsible. That distinction has to do with the possession of the  
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16 capacities required for proper responsiveness to reasons. Hence the very young, and some of the  
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18 mentally impaired, are not responsible in virtue of lacking the necessary capacities. If they are  
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20 not properly responsive to reasons, they cannot be responsible because “[w]e are responsible  
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22 (prospectively and retrospectively) for what we have reason to do or not to do”.<sup>25</sup> The criminal  
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24 law’s task is to give authoritative recognition to the prior moral reasons to refrain from doing  
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26 wrongs that violate the polity’s public values. This authoritative recognition certifies these as  
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28 public wrongs. Without the relevant capacities required to engage with these reasons, a subject  
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30 cannot participate in the criminal law.  
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38 Philosophers may object that this work on responsibility and authority must engage with  
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40 worries about determinism and free will. I will briefly outline a strategy for responding to that  
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42 objection. Duff mentions that it might be added to his discussion of responsibility that  
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44 determinism’s truth or falsity is irrelevant to the practices under consideration, and cites P.F.  
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46 Strawson’s work as an example of this approach. Strawson’s conception of responsibility not  
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48 only can help Duff answer this objection, it explains the impulse to hold people to account for  
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50 their wrongs.  
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59 <sup>24</sup> *Ibid.*, p. 444.

60 <sup>25</sup> *Ibid.*, p. 445.  
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4 Strawson understands responsibility in terms of a set of interpersonal reactive attitudes or  
5 emotional states. Being a proper object of these states is what it is to be a responsible agent. For  
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Strawson understands responsibility in terms of a set of interpersonal reactive attitudes or emotional states. Being a proper object of these states is what it is to be a responsible agent. For example, if you intentionally harm me, I naturally and justifiably feel resentment towards your ill will. It is constitutive of these natural reactive attitudes that we have a general expectation of good will among people. We expect that persons will not attempt to harm one another, and that they will show concern for each other's well being. When a wrong is done, certain attitudes or responses are appropriate. The harmed party feels resentment. The offender should feel guilt. A third party observer may feel indignation.

However, if you merely accidentally harm me, rather than wrong me, then you are not a proper object of my resentment. If I am in error about the stance behind your action, and conclude that you have shown disregard for my well-being, I may wrongly feel resentment. But an explanation (you kicked me because you had a mild seizure) can modify my attitudes. I can then switch from taking the reactive stance towards you to the objective stance. The latter is what we properly take when conduct is involuntary, or in Duff's terms, the subject lacks certain capacities that are required to be responsible. We can only properly take the objective stance towards a normal adult human for discrete moments, not universally. Some mentally disabled persons, however, may never be the proper object of the reactive attitudes. If we think lack of the relevant capacities matters, we must think that in normal cases, persons are capable of being responsible.

Strawson agrees with Duff's claim that we take responsibility for granted. "Our natural disposition to such attitudes and judgments is naturally secured against arguments suggesting they are in principle unwarranted or unjustified."<sup>26</sup> They are secured against any argument that they are globally unjustified, and therefore insulated from the truth or falsity of determinism. The

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<sup>26</sup> Strawson, *supra* note 3, p. 32.

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4 first reason Strawson gives for this position is that if the truth or falsity of determinism could  
5 threaten the practices involved in responsibility, then we would be obligated to give up these  
6 practices, and we simply cannot do that. We cannot completely refrain from feeling the reactive  
7 attitudes towards each other, nor from praising and blaming, punishing and rewarding. This  
8 inability can be understood as something definitive of humanity. This argument is descriptive,  
9 based in a speculative but plausible thesis about human psychology and social practice. Duff  
10 admitted that much more needs to be said about humanity and crimes against humanity, and this  
11 argument fleshes out a feature of humanity that is tied to responsibility: we cannot universally  
12 take the objective stance towards each other. That gives us a reason to hold each other to  
13 account.

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29 Strawson's second argument for his thesis is that, even if we could abandon the reactive  
30 attitudes in response to whatever metaphysical conclusion gives us anxiety, we ought not do so.  
31 This is a normative claim about what form of human life has value. We should opt for the world  
32 in which we normally take the reactive stance towards each other. This is also a reason to hold  
33 each other responsible, because doing so is constitutive of a valuable form of life. So in the first  
34 argument Strawson relies on a description of what humanity is, and in the second argument he  
35 relies on a view about what humanity should be. As long as one of these arguments is sound, we  
36 have a justification for Duff's strategy of analyzing responsibility and authority without worrying  
37 about debates over causal determinism, and we also have a further specification of the  
38 community of humanity that underwrites the authority of international criminal law.

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53 Now, one may object that in order for the criminal law to justifiably hold someone  
54 responsible, they must be responsible in some metaphysical sense that is incompatible with  
55 determinism and that Strawson's account does not provide. On this line of thought, Duff and  
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4 Strawson fail to insulate responsibility from worries about determinism. In order to be genuinely  
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6 responsible one needs a form of contra-causal freedom. (For sophisticated examples of such  
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8 views, see the work of Robert Kane and Timothy O'Connor.) According to this objection,  
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10 neither Strawson's descriptive nor normative arguments falsify the claim that determinism and  
11  
12 genuine responsibility are incompatible.  
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16 I disagree with this objection and think Duff's appeal to reasons-responsiveness is the right  
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18 strategy. Since we do in fact deem it morally and legally relevant whether or not persons are  
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20 incapacitated in their ability to respond to reasons, we do take it for granted that persons with  
21  
22 normal capacities are capable of being responsible. Similarly, Strawson thinks that being a  
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24 *proper* object of the reactive attitudes just is definitive of responsibility. I have presented  
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26 Strawson's work as a way to justify and fill out Duff's claim that we take responsibility for  
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28 granted. I will now bracket and move on from the lively and ongoing dispute over free will and  
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30 determinism.  
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35 Strawson's work, when combined with Duff's, also helps explain the moral psychology  
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37 behind international criminal law. We should feel negative reactive attitudes about our polities  
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39 and ourselves when we know there is a state in which public international wrongs go  
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41 unanswered, or crimes of aggression go unanswered, and we could do something to hold the  
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43 wrongdoer responsible. We should feel indignation towards the wrongdoers. If we do nothing,  
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45 we should feel guilt about our ill will. If the entire globe were covered in domestic states that did  
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47 an adequate job responding to public wrongs, there would be no reason to feel these negative  
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49 attitudes towards ourselves. But when one state breaks down or turns malevolent, then showing  
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51 good will towards our fellow members of humanity, whom we take it for granted are responsible  
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53 agents, requires holding wrongdoers to account.  
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#### 4. Authority and Community: An Objection and Modification

As in the domestic criminal law, Duff grounds the authority of the international criminal law in a community. In this domain, he defines the relevant community as humanity. Humanity is not, he grants, a political community. It is merely a moral community. This is quite unlike the domestic case. My objection is that the domestic and international analyses are an unstable mixture. First, if a political community is not always necessary for the authority of criminal law, where does this leave the arguments he gave in the domestic case? Second, if the international criminal law does not involve a political community and its self-defining values, how do we determine the set of public wrongs in the international case? In the domestic case public wrongs are determined by the self-defining values of the polity. What, if anything, can fulfill this function in the international criminal law?

The analysis Duff gives of the international law as grounded in the moral community is explicitly considered and rejected in his analysis of the domestic law. Appeal to the moral community is rejected as too universalist and impartial, and therefore unable to explain the value of local, particular attachments. Recall the examples of why a dictator should be tried by his own people, why someone who is wronged would be unsatisfied if his attacker were convicted by a foreign court, and so on. Duff takes these particular attachments to have a form of value that is destroyed by a universalist understanding of the criminal law. Thus when he demands there be a community that binds the one called to account and those doing the calling, he denies that this can simply be the entire moral community. It must be something narrower. It must be a political



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4 community, and there must be a compatriot relationship between the parties. However, in the  
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6 international case, the community is merely humanity, which is to say, the moral community.  
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8 Therefore criminal law can rely upon a universal community, and this community need not even  
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10 be a political community. Why could we not give the same analysis of the criminal law in all its  
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12 forms?  
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16 I see three options for interpreting the relationship between Duff's domestic and international  
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18 theories. The first would be to deny the importance of the particular attachments that Duff  
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20 emphasizes, admit that they can only be pragmatically justified, and grant that we must be open  
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22 to radically revising or eliminating them. This would give a unified account of domestic and  
23  
24 criminal law. The second option is to follow Duff and argue that the domestic case must account  
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26 for phenomena that are absent in the international sphere. Therefore we cannot simply extend our  
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28 analysis from the paradigm domestic case to the international case, we must allow for some  
29  
30 major changes to the theory. The third is a middle option Duff does not consider. Even though  
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32 particular attachments are valuable and have a role to play, the moral community plays a role in  
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34 generating the authority of even domestic criminal law. Similarly, political communities generate  
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36 the authority of international criminal law. They do not do this by any strict democratic  
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38 procedures, but via a set of political ideals and values.  
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46 Duff rejects an explanation of domestic criminal law by appeal to the moral community  
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48 because he believes that this move entails cosmopolitanism. Since he thinks that local  
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50 attachments and have genuine value, and that cosmopolitanism cannot give an adequate  
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52 justification of that value, he rejects the moral community option in the domestic case. What  
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54 drives this argument is Duff's commitment that those local phenomena and practices ought not to  
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56 be radically revised or forsaken. He concludes that the only way to let them retain their value is  
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4 to narrow the relevant community. To generate authority, the community must be local and  
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6 political. Therefore the relationship relevant to the analysis of responsibility and authority in the  
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8 criminal law is citizenship. The rejection of cosmopolitanism is the crucial move in Duff's  
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10 domestic analysis, and it is the only reason for treating domestic and international law  
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12 differently.  
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16 What if the moral community is relevant to all forms of criminal law, yet there is still *sui*  
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18 *generis* value to citizenship status and particular attachments? A third option is open: we appeal  
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20 to the moral community without committing ourselves to the cosmopolitanism that Duff rejects.  
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22 Note that one of the universal goods of human life is participating in a polity, shaping and  
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24 affirming its self-defining values. Appealing to the moral community only entails  
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26 cosmopolitanism if we have reason to believe there should be a total convergence on those  
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28 values and therefore on what counts as a public wrong. My suggestion is that we can link Duff's  
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30 discussion of the self-defining values of particular polities to a universal human good. We must  
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32 come together in political communities to construct and express these self-defining values.  
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34 According to this third option, the difference between the domestic and international is not that  
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36 we move from a more specific to a more universal community, but rather, that we move from a  
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38 domain in which there can be reasonable disagreement over what counts as a public wrong to a  
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40 domain in which the criminal law deals solely with consensus among reasonable polities on what  
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42 qualifies as a public wrong. That consensus should be based in reasons that can speak to all the  
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44 world's people, and not require adherence to any particular comprehensive religious or  
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46 philosophical conception of the good.<sup>27</sup> International criminal law should deal only with what is  
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48 beyond the scope of reasonable disagreement. There can be reasonable disagreement over  
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60 <sup>27</sup> John Rawls, *Political Liberalism* (Columbia University Press, New York, 1993).  
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4 private, though morally egregious, wrongs. It is political consensus, not comprehensive moral  
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7 egregiousness, that determines the relevant international wrongs.  
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9 The structural similarity between this move and Richard Miller's work in distributive justice  
10 is illuminating.<sup>28</sup> He denies the apparent tension between universalist moral requirements and  
11 giving redistributive priority to one's worst-off compatriots. He argues that patriotic bias in  
12 redistribution is justified, not a violation of a universal ethical duty of equal concern for all  
13  
14 persons. He therefore denies that there is a contradiction between patriotic bias and universal  
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16 ethical requirements. There are crucial goods that all humans need, but that, for the majority of  
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18 humanity, can only be realized in local communities. These are goods of self-respect and  
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20 respectful social interaction. While some small number of privileged elites can obtain these  
21  
22 goods in a way that transcends nationality, the overwhelming majority of humanity must secure  
23  
24 them through interaction with their fellow citizens. Miller's point is that domestic bias in  
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26 redistribution is not an exception to universal ethical requirements, it is universally required. To  
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28 realize our good as social beings we must live in a polity, and that polity, if it has serious  
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30 inequality, can only generate those goods when it prioritizes internal over external redistribution.  
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32 In states with significant inequality, lack of patriotic bias generates resentment and a loss of  
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34 social trust, and therefore prevents citizens from securing those universal goods. Miller's  
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36 argument on this point nicely dovetails with Duff's, since lack of patriotic bias in such polities  
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38 not only undermines faith in the public political culture and inhibits participation in democratic  
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40 political processes, it also undermines people's motivation to obey and respect the law.  
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52 My third option exhibits this same structure. We must create polities with self-defining  
53 values. This is because, as Miller argues, it is necessary for securing the universal good of  
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59 <sup>28</sup> Richard W. Miller, 'Cosmopolitan Respect and Patriotic Concern', 27(3) *Philosophy and Public Affairs* (1998)  
60 202-224.  
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4 respectful social interaction. But beyond that, we need to take some particular stand on what  
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6 wrongs should be considered public wrongs for which we will collectively hold people  
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8 responsible. This is universalist, but acknowledges the value of local attachments because  
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10 variation among the values of different polities is neither a temporary nor lamentable feature of  
11  
12 human social life. (Rawls makes the same point about internal disagreement within a free state.)  
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14 Free people will never converge on a single comprehensive conception of the good, or even on a  
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16 compatible set of conceptions. Such consensus only arises through subjugation. There is not a set  
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18 of objective public values on which we will reach complete consensus, therefore we will not  
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20 reach total consensus on what qualifies as a public wrong. Duff admits there is reasonable  
21  
22 disagreement among polities over what counts as a public wrong. This is explicit in his  
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24 discussion of how non-citizens who are guests in a state are still subject to its domestic law, even  
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26 when it differs from their native laws. What counts as a public wrong varies in accordance with  
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28 the defining values of different polities.  
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36 This third option makes the moral community relevant to international criminal law, but it  
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38 also makes each particular polity relevant to international law. This fills a lacuna in Duff's  
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40 account. He ties public wrongs in the domestic case to the particular political community's self-  
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42 defining values, but there is no analogous political community with self-defining values in the  
43  
44 international case. This is why he implicitly resorts to the idea that egregious wrongs and  
45  
46 atrocities constitute the relevant international public wrongs. But this leaves us with some  
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48 uncomfortable results. As discussed earlier, Duff claims that when we think about what concerns  
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50 us as citizens, we cannot see a rape committed in Poland as something that concerns us and our  
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52 criminal law. But if the moral community is relevant to the domestic criminal law, then we can  
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54 say that rapes committed in other states can concern us as citizens. It potentially concerns us  
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4 because no reasonable set of self-defining values can be compatible with rape. Therefore if it  
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6 occurs in a state that does not consider it to be a violation of its values, or in a failed state, it does  
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8 concern us as citizens. That is because showing good will to the residents of that territory  
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10 requires allowing them to secure the universal human good of living in a polity with a reasonable  
11  
12 set of defining values and with a minimally effective system for holding wrongdoers responsible.  
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14 That is our concern as citizens because any attempt to hold those wrongdoers responsible must  
15  
16 be effected through the political power of our states. We cannot accomplish this individually. If  
17  
18 our state has the ability to contribute to holding these people responsible, but does not, then we  
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20 can justifiably feel guilty about ourselves and resentful of our polity. This is one way to  
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22 understand the obligation to hold wrongdoers to account even when the wrongs occur outside our  
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24 polity.  
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31 One could object that my view is only a clarification of Duff's, not an alternative. If political  
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33 consensus is driven by moral egregiousness, then my view is functionally equivalent to Duff's.<sup>29</sup>  
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35 It has the virtue of explaining in greater detail how the system works, but the outcome is the  
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37 same. In other words, I have proposed that the relevant community is not merely humanity, but  
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39 the collection of (reasonable) states. I argued that international public wrongs should not be  
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41 identified with the morally egregious, or with atrocities, but rather with conduct that is seen, by  
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43 consensus, to be beyond the bounds of what any reasonable state can accept. But if that boundary  
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45 is defined by consensus on what is morally egregious, then what I have done is provide a more  
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47 nuanced explanation of how Duff's view works rather than providing a genuine alternative.  
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53 The key to seeing how my view is an alternative is to recognize that it is not always the case  
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55 that the more egregious the moral wrong, the more claim it has to be declared a public wrong.  
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57 Consider the controversy over whether certain forms of blasphemy and defamation of religion  
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60 <sup>29</sup> I am grateful to an anonymous referee for raising this worry.  
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4 should be proper concerns of international criminal law. Such proposals have gained almost no  
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6 traction in the west, but we need not explain that in terms of a disagreement over egregiousness.  
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8 One can believe, for comprehensive reasons, that blasphemy is a moral wrong as egregious as  
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10 any other, without being committed to the conclusion that that it is the proper business of the  
11  
12 criminal law. (Even if one thinks this conduct should be criminalized domestically, there is no  
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14 need to conclude it is an international public wrong.) What makes something an international  
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16 public wrong is not its egregiousness, but consensus on the bounds of reasonable self-defining  
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18 values of the world's polities. If some conduct is a direct violation of *any* reasonable set of self-  
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20 defining values, it is an international public wrong. In this particular case, there is no consensus  
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22 that a reasonable set of self-defining values must consider these religious offenses to be public  
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24 wrongs. This third option, therefore, makes humanity more important to the domestic law, and  
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26 particular polities more important to the international law, than Duff allows.  
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33 This approach also gives us a more nuanced understanding of in whose name courts act. Duff  
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35 claims that if we appeal to the moral community in the domestic case, this means that local  
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37 courts ultimately act in name of justice, not merely of their local community. Demands of justice  
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39 are understood in cosmopolitan terms: they are not grounded in any particular community nor  
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41 addressed only to its members. He argues that approach "can succeed only if we can plausibly  
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43 explain the distinction between 'private' and 'public' wrongs without appealing to ideas of  
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45 community: but I do not think that we can do so. What is 'private' in this context is what I can  
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47 claim to be my, or our, business but not yours; what is 'public' is what I must admit to be your  
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49 business as well as mine or ours".<sup>30</sup> To identify something as a public wrong always requires  
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51 identifying the relevant public to whom the wrongdoer is answerable. However, my proposal  
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53 does not merely appeal to an impersonal demand of justice that that the wrongdoer be punished  
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60 <sup>30</sup> Duff, *supra* note 2., p. 596.  
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4 because the universal requirement to hold people responsible should be satisfied in a personal,  
5  
6 local way. The ideal is for domestic courts to speak *both* in the name of justice and in the name  
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8 of a local community. We can both appeal to the moral community and to the self-defining  
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10 values of our particular polity. Some public wrongs we see as relevant to the entire moral  
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12 community because any reasonable set of self-defining values must be opposed to those wrongs.  
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14 Other public wrongs are purely internal matters because not every reasonable polity must see the  
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16 conduct as a public wrong. But within the relevant state, all of those wrongs are the proper  
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18 concern of all citizens.  
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23 Duff objects to the cosmopolitan approach to the domestic criminal law because without  
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25 appeal to a particular community we will have no way to distinguish private from public wrongs.  
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27 However, when it comes to international public wrongs, Duff's view seems to be the one that is  
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29 unable to explain the distinction between private and public wrongs. If the relevant community is  
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31 simply the moral community, which is not a political community and therefore lacks self-  
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33 defining values, how do we specify the wrongs? Moral egregiousness is not a satisfactory answer  
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35 because it would mean that no egregious wrongs could be private. If you think blasphemy is an  
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37 egregious wrong, you must think it is a public wrong. Conversely, the egregiousness of  
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39 blasphemy must be mitigated if you do not think it is a public wrong. If we take that line, the  
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41 distinction between public and non-public wrongs disappears. The only distinction remaining is  
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43 between moral wrongs seen as egregious enough to warrant criminalization and wrongs seen as  
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45 less weighty.  
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53 The answer is that the global community comes to a general consensus on what must be  
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55 incompatible with any reasonable set of self-defining values. The international case relies upon  
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57 the domestic case. Duff was correct in his claim that the domestic criminal law is the paradigm  
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4 case. But the domestic case has more to do with the moral community than he claims, and the  
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6 international case has more to do with particular polities than he claims. What defines  
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8 international public wrongs is that any reasonable political community must take them as  
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10 violations of their defining values. If a state does not, either because its defining values are  
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12 beyond the bounds of the reasonable, or because the state has simply failed, then those wrongs  
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14 are everyone's proper business. Everyone deserves the universal human good of living in a polity  
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16 that affirms and enforces a reasonable set of self-defining values. When a particular state breaks  
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18 down and fails to do this, then for us to show good will towards its residents, we need some  
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20 international legal system to hold its wrongdoers to account.  
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26 One might object that this approach is far too inclusive. It makes many wrongs that are  
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28 handled domestically, and according to Duff ought to be so handled, a proper international  
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30 matter of concern. Murder is incompatible with any reasonable set of self-defining values, so is it  
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32 no longer the proper business of domestic courts? Duff's theory gave an explanation of why  
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34 murder in one nation is properly tried in that nation. It seems that according to my view, only  
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36 wrongs on which nations reasonably disagree are appropriate objects of domestic prosecution.  
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38 Or, at least, those are the only wrongs that are not potentially the proper concern of international  
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40 criminal law.  
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46 There is simply an overdetermination of reasons to hold the alleged perpetrator to account.  
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48 The domestic criminal law acts in the name of both universal justice and the local community.  
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50 The reason why most crimes should be handled domestically, and why it is proper for dictators  
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52 who commit atrocities to be tried locally whenever possible, is that it reinforces the polity's self-  
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54 defining values. It is no problem to point out that certain public wrongs are such that prosecuting  
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56 them would reinforce *any* reasonable set of self-defining values. This leads to disagreement with  
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4 Duff over the nature of both international and domestic public wrongs. Duff says of international  
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6 public wrongs that “perpetrators must answer not just to their local communities, but to  
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8 humanity”.<sup>31</sup> I would change the last claim to state that they are potentially answerable to  
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10 humanity, but only when no particular state adequately holds them responsible. This is far from a  
11  
12 merely efficiency-based justification for local attachments. As for domestic public wrongs, Duff  
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14 argues that crimes such as rape and murder are only our proper concern when they happen in our  
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16 polity. To the contrary, they are our proper concern everywhere. However, we respect the  
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18 Territoriality Principle and the Principle of Complementarity (which states that we only try cases  
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20 not adequately handled by a relevant state’s legal system) not merely because this is efficient, but  
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22 because there is real value in these wrongdoers being brought to account by their own polities.  
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24 What is ideal is that all crimes (other than truly international crimes of aggression) be tried  
25  
26 locally. Doing so provides an opportunity for fellow citizens to affirm their self-defining values.  
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28 Duff is correct that a rape committed in Poland is not the proper business of the English.  
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30 However, that is not because the wrongdoer can only be authoritatively tried by his co-citizens,  
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32 but because Poland has a criminal justice system that treats rape as a public wrong. That is  
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34 sufficient to respect their sovereignty, and their sovereign control over the crime is ideal because  
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36 it reinforces their self-defining values. When a wrong occurs in a state that does not see the  
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38 wrong as incompatible with its (unreasonable) self-defining values, or in a failed state, then it is  
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40 the proper business of everyone and every polity. Duff’s conclusion about a crime that occurs in  
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42 Poland is only conditionally true. International public wrongs have to do with consensus on what  
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44 must be incompatible with any reasonable set of self-defining values. The international criminal  
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46 law ought to deal with states that are unreasonable or nonfunctioning. When we respond to such  
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48 wrongs through the international criminal law, we respond to what was already our proper  
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60 <sup>31</sup> *Ibid.*, p.601.  
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4 concern as citizens. By responding, we avoid warranted feelings of guilt and resentment over  
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6 failing to hold the perpetrator to account and failing to secure the victim's (and perpetrator's)  
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8 human right to live under a political community whose self-defining values meet a minimum  
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10 standard of reasonableness.  
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14 Both Duff's account and my alternative appeal to values in order to determine what counts as  
15  
16 a public wrong. The reason why morally egregious acts and atrocities drive Duff's view is that  
17  
18 those things fundamentally conflict with the values he thinks matter to international law. I have  
19  
20 argued that the relevant values should not be identified with our comprehensive moral and  
21  
22 philosophical doctrines. Rather, we should remember that there need not be any simple  
23  
24 relationship between what someone finds morally egregious and what they consider to be a  
25  
26 public harm. Public harms are only a subset of the morally egregious. Public harms should be  
27  
28 understood in terms of acts that violate the self-defining values of any reasonable polity,  
29  
30 regardless of what comprehensive philosophical or religious views happen to be dominant within  
31  
32 any given polity. Rawls' notion of the reasonable in a domestic context is useful. He understands  
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34 reasonableness in terms of persons being willing to propose and abide by fair terms of social  
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36 cooperation, and to justify their arguments in favor of certain sorts of state policies in thin,  
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38 political terms that they believe their fellow citizens could accept, regardless of whatever  
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40 comprehensive doctrines those citizens may hold. Applying that idea in an international context,  
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42 I should not offer an argument that some particular conduct is an international public wrong  
43  
44 when I can only expect you to agree if you share my comprehensive religious or philosophical  
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46 conception of the good or are willing to convert to it. We should rather appeal to public values  
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48 that can matter to all of humanity. Candidate values for filling out my view include reciprocity,  
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50 respect, bodily integrity, freedom of conscience, and autonomy. More work needs to be done to  
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4 articulate this notion of reasonableness and to identify the relevant values. This paper has  
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6 outlined the structure that such a view should take.  
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## 10 **5. Conclusion**

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16 This modification of Duff's view allows us to appeal to the moral community in both the  
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18 domestic and international criminal law without losing the value of particular, local attachments.  
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20 My alternative fills out Duff's analysis and provides guidance on how to define international  
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22 public wrongs. He implicitly relies on the notions of moral egregiousness and atrocities, but they  
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24 are at best imperfect proxies for what makes something an international public wrong. Consensus  
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26 on the boundaries of reasonable self-defining values for polities determines the set of  
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28 international public wrongs. My proposal takes what is so powerful in his domestic analysis and  
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30 repurposes it to answer these international questions.  
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